

Friday 9 March 2018

TEAM National Networking Conference

What's New & Upcoming?

An Employment and Recruitment Law Update

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What's New and Upcoming?

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General Data Protection Regulation [GDPR]

GDPR



Background

- Current Data Protection legislation = Data Protection Act 1998
- Since 1998, significant changes in technology and in the way individuals and companies communicate and share information
- **Solution?**

European legislation enacted: General Data Protection Regulation to effectively replace Data Protection Act 1998

- **When?**

Directly applicable in EU member states from **25 May 2018**

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GDPR

Key changes



- Greater emphasis on employer data transparency and accountability. Employers will need up-to-date records on how they have obtained, processed and stored data;
- The ‘Processor’ and the ‘Controller’ will now **both** be on the liability hook;
- Enhanced rights for individuals, including the right to: (i) be informed, (ii) be forgotten, (iii) rectify and restrict data; and (iv) data portability;
- Consent;
- You must be able to demonstrate compliance;
- Subject Access Requests – response period shortened from 40 days to 1 month;
- Data Breach Notification – 72 hours to notify of any breach.

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GDPR

Breach



- Current fines vary and are low. GDPR will significantly increase the maximum fines on a two-tier basis:
- **Up to 2% of annual worldwide turnover** of the preceding financial year or 10 million euros (which ever is the greater) for violations relating to internal recording keeping, data processor contracts, data security and breach notification, and data protection by design and default
- **Up to 4% of the annual worldwide turnover** of the preceding financial year or 20 million euros (which ever is the greater) for violations relating to breaches of the data protection principles, conditions for consent, data subject access requests and international data transfers
- Minor infringements of the GDPR will likely result in a reprimand to be issued instead of a fine.

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GDPR



What you should be doing now...

- Understand and “cleanse” the data which you currently hold (databases, CRM systems etc.)
- Consider whether to obtain fresh consents and/or rely on alternative grounds for processing
- Review data-sharing contracts
- Update/implement data protection policies
- Train your staff
- Consider drawing up contracts with any processors / third parties
- Contact us! We can provide specialist help.

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Gender Pay Gap Reporting

Gender Pay Gap Reporting



Background

- Average pay for men is greater than that for women
- From 2015, Government consultations on the gender pay gap and its causes

- **Solution?**

Equality Act 2010 (Gender Pay Gap Information) Regulations 2017:

Mandatory gender pay gap reporting for large private sector employers

- **When?**

4 April 2018 – by this date applicable employers must publish their gender pay gap information

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Gender Pay Gap Reporting



What is a “relevant employer”?

- A relevant employer = a private employer with 250+ ‘employees’ on the ‘snapshot date’
- Snapshot date = 5 April of each year (starting 5 April 2017)
- Wide definition of employee which includes an individual under a contract personally to do work
- Does a casual worker count towards the 250 threshold?
 - Casual workers on umbrella contracts count towards thresholds even if not given assignments during the pay period
 - Casual workers engaged on a contract with no mutuality of obligation between assignments only counts towards the threshold if engaged on an assignment on 5 April.

Gender Pay Gap Reporting



Who should be included in the report?

- Any employee employed on the relevant snapshot date
- Any casual worker or bank staff engaged directly by the relevant employer (including umbrella workers)
- Contractors where they are employed under a contract that obliges them to perform the work personally for and under the direction of another person
- Excludes contractors where the employer does not have and it is not reasonably practicable for them to obtain the relevant data
- Agency workers will generally be regarded as employed by the employment business that provides them rather than the end user.

Gender Pay Gap Reporting



What to include in the report?

- Gender Pay Gap Data to include:
 - Difference in the mean and median hourly rates of pay of male and female full-pay;
 - Difference between the mean and median bonus pay of males and females;
 - Proportion of males and females who were paid bonus pay during the bonus pay period; and
 - Proportions of male and female full-pay, in four pay bands.
- Written statement of accuracy
- Voluntary accompanying narrative
- Report should be published on employer website (retained for at least 3 years) and submitted to government website.

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Gender Pay Gap Reporting



What you should be doing now

- Consider if you need to comply, are you a relevant employer?
- Carry out assessment of those employed on the snapshot date. Who is within the scope?
Casual workers and contractors? Accessible data?
- Consider and collate the relevant employees remuneration packages
- Calculate the gender pay gap – we can help!
- Strongly consider the inclusion of a narrative to explain the data and contain an action plan going forward
- Watch out for our upcoming webinars on Gender Pay.

Government's response – Taylor Review

Government's response – Taylor Review

Background

- 7 February 2018 – Government published response to the Taylor Review of Modern Working Practices
- Taylor Review made number of recommendations including changes to status and rights of works
- Government response gives indication of potential upcoming changes in employment and recruitment sector in relation to worker right and increasing awareness of worker rights.

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Government's response – Taylor Review

Taylor Review – the recommendations

- Recommendations included:
 - Changes to employment status and the definition of “worker”, with greater emphasis on control when considering employment status
 - Increased rights for workers e.g. day one right to a written statement of terms, right to receive payslips and continuity and employment period for casual workers increased to 1 month
 - Increased rights for agency workers including rights to request direct contract with hirer after 12 months, improved transparency of information on pay and abolition of the Swedish derogation.



Government's response – Taylor Review

Overview of Government response

- Government response set out proposals to increase workers' rights and awareness of rights
- Government has proposed 4 consultations on:-
 - (i) Employment status;
 - (ii) Agency workers;
 - (iii) Enforcement of employment rights; and
 - (iv) Measures to increase transparency in the UK Labour Market.

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Government's response – Taylor Review

Overview of Government response

- Proposals include:
 - Day-one rights for workers e.g. written statement of terms
 - Itemised payslips for workers
 - Increased financial information for agency workers
 - Right to request a “more stable contract” for workers
 - Development of a new online tool to assess employment status
 - Tougher enforcement and penalties for employers who breach employment rights
 - Extended period of continuous employment

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Government's response – Taylor Review

Overview of Government response

- Proposals include:
 - Tougher enforcement and penalties for employers who breach employment rights
 - Extended period of continuous employment for casual workers
 - Increased pay reference period for holiday pay calculations from 12 to 52 weeks
 - Changes to the regulation of umbrella companies / intermediaries
 - Making SSP a basic employment right
 - Potential increase of NMW / NLW for hours not guaranteed as part of contract.

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Government's response – Taylor Review

Agency Worker Consultation – *what could change?*

- **Government obtaining opinions on:**

- (i) Amending legislation to improve transparency for workers*

- Key facts document contained in contract between worker and employment business at time of registration
- To include information on who is employing work-seeker, how much umbrella company will pay work-seeker and any fees payable, what statutory deductions will be made to pay and any additional benefits for work-seeker

- (ii) Abolition of Swedish derogation*

- Feedback is sought on abuses of Swedish derogation and how widespread abuse is
- How best abuses can be combatted i.e. stronger enforcement or repeal



Government's response – Taylor Review

Agency Worker Consultation – *what could change?*

- **Government obtaining opinions on:**

(iii) Increased regulation of umbrella companies

- Bringing activities of umbrella companies into remit of Employment Agency Standards Inspectorate (EAS)
 - If so, would require umbrella companies to meet set of minimum standards already required of employment businesses and agencies.
- No changes to law yet
 - Insight into what future changes could entail and scope of changes
 - Could mean increased regulation, red tape and costs
 - Consultation closes on 9 May 2018 – have your voice heard!

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Government's response – Taylor Review

Other consultations – what could change?

- **Employment status**

- need for clarity re: employment and worker status
- Are existing status tests still relevant in modern workplace?
- Any changes required to legislation? i.e. should concepts like “control”, “personal service” and “mutuality of obligation” be defined or only core principles?

- **Enforcement of employment rights**

- Increased state enforcement of vulnerable workers' core rights
- Changes to enforcement of tribunal awards including naming and shaming scheme and higher penalties

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Government's response – Taylor Review

Other consultations – what could change?

- **Measures to increase transparency**
 - Extending right to written statement of terms to all workers
 - Extension to period of continuous employment
 - Increased awareness of holiday pay right and extension of pay reference period
 - Right to request more predictable and stable contract
 - Improving “worker voice” in the workplace

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Government's response – Taylor Review

Payslips

- Government response: right to itemised payslips to be extended to all workers and changes to what should be included in payslips.
- Two Orders will come into force on **6 April 2019**

1. The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018

- Will change information on payslips to include number of hours worked when paid on hourly basis
- Can be demonstrated either as aggregate or separate figure for different types of work / rates of pay

2. The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018

- Will extend right to itemised payslips to all workers, including casual and zero hour workers.
- Make sure you are collecting additional data required and format of payslips amended.

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Government's response – Taylor Review

What next?

- Government proposals cover a wide range of employment law areas and issues – potential to significantly change the world of work in employment and recruitment sector
- With Government opting for consultations at this stage over amendments to legislation and changes to the law – will these follow?
- Consultations give insight into what future changes could entail – make sure your voice is heard! If changes go ahead, likely to result in increased cost and regulation in the sector, as well as stricter enforcement
- Watch this space!

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And finally...
a case law update

Agency Workers & Equal Treatment

Higher pay does not offset inferior holiday and rest break entitlements

Kocur v Angard Staffing Solution Limited – the law

- **Regulation 5 of Agency Worker Regulations 2010 (AWR)**: an agency worker who has undertaken the same role (whether on one or more assignments) with the same hirer for 12 continuous weeks = entitled to same basic working and employment conditions that would ordinarily be included in a contract had they been recruited directly by the hirer
- The relevant terms and conditions include those relating to pay, duration of working time, annual leave, night working, rest breaks and rest periods
- What would be *ordinarily* included in the contract is a matter of fact and will include terms in express contracts, any staff handbook, implied terms through custom and practice and any collective agreements
- Regulation 5 is a continuing obligation.



Agency Workers & Equal Treatment

Higher pay does not offset inferior holiday and rest break entitlements

Kocur v Angard Staffing Solution Limited – the facts

- Kocur was employed by Angard Staffing Solution Limited and was supplied to work for Royal Mail Group Limited under an agency agreement
- He completed the 12-week qualifying period, meaning he was entitled to the same basic working and employment conditions as direct recruits under Regulation 5
- He brought a claim to the Tribunal for breach of AWR because:-
 - (i) He was only entitled to 28 days' annual leave, whereas permanent employees were entitled to 30.5 days; and
 - (ii) He was given a one-hour break on night shifts, but was only paid for 30 minutes whereas permanent employees were paid for the full hour
- He was paid a higher hourly rate of £10.50 per hour compared to £9.60 for permanent employees.



Agency Workers & Equal Treatment

Higher pay does not offset inferior holiday and rest break entitlements

Kocur v Angard Staffing Solution Limited – the employment tribunal decision

- The claims brought relating to annual leave entitlement and rest breaks were dismissed by ET
- **Annual leave entitlement:**
 - Was a disparity of 2.5 days, but Claimant's higher rate of pay compensated for this
 - Overall equivalent treatment under Regulation 5 could be achieved if agency worker chose to not put himself forward for work for an additional 2.5 days a year. Result would be that the worker would receive the same holiday and same pay as direct recruits, therefore discharging Regulation 5
- **Rest breaks:**
 - Enhanced rate of pay for agency worker compensated for not being paid for full rest period and rolling up hourly rate to achieve equal remuneration in relation to rest breaks discharged Regulation 5



Agency Workers & Equal Treatment

Higher pay does not offset inferior holiday and rest break entitlements

Kocur v Angard Staffing Solution Limited – the employment appeal tribunal decision

- EAT allowed appeal and held that Regulation 5 had been breached for both annual leave entitlement and rest breaks
- **Annual leave entitlement:**
 - Disparity in annual leave entitlement between direct recruits and agency workers could not be compensated for by higher rate of pay – Regulations don't allow for this type of offsetting
 - Term-by-term approach is required
 - Just because agency worker could achieve equal terms through choosing not to work for 2.5 days a year, such a voluntary allocation of leave is not the same as an “entitlement” under Regulation 5.



Agency Workers & Equal Treatment

Higher pay does not offset inferior holiday and rest break entitlements

Kocur v Angard Staffing Solution Limited – the employment appeal tribunal decision

- **Rest breaks:**

- Failure to pay Claimant for full hour rest break, when direct recruits were paid for it in full, breached Regulation 5
- There was no disparity on duration of rest break, both Claimant and direct recruits had 1 hour
- Did not matter Claimant was paid a higher rate of pay throughout the whole day
- If any payment for rest breaks is to be rolled into hourly pay, to achieve overall equivalent treatment any arrangement would need to be transparent and carried out in a way which meant agency worker received same pay as direct recruits for their rest break.



Agency Workers & Equal Treatment

Higher pay does not offset inferior holiday and rest break entitlements

Kocur v Angard Staffing Solution Limited – what does this mean?

- Equal treatment of agency workers under Regulation 5 must be on a “term-by-term” approach i.e. each entitlement must mirror the same entitlement of someone directly recruited
- **Annual leave entitlement:** EAT confirmed that in principle, it could have been different if Claimant was granted 30.5 days annual leave entitlement but was only paid for 28 days, whilst receiving the higher rate of pay
- Regulations do not outline the way in which equal overall treatment much be achieved, and if arrangements are transparent and agency worker still receives same pay for holiday, method of payment could differ i.e. in rolled up pay or lump sum at end of assignment
- **Rest break:** pay for rest break could have been rolled up if result was overall equality of treatment and arrangements transparent
- **You should consider carefully the arrangements you have in place as to whether they comply with the Regulations.**

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Thank you.

Any questions?

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