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COVINGTON & BURLING LLP

E-ALERT | Employment

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SPRING / SUMMER 2014 - SUMMARY OF U.K. EMPLOYMENT LAW CHANGES

Several important changes to U.K. employment law are due to come into force on 6 April 2014 or shortly thereafter. The key changes are discussed below. Common themes include measures to reduce the administrative burden on businesses (e.g., the abolition of discrimination questionnaires and the removal of record-keeping requirements for statutory sick pay), and to promote early settlement of disputes (e.g., the introduction of a mandatory early conciliation process to facilitate settlement and discretionary fines for unreasonable behaviour by employers who subsequently lose in litigation).

Mandatory Early Conciliation

From 5 May, following a transitional period commencing 6 April, any employee wishing to file a claim at the employment tribunal ("ET") will first be required to present details of a claim to the Advisory, Conciliation and Arbitration Service ("Acas") for mandatory early conciliation ("EC"). The new EC requirement will apply to most categories of claim, with certain limited exemptions (for example, where the claimant is applying for interim relief).

The employee will be required to notify Acas of the name and address of the employer. With the employee's consent, Acas will then contact the employer and will offer EC for a prescribed period of one month, during which time the parties may attempt (but will not be compelled) to settle their dispute with the assistance of an Acas conciliator. The Acas conciliator will provide claimants with information about the law and make them aware of any applicable limitation period. He/she will not offer an opinion on the merits of any prospective claim.

If either party refuses EC, or the EC process is unsuccessful, Acas will issue an EC certificate confirming the dates on which the EC process was commenced and completed. Only then will the claim be able to proceed to the ET (if the claimant were to issue a claim in the ET without an EC certificate, the claim would be rejected automatically).

If the parties do enter into EC, this will "pause the clock" on the employee's limitation period to submit their claim to the ET (most employment claims are subject to a three month limitation period). Time will restart on the day after Acas issues an EC certificate to the claimant, with the limitation period extended to one month after such date.

The government's aim in introducing EC is to reduce the burden on an overloaded ET system. The introduction of filing fees in the ET in July 2013 is reported to have already reduced the number of claims filed by 79 per cent for October to December 2013, compared with the corresponding quarter the previous year. The success of the EC program remains to be seen; many commentators are sceptical about whether Acas is adequately resourced to cope with the significant increase in its workload.

Discrimination Questionnaires Abolished

Formal discrimination questionnaires will be abolished on 6 April. Currently, an employee may use this questionnaire to present a complaint to the employer, setting out the treatment he/she believes to be unlawful. The employee may also use the questionnaire to pose specific questions to the employer regarding the alleged treatment. When presented with a discrimination questionnaire by an employee, employers are legally obliged to respond. Failure to respond to the questionnaire is likely to result in adverse inferences being drawn, if a claim later proceeds to the ET.

From 6 April, there will no longer be a statutory requirement to respond to such questionnaires. The repeal follows a government consultation in which it was opposed by over 80% of respondents. Many supported the questionnaire on the basis that it gave employees an opportunity to gather evidence before deciding whether to commence ET proceedings, and offered the potential for early settlement. However, the government considered that the questionnaire placed an unnecessary administrative burden on business.

Tribunal Penalties for Losing Employers

From 6 April, tribunals will have discretion to order financial penalties to be paid by losing employers, in addition to any compensatory award, where it is found that the employer has breached the employee's rights and the breach has "one or more aggravating features." What amounts to an aggravating factor is not explained, but it is likely to require unreasonable behaviour (i.e., negligence or malice), rather than genuine mistakes on the part of the employer.

Where aggravating features are identified, the ET will be able to impose a fine of between £100 and £5,000. The ET's discretion will allow it to take account of the employer's size and resources, the duration of the breach, and the behaviour of both the employer and the employee. However, if the ET also makes a compensatory award to the employee, the fine it imposes must amount to 50% of that compensatory award (although still subject to a maximum of £5,000). The fine may be "discounted" by 50% if paid within 21 days.

Statutory Sick Pay Regime & New Health and Work Assessment and Advisory Service

The legislative requirement for employers to keep records of sickness absence and statutory sick pay ("SSP") for three years after the end of each tax year will be abolished from 6 April in an attempt to reduce the administrative cost to business. Employers will still be required to keep sickness records for PAYE purposes, but will now be able to set up a risk-based approach to SSP record-keeping.

Employers will still be able to claim reimbursement from the government of SSP paid for sickness periods up to 5 April until the end of the 2015/2016 tax year.

Later in the year, we expect the government to introduce its state-funded health and work assessment and advisory service to assist in situations of long-term sickness absence. The service is intended to reduce the cost-burden for employers of managing employees on sick leave by providing assessments by occupational health professionals for employees off sick for 4 weeks or more, and case management and support for employees with complex needs to facilitate their return to work.

Flexible Working

From 30 June, the new Children and Families Act 2014 will extend the statutory right to request flexible working, which is currently available only to registered carers and parents of children aged 16 or under, to all employees with at least 26 weeks' continuous service. Employers will no longer be obliged to follow a statutory procedure on receipt of a request but to consider all requests in a reasonable manner and within a reasonable period of time. Employees will be limited to making only one request per year.

Regardless of whether the new legislation applies, female employees with caring responsibilities may be able to challenge an employer's decision to refuse a request for flexible working on grounds of indirect sex discrimination. Employers should, therefore, continue to give careful consideration to such requests. A well-drafted policy will help to reduce the risk of claims.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our international employment practice group:

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