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NEWS FROM THE **HR TEAM**

PROPOSALS FOR FLEXIBLE, SHARED PARENTAL LEAVE AND PAY

In November 2012, the Government announced its decision to proceed with the extension of the right to request flexible working.

Currently, employees only have the right to request to work flexibly if they are parents of children under the age of 17 (18 if disabled) or if they are "carers". They must have 26 weeks' continuous employment and their employers are obliged to consider their request. Only one request may be made in any 12-month period.
This right will become available to all employees from 2014, provided they have 26 weeks' continuous employment. The requirement to be a parent or carer will be removed.

PARENTAL LEAVE INCREASE IN AGE OF CHILD

From 2015 each parent will be able to exercise the right to take unpaid parental leave in relation to children up to the age of 18.

The cut off age at the moment, however, is five.

INCREASE TO STATUTORY REDUNDANCY PAY FROM 1 FEBRUARY 2013

A week's pay for the purpose of statutory redundancy pay is subject to a cap.

This increased to £450 from £430 on 1 February 2013.

INCREASE TO THE PERIOD OF PARENTAL LEAVE FROM 8 MARCH 2013

The Parental Leave (EU Directive) Regulations 2013 comes into force on 8 March 2013. Regulation 3 makes the following change to the 1999 Regulations.

The entitlement to parental leave of a qualifying employee increases to 18 weeks from 13 weeks in its current form. This is in respect of an individual child.

BRIBERY ACT TWO YEARS ON

Two years ago, firms were being warned to get ready for a new Act which came into force on 1 July 2011, creating a new offence of failing to prevent persons associated with a company from bribing another person on its behalf.

The Government made it clear that "reasonable and proportionate corporate hospitality", intended to promote normal business relationships, were unlikely to give rise to any concerns under the new Bribery Act.

However, according to analysis by accountants Ernst & Young, very little else seems to have been caught by the legislation.

Only eight cases of bribery and corruption have been completed in the UK in the past year, Ernst & Young found, yielding penalties of less than £8million. And this is despite indications that bribery and corruption has risen during the economic downturn.

The firm's UK Bribery Digest shows that the Serious Fraud Office (SFO) completed only four cases in the past year (two criminal and two civil settlements) while the Scottish authorities completed just one.

Yet Ernst & Young's Global Fraud Survey shows that bribery and corruption has risen over recent years, with 15% of executives saying they would contemplate unscrupulous behaviour including providing personal gifts or cash to secure business.

Fraud Investigation and Dispute Partner Jonathan Middup said: "In particular, it continues to be a point of debate that there have still been no corporate Bribery Act cases 18 months after the legislation came into force. Businesses feel that an artificial war is being fought at the moment."

The SFO has however said that it has 11 active bribery and corruption cases and a further 18 under consideration.

Ernst & Young concludes therefore that corporate Bribery Act cases will be brought into the public arena this year and advises that organisations would be unwise to hold back on their compliance programmes just because the courts are currently quiet

EMPLOYEE-OWNER CONTRACTS

The Government has announced that it will introduce a new type of contract, called an "employee-owner contract". Legislation to bring in this new type of contract was expected to be in force as from April 2013, and is aimed primarily at rapidly growing small and medium-sized businesses that want a flexible workforce (although companies of any size will be able to use the new-style contracts). We've not heard anymore on the implementation of this so watch this space. Need I say, this hasn't been very well received, it seems that out of 219 consultation responses, only 5 welcomed it. So how willl it work?.

How the employee-owner contract will work

Under the new employee-owner contract, an individual would, in return for a shares allocation worth between £2000 and £50,000 (which will be exempt from capital gains tax), be required to give up certain rights, including the right to claim unfair dismissal and statutory redundancy pay, the right to request flexible working and the right to ask for time off for training. An employee on this type of contract will also be required to give 16 weeks' notice (instead of eight) in order to return to work early from maternity leave or adoption leave. The right not to be discriminated against, working time rights and other rights derived from EU legislation will not be affected.

All types of shares will be eligible for use in the new type of arrangement and their allocation will form part of the employee-owner's contract. However, it is likely that companies will be able to impose restrictions on the shares they issue in order to protect themselves.

The Government has stated that it will implement anti-avoidance measures, but it is not yet known what these are likely to be. It is also not yet clear whether there will be any restrictions on eligibility.

Options for employers and employees

Established employers and new start-up companies will be free (if they wish) to make offers of employment conditional upon the new recruit accepting employee-owner status, thereby effectively forcing new staff into accepting the arrangement if they want the job. For existing employees, the new status will be optional.
An existing employee with two or more years' service who is offered a new employee-owner contract will need to consider carefully whether he or she wants to "sell off" his or her unfair dismissal and redundancy rights.

On the other hand, an employee who has less than two years'continuous service could potentially be forced into agreeing to a new-style contract, if the employer were to terminate his or her existing contract and offer re-employment conditional upon him or her agreeing to be an employee-owner. In this scenario, the employee would have little in the way of bargaining power because he or she would not be eligible to bring an unfair dismissal claim due to lack of service. So, although the Government has stated that the new employee-owner status will be optional for existing employees, it seems that employers will be able to force the issue in some cases.

What if the employee-owner leaves the company?

If an employee-owner leaves the company, and the company wishes to buy back the shares, it will have to do so at "a reasonable price". This will be the case irrespective of whether the employee-owner leaves voluntarily, is made redundant or is dismissed for another reason. This aspect of the employee-owner contract could prove to be quite complicated, as putting a reasonable value on the shares could lead to disputes (especially if the termination of employment is acrimonious), and hence be costly for the employer. It is not yet clear what "reasonable price" means in this context, how the shares value will be calculated, who will pay for a valuation and what will happen if the company is unwilling, or unable, to pay.

The Government's view

The Government believes that this new type of contract will create a more engaged workforce — because individuals will own part of the company they work for and will therefore have more of a vested interest in working hard to make it successful. They also believe that the introduction of employee-owner contracts will lead to an increase in recruitment because the companies that use them will not need to worry about the possibility of tribunal proceedings should they need to dismiss an employee-owner.

Implications

Although the principle of increasing employee participation and commitment in line with the success of a business may be a good idea in theory, it remains doubtful whether employee-owner contracts will be popular. The notion that companies decline to recruit new staff because of the fear of unfair dismissal claims has no foundation in fact, a point clearly established prior to the Government's decision to increase the qualifying period for unfair dismissal from one year to two years (from 6 April 2012). Companies recruit staff because they need to fill vacancies or simply because there is more work to do. Additionally, companies recruiting staff on employee-owner contracts will not be protected altogether from tribunal claims as employee-owners will still have a range of employment rights, such as the right not to be discriminated against, whistleblowing rights, and the right not to be dismissed for a range of reasons that are classed as automatically unfair.

It may also be doubtful whether small businesses will have the resources to commit to setting up an employee-owner scheme and, importantly, whether they are likely to be willing to offer shares to their staff— especially new staff.

It is also questionable how attractive employee-owner contracts will be to individuals, who may be reluctant to give up their key employment rights. Being a shareholder does not inevitably mean having a greater role in the management of the company — this will depend on what other rights are bestowed on the employee as a shareholder. Another major area of concern is likely to be the fact that many start-up businesses fail, and employee-owners who have invested a great deal of time and effort in a new company may find they are left not only with an allocation of shares that has no value, but also with no employment rights on termination.

There will be other concerns, including what the realistic chance is that employees of the company in question will benefit financially by owning shares and whether, if they want to sell them, they will be able to do so at a profit or even at all. Additionally, although any increase in the value of the shares awarded under an employee-owner contract will not be subject to capital gains tax, the Government has said that income tax will be due on the value of the shares.

On the plus side, research has shown that employee-owned companies are more profitable, employees are incentivised, there are lower levels of sickness absence, and employees are, in general, happier.

HARASSMENT

Law firm Maxwell Hodge has given the annual warning that an office love affair can leave employers facing huge pay outs, reminding them that they can be held liable for the misconduct of their employees unless they are able to show that they have attempted to prevent such behaviour.

Employment lawyer Heather Grant explained: "Many firms don't have policies in place covering the fallout from office romances, but they are leaving themselves open to potentially damaging and expensive legal claims."

Issues tend to arise more when a relationship breaks down, she continued, but, even at the start of a relationship, and particularly when involving a manager and their subordinate, it can lead to accusations of favouritism from other employees.

A written policy must be in place addressing harassment, Ms Grant advised.

This policy should send a strong message that any kind of harassment, be it sexual or not, will not be tolerated and that employees are expected to act professionally at all times even if they are in a romantic relationship.

It should set out whether the employer expects to be told about any office romance or just one between a manager and subordinate. It should make clear how any concerns about harassment can be reported and what steps the business will take when faced with such an allegation

RISE IN RATE OF STATUTORY ADOPTION, MATERNITY AND PATERNITY PAY FROM 7 APRIL 2013

The standard rate of Statutory Adoption, Maternity and Paternity Pay is set at £136.78 per week for 2013/14 from 7 April 2013. The previous rate was £135.45 per week.

The lower earnings limit is set at £109 per week for 2013/14. The previous rate was £107 per week

Proposed changes to adoption rights

The Government has announced proposed changes to the adoption system, which aim to increase the number of adoptions as follows.

- Prospective parents will be given time off work to meet the children they are due to adopt before they move in with the family. It is not yet known whether this time off will be paid or unpaid.
- Adoption pay will be brought into line with maternity pay and eligible adopters will be entitled to receive 90% of their weekly earnings for the first six weeks of adoption leave.
- Adoption Activity Days are to be encouraged to allow adopters a more active role in the adoption process, with the chance to make a connection with a child in advance and play a greater role in finding the right match.
- The Children and Families Bill 2012-13, introduced in the House of commons on 4 February 2013, will implement a new system of shared parental leave and pay, time off work for ante-natal and adoption appointments and an extended right to request flexible working.
- In relation to shared parental leave and pay, eligible adopters as well as birth parents will be able to benefit from the new system. Adoption leave and pay will also be extended to prospective parents in the "fostering to adopt" system, and also to eligible parents in a surrogacy situation.

It is not known exactly when these rights will come into force but it is thought to be some time in 2014 or 15.

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RECORD NUMBER OF BRITISH WORKERS ON **"ZERO HOURS" CONTRACTS**

You may well have read about this in the papers recently, but official figures show that the number of Britons on "zero hours contracts", whereby staff are kept on standby without any guarantee of actual work or pay, has almost doubled during the last year.

While the Government last month announced that employment levels have risen to 29.73 million during the last three months of 2013, nearly 200,000 were employed on "zero hours" contracts over the same period in arrangements which, UNISON claims leaves workers"open to abuse".

The contract legally allows firms to employ staff, often in low-paid jobs, without any guarantee of actual work or income in exchange for some flexibility — workers may turn down work or even go and work in other jobs as they are not contracted to work any hours.

Almost a quarter of Britain's major employers use "zero hours" contracts, including the House of Lords, Boots, Bupa, Cineworld, Centerparcs and the NHS. The Co-op employs around a fifth of its funeral staff this way.

While there is seasonal variation in the number of people employed under "zero hours" contracts — rising in the run-up to Christmas and falling through the summer — in 2005 there were 55,000 people on "zero hours" contracts. This rose to 110,000 between April and June last year, before nearly doubling to 200,000 between October and December.

The TUC criticised the trend as a sign of "desperation",but others have defended the contracts, claiming they help keep unemployment levels down by providing at least some work to those who would otherwise be without jobs.

RIGHT TO TAKE PILGRIMAGE LEAVE?

New guidelines issued by the Equality and Human Rights Commission (EHRC) require employers to "consider seriously" adapting employees' work duties to suit their beliefs, meaning that, among other things, druids will be able to go on pilgrimages to sites such as Glastonbury and Stonehenge, and vegans can refuse to clean office fridges containing dairy or meat.

The EHRC guidance, Religion or Belief in the Workplace: a guide for employers, was issued in response to a series of judgments and the landmark decision by the European Court of Human Right (ECHR) to allow Christians to wear a cross at work. Similar rights will now be extended to others with profound personal beliefs, including druids, pagans, vegetarians, ecologists, Zoroastrians and atheists.

Under the new guidance, workers will be able to legitimately ask for leave to attend religious festivals or to be excused from duties that contravene their beliefs — Muslims will be able to request time off to visit Mecca, Christian nurses will be able to pray for patients (unless the patient objects) and ecologists can ask not to fly to business meetings or to sit on a leather chair. Religious people may also seek to promote their beliefs or distribute leaflets, so long as this is done in a way that is not intimidating, hostile or offensive to others.

However, although the guidance asks all employers to "review workplace policies and practices to ensure that they do not unjustifiably discriminate against an employee who requests a change due to a particular belief", the EHRC also says employers can ignore a request"when they reasonably conclude that the belief is not sincere".

NEW CHILDCARE SCHEME FROM AUTUMN 2015

The Government has announced plans to introduce a new childcare scheme from Autumn 2015.

Under the scheme, which is available to families with working parents as long as neither parent earns more than £150,000 a year, the Government will meet childcare costs up to £1200 a year (the equivalent of basic rate relief on childcare costs of £6000).

The scheme will originally cover childcare for children under 5 and disabled children under 16, but will be extended to cover childcare for children under 12. The existing tax exemptions for employer-supported childcare and childcare vouchers will be phased out once the scheme is introduced

CASE LAW

IN COURT: **REQUIRING A CHRISTIAN TO WORK ON A SUNDAY COULD BE JUSTIFIED**

In the recent case of Mba v Mayor & Burgesses of the London Borough of Merton, UKEAT/0332/12, the EAT had to consider whether a Christian care worker was indirectly religiously discriminated against when required to work on Sundays.

Ms Mba worked in a residential care home, which usually had four or five children staying there. At any one time, three members of staff had to be on duty: a team leader and two residential care officers. There were five full-time members of staff, but there was a requirement for nine staffing posts in total, so bank and agency staff filled the four vacant posts. The cost to the council of using agency staff to work weekends, rather than the full-time staff, was higher than it was for weekdays.

When Ms Mba started working for Merton, they initially tried to accommodate her request not to work on Sundays. After a couple of years, they said that she would be scheduled to work two weekends in three in accordance with the normal rota that all other staff were subject to. She failed to work the Sundays that she was rostered for and was disciplined as a result, so she resigned.
She subsequently brought a claim for religious discrimination.

The tribunal found that the council had legitimate aims, which were: to ensure that there was an appropriate gender balance on each shift, an appropriate seniority mix on each shift, a cost-effective service in the face of budgetary constraints, fair treatment of other staff and continuity of care for the children.

As a result, although the requirement did impact on Ms Mba's religious observance, the tribunal found that Merton was acting in a proportionate fashion as it made efforts to accommodate her for two years and was still prepared to arrange Sunday shifts in a way that enabled her to attend church.
Ms Mba appealed to the Employment Appeals Tribunal, which upheld the tribunal's decision.

Practical considerations
As with all cases of this type, the decision is very fact-specific. Here, there were only five full-time members of staff, caring for a small number of vulnerable children who needed continuity of care, and a balance of genders and seniority in those looking after them. It was also accepted that the additional cost of using bank staff to cover Sundays was not reasonable given the budgetary constraints that the council operated under. Clearly, a large employer with greater numbers of employees and greater resources may find it more difficult to justify such an approach.

ONYANGO V BERKELEY SOLICITORS

Mr Onyango made a protected disclosure (often known as 'whistleblowing disclosure') after leaving his job at a firm of solicitors.

When he was then investigated by the Solicitors Regulation Authority following allegations of forgery and dishonesty, he claimed that the allegations had been made because of his protected disclosure.

The employment tribunal held that because he had made the disclosure after his employment had ended, and not during it, he was not covered by whistleblowing laws and his claim could not be heard.

The Employment Appeal Tribunal (EAT) overturned that decision. Whistleblowing protection is not limited to disclosures made during the relevant employment, the EAT said. So tribunals can hear claims that relate to alleged detriments suffered because of protected disclosures made after employment ends.

LOCKWOOD V DWP

Ms Lockwood took voluntary redundancy from her administrator's role at the Department for Work and Pensions

She received £10,900 after nearly 8 years' service. She was 26. Had she been over 35 with the same level of service she would have received £17,700 more. This, she claimed, was discriminatory.
The tribunal found against her. On appeal, the DWP argued that it was not right to compare Ms Lockwood's age group with over 35s. Older workers find it more difficult to get a new job, and the enhanced redundancy terms reflected this.

The Employment Appeal Tribunal accepted that argument. It held that even if it were right to compare the two age groups and if Ms Lockwood had been treated less favourably, the treatment was objectively justified. The DWP was giving older workers a financial cushion and it was in the public interest to do so. The enhanced voluntary redundancy pay for that age group was a proportionate means of achieving a legitimate aim.

A reminder that when it comes to treating staff of different ages differently, objective justification is everything.

Over the last couple of years the number of cases reaching Tribunal has hugely increased, it is thought to be by more than 50%. Many of you may have experienced this for yourselves, the increases being driven by disputes about equal pay, unfair dismissal, age, sex, race and disability discrimination.

With this being high on the agenda, we are able to offer our clients with not only hands on consultancy but also, an insured/legal expenses cover of up to £75,000 per claim.

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