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CHILTERN HR NEWSLETTER SEPTEMBER 2016

Increase in auto enrolment contributions is postponed

Employers have a duty to auto enrol certain workers into a qualifying workplace pension scheme and pay minimum level contributions into it.

The minimum required levels of contributions are being phased in over a period of time.

Regulations come into force on 1 October postponing the increases by six months so that they will be aligned with the beginning of the relevant tax years.

The minimum amount employers currently have to contribute is 1%. This was to rise in October 2017 and then again in October 2018. However, those dates have now been amended meaning that the minimum employer contributions will be as follows:

Until 5 April 2018	1%
From 6 April 2018	2%
From 6 April 2019	3%

Employers named and shamed for non-payment of the National Minimum Wage

The largest ever list of National Minimum Wage offenders has been published by the Department for Business, Energy and Industrial Strategy (BEIS).

Almost 200 employers have been named and shamed including football clubs, hotels, care homes and hairdressers. The £466,219.00 owed to their workers has been paid back to them.

Meanwhile a report by the UK Commission for Employment and Skills (UKCES) has revealed how businesses in the hospitality and retail sectors have sought to overcome the challenges brought by the introduction of the National Living Wage in ways which could benefit both their businesses and their staff.

The report tested how businesses in the retail and hospitality sectors can address problems, such as not being able to retain staff and knock on problems of poor customer service and high recruitment costs, by supporting pay and career progression for low paid staff.

Projects undertaken showed that businesses can find other ways to cover the costs of the National Living Wage by changing the way they run their business, making low paid jobs more interesting to staff and more valuable to the business.

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Guidance on race hate incidents

The Chair of the Equality & Human Rights Commission has published an open letter to employers following the increase in race hate incidents since the EU referendum.

It advises employers:

- To be clear that racism and racial harassment will not be tolerated
- To make sure employees understand the standards of behaviour they can expect from colleagues and customers and that are expected of them and, if the employer recognises a trade union, to include them in discussions
- To be vigilant in spotting and dealing with any behaviour which could amount to discrimination, harassment or hate incidents in the workplace
- That any discussion of contentious political issues at work should be conducted sensitively and with respect for the views and positions of others
- To ensure that line managers have access to appropriate information and training so that they can manage difficult situations that may arise and support employees who may be feeling vulnerable and facing uncertainty
- To make sure employees know what to do if they experience discrimination, harassment or a hate incident.

The Equality & Human Rights Commission has also published a flyer providing information for employees who are worried about racism, which it is encouraging employers to display on workplace notice boards.

Employer failed to make reasonable adjustments for disabled employee

The Employment Appeal Tribunal has upheld a tribunal's decision that an employer failed to make reasonable adjustments for a disabled employee, who suffered from a heart condition, in requiring her to move to a unit where she would be required to do a great deal of heavy lifting and for deciding to put her on the Bradford Scale (a sickness absence monitoring mechanism) on her return to work following a period of long term sickness absence and for constructive dismissal.

The employer had a precise definition of the employee's condition and was in a position to obtain further information about it and knew that the employee was saying that the working arrangements were disadvantageous and were unfavourable treatment. The employer could have reviewed the rotas and accede to the employee's request to work at the unit where less lifting was needed but they did not consider this adjustment.

By putting her on to the Bradford Scale as a result of long term absence, which in turn was a consequence of her disability, the employee was disadvantaged. There was no justification for the failure to make reasonable adjustments.

As for the constructive dismissal claim, there was a fundamental breach of contract by the employer.

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Employers should always make reasonable adjustments for disabled staff and if they are unsure whether a member of staff is disabled or not they should obtain further information.

No discrimination where job applicant applies for job to bring a claim

The European Court of Justice has held that a job applicant is not entitled to protection from discrimination where they have only applied for the job in order to seek compensation rather than employment.

Where an individual applies for a job only in order to seek compensation for discrimination, and not to obtain employment, they will not be protected by discrimination laws. The purpose of discrimination laws is to protect those in employment or seeking employment and an individual who applies for a job only in order to bring a claim could not be said to be seeking employment. Neither would they be a victim of discrimination nor have suffered loss or damage and, therefore, they would not be entitled to compensation. Also EU law cannot be relied on for abusive or fraudulent ends.

In 2009 the Employment Appeal Tribunal held that job applicants who would not be interested in accepting a job if they were offered it cannot claim discrimination if the application is unsuccessful so this latest judgment bolsters that decision.

Employers should have systems in place to minimise the risk of discriminating against job applicants.

English language requirement for public sector workers code of practice

A requirement that public sector workers in customer facing roles speak fluent English, or in Wales fluent English or Welsh is expected to be introduced in October.

To help organisations comply with this new statutory duty once it comes into force, the Government has published a draft statutory code of practice this will be laid before Parliament in October.

The code explains how public authorities should determine the necessary standard of spoken English (or English or Welsh in Wales) to be met by their customer facing staff, the appropriate complaints procedure to follow should a member of the public consider that the required standard has not been met and the appropriate forms of remedial action which may be taken if a member of staff falls below the standard required.

Employers who employ illegal workers face business closure

As part of the government's plans to crack down on illegal working, employers who employ foreign workers illegally could face temporary or continued closure.

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The power to shut down businesses who employ illegal workers is one of many measures contained in the Immigration Act 2016 aimed at tackling illegal working. It is not yet clear when this new power will come into force.

When it does come into force, a chief immigration officer will have the power to issue an employer with an Illegal Working Closure Notice, where he or she reasonably suspects that the employer is employing foreign workers illegally and the employer, or someone closely connected to the employer (such as a co-director or business partner), has previously committed one of the offences of illegal working set out in the Act.

An Illegal Working Closure Notice will prevent access to the employer's premises (except by a person who habitually lives there or unless an immigration officer has given written authorisation) and paid or voluntary work at the premises will be prohibited (unless an immigration officer has given written authorisation).

Before issuing an Illegal Working Closure Notice the chief immigration officer will have to make reasonable efforts to inform people who live on the premises (whether habitually or not), and any person who has an interest in the premises, that the notice is going to be issued. He or she will also have to consult with any person he or she thinks it appropriate to do so.

An Illegal Working Closure Notice will last for a maximum period of 48 hours.

Unless the notice has been cancelled, an immigration officer will have to make an application to court for an Illegal Working Compliance Order, which can, among other things, prohibit or restrict access to the employer's premises for a period of 12 months. This can be extended for a further period of 12 months in certain circumstances. *Reference: Section 38, Immigration Act 2016*

Voluntary overtime should have been including when calculating statutory holiday pay says tribunal

An employment tribunal has held that voluntary overtime and voluntary standby allowances, voluntary call out payments (and mileage payments) should have been included when calculating the statutory holiday pay due to workers who don't have normal hours of work.

Allowing their claims for unlawful deductions from wages, the tribunal having regard to the principle established by previous case law that an employee should not be deterred from taking leave and taking into account case law on what constitutes 'normal pay', it concluded that the additional elements should be included in holiday pay in relation to most of the workers.

It said that in relation to voluntary overtime, where overtime was regularly worked, this should be included in normal pay. In relation to one individual who rarely worked overtime, it said that this did not need to be included in normal pay.

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The tribunal said that although the rotas were voluntary, once an employee's name was on the rota, they were required to attend the workplace or be available so the payments were intrinsically linked to the work required to be done under the contract by the worker.

Decisions of employment tribunals are not binding so the position as to whether voluntary overtime and other allowances need to be taken into account remains unclear.

Employers who employ staff who don't work normal hours of work should include voluntary overtime and other payments associated with rotas worked voluntarily when calculating statutory holiday pay or budget for possible future claims.

Reporting on the gender pay gap; some known unknowns

Large employers will be obliged to publish information about their gender pay gaps.

We know that regulations must be introduced by 26 March 2016 that will make it compulsory for organisations with 250 or more employees to publish information about the difference in pay between men and women. This will need to include details of the gap in bonus payments.

However, further details of what this means for employers are yet to be disclosed, including the particulars that they will need to provide and where the information should be published.

Note: *Changes to employment law come into force in April and October every year, so you need to make sure your contracts are updated.*

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