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Client Alert

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New Developments in UK Employment Law for 2013 and Onwards

In the last 18 months, the UK government has introduced a host of legislative reforms to UK employment law.

These reforms are part of the government's "Employment Law Review" which is designed to cut back the "red tape" in employment law in a bid to help promote economic growth by simplifying and making employment laws less restrictive for employers. The government has progressed in its on-going commitment to employment law reforms through 2013 with a number of key changes coming into force this year through the implementation of the Enterprise and Regulatory Reform Act 2013 (ERRA). This Client Alert summarises the key changes and proposals on the horizon and which employers with UK employees need to be aware of.

Spring 2013

Change to Collective Consultation Period

On 6 April 2013, the rules on collective consultation changed so that, where an employer proposes to make 100 or more employees redundant within a 90 day period, the minimum consultation that must be undertaken before the first redundancy can take affect is reduced from 90 days to 45 days. This will help to reduce the burden on UK employers carrying out large-scale redundancy exercises allowing quicker and more effective restructuring. The 30 day period for collective redundancies involving between 20 and 99 employees will remain unchanged.

The legislation has also been amended so that employees who are on fixed term contracts which have reached their “agreed termination point” will be excluded from the threshold for collective consultation requirements.

To assist employers with collective consultation obligations, the Advisory, Conciliation and Arbitration Service (ACAS) has recently published a new non-statutory Code of Practice called *“How to manage collective redundancies”*, which includes clarification on the meaning of “establishment”.

Summer 2013

New Employment Tribunal Rules

New employment tribunal rules will come into force in Summer 2013 that aim to “make tribunals easier to understand, more efficient and will help weed out weak claims”.Revisals include a “paper sift” of claims at an initial stage in order to strike out weak or vexatious claims, the removal of the £20,000 cap on costs that can be awarded in the employment tribunal and facilitating claim withdrawals and dismissals by cutting down the amount of paperwork.

Introduction of Employment Tribunal Fees

In an attempt to shift the burden onto the end users of the tribunal system, claimants who wish to submit a claim to the employment tribunal will need to pay an initial issue fee, followed by a subsequent hearing fee. The level of fee will be dependent on the nature of the claim:

- "Type A" claims, which include unauthorised deduction from wages and unpaid redundancy payments, will be subject to a £160 issue fee and £230 hearing fee; and
- "Type B" claims, which include unfair dismissal, discrimination and whistleblowing claims, will be subject to a £250 issue fee and £950 hearing fee.

A draft statutory instrument which will introduce these fees is before Parliament, and this new regime is likely to be implemented in July 2013. It is expected that the hearing fee will become payable four to six weeks before the hearing, and there will be provision for reimbursement by the unsuccessful party. The hearing fee is likely to impact on the timing of settlement negotiations as claimants will be eager to settle their claim before they incur the cost of the hearing fee. In addition, the government is currently consulting on a fee remission scheme whereby fees will be waived for those who cannot afford to pay.

Compensatory Award Cap

An unfair dismissal award comprises two elements—a basic award (based on an employee’s length of service, age and weekly pay) and a compensatory award (based on what the employment tribunal consider “just and equitable” in the circumstances). The ERRA introduces a limit to unfair dismissal compensatory awards so that they will be capped at the lower of 12 months’ gross pay or the statutory limit (currently £74,200). The policy aim behind this amendment is to help manage employees' expectations and provide clarity as to the maximum level of award that they would receive at tribunal if they were successful. This cap will not apply to discrimination or whistleblowing claims, where the compensation that may be awarded will remain uncapped.

Whistleblowing

A current loophole in whistleblowing legislation allows individuals to blow the whistle in respect of a breach of their own employment contract. The ERRA closes this loophole by amending the definition of “qualifying disclosures” so that they must be “in the public interest”. The ERRA also removes the requirement for an individual to act “in good faith”, although tribunals will have a new discretionary power to reduce compensatory awards where a protected disclosure is not made in good faith.

Pre-termination Negotiations and Settlement Agreements

The ERRA introduces a new statutory provision which will enable an employer to raise a capability or performance issue and include within that discussion a proposal to end the employment relationship on agreed terms, and that conversation would not subsequently be admissible in an employment tribunal. This new statutory provision will sit alongside the existing "without prejudice" rule that prevents disclosure of certain documents or discussions but which only applies where there is an existing dispute between the parties. This new rule will only apply to unfair dismissal claims and will not apply to discrimination or automatic unfair dismissal claims.

Although this new provision will help to facilitate employers raising performance or capability issues with employees, these provisions include some limitations so an employer cannot take unfair advantage by exerting "undue pressure" or "improper behaviour" on the employee. ACAS are currently preparing a new statutory Code of Practice that will accompany the legislation. The Code, which is intended to provide employers and employees with a shared understanding of settlement discussions, will include guidance on what might constitute "undue pressure" and "improper behaviour".

The ERRA also renames compromise agreements as "settlement agreements". The government has proposed a model template settlement agreement that may be used by parties. While this may seem a welcome simplification, in practice a model agreement is unlikely to be workable for any but the simplest of dismissals.

September 2013

Employee Shareholder Status

Despite the Parliamentary "ping-pong" on employee shareholder status, the Growth and Infrastructure Bill received Royal Assent after the House of Lords accepted the government's concessions regarding the proposals. Employee shareholder status is expected to be introduced in September 2013, and will create a new employment status alongside that of employee and worker status.

Under the new regime, employees will be able to give up some of their statutory employment rights in exchange for shares in their employer company worth between £2,000 and £50,000. An employee shareholder will not have the following statutory employment rights:

- right to a statutory redundancy payment;
- right to claim unfair dismissal (unless the dismissal is automatically unfair or discriminatory on the grounds of a protected characteristic);
- right to flexible working (except when the employee returns from parental leave); and
- right to request time off work for training.

Existing employees will be protected from being required to switch to an employee shareholder contract. However, employers will be able to offer jobs to new recruits only as employee shareholders. One late amendment to the Act is that an employee shareholder must receive advice from a relevant independent advisor for an employee shareholder contract to be effective, and the employer has to pay the reasonable costs of that advice.

Clearly, the tax treatment of the shares is the most attractive feature of employee shareholder status. Any growth in the value of the shares will be exempt from capital gains tax. In addition, the first £2,000 of shares will not attract income tax or National Insurance contributions. This is a new feature of the regime which was not initially proposed but has been added to make the employee shareholder status more attractive. However, income tax and National Insurance contributions will still be due on the acquisition of shares in excess of £2,000 and therefore employee shareholders receiving substantial share grants will face an up-front tax liability which may be difficult for them to fund.

Without a doubt, one of the biggest concerns with these new provisions is that as with existing employee shareholding arrangements, private companies will have to value the shares on acquisition and disposal. Valuing shares in unlisted companies is costly and burdensome and typically requires an expert valuation. The administrative burden of this alone is likely to dissuade employers from offering employee shareholder status. For our previous *Client Alert* on Employee Shareholder Status, please click here. We will also be reporting on these proposals in our forthcoming Working World newsletter.

October 2013

Shareholder Rights and Directors' Remuneration

The ERRA amends provisions of the Companies Act 2006 to ensure a link exists between directors' pay and long term company performance by giving shareholders of UK quoted companies binding votes on directors' pay. Key changes include the following:

- the directors' remuneration report for quoted companies must include a forward looking policy which will require shareholder approval (which is binding) every three years;
- the non-policy part of the directors' remuneration report will still be subject to an annual advisory vote; and
- the company is prohibited from making any remuneration payment, including a loss of office payment to directors' if the payment is inconsistent with the most recently approved remuneration policy.

Spring 2014

Financial Penalties on Employers

In an attempt to encourage employers to meet their obligations, employment tribunals will be given the discretion to impose a financial penalty of 50 per cent of the total amount of the award made by the employment tribunal, in addition to any compensatory award paid to the claimant. This award will be reduced by 50 per cent if it is paid by the employer within 21 days. There will be a minimum threshold of £100 and a maximum of £5,000.

Mandatory Pre-Claim Conciliation with ACAS

The ERRA introduces the requirement that claimant's must firstly submit their claim to ACAS where they will be offered pre-claim conciliation for one month before they can present a claim to an employment tribunal. Where either party refuses pre-claim conciliation, or if after one month conciliation is not achieved, the claimant will at that stage be able to lodge their claim at tribunal.

This requirement aims to try and encourage early settlement of employment disputes without recourse to the employment tribunal. Even where early conciliation is unsuccessful, ACAS will have had the opportunity to give the claimant information about the employment tribunal process, allowing them to make an informed decision about proceeding with their claim.

Flexible Working

The Children and Families Bill 2013, currently passing through the House of Commons, amends the right to request flexible working to include all employees who have worked for their employer for 26 weeks or more, as opposed to just those employees who are parents of children aged 18 and under or carers.

2015

Shared Parental Leave

The Children and Families Bill aims to provide "unprecedented support for parents" and to "give dads the opportunity to play a greater role in raising their child". The most significant proposal set out in the Children and Families Bill is the introduction of shared parental leave where up to a year's maternity leave (39 weeks of which will be paid where eligibility requirements are met) can be taken by either parent, either concurrently or one at a time. Note that the first two weeks of compulsory maternity leave will still need to be taken by the mother. The government is currently consulting on the finer details of how the scheme, proposed to come into force in 2015, will operate in practice.

Other Notable Changes

There are a number of other key changes to UK employment law that are on the horizon:

- **Changes to the Equality Act 2010:** the government intends to repeal statutory discrimination questionnaires and the specific third party harassment provisions in the Equality Act 2010. Observers expected these provisions to be repealed in March, but, now expect that the repeal of these provisions will take effect in October this year.
- **TUPE:** the government recently consulted on possible changes to simplify the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and a response to the consultation is expected to be published by 13 June 2013. One of the key proposals is to repeal the provisions which relate to "service provision changes" so that the definition of a TUPE transfer is more closely aligned with the definition in the Acquired Rights Directive. Arguably, the service provision changes brought more transfers within the scope of TUPE than was intended and this "gold plating" has potentially had anti-competitive effects, particularly for small businesses. The government also consulted on the removal of the requirement for transferors to provide employee liability information at least 14 days before the transfer, and on the practicality of allowing a greater freedom for transferee employers to change terms and conditions of employment following a TUPE transfer. Given the complexity of TUPE, the proposed implementation date of October 2013 for these changes may be slightly ambitious.

- **Queen's Speech:** the Queen outlined the government's legislative programme for the new Parliamentary session. Key proposals include:
    - a National Insurance contributions bill that will introduce a new "Employment Allowance" that will give every business and charity a £2,000 allowance to reduce their employer NIC's bill;
    - a Deregulation Bill that will help to reduce the burden of unnecessary legislation on business by removing the ability of employment tribunals to make wider recommendations in discrimination cases; and
    - an Immigration Bill that will impose tougher penalties on employers that use illegal labour.

Pensions and Automatic Enrolment

Finally, a reminder that from October 2012, the UK government introduced the requirement on all UK employers to auto-enrol “eligible jobholders” into a qualifying pension plan and make minimum pension contributions, starting at one per cent and rising to three per cent. The introduction of auto-enrolment obligations has been staggered, applying to the largest employers first. By the end of 2013, all UK employers who have 500 or more employees (calculated by UK payroll numbers as at 1 April 2012) will be subject to auto-enrolment requirements by the date auto-enrolment applies. For further information on auto-enrolment please click here for our *Client Alert* ‘New Compulsory Pensions Provision in the UK from 2012’ and the subsequent update.

Conclusion

The UK employment and benefits landscape is changing, and employers with UK employees need to ensure that they remain compliant to avoid potential pitfalls and maintain a harmonious workforce. A number of these reforms and proposals are complex and will require careful consideration. Whether they will achieve the government’s objective of reducing the burden on employers in a bid to help stimulate economic growth remains to be seen.

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