EMPLOYMENT LAW
NEWSLETTER

Welcome to our latest employment law newsletter. As we countdown to Christmas and bid farewell to 2023, we look at some of the key employment law changes to prepare for in 2024. We also look at your position as an employer, when employees have a second job, including whilst on sick leave or working for a competitor in their spare time.

So grab yourself a mince pie, a festive drink perhaps, and enjoy.

JUST SOME OF THE CHANGES TO EXPECT IN 2024

This year has been a busy one for Parliament with many legislative changes agreed and expected to come into force over the course of 2024. For employers some of the changes you need to be aware of include:

Changes to the calculation of holiday pay

In our November 2022 newsletter we covered the case of Harpur v Brazel and the implications this had when calculating holiday pay for part-year and irregular hours workers. In Ms Brazel's case she was being underpaid when it came to calculating holiday pay despite her employers basing their calculations on 12.07% of the hours worked during the school term in question. The outcome of her case effectively meant Ms Brazel was paid more for annual leave than her full-time colleagues.

This case led to Government consultation on whether reform was needed, the outcome of which has been the publishing of draft legislation, expected to come into force on 1 January 2024. This legislation seeks to simplify the calculation of holiday entitlement and pay for both part-year workers and those working irregular hours.

Basically, for any annual leave year starting on or after 1 April 2024 those working irregular hours or for only part of the year will, on the last day of each pay period, accrue holiday at the rate of 12.07% of the hours worked within that pay period, up to 28 days per annum.

In terms of how employers will then pay workers for this holiday, they can either pay holiday pay when the holiday is taken based on the individual's average weekly earnings over the preceding 52 weeks worked ("week's pay") or they will have the option to pay "rolled-up" holiday pay under the new regulations, something that had been unlawful under EU law. If "rolled-up" holiday pay is used, then this will result in a 12.07% uplift in the worker's pay for that pay period.

There will also be provisions for calculating average holiday entitlement for those irregular/part year workers on long term sick or statutory leave e.g. maternity leave.

Under these legislative reforms the definition of a "week's pay" for the purposes of calculating holiday pay is also being updated to reflect existing case law meaning regular overtime and certain other payments (such as some commission payments) will need to be factored in.

This definition of a "week's pay" will also apply to those who work regular hours, although unlike those working irregular hours, it will only apply to the first four weeks of their annual leave entitlement for the time being.

If these changes potentially affect you, please get in touch for further guidance.

Changes to Flexible Working Requests

In July 2023 the Employment Relations (Flexible Working) Act 2023 received Royal Assent and is expected to come into force in July 2024 (if not before) bringing in the following legal changes:

- Employees will now be able to make up to two, rather than one, formal flexible working request in any 12-month period;
- Employers will now be required to respond to any formal requests (which usually includes dealing with any appeal) within two months. Currently you have three months to respond;
- The procedure for employees to follow is being simplified. They will no longer have to address in their request the effect, if any, it may have on the business and how that effect could be dealt with; and
- If you, as an employer, intend to reject the request you should firstly consult with the employee before doing so.

There will be no change to the eight permitted business reasons an employer can currently rely on to refuse a flexible working request. Additional legislation will also be needed to implement separate plans to make requesting flexible working a day one right, although you should expect this to follow.

ACAS will be updating their Code of Practice on handling flexible working requests when these changes come in. As an employer, you are also advised to consider reviewing any current flexible working policies and prepare for these changes now. Do not wait until July 2024!

New Statutory Right to request a predictable working pattern.
The Workers (Predictable Terms and Conditions) Act received Royal Assent in September 2023 and is expected to come into force around September 2024.

This legislation will create a new right for those workers who face a lack of certainty in their working patterns, to request predictable terms and conditions of work. This could include predictability of the number of hours they are required to work, the days of the week or predictability in other respects. It will not, however, introduce a right to receive reasonable notice of their work schedule or compensation for late shift cancellations (something that has been recommended by the Low Pay Commission (LPC)).

It is expected this new right will be exercised in a similar way to making a flexible working request. As with flexible working requests currently, this is not expected to be a day one right, so workers will need to have a minimum length of service. Employers will also need to provide a decision within one month of the request being made and will only be able to refuse the request on certain permitted grounds.

Similar rights are also being introduced for agency workers.

Extension of current protections for pregnant employees and those on statutory leave

In July 2023 the Protection from Redundancy (Pregnancy and Family Leave) Act 2023 came into force. This Act gives the power to introduce promised regulations to extend the protections currently afforded to those on maternity leave if their role becomes redundant.

Presently for any individual who is on maternity leave (or shared parental/ adoptive leave) if their role becomes redundant the law gives them priority over colleagues to any suitable alternative roles available within the business.

If the draft regulations laid before Parliament this month follow, as expected, then from April 2024 the current protections set out above will also extend to those who are pregnant (from the moment they tell their employer) as well as to those returning from statutory leave up until 18 months after the birth of their child or placement of the child (if adopted). For those taking shared parental leave only they will need to have taken at least six consecutive weeks leave to qualify.

New positive duty on employers to prevent sexual harassment in the workplace

Sexual harassment (as defined by the Equality Act 2010) happens where someone engages in conduct of a sexual nature which has the purpose or effect of violating another's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. It does not matter if the person engaging in the conduct is of the same or different sex.

It is already important for employers to take active steps to prevent sexual harassment in the workplace given not only the risk of costly employment tribunal claims but also reputational damage. However, from the 26 October 2024 there will be a new positive duty on employers to take reasonable steps to prevent sexual harassment. This is being introduced under the Worker Protection (amendment of Equality Act 2010) Act 2023.

As a means of encouraging employers to comply with this obligation employment tribunals will have the power to uplift any compensation award given by up to 25% if they find reasonable steps to prevent the sexual harassment have not been taken by the employer.

It is expected that the Equality and Human Rights Commission (EHRC) will update its current technical guidance to reflect this new duty. There is also talk about a statutory code of practice to compliment the technical guidance.

In the meantime, employers should already be taking active steps to prevent sexual harassment in the workplace, examples of which include:

- Identifying potential areas of risk within the business and how these will be tackled.
- Making sure you have an appropriate and effective anti-harassment policy in place which should be kept under regular review. Is it clear to your workforce what behaviours are not acceptable and the action that will be taken if they act inappropriately? Do they appreciate this extends beyond the workplace itself to staff social events including, just as one example, drinks down the pub after work? Do they know how to report inappropriate behaviour? Are they encouraged to do so?
- Backing up your anti-harassment policy with all staff training.
- Making sure any third parties attending your premises are also aware of your anti-harassment policy and zero-tolerance approach to sexual harassment and other inappropriate behaviour.
- Where inappropriate behaviour is reported ensuring such complaints are investigated promptly, appropriately, and sensitively. If inappropriate behaviour is found to have taken place make sure appropriate disciplinary action is taken, whilst also ensuring the person who spoke up is protected from any form of victimisation (which could lead to further claims against the business).
- You should also consider having a workplace champion (recommended by the EHRC). This would be a member of your HR team, or other appropriate senior member of staff, tasked with monitoring any harassment issues and effectiveness of measures put in place, as well as providing support to anyone who is the victim of inappropriate behaviour. It will be important to ensure such individuals also receive appropriate training to assist them in this role.

If you are unsure whether the steps you, as a business, are already taking to prevent sexual harassment are sufficient please get in touch.

EMPLOYEES WITH SECOND JOBS

With the cost of living remaining a concern for many, taking on a second job continues to be one means to boost income. The Office for National Statistics found as of July 2023 approximately 1,206,000 people in the UK have a second job.

With secondary employment comes potential issues for you, as an employer, and two examples where we have recently been asked to provide advice are below.

Working for someone else whilst on sick leave

What should an employer do where a member of their work force is signed off as unfit to work but is found to be working for someone else?

This will very much depend on the facts. Whilst in many instances this may warrant disciplinary action, potentially even dismissal, this is not necessarily so in every case.

In Perry v Imperial College Healthcare NHS Trust [2011], Ms Perry worked part-time as a midwife for Imperial College Healthcare NHS Trust (Imperial College). Her role involved cycling to patients' home to carry out visits which required her to access different types of accommodation including high-rise buildings. She also worked part-time for another NHS Trust in a desk-based job during different hours and close to home. Over time Ms Perry developed a chronic knee condition which left her unable to carry out her midwifery duties, and she was subsequently signed off sick from this role. Her condition did not prevent her from carrying out her desk-based job which she continued to do. When Imperial College discovered she was continuing to work for the other NHS Trust whilst on sick leave they dismissed her for gross misconduct. They reasoned that she had deceived them by being on sick leave and accepting sick pay from them, whilst continuing to work for the other NHS Trust. There was also a provision in the employment contract requiring her to seek permission from Imperial College before carrying out work for someone else whilst on sick leave, permission Ms Perry did not seek.

Ultimately Ms Perry was found not to have acted dishonestly in failing to ask for permission to continue with her second NHS role whilst off sick. Ms Perry mistakenly but genuinely believed the provision in her employment contract did not apply to other work she was already carrying out with Imperial College's knowledge before being signed off sick. The Employment Appeal Tribunal also did not view summary dismissal as a reasonable sanction for Ms Perry's actions based on the specific facts of her case, in particular the fact the two roles were for mutually exclusive hours, entailing different duties and with Ms Perry remaining fit to carry out desk duties close to home. It was therefore held that Ms Perry had been unfairly dismissed, although there was a 30% reduction in the compensation awarded.

Of course, the outcome would have been very different had Ms Perry being working for the other NHS Trust during her contracted hours to Imperial College, especially when also in receipt of sick pay.

This case nonetheless serves as a warning for employers not to rush and automatically dismiss an employee for gross misconduct. A proper investigation process should always be conducted first to consider the factors in play and any mitigating circumstances before any disciplinary decisions are taken.

Working for a competitor outside normal working hours

What about where an employee takes on a second job outside their normal working hours with you, but with a potential competitor?

Implied into every employment contract is the duty of fidelity (loyal service), so a duty not to disclose/mis-use confidential information, not to compete with the employer or entice away clients/customers, suppliers or staff. A breach of this duty will generally constitute what we call a "repudiatory breach" of the employment relationship leading to dismissal. Whilst the implied duty not to compete extends to an employee's free time it should be noted that there is a reluctance on the courts to apply this too strictly and not all work for a competitor will therefore entitle you, as an employer, to dismiss.

In the case of Nova Plastics v Froggatt [1982], as an example, an odd-job man working for Nova Plastics also started working for a competing company in his spare time. As Mr Froggatt's work with the competitor did not seriously contribute to any competition between his two employers, and it was unlikely either employer would suffer any harm by him continuing to work for both Mr Froggatt was not in breach of his duty of loyal service to Nova Plastics.

Of course, the more senior the role and the more sensitive the information they are privy to the greater the risk of harm and the more likely the implied term of fidelity will be broken.

Advice for employers

As a business it will always be important to consider whether you are content for your workforce to have a second job in their spare time and, if so, if you wish to place any restrictions over and above the implied duty of fidelity set out above. These restrictions will likely vary between junior and more senior roles and will need to be clearly set out in your employment contract. They could even extend to restrictions on second employment whilst on sick leave especially if you offer enhanced sick pay.

When allowing members of your workforce to have a second job you should also be mindful of the Working Time Regulations 1998 (WTR 1998). An employee's average working time per week should not exceed 48 hours, although employees can opt-out of this limit. Government guidance confirms all hours worked in all jobs factor into these calculations, so you will need sufficient detail regarding the second job and ensure you obtain a written opt-out agreement if required.

Where you discover a member of your work force has a second job, even if this would appear to be in breach of their employment contract or whilst they are on sick leave, do not rush to dismiss them without carrying out a fair process, including an appropriate investigation, first. Taking early legal advice in this respect will be key to protect your business from potential claims.

HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter so please do get in touch with us if that's the case (contact details below):

- We can help introduce and/or update any internal policies and practices to ensure you are ready for the legal changes coming in 2024 as well as provide staff training where needed;
- We can review and update your employment contracts to both ensure they are up to date with the legal changes previously introduced in April 2020 as well as ensuring they meet your needs when it comes to your workforce have secondary employment; and
- If you find a member of your workforce is working for a competitor in their spare time, or for someone else whilst on sick leave we can provide any necessary guidance and support to ensure the right decisions are taken, limiting the risk of claims.

You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

Contact Us

Louise Nunn
Partner/ Head of Employment Law
01844 268 316
lnunn@lightfoots.co.uk

Charlotte Coles
Solicitor
01844 268 341
ccoles@lightfoots.co.uk