Employment law updates: important changes for Employers

Below are the latest changes in Employment Law which you need to know, and which are becoming law this year regardless of Brexit.

This article only covers new employment laws which are definitely changing or coming in 2019.

Before we dive in, first a word about workers' rights and employers' duties in the context of Brexit. From what we can tell, with the exception of business immigration, the indications are that workers' rights and employers duties in the UK are likely to remain similar (aligned) to the EU principles and directives that the UK helped to develop during its membership. We will keep you posted on any definitive change to workers rights or employers duties as a result of Brexit negotiations.

To keep up to date with the new employment laws and what they mean for your business, check back here regularly or subscribe to our updates using the sign up button at the side of and below this article.

Employment Law Updates

There are important changes to the taxation of termination payments coming in from 6th April 2019.

The yearly increases to the National Minimum Wage and to statutory maternity, paternity adoption and shared parental pay come into force from 7th April, and changes to statutory redundancy pay from 1st April.

Holiday pay: new reference period for calculating holiday pay, inclusion of bonus, regular overtime and commission payments.

Towards the end of last year the government published its "Good Work Plan" following the four consultations it announced in the Good Work Report, which was in response to the Taylor Review recommendations. The plan outlines an intention to legislate to improve working conditions for agency workers, zero hours workers, and those on atypical contracts.

The government has already drafted legislation in relation to some of its proposals in the Good Work Plan, to allow these to become law in April 2019; these are noted below. Others will become law in April 2020. For others still, the government wants more time, so the timetable is less clear on these. We finish this update with a summary of the key points of The Good Work Plan, and some figures on numbers working in the gig economy and on zero hours contracts.

New Employment Laws for 2019
Time Line

from 1st April 2019

National Living Wage Rise

From 1st April 2019 new hourly rates of pay apply:

Workers aged 25 yrs and over – £8.21 an hour (National Living Wage)

Workers aged 21-24 – £7.70 an hour
Workers aged 18-20 – £6.15 an hour
Workers aged 16-17 – £4.35 an hour
Apprentice rate (workers under 19 or in first year of apprenticeship) – £3.90 per hour

More detail is available on the gov.uk website.

Next Steps

Ensure all staff salaries are reviewed to comply with the new hourly rates.

The Low Pay Commission has begun to consult on the National Minimum Wage rates for 2020. Understand the difference between National Living Wage, National Minimum Wage and The Living wage in this article.

from 4th April 2019

Gender Pay Gap Reporting

Private and charity organisations with more than 250 staff publish their gender pay gap information for 2019, by the deadline 5th April 2019. (Public sector organisations reporting deadline was 31st March 2019).

The information is made public on a government database and 2019 reports are published on this..

Use the Government calculator to calculate your organisation's gender pay gap.

The gender pay gap is the difference between the average hourly earnings and bonus payments of men and women. It is worked out using most common hourly earnings figures. See a worked example below.

Companies are also asked to report the difference in median hourly earnings and bonus payments of men and women. This is a typically more accurate figure, as the mean (a simple average) can be skewed by a handful of highly paid employees.

Despite being under pressure to show a year on year reduction, unsurprisingly, most organisations are finding it tough to shift the needle on their gender pay gaps. Amongst the headlines too, there has been some criticism of gender pay gap reporting, that it fails to give any real insight into fair pay for men and women, as calculations don't distinguish between full-time and part-time workers, nor does the current reporting system take into account any like-for-like comparisons such as type of job or age, background, experience.

Next steps

Whatever the size of your organisation, consider taking action to identify and tackle any gap and be prepared to answer questions from the workforce and from candidates at interviews.

Here are some useful articles and resources to address gender pay gap:

What is the Gender Pay Gap

Calculate your Gender Pay Gap using the Government's calculator.

Acas has some helpful tools including a template letter for reporting to employees, search "gender pay gap reporting guidance" on the Acas website.

The Government Equalities Office has published some effective actions as part of its toolkit to reduce the pay gap and improve the recruitment and progression of women, that have been shown to work.

from 6th April 2019

Statutory Sick Pay (SSP) rise

The rate of Statutory Sick Pay increases to £94.25 per week.

Qualifying employees who have been absent from work for 4 or more consecutive days receive this minimum weekly payment.

Employees are entitled to up to 28 weeks' SSP in any period of incapacity for work.

To qualify for SSP, an employee's average weekly earnings must be at or more than the lower earnings limit, which is £118 a week for the 2019-20 tax year.

Next steps

Ensure relevant employees know these rates and receive the correct payments for SSP.

Calculate your employee's Statutory sick pay

Workers entitled to itemised pay slips

All workers, including casual and zero hours workers, now have the right to an itemised payslip and to enforce that right in an employment tribunal. Where a worker is paid on an hourly rate basis, the payslip must also itemise the number of hours worked.

This new law is introduced as part of the Government's Good Work Plan that was published in December 2018.

Ensure all payroll processes are updated for end of April 2019 pay statements onwards.

Maximum ET compensatory award limit rises

The maximum compensatory award for unfair dismissal increases in line with inflation to £86,444 (from £83,682)

where the effective date of termination is on or after 6th April 2019.

Rise in a week's pay to calculate awards

The maximum amount for a week's gross pay (used to calculate statutory redundancy payments and various awards for unfair dismissal (basic and additional awards) increases from £508 to £525 per week.

Be mindful of these increases if you are planning redundancies on or after 6th April 2019.

Use the weekly gross pay figure of £525 when calculating statutory redundancy payments and basic awards in unfair dismissal situations.

Increases to taxation of termination payments

From 6th April 2019 all termination payments above £30,000 will be subject to deductions for employer's national insurance contributions (NICs) as well as income tax. (Between 6th April 2018 and 2019, termination payments above £30,000 were subject to tax but not employers' NICs).
Note that Employee's NICs are not deducted from termination payments.

Please be aware of these increases when negotiating settlement agreements and termination payments with employees, as they could potentially increase costs of the settlement package and impact your settlement negotiations.

HMRC has published answers to some of the more common questions about the tax treatment of termination payments and benefits. It is not comprehensive, and if you are unsure, please call us.

Increased financial penalties for employers in "aggravated" breaches

The penalty that ETs can impose on employers for "aggravated" damages for breaching a workers' employment rights quadrupled from £5000 to £20000 from 6th April 2019. "Aggravated damages" includes the duration or repetition of a breach, which means that tribunals must consider stronger fines for employers that ignore previous tribunal judgments against them, or who "behave badly".

This new legislation, alongside the introduction of a "naming and shaming" scheme for employers that fail to pay tribunal awards, is also part of the Government's Good Work plan that was published in December 2018.

Increase in Vento Bands: levels of compensation for

injury to feelings in awards

In successful discrimination claims, ETs can award claimants an “injury to feelings” award, in addition to financial compensation. These awards can be significant.

Back in 2003, a decision by the Court of Appeal (in Vento v Chief Constable of West York’s Police) set out 3 levels for potential injury to feelings awards, called the Vento Bands.

On 6th April 2019 the Vento bands increased to:

Lower band: £900 – £8,800

appropriate for less serious cases, eg where the act of discrimination is an isolated, one-off ocurrence

Middle band: £8,00 – £26,300

relates to “serious cases, which do not merit an award in the highest band”

Upper band: £26,000-£44,000relates to “most serious cases, eg where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race”.
Only “in the most exception case should an award for injury to feelings exceed this top band”.

Employers need to consider these potentially significant injury to feelings awards when dealing with complaints and grievances as well as litigation that are related to discrimination.

Next Steps

It’s wise to educate line managers about the liabilities than can arise from unlawful discrimination, as well as ensuring your whole workforce is trained and fully up to speed on what constitutes sexual harassment and discrimination. Employers can be vicariously liable for acts of sexual harassment or discrimination by an employee.

Ongoing Throughout 2019

Employment Status of workers

As part of its Good Work Plan, the Government has begun legislating to improve working conditions for agency workers, zero hours workers and other a-typical workers including those in the gig economy.

But case law has for some time now been marching ahead of legislation. The Courts’ decisions in a series of recent cases relating to the employment status of workers, mostly within the gig economy, have been shaping and driving the changes in this complex area.
Let’s take a look at where we are now and why employment status matters.

why employment status matters

Employment status determines rights and protections in the UK workforce.

Currently “employees” have the broadest rights, including protection from unfair dismissal, whereas “workers” have more limited protections (such as working time rights), although workers are entitled to protection from discrimination in the same way as employees.

Also similar to employees, workers have entitlements to holiday pay, sick pay, rights to be paid the minimum-wage, to itemised pay slips (from April 2019) and to receive a written Statement Of Particulars, containing the main terms and conditions of an employment (from April 2020 onwards); this will become right from day one in the role.

Genuinely self-employed individuals however have none of these rights.
A summary of the main rights and protections available to employees, workers and the self-employed can be seen below.

Business models have changed in the last few years. Large companies in the emerging gig economy operate through platforms or apps and rely on a freelance, on-demand workforce, who are currently treated as self employed contractors.

From an individual’s perspective, things have also changed – whereas in the past the classic self-employed person ran his or her own business, now it is much more common for an individual to provide services as part of a business run by someone else; and in this scenario they are much more likely to be a worker.

This change in the way people are employed makes understanding the distinction between the three categories, and particularly between workers and the self-employed even more challenging. Yet whether or not someone is an employee, a worker or a self employed contractor can still only be established by an Employment Tribunal decision.

Businesses need to know when they take on staff whether they are employees, workers or self-employed contractors.

A major concern for employers is that, if someone who they thought was an independent contractor successfully establishes worker status, other claims may follow – for unpaid holiday for example, potentially stretching back over the entire working relationship.

In King V Sash Window Workshop 2017, the European Court found that where an employer had misclassified a worker as self-employed, with the result that the worker was denied paid annual leave, he could claim holiday pay stretching back over the entire working relationship.

Where are we now?

The recent case law, culminating in the Court of Appeal’s decision in Uber V Aslam in December 2018, shows (with the exception of the decision in the Deliveroo case) a clear trend of finding for worker status when large-scale gig economy businesses are challenged.

So, for any employer considering engaging independent contractors across its workforce, what are the key points to keep in mind?

How much control does the employer have?

The more control the business exerts over an individual, including the work they do, when they do it, the quality

of the service and the branding at point of delivery, the more likely that individual will be a worker; the harder it will be for the business to defend the individual's status as a self employed, independent contractor.

Arrangements for performance management and disciplinary procedures can be powerful indicators of worker status. Uber's stringent performance management system for its drivers was a contributing factor in the decision to find them workers, not self employed.

As further indicators of the extensive control Uber exerted over its workforce, Uber drivers had limited rights to reject fares, and were subject to restrictive covenants. Restrictive covenants should be viewed as a particular "red flag" in contractor agreements.

Is personal performance a dominant feature?

If the individuals working in a business have the freedom to substitute someone else to do the work in their place rather than performing the work personally, this is an important indicator of their self-employed, independent status.

In the Deliveroo case in December 2018, the High Court ruled that riders were self employed contractors and not workers in large part because they had the freedom to substitute another to do their work (and could do so without penalty).

This "right to substitute" is traditionally a key element. If it is limited in any way (for example if a contractor is allowed to replace themselves only with another individual working in the same business or "approved" by the employer), or if it rarely happens in practice, then this can tip the balance towards the contractor having, at least, worker status.

Looking at the reality of the situation

It's not just about what the contracts say. Courts and tribunals will look behind the contractual formalities to identify the genuine relationship, the day to day arrangements between an individual and the business. The 'high degree of fiction' in the contracts was an important contributory factor to the Court of Appeal's decision in Uber.

Is there Mutuality of Obligation?

Hugely significant for companies operating in the gig economy is the ruling in Addison Lee V Gascoigne in May 2018. This confirmed the likelihood that when an individual is logged onto or working via an app, this provides enough "mutuality of obligation" to establish the individual as a worker.

(The courier who had worked for Addison Lee for 9 years, had stopped working because of back problems and brought a claim for holiday pay in 2017, arguing that he was a "worker" as defined under "Limb B of the Working Time Regulations 1998").

The EAT found that once the courier was logged onto the Addison Lee app, there was sufficient mutuality of obligation, that is both sides expected that he was available for work, would be provided with it and would carry it out as directed by the AL controller, to establish his status as a worker.

Even though the courier had variable work patterns, and there was no requirement for him to log onto the AL app, from the moment he did log onto the app, there was sufficient mutuality of obligation to establish him as a worker.

Are the individuals integrated into the organisation?

How do individuals working within an organisation appear to the outside world? Uber's public statements played a part in reinforcing the claim that its drivers were workers.

Status can evolve over time, so that even if self-employment was the correct classification at the start, the position may change over the duration of the work relationship.

What happens next?

It's recognised that existing employment legislation is not sufficiently clear when it comes to the different categories of employment status.

The Taylor review recommended clarification and the Government decided to consult on a number of areas before taking action. The Government published the results of its consultations in The Good Work Plan issued in 2018, confirming that it will legislate to improve the clarity of the employment status tests and tackle misclassification but that, before doing so, it will commission further research on those with uncertain employment status.

We have summarised the main 12 points of the Government's Good Work Plan below. For a more detailed explanation these plans, see our article on Government's Good Work Plan: Key Points for Employers. (link)

Next Steps

In the meantime, be mindful that this area is at the moment complex and changing. Regularly review your terms of engagement with any contractors (and other non-employees and non-workers). If you are in any doubt about the employment status of the people in your business, and need help or advice, please get in touch. We can help assess your exposure and de risk your business from the challenge of the type faced by gig economy businesses in recent years.

The Good Work Plan

The Good Work Plan was published on 17th December 2018, setting out what the Government describes as "the biggest package of workplace reforms for over 20 years".

It builds on the response given by the Government in February 2018 to the Taylor Review, and reports on the progress of the issues raised in the consultations

The Government's strategy is broken down into three main themes.

Fair and Decent Work

Clarity for Employers and Workers; and

Fairer enforcement

These key points below summarise the proposals (a combination of new laws, further research and campaigns) set out in the Government's Good Work Plan to achieve their stated aims.

1. New Law from April 2020: Workers have a right to request a more stable and predictable contract.

   In order to address what Matthew Taylor called the problem of "one sided flexibility", with workers remaining on insecure, atypical contracts for long periods of time, the Government will introduce a right for all workers to request a more predictable and stable contract after 26 weeks service.

   Employers will have to deal with these requests in a similar way to a flexible working requests, and respond within 3 months.

2. Further Consultation: Should workers have 1) reasonable notice of work schedule and 2) compensation for shift cancellation.

3. New Law from April 2020: Workers will only lose continuity of employment rights after 4 weeks not 1 week.

   Casual employees sometimes find it difficult to accrue certain employment rights such as unfair dismissal, flexible working or shared parental leave because a gap of one whole week in employment can break continuity.

   The Government will legislate to extend this to four weeks, allowing more employees to gain access to employment rights with a minimum service requirement.

4. New Law from April 2020: Agency workers will have pay parity with direct employees in client businesses after 12 weeks.

   The "Swedish Derogation" will be abolished. This currently allows employment businesses (who hire individuals and supply them on to end clients) to avoid giving agency workers pay parity with comparable direct recruits, if the agency workers have an employment contract which gives them a right to pay between assignments.

   The Government therefore intends to repeal the Swedish Derogation, so that all agency workers will have a right to pay parity after 12 weeks.

5. New Law date TBC: Ban on deductions from staff tips.

6. New Law from April 2020: Employees to have rights to information and consultation arrangements with Employer.

   e.g more knowledge and access to business information if 2% (down from 10%) of employees want this.

7. Further research: to refine and clarify Employment status tests – Employee or worker or self employed.

   As we have highlighted in this article, existing employment legislation is not sufficiently clear when it comes to the different categories of employment status; self-employed, worker and employee.

   The Government states that it has "commissioned independent research to find out more about those with uncertain employment status, which will help us to understand how best to support them when bringing forward legislation". In other words, it still does not have a proposed solution to the employment status conundrum.

8. New Laws from April 2020: Improved written statement of terms for all workers, from day 1 in role + New 'Key Facts" statement for agency workers.

   The Government will legislate to give all workers the right to a written statement of terms (a right which is currently only available to employees) and to provide the statement must be given on or before the first day of employment, rather than within two months of commencement of role.

   It will also add to the information that must be given in the written statement, to include: length of time a job is expected to last, the notice period, eligibility for sick leave and pay, other rights to leave, and probationary period, all pay and benefits and specific days and times of work.

   It will be important to review Contracts of Employment in the run up to April 2020, for any required changes as well.

   All employment businesses will be required to provide agency workers with a "Key Facts " statement to include information on the type of contract, their rate of pay, who is responsible for paying them and any deductions or fees that will be taken.

9. New Law date TBC: Enforcement of "vulnerable" workers' rights to holiday pay, sick pay and the NMW and wider review of statutory sick pay.

   The Government considers that investigation and enforcement by a state body (HMRC) is proving a useful strategy for enforcing the National Minimum Wage. The Taylor Review recommended that the state should take responsibility for enforcing holiday pay.

The Government intends to extend state enforcement, but only to “vulnerable workers’ holiday pay rights”. It does not say what is meant by “vulnerable”, and has yet to identify which body will be responsible for enforcement.

10. New Law from April 2020: Reference period for holiday pay to be 52 weeks rather than 12 weeks.

    The Government will also launch a holiday pay awareness campaign.

In addition, it appears that the re-introduction of tribunal fees looks increasingly likely given that the Good Work Plan statement to Parliament indicated this was “under consideration” by the Government.

The changing nature of how we work: in figures

Self – Employment

Although it is generally understood that there has been a rapid growth in self-employment in recent years, it seems it is not easy to estimate accurately the numbers of people in self employment, due in part to how this data is collected.

According to the Office of National Statistics, The number of self-employed increased from 3.3 million people (12% of the labour force) in 2001, to 4.8 million (15% of the labour force) in 2017.

The numbers on Zero Hours Contracts

It’s difficult to calculate with any certainty the numbers of people on zero hours contracts (ZHCs). Figures gathered by The Labour Force Survey (LFS) and the Business Survey (BS) figures vary showing between just over 900,000 and 1.8 million people respectively on Zero Hours Contracts.

The The Taylor report in 2017 concurs, noting that just under a million people, 2.8% of those in employment, are reported to be on a zero hours contract. 18% of those on Zero Hours Contracts are in full time education, suggesting the flexibility of such contracts is a benefit to students.

The size and nature of the gig economy

Not as large as you might think, predominantly London based, mostly made up of 18-34 yr olds, used to “top-up income” and, despite all the recent employment status claims indicating the contrary, gig economy workers are reasonably satisfied. That is according to the findings of a survey commissioned by department for Business, Energy & Industrial strategy (BEIS) in 2017 and published in February 2018

A NatCen survey commissioned by BEIS into the size and characteristics of the gig economy, found that in a survey of of 2,184 individuals,
4.4% of the entire British population, roughly 2.8 million people, had worked in the gig economy in the last 12 months.

Comparing this with CIPD research in the same year, CIPD estimated that there were 1.3 million people, 4% of working adults, working in the “gig” economy.

CIPD's UK working lives survey of 6000 individuals across a number of sectors, would seem to bear out CIPD's figure.

According to a larger survey also carried out by NatCen in 2017, in which 11,825 people were surveyed and of which 343 were deemed as being part of the gig economy, (that's just 2.9%) , providing courier services was the most common type of gig economy activity.

And approximately two-thirds (65%) of survey respondents earned less than 5% of their total income in the gig economy.

Most commonly, survey respondents saw the income from the gig economy as an "extra source of income on top of their regular income (32%). Fewer than 1 in 10 respondents (8%) saw the money earned in the gig economy as their main source of income".

Those to whom the gig work was their main source of income, and those who treated their work in the gig economy as a source of income while they focus on something else were particularly satisfied overall with their experience; 90% of those to whom the gig work was their main source of income and 71 % of those to whom the work provided a source of income while they focus on something else, said they were "fairly" or "very" satisfied with their experience of working in the gig economy.

Given these figures and findings, it's perhaps wise for the Government to focus its legislation on improving working conditions not so much or solely on the headline grabbing gig economy workers, but for those on zero hours contracts, agency workers, those who work non guaranteed hours and those whose income is insecure. The Government now needs to get on with it.

How to use Incoterms to de-risk your exports

International Commercial Terms (Incoterms) are internationally recognised standard trade terms used in export contracts or international sales contracts.

They are used to make sure the buyer and seller know:

- who is responsible for the cost of transporting the goods, including insurance, taxes and duties.
- where the goods should be picked up from and transported to.

who is responsible for the goods at each step during transportation

The current set of Incoterms is Incoterms 2010.

A copy of the full terms is available from the International Chamber of Commerce

What do the Incoterms mean?

Incoterms are used in contracts in a 3-letter format followed by the place specified in the contract (eg the port or where the goods are to be picked up).

The export contract or international sales agreement includes the 3 – letter format below usually in the delivery section of the contract.

There are different terms for sea and inland waterways (eg rivers and canals) compared to all other modes of transport.

The common terms cover any mode of transport (air, sea etc) and are explained below.

Each term has different implications for the UK exporter and the Asian importer for the cost of transport and risk if the goods get damaged and the need for insurance to cover these damages

In the examples below the UK exporter is the seller and the buyer is the Asian importer.

EXW ('Ex Works') eg EXW London

The seller makes the goods available to be collected at their premises and the buyer is responsible for all other risks, transportation costs, taxes and duties from that point onwards. This term is commonly used when quoting a price. This puts the most obligations on the buyer.

Example
Goods are being picked up by the buyer from the seller's warehouse in London. The term used in the contract is 'EXW London".

FCA ('Free Carrier')

The seller gives the goods, cleared for export, to the buyer's carrier at a specified place. The seller is responsible for getting them to the specified place of delivery. This term is commonly used for containers travelling by more than one mode of transport. E.g. the UK exporter delivers the container by road to the rail distribution centre at London Gateway and the Asian importer is responsible from that point to transport the container to Asia.

CPT ('Carriage Paid To')

The seller pays to transport the goods to the specified destination. Responsibility for the goods transfers to the buyer when the seller passes them to the first carrier. E.g. UK exporter ships the goods from London Gateway to Singapore. Asian importer connects goods from Singapore port and distributes them to the Kuala Lumpur distribution centre in Malaysia. Asian importer insures the goods during shipping.

CIP ('Carriage and Insurance Paid')

The seller pays for insurance as well as transport to the specified destination. Responsibility for the goods transfers to the buyer when the seller passes them to the first carrier.

CIP ('Carriage and Insurance Paid') is commonly used for goods being transported by container by more than one mode of transport. If transporting only by sea, CIF is often used (see below).

DAT ('Delivered at Terminal')

The seller pays for transport to a specified terminal at the agreed destination. The buyer is responsible for the cost of importing the goods. The buyer takes responsibility until the goods are unloaded at the terminal.

DAP ('Delivered at Place')

The seller pays for transport to the specified destination, but the buyer pays the cost of importing the goods. The seller takes responsibility for the goods until they are ready to be unloaded by the buyer.

DDP ('Delivered Duty Paid')

The seller is responsible for delivering the goods to the named destination in the buyer's country, including all costs involved.

This is the most onerous requirement for the UK exporter and the UK exporter will need to know all costs when it quotes to the Asian importer on the DDP basis.

If the UK exporter is uncertain which of the Incoterms to choose or if any of the relevant Incoterms does not correctly describe what has been agreed with the Asian importer, then the detail for delivery including who pays for transport, insurance and any export and/or import licences should be written into the export contract.

For more information please contact Richard Mullett on 0208 334 8049.

For more information about exporting, check The UK Government's Department for International Trade resources for exporters, Exporting is Great, E-Exporting Programme and Open to Export.

The Legal Partners are a Member of the Trade Advisory Network

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Handling an employee grievance, 5 key actions

This is a 5 step guide to handling an employee grievance effectively and efficiently in order to save management time, preserve employee relations and keep the business out of Employment Tribunals. It includes 2 Golden Rules of handling an employee grievance.

Grievances are concerns, problems or complaints raised by an employee about workplace issues such as their work, workload, where they work or who they work with. These grievances are best dealt with at an early stage informally, but employers must be prepared to handle employee grievances that cannot be resolved informally using a formal employee grievance procedure

It's important for every business, whatever its size, to have a formal grievance procedure in place, which takes into account the ACAS Code of Practice. Include your formal grievance procedure in the staff handbook, and, importantly ensure your staff are aware of it. Employers have a duty to provide staff with details of any workplace disciplinary and grievance procedures.

Discipline and Grievance – Acas Code of Practice.

The procedure should require the employee to set out in writing the nature of their grievance and for employers to deal with the grievance fairly and consistently. Do not ignore any concern or complaint raised by an employee, however casual the manner in which it was raised.
These are the 5 steps:

1. INFORMAL ACTION– Initially and as soon as they can the line manager should have a quiet word with the employee making the complaint. Problems can often be settled quickly and informally in the course of everyday work. However, if the grievance is not settled at this stage or circumstances make this route inappropriate then, if they have not already done so, the employee should be requested to submit a formal Grievance letter.

2. INVITE EMPLOYEE TO A FORMAL MEETING – This should be held in a private and confidential room between the Manager designated to hear the Grievance and the employee who may be accompanied by a work colleague or Trade Union official. This is the opportunity for the grievance to be thoroughly discussed and any witnesses called.

3. INVESTIGATION – Depending on the complexity of the grievance it may be necessary to adjourn the meeting so that further investigation may take place before any decision is taken.

4. COMMUNICATE DECISION & KEEP RECORDS – After the grievance meeting and any investigations have taken place, the employer needs to decide whether to uphold or dismiss the grievance and communicate this decision to the employee in writing without unreasonable delay, usually within 10 working days. The HR Director or Manager handling the employee grievance must ensure that the minutes of all formal grievance meetings are taken and copies given to the employee for information. The minute taker should not be part of the discussions about the outcome of the grievance or appeal other than to record the key points of the

discussion.

5. APPEAL – if the Grievance is rejected or partially rejected then the employee has the right to appeal against that decision. The appeal should be heard promptly and wherever possible by a Manager not previously involved in the case. The employee may be accompanied as before and notified in writing of the decision, again within 10 working days is standard practice.

THE 2 GOLDEN RULES OF HANDLING EMPLOYEE GRIEVANCES

1. A very helpful question to ask an employee raising a grievance is "what outcome do you want from this grievance?" This tends to focus the employee's mind on the solution he or she is looking for rather than just the problem.

2. BE PREPARED FOR A GRIEVANCE. Check that there is an up to date procedure in place, published in the handbook, that supports the resolution of grievance issues in your workplace.

> Please also note an employee can raise a grievance during a disciplinary process. The disciplinary process may be temporarily suspended or if the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently. The size of the business may require an expert outside advisor e.g experienced HR professional to hear the Grievance, the Appeal or even the Disciplinary.

Bear in mind also that where the Grievance Procedure itself is not appropriate then with the employee's consent an external Mediator might be more suitable.
Click here or view our presentations opposite for the slide share on this topic.

Handling an employee grievance – 5 key steps for HR Directors and employers from legalpartners

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Key Employment Law changes for employers 2018

Below are listed all the changes in Employment Law for 2018, and those on the horizon coming in 2019.
Larger employers were kept very busy preparing to publish their Gender Pay Gaps by the April 2018 deadline. Companies are supposed to detail plans for how they will tackle any gap. Given the sizeable gaps revealed across the board, and the media spotlight on the issue, the pressure on individual employers to show reduced gaps by next April 2019 will be very high; an ongoing priority for HRs and boards.

There are important changes to the taxation of termination payments, as well as increases to the National Minimum Wage rate in April 2018 (and coming in April 2019). 2018 sees increases also to statutory payments e.g SSP and redundancy pay.
Throughout the year, the courts have been busy deciding on the employment status of workers in the gig

economy. We explain the likely effect of the rulings, as they come in, on business practice.

Following the abolition of ET fees last July, the number of people lodging claims at Employment Tribunals has been rising fast, to a remarkable 90% increase between October to December 2017 compared to the same period in 2016, according to the Ministry of Justice figures published in March. (It's worth noting that this 90% rise is from a very small base, as the numbers of employees bringing ET cases plumetted after fees were introduced in 2013). Nonetheless, now would a good time to review our advice for best practice and rules for de-risking your business against workplace claims.

And then there is GDPR compliance from 25th May and beyond. We have listed the 10 things Employers and HRs must do. The key with GDPR compliance is to start, and then to keep going, reviewing it regularly.

Click on the headings in the table for more details. The "Next Steps" column highlights initial actions to take.

To keep up to date with the new employment laws and what they mean for your business, subscribe to our updates by clicking the sign up now button in the column to the right of this article.

Key Employment Law changes for employers 2018

Date	Key Employment Laws Spring 2018 – 2019	Next Steps
1st April 2018	**National Living Wage rise** From 1st April 2018 New hourly rates of pay apply: 25 yrs+ £7.83 (NLW) 21-24 £7.38 18-20 £5.90 under 18 £4.20 Apprentice £3.70 The Low Pay Commission has begun to consult on the national minimum wage rates for 2019. We explain the difference between National Living Wage, National Minimum Wage and the Living Wage here.	Ensure all staff salaries are reviewed to comply with the new hourly rates.
1st April 2018	Statutory Payments: SMP, SPP, ShPP, SAP From 1st April 2018, the rates of Statutory Maternity, Paternity, Shared Parental and Adoption Pay rise to £145.18 per week (or 90% of the employees average weekly earnings if this figure is less than the statutory rate). From 1st April 2018, employees qualifying for SMP, SAP are still paid enhanced pay of 90% of their average weekly earnings for the first 6 weeks, but the remainder (33 weeks for SMP, for SAP the remainder of the adoption period) is paid at this new rate £145.18. Maternity Allowance also rises to £145.18 per week from 9th April 2018.	SMP,SPP,ShPP, SAP rate rises from£140.90 per week to £145.18 per week. Calculate SMP, SPP, ShPL, SAP
6th April 2018	SSP, Statutory Sick Pay The rate of Statutory Sick Pay increases to £92.05 per week. The same qualification criteria apply to receive these statutory payments. To be entitled, the employee's average earnings must be equal to or more than the lower earnings limit.The lower earnings limit increases to £116 in April 2018.	SPP rises from £89.35 to £92.05 per week. Calculate SSP

6th April 2018

Changes to taxation of termination payments

Ensure you deduct tax and N
I from all payments in lieu of notice.

From 6th April 2018, all payments in lieu of notice are subject to tax and NI, regardless of whether they are contractual or not.
In the past, whether or not a payment in lieu of notice (PILON) was subject to tax depended on the terms of the employee's contract and what was the custom and practice of the employer when making previous PILONs.
If the contract had an express clause allowing payment in lieu of notice, or if the employer's practice was to pay in lieu, the payment was considered as wages, and subject to tax and NI.
If there was no express clause, no custom and practice and no possibility of it being implied in the contract, the payment was considered as compensation for breach of contract, and the first £30,000 was tax free.
HMRC has tightened up the rules so that in almost all cases the employer will deduct tax and NI from the leaving employee for any payment which covers the notice period which the employee would usually have worked but the employer has decided instead to pay as a PILON.
The employer will need to show to HMRC a calculation of this Post-Employment Notice Pay.
Take note, the Treasury now has power to change the £30,000 tax free termination payment level. An additional tax free or ex-gratia compensation payment is sometimes agreed in a settlement negotiation. This payment does not have tax or NI deducted up to the £30,000 level because it is not a contractual payment under the employment contract eg. for salary and benefits, commissions, bonus etc. For any compensation payment above £30,000 the employer must deduct tax and from 6 April 2019 employer NICs (currently 13.8%) but not employee NICs (currently 2%).

Settlement negotiations are usually complex. We will help you make sure that the Post-Employment Notice Pay is correctly calculated so you are ready if HMRC investigate.
Employers will need to ensure they can clearly explain the taxation of the settlement payments so the employee knows they are being treated fairly and correctly.
Get in contact to plan these negotiations before you start them and to ensure that the settlement package complies with these tax law changes.

4th April 2018 deadline for publishing

Gender Pay Gap reporting for the private sector.

This is just the beginning of a longterm nationwide debate as UK organisations work to limit and remove the gap.

Over 10,000 private and charity organisations with more than 250 staff published their gender pay gap information by the 4th April deadline.
The information was made public on a government database, and the results caused a media storm. The data shows that 78% of employers pay men more than women. 8% reported no gap at all.
The Gender Pay Gap figures of large public sector employers, reporting by the end of March, revealed that men are paid, on average more than women in 90% of cases.
Women working in the public sector receive on average 19% less than men, with significant gaps reported in NHS, universities, central and local government.
The gender pay gap is the difference between the average hourly earnings and bonus payments of men and women. It is worked out using most common hourly earnings figures. See a worked example below.
Companies are also asked to report the difference in median hourly earnings and bonus payments of men and women. This is a typically more accurate figure, as the mean (a simple average) can be skewed by a handful of highly paid employees.

Whatever the size of your business, consider taking new or faster actions to identify, reduce or eliminate gender pay gaps within your organisation. Follow our worked example of a simple pay gap calculation below.
Use the Government calculator to calculate your organisation's gender pay gap, and be prepared to answer questions from your workforce.
ACAS reporting guidance also has some helpful tools for gender pay gap reporting including a template letter for reporting to employees.
Much has been written already in the media about the reasons for the sizeable gender pay gap in the UK that has been revealed by this reporting. The data suggests that the principal reason is under-representation of women in senior roles.
Removal of unconscious bias from organisations, a call to embed a culture of flexible working, and increased help with childcare costs are among many ideas that are being considered.
Solutions by sector, and on a company by company basis are likely to emerge as sectors and organisations take action to address their specific challenges, and effective best practice begins to appear, and be adopted.

25th May 2018

New Data Protection regime arrives GDPR

The EU General Data Protection Regulation (GDPR) harmonises data protection rules across the EU including the UK and will affect employers in 2018.The new Data Protection Act 2108 enshrines GDPR into UK law no matter what happens with the UK:EU relationship.

The overall premise of GDPR is that individuals should be in charge of their personal data. GDPR require companies (called “Data Controllers” because they determine “How” and “Why” personal data is collected and used) to analyse and make clear how they collect and process the data of an individual (called a “Data Subject”), why they are keeping it, for how long, and how they keep it secure.

The Information Commissioners Office (ICO) can levy fines on firms who break the rules. The fines can be up to 4% of turnover in serious situations.

Every employee will be a Data Subject and his/her HR data is covered by GDPR. His/her HR data is personal information from which the employee can be identified. e.g names, addresses, bank details, IP address, national insurance numbers, next of kin, sickness absence and health data.

The employer has to be particularly careful to ensure it clearly explains to employees why it may need to collect health data and certain other sensitive data eg ethnicity for equal opportunities monitoring at the recruitment stage.

The changes, put briefly, are as follows:

6 principles: these principles confirm that the employer can only collect data with basically employee consent or where there is a legitimate purpose which is clearly explained. The employer should only collect a reasonable and necessary amount of data, maintain its accuracy, keep it for only as long as is necessary and store it securely (whether onsite or via a third party (called a “Data Processor”) eg a payroll supplier using the cloud.

Accountability: this means that the employer must show it is complying with the GDPR principles. The way to show this is by following certain required processes (see next column) and having a documented ongoing compliance plan.

Personal data:

There are new rules which employers must follow so the employer has told the employee of the legitimate purpose it has for using the data eg holding bank account details to pay the employee to comply with the employment contract.

Right to be forgotten:

There is a new employee “right to be forgotten” which allows employees to request deletion of their data.

Data Subject’s Rights “Amend it, Delete it, Freeze it”:

The employee has the right to: access data, delete data, restrict the processing of data, ask for incorrect data to be rectified, transfer data, object to data collection, request human analysis where data is be automatically processed and profiled and the right to know that data is being collected. The Data Subject Access Request procedure has changed to make it fairer to employers but the timescales are shortened to 30 days. There will be an employee “right to rectification” allowing employees to insist in certain circumstances on making changes to their personal data held by the employer.

Transfer of Data outside the EU: GDPR stops data transfers outside the EU unless certain safeguards are in place and followed.

GDPR compliance is not just for 25th May. Ongoing compliance is equally important to show the Accountability obligation has been complied with. The infographic below explains the types of HR data that organisations collect, and how HR data is typically stored and where it is often outsourced for processing to Data Processors.

Once you have mapped the HR data flow in your organisation, you will be in a position to list your processing activiti
es and risk assess the important areas for your GDPR compliance plan: for example, you can plan the changes you will need to make so that employees receive an additional document called a Privacy Notice explaining how the employer will process their personal data. In effect you are conducting a Data Audit.

Once you have identified where employee HR data is outsourced to be processed (for example to your payroll, pension, healthcare scheme companies) you can plan the new contractual terms with those companies that GDPR requires for processing that data. These organisations may also be joint Data Controllers if they also determine “How” and “Why” personal data is being collected and used.

Employers need the following documents and work-streams as part of their ongoing compliance plan:

1. Complete the HR Data map
2. Record the Data Processing Activities eg what type of data is collected and for what purpose and what are the retention periods.
3. Undertake a Data Protection Impact Assessment where there is likely to be a high risk to employees – considering the likelihood of the risk and also the impact to the employee. For example theft of bank details would be a high risk. It has therefore become best practice process to undertake a DPIA.
4. Issue new HR Privacy Notices for staff showing what data is being collected, why and for how long, and also explaining if there are special arrangements for sensitive data and if data is being transferred outside the EU.
5. Conduct due-dilligence/audits on outsourced Data-Processors & negotiate changes to their contracts as necessary.
6. Ensure new data processing systems are designed to comply with GDPR “Privacy by Design” requirements as systems are upgraded so that data privacy is planned to be included as part of the upgrade.
7. New Privacy Standard (which updates the current Data Protection Policy) and will be the employers published standard to which, for example, customer and HR personal data is used in accordance with GDPR.
8. Train Staff on the new GDPR compliance standards.
9. Appoint a Data Protection Officer who is the guardian of privacy. A DPO is required for public sector authorities and private or public sector employers who are monitoring individuals or processing special categories of data or data relating to criminal convictions in each case on a large scale. Employers can still appoint a DPO even when not required under GDPR eg to show the compliance culture within an organisation and ensure an employee or outsourced supplier is separately looking at privacy and compliance with GDPR.
10. Pay the annual registration fee to the ICO of £40 (where employer turnover is less than £632,000 or there are no more than 10 staff) to £60 (turnover up to £36m and no more than 250 staff).

We have seen from advising our clients over the last 18 months on GDPR that each organisation has different GDPR compliance requirements and risk areas. Careful thought and analysis is required in steps 1 to 9 above to show that the Accountability obligation has been met.

This is therefore not a comprehensive GDPR compliance list but a very good starting point to speak with us. Get in touch if you need help becoming and staying GDPR compliant.

Ongoing

Employment Status of Workers

The Good Work plan: government proposals in response to The Taylor Review.

To Taylor's recommendations on employment status of workers, the Government offered no firm commitments, instead proposing a further consultation (one of 4) to explore the best ways to get better clarity for those on the boundary between employment and self-employment. The consultation also covers certain other Taylor Review recommendations that the Government has neither committed to nor rejected. It also covers issues concerning the definition of working time for the purposes of the national minimum wage (NMW). So it seems unlikely that there wil be any legislative change to employment status tests soon.

The Government did accept many of Taylor's recommendations in principal, and stated its commitment to:

1. pursing the quality of work as well as the number of jobs
2. embracing new ways of working
3. being amongst the first countries to develop employment rules to reflect the changing world of work
4. helping enforce workers rights to sick and holiday pay
5. ensuring all workers including zero hour and causal workers receive basic rights, payslips and terms of conditions of employment from day one, and have a new right to request "more stable employment contracts"
6. considering a higher rate of national minimum wage for zero hours workers
7. define "working time" for flexible workers who find work through apps and platforms, so they know the hours for which they are and should be being paid
8. boost awareness of the right to request flexible working and encourage take-up of shared parental leave
9. naming and shaming employers who fail to pay tribunal awards
10. quadrupling ET fines for employers who have shown malice, spite or gross oversight, to £20,000.

It rejected the Taylor Review's recommendation on the use of rolled-up holiday pay as unlawful under EU case law.

On a closely related issue, the government has said it will propose employee representation on company boards. As yet there are no real details and again we will report on this as they emerge.

There are similar reports from BEIS and DWP due in late 2018, Spring 2019.

May 2018

Employment Status of workers

Addison Lee v Gascoigne

In May 2018, Addison Lee (AL) lost its appeal to the Employment Appeal Tribunal which upheld an earlier Employment Tribunal (ET) decision that an Addison Lee cycle courier was a worker, not a self-employed contractor.

The EAT found that once the courier was logged onto the AL app, there was sufficient mutuality of obligation (both sides expected he was available for work, would be provided with it and would carry it out as directed by the AL controller) to establish his status as a worker.

The courier had brought a claim for holiday pay in 2017, arguing that he was a "worker" as defined under "Limb B of the Working Time Regulations 1998".

Update November 2018

A further EAT ruling against Addison Lee in this later Lang case, confirmed that Lang was a worker because he was continuously logged into the AL app and therefore under their control.

Pimlico Plumbers v Smith

June 2018

In June 2018 Pimlico Plumbers lost is appeal to the highest court in the land when The Supreme Court upheld an earlier Court of Appeal ruling that Mr Smith, a plumber with Pimlico Plumbers was a worker, not a self-employed contractor, and as such entitled to paid holiday and other worker benefits.

Now established as a worker within the meaning of The Employment Rights Act 1996. Mr Smith may now bring a case for unfair dismissal.

Oct 2018 Uber to appeal to CA the Landmark ET ruling *..awaiting decision.*

Uber V Aslam

Uber launches an appeal to the Court of Appeal challenging the landmark ET ruling (in 2016) that the company's drivers were workers. Both the plumbers and the Uber drivers were found to be workers, rather than self-employed.

This trend of the courts finding for worker status when business are challenged looks set to continue. But each case will depend on the specific facts and the terms made between the individual and the company they work for, (this is important, read the next steps column).

Companies in the "gig" economy, operating through platforms or apps, and those relying on a freelance on-demand workforce, would be wise to plan for these people being workers, with rights to NMW and paid holiday etc.

There will be more cases, brought from the tax and the employment perspective. For example, delivery company Hermes has for many months been under investigation by HMRC for wrongly classifying its couriers as self-employed and not paying NI, PAYE and the NMW.

This is particularly important when companies wish to have control over the branding and quality of the service delivered.

For employers, the key take away from all this is a caution to consider carefully whether the freelancers or contractors in the business are genuinely self employed, or are they, in fact, workers.

The issue of control, critical in the Uber and the Pimlico Plumbers cases is likely to become even more important in determining worker status.

The more control the business exerts over an individual, including over the quality of service they give and the branding at point of delivery, the more likely that person will be a worker.

In the arrangement between the business and the freelancers, contractors

if the business decides:

- What they do
- when they work
- whether they must accept or can reject work offered

then these are strong indicators that the freelancer, contractor is in fact a worker.

If on the other hand, freelancers and contractors have the freedom to choose when they work, whether to take on work or not, and can substitute someone else to do the work in their place, (substitution) these are important indicators of self-employment.

From Pimlico Plumbers V Smith employers should be aware that if a "contractor" is allowed to replace themselves *only* with another "approved" individual working in the same business, then the "contractor" is likely to be considered a worker.

The ruling in Addison Lee V Gascoigne confirmed the likelihood that when an individual is logged onto / working via an app, this provides enough mutuality of obligation to establish them as a worker.

But, don't assume that individuals can no longer be self employed, including in the "gig" economy. (In the Deliveroo case late last year, riders were ruled to be self employed contractors and not workers, in large part because they had the freedom to substitute another to do their work.)

These cases turn on the facts.

Employers need to look at the actual on-the-ground, day to day, arrangement between the individual and the company, rather than relying on what is written in the contract.

Once you know what you have, make time to check and where necessary tighten contractual documents.

With case law marching ahead of the Government's activity, this area can be a minefield.

If you are in any doubt about the employment status of your people in the business and need help or advice please get in touch.

6th April 2018

Tribunal Compensation Limits

From 6th April 2018 the maximum compensatory award for unfair dismissal rises from £80,541 to £83,682 .

The maximum amount of a week's pay, used to calculate statutory redundancy payments, and various awards for basic and additional awards for unfair dismissal also rises from £489 to £508.

You will need to use the updated £508 per week gross salary for calculating eg statutory redundancy payments.

October 2018

Childcare Voucher Scheme

The deadline for closing the current Childcare Voucher Scheme to new entrants is extended to October 2018.The Government has been planning to remove the current system of childcare vouchers and introduce a new tax-free childcare scheme. Plans were deferred throughout 2017 to March 2018 and have been deferred again until October this year.

This is so important to working parents. Currently, the childcare voucher scheme can save parents up to £933 on childcare per year.

Eligible parents can have 20% of their childcare costs each year paid by the Government, up to a limit of £2000, or £4000 for a disabled child.Ensure working parents know of the extension to the decline, for the current scheme.

Contact your company Accountants, or payroll department, for advice on setting up a scheme.

Childcare Vouchers & Tax Free Childcare more information, and FAQs for employers.

April 2019

Taxation of Termination Payments
The proposed introduction of employer NI contributions on termination payments of more than £30,000 which was due to come into force from 6th April 2018, has been delayed until 6th April 2019.

Employment Status of workers

Government consultations following Taylor recommendations

Taylor Review recommendation

All workers (including those in the gig economy) who are neither full employees nor *genuinely* self-employed should be reclassified in Employment Law as **Dependent Contractors**. This would mean they are automatically entitled to sick pay, holiday pay, and the minimum wage. If implemented, this reclassification would shore up the rights of those working in insecure roles and lead to greater wage costs for employers.

Government response and proposed consultations

The Government accepted that there was a lack of clarity surrounding the tests for employment status, but did not take up this recommendation, nor did it provide any solutions on how to achieve greater clarity.

Despite its stated commitment to taking action in this area, including considering legislative options, its position is that these recommended changes to employment status represent the single largest shift in employment status since the Employment Rights Act in 1996.

It was concerned that any action it takes preserves flexibility in the labour market and does not impose any unnecessary burdens on business or adversely impact the ability of those in the labour market to work.

Hence its proposal of further consultation to gain clarity on Employment status for those on the boundary between employment and self-employment.
Options under co
nsideration are:

a “Precise Criteria” test: a test based on price and objective criteria, such as:
length of engagement,
the percentage of an individual’s income that comes from a single employer, and
where the work is done

a “Precise structure” test: similar to above but the test is based on a clear order, hierachy and weighting of the criteria

A less complex test by reducing the number of factors to consider. The Government used as an example the test for taxing individuals who work through agencies, which depends on whether they work under the “supervision, direction or control of another”.

The Government is launching 3 other consultations on the recommendations made by the Taylor review, seeking views on legislation for:

protecting agency workers

measures to increase transparency in the UK labour market and

enforcing employment rights:

HMRC taking responsibility for enforcing the core pay rights of national minimum wage, sick pay and holiday pay for low paid workers.
naming and shaming those employers who do not pay employment tribunal awards
increasing ET fines for employers showing malice, spite or gross oversight to £20,000 and considering increasing penalties for employers who have previously lost similar cases.

The changing nature of how we work: in figures

CIPD research estimated that in 2017 there were 1.3 million people, 4% of working adults, working in the "gig" economy and suggested that this figure will continue to grow.
A more recent CIPD UK working lives survey of 6000 individuals across a number of sectors, would seem to bear out these figures

Its difficult to calculate with any certainty the numbers of people on zero hours contracts. Figures gathered by The Labour Force Survey and the Business Survey figures vary showing between just over 900,000 (LFS) and 1.8 million (BS) people on Zero Hours Contracts. The The Taylor report in 2017 noted that just under a million people, 2.8% of those in employment, are reported to be on a zero hours contract.
18% of those on ZHCs are in full time education, suggesting the flexibility of such contracts is a benefit to students.

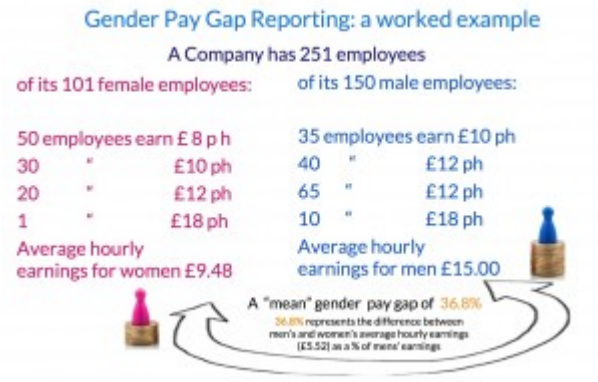
The number of self-employed people has doubled over the past 40 years,
up from 7% of the UK labour market in 1979, to 12% in 1990, and to 16% in 2016.

Gender Pay Gap Reporting

The gender pay gap refers to the differences in average pay between men and women across an organisation, or the labour market, over a period of time, no matter what their role is.

It is worked out using most common hourly earnings figures for UK employees: see a simple worked example below.

The gender pay gap is not the same as gender pay inequality or wage discrimination. It doesn't mean 'women getting paid less for doing the same work, work rated as equivalent or work of the same value as men: This right to "equal work for equal pay" is set out in the Equality Act 2010.

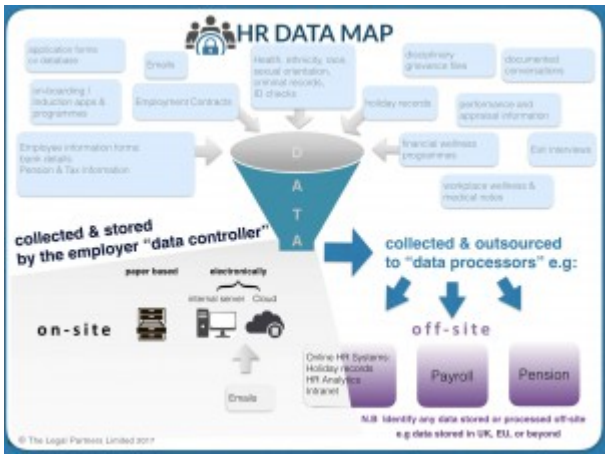


For example, Gender Pay Gap reporting may reveal that on average men earn 36.8 % more per hour than women (as in the worked example here). or that the lowest paid quarter of the workforce is mostly female (which is also the case in our example). If you have more men than women in senior positions within your organisation, the

organisation will show a gender pay gap.

General Data Protection Regulations

Below is an infographic showing an example HR Data map. This shows where HR data typically comes into the organisation, where it is stored, and where it is outsourced for processing.
This is a first step. You will need to decide whether your organisation is a Data Controller or Data Processor. All employers will be a Data Controller of HR personal data when they collect this data from their staff. These terms are used in the infographic so HR professionals can start to see an overview of the HR data collection process and start the GDPR compliance compliance plan.



Preparing for the General Data Protection Regulation (GDPR) 12 steps to take now is useful document from the Information Commissioners Office that outlines the 12 steps to take for GDPR compliance and covers customer as well as HR Data and contains further information.

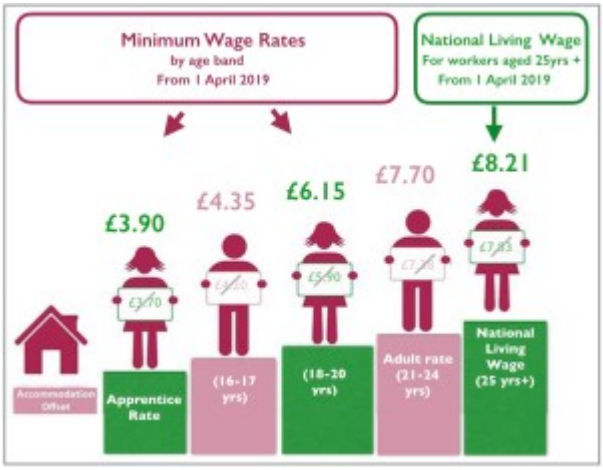
The general employment law landscape and key employment law changes in 2018 mean there is much for employers to get their heads around. As this article seeks to bring you the nub of the issues and how they might affect your business and HR practices, it doesn't constitute legal advice, and should not be taken as such. Far better to get in contact if you need help and advice on your particular situation, either by email, or call me directly on 0208 255 1914.

Explaining National Living Wage, National Minimum Wage 2019

Confused about the National Living Wage and the National Minimum Wage?

You are not alone. Employers and workers alike find these terms confusing to say the least. This article explains difference between the National Living Wage rate and the National Minimum Wage rate and shows the new increased rates from 1st April 2019.

From 1st April 2019, all workers aged 25 and over are legally entitled to be paid at least £8.21 per hour. This is the National Living Wage (NLW).



What is the National Minimum Wage? (NMW)

The National Minimum wage (NMW) is what it says: the minimum pay per hour most workers are entitled to by law. Workers includes all employees and workers: part-time, flexible and agency workers and those working under apprenticeship schemes. There are different rates for each age group, from school leavers (16yrs) upwards. The government sets these rates and reviews them yearly. The rates change in October each year and are advised by the independent body Low Pay Commission. The increases in this years National Minimum wage rates were recommended by the Low Pay Commission.

All employers are legally obliged to pay the National Minimum Wage, irrespective of their size.

What is the National Living Wage? (NLW)

The short answer: The National Living wage is the highest band of the National Minimum Wage which staff should be paid if they are aged 25 or over.
In April 2016, The Government introduced The The National Living Wage for workers aged 25 and over. Launched in 2015 by George Osborne, The National Living Wage was part of the government's aim to raise the wages of workers aged 25 and over to £9 per hour by 2020. Despite adopting the term "Living Wage", The National Living wage has nothing to do with The Living Wage: The Living Wage is set by the Living Wage Foundation, see details below.
Basically, the Government's National Living Wage was actually just a new minimum wage for workers aged 25+, but rebranded as The National Living Wage. This is extremely confusing given that The Living Wage already existed, still does, and is completely different, see below.
The first increase to The Government's National Living Wage (NLW) for workers of 25yrs + came in April 2016. Yearly increases to the NLW (and the NMW across all age brackets) followed.

So in summary, on 1 April 2019:
The National Living Wage rate per hour (for 25+ yr olds) increases by 33p to £8.21 p.h
The National Minimum wage rates increase:
for 21-24 yr olds to £7.70
for 18-20 yr olds to £6.15
for 16-17 yr olds by £4.35.
Apprentice rates change according to age and time spent in Apprenticeship also, more details on these can be

found here.
The National Living Wage will most likely increase in April 2020 as the government pushes ahead to its target National Living Wage of £9p.h by 2020. The National Minimum Wage increases each April and October.
There are penalties on employers for failure to pay the correct amount, these are outlined below. But first, lets consider the Living Wage.

So,what is the Living Wage?

VOLUNTARY LIVING WAGE

The Living Wage is a voluntary hourly rate, independently calculated each year by Living Wage Foundation to meet the real cost of living. Don't confuse the Government's National Living Wage with this voluntary Living Wage. The Living Wage is a benchmark and a recommendation of what it will take to improve living standards now, not in 2, 3 or 5 years time.
The Government's National Living Wage (and National Minimum Wage of course) is enforcable by law. The Living Wage Foundation's Living wage is voluntary. Oliver Bonas became the first high street retailer to pay staff the accredited living wage in September in 2015.
The current living wage is £8.75 per hour and £10.20 per hour in London.
There are over 3,900 accredited Living Wage employers across the UK. In order to become an accredited Living Wage Employer you need to pay all of your employees a living wage, and have a plan to extend this wage to regular on-site subcontracted staff as well.

image credit: www.Livingwage.org.uk

A few important points to remember about the National Living Wage and The National Minimum Wage.

National Living Wage, National Minimum Wage, penalties for non compliance:

Currently non payment is enforced by HMRC who can issue a notice of underpayment. This will calculate the arrears of pay to be paid and the penalty set at 100% of the total underpayment of the NMW, with a minimum penalty of £100 and a maximum penalty of £20,000. If an employer does not comply with the notice of underpayment, the enforcement officer can:

- issue civil proceedings in the civil courts or in the employment tribunal to recover the sums that should have been paid. If, following the judgment, the debt remains unpaid, HMRC will take steps to enforce the debt.
- prosecute the employer to seek a criminal conviction.

Employees concerned they are not being paid the NLW or NMW are advised to check with Acas then speak to their employer in the first instance and raise a grievance if necessary. They can report an employer to HMRC and take their employer to a tribunal (following early conciliation through Acas) if the situation remains unresolved. Back in 2016 the government started to name and shame companies who fail to pay the National Minimum Wage. A package of measures intended to improve compliance with the NMW and the NLW include:

- Doubling the penalties for non-payment. From April 2016, penalties increased from 100% of arrears to 200% of arrears (halved if employers pay within 14 days). The maximum penalty of £20,000 per worker remains unchanged.
- Increasing the budget for enforcement of the NMW and NLW in 2016.
  a new HMRC team was created in 2016, dedicated to pursuing the most serious cases of employers deliberately not paying the NMW and NLW. They have powers including the imposition of penalties, referring cases for criminal prosecution and naming and shaming the worst-offending employers. HMRC's current approach is to target the high-risk areas for non-payment of the NMW, which are currently the social care, hairdressing and retail sectors.
- The introduction of a new penalty of disqualification from being a Company Director for up to 15 years for the non-payment of the NMW and the NLW.
- The creation of a new position called the Director of Labour Market Enforcement and Exploitation, which will oversee enforcement of the NMW and NLW, the Employment Agency Standards Inspectorate and the Gangmasters Licensing Authority.
  Find current NMW rates here.

Workplace pensions: 2019 contributions & ongoing duties

All deadlines and staging dates for auto enrolment have now passed. This means that under the Pensions Act 2008, every employer in the UK must put their qualifying employees in a workplace pension scheme (called auto enrolment) and, where appropriate, pay contributions. If you employ just one person, you are classified as an employer and have certain legal duties. This article from the pensions regulator web site explains more about ongoing pensions duties for employers.
If you are employing staff for the first time (or haven't caught up with auto enrolment) act now and click on this

link to the pensions regulator web site, to find out what to do and by when.

Auto enrolment, Employer contributions increasing in 2019.

The minimum amounts that employers and their staff have to pay into their workplace pension scheme increased in April 2018, and increase again in April 2019.

As the employer, you must by law make a minimum contribution towards this increased amount. You can decide to pay contributions at a rate that suits your business objectives, so long as you meet at least the Total minimum contribution figure, on the far right in the table below. If, for example, you decide to pay the minimum contribution (i.e 3% from April 2019 onwards) your employees must make up the difference (contributing 5%) to reach the total of 8 % minimum contribution.

Date	Employer pays minimum contribution of	Employee pays contribution of	Total minimum contribution of
6th April 2018 – 5th April 2019	2%	3%	5%
6th April 2019 onwards	3%	5%	8%

Contributions are set on “qualifying” earnings of over £112 per week to an upper limit of £827 per week.

2. Remember to keep assessing your workforce, as someone not yet old enough or not yet earning the minimum salary required may in time fit the criteria and need to be auto enrolled. The link below explains what salary levels qualify for pension auto enrolment Pension Regulator Know Your Workforce site –

3. Review your pension arrangements – there is paperwork to complete if you want an existing pension scheme to be approved. The pension scheme you use for auto enrolment must pass a ‘Quality Test’ in order to comply with new legislation. There is to be consultation on simplifying this too.

4. Communicate the changes to all your workers – The Pensions Regulator requires employees to be provided with specific information about auto enrolment, including what it means for them and their right to opt-out.

5. Automatically enrol your ‘eligible jobholders’ – and remember that in three years you will need to re-enrol any who decide to opt out

6. Register with The Pensions Regulator and keep records – You will need to register your scheme with The Pensions Regulator. Registering the scheme will include providing a range of evidence to the regulator as listed below:

- Overview of the organisation
- Details of the pensions scheme
- The number of jobholders that have been auto enrolled

You will also have to provide evidence to the Pensions Regulator on an ongoing basis demonstrating that you have met your auto enrolment responsibilities. This evidence will include:

Name and Date of Birth of employees

Employees salary

Contributions made in each payment period

Dates of contribution

Auto enrolment dates

Details of employees who opt-out of the scheme

Failure to provide sufficient evidence will incur penalties and fines.
Be aware too that employers who fail to heed a 28 day warning notice from The Pensions Regulator risk a fine which increases each day. The fine for small employers with 1 to 4 staff who fail to comply with an "escalating penalty notice" is £50 per day and £500 per day for those with 5 to 49 staff.

7. Contribute to your workers' pensions – The legislation sets out minimum contribution levels at which eligible employees must be automatically enrolled. As in the diagram above, employer contributions will start at 1% of an employee's salary. This will increase to 2 % by April 2019, then rising to 3%; dates are subject to approval by Parliament and may change. For more details and planning advice visit http://www.thepensionsregulator.gov.uk/employers/planning-for-automatic-enrolment.aspx

Employer and Employee Contributions for pension auto enrolment

Employees must also contribute to the pension to receive the employer's benefits. Employee contributions will start at 0.8%. This will increase to 2.4% by 2019, then rising to 4%. The Pensionable Salary for every worker between £5,668 and £41,450 per annum includes:

Salary

Wages

Commission

Bonuses

Overtime

Statutory sick pay

Statutory maternity, paternity and adoption pay.

What to do next.

What is the impact on employers' cashflow of Pension auto enrolment?

It is important that all businesses start planning for auto enrolment and consider how this will affect cash flow and how you will deal with it in terms of your employees eg will this be a form of pay increase?

Which employees qualify for Workplace Pension Schemes?

Eligible jobholders have to be automatically enrolled. This is a jobholder who:

- is aged at least 22 but has not yet reached state pension age, and
- earns above the earnings trigger for automatic enrolment, currently £833 per month: (£192 per week)These figures change year on year so do che
  ck The Pensions Regulator website here.

Also check The Pension Regulator Know Your Workforce web site here

Non-eligible jobholders are not eligible for automatic enrolment but they must be offered the opportunity 'opt in' to an automatic enrolment scheme. This is a jobholder who:

- is aged at least 16 and under 75, and
- is earning between £486 – £833 monthly (£112 – £192 weekly)
- is aged at least 16 and under 22, or between state pension age and under 75, and earns above £9,440.

Employees earning less than £5,668 have the right to join a pension scheme but there is no obligation on employer to contribute.

What are the age limits for pension auto enrolment?

The age band for eligibility is between 22 and the state pension age, 67. Retaining the state pension age as the upper age limit gives people access to pension saving during their normal working lives and avoids automatically enrolling people for whom saving is no longer the right option. Assess your workforce to see how many are likely to opt-in to the new workplace pension scheme.

What changes do employers need to make to Employment Contracts and staff Handbooks for workplace pensions?

You will need to inform and consult with staff as every employment contract will need the clause about pensions changed according to what type of workplace pension scheme you put in place. The staff handbook will also need to refer to the pension auto-enrolment scheme you have put in place.

What payroll changes need to be made for workplace

pensions?

You will need to contact your payroll provider to ensure the correct changes are made by way of salary deductions and reporting in pay slips. You should also decide if your business is going to offer salary exchange arrangements. If salary exchange is used as well that can add additional complications. Salary exchange is a mechanism to enable staff to exchange part of their gross salary in return for a non cash benefit such as employer contributions into a pension scheme. This means they get 100% of the salary exchanged going into their pension scheme because no PAYE or NICs are deducted.

Flexible Working requests, a flow chart of the procedures

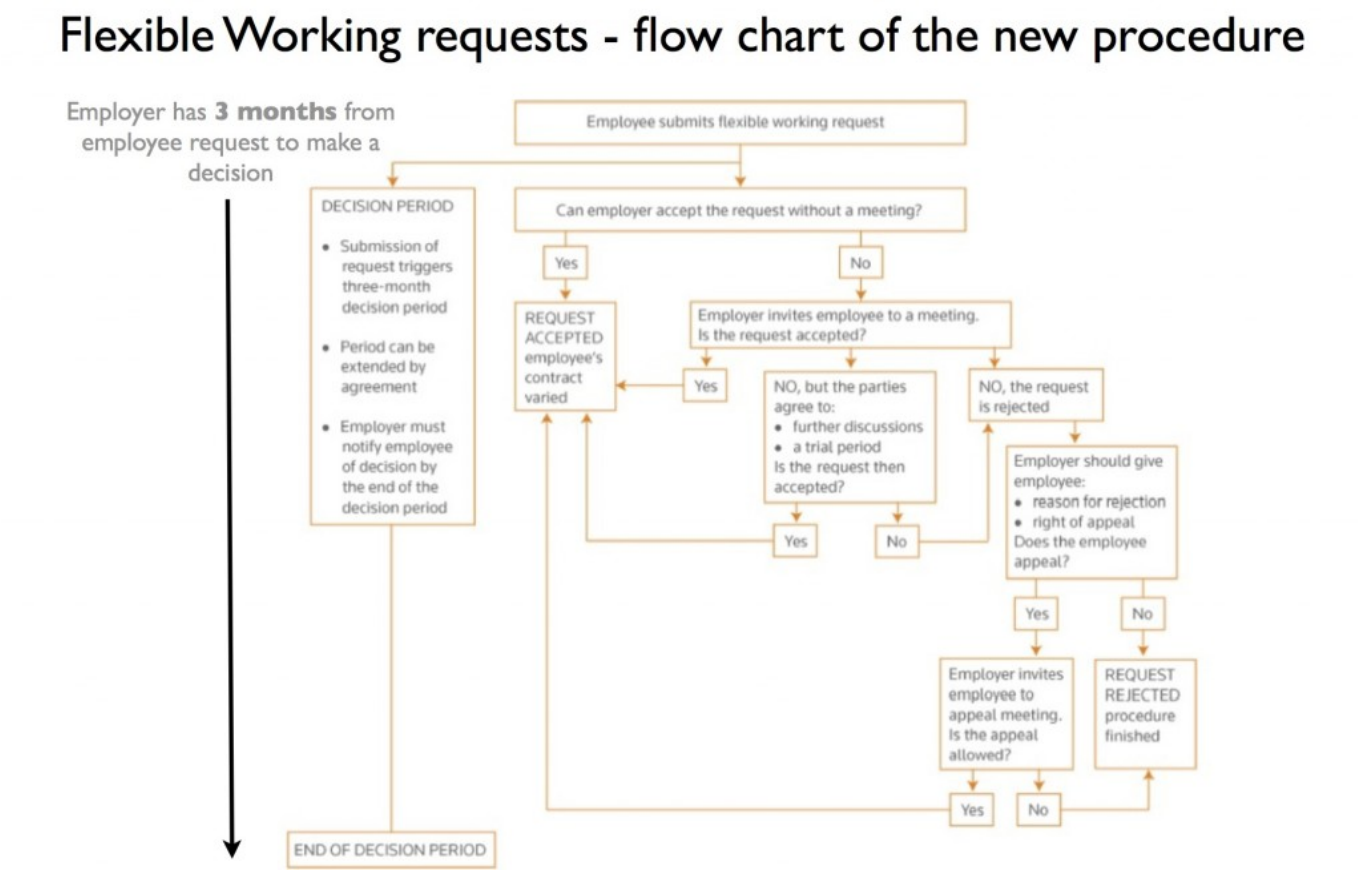
Back in June 2014, the right to request flexible working was extended to all employees who have worked for 6 months for their employer. Since that date, employers have been legally bound to consider flexible working requests from employees, and to give a decision within 3 months of the request. Note, the right to request flexible working is not yet extended to workers.

Read more on the Flexible Working Laws & what to do when faced with a Flexible Working Request.

Employers have a duty to consider requests “in a reasonable manner”.
The obvious approach for employers is to sit down with the employee and discuss/agree a workable solution.

There is a new procedure to follow, as well as 2 Acas documents: a brief Acas Code and a longer Acas Guide to handling flexible working requests, and what the “reasonable manner” means in practice.

Below is a flow chart showing the procedure for handling a flexible working request. It’s a simple principle made more complicated by complex regulations which busy HR Directors and employers need to follow and understand. Click on the image to enlarge it.



Be prepared to handle flexible working requests

It makes good sense for Employers and HR Directors to prepare for a significant increase in flexible working requests, for handling multiple requests coming in at the same time, and for the administrative challenges of running teams with differing working patterns.

1. Update handbooks with new Flexible Working Policy

If your company has an existing flexible working policy, it will be out of date after 30th June 2014 and will need to be updated to reflect the new laws and procedures.
If not, take advantage of this opportunity to think about flexible working and to create a policy that works for your business and your workforce. You can use trial periods to test and measure the effect, and refine the policy to make it work for the business. Companies with policies in place are able to show they are complying with the new laws and regulations, to demonstrate this to employees and prospective candidates, and to benefit from the resulting productivity gains and attractiveness/stickiness as an employer.

2. Template letters responding to a request for flexible working

Employers are also now required to tell employees how to apply for flexible working. There is more administration involved for the busy HR Director, we suggest saving template request letters, and response letters from the company, into your files, so you have them to hand.

3. Best practice for handling requests for flexible working

As more employees request, and are granted, flexible working going forward, it will become more challenging for companies to be consistent in their responses to requests. Companies will also need to minimize the disruption of managing multiple requests at once, and of managing the increased administration involved in running a workforce where more employees are on flexible working agreements than ever before.
Take an example from a recent PLC client, whose 5 strong administration team all requested, and were granted, flexible working. The company didn't plan sufficiently, and the now fractured team is unable to deliver the administration service that the company needs. As a result, the head office is considering moving the administration function to another part of the country, making the whole administration department redundant.

Flexible Working Toolkit: policy + templates + legal guidance

With this in mind, we've put together a Flexible Working Toolkit to enable busy Employers and HR Directors to comply easily with the new rules, manage and administer the new procedures with maximum benefit and minimum disruption.

The toolkit includes:

– a flexible working policy, a new one / updated version,
– *plus* all required template letters
– *plus* a 30 minutes consultation (by phone, email, Skype) with one of our lawyers to help you tailor the policy to the business.

All for £299+VAT. For details, and for more in-depth advice on creating a flexible working policy for your company, please contact The Legal Partners on 0203 755 5288 or by email Richard.mullett@thelegalpartners.com

A final word about the rights of working parents.
Its fair to suggest from the Acas short guide to flexible working requests, that Acas expects the majority of flexible working requests will still be related to childcare, and workers returning from maternity leave. Below is a table showing the rights of working parents, taken from this Acas short guide to flexible working requests so you know what rights ACAS is highlighting to employees.

Rights of working parents, Acas short guide to flexible working

	Babies due on or after 1 April 2007
Ordinary Maternity Leave (OML) and	26 weeks OML.
Additional Maternity Leave (ADM)	26 weeks AML. **All women are entitled to one year's maternity leave in total.**
Notice of early return	A woman must give **eight weeks** notice before returning early from OML or AML.
Changing an early return date	Eight weeks notice required before the new date.
Working during maternity leave – 'keeping in touch' days	A woman can do up to **10 days' work** during her maternity leave without losing any SMP. The employer and employee should agree on payment for time worked.
Reasonable contact	Employer and employee are allowed **reasonable contact** during maternity leave – this does not constitute work. An employee should be kept informed about workplace issues – such as job vacancies and training opportunities.
Statutory maternity pay (SMP)	**39 weeks' SMP** – six weeks paid at 90% of average weekly earning and 33 weeks at a flat rate (£128.73 a week from April 2011 – reviewed annually). A woman can start to receive SMP on any day of the week.
Maternity allowance (MA)	**39 weeks' MA** payable by Jobcentre Plus.
Statutory adoption pay (SAP) and Adoption leave (SAL)	**39 weeks' SAP** the rights that apply to maternity leave – in terms of notice of return to work early, keeping in touch days, and reasonable contact – also apply to adoption leave (see above).

Useful links: Right to request Flexible Working | Advice and Guides | Acas

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Workplace Mediation, resolving conflict at work

Workplace Mediation has long been gathering momentum, becoming increasingly popular amongst UK companies who now use it as an effective way to resolve disputes at work. Mediation can provide solutions which meet the needs of all parties; its cost effective, fast (90% are resolved within one day), avoids disruption, removes the debilitating effects of unresolved conflict and can pave the way for restored workplace relationships.

So what is Workplace Mediation and how can it solve conflict at work?

What is workplace mediation?

In a workplace mediation the mediator, who is an impartial third party, helps 2 or more staff in dispute to attempt to reach an agreement. Any agreement comes from those in dispute, not from the mediator. The mediator is not there to judge the issue e.g. to say one member of staff is right and the other is wrong, or to tell those involved in the mediation what they should do. The mediator is in charge of the process of seeking to resolve the problem but not the outcome. It is for the staff members in dispute to agree the outcome to resolve the dispute. An agreement settling the dispute is then signed by the members of staff. Workplace mediation is often a voluntary process and all discussions are confidential.

Who can use workplace mediation?

Any employer can use workplace mediation. It is regularly used for resolving conflict involving:

- colleagues of a similar job or grade
- unresolved issues between a line manager and his/her staff

It's difficult for an HR Director, any Senior Manager or indeed the business owner to be seen as neutral in a mediation. He or she will know the personalities involved and will not be seen as impartial. An external mediator will help show that HR is looking to resolve this dispute without taking sides. The HR Director or Manager also may be involved later in a grievance or disciplinary dispute.

Workplace mediation is not suitable for some situations , for example where a discrimination or whistle–blowing grievance has been raised and it must be investigated. Note that mediation may also not be appropriate for situations that involve sexual harassment which is a serious issue requiring particular handling. For more on this, see our Employer's guide to handling sexual harassment at work.

When is workplace mediation used?

Common examples of situations where workplace mediation works are:

- personality clashes

communication breakdowns

relationship breakdown within a team

bullying and harassment

cultural misunderstandings due to different nationalities working in the same workplace

> Workplace Mediation can be used before a formal grievance has been identified or after a formal dispute has been resolved to rebuild relationships

In 2011 CIPD undertook a Conflict Management Survey in which 57% of respondents reported using workplace mediation successfully.

The Legal Partners mediation team has used workplace mediation successfully in the care, IT and professional services sectors and it is very suitable to workplaces where there are communication difficulties within the business and within teams.

What are the benefits of workplace mediation within the business?

Taking a dispute to an Employment Tribunal is now very costly for both employers and employees, and rarely actually resolves the underlying issues that may have caused the initial problem to occur. The Employment Tribunal will give judgement on the employment dispute at the time but will not resolve any underlying workplace situation problems.

Cost savings of using Workplace Mediation

Workplace Mediation can save many organizational costs.

it avoids formal grievance and appeal proceedings which can consume a lot of HR Directors' and Senior Management time and resources. It's important to note that workplace mediation could form part of the Step 1 Informal Action to resolve a grievance. For further details on resolving grievances, see our related article Handling and employee grievance, five key actions

workers take sickness absence while there is a conflict situation at work which leads to expensive temporary workers needing to be hired

it can avoid staff turnover and re-recruitment and retraining costs

it can avoid low staff morale and lower productivity

it can repair working relationships within teams so they focus on the team and corporate goals

What are the benefits of workplace mediation undertaken outside of the business?

Any unnecessary conflict can be bad for PR outside of the business and bad for the morale of the workers who are no longer ambassadors for the business but instead can spread negative PR.

Which organisations already use workplace mediation?

Workplace Mediation is good for the employer and employee, and many major businesses use it:

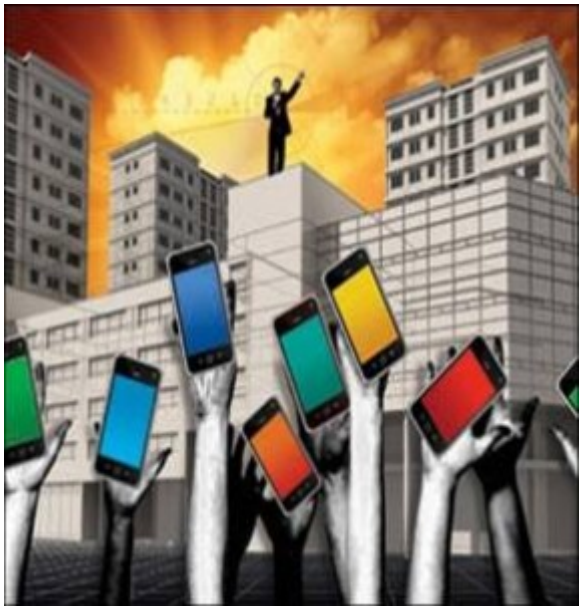
> Marks & Spencer has been using mediation since 2011 and employees find resolving grievances informally less stressful, more effective and a quicker solution than raising a formal grievance.
>
> Arcadia Group which has more than 2500 outlets and owns a number of worlds-known high street brands including Topshop and Topman. Arcadia group calculated that in particular grievances between managers and their team members were taking at least 3 weeks to resolve. By using workplace mediation since 2009 Arcadia Group has significantly these types of grievances by 50%.
>
> The US Postal Service has over 600,000 workers. It uses a REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly) internal mediation service. This workplace mediation service provides a fast, fair, neutral and informal alternative to traditional counselling and grievance procedures. Employees know that they will be making the decisions, are expected to try to understand the other party's concerns and to look at options for addressing those concerns. Outcomes include settlement, withdrawal of the complaint, or where no agreement is reached, rarely, continuation to formal processes.

How can our business start using workplace mediation?

The Legal Partners provide a workplace mediation service to settle workplace disputes to help the busy HR Director.

Our mediation Partner Shân Veillard-Thomas will arrange the confidential mediation process for you and co-ordinate the successful workplace mediation meeting either at your offices or at a neutral venue. To find out more on Workplace Mediation can resolve the workplace conflict your business is facing, make contact on 0203 755 5288.

Practical tips for an effective BYOD policy (Bring Your Own Device)



In this article we highlight the potential risks and benefits for businesses of allowing employees to use their own personal mobile devices (tablets, smartphones, laptops or notebook computers) for business purposes. We talk through the important issues to consider when putting together an effective Bring Your Own Device(BYOD) policy, to maximise the upsides whilst limiting the risks.

Fuelled by the surging use of smartphones, high speed internet services and 4G as well as the growth in remote and flexible working, staff today have come to expect to use their own devices to conduct business. Employers of every size have been quick to adopt a BYOD approach.

Although the following figures are from the USA, the BYOD statistics below show impact of BYOD in the workplace and its widespread adoption.

> The BYOD market is on target to reach nearly $367 billion by 2022, up from just $30 billion in 2014 (Research report by Global Markets Insights Inc 2016).
>
> 59% of organisations allow employees to use their own devices for work purposes. Another 13% had planned to allow use within a year (From Tech Pro Research published in 2016).
>
> 87% of companies rely on their employees using personal devices to access business apps (Research by Syntonic) conducted on a survey of 409 respondents among CEOs, CFOs and CIOs who work for companies with >100 employees, published in 2016).
>
> As of 2016, six out of 10 companies had a BYOD-friendly policy in place (from the same Research by Syntonic).

BYOD benefits

BYOD can bring a number of benefits to businesses, including:

> Increased flexibility and efficiency in working practices.
>
> Improved employee morale and job satisfaction.
>
> A reduction in business costs as employees invest in their own devices.

BYOD risks

The boom in BYOD has been matched with an upsurge in activity by criminals trying to exploit the data and intellectual property stored on personal mobile devices. The use of personal mobile devices for business purposes increases the risk of damage to a business's:

IT resources and communications systems.

Confidential and proprietary information.

Corporate reputation

Customer and employee data
The General Data Protection Regulation (“GDPR”) which became law on 25th May 2018, has increased the risks of BYOD through:

enhancing the rights of individuals with regards to their data (e.g right of access, correction, deletion), increasing the legal responsibility on businesses (the data controller in this context) to keep data secure, and allowing the ICO to fine organisations for breaches and non compliance.

Obviously allowing employees to use their own devices to conduct business comes with an increased risk of data breaches, both physical (such as leaving a device on the train) or electronic (such as hacking or malware).

The research cited above showed that even before GDPR came into force, companies and CIOs were well aware of the security implications of a BYOD approach: 61% of respondents in the Syntonic survey viewed mobile devices as less secure than fixed devices such as desktop personal computers, but said that security measures aren’t always consistent.

Ownership of the device

Personal mobile devices are owned, maintained and supported by the user, rather than the business. This means that a business will have significantly less control over the device than it would normally have over a corporately-owned and provided device. But the business remains responsible for protecting company data stored on those personal mobile devices.

Issues to consider in a Bring Your Own Device (BYOD) policy

A BYOD policy brings with it unique challenges which employers must address, such as:

How will the business record and keep track of the devices used to access company data?

What security measures will be installed on employees’ devices?

What are the steps required if a device is lost or stolen?

Will an employee be required to a return a device to the company for wiping on termination of employment?

Are company emails stored on the employee’s device? If so particular care should be taken when an employee leaves the business, as company emails and data will remain on their device.

The tone of the BYOD policy should be varied depending on whether the BYOD policy is voluntary (and the employer offers an alternative company-owned device) or whether using their own device is the only option available to the employee. If the policy is purely voluntary, then the employer may impose stricter limitations on

usage and more stringent monitoring requirements. If employees are required to use their own device for business purposes, then there is likely to be less scope to impose limitations, particularly if there is an associated cost for employees.

How to manage the risks associated with a BOYD scheme

To de-risk the business when adopting a BYOD scheme, employers should:

Audit and assess the risks, including assessing:
where the data is held?
what type of data is stored?
how will the data be transferred?
what is the potential for leakage ?
how easily employees may blur personal and business use?
and how cloud-based services will affect security?

Ensure that security measures impose controls on access to data, encryption and PIN numbers, and verify the device's security features.

Keep pace with advances in the features of devices and maintain a list of approved models. Choose Your Own Device (CYOD), is becoming more popular, where employees choose from a list of models pre-approved by the business.

Insert safe and secure deletion methods on the device.
Note that the ICO guidance recommends that portable devices used to store and transmit personal data should be encrypted. A failure to protect data using encryption software may lead to the ICO taking enforcement action against an employer.

Consider how the use of company data on the device can be monitored. The ICO guidance recommends using technology to monitor the device to assess data leakage and loss, but reminds employers to consider employee privacy; a careful balancing act must be maintained and employees should be informed of the monitoring.

Have a well-publicised BYOD policy.

Before implementing a BYOD policy, an organisation should look at the strategic and business case for it, and conduct a privacy impact assessment. In particular, employers should consider:

Compliance with relevant laws – the GDPR 2018 we have already mentioned, and the Data Protection Act 2018. Privacy impact assessments are a legal requirement under the GDPR in some circumstances. Implementing a BYOD policy will almost certainly require employers to carry out a privacy impact assessment.

Whether consultation with any staff forums, employee bodies or trade unions are required before implementation of a new BYOD policy.

Whether BYOD will save the company enough money, taking into account the potential hidden costs such as employee reimbursement, licensing, infrastructure and support to justify a potential reduction in control over the processing of company data (particularly if employees are using a variety of makes and ages of device which may have varying degrees of security sophistication).

Whether there are any technical limitations to implementing a BYOD policy. An example of this might be

capacity restrictions on the internal Wi-Fi network, or a lack of sophistication in the IT team with respect to technical security measures.

Securing data stored on a device

A business is responsible for protecting company data stored on personal mobile devices. Businesses should consider implementing security measures to prevent unauthorised or unlawful access to the business's systems or company data, for example:

Requiring the use of a strong password to secure the device.

Using encryption to store data on the device securely.

Ensuring that access to the device is locked or data automatically deleted if an incorrect password is inputted too many times.

The business should ensure that its employees understand what type of data can be stored on a personal device and which type of data cannot.

Mobile Device Management for BYOD

Mobile Device Management software allows a business to remotely manage and configure many aspects of personal mobile devices. Typical features include:

Automatically locking the device after a period of inactivity.

Executing a remote wipe of the device (make sure employees are aware which data might be automatically or remotely deleted and in which circumstances).

Preventing the installation of unapproved apps.

Monitoring use of a device

Employers should also consider how, and to what extent, they will have access to and monitor company and personal data contained on employees' personal devices. Employees have a reasonable expectation of privacy under Article 8 ECHR. Steps should be taken to ensure that company and personal data are segregated on personal devices, and access to personal data by the employer is minimised.

Loss or theft of a device

The biggest cause of data loss is still the physical loss of a personal mobile device (for example, through theft or by being left on public transport).

Loss or theft of the device could lead to unauthorised or unlawful access to the business's systems or company data. The business must ensure a process is in place for quickly and effectively revoking access to a device in the event that it is reported lost or stolen.

Businesses should consider registering devices with a remote locate and wipe facility to maintain confidentiality of the data in the event of a loss or theft.

Transferring data

BYOD arrangements generally involve the transfer of data between the personal mobile device and the business' systems. This process can present risks, especially where it involves a large volume of sensitive

information. Transferring the data via an encrypted channel offers the maximum protection.

Employees should be encouraged to avoid using public cloud-based sharing which have not been fully assessed. Businesses should provide guidance to employees on how to assess the security of wi-fi networks (such as those in hotels or cafes).

Departing employees

A business needs to think about how it will manage data held on an employee's personal mobile device should the employee leave the business.

BYOD and the 'Always on' culture

There is increased commentary around the potential negative consequences of remote working and mobile device usage and its impact on employees' wellbeing as a result of the 'always on' culture. Particularly where use of personal devices is voluntary, employers may wish to consider including the optional 'work-life balance' sub-clause in any BYOD policy, to help evidence a commitment to their duty of care towards employees and counter claims in connection with, for example, stress-related illnesses from employees.

BYOD and registering employees' devices

A key aspect of an effective BYOD policy is ensuring that the employer is aware of the data processing activities that are being conducted in respect of company data. To mitigate against the risks of unlawful processing and undisclosed data breaches, employers should require all employees to register their devices with the employer before using it for business purposes. Employers should also take this opportunity to set up the device with appropriate security software, and register it with remote locate and wipe technology in the event a device is lost or stolen.

BYOD and unauthorised access and repairs

There is a risk of data breach if an employee arranges for a device to be repaired by an unknown third party who may be able to access company data. Requiring that all repairs are arranged through the company will allow for greater control over who has access to the device. If this approach is adopted, the company should also meet or contribute to the cost of repairs. Therefore, the company must balance the costs of contributing to repairs against the risks of a data breach.

ICO guidance on BYOD

The Information Commissioner's Office has published guidance on bring your own device and the data protection issues for employers who adopt a BYOD approach. The guidance has not yet been updated to take into account GDPR but many of the practical points it makes are still valid and useful. It highlights:

the importance of having a clear BYOD policy that is regularly audited and monitored for compliance

that staff connecting their devices to the company IT systems fully understand their responsibilities

that alongside a BYOD policy, employers create and maintain an Acceptable Use Policy (to provide guidance and accountability of behaviour) in order to minimise the risk of unauthorised or unlawful processing of data or the accidental loss or destruction of personal data.

NCSC guidance on BYOD

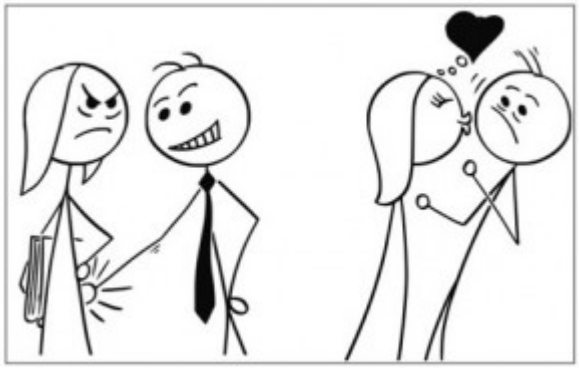
The National Cyber Security Centre, part of GCHQ, has published a useful infographic as part of its summary of the key security aspects for large and public sector organisations.

Choose Your Own Device (CYOD) is likely to offer employees an advantage to select one among several enterprise-approved systems and this is predicted to eliminate standardization and security challenges of BYOD system.

This article seeks to spotlight the key issues around BYOD and how adopting a BYOD approach may affect your business and HR practices.

Employer's guide to tackling sexual harassment at work

Practical guidance for employers on how to tackle sexual harassment at work.



Following the groundswell of publicity across the media and social media regarding sexual harassment allegations and disciplinary offences, employers are well advised, morally of course and in terms of best practice, to review the most effective ways of tackling and putting a stop to such behaviour in the workplace.

This article will help you understand the risks, to employees as well as employers. We explain the law, how to deal with a complaint, how to protect your staff from sexual harassment, how to help employees feel comfortable reporting issues and how to put the business in the best position to defend a claim.

Employers can be vicariously liable for any acts of harassment. Employees too can have a personal liability. Both the employer and the individual accused of the harassing behaviour can be sued. You will see cases taken against both employer and the individual.

It is therefore really important for every business to deal correctly with any complaints of, or concerns about, sexual harassment. A possible defence is available to an employer if it can show it took all reasonable steps to prevent the harassment (see the section below on Liability and Reasonable Steps Defence).

What is sexual harassment?

General harassment occurs when person A harasses another person B, by engaging in unwanted conduct related to sex (or any of the other protected characteristic)
which has the purpose or effect of:
violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

> Sexual harassment occurs when a person engages in unwanted conduct of a sexual nature that has the purpose or effect of

> *violating someones dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.*

Less favourable treatment occurs when A or another person engages in unwanted conduct of a sexual nature or conduct that is related to gender reassignment or sex,
that has the purpose or effect referred to above
and because of B's rejection of, or submission to, the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(For example, Beth's line manager Adam ensures Beth is not put forward for promotion because she rebuffed his advances in the pub after the office away day).

> It's important to remember that it is the effect of the behaviour on the recipient that counts – and not how it appears to the person doing the behaviour, or anyone else."

Sexual harassment: once is enough

A one-off act of harassment is sufficient, there does not need to be repeated behaviour or a pattern of behaviour. Be aware that you may receive a compaint about somone who does not work for the business (for example, a client, trainer, cleaner; third parties who visit the premises or are involved with the business and with your staff).

Don't ignore it!

Potentially unlimited compensation is available to victims of sexual harassment who take successful legal cases.

Employment Tribunals can make public declarations against businesses which would create embarrassing and damaging publicity and make the business less attractive to customers, clients and of course future staff. Working in a culture where sexual harassment, however subtly contrived, is present and seen as going unchecked or dismissed creates a prevailing mood of fear and futility that is ultimately damaging for staff and business alike.

Some examples of sexual harassment

- Propositioning and making sexual advances
- Unwelcome touching, hugging, massaging or kissing
- Sending sexually explicit emails and text messages
- Suggestive looks, staring or leering
- Criminal behaviour, including sexual assault, stalking, indecent exposure and offensive communications
- Watch for office banter also, sexual harassment couched as office banter can be quite subtle and closely related to culture of an organisation.

This is not an exhaustive list but gives you an idea of some of the types of behaviour that may appear in a complaint.

Dealing with complaints of sexual harassment

The Equalities and Human Rights Comission (EHRC) has published useful guidance for employers on how to deal with complaints of sexual harassment.

Some of the suggestions are listed below, with our comments.

> Deal with any complaint in a fair and timely manner.
> Early engagement is vital, as is your reassurance from the outset that those involved will be listened to and heard.
>
> Provide for quick and informal resolution of less serious complaints.
> Don't always insist a complaint is put in writing if this means any delay in getting on with the investigation or getting to the nub of the issue quickly.
>
> Make sure it is clear to those involved that disciplinary action up to and including summary dismissal may be taken if a complaint of sexual harassment is upheld.
> Ensure that harassment on the grounds of any protected characteristic is listed in the company disciplinary policy as one of the acts of potential gross misconduct.
>
> Suspend the alleged perpetrator during the investigation – depending on the seriousness of the complaint.
> Explain to the alleged perpetrator that the suspension is a neutral act, necessary because the Employer is under a duty to investigate quickly the complaint and the suspension allows the necessary focus to take place, it protects the complainant and prevents interference in the investigation, which must be fair.
>
> Ensure the confidentiality of all involved, subject to any requirement to involve external agencies.
>
> Offer informal support to the complainant, including counselling in serious cases.
>
> Guarantee that the complainant will not be disadvantaged by making the complaint.
> A common barrier to employees coming forward with a complaint is fear of losing their job if they speak up. This could amount to victimisation and is illegal. Despite this, the fear may be very real, so giving reassurance that the complainant will suffer no disadvantage by speaking up is extremely important.
>
> Make adjustments to enable the complainant to participate in the disciplinary process without fear of victimisation. Allow a complainant to be accompanied to any investigatory meeting by a family member in order to provide support.
>
> Where an employer believes that a criminal offence may also have been committed, provide for the matter to be reported to the police and provide appropriate support to the complainant.

Acas recommends that those investigating such complaints have special training. The Acas guidance on sexual harassment makes it clear that the process can also be distressing for the alleged perpetrator and so support should also be offered to them also, without impeding the fairness of the process. However, employers should not be seen to be favouring the alleged perpetrator, as this may give the appearance of bias and lack of impartiality in the investigation process. Read more ab
out supporting those involved in a sexual harassment below.

Liability and Reasonable Steps Defence

As the employer, you want to be able to protect your staff from sexual harassment, and to show that you took all reasonable steps to prevent such behaviour or reduce the risk of it as far as was possible.

To be protected by the Reasonable Steps Defence, employers must:

ensure the business has appropriate policies and procedures to explain what inappropriate conduct is. Policies and procedures alone aren't enough, employers must also

provide training so that staff understand what constitutes inappropriate conduct, the implications of breaches and that line managers know how to deal with complaints

impose disciplinary sanctions for non-compliance.

Consider staff training and awareness which spells out what behaviour is appropriate and what is not. It is always best to assume this distinction is not obvious to all! Cultural differences for example may mean that examples of appropriate and inappropriate conduct need to be provided. Make training more than just an annual seminar, consider how, where, and how often, to keep the training firmly in mind and current for staff as time goes on. In support of training, some companies run "dignity at work" days or weeks. Set the tone from the top: involving the leadership and upper management in training and in embedding a culture of zero tolerance of sexual harassment will influence employee behaviour and help staff to feel more comfortable about reporting issues.

The Legal Partners regularly run training sessions and feedback tells us that these sessions are well received and appreciated. As well as helping employees be more aware of their own behaviour, and better equipped to detect incidents, it can help create an environment where disclosure can happen more easily.

> Policies and procedures aren't enough. To be protected by the reasonable steps defence, Employers must provide training so that staff understand what behaviour is ok, and what behaviour is not.

You may also have to consider whether there is a knock on impact on other office cultures eg drinking in the office, perhaps on Fridays or when people are working late. Is it appropriate? Is it increasing a risk in terms of behaviour?

It won't necessarily help your defence if the person complaining about the harassment also engaged in office 'banter' or seemingly put up with the situation for longer than might on the face of it seem acceptable before making a complaint.

In the case of *Munchkins Restaurant Ltd v Karmazyn and others*, waitresses at a restaurant had for a long time put up with the manager's requirements that they wear short skirts and his subjecting them to talk of a sexual nature including talk about sexually explicit photographs left around the workplace. It took some time for the women to raise their complaints and in the meantime, as a coping mechanism, the women had at times asked the manager about his sex life as they found this to be a potentially successful way of deflecting his attention from them. Neither of these issues resulted in a successful defence for the employer and the women were awarded compensation.

In summary, don't ignore the complaint, don't sweep it under the carpet – investigate.

Even if, as can happen, the process of dealing with a complaint leads to an employee moving on by mutual agreement, once a complaint of sexual harassment has been made, its still important to investigate it. You must get to the bottom of what has happened, consider what needs to change in order to prevent a reoccurrence in the future.

Your investigation needs to be thorough. The courts will pick up on half-hearted or token investigations.

In the case of *Southern v Britannia Hotels Ltd and another*, the employer failed to conduct anything like a thorough investigation and the ET commented that the employer "did not appear to have the slightest interest in getting to grips with what had actually happened". Miss Southern successfully sued for harassment committed by her Line Manager. The court awarded her £19,500 for injury to feelings and stated that the lack-lustre approach to their investigation contributed to the amount of damages awarded.

Non-disclosure agreements (NDAs) and confidentiality clauses in Settlement Agreements (Confidentiality Clauses)

NDAs and in particular Confidentiality Clauses do regularly appear to protect a company's business interests, information, intellectual property or trade secrets.

Don't however automatically use an NDA, or Confidentiality Clauses without taking advice. This is because in reported cases of sexual harassment, it has come to light that there has been a widespread and inappropriate practice of using NDAs or Confidentiality Clauses to silence employees about the sexual harassment they have experienced at work. The inappropriate use of NDAs as "gagging orders" was exposed by the Equalities and Human Rights Commission to the women and equalities committee in March 2018 following a call for evidence into sexual harassment in the workplace.

Just to emphasise how important this point is, on 12 March 2018 the Solicitors Regulation Authority (SRA), published a warning notice indicating that it would amount to professional misconduct for a Solicitor to prepare an agreement for use by a client that contains an inappropriate NDA which prevents an employee from, for example informing the Police or whistleblowing.

If you do need an NDA or a Confidentiality Clause, it must to be carefully and specifically worded, so do take advice from The Legal Partners.

Supporting an employee who has made a complaint of sexual harassment

In its guidance, Acas offers this advice on supporting victims who come forward:

Experiencing sexual harassment is often extremely emotional and distressing for the worker involved. This means an employer should make reporting such a matter as stress-free as possible. In most cases this involves simple things like making sure there is plenty of time to discuss the matter and finding a private space to meet and making sure they have a family member to support them in meetings on the subject.

We would add that keeping in regular communication and ensuring those involved feel listened to and heard at each interaction and stage in the process is key to handling the issue sensitively and effectively.