What to Expect in UK Employment Law in 2018: GDPR, Brexit Negotiations and More

Monday, January 8, 2018

Summary

Whilst 2017 was anticipated to be a fairly static year for employment law (as we reported here), that did not in fact prove to be the case, and there were various notable developments, including the following:

- The **landmark defeat** of the employment tribunal fees regime introduced by the Government in 2013.
- The release of the hotly anticipated "**Taylor Review of Modern Working Practices**".
- A flurry of case law on employment status in the gig economy, demonstrating a clear trend towards the courts recognising workers’ rights for individuals previously considered (or at least labelled as) self-employed. This included confirmation in November 2017 that where an individual has been miscategorised as self-employed instead of as a worker, then the associated holiday pay compensation must cover loss for all holiday, untaken or unpaid, over the whole of the engagement—a decision that could have far-reaching and very expensive consequences for UK employers.

To a large degree, 2018 is likely to be defined by the ongoing Brexit negotiations and the passage of the EU Withdrawal Bill, which will, amongst other things, lay the framework for the future movement of EU workers to the United Kingdom. Employers should, however, be aware of some additional key developments on the horizon.

In Depth

**Expected 2018**

**Increase in the Number of Employment Tribunal Claims**

According to recently published UK Government statistics, since the abolition of tribunal fees in July 2017, there has been a 64 per cent increase in the number of employment tribunal claims.

UK employers should therefore expect a rise in the number of employment tribunal claims. Indeed, employment tribunals have been writing to claimants who previously submitted claims but had their claims invalidated for failure to pay the fee or to succeed in a remission application, inviting them to resubmit their original claim, despite the lapse in time.

**Expected early 2018**

**Government Response to the Taylor Review, the Gig Economy and Ongoing Employment Status Cases**

“Good Work: the Taylor Review of Modern Working Practices” was published in July 2017. The Taylor Review included a number of recommendations, particularly in respect of the gig economy and the continuing debate on employment status issues. The House of Commons and Business, Energy and Industrial Strategy Committees have completed their analysis of the Taylor Review and issued their own recommendations, and so now we wait to see which the Government might take on board during
the course of 2018.

In the meantime, we likely will continue to see high-profile employment status cases in 2018 (including an appeal in the *Pimlico Plumbers* case, which the Supreme Court is scheduled to hear in February 2018, seeking to overturn the Court of Appeal’s finding that the plumbers are workers, and not self-employed).

**Expected Brexit and EU Immigration early 2018**

It is currently relatively straightforward to recruit an EEA citizen to work in the United Kingdom, provided that the candidate can evidence a right to work in the United Kingdom by producing the appropriate documentation, such as a passport (UK), National ID card (UK or EU) or EEA registration certificate.

According to the UK Government’s recent proposals regarding the status and rights of EEA citizens in the United Kingdom after Brexit, provided that a worker who is an EEA citizen has started working in the United Kingdom before Brexit, he or she will be permitted to apply for “temporary status” or “settled status”, depending on the length of the individual’s UK service at the time of Brexit. Both statuses will allow non-British citizens already working in the United Kingdom to remain and continue to work. This proposal, of course, could change as Brexit negotiations continue.

A Home Office White Paper on immigration and a draft new Immigration Bill are expected in due course, possibly as early as the first quarter of 2018. Watch this space.

**4 April 2018**

**Mandatory Gender Pay Gap Reporting Deadline**

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 require employers in the private sector with at least 250 employees to publish by 4 April 2018 (and public sector employers by 30 March 2018), at the latest, information on gender pay. The information to be published includes the difference between the mean and median hourly rates of pay and bonus for male and female employees.

For more information on the requirements, see our previous alert [here](#).

**6 April 2018**

**Taxation of Termination Payments – PILONs**

The Government has resolved uncertainty over whether a payment made in lieu of notice (PILON) should be taxed, by providing that all PILONs, whether contractual or non-contractual, are taxable and subject to Class 1 National Insurance Contributions (NICs). This change comes into effect on 6 April 2018. This proposal was revised during 2017, and now employers will be required to calculate the taxable PILON on the basis of basic pay only.

The way in which a standard termination payment is taxed will also change, but not until 2019. Currently, the first £30,000 of a termination payment is payable without deduction of income tax or NICs. Any amount over £30,000 is subject to income tax, but currently not NICs. The proposed change is that, in future, payment in excess of £30,000 will be subject to employer’s NICs (but not employee’s NICs). This had been due to come into effect from April 2018. However, the Government has now postponed the implementation of this change to April 2019.

**25 May 2018**

**GDPR**

The General Data Protection Regulation (GDPR) is set to come into force on 25 May 2018.

The GDPR will supersede the UK Data Protection Act 1998 and apply to all data controllers and processors who have an establishment in Europe and all those outside Europe that process data in connection with the offering of goods or services to, or monitoring of, data subjects in the European Union, which, pending Brexit, still includes the United Kingdom.

Whilst to a large extent the GDPR builds on existing data protection standards, it will place additional compliance burdens on employers and significantly increase the risks for organisations that are not compliant. Notably, the GDPR will permit fines of up to 4 per cent of annual worldwide turnover (or, if higher, EUR 20 million), although it remains to be seen precisely what enforcement approach the relevant supervisory authorities will adopt.
Key themes of the new regime include the following:

- Stricter requirements for obtaining consent from individuals before processing their personal data. These will make it very difficult to establish valid consent in the employment context, meaning that employers will generally wish to rely on other lawful bases for processing data.
- A requirement to provide more detailed information to data subjects. This will require employers to have a thorough understanding of what and how employee personal data is being processed, and will necessitate existing employee data protection policies and/or privacy notices to be revised appropriately.
- A new requirement for organisations to be able to demonstrate compliance with data protection principles, which will include maintaining an “accountability record” of processing activities.
- Enhanced data subject rights, including, in addition to the subject access right already familiar to many UK employers, the “right to be forgotten”, the right to rectification and the right to object to processing in certain circumstances. These rights should be reflected in updated employee privacy notices.
- A requirement for certain organisations to appoint a Data Protection Officer (DPO). Specifically, a DPO will be required for (1) most public authorities or bodies; (2) organisations whose core activities consist of processing and require regular and systematic monitoring of data subjects on a large scale; and (3) organisations whose core activities consist of processing special categories of personal data and personal data relating to criminal convictions and offences (i.e., what we know currently as “sensitive” data) on a large scale.
- New cyber security and data breach notification obligations requiring higher standards of cyber security and personal data breaches to be reported to the relevant supervisory authority without undue delay and within 72 hours where feasible. From a human resource perspective, organisations may wish to establish a dedicated breach response team and train personnel to ensure prompt escalation of and response to any breach incident.
- New obligations on “processors”, meaning that employers should review the contracts they have with payroll processors, insurers and other suppliers to the HR function.

To the extent they have not already done so, employers should take steps now to assess the impact of the GDPR and prepare for its arrival.

The GDPR will be supplemented in the United Kingdom with a new Data Protection Bill, which is currently being debated in Parliament. Amongst other things, it is expected that this bill will (1) ensure that GDPR-equivalent data privacy standards are maintained following Brexit, and (2) take advantage of provisions in the GDPR which permit more specific rules to be introduced in particular areas, including employment. Again, watch this space.

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