

employment bulletin



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Welcome to Pritchard Englefield's employment bulletin. The aim of this bulletin is to give a brief overview of some of the more significant and interesting developments in the fast-moving world of employment law.

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Employment Law Changes in 2012

The Conservative Government is introducing several significant employment law changes this year to assist businesses. Here are the key changes to watch out for in 2012:

FEBRUARY

From 1 February 2012, the maximum unfair dismissal compensatory award has increased from £68,400 to £72,300 for dismissals taking effect on or after 1 February 2012. The maximum limit on a week's pay, which is used to calculate statutory redundancy pay and unfair dismissal basic awards, has risen from £400 to £430.

APRIL

Unfair Dismissal

Most importantly, from April 2012, the qualifying period an employee will need to claim unfair dismissal will increase from one year to two. The Government's aim is to 'provide more time for employers and employees to resolve difficulties, give employers greater confidence in taking on people and ease the burden on the employment tribunal process'. It has the potential to do so although the risk is that employees will be tempted to claim they have been discriminated against instead (because that protection starts from day one of employment).

Inevitably questions have been raised whether or not the increase to the qualifying period will have immediate effect. The Department for Business, Innovation and Skills (BIS) has confirmed that only those employees who commence employment on or after 6 April 2012 will be affected. This means that employees whose employment commenced before 6 April 2012 will remain subject to the current one-year qualifying period.

Employment Tribunal Changes

The following substantial changes to employment tribunal cases will apply from 6 April 2012:

- the maximum amount of costs a tribunal may order the losing party to pay the victor will increase from £10,000 to £20,000 (where the victor has been legally represented). This will assist employers who have had to incur substantial costs in defending vexatious and ill-conceived claims;
- unfair dismissals will be heard by a judge sitting alone;
- the maximum amount of deposit a tribunal can require a party to pay as a condition of their claim proceeding, will increase from £500 to £1,000, which may prove a greater deterrent for some employees; and
- witness statements are to be taken 'as read' unless directed otherwise by the tribunal.

Increase in Statutory Payment Rates

From 9 April 2012, statutory sick pay will increase from £81.60 to £85.85 per week and statutory maternity pay, statutory paternity pay and statutory adoption pay will increase from £128.73 to £135.45 per week.

The weekly earnings threshold to be entitled to these payments will rise from £102 to £107. Maternity allowance will rise from £128.73 to £135.45 per week with the weekly earnings threshold remaining at £30.

OCTOBER

New Compulsory Pension System: Auto-Enrolment

From 1 October 2012, all eligible jobholders will have to be auto-enrolled into a qualifying pension scheme over the next few years. The staging date for employers will depend on the size of the employer's PAYE scheme, with larger businesses starting first.

FUTURE CHANGES

ACAS Conciliation

The Government will require all potential claimants to submit their employment tribunal claim to ACAS for early conciliation to take place. It is not compulsory but if the parties do enter into the pre-claim conciliation then this will "stop the clock" on the limitation period to present the claim to the tribunal. The ACAS website states that this service is not expected to be introduced until April 2014 at the earliest.

Financial Penalties On Unsuccessful Employers

Financial penalties will be introduced for employers who have failed to defend a claim at tribunal. The levy of a financial penalty will be at the tribunal's discretion. The current proposal is a penalty equal to half of the total amount awarded to the successful employee, subject to a minimum of £100 and a maximum of £5,000. It will be payable to the State and will be reduced by 50% if paid within 21 days.

Mediation

The Government is proposing to work with the private sector to share its knowledge of mediation with small businesses to increase the use of mediation to resolve disputes. To this end, it has been announced that BIS will fund mediation training networks in Cambridge and Manchester. Each network will be composed of employees drawn from a group of 24 SMEs and the pilot schemes will run for 12 months. A tender process to find a provider to deliver the first round of mediation training is now open.

Up-Rating Tribunal Awards and Statutory Redundancy Payments

Increases to a week's pay for tribunal award and statutory redundancy payment purposes will be rounded up to the nearest £1 instead of the nearest £10.

FUTURE PLANS

The Government has also launched the following consultation programmes:

- the introduction of fees to commence a claim in the employment tribunal and to proceed to a hearing. Proposals are being pursued to require workers with a gross annual income of £13,000 (the minimum wage for a full-time job) or couples with an annual joint income above £18,000 to pay a minimum of £600 and up to a maximum of £1,750 to have a discrimination or equal pay claim heard;
- whether protected conversations between employers and employees should be encouraged to permit more open discussions on certain topics such as poor performance and retirement plans;
- simplifying compromise agreements;
- altering the collective redundancy rules to reduce the current 90-day consultation period to 60, 45 or 30 days when the proposed collective redundancy involves 100 or more employees; and
- the effectiveness of TUPE regulations in terms of protecting employees' rights and smoothing the process of business restructuring.

It is going to be a busy year whilst these changes come into effect and we work through their consequences. If you have any concerns about the impact for your business, do check the position before you act.

Interns: To pay or not to pay? "When" is the question!

During the current economic climate, recruiting more interns has proved an effective method for cost-cutting. However, some businesses have neglected to address the need to pay those interns who qualify as "workers". Following two intern victories in the employment tribunal, *Vetta v London Dreams Motion Pictures Ltd* and *Keri Hudson v TPG Web Publishing Limited*, in which claims for pay for work carried out as interns succeeded, the Government has recognised that the payment of interns is a grey area and, in response, has published guidance for employers (click [here](#) to access the guidance).

Keri Hudson, the claimant in the second case, resigned from her position after 6 weeks. She had worked for no pay from 10am until 6pm and had carried out "training and delegating tasks, collecting briefs, scheduling articles and even hiring new interns". She received no training or induction and the pay promised repeatedly to her failed to materialise. Even though she did not have a written contract, she was found to be a "worker" which meant she was entitled to national minimum wage (NMW) and to paid holidays. She was awarded £1,025 for five weeks' work at the NMW rate together with pro rata holiday pay.

The National Minimum Wage Act 1998 (the "Act") does not specifically address the payment of interns. For an intern to be entitled to the NMW, he or she must meet the test of being a "worker". A worker is defined as an individual who works under a contract of employment or any other type of contract whether express or implied (so written or not) whereby they agree to carry out work personally for another party.

It is likely that an intern will fall within "worker" status if:

- a) there is an obligation on the individual to perform the work and an obligation on the other party to provide the work; and
- b) the individual is rewarded for the work by money or benefits. The greater the reward the more likely it is that the individual is working under a contract.

The failure to pay a worker NMW can be costly. In addition to a liability to pay NMW, currently £6.08 per hour for individuals of 21 years or more, the "employer" can be fined up to £5,000.

The terms "work experience", "internship" and "voluntary work" are commonly used interchangeably. The key in establishing whether or not a person is a "worker" is the "actual circumstances of the arrangement", and not the job title.

The guidance does not impose or suggest a blanket ban on all unpaid internships. It does say the working arrangements of an unpaid individual should not always fall within the scope of "worker" status. For instance, there is no obligation to pay somebody who is "shadowing" an employee and who has no prescribed duties. Certain groups classified as "workers" are also exempt from receiving NMW under the Act such as students working as a required part of a UK-based further or higher education course or volunteers at a charity.

If you recruit interns to work in your business, you would be well advised to:

1. reconsider recruitment advertising for 'unpaid' or 'expenses only' positions;
2. assess whether NMW (and holiday pay) needs to be paid to existing interns;
3. review your current internship agreements and/or policies; and
4. comply with the duty to keep records of all employment and internship arrangements.

ABOUT US

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