

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](https://www.gov.uk).

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 occurrence

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 atypical 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 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 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.