

Employment Webinar

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Presented by



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Agenda

- Working time – Mencap decision in the Supreme Court
- Returning to the office – legal and practical issues to consider
- Contracts of employment – are you compliant?

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NMW Regs - working time

- NMW Regulations
 - No definition of “work”
 - Must be paid NMW when working
 - 4 types of work
 - Salaried hours work – fixed pay for basic hours
 - Time work – eg hourly paid work
 - Output work – eg piece work
 - Unmeasured work – catch all, eg Uber drivers
 - Salaried and time work – must also be paid NMW if “available for work” when awake for purpose of working



Mencap Case

- Supreme Court decision in Tomlinson-Blake v Mencap
 - Care worker on sleep-in shift.
 - Paid when awake and working and an allowance for whole shift but less than NMW for total shift.
 - Keep a listening ear, woken 6 times in 16 months
 - Previous authorities – care workers were actually working (not just available) throughout sleep ins for example because they couldn't leave site or had to be there due to a statutory obligation on employer
 - Didn't quite fit with requirement to be “awake for the purpose of working” if merely available for work
 - Potential historic liability of £100Ms – many providers in jeopardy



Mencap case – decision and the future

- Supreme Court decision in Tomlinson-Blake v Mencap
 - Supreme Court overruled previous authorities and resolved uncertainty
 - Asleep = available for work as this was “time work” – NOT working
- Possible legislation/guidance in future
 - Low Pay commission now over 20 years ago
 - Variation in arrangements of sleep ins, eg some won't normally be woken vs those on-call.
 - Concerns about abuses in this area and many low paid workers in the sector



What is working time?

Key Points

- NMW = pay – work not defined
- WTR = health and safety – work is being at employers disposal and carrying out duties
- Working time may be different for each
 - Eg in Mencap sleep ins were working time for WTR but not for NMW Regs (except when awake)
- NMW calculations differ depending on type of work

Poll question



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Back to the office?

- End of work from home where possible and social distancing
 - July 2021?
- Many nervous/anxious about return – long time out
- Business needs
- Remote working can work but how much and how should it work in future
 - what employment issues does it raise?



Future of Work (1)

- McKinsey report – Future of Work after COVID-19 – Feb 2021
- Big differential in disruption based on need for physical proximity
- 25% of workforce in industrialised countries could work from home 3-5 days a week.
 - 4-5 x more than pre-pandemic
- Many activities less effective online
 - Inductions
 - dealing with other sensitive HR issues
 - Negotiations
 - Brainstorming
 - business critical issues



Future of Work (2)

- Office space intended to reduce by 30%
 - Impact on cities
- 20% of business travel may not return
- Use of AI / automation likely to accelerate



On the horizon...

- House of Lords Select Committee - Beyond Digital: Planning for a Hybrid World
 - April 2021
 - Recognise online /offline mix
 - Strengthen employment rights around that to support its strategy
- Government's flexible working Taskforce
 - Spring 2021
 - flexible working should be default
- Welsh Government
 - Planning pilots to encourage remote working hubs



Planning for the return

- Company policy?
 - How much flexibility vs fixed?
 - Where is “base”?
 - Desk booking/hot desking?
- No simple answer
 - solution will be different by employer and possibly by team/department
- Consultation
- Communication



Flexible working

Flexible working requests

- Can take many forms
- agreed contractual change
- necessary depending on policy?
- Statutory process – now less rigid
- May only be rejected on specified grounds
- Trial periods advisable
- Competing requests

Poll question



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Homeworking - practical issues (1)

- Changes to terms
 - Contractual change exercise
 - Collective issues
 - Travel expenses?
 - Trial periods
- Security
 - Equipment
 - Data
 - Confidential information
 - Costs...
- Insurance



Homeworking - practical issues (2)

- Health & safety issues (see later)
 - employer responsible “as far as reasonably practicable”
- Flexible working requests
 - Compulsory?
 - how to handle competing requests?
- Practicalities
 - Teams together physically
 - Meeting planning
 - Desk booking
 - Space management
 - Pay e.g. London weighting



Homeworking - practical issues (3)

- Working abroad
 - UK/foreign employment rights
 - Immigration status issues
 - Tax & social security
 - Implications for company, do you risk creating a permanent operation and subject to local tax/company law?
 - Data protection
 - Insurance

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Dealing with Covid-19 Vaccinations at work

- Clear communication between employer and employee
- Provide encouragement and support



No jab, no job?

- Can employers make vaccines mandatory?
- New recruits v Existing employees



New recruits

- Vaccination – condition of employment?
- Discrimination risk



Existing employees

- Mandatory vaccinations for existing employees? **Consent** most useful
- **Sector dependent** e.g. Vaccine Minister – Nadhim Zahawi’s statement that it would be irresponsible not to consider compulsory jabs for NHS staff.
- **Contractual clause** – unlikely
- Therefore what are possible options deal with vaccine hesitancy/objections?



Managing objections

- Importance of **dialogue**
- Is the refusal is **reasonable/unreasonable** in the circumstances?
- Only unreasonable refusal can lead to disciplinary action being taken.
- Health and Safety at work Act 1974 – employer under a duty to take reasonable steps to reduce workplace risks – therefore, employers should at least encourage staff.



Managing objections: 2

Options if refuse:

- o Do nothing
- o Impose change
- o Dismiss and offer re-engagement
- o Unreasonable refusal - conduct dismissal.



Exploring potential reasons for refusal – including discrimination risk

- Equality Act 2010 – protect employees from discrimination
- Medical/disability objections
- Religious objections
- Pregnancy and maternity objections



Exploring potential reasons for refusal – including discrimination risk 2

- Anti-vax objections – philosophical belief under Equality Act 2010?
 - For a philosophical belief to be protected:
 - genuinely held
 - be a belief and not just an opinion on the present state of information available
 - be about a weighty and substantial aspect of human life
 - attain a certain level of importance, and
 - be worthy of respect in a democratic society.
- **Defence** against a discrimination claim if employer can justify forced vaccinations policy - proportionate means of achieving a legitimate aim.



Health and safety considerations

Health and Safety at work Act 1974:

- employer under a duty to take reasonable steps to reduce workplace risks – encourage staff to be vaccinated
- employees – duty to cooperate with employer
- Risk assessments – employers should have carried out a risk assessment on the impact of Covid-19 on its staff



Health and safety considerations 2

- Review the impact of Covid-19 vaccinations (and any vaccination objections) on risk assessment.
- Consider H&S risk of the vaccine to individual staff – prudent to obtain medical advice/evidence in relation to employees who object on health grounds.
- Possibility vaccination not required for objecting staff if majority have been vaccinated



Dismissing employees for refusing to take the vaccine?

- Contractual clauses
- Is the refusal is reasonable/unreasonable in the circumstances?
- Failure to follow reasonable instruction – conduct dismissal
- Alternatives to dismissal
- Defence to dismissal – SOSR/conduct (fair reason)
- Fair process



Planning ahead

- Employers can consider a mandatory vaccine policy if necessary – however, it is best to try to avoid this and communicate, encourage and engage with staff;
- Employers should be proactive in getting the most up to date information regarding Covid- 19 vaccines which it can then share with staff as a means of encouraging them to be vaccinated.
- Employers can also support staff in more practical ways.
- Keep vaccination position under review



What are section 1 statements?

- Minimum particulars of employment
- Section 1 Employment Rights Act 1996.



Changes from 6 April 2020

- Government announced changes to section 1 statements in its Good Work Plan
- Relevant to any person **starting work** on or after 6 April 2020.
- Although if:
 - A) an existing employee requests a section 1 statement either whilst employed or within three months of termination, they must be given one; and
 - B) after 6 April 2020, if there is a change in any of the particulars, the employer must provide particulars of the change (section 4 ERA).
- Statement must be provided on day one (except in relation to certain provisions which can be given within two months).



Who does it affect?

- Employees and workers
- No exclusion for employees in short term employment



The purpose of these changes

Good Work Plan - protect vulnerable workers and increase transparency for in the employment relationship.



Summary of the changes in the section 1 statements from 6 April 2020

1. Working days/hours

- Must not only state the employee's **normal working hours** but also the **days of the week** the employee is required to work.
- It must also specify whether such hours or days are **variable** and, if they are, the statement should state how they may vary or how that variation will be determined.



2. Overtime

- If the employer may want to require employees/workers to work longer than their normal working hours, the contract provides for this.
- Paid or unpaid.



3. Details of paid leave

- Must detail any paid leave which the employee/worker is entitled to take;
- Most common types of leave that ordinarily fall to be included in this section are:
 - all types of statutory family leave;
 - time off for trade union activities;
 - bereavement or other compassionate leave;
 - paid sabbaticals or career breaks; and
 - paid time off for jury service.
- If there are no relevant particulars, then this fact must be explicitly stated.



4. Benefits

- Details of benefits provided by the employer.
- Economic value.
- If an employer does not provide any benefits, this fact must be explicitly stated.



5. Any probationary period

- Details of any probationary period, including **conditions** applicable to it and its **duration**
- If an employee will not be subject to a probationary period, this must be explicitly stated.



6. Training

- Any training entitlement provided by the employer – including whether training is **mandatory** or must be **paid for by the worker**.
- Particulars of compulsory training/compulsory training which the worker has to pay for must be set out in the particulars.
- Other training - details in the S.1 statement or in another document referred to in the S.1 statement that is **reasonably accessible**.
- If the employer will not be providing training, that fact must be explicitly stated.



7. Notice periods

- Notice periods for both worker and employer.
- Only **employees** entitled to **statutory minimum notice**.



Enforcement

- The right to make a complaint extended to worker.
- Where there is **no other substantive** claim - only remedy is a **declaration** from an employment tribunal
- If they have a **substantive claim** - compensation of between 2-4 weeks' pay



Practical considerations

- Draft new contracts for all workers and employees starting after 6 April 2020
- Update HR managers/other relevant staff so they understand the legislation and the reasons for the changes

Questions

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