

Quarterly UK employment update

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Changing direction
Employment update



July to September 2021 – a backward glance

Development	Impact on employers
<p>The Gov't deferred the end date for the temporary adjusted right-to-work checks to 5 April 2022 and amended the "List A and "List B" documents which may be considered evidence of the right to work. The most important change concerns the process for employees with outstanding applications made within the EU Settlement Scheme to show this. The updated guidance note is edited to reflect the new lists.</p>	<p>Employers who currently conduct "virtual" right-to-work checks should note the extension of the end date and that it will continue to be possible to rely on these until April 2022. Employers may also wish to update internal documents with the new "List A" and B tables.</p>
<p>The Gov't published its response to a consultation on sexual harassment in the workplace. It will introduce a mandatory duty on employers to prevent sexual harassment and will establish a statutory protection from third party harassment (Read our Alert).</p>	<p>A new mandatory duty should prompt employers to prioritise prevention, such as implementing a policy, regular training and effective complaints processes. A new EHRC Code of Practice will provide guidance on the steps employers will be expected to take.</p>
<p>The Gov't published its response to a consultation on ill-health in the workplace. It rejected changing legislation, including a reform of SSP, in favour of awareness-raising. For example, developing guidance to support disabled people to remain in work (Read our Alert)</p>	<p>Employers will be relieved that a proposal in the consultation, to introduce a new right to request workplace modifications on health grounds, has been abandoned given concerns about how this would work alongside the duty to make reasonable adjustments.</p>
<p>Self-isolation rules changed in August with some workers no longer required to self-isolate. However, the rules do slightly differ across the devolved nations (Read our Alert).</p>	<p>Despite these changes, there will be many circumstances where workers are still required to self-isolate. Where the employer is aware of this requirement, it must not knowingly allow the worker to attend the workplace.</p>
<p>The Gov't named a further 191 businesses which had breached the NMW legislation. The majority of NMW payment errors result from a misunderstanding of the requirements, rather than deliberate avoidance, such as paying the incorrect apprenticeship rate or wrongly deducting pay for uniform and other expenses.</p>	<p>Penalties for underpayment of the minimum wage can be considerable, with arrears payments going back over a six-year period, fines of up to 200% of the shortfall per person (capped at £20,000 each) as well as adverse publicity. It is important that employers are proactive and seek to address mistakes, certainly before a formal HMRC investigation.</p>
<p>The EAT upheld a large award of compensation on a career-loss basis to a prison officer, who had been subjected to discriminatory workplace harassment, as it was very unlikely that he would be able to return to any work. (<i>Secretary of State for Justice v Plaistow</i>)</p>	<p>Although it is rare for tribunals to award future loss of earnings based on a lost career, this case is a reminder of the potential grave consequences of failing to act to prevent harassment and victimisation.</p>

<p>The CJEU has held that a workplace ban on showing any visible sign of political, ideological or religious beliefs does not constitute direct discrimination, provided that the ban is applied without distinction, such as not limiting the ban to large signs (<i>IX v WABE eV</i>)</p>	<p>Legal risk remains from an indirect discrimination perspective should an employer decide to take action against a worker for wearing a sign of political, ideological or religious belief. Although, as a result of Brexit, the CJEU's decision is not binding on our courts and tribunals, they may have regard to this decision.</p>
<p>Northern Ireland: The Minister for the Economy announced her intention that Parental Bereavement Leave and Pay should be introduced as soon as practicable in Northern Ireland.</p>	<p>The Bill is progressing through the Assembly and, when introduced, is likely to replicate the provisions in place in the rest of GB - employees who suffer the loss of a child under the age of eighteen, or a stillbirth after 24 weeks of pregnancy, will have a statutory entitlement to two weeks' leave and statutory payment.</p>



October to December 2021 – short range forecast

Development	Impact on employers
<p>The Furlough Scheme ends on 30 September 2021, having been extended four times since it was announced in March 2020. The Gov't has resisted the adoption of a permanent furlough scheme to support jobs during future economic crises, as seen in some EU countries.</p>	<p>From a peak of 5.1 million jobs on furlough in January 2021, numbers have fallen as restrictions have eased. However, some sectors, including transport, travel and the arts, remain affected by the pandemic. If redundancies arise, adequate notice and, potentially, a period of consultation, will be needed before any dismissals are effected.</p>
<p>The postponed deadline for 2020/21 gender pay gap reports ends on 5 October 2021.</p>	<p>The Gov't and the EHRC have published guidance addressing the issue of how to account for furloughed employees in pay reports. Employers should be preparing now for gender pay gap reporting for this year. (Read our Alert).</p>
<p>From 11 November 2021, regulations in England provide that care homes must ensure that, subject to certain exceptions, staff (and others) do not enter the premises unless they provide evidence that they have been fully vaccinated. The DHSC has issued guidance for care homes.</p>	<p>Employers affected should consider: checking vaccination rates amongst staff and any exemptions; conducting regular communication and employee/trade union engagement to encourage vaccination and explain the consequences of refusing; amending policies, contracts and other documents; ensuring data is lawfully processed; exploring all options for unvaccinated staff, including redeployment, before any dismissal.</p>
<p>The implementation of the EU Whistleblowing (WB) Directive in December 2021 marks a significant step change which will have practical workplace consequences for UK employers with operations in Europe and for those multi-nationals applying a one-size-fits-all global whistleblowing policy.</p>	<p>The Directive differs from UK law, for example, it protects a broader range of workers and requires employers to have WB channels in place and to respond diligently to disclosures within set timescales. While the UK Gov't has no immediate plans to amend UK law in response, cross-border employers should review the impact of the Directive on their WB policy. (Read our Alert).</p>
<p>The Gov't remains committed to introducing the awaited Employment Bill and has promised next steps on carers' leave and flexible working before the end of 2021. The scope of the Bill is expected to be wide-ranging, including provisions on: a single enforcement body; carers' leave; neonatal leave/pay; a right to request a more predictable contract; and flexible working as a default.</p>	<p>Employers reliant on casual workers should anticipate a new right to request a stable contract and all employers should assess the potential impact of making flexible working the default position, given the rise in remote working during and post the pandemic. However, the Gov't has indicated that a consultation will precede a change in the law and that there will be scope for employers to refuse flexible working with a good reason.</p>
<p>The pandemic increased modern slavery and other human rights exploitation risks in UK and global supply chains. Having launched a new central registry for modern slavery statements, the Gov't is expected to publish legislation to strengthen modern slavery reporting requirements to increase transparency and compliance.</p>	<p>Continuing allegations involving potential worker exploitation in parts of domestic supply chains show that this is not the time to divert resources away from anti-slavery training, risk assessments, due diligence and other capability-building initiatives. In addition, other jurisdictions are proposing, or have introduced, more stringent human rights due diligence duties, including the EU, Germany, Norway and the NLS.</p>
<p>The SC is expected to clarify the scope of trade union legislation in restricting an employer's ability to change employment terms in a unionised workplace without collective agreement. (<i>Kostal UK Ltd v Dunkley</i>).</p>	<p>The CA decided that the employer had not breached the legislation (Read our Alert). A SC judgment to the contrary would potentially restrict an employer's ability to change employment terms in a unionised workplace without collective agreement.</p>

Against a backdrop of case decisions on worker status , the EAT is due to hand down an important clarification regarding the status of individuals operating under a franchise agreement providing parcel collection and delivery services (<i>Stojavljevic v DPD Group UK Ltd</i>).	Several recent case decisions have found individuals offering courier or similar services to have worker status and consequential employment rights. The ET found against worker status in this case, so the EAT conclusions may be particularly revealing on this issue. Employers who engage individuals on a non-employed basis should consider carrying out a review and risk assessment in all cases.
Northern Ireland: The relevant legislative provisions relating to gender, ethnicity and disability pay reporting set out in the Employment Act (Northern Ireland) 2016 await implementation by the Northern Ireland Executive.	It is anticipated that, at the end of 2021 or beginning of 2022, the Equality Commission for Northern Ireland will be lobbying the Executive to implement these regulations.



January to June 2022 - long range forecast

Development	Impact on employers
New legislation on confidentiality clauses is awaited, including a requirement that limitations imposed by confidentiality clauses are clearly set out in contracts/settlement agreements. Implementation has been delayed due to COVID-19. Both Acas and the EHRC have already published guidance.	Employers should review their contracts and settlement agreements to ensure the use of confidentiality clauses is appropriately managed on a case-by-case basis and is clearly explained.
The outcome of several Gov't consultations , postponed due to the pandemic, is expected in due course including future proposals on: exclusivity clauses; non-compete clauses and ethnicity pay gap reporting.	Some proposals within these consultations could prove significant. For example, depending on how the Gov't proceeds, some existing exclusivity and non-compete clauses may be rendered invalid and employers should review their use and potential impact. Watch out for further Eversheds Sutherland Alerts.
The Gov't will publish regulations to implement, from April 2022, a new power for the Certification Officer (CO) to impose financial penalties on trade unions for breaches of their statutory duties (e.g. a failure to conduct their elections properly) of up to £20,000.	Unlikely to be welcomed by trade unions, this change will be accompanied by enhanced CO investigatory powers as well as a new requirement for trade unions and employers' associations to pay a levy to the CO by way of contribution to its costs.

NB. Employment law is a devolved matter in Northern Ireland and the issues set out above may not all apply in NI. For NI specific advice contact our [Belfast office](#).

For further information, please contact:



Key

CA	Court of Appeal
CAC	Central Arbitration Committee
CJEU	European Court of Justice
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
EHRC	Employment & Human Rights Commission
ET	Employment Tribunal
Gov't	The UK Government
HMRC	Her Majesty's Revenue and Customs
NMW	National Minimum Wage

SMP Statutory Maternity Pay

SC Supreme Court

SSP Statutory sick pay

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