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UPDATE

Employment - October 2018

WORKERS TAKING SICK DAYS DROPS TO RECORD LOW

GIG-ECONOMY WORKERS - LATEST NEWS

GOVERNMENT LAUNCHES LGBT ACTION PLAN

WELCOME TO OCTOBER'S EMPLOYMENT LAW UPDATE

As autumn arrives, we provide you with this month's edition where we take a look at the new Government LGBT action plan to help you as employers and employees deal with LGBT discrimination.

Also in this month's issue, we dig deeper into a recent case about holiday pay and whether voluntary overtime should be included. We also consider whether employers are required to pay national minimum wage for sleep-in/on-call workers.

We also look at the reasons why employees are spending longer at work than is required of them, we tell you what you need to know about statutory notice periods and take a look at the latest gig economy news.

If you have any comments or questions, please do not hesitate to contact me on 023 8071 8094. You can also follow us on Twitter for the latest employment news @MBEmployment.

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GOVERNMENT LAUNCHES LGBT ACTION PLAN

Following a national survey of LGBT people, the Government Equalities Office (GEO) has published the *LGBT Action Plan: Improving the Lives of Lesbian, Gay, Bisexual and Transgender People.*

The commitments in the plan include the following:

- a training package to help employers and employees deal with LGBT discrimination in the workplace, and the inclusion of LGBT harassment in sexual harassment policies and guidance issued by Acas and the Government.
- a working group of employers to understand the experiences of LGBT staff in different sectors and who will work with employers to develop targeted interventions to improve the experience of LGBT people at work.
- The Civil Service will continue to role model best practice in establishing working environments that are inclusive for LGBT staff in accordance with the Civil Service Diversity and Inclusion Strategy.

The publication of this report follows a national survey of LGBT people which received over 108,000 responses. You can read both the research report and a summary report.

In light of the LGBT Action Plan, it is advisable for employers to start thinking about what procedures and policies they have in place that support LGBT people in the workplace.

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WORKERS TAKING SICK DAYS DROPS TO RECORD LOW

Nearly 9 in 10 HR professionals have noticed that employees are spending longer at work than is required of them

This is thought to be a reflection of unmanageable workloads and employees feeling more insecure about their jobs.

According to the National Office for National Statistics (ONS), in 2017, employees took an average of 4.1 days off due to illness which is a significant drop from the average of 7.2 days taken in 1993. The ONS also reported that:

- 34.5% of lost working hours were due to minor illnesses such as coughs and colds;
- 17.7% of absences were due to musculoelastic problems; and
- 7.6% of absences were due to stress, depression or anxiety.

Legal comment

Often when people are genuinely unwell, they will not be productive at work. If staff feel that they cannot take time off, or are not able to work from home when they are suffering from coughs and colds they will only spread germs and debilitate a wider part of the workforce. Equally, organisations need to consider how they can cultivate a culture that enables staff to seek assistance when suffering with conditions that, with adjustments to the workplace or working hours, do not preclude them from being able to work.

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CONFUSED ABOUT HOLIDAY PAY?

The recent case of *'Flowers v East of England Ambulance Trust'* finds that voluntary overtime should be taken into account.

This case centres around a group of claimants who worked for East of England Ambulance Trust. Occasionally, they were required to work extra time at the end of their shift in order to complete a job such as caring for a patient or dealing with a call made to emergency services. These shift overruns are referred to as 'non-guaranteed overtime'.

The claimants could also work voluntary overtime but were not obliged to do so.

The claimants argued that both non-guaranteed overtime and voluntary overtime should be taken into account when calculating their holiday pay.

The Employment Judge found that voluntary overtime and non-guaranteed overtime should be considered as part of 'normal remuneration' for the purposes of calculating holiday pay if it was paid over a "sufficient period of time".

Legal comment

This is a timely reminder of the basic principle that workers ought to receive the same pay whilst on annual leave as they would normally receive had they been at work.

Whilst the basic principle seems simple, there has been much case law around how to calculate holiday pay. To further complicate matters there have been inconsistencies found between UK law and EU law.

We therefore strongly recommend that you seek legal advice when considering what to include in your calculations of holiday pay.

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GIG-ECONOMY WORKERS

LATEST NEWS

In order to "fulfil the tax obligations of their workers" the Office for Tax Simplification (OTS) has asked the government whether online platforms such as taxi firms or food delivery businesses could deduct tax from earnings.

Changing the way gig-economy workers are taxed could simplify the tax process and make it more efficient as gig-economy workers would no longer need to complete a self-assessment tax return.

Whilst undoubtedly this helps workers it may cause further confusion regarding the employment status of gig-economy workers, making employers responsible for the taxation of both the employed and self-employed.

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SHOULD YOU PAY NATIONAL MINIMUM WAGE FOR SLEEP-IN/ON-CALL WORKERS?

'Royal Mencap Society v Tomlinson-Blake'

This case considered whether two care workers (Mrs Tomlinson-Blake and Mr Shannon) were entitled to national minimum wage for the whole time they were 'on-call' during the night, or just when their services were called upon.

Finding in favour of the employer, the Court of Appeal decided that only the time spent awake for the purpose of doing some activity should be included in national minimum wage calculations, not time when workers are expected to be asleep.

Legal comment

If a worker is on a 'sleep-in' shift or 'on-call' and they are expected to be asleep but available for work, they are not entitled to national minimum wage.

However, if a worker is expected to be performing duties but permitted to have some sleep, this is classified as working and they are entitled to national minimum wage.

This is a notable ruling as it overturns case-law which classified workers as 'working' when they were expected to be asleep but available for emergencies.

This primarily concerns the care industry and there is still uncertainty about how this applies to night workers in other industries. At this stage, each case would be decided on its own facts and we would urge you to take legal advice if you are unsure about your situation.

Moreover, it is important to note that *'Royal Mencap Society v Tomlinson-Blake'* could be subject to an appeal in the Supreme Court.

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UNFAIR DISMISSAL CLAIMS
WHEN DO STATUTORY NOTICE PERIODS NEED TO BE ADDED TO QUALIFYING SERVICE?

'Lancaster and Duke Ltd v Wileman'

Unfair dismissal claims can only be brought if an employee has worked for a qualifying period of two years. The effective date of termination (EDT) is crucial in calculating whether an employee has sufficient qualifying service.

When an employee is dismissed without notice (known as a summary dismissal), the EDT will be the date that actual dismissal took place. However, when an employee is close to the two-year milestone, calculating whether or not they have sufficient qualifying service can be complex.

If an employee is dismissed without notice, the EDT will be the actual date of dismissal plus the minimum statutory notice period (1 week for service of less than two years). If this then extends the employee's service to two years, the employee is entitled to bring an unfair dismissal claim. However, in the case of 'Lancaster and Duke Ltd v Wileman', the Tribunal held that the EDT extension as described above does not apply if an employee is dismissed for gross misconduct.

Legal comment

An employee dismissed for gross misconduct in this situation would need to establish that the employer acted unfairly in the dismissal and also that they themselves had not committed gross misconduct.

Whilst this provides relief for employers concerned about dismissing employees close to the two-year qualifying period, we still strongly recommend seeking legal advice if you are considering dismissing an employee, especially if around the two-year mark.

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16K FOR SCHOOLGIRL IN PIZZA HUT SEXUAL HARASSMENT CASE

Pizza Hut have been ordered to pay £15,800 to a schoolgirl who was working as a receptionist in a Pizza Hut delivery branch after she won her sexual harassment case against the firm.

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The claimant's manager was said to have shaken food onto her face and clothes and tried to hold her hand, persisting even when she moved away. The manager was also said to have hugged her and whispered into her ear.

The claimant rebuffed these advances, and as a result the manager shouted at her and found fault with her work.

The Employment Judge found that the manager had created an environment that was "intimidating, hostile and humiliating", especially considering that the claimant was still at school and this was her first job. She was awarded £13,000 for injury to feelings.

In addition, the Judge awarded a 15% uplift due to the lack of adequate policies and procedures in place to deal with sexual harassment cases and further compensation for loss of earnings and interest.

Legal comment

This case highlights the importance of ensuring that employers have the right policies and procedures in place and ensure that staff are thoroughly trained on acceptable behaviour in the work place. With sexual harassment being so prevalent in the news at present, not only can any incidences be deeply upsetting for those affected, they can also result in serious reputational damage for employers.

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