

EMPLOYMENT LAW UPDATE SUMMER 2019

Contents

Recent Developments

- Britain after Brexit – employing EU nationals
- Preventing sexual harassment in the workplace – action plan

Future Proposals

- Extending redundancy protection before or after maternity leave

Current Rates

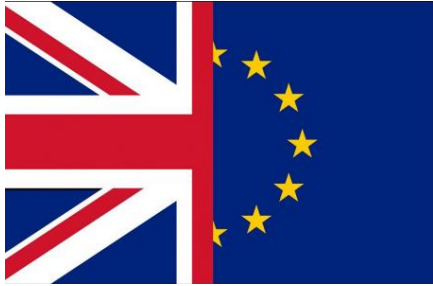
- National Minimum Wage / National Living Wage
- Employment Protection Awards
- Maternity and Paternity Pay
- Statutory Sick Pay



EMPLOYMENT LAW UPDATE

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RECENT DEVELOPMENTS



Britain after Brexit – employing EU nationals

The government has now established the EU Settlement Scheme under which EU nationals can continue to live in the UK after Brexit. Different considerations apply in the event of a 'deal' or 'no deal' scenario assuming the UK leaves the EU on or before 31 October 2019. It has also set out proposals for EU nationals who wish to work in the UK after Brexit.

Deal

Once the UK leaves the EU, the principle of free movement of workers will cease to apply. However, this will not take immediate effect. Under the proposed EU Withdrawal Agreement (the deal) it was agreed there would be a transition period from 29 March 2019 to 31 December 2020. This should now take effect from 31 October 2019 unless there is an earlier leave date. During the transition period, EU nationals can still come to the UK to live and work.

EU nationals who wish to remain in the UK after the transition period will need to apply for settled status before 30 June 2021. Those who have been resident continuously for 5 years (whether or not they have already applied for permanent residence) will be granted settled status. Those who have been resident for less than 5 years will be granted pre-settled status and would be eligible for settled status once they reach 5 years.

Settled status entitles EU nationals to live and work permanently in the UK and access to benefits.

The application is a relatively simple process and is free of charge. Those who paid the £65 fee which applied previously are entitled to a refund.

No deal

If the UK leaves the EU without a deal on or before 31 October ie the Withdrawal Agreement is not approved by Parliament, then under current proposals, only those EU nationals resident in the UK before 31 October 2019 (or earlier leave date) would be entitled to apply for settled status and will need to do so before 31 December 2020. Any EU nationals who come to the UK from 31 October to 30 December 2020 will only be able to live and work in the UK for up to 3 months. If they wish to stay for longer, they will need to apply for European Temporary leave to remain in the UK within the initial 3 months. This will allow them to live and work in the UK for up to 36 months. They will not be able to extend this period so will either need to leave the UK or apply to remain under the UK immigration rules which apply when the permission expires.

After 2021

Any EU nationals who come to the UK from 2021 in either scenario will need to comply with UK immigration rules in force at that time. Visas will not be required for short visits but permission will be required in order to work in the UK. The government has set out proposals for new immigration rules. These will simplify the

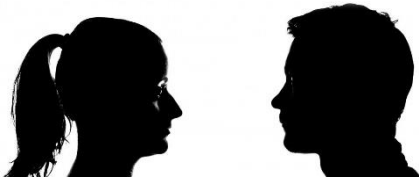
sponsorship licence system, currently required to employ non-EU nationals. Changes include abolishing the resident labour market test and the cap on the number of skilled workers allowed each year. There will also be a new temporary work route for lower skilled jobs allowing stays of up to 12 months in the UK followed by a 12 months' cooling off period. There are no specific provisions or concessions for employing EU nationals.

The post Brexit restrictions do not apply to Irish nationals who will continue to have the right to live and work in the UK.

Comment

Deal or no deal, under current proposals, it will be far harder for employers to employ EU nationals from 2021. The sponsorship licence system is unnecessarily complicated and expensive. The proposed changes are unlikely to make very much difference. Right to work checks will also be more onerous. However, nothing is finalised with Brexit and the proposals could easily change.

Preventing sexual harassment in the workplace – Government action



The government has announced various action points to prevent sexual harassment in the work place in response to a report from the Women and Equalities Select Committee (WESC). These include the Equality and Human Rights Commission developing a statutory code of practice on sexual harassment and to increase the penalties which a tribunal may impose on an employer for an aggravated breach of employment law from £5,000 to £20,000 (now implemented). Other points will be subject to consultation before being implemented.

Background

The WESC published its report on sexual harassment in the workplace in July 2018. The report called on government, regulators and employers to take a more proactive role in relation to sexual harassment. The government responded in December 2018 by setting out 12 action points. These comprised recommendations which the government accepted, proposals for consultation and various other commitments. The remaining WESC recommendations such as punitive damages were rejected.

Accepted proposals

The main proposal is for the EHRC to develop a statutory code of practice on sexual harassment. The government's view is that as employers already have a defence to sexual harassment if they can show they took reasonable steps to prevent the harassment, a statutory code will help employers understand and demonstrate that they have taken such steps. There is no timeline for the EHRC to produce the code.

The government has also accepted and now increased the financial penalties (payable to the government) from £5000 to £20,000 for any aggravated breach of employment law. These can be imposed on an employer by an employment tribunal although in practice have not been greatly used.

Consultations and further commitments

Proposals for consultation include

- whether there should be a mandatory duty to protect workers from sexual harassment (the government has already indicated they do not believe it to be necessary);
- how to deal with harassment from customers;
- protection for interns and volunteers (not currently covered by the Equality Act 2010);
- whether to extend tribunal time limits to bring claims from 3 months to 6 months; and
- how to better regulate the use of non-disclosure/settlement agreements (NDAs).

Future commitments include working with ACAS, the EHRC and employers to raise awareness of appropriate workplace behaviours and individual rights.

There is currently no specific timeline for the consultation or commitments although the WESC has recently produced a further report on NDAs in discrimination cases. Most of the recommendations are, however, unlikely to be accepted by the government.

Comment

The government's approach seems to be to increase awareness of sexual harassment in the workplace rather than imposing new obligations/laws on employers. However, under existing laws compensation for sexual harassment claims can be high and claims usually come with unwelcome publicity, regardless of success. Employers should therefore be taking appropriate action such as policies, awareness and training to try and prevent any claims.

FUTURE PROPOSALS

Extending redundancy protection before and after maternity leave



At present, a woman on maternity leave has some protection against redundancy. Under the regulations, before making a woman on maternity leave redundant, an employer must offer her a suitable alternative vacancy where one is available with the employer or an associated employer (ie group company). It is up to the employer to decide whether the vacancy is a suitable alternative and it must be offered on the same terms and conditions of employment.

The protection only applies during maternity leave and not when the woman is pregnant or has recently returned from maternity leave.

Following a consultation period, the government intends to extend this protection to cover pregnant employees and those returning from maternity leave for a period of up to 6 months. No timeline or details have been published.

Meanwhile, a 10-minute Rule Bill has been put before parliament proposing a complete ban on redundancy for any woman who is pregnant, on maternity leave or within 6 months of returning to work after maternity leave except if the business where the woman works is being closed down. This would provide greater protection than under the government's proposals.

Comment

Private members bills do not often become law and it is more likely the government's proposals will eventually be implemented. The complete ban on redundancy would be onerous for employers in financial difficulty and the enhanced protection could cause resentment from other employees. In spite of this protection, it should still be possible to apply for voluntary redundancy if that is the preferred option.



CURRENT RATES

The national minimum wage provides a minimum hourly rate of pay for workers between ages 16-24. The national living wage applies to workers aged 25 and over. The rates for the NMW and the NLW are increased in parallel in April of each year. The rates increased on **1 April 2019** and are as follows:

	Apprentices	16 and 17	18 – 20	21 – 24	25+
National Minimum Wage	£3.90	£4.35	£6.15	£7.70	
National Living Wage					£8.21
Previous rate before April 2019	£3.70	£4.20	£5.90	£7.38	£7.83

The penalties for failing to pay the NMW and NLW are high and can be up to £20k per worker.

Employment Protection Awards

The maximum limits on employment protection awards are increased in April each year. From 6 April 2019 the rates are as follows and apply to all dismissals after this date:

Award	Current Rate Applies to dismissals from 6 April 2019	Previous Rate for dismissals before 6 April 2019
Unfair dismissal compensatory award (maximum)	£86,444 (maximum or 12 months' pay whichever is lower)	£83,682 (maximum or 12 months' pay whichever is lower)
One week's pay for statutory redundancy pay and basic award	£525	£508
Maximum statutory redundancy payment and basic award	£15,750	£15,240

Awards for discrimination claims have no maximum limit.

Maternity and Paternity Pay

Statutory Maternity Pay and Statutory Adoption Pay are payable for a period of 39 weeks. Statutory Paternity Pay is payable for a period of two weeks following the birth. Under the shared parental leave scheme, it is possible for parents to share up to 37 weeks of the mother's maternity pay.

The rates are increased in April each year and from **6 April 2019** are as follows:

Type of Payment	Current Rate from 6 April 2019	Payment Period	Previous Rate from April 2018
Statutory Maternity Pay and Statutory Adoption Pay (higher rate)	90% of normal weekly earnings	First 6 Weeks	
Statutory Maternity Pay (basic rate)	£148.68 per week*	Next 33 Weeks	£145.18
Statutory Paternity Pay	£148.68 per week*	Up to 2 Weeks	£145.18

*or 90% of normal earnings, if lower.

Statutory Sick Pay

Statutory Sick Pay is payable if an employee is incapable of work for 4 or more consecutive days. The entitlement starts from the 4th qualifying day up to a maximum of 28 weeks. From **6 April 2019**, the SSP rate is **£94.25** per week (previous rate - £92.05).

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Disclaimer – This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.