WORKMATTERS

The natural choice for human resources

NEWSMATTERS

Oct 2023

WELCOME TO THE FINAL NEWSLETTER FOR 2023

Our newsletter is written to ensure that you are kept up to date with employment issues, back copies are available on our website www.workmattershr.co.uk so you never miss out on the ever changing aspects of employment law. We offer helpful hints on how to handle situations within the workplace, but feel free to give us a call for both guidance and support.

In this newsletter we focus on changes in the law which will affect your business immediately as well as a look at the following:

1 EU law to remain on the statute books unless specifically revoked
2 Tribunal statistics for the first quarter of 2023
3 Forthcoming legislation from now through 2024
4 Redundancy – key facts
5 Other news...

We think you'll find the articles very interesting. Please call us on 01442 870742 to discuss any of these articles and see how we can help you and your business more effectively in the field of Human Resources. Alternatively have a look at our website www.workmattershr.co.uk and email us from there or on info@workmattershr.co.uk

If you would prefer not to receive any future newsletters from Work Matters (HR) Ltd, please reply to this email with 'unsubscribe' in the title and we will remove you from our list – thank you.

IN THIS ISSUE

1. EU Law to Remain on the Statute Books Unless Specifically Revoked Retained EU Law (Revocation and Reform) Bill

page 2

2. Tribunal Statistics for the First Quarter of 2023

page 3

3. Forthcoming Changes to Employment Law From Now Through 2024

page 4

4. Key Facts About Redundancies

page 5

5. Other News…

pages 6 & 7

Work Matters (HR) Ltd Amberley, 18 Oakwood, Berkhamsted, Herts HP4 3NQ
T 01442 870742 M 07711 613153 E info@workmattershr.co.uk W www.workmattershr.co.uk

1. EU LAW TO REMAIN ON THE STATUTE BOOKS UNLESS SPECIFICALLY REVOKED RETAINED EU LAW (REVOCATION AND REFORM) BILL

Removal of EU Laws

Last year we said:

Among the key changes outlined in the mini budget last year and that will significantly affect employers – in terms of the rights of their workforce and their obligations as an employer – is the retained EU law. This mandates that employment laws derived from the EU are now all subject to change or removal.

Following the UK's departure from the EU, new guidance from the government has been expected to clarify how the current employment laws will change.

The introduction of a retained EU law bill will enable "government departments to review then retain or replace all EU-derived law". "Any laws that are not formally retained will automatically expire on 31 December 2023,".

The key components dependent on the Retained EU Law (Revocation and Reform) Bill include the Working Time Regulations, Transfer of Undertakings (Protection of Employment) (TUPE), part-time and fixed-term worker regulations, and agency worker regulations.

While many laws are expected to stay the same, reviewing these is a huge task and the profession can expect changes to almost every area of business and society.

With this in mind, all employers should put 31 December 2023 in their diary and make sure they are prepared for any changes that are announced before the deadline, as well as knowing which laws will automatically expire after it. Failure to do so could mean companies are wrongly following outdated laws, leading them to breach their legal obligations and withhold statutory entitlements, which, in turn, could lead to tribunal claims and widespread discontent.

It's important to highlight that, over the next 15 months, we will likely see a stream of updates, which employers will have to track and manage accordingly.

Now we are saying:

The government has announced in a written statement to parliament that it is abandoning the sunset clause in the Retained EU Law (Revocation and Reform) Bill.

As the Bill was originally drafted, almost all EU law would automatically be revoked at the end of 2023, unless a statutory instrument was passed to preserve it. **That position is now being reversed**, so that EU law will remain binding in the UK unless it is expressly repealed. The Bill will be amended to contain a list of the retained EU laws that the government intends to revoke on 31 December 2023 – but anything not on that list will remain valid. The list has been published and does not include any of the significant employment legislation. The only ones with relevance which are currently on the list for revocation on 31 December 2023 are:

- The Community Drivers' Hours and Working Time (Road Tankers) (Temporary Exception) (Amendment) Regulations 2006
- The Posted Workers (Enforcement of Employment Rights) Regulations 2016; and
- The Posted Workers (Agency Workers) Regulations 2020

However, from 1 January 2024, UK courts will no longer be bound by decisions of the Court of Justice of the European Union, and will no longer be able to give those decisions priority over what UK legislation says. The most important impact is that – unless the government does something – it is very likely that the caselaw on holiday pay which has arisen over the last ten years will cease to be binding, and employers will no longer need to factor in commission and overtime when calculating holiday pay (unless your employment contracts require you to do so). We will keep you updated.

2. TRIBUNAL STATISTICS FOR THE FIRST QUARTER OF 2023

The Ministry of Justice (MoJ) has published its latest quarterly update for cases brought to, heard and disposed of before the Employment Tribunal (ET) service. This covers Quarter 1, April to June 2023.

Key Data

- 23,693 claims were received by Employment Tribunals
- The type of claims that have increased the most from the same time last year are:
  - Failure to provide a written statement of main terms (up 186%) – **this should be issued on day one of employment**
  - Breach of contract (up 103%)
  - Failure to inform and consult on TUPE (up 53.6%)
  - Unauthorised deductions from wages (up 48%)

In-Depth Statistics – Key Claim Types in Quarter 1

- Unfair dismissal – 4,083 claims made
- Unauthorised deduction from wages – 6,161 claims made
- Breach of contract – 5,786 claims made
- Redundancy pay – 1,086 claims made
- Sex discrimination – 857claims made
- Failure to inform and consult on TUPE – 63 claims made
- Failure to provide a written statement of main terms – 1,422

What Do These Figures Tell Us?

We have also seen a major spike in claims for an employer's failure to provide a written statement of main terms, which could be indicative of employees becoming more aware of their basic employment rights. For what should be a relatively simple task, failing to do this can come with a hefty fee, as the maximum compensation for this is £2,572 per employee (£2,676 in Northern Ireland).

Closely related to this is the increase in breach of contract claims. This can happen when an employer misunderstands how the terms of their contract can be used, especially when it comes to changing bonus payments. Employers looking to avoid making this same mistake might want to contact us and discuss this before making a costly mistake.

How Can Claims Be Avoided?

There are various ways employers can avoid a claim.

Ensure compliance with contractual terms and employment laws at all times. This might seem obvious, but with a 17% increase in overall claims this year, perhaps not.

Mediation, either run internally or by a third party, to try and get both sides working together.

Settlement agreements can be where either a dispute has arisen between employer and employee, or where either party wants to bring the relationship to an end. These can be costly, however, they can give an employer peace of mind that a claim will not be brought, saving them the time that would have been spent preparing for and attending a hearing.

3. FORTHCOMING CHANGES TO EMPLOYMENT LAW FROM NOW THROUGH 2024

2023 so far has been a busy year for employment law, with a number of new laws gaining Royal Assent. Many of these will not come into force until 2024 or beyond, however, giving employers plenty of time to become familiar with the new requirements and plan how they will be introduced and implemented into their organisation.

Employment (Allocation of Tips) Act 2023

Once implemented, employers will be required to pass on 100% of tips, gratuities and service charges via a fair process of distribution.

This received Royal Assent on 2 May 2023. A commencement date has not yet been announced but is expected to be around a year after Royal Assent was given, to give time for secondary legislation to be created and put before Parliament and for a new statutory Code of Practice to be written and subjected to public consultation.

Once the Code of Practice has been released, employers can start to design and implement policies and practices on allocating tips.

Carer’s Leave Act 2023

A brand new right, this will give unpaid carers the right to up to five days’ leave per year to provide, or make arrangements for, care for someone with a long-term care need who is dependent upon them.

This received Royal Assent on 24 May 2023. A commencement date has not yet been announced but this is not expected to be before April 2024, to give employers time to create new processes to keep track of this leave and ensure staffing levels are sufficient to accommodate it.

Protection From Redundancy (Pregnancy and Family Leave) Act 2023

Protection from redundancy will be extended beyond maternity leave to include during pregnancy, or adoption or shared parental leave, and for six months after.

This received Royal Assent on 24 May 2023. Regulations will need to be put before Parliament with the finer details of this right before it can be implemented, which the Government has confirmed will happen “in due course”.

Strikes (Minimum Service Levels) Act 2023

This will require minimum service levels to be met in certain industries for strike action to be lawful.

This received Royal Assent on 20 July 2023. Secondary legislation is needed to determine the specific minimum service levels for particular sectors before this Act can be implemented.

Neonatal Care (Leave and Pay) Act 2023

New parents will be able to take up to 12 weeks of paid leave, in addition to existing leave entitlements, to allow them to spend more time with their baby who has been hospitalised (up to 28 days after birth) and who needs a continuous stay in hospital of seven full days or more.

The Bill received Royal Assent on 24 May 2023. However, before it can be implemented, seven statutory instruments are expected to be laid before Parliament "in due course".

Ultimately, introduction of this leave and pay is not expected until April 2025, however provisions in the Act are anticipated to commence ahead of this date.

Neonatal Care (Leave and Pay) Act 2023

This was given Royal Assent on 18 September 2023. Under this, all workers, including those on zero-hours contracts, will have the legal right to request a predictable working pattern.

If their existing working pattern lacks certainty in respect of the hours they work or the times they work, or if it is a fixed-term contract for less than 12 months, they will be able to make a formal application to change their working pattern to make it more predictable.

Employers will have to notify the employee of their decision within one month of the request.

Refusal is permitted provided it is on one of the prescribed grounds, which mirror the grounds for refusing a flexible working request.

It is anticipated that 26 weeks’ service will be needed before a request can be made, however, this will need to be confirmed by the regulations.

It is expected that the measures in the Act and secondary legislation will come into force in approximately a year. Acas will produce a new Code of Practice to provide further guidance on making and handling requests, to assist employers in managing this new right, the draft of which will be available for public consultation this autumn.

Pensions (Extension of Automatic Enrolment) Act 2023

This received Royal Assent on 18 September 2023. Once implemented, it will lower the age at which eligible workers must be automatically enrolled into a pension scheme by their employer from 22 to 18. The Department for Work and Pensions will launch a consultation on implementing the new measures in due course.

4. KEY FACTS ABOUT REDUNDANCIES

A new survey from ACAS reports that over 40% of large employers and 20% of small and medium sized employers are planning to make redundancies in the next 12 months. Here are some key facts to get you started in an area which looks like it will see a lot of action in the next year:

- A redundancy situation arises where a business closes, a workplace closes or where an employer has a reduced requirement for employees to carry out a particular kind of work.
- Redundancy is recognised in law as a potentially fair reason to dismiss an employee but the redundancy situation must be genuine and the employer must act fairly to avoid unfair dismissal claims.
- Redundancies can be stand-alone (where a single position or an entire cohort of employees are at risk) or they may involve pooling. Pooling applies where there is a reduced requirement for employees who do a particular kind of work but the requirement has not ceased entirely. Employers must act fairly in deciding who to keep. This can be done by applying selection criteria to the pool or, in some cases, by way of structured interview.
- Care should be taken to make sure that selection criteria are not discriminatory. Objective criteria are less open to challenge than subjective criteria but are quite restrictive. It may be reasonable to amend the application of selection criteria in some circumstances (for example, ignoring disability or pregnancy related absences when scoring employees against an attendance criteria). Employers need to have fairness at the forefront of their minds when scoring.
- Selection criteria should be discussed with employees and agreed if possible.
- Consideration should be given to having more than one person carrying-out the scoring against selection criteria to avoid allegations of bias.
- In addition to the normal sums payable when an employee is dismissed (notice pay, holiday pay etc...), those with over 2 years' service will be entitled to receive a statutory redundancy payment. This is calculated using a formula which combines age, length of service and a week's pay (subject to an annually reviewed cap). Some employers also pay enhanced contractual redundancy pay in addition.
- Employers have a duty to consider alternative employment for employees who are at risk of redundancy. Employees can risk losing their right to a redundancy payment if they unreasonably refuse a suitable alternative job.
- Employees who are on maternity leave when a redundancy situation arises have additional rights. Specifically, they must be offered any suitable alternative employment that exists in advance of any other employees. This is a rare example of positive discrimination in UK employment law.
- Where 20 or more employees are proposed to be made redundant in a 90-day period special rules apply to the redundancy process including a requirement to consult with representatives for a period of at least 30 days (rising to 45 days if 100 or more redundancies are proposed). This is known as collective redundancy.

The Right to Be Accompanied (Not Just for Redundancy Meetings)

There are specific legal rules about employees' rights to bring someone with them to work meetings.

- The right to be accompanied applies to disciplinary and capability hearings (including appeal hearings) at which a formal warning, dismissal or some other formal sanction is being considered. It also applies to grievance and grievance appeal hearings.
- The right is to reasonably request to be accompanied at a hearing. A request is only going to be regarded as unreasonable in very limited circumstances.
- Employees can choose to be accompanied by either a work colleague, a workplace trade union representative who is certified or trained to act as a companion or an official employed by a trade union. The trade union does not need to be recognised by the employer and the employee does not need to be a member of the trade union.
- There is no easy tool which employers can use to check the identity of a companion who accompanies as a workplace trade union representative. Employers can ask for evidence of certification and/or training. If this is not provided or concerns remain then employers can contact the trade union direct to seek information. The scope to refuse a chosen companion is very narrow so a lack of available credentials should not usually result in a chosen companion being refused.
- If the employee's chosen companion is not available then the employee has the right to ask for the meeting to be re-arranged for an alternative time within 5 working days following the original time set. If the employee's chosen companion is not available at all in the 5 day window then, depending on the circumstances and the length of time that the companion will be unavailable, a further delay should be considered to make sure that the employer is not found to have refused a reasonable request.
- Companions can address the hearing and confer with the employee during the hearing. They have no right to answer questions on the employee's behalf.
- Employees can bring a stand-alone claim if they believe that their employer has refused a reasonable request that they be accompanied. Compensation is limited to 2 week's pay (subject to the statutory cap on a week's pay). Any refusal can also impact on unfair dismissal claims as a failure to allow an employee to be accompanied will be a factor pointing to procedural unfairness.
- Employers should always check their policies and employment contracts for any references to the right to be accompanied which extend beyond the legal obligations in this area.

5. OTHER NEWS…

Tripling of Fines for Those Employing Illegal Immigrants

In the biggest change to civil penalties since 2014, fines are to be more than tripled for employers and landlords who allow illegal migrants to work for them or rent their properties.

Home Secretary, Suella Braverman, has confirmed that the penalty for employers, which was last increased in 2014, will be raised to up to £45,000 per illegal worker for a first breach from £15,000 and up to £60,000 for repeat breaches from £20,000.

Later this year, she went on, the Home Office will consult on options to strengthen action against licensed businesses who are employing illegal workers.

Since the start of 2018, almost 5000 civil penalties have been issued to employers with a total value of £88.4 million. Meanwhile, landlords have been hit with more than 320 civil penalties worth a total of £215,500 over the same period.

Minister for Immigration, Robert Jenrick, said: “There is no excuse for not conducting the appropriate checks and those in breach will now face significantly tougher penalties.”

Employers should already be checking the eligibility of anyone they employ. There are a number of ways to do this, which are not changing, including via a manual check of original documentation and a Home Office online checking system.

The online check takes only five minutes with details available on the GOV.UK website.

Illegal working and renting are significant pull factors for migrants crossing the Channel, Mr Jenrick pointed out, as people smugglers will often use the promise of jobs and housing to lure people into making these journeys.

Employing illegal migrants also undercuts honest employers, he concluded, puts vulnerable people at risk of exploitation, cheats legitimate job seekers out of employment and defrauds the public purse as the businesses and workers do not pay taxes.

Employers Are Counter Offering to Keep Staff

To tempt workers to stay, 38% of employers who made offers matched the salary of the new job offer, and 40% offered even higher sums according to the latest Labour Market Outlook from the Chartered Institute of Personnel and Development (CIPD).

The quarterly survey of 2000 UK employers’ hiring, pay and redundancy intentions found that 40% have made a counter-offer in the past 12 months with the highest number (58%) being in London.

The CIPD said the survey shows that employers continue to face pressure to pay higher wages to compete in the labour market. Employers expect basic pay increases to remain at 5% for the next 12 months, unchanged from the last two quarters, and counter-offers are regularly being made to keep key staff.

However, the survey found that just 22% of employers that make such offers have a formal policy on them, for example explaining in which circumstances they can be made.

The CIPD is warning that a lack of a formal process could result in issues relating to pay gaps, pay fairness across similar roles and the organisation's overall approach to reward.

Its senior labour market economist, Jon Boys, said: “The fact that counter-offers are so widespread suggests they do have a role in matching people and jobs. Employers need to approach them with caution though and have clear internal processes for when these situations arise. Counter-offers may help to retain key staff and avoid knowledge drains and the cost to hire new people, but this must be weighed up against other considerations.”

For example, he went on, they could exacerbate pay gaps, cause equal pay challenges, or result in a drop in employee engagement. They may also only work for the short term.

Employers should consider factors other than pay that could make roles more attractive, he concluded, such as flexible working, additional paid holiday, opportunities for career development or better pension contributions.

5. OTHER NEWS... CONTINUED

Managing Seasonal Viruses in the Workplace

The Government is rolling out its Covid and flu vaccination scheme a month earlier than planned this year, and as autumn approaches now is a good opportunity to review the position on managing Covid and other infectious viruses in the workplace.

Covid and employment law

The only remaining employment law introduced as a result of Covid is one which allowed annual leave to be carried over, for up to two years, where the employee had been unable to take it due to the impact of the Covid pandemic. However, since restrictions have been lifted and the pressure related to Covid has eased, this is unlikely to be applicable to any situation now. Indeed, the Government has suggested in consultation it will appeal this.

Where are we now?

Covid remains an issue in the UK and Employers must continue to manage it. With new variants continuing to emerge, it is important not to become apathetic to the virus. However, with the UK population now on its way to reaching hybrid immunity, either through vaccination or infection, the number of serious cases has become less.

Limiting the spread of viruses within the workforce

In order to protect their workforce, many employers have chosen to implement policies that require employees to inform them of a positive case of Covid and remain home on pay until they test negative or at least take additional precautionary measures if attending the workplace, such as wearing a face mask, distancing from others and sanitising surfaces regularly.

It will be important as we move into autumn and this winter's flu season to ensure workplace practices are in place to limit the chances of any viruses spreading within the workforce, and that employees are given a refresher on what they need to do to follow these. This is likely to include a reminder to employees of the problems of presenteeism, when an employee attends work when they are too unwell to be there. Not only can this lead to stress and burnout on a personal level, but for those that are office or site-based, it can also increase the risk of the illness spreading through the workforce.

There are various steps that can be taken to prevent the transmission of Covid, flu and colds in the workplace. These include:

- remaining vigilant about hygiene in the workplace, particularly handwashing
- maintaining good ventilation
- social distancing by keeping a distance between employees and others in the workplace
- encouraging employees to have injections of Covid and flu vaccines
- other steps such as face coverings
- wencouraging employees to work at home or partly at home.

Now that hybrid working has become established in many businesses, a transition to temporary homeworking during a bout of Covid or another virus, where the employee is well enough to work but could pass the illness on to others, should be easier to arrange and have little impact on the employee's ability to perform their duties. Taking steps now to ensure employees have what they need to work in such a situation would mean there is time to make any additional arrangements, should it be necessary to implement this.

Next steps

Covid has not gone away, and as we continue to live with it, along with other viruses and illnesses, businesses must remain prepared to react swiftly should a case arise within their workforce, to prevent absences related to it spreading.

Making sure there are policies and procedures in place dealing with these situations is important, as is raising awareness amongst employees as to what they should do, should they suspect or know they are unwell with a contagious illness. Line managers may also need to be reminded of their role in controlling and managing these situations, to ensure they have a good understanding of the steps they need to take, should they need to.

Thank you for taking the time to read our Newsletter which I hope you found informative. An e-newsletter will be sent on a quarterly basis to help keep you up to date with current legislation changes, as well as giving you some helpful hints and tips to help your business run smoothly.

In the meantime please contact us if we can be of service to you or your company.

Have an enjoyable quarter and we look forward to issuing you with our next newsletter in January 2024.

May you have a Happy and Prosperous New Year.

Work Matters (HR) Ltd Amberley, 18 Oakwood, Berkhamsted, Herts HP4 3NQ
T 01442 870742 M 07711 613153 E info@workmattershr.co.uk W www.workmattershr.co.uk