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CHILTERN HR NEWSLETTER APRIL 2017

Employment Status Guidance

HM Revenue and Customs has released an employment status indicator online tool.

The tool has been designed so that workers, people or organisations hiring a worker or agencies placing a worker, can find out whether the worker should be classed as employed or self-employed for tax purposes.

The tool asks a series of questions about the worker's responsibilities, who decides what work needs doing, who decides when, where and how the work's done, how the worker will be paid and whether the engagement includes any benefits or reimbursement for expenses. HMRC advises that the answers should be chosen that best match the usual working practices of the engagement.

Once the questions have been answered, the tool gives the view of HMRC on whether the intermediaries' legislation (known as IR35) applies to an engagement or whether a worker should pay tax through PAYE for an engagement.

HMRC has said that it will stand by the result given unless a compliance check finds the information provided isn't accurate. It has also said that it won't, however, stand by results achieved through contrived arrangements designed to get a particular outcome from the tool. This, it says, would be treated as evidence of deliberate non-compliance which would lead to higher penalties.

The tool can be used for current or future engagements in the private or public sector. HMRC advises that the status of the role should be reassessed if there are changes to the engagement or the way the work is done.

This information imputed into the tool is anonymous and won't be stored. However, those using the tool are able to print out their results for their own records.

ACAS has also published new guidance on employment status The guidance aims to help employers and their staff understand the many different types of employment arrangements that exist in the modern workplace and their legal entitlements.

The guidance explains the three main types of employment status: employee, worker and self-employed and explains what basic entitlements they have.

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The new revised guidance includes a larger focus on people who are self-employed and umbrella companies following the publication of a review on modern workplaces, recent legal cases about employment status and the heightened focus on gig economy working.

The guidance also covers:

- Agency workers;
- Apprentices;
- Fixed Term Workers;
- Peripatetic workers (workers with no fixed work base);
- Piece workers;
- Volunteers, work experience and internships; and
- Zero hours contracts.

Long Term Sickness Absence Dismissal Was Unfair

The Court of Appeal has held that, in a case of long term sickness absence, the employer should not have disregarded evidence produced at an internal appeal against a dismissal that the employee was fit to return to work without at least a further assessment by its own occupational health advisers. The employer should also have presented evidence on the impact the absence had had on it.

Despite the fact that the employee had been off work for over a year and even though the evidence that the employee was fit to return was unsatisfactory, in that it was inconsistent with previous medical reports which indicated that a return to work in the near term was unlikely, there was at the time of the internal appeal hearing some evidence that she was fit to return. For this reason it was disproportionate / unreasonable for the employer to disregard that evidence without at least a further assessment by its own occupational health advisers.

The severity of the impact on the employer of the continuing absence of an employee who is on long term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Where it is obvious that the impact is very severe a general statement to that effect will suffice. However, where it is less evident, the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. In this case no evidence had been provided to the tribunal on the impact on the employer.

Employers should not dismiss updated medical evidence out of hand in such circumstances because it could be that there was a misdiagnosis, for example, in the first place. Instead they should carry out further enquiries. They should carefully review all the medical evidence during the whole of the sickness absence management process.

They should also keep a written record of the disruption to the business that the absence is causing, for example what extra work colleagues are doing due to the absence and whether anyone has been brought in to cover the work.

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Redundancy Dismissal Of Part-Time Employee Was Unfair

The Employment Appeal Tribunal has held that an employee who changed to part-time working on her return from maternity leave (which lasted for just under a year and was followed by a period of annual leave) and who was subsequently made redundant following a restructuring exercise, had been subjected to indirect sex discrimination, part-time worker detriment and had been unfairly dismissed.

The fact that the employee took annual leave immediately after her maternity leave did not prevent her from relying on the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which preclude a comparison with a working arrangement which is more than 12 months old.

Reneging on an agreement that the employee could leave work at 5 pm was less favourable treatment of which her part-time status was the predominant and effective cause.

The PCP applied to the new role, following the restructuring exercise, namely the requirement to perform duties from the office after 5 pm put women, and the employee, at a disadvantage and had not been justified. There had been no proper consideration of alternative ways of working, such as working from home. For these reasons the dismissal had been tainted by indirect discrimination and was, therefore, unfair.

When considering whether a period of absence is less than 12 months for the purposes of the Regulations, employers should disregard any annual leave taken immediately on their return. Employers should also, where possible, allow female workers to exercise childcare functions and allow them to collect their children from nursery at the end of the working day.

General Data Protection Regulation Compliance Efforts Underway

Although the EU General Data Protection Regulation (GDPR) does not come into force until May 2018, the scope of the charges under the new Regulation means that preparing for the GDPR will be high priority for employers in 2017**.**

Employers will need to carry out audits of employee personal data that they collect and process to ensure that it meets GDPR conditions for employee consent.

New governance and record keeping requirements mean that employers will also have to create or amend policies and processes on privacy notes, data breach responses and subject access requests.

As the GDPR will come into effect before the UK exits the EU, organisations that are not compliant by May 2018 risk fines of up to £20 million or 4% of annual worldwide turnover, whichever is higher.

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National Minimum Wage Changes Aligned

Cycles for national minimum wage increases – including the national living wage – will be aligned, with the next round of changes taking effect on 1 April 2017. The next increase will see the national living wage for staff aged 25 or over rising to £7.50

Statutory Family-Related Pay And Sick Pay Rates Increase

The weekly rate of statutory maternity, paternity, adoption and shared parental pay will increase to £140.98 for pay weeks commencing on or after 2 April 2017. The weekly rate of statutory sick pay will increase to £89.35 from 6 April 2017.

No Clear Guidance Yet From EAT On Type 2 Diabetes And Disability

The latest decision from the Employment Appeal Tribunal involving a claimant with type 2 diabetes has not given us a clear answer about when someone with this common condition is to be regarded as disabled. But it has provided guidance on what should and should not be taken into account when deciding whether someone with a progressive condition is disabled.

The Equality Act 2010 states that a progressive condition which has *any kind* of effect on an individuals' ability to carry out normal day-to-day activities is to be considered to have a *substantial adverse* effect if it is *likely* to result in the employee having such an impairment. The Act also makes it clear that an impairment is to be treated as having a substantial adverse effect even if "measures" (particularly medical treatment) are being taken to treat or correct it, but the effect would remain if such measures were not being taken.

In the present case, the EAT emphasised that, where the Equality Act refers to a condition being "likely" to having an impairment, this does not need to be something which is likely to occur by reference to a definite percentage or proportion, but rather it needs to be considered whether or not there is a chance of it happening.

The EAT also said that the medical evidence was not sufficiently clear to help the tribunal draw the line between the effect of "coping strategies" and the effect of medical treatment. It is only the former that the Act requires the employment tribunal to disregard when assessing the impact of type 2 diabetes on the claimant's ability to perform ordinary day to day activities. In addition, the employment tribunal had mistakenly concluded that type 2 diabetes progresses to type 1 diabetes, which highlights the importance of medical reports being detailed and leaving no room for confusion.

The case has been remitted to the employment tribunal with an instruction that it would benefit from a clear view as to the likely progression of type 2 diabetes. According to data from Public Health England at least 3.8 million people in the UK suffer from diabetes, with 90% of these cases being type 2 diabetes. Particularly since this number is expected to rise to 4.9 million by 2035, further clarity on the way this condition should be assessed under the Equality Act would be very much welcome.

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What To Wear At Work?

The sensitive issue of what employees wears to work looks likely to generate debate and fill column inches in 2017. It is always the case that publicity about an issue fuels employee complaints, so do be aware of the increased risk of challenges to workplace dress codes.

Relating to the wearing of Islamic headscarves at work and whether the wearing of scarves was discriminatory on the grounds of religion or belief. Employment lawyers are waiting to see how the ECJ will reconcile differing opinions on this issue and what new insights it will offer regrading workplace discrimination. The UK, at least for the moment, remains bound by ECJ case-law, and this decision has the potential to make waves in Britain as we navigate Brexit

Closer to home, a report has been published into 'High Heels and Workplace Dress Codes'. The Inquiry was sparked by receptionist Nicola Thorpe's complaint, in early 2016, that she had been sent home from work for refusing to wear high heels. The report looks at workers' experience of challenging dress codes, said it received hundreds of comments from women and suggests that there is a widespread misunderstanding by employers of the law. It particularly believes there are inappropriate dress codes in certain sectors – retail, hospitality, tourism, corporate services and agency work. It proposes new guidance around the more controversial dress code requirements (including high heels, make up, hair, hosiery, skirt length and low-fronted or unbuttoned tops) and tougher penalties where employers act unlawfully.

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