CHILTERN HR

JUNE 2013 NEWSLETTER

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1. The law on whistle-blowing is changing

On 25th June a public interest requirement will be introduced into the definition of 'qualifying disclosure' and other changes are made or planned for the future.

What does this mean?

To be protected under the legislation, whistle-blowers will not just have to demonstrate their reasonable belief that the information they disclose tends to show, for example, that a criminal offence has been committed. They will also need to establish their reasonable belief that the disclosure is made in the public interest.

The blanket requirement that a disclosure must be made in good faith to be protected will go, although a tribunal will be able to reduce compensation by up to 25% if it considers the disclosure was not made in good faith and that a cut would be just and equitable in all the circumstances.

The extension of the meaning of 'worker' will mean that certain contractors working in the NHS should be protected.

A further change about victimisation is planned but not expected to come into force until later in the summer. Whistle-blowers are to be given the right not to be victimised by co-workers or agents of their employer for having made a protected disclosure. In those cases the employer will be vicariously liable, regardless of whether it knows or approves. However, the employer will have a defence if it can show it took all reasonable steps to prevent victimisation. In most cases the co-worker or agent will also be personally liable.

What should employers do?

Employers should have a policy on whistle-blowing in place and consider the implications of any disclosures carefully, taking legal advice if in doubt.

Reference: Enterprise and Regulatory Reform Act 2013.

2. Dismissal for political opinions unfair regardless of length of service

From 25th June an employee will no longer need to show that they have completed the qualifying period for unfair dismissal if the reason, or the principal reason, for their dismissal is, or relates to, their political opinions or affiliation.

What does this mean?

This change simply removes the need to show a qualifying period of service and does not create a new ground for a discrimination claim or a new form of 'automatically unfair' dismissal. Where a contract of employment is terminated prior to 25th June the employee will still need to show the requisite period of service to bring this sort of claim for unfair dismissal.

What should employers do?

Employers should always take care to follow their procedures before dismissing an employee, and seek legal advice if substantial issues about political or religious affiliation are involved.

Reference: Enterprise and Regulatory Reform Act 2013.

3. New update service for criminal records checks is to be launched

The Disclosure and Barring Service (DBS), is launching a new 'Update Service' on 17th June.

What does this mean?

Under the new service job applicants will pay an annual fee of £13 and prospective employers will be able to check the status of the individual's DBS certificate online at no additional cost once they have the individual's permission to carry out a check. Volunteers will be exempt from paying the annual subscription fee.

The service will enable individuals to move between jobs without the need for applying for a separate criminal records check each time as long as the level and type of check required for each job is the same.

The DBS will carry out regular searches to ensure that DBS certificates are kept up to date.

From 17th June DBS certificates will be sent only to individual applicants and will no longer be sent to the registered person who countersigned the application form. This will enable an individual to review and, if necessary challenge, the contents of a certificate before it is seen by an employer or prospective employer.

What should employers do?

The DBS has published a series of guidance notes for employers and employees explaining how the Update Service will work. Copies of these can be found here https://www.gov.uk/government/news/coming-soon-disclosure-and-barring-service-to-launch-the-update-service

4. Further employment reforms have been announced

In the recent Queen's Speech the government set out plans to introduce a number of new bills.

From an employment law perspective the plans include:

- giving businesses and charities an 'employment allowance' of £2,000 each year from April 2014 thereby reducing their national insurance contributions (NICs) bill;
- introducing a General Anti-Abuse Rule for NICs, as well as for various other forms of tax. This is aimed at counteracting tax advantages arising from abusive avoidance schemes.
- strengthening legislation to prevent the use of offshore employment payroll companies to avoid paying employer's NICs;
- removing the presumption that members of a Limited Liability Partnership are self-employed;
- tightening up controls on illegal immigrants, including heavier fines for businesses that employ them;
- enabling greater flexibility in the delivery of apprenticeships and involving employers more in designing and assessing them;
- removing employment tribunals' power to make wider recommendations when claimants win discrimination claims under the Equality Act 2010;
- exempting from health and safety laws the self-employed whose activities pose no potential risk of harm to others.

5. Ex-employee was protected from victimisation

The Employment Appeal Tribunal has held that an ex-employee was protected from victimisation after her employment had ended.

<u>What does this mean?</u>

After the Equality Act 2010 there has been some uncertainty about whether ex-employees are protected from victimisation. Last year the Employment Appeal Tribunal held, in a different case, that employees were not protected after their employment had ended.

<u>What should employers do?</u>

Employers should err on the side of caution and assume that ex-employees are protected against victimisation until the law is clarified by the Court of Appeal.

Reference: Onu v Akwiwu and another

6. Restrictive covenant was enforceable

The High Court has held that a 12 month non-solicitation restrictive covenant was enforceable.

What does this mean?

The covenant was upheld because the employer was able to show that it had a legitimate interest to protect and that the restraining covenant was no wider than reasonably necessary to protect that interest. The covenant was in line with the employee's expectations when he joined the company as it was similar to a covenant contained in the contract he had with his previous employer which he had observed after taking legal advice. A 12 month period, the Court said, was common in the industry in which the employee worked and reasonable in that context. The purpose of the 12 month period was to give time for a relationship to be built up between the company's clients and the employee's replacement. The Court did, however, say that a longer restriction would not have been enforceable.

What should employers do?

Employers should be aware that they'll have to justify the point and extent of any restrictive covenants if they need to enforce them. They may need legal advice on the drafting of any such covenants.

Case reference: Romero Insurance Brokers Limited v Templeton and another

7. The National Minimum Wage: Interns and work experience students

The Government has announced plans to crack down on unpaid internship abuse.

What does this mean?

The plans include the launch of a social media campaign and a student handout to raise awareness of the rights of interns and work experience students. The Government will also be encouraging individuals to report employers who are abusing National Minimum Wage (NMW) laws to HMRC, who is tasked with enforcing NMW laws.

If somebody on a work experience placement or internship is classed as a 'worker' under NMW legislation, then they are entitled to the NMW regardless as to their job title.

What should employers do?

To help employers who offer work experience, including placements and internships, the government has published detailed guidance which can be found here https://www.gov.uk/national-minimum-wage-work-experience-and-internships. The guidance includes a Worker checklist https://www.gov.uk/government/publications/national-minimum-wage-worker-checklist as well as examples, to help employers assess whether an individual is a 'worker' or not, explains the exemptions in the NMW rules relevant to work experience and provides guidance for employers when designing work experience placements.

8. Re-engagement was practicable

The Employment Appeal Tribunal has held that a breakdown in the relationship between a teacher and the school where he worked did not mean that the teacher's re-engagement at one of the employer's other schools was impracticable.

What does this mean?

If the employee wins his case and asks the tribunal to order the employer to re-engage him, it may do so, particularly if it is possible for him to work at a different site with new colleagues and no history to live down.

What should employers do?

Employers should seek specific legal advice if they want to contest applications for reinstatement or re-engagement.

Case reference: Oasis Community Learning v Wolff