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## CHILTERN HR NEWSLETTER JULY/AUGUST 2017



### What To Wear At Work!

Dress codes are one of the more emotive workplace policies and hit the media on a regular basis.

The Government is reluctant to make changes to the law, stating that “scope for redress already exists” in the Equality Act 2010, meaning it is already considered unlawful for an employer of any kind to either discriminate or harass an employee because of, or for reasons related to, their gender.

There is clearly a need for employers to take a balanced view of dress codes when reviewing their approach and policy on this thorny topic. An “anything goes” policy is likely to present a range of unintended problems. On the flip side, a strict policy will not go down well with employees and could be deemed discriminatory.

Those organisations who are able to successfully strike a happy medium will be the winners at the end of the day. The key will be in finding a balance that allows employees freedom of expression whilst protecting wellbeing and dignity.

### Eating At Your Desk

Whilst employees should be encouraged to take a lunch break and to go away from their desks to eat or take a break from work to promote the health benefits and the increase in productivity around this, there are still many employees who work and eat at their desk. Apart from the health concerns about not taking a rest break or the drop in productivity during the latter part of the day, certain foods can be a nuisance for other employees and colleagues.

Noisy foods or hot strong smelling foods in an open plan office can be irritating and interrupt employees and colleagues sharing that work place. To avoid these issues, a policy banning hot foods or eating at desks can be implemented with the reasons for this promoting rest breaks, protecting equipment and ensuring a pleasant working environment for all to work in. Food and crumbs on desks, furniture and on the floor can damage company property, look unsightly or become unhygienic. Also, if staff are eating at their desk are they really being more productive because they are still sat at their desk, is another point to bear in mind. There is a need to be hydrated whilst working but the risks of spilling hot or cold drinks should also be considered.

***Whether other suitable locations are available for employees to eat away from their desks also has to be taken into consideration.***



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## Settlement Agreements

Settlement Agreements (formerly known as Compromise Agreements) can be used to make a deal with an employee and also draw a line under both contractual and statutory claims.

The content of the financial settlement can vary extensively and will take account of a whole range of factors. When considering such a settlement, employers will need to consider a whole range of information, including potentially, their marketability for a new role. Those employers that have the most success in getting a settlement agreement will be those that are able to offer more than the employee would receive under a standard redundancy package – i.e. there needs to be some sort of carrot on offer that will be motivational enough for the employee to consider signing away their employment rights.

Settlement agreements are useful in enabling a range of issues to be wrapped up within one document. However, employers do need to be very clear in terms of what will and will not be included within any contemplated settlement – people like clarity and that will give the employer credibility in the matter.

Employers should remember that Settlement Agreements need to be considered on a case by case basis. Every exit will be different and where Settlement Agreements are used, they need to reflect the outgoing employee's individual circumstances. Legal advice should always be taken in any Settlement Agreement.

## Staff Handbook

How many times do you hear ....*But the Handbook Says* .....

Yes, the handbook is absolutely necessary for guidance and consistency but it's also important to balance this with 'doing the right thing'. Managers need to be able to get the balance right between sticking to the rules and doing the right thing both for the business and the individual. The handbook says bereavement leave is only given for the loss of a parent, son, daughter or spouse. So, what about the employee who was brought up by her Auntie and when she died felt like she had lost her Mum. Should we stick to the rules and refuse bereavement leave or do we do the right thing and support the employee by granting the leave?

Successful Managers are not the ones that stick to the rules with no flexibility but the ones that show the life skills and empathy to take a balanced view. Without this, the employee is disengaged, feels let down by the business and may leave. Ultimately the company may lose a skilled and long serving employee just because they didn't take a balanced view. It's not inconsistent to make an exception to the rule if it's fair and morally right to do so. Taking this balanced approach will have a positive impact on other employees who will see that the company can show compassion and do the right thing irrespective of what the handbook might say.

It is another example of knowing your employees and doing the best that you can in any given circumstance.



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## **Holiday And Casual Workers**

First of all, let's be clear about the status of the casual worker. They are usually on a zero-hours contract, have no obligation to accept the work offered to them and the employer has no obligation to offer them work. The hours and work is casual and offered on an as and when basis and no regular pattern of work exists. Casual workers would accrue holiday for the hours they work. The calculation for this as advised by ACAS is 12.07%. This figure is arrived at (52 weeks minus 5.6 weeks holiday = 46.4 weeks) 5.6 weeks' divided by 46.4 multiply by 100 = 12.07%.

Where the worker has accrued holiday they are entitled to take that holiday. Our experience has found that usually the holiday is taken at the end of the casual work assignment or it is paid in lieu of being taken. However, bear in mind that where it is paid in lieu of being taken, this must show as a separate item on the payslip and not rolled up with the hourly rate of pay.

Where holiday pay accrued is not paid, the worker can claim unlawful deduction of wages either through the Employment Tribunal or Civil Courts.

## **Absent Employee Fails To Maintain Contact**

There may be times when an employee is absent from work and fails to maintain communication with the employer. There may be clear guidelines in place pointing out that the employee is required to call in by a specific time and explicitly stating how often. Even where there are guidelines in place an employee may fail to maintain contact with their employer which is frustrating because the employer is no clearer on when the employee is expected back to work, how long they may be off, what adjustments may help the employee return to work.

Where the employee has not contacted their employer, the employer has the right and duty of care to contact the employee by phone and letter to ask about their health, treatment and likelihood of a return to work. If there is no response to messages left on phones, then the next step is to contact their emergency contact and it would be appropriate to write to the employee reminding them that failing to maintain contact could potentially be a disciplinary matter. In addition, the letter should request the employee to make contact immediately, agree how often contact is expected; perhaps a copy of the absence guidelines as a reminder, if one is in place.

If applicable a meeting in person can be requested where the employee is off absent long term. Despite the employee being off sick, it may be that they can't attend a meeting when suggested so it can be rescheduled to suit the employee. The purpose of having contact with the employee can be helpful in the employee returning to work sooner and deal with any challenges that may be preventing a return to work. It also helps the business to plan business operations, there is of course the duty of care the employer has towards the employee.



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It is necessary to understand what the reason for the absence is and whether that condition is also protected by disability discrimination, in which case advice should be sought before taking any action.

### **What's The Difference Between An Employee, A Worker, And A Self-Employed Contractor?**

An **employee** enjoys full employment rights, including protection against unfair dismissal, statutory redundancy pay and the right to request flexible working.

A **worker** is employed under a contract, and is entitled to certain employment rights such as the national minimum wage, paid annual leave, and protection from unlawful deductions of wages.

A **self-employed contractor**, save for basic health and safety and anti-discrimination entitlements, has no employment rights.

### **Hot Weather Guidance**

ACAS has published guidance to help employers manage workplace challenges due to the hot weather.

- **Workplace temperatures should be reasonable** and refers to the HSE advice on how to carry out a thermal comfort risk assessment if staff are unhappy with the temperature at work
- **Any fans** or air conditioners should be switched on and blinds or curtains should be used to block out sunlight
- Staff working outside should wear appropriate clothes and use sunscreen to protect from sunburn
- Employers must provide staff with suitable drinking water in the workplace. Workers should drink plenty of water throughout the day to prevent dehydration and not wait until they are thirsty
- Employers are not under any obligation to relax their uniform or dress code requirements during hot weather but where possible it may be advisable to for employers to relax the rules for wearing ties or suits
- **Staff should check** public transport timetables in advance in case it gets adversely affected by the hot weather as this could affect staff attendance and their ability to get into work on time
- Some workers may be more adversely affected by the hot weather such as the elderly, pregnant women or those on medication. Employers may wish to give them more frequent rest breaks and ensure ventilation is adequate by providing fans or portable air cooling units
- If Muslim staff are observing Ramadan and fasting during the daylight hours, which involves not eating food or drinking liquids, employers may help those affected by holding meetings in the morning when energy levels are higher or consider a temporary change in working hours.



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## **Same Sex Partners Entitled To Equal Survivor's Pension Benefits**

The Supreme Court has held that same sex partners are entitled to equal survivor's pension benefits.

The partial exemption to the requirement to equalise survivor benefits contained in the Equality Act is incompatible with the Equal Treatment Framework Directive. The part of the Act which authorises a restriction of payment of benefits based on periods of service before 5 December 2005 cannot be reconciled with what the court considered to be "the plain effect of the Directive".

For this reason as long as the employee's husband does not predecease him and they remain married at the time of the employee's death, the husband will be entitled to a spouse's pension calculated on the basis of all the years of the employee's service with the employer. Employers should always take specific legal advice if they are unsure as to a person's entitlement.

## **Paid Parental Bereavement Leave**

A new Bill has been introduced to allow parents who are bereaved following the death of a child to be given statutory paid leave to grieve.

The Parental Bereavement (Pay and Leave) Bill has been introduced following the Government's pledge to "enhance rights and protections in the workplace". Currently, there is no legal requirement for employees to receive paid leave following a bereavement.

The Bill is expected to have its second reading during the autumn following consultation by the Department for Business, Energy and Industrial Strategy with various parties to better understand the needs of bereaved parents and employers.

## **Obese Workers**

What happens if you have inherited an employee through a TUPE transfer who has many years of service with the previous Company but, because of his size, he simply cannot physically do his job properly? The first hurdle to overcome is whether or not he is covered by the Equality Act, 2010. Obesity itself is not protected. However, if his obesity can be associated to a medical condition that is protected, then it may add some complication. You will need to understand the reason for his excessive weight. Is it simply because he eats too much and does no exercise or is it because he has a medical condition which results in weight gain?

Find out more information relating to this individual. Look at his sickness records and the reason for his absence and is there anything on his employment file indicating a medical condition. Then arrange a formal meeting with him, allowing him to be accompanied by a workplace colleague or an accredited trade union official, and discuss with him the issue faced by the company, the impact his lack of ability to carry out his job has on the business and his colleagues and ask him to explain the reasons for his size. Consider whether a medical report is necessary.



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If his obesity could be linked to a disability, consider all reasonable adjustments that could be made to help him. If it is not disability-related, then agree a time scale with him for him to take some action to reduce his weight and review the situation at agreed intervals. If there is no improvement and no good reason, then it will be possible to commence proceedings to dismiss on the grounds of capability.

### **Attending Meetings If You Are Signed Off As Unfit**

There is often a misconception that if an employee is signed unfit to attend work, they cannot be invited to attend meetings about work – whether concerning a consultation, training event or disciplinary meeting.

Where an employee has been signed unfit to work by their GP, this means they are unfit to carry out their normal duties. With some flexibility and adjustments (if necessary), then there is no reason why an employee cannot be invited to or be expected to attend a meeting. Often these meetings may help to alleviate symptoms that may have caused the absence in the first place. Some adjustments can be to hold the meeting at a time and/or place that is convenient to the employee allow them to be accompanied and take breaks.

Have an understanding of your employee's reasons for their absence, what treatment they are receiving so you can ascertain whether it is appropriate to invite them to a meeting and what adjustments you may need to make. For example, they may experience side effects from medication or treatment which mean they would struggle to remain attentive in a meeting. In such instances it would require some additional adjustments.

Where an employee refuses to attend a meeting, a business can ask them to produce a letter from their GP to explain why their condition prevents them from attending a meeting. The business may need to pay for this letter, but it would help to ensure, whatever process the business is following, i.e. disciplinary or capability, to remain on track.

### **Potential Job Candidates And Social Media**

You may have seen press reports recently in respect of the potential pitfalls faced by employers who use social media to check on potential job candidates. An EU data protection working party has rules that employers require "legal grounds" before carrying out such activity which can be deemed as "snooping".

Currently, these recommendations are not binding but will most likely influence changes to data protection laws, due to come into force in May 2018.

Existing guidance for employers in terms of data protection should continue to be followed. This means that employers need to inform job applicants if they are proposing looking at social media profiles to enable the applicant the opportunity to comment. It goes without saying that any searches should be proportionate and relevant to the role being applied for.



It is highly likely that the changes to data protection rules next year will tighten the enforcement of these guidelines. Employers would therefore be wise to stay ahead of the game to avoid potential pitfalls.



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