

Because Recruitment Matters

Legal bulletin

Fiona Coombe, Solicitor and Director of Professional Services, REC

2010 - A year for change

David Cameron called for change this year on the campaign trail and this certainly seems to be the theme for the early days of the Coalition Government. We have already started to see decisions taken which will have an impact on the recruitment and employment landscape in the short and medium term, such as public spending cuts and the cap on economic migrants from outside the EU. But a number of changes were already in the pipeline and it remains to be seen whether planned legislation will go ahead with alterations or at all.

In this article we summarise the legislative changes for 2010 past and future.

April 2010

Right to request time off for training or study

Employees of organisations with over 250 staff now have the right to request time off for training or study provided they have 26 weeks service. Employers have a duty to "seriously consider" a formal request, but have no legal obligation to fund the training or study or pay for the time off. Within 28 days the employer must agree to the request, meet the employee to discuss the proposal or refuse the request on the basis of one or more of a list of specified reasons. These relate to the relevance of the training or study to the individual and the organisation and implications for operational effectiveness or cost. A

failure to consider the request can result in a claim for compensation of up to £3040 per employee. This right will be extended to all employees from 6 April 2011.

Additional paternity leave

Fathers of babies due (or children placed for adoption) on or after 3 April 2011 will be able to take additional paternity leave if the mother goes back to work before the end of her maternity leave (provided the mother has used up at least 20 weeks leave.) The father will be entitled to be paid paternity pay at a flat rate for the remaining period, if any, if this falls within the mothers' statutory maternity pay period. Employers should review handbooks and policies to ensure the changes are incorporated in time for next April.

Fit notes replace sick notes

In an attempt to get people back into work quickly after illness or injury the pro forma medical note will no longer give options of fitness or unfitness for work and instead will require a statement that either the patient is unfit or "may be fit for work, taking into account the following...". The GP can add advice as to how the employee's condition affects what they can do and how they might be able to return to work. This may include advising a phased return to work, amended hours or duties and workplace adaptations and employers should discuss the advice with their employee to agree a return to work or a review date. Employees may be signed off for a maximum of

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3 months and the form may only be required after 7 days of absence.

July 2010

Immigration cap on economic migrants

The number of workers entering the UK from outside Europe will be controlled by a new limit from 1 April 2011 following a 12-week consultation with businesses and other parties which will run to September. In the meantime an interim limit will be introduced to take effect from 19 July 2010 to ensure that there is no rush of applications and the number of work visas issued stays below 2009 levels. Permanent limits on non-European economic migration routes will then be decided and put in place by 1 April 2011.

Interim measures include:

- capping the number of Tier 1 Points Based System (PBS) migrants at current levels and raising the number of points needed by non-EU workers who come to do highly skilled jobs from 95 to 100, meaning that the route is



effectively being limited to either higher earners or those with post graduate degrees; and

- limiting the number of certificates of sponsorship that licensed employers can issue to those who wish to come to fill skilled job vacancies. This will reduce the number of people entering through Tier 2 of the PBS by 1300.

The Vetting and Barring Scheme and ISA registration

Voluntary registration with the Independent Safeguarding Authority for anyone taking up employment or changing roles involving working with children or vulnerable adults was planned to commence on 26 July with compulsory registration starting in November 2010. This has been put on hold pending a review of the Vetting and Barring Scheme by the Home Office, the Department of Health and the Department for Education in order to scale registration back to 'proportionate, common sense levels'.

Although the timing and scope of registration now depends on the outcome of the review, the following requirements, which came into effect in October last year, remain in place:

- It is a criminal offence for barred individuals to apply to work with children or vulnerable adults in a wider range of posts;
- Employers also face criminal sanctions for knowingly employing a barred individual across a wider range of work;
- The Children's Barred List and the Adults Barred List which replaced the previous POCA and POVA Lists and List 99, remain in place;
- Employment businesses and agencies along with employers, local authorities, professional regulators and inspection bodies have a duty to refer to the ISA any information on an individual working with the vulnerable where they consider them to have caused harm or pose a risk.

October 2010

Changes to the Conduct Regulations - Removal of obligations on permanent recruiters

As part of the Government's drive to reduce the regulatory burden on businesses they have reviewed the Conduct of Employment Agencies and Employment Businesses Regulations 2003 and certain obligations imposed on permanent recruiters will be removed from 1 October 2010.

These are as follows:

- Removal of the requirement to obtain a candidate's agreement to terms stating the type of work they are looking for and the fact they are looking for permanent work;
- Removal of the requirement to obtain a client's agreement to terms of business. This does not mean that agencies should not continue to issue terms of business to clients or that they should not make sure the client accepts those terms before introducing candidates as this is just good business practice. But the regulatory obligation to do so is removed;
- Removal of the requirement for terms to be recorded in a "single" document. Terms must still be recorded in writing but they may be in "one or more" documents with copies provided as soon as reasonably practicable;
- Agencies retain an obligation to check a candidate's identity, obtain copies of qualifications and two references but only for those candidates working with vulnerable persons. There is no longer a need to carry out these checks for other roles where there is a legal requirement to have qualifications as this will be the responsibility of the client;
- Advertisements need no longer indicate if you are an "employment agency" but must state if the work is "temporary or permanent" work.





Equality Act 2010

While the Coalition Government is committed to introducing the Equality Act they have indicated they are currently considering how the different provisions will be commenced so that the Act is implemented in an effective and proportionate way. It is their stated intention to stick to the planned timetable with commencement of the core provisions in October 2010 but the website of the Government Equalities Office is currently silent on what will come into force when.

As a consolidating Act it brings together 9 separate pieces of legislation and numerous statutory instruments which deal with unlawful discrimination with relatively few new provisions. However those that were included are likely to cause some controversy. They include:

- The extension of direct discrimination and harassment to include "associative" and "perceptive" claims i.e. cases of discrimination brought on the basis of a claimant's association with persons with a 'protected characteristic' (sex, race, disability etc.); or discrimination or harassment on the basis of a perceived characteristic of the claimant e.g. an assumption that a person is gay;
- A provision permitting employers to take positive action to enable persons with a protected characteristic to overcome or minimise a disadvantage. This means that an employer may choose one candidate over another on

the basis that they have a 'protected characteristic' which is under-represented in the workforce e.g. they are female or disabled. However both candidates must have equal skills and abilities;

- Except in certain circumstances there is a prohibition against pre-selection health checks. Medical questionnaires and health checks may still be used once an offer has been made but they may not be used to screen out candidates. This also applies to recruiters. So members will need to review the circumstances in which medical information is requested from candidates. Please see the May/June 2010 edition of the [Legal bulletin](#) for further details;
- Equal pay claims may now include a claim for indirect discrimination;
- Limitation of pay secrecy clauses in contracts of employment;
- Public sector pay reporting requirements to identify gender pay disparities.

It is early days yet of the Coalition Government but they are sure to make their mark with planned reviews of health and safety legislation and even a potential review of the Agency Workers Regulations due into force in October 2011. There are pledges to phase out the default retirement age and further consultation on the Working Time Regulations 1998 so there is certainly no room for complacency or a quiet life.





FAQs

Zoe Rogers-Wright, Legal Advisor at the REC, brings you a sample of your questions posed to the Legal Team

Q: Do temporary workers need to be paid for untaken lunch breaks?

A: Under the Working Time Regulations 1998, adult workers are entitled to take a 20 minute rest break when working 6 hours or more. It has been the subject of much debate as to whether an employer must force a worker to take this break but nevertheless employers must make sure that a worker can take the break. An employer is not required to pay for rest breaks. The hours and times that the worker is required to work under the assignment and which will be paid for should be set out in the contract or the assignment details form. Employers should note that if workers are regularly working through breaks with an employer's knowledge (and implied consent) and this is deemed to be working time, employers will need to ensure that national minimum wage is being paid for all of the working time.

Q: Do I have to approve my employees request to work flexibly?

A: Employees who are parents of children aged under 16 (or of disabled children aged under 18) have the right to apply to work flexibly. You have a legal duty to seriously consider an employee's requests for flexible working. This does not mean that employees have an automatic right to work flexibly.

In order to be eligible to apply to work flexibly, an individual must be an employee (so this right does not apply to a temporary worker engaged under a contract for services) and have a child under the age of 16 (or under 18 if the child is disabled), be the child's mother, father, adopter, guardian or foster parent (or be their partner or married to), have worked with their employer continuously for 26 weeks at the time when their application is made; have or expect to have responsibility for the child's upbringing; and be making the request in order to care for the child.

Employees may request a change in the hours/times they work or request to work from home e.g. flexitime, compressed hours or job-sharing. The employee's request must be in writing and if accepted by the employer, will entail a permanent change in the employee's contract of employment.

On receiving an employees request you can either agree to it, or if not, you must arrange to meet with the employee within 28 days to discuss the request. The employee is entitled to be accompanied at the meeting by a fellow employee.

During the meeting you will have to seriously consider the proposed working pattern and discuss the options with the employee.

You will have 14 days from the date of the meeting to write to the employee and either agree the new work pattern and a start date for the new flexible working to take effect or set out clear business grounds why the request for flexible working is not acceptable and the reasons behind the decision. The grounds on which a flexible working request can be turned down are limited. If declining the application you must be able to show that the reason is due to one of the following: burden of additional costs; detrimental effect on the ability to meet customer demand; inability to re-organise work among existing staff; inability to recruit additional staff; detrimental impact on quality, detrimental impact on performance; insufficiency of work during the periods during which the employee proposes to work; or planned structure changes. If the employee's request is turned down, he or she has 14 days in which to appeal against a decision.

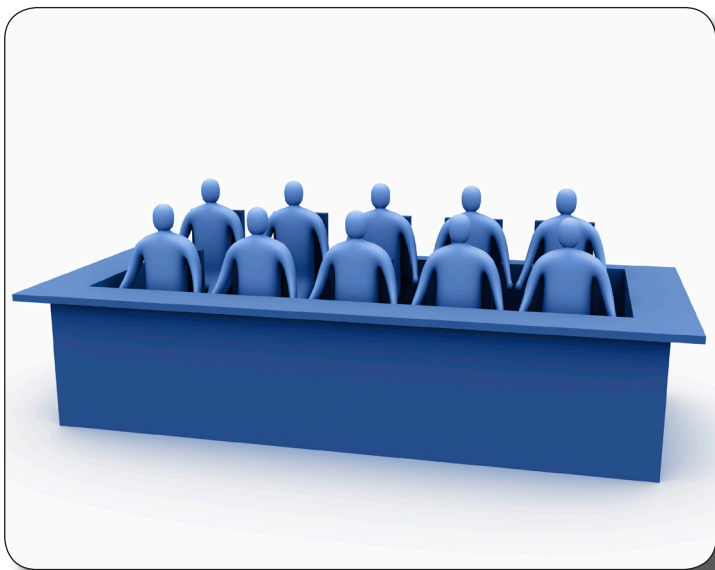
In the event that an employer fails to deal with the flexible working request correctly, the employee can take action in an employment tribunal. The employment tribunal may order the employer to reconsider the application and may award

compensation of up to eight weeks' pay, but it cannot order the employer implement the employee's request for flexible working.

Although there is no equivalent procedure in place for employees who are carers of a relative with a disability, the Disability Discrimination Act (DDA) has been interpreted to provide some protection for such employees. The employer's duty to make reasonable adjustments under the DDA may also include a requirement to allow an employee to alter working hours/pattern etc in order to care for a disabled relative.

Q: What do I need to do if a temp needs to take time off to attend jury service? Do I need to pay the temp for the time off?

A: You cannot prevent the temp from taking the time off to attend jury service, but you are not required to pay the temp for this time. The temp is however entitled to claim his or her losses from the court by making an application to the court directly. He or she should speak to the court about this. To support the application the temp will be required to submit evidence of the loss of earnings incurred by carrying the jury service and to this end, may require you to complete a Certificate of Loss of Earnings Form on their behalf. You should only complete and submit the Loss of Earnings Form if you had work to offer the temp during their time on jury service and you should base the daily net loss on the work you could have offered them for the time they were on jury service.



Legal round up

Withdrawal of the Worker Registration Scheme

The Government has announced that the Worker Registration Scheme (WRS) will be no longer apply to workers from Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia from 30 April 2011. Currently, workers from these countries, referred to as A8 countries, are required to register with the Home Office Scheme when taking up employment in the UK. The Scheme was introduced as a temporary measure when the A8 countries joined the European Economic Area. From 30 April 2011 workers from the A8 countries will be free to work in the UK without any restrictions in the same way UK nationals and workers from the original member states of the EEA.

Additionally the Government has announced that the restrictions which currently apply to workers from Bulgaria and Romania (A2 countries) requiring them to have work authorisations to work in the UK, may be lifted in December 2011. However, it is possible for these restrictions to be retained until 2013 for A2 workers if the removal is likely to result in a risk of detriment being caused to the labour market.

VAT increase to 20%

From 4 January 2011 the standard rate of VAT will increase from the current rate of 17.5% to 20%.

Please [click here](#) for detailed guidance from HMRC.

ACAS Guide on how to manage performance

ACAS have published Guidance on how to manage performance including some useful sample documents.

To view the Guidance, please [click here](#).



Case Law

Rawlings v Direct Garage Door Company Ltd **Non-payment of holiday pay amounts to an unlawful deduction from wages**

In this case, Mr Rawlings was unable to take his annual leave entitlement for 15 months due to being on long term sickness absence. The Tribunal had to consider whether or not Mr Rawlings was entitled to receive holiday pay on termination of his employment. The Tribunal followed the decision of the ECJ in *Stringer and ors v HMRC* 2009 where it was held that workers who are unable to take their holiday entitlement because of sickness absence for most or all of a leave year are entitled to be paid annual leave.

By failing to pay the worker for his accrued holiday which was not taken in the leave year due to sickness, the employer was found to have made an unauthorised deduction from wages.

Please [click here](#) to view BIS guidance on the interaction of annual leave and sick leave.

Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol **ECJ rules on holiday pay for part time workers**

The European Court of Justice has handed down its decision on the issue of how a worker's holiday entitlement should be adjusted in the event of a variation of working hours during the holiday year.

The ECJ ruled on the practice which is applied in Austria which provides that when a full time worker changes to part time work, statutory leave accrued at the full time rate which has not been taken is reduced in proportion to the reduced part time hours. The ECJ ruled that this method of recalculating leave is not consistent with the Working Time Directive and that workers who have accrued statutory leave but have not been able to take the leave before reducing their hours remain entitled to use the leave accrued, and to take the leave at the rate applicable before the variation of hours.

ACAS Guidance on the Equality Act 2010

In association with the Government Equalities Office and the Equality and Human Rights Commission, ACAS have this month published a 'Quick Start Guide for Employers' on the Equality Act 2010.

The Guide covers the provisions due to come into force in October 2010 and also includes a summary table of the key changes. The Guide covers:

- Definitions of the different types of discrimination i.e. direct, associative, perceptible, indirect, harassment, third party harassment and victimisation;
- They key points regarding protective characteristics;
- Some of the key changes from the current equality legislation;
- Examples of types of discrimination and examples of some of the changes.

Please [click here](#) to view the Guide.



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