



## CHILTERN HR NEWSLETTER MARCH 2016

### THE NATIONAL LIVING WAGE

Regulations introducing the National Living Wage (NLW) and increasing the financial penalty payable by employers who underpay have now been made.

The Regulations, which will come into force on 1 April, introduce the NLW rate of £7.20 an hour for workers aged 25 and over. This means that from 1 April the minimum rates will be as follows:

<u>Age</u>	<u>Amount</u>
25 or over	£7.20
21 to 24	£6.70
18 to 20	£5.30
Under 18	£3.87

The apprentice rate, which applies to apprentices who are in the first year of their apprenticeship, will remain at £3.30 regardless of their age.

The Regulations also increase the financial penalty payable by employers who underpay the National Minimum Wage (including the NLW) from 100% to 200% of the underpayment due to each worker.

### COMMISSION SHOULD BE INCLUDED WHEN CALCULATING HOLIDAY PAY

The Employment Appeal Tribunal has held that results based commission should be included when calculating a worker's four week entitlement, under European law, to holiday pay where the worker has normal working hours and their remuneration includes commission.

#### What does this mean?

Commission should be included when calculating four weeks holiday pay, although it need not be included when calculating the additional 1.6 week statutory entitlement provided by UK law.

The question of what is an appropriate reference period for averaging pay, however, remains unclear.

#### What should employers do?

Employers should consider taking into account commission pay when calculating statutory holiday pay for the four weeks holiday entitlement provided by the Working Time Directive. A calculation based on a 12 week reference period may be a sensible approach. Alternatively they should set aside funds to cover any claims in respect of holiday pay they may receive in the future.



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## **GENDER PAY GAP REPORTING**

The government has published draft regulations on gender pay reporting, which will require private and voluntary sector employers with at least 250 employees to publish figures on gender pay within their organisation.

Employers covered by the regulations will have to:

- publish the overall mean and median difference between male and female pay across their workforce
- publish how many men and women appear in each of 4 salary quartiles, based on the employer's overall pay range
- publish the mean difference between what men and women receive by way of bonuses
- publish the figures annually on their website and leave them there for at least 3 years
- submit evidence of compliance to the government annually

The regulations are expected to come into force on 1 October 2016. Employers will have to produce a preliminary data snapshot by 30 April 2017 and have publically reported their pay gap information by 30 April 2018.

The regulations do not contain any enforcement mechanism or any sanctions for employers who don't comply.

## **CRIMINAL RECORDS DISCLOSURE SCHEME HAS BEEN SUCCESSFULLY CHALLENGED**

The High Court has ruled that the present criminal records disclosure scheme is incompatible with article 8 of the European Convention of Human Rights because the scheme lacks the machinery for testing the proportionality of interference with article 8 rights, which is required if the scheme is to be lawful.

### What does this mean?

The present scheme is not in accordance with the law because the filtering mechanism introduced by the government in 2013 is inadequate. This is because minor convictions, which were committed long ago and not relevant to an employee's employment now, are disclosed under the present scheme and the requirement to disclose such convictions is arbitrary and not necessary or proportionate.

### What should employers do?

Employers who are concerned about whether they should carry out DBS checks and what they should do with the information in the event that there are disclosures of spent convictions should take specific legal advice.



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## **DISMISSAL FOR DISCLOSURE OF CONFIDENTIAL INFORMATION WAS WRONGFUL AND UNFAIR**

A tribunal has held that a summary dismissal for disclosure of confidential information was wrongful and unfair as the employer had a culture of information sharing.

### What does this mean?

It is insufficient for an employer to rely on a strict reading of its policies and codes of practice on protecting confidential information without properly investigating how the policies are actually applied in the business or the extent to which the information was already in the public domain.

### What should employers do?

Employers should always take specific legal advice before dismissing an employee or taking action short of dismissal.

## **LAY OFF PERIOD DID NOT HAVE TO BE REASONABLE**

The Employment Appeal Tribunal has held that there is no implied term in an employment contract that a lay off period should be reasonable.

### What does this mean?

As there is no implied term of reasonableness in a contractual provision allowing employees to be laid off or put on short time working for an indefinite period without pay, an employee who resigns after being refused redundancy may find it hard to argue that they have been constructively unfairly dismissed.

In this case there had been a genuine downturn in work that had led to the employer operating a contractual lay off clause, and the employer had legitimately followed the statutory scheme under which a redundancy payment does not have to be paid if there is a reasonable expectation that further work will become available within four weeks.

It is, however, possible to imagine a scenario where an employer, faced with a lack of orders or a downturn in work, acts in such a way as to amount to a breach of the implied term of mutual trust and confidence. In this case there was no suggestion that the employer had manipulated the lay off or short time working provisions for its own economic benefit, at the expense of its employees.

### What should employers do?

Employers laying off staff or placing them on short-time working should act reasonably.



## **TEMPORARY CESSATION OF WORK AND TUPE**

The Employment Appeal Tribunal has held that a temporary cessation of work by a subcontractor did not preclude a TUPE business transfer or service provision change. A temporary cessation is just one of the relevant factors which will be taken into account in deciding whether a transfer has occurred. Tribunals will consider the length of the cessation and the purpose or reason behind it. Employers should take specific legal advice in circumstances where TUPE may apply.



## **DATA PROTECTION SELF-ASSESSMENT TOOL**

The Information Commission's Office has launched a new data protection self-assessment tool.

The tool is aimed at helping small and medium sized organisations assess their compliance with the Data Protection Act and find out what they need to do. The tool generates a rating based on responses.

## **BULLYING IN THE WORKPLACE**

- Bullying in the workplace is normally based on a misuse of power. There is evidence that the incidence of workplace bullying is rising, mainly due to changes in working practices and increased economic pressures. Bullying can have a significant impact on the victim's mental and physical health, leading to increased sickness absence and lower productivity. It can also have a negative effect on morale, and may cause the employee to resign
- Anti-bullying measures should focus on prevention, which requires everyone in the organisation to be committed to creating a culture of dignity and respect. Employers should establish an anti-bullying policy that articulates their commitment to dignity and respect in the workplace and sets out their approach to preventing and addressing bullying. An anti-bullying policy is of little value unless the organisation communicates its existence and contents effectively to employees at all levels



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## IN THE PIPELINE

BIS has published a plan setting out its aims during the current government. These include:

- The introduction of up to three days a year volunteer leave for people working in large companies and the public sector
- The repeal of the restriction on employers hiring agency staff to provide essential cover during strikes
- Tackling illegal working and exploitation
- Increasing the National Living Wage to £9 an hour by 2020.



Separately, BIS has published the government's response to a consultation on reforming the recruitment sector. It plans include banning employment agencies and businesses from recruiting solely from other European Economic Area countries without advertising in Great Britain.

An employment law specialist can make a big difference to your business, providing the support and guidance you need to prevent damaging or expensive tribunal claims against the company. If you do not have an in-house employment law specialist, Chiltern Solicitors are on hand to provide the experienced and professional support you need.

There are countless potential issues relating to employment law, including workplace bullying, maternity leave, holiday pay, health and safety regulations, as well as numerous other essential legal obligations.



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