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Wrigleys Employment Update Bulletin

Welcome to our Autumn 2006 Update Bulletin.

Autumn is usually a busy time for those with HR and staff responsibilities. The 1st October is one of the two dates each year (the other is 6th April) on which new Employment Regulations come into effect. This year is no different, but what is perhaps somewhat unusual is that we have had such a long lead in time for the new Age Equality Regulations it'll come as a bit of a relief to get it out of the way. Of course you are all fully prepared, but if not give us a call. However there are a few other changes being slipped through without as much of a fan-fare and we highlight those below, together with the usual round up of recent cases and other matters of interest.

We hope you like the new look. No doubt you will let us know.

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Show me the Money - Termination Payments

There is a lot of confusion about whether pay in lieu of notice or other termination payments can be made free of tax. There is a general awareness, especially amongst leaving employees that up to £30,000 can be paid tax free on termination of employment. As you might expect, it is not that simple.

The issue is generally one of whether or not the employee is entitled to receive a contractual payment. For example, where the contract provides that the employer may pay in lieu of notice (PILON) this amounts to a contractual payment and the PILON will need to be made subject to the usual deductions for PAYE and N.I.

Unsurprisingly HM Revenue & Customs is increasingly willing to argue that the termination payment should be subject to tax. Where a PILON has become the usual practice on the part of an employer the Revenue will argue that this has given rise to a reasonable expectation on the part of an employee's. The Revenue has argued that such reasonable expectation amounts to a contractual right. Alternatively, because a PILON is commonly paid it falls under the general heading of "Custom and Practice" which allows the entitlement to be implied into the contract.

Faced with a demand for tax payments employers or as is often the case employees, will often simply pay up. But many may be doing so needlessly.

The recent case of *SEA Packaging Limited v Revenue & Customs Commissioners* confirms that habitual payments which nonetheless remain at the discretion of the employer will not amount to a contractual entitlement. The case also highlighted an often ignored element to this issue which was the existence of a Memorandum of Agreement between the employer and Unions on behalf of the employees. The Memorandum provided for a PILON in redundancy cases which, on the terms of the Memorandum, was incorporated into the contract of employment. Hence, the PILON became a contractual entitlement, but only where it was paid, in accordance with the Memorandum, on a redundancy.

European Union 2007, Year of Equal Opportunities For All

Events throughout 2007 will focus on four themes, covering rights, representation, recognition and respect, in an effort to make Europeans aware of their right not to be discriminated against, to provide equal opportunities in areas from work to healthcare and to show how diversity makes the European Union stronger.

Entirely unconnected with this recent announcement, the European Commission recently felt the need to issue a press statement following a widely publicised Irish case where an employer issued a job advert stating that smokers would not be considered. Whilst discrimination against smokers is not prohibited under existing legislation (addiction to nicotine does not amount to a disability) the European Commission stated that it did not support discrimination on any grounds and that opportunities for employment should focus on the individual's ability to perform the job.

Greening your workplace

According to the TUC there are ten easy steps that will enable many organisations to save 20% on energy costs whilst also doing some good for the environment. Good suggestions include matters such as turning off lights and computers but we suggest this is only done when people aren't using them otherwise you may face a claim of bullying. Most of all, employees should be encouraged to think about the 3R's, Recycle, Reuse and Reduce. This isn't ground breaking stuff, but it is worth remembering that employers can benefit both financially and through improved staff morale through promoting the 3R's as well as other 'green' incentives such as car-sharing, bikes, public transport and environmental protection through the likes of payroll giving and adopting an office zero-carbon emissions policy. We often hear suggestions that charity and other voluntary and community organisations can't afford to pay a commercial rate for their staff. This isn't exactly true, but even if it is there is much that any organisation can do to create an attractive place to work which goes beyond their charitable or other good works. Imaginative and flexible benefits can go much further than a simple pay packet. Most of all, treating staff with respect; something which goes beyond simply complying with your legal obligations such as not to discriminate or bully staff, and occasional praise will create a warm glow of satisfaction. Then you can turn the heating down a notch or two.

New Legislation

Corporate Manslaughter and Corporate Homicide Bill

The revised Bill was introduced to the House of Commons on 20 July 2006 and sets out a new criminal offence of corporate manslaughter which can be committed by companies and other bodies such as government departments and police forces.

The offence is committed where there exists a duty of care owed by the company to the victim; a breach of that duty causes the victim's death and where that breach is "gross", that is the conduct amounting to the breach of duty falls far below what could reasonably have been expected.

The duty of care may exist where the company is the employer, occupier of premises, supplier of goods or services, or when carrying out other activities on a commercial basis. If found guilty, the Court has the power to impose an unlimited fine but the new offence cannot be committed by any individual. The test looks at the way in which the company activities were managed or organised by its senior managers and replaces the old "controlling mind" test which required that for a company to be liable for manslaughter there had to be a failing of an individual who could be identified as the controlling mind.

The criticism of the old test remains, in that is far easier to identify a management structure responsible for decision-making in a smaller company. The larger the company, the more complex its chain of command becomes and potentially, for example in relation to rail disasters, the decision-making is delegated to a level which is considered to exist below management. It has been almost 10 years since the Labour government said that it would review this area. The proposals do go some way to make management more accountable for their failings, but they continue to fall short of what most of those who have pushed for reform wish to see. What is still needed is a means of holding management personally, whether on an individual or collective basis, liable and this looks towards appointing a designated individual with responsibility, for example, in relation to Health and Safety. Opponents of this highlight the impossible task of such a role, particularly in a larger organisation where concern over accountability remains an issue.

For most organisations the proposals impose a responsibility to look closely at all areas of risk. This is reinforced by the new fire safety regime which we highlight below. It remains a matter of good governance for organisations to conduct risk assessments and to act to limit any risk identified. This is not restricted just to risk of injury or death or to the delivery of your services. Risk assessment must cover all aspects of your organisation including policies and procedures. In the field of employment this covers topics we have raised in earlier Bulletins such as the employment status of your workers, which should include looking at the role and responsibilities of volunteers and trustees.

Coming into Force...

Regulatory Reform (Fire Safety) Order 2005

The new regime comes into effect on 1 October 2006. There will no longer be any need for fire certificates and emphasis will be on undertaking a fire risk assessment, preventing fires and reducing risk. The duty applies to employers and those who occupy business premises (including charity and voluntary organisations) imposing responsibility to ensure the safety of everyone who uses the premises and, importantly, who may be in the immediate vicinity. The new regime also identifies an appointed individual with responsibility for compliance. More information is available at www.communities.gov.uk/index.asp?id=1162115

Public Sector Disability Equality Duty

under the Disability Discrimination Act 2005, comes into force on 4 December 2006. The duty applies to the various bodies listed under the Human Rights Act 1998 covering government departments, executive agencies, ministers, local authorities, the governing bodies of colleges and universities and schools, NHS trusts and boards, inspection audit bodies and certain publicly funded museums. The duty requires that public authorities adopt a proactive approach to disability equality in all decisions and activity including having regard to the need to promote equality of opportunity, eliminate discrimination and harassment, promote positive attitudes and encourage participation by disabled people. The duty extends to taking steps to meet disabled peoples needs even if this requires more favourable treatment.

Public Authorities are required to publish a disability equality scheme which has included disabled people in its development and review the scheme at least every three years. There is a requirement of the authority to take the steps set out in its action plan and publishes an annual report of its activities.

The Disability Rights Commission guidance can be found at www.drc-gb.org

Also, as an advance reminder, the Public Sector Gender Equality Duty comes onto force in April 2007, with similar requirements for public authorities based on gender considerations.

Collective Redundancies (Amendment) Regulations 2006

come into effect on 1 October and seek to make clear that employers' proposing collective redundancies (over 20 in a 30 day period must notify the Secretary of State *before* issuing redundancy notices.

The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006

will come to force on 1 October 2006 although the amendments only take effect in relation to employees whose expected week of childbirth or expected week of adoption is on or after 1 April 2007. A summary of the changes was outlined in our Summer Update Bulletin and we will include a reminder in our Spring 2007 Bulletin.

Useful Links

We mention them regularly in our Bulletins and Seminars, but here is a list of good resources.

www.acas.org.uk - ACAS homepage with latest policy, research and e-learning facilities

www.dti.gov.uk/employment/index.html - dti Employment Relations website which contains useful Regulatory Guidance

www.drc-gb.org - Disability Rights Commission

www.cre.gov.uk - Commission for Racial Equality

www.eoc.org.uk - Equal Opportunities Commission

www.agepositive.gov.uk - Age Positive, covers the new Age Equality rules. Click on guidance.

Transfer of Undertaking (Protection of Employment) Consequential Amendments Regulations 2006

from 1 October 2006. No, not another update to TUPE; this one is just catching up with the changes introduced in April by amending references in other legislation to the new TUPE 2006 from the old 1981 rules.

Employment Equality (Age) Regulations 2006

from 1 October 2006. Enough said, save that some of the pension changes which are now delayed to December to allow further reflection on whether clarification is required to assist pension funds. For more information on the pensions issue see the DWP press release for 8th September - www.dwp.gov.uk/mediacentre/pressreleases/2006/sep/pens073-080906.asp

Recent Publications

Wrigleys

Copies of our speaker notes from our 2006 Employment Update Seminars are now available on our website. You can also access notes from previous seminars and other really useful information - www.wrigleys.co.uk/charity/page.php?c=2&p=4

Civil Partnership

ACAS has published a short guide for employers on the implications of civil partnerships - www.acas.org.uk

The ACAS Annual Report 2005/06

is also available on the ACAS website and contains a number of interesting (?) statistics:

The ACAS website has received over 1.7 million visits with the "A to Z of work" and "Rights at Work" most frequently viewed. It has delivered almost 3,000 training sessions to over 40,000 delegates, including to delegates who attended our Employment Seminars in 2005 where ACAS appeared as our guest speakers.

Perhaps of more interest is that there were slightly less than 110,000 applications to tribunals, an increase of 25% on the previous year with unfair dismissal being the largest category with almost 36,000 applications.

The DTI has published findings from the 2004 Workplace and Public Relations Survey,

the last survey conducted in 1998, providing an up-date on the state of employment relations in Britain covering methods of recruitment, workplace consultation, paying benefits, work conflicts, equal opportunities, work life balance and other matters. See www.dti.gov.uk/employment/research-evaluation/wers-2004/

Cases of Note

Is there an obligation on employers to ensure that workers take holiday?

We reported at our Employment Update Seminar that the U.K. was accused of having failed in its obligation to properly implement the Working Time Directive.

Workers (note this extends beyond employees) have a right to in-work, daily and weekly rest periods as well as statutory paid holiday. The claim before the European Court of Justice (ECJ) focused on the DTI guidance which states that although an employer must not prevent a worker from taking such breaks as they may be entitled to, the employer was not obliged to ensure that the workers actually took those rest breaks. The ECJ held that the DTI guidance rendered the rights meaningless and therefore the U.K. had failed to ensure that worker rights were effectively granted and could be exercised.

It is likely that this measure will be dealt with by a simple amendment to the DTI guidance. The Working Time Directive does not require an employer to force its workers to actually take the rest periods that they are due. An employer will be in breach if they deny an employee rest breaks, save in permitted circumstances, for example, national security or where service provision must be maintained, where there is a right for compensatory rest period to be taken as soon as conditions allow. There remains little by way of guidance of exactly when such compensatory rest should be taken.

In additional, Tribunals and Courts will take into account the fact that an employee has been unable to take rest breaks or required to work in excess of the 48 hour average working week limit as evidence of an employers breach of duty where injury may have arisen. *The European Commission v the U.K. [C-484/04]*

Are you required to pay full pay to an absent disabled employee?

Recent cases have looked at an employer's duty under the Disability Discrimination Act, to make reasonable adjustments where an employee is unable to fulfil their duties due to a disability.

The case of *Archibald v Fife Council [2004]* held that a reasonable adjustment would include the automatic preferment of a disabled employee, transferring the employee into a vacant post without a need for competitive interviews. Adjustments have included the requirement to adjust contractual sick pay for the benefit of a disabled employee *Nottinghamshire CC v Meikle [2004]*. More recently, in appropriate circumstances the employer can be required to create a new role - *Randall v Southampton City College [2006]*.

The Employment Appeal Tribunal (EAT) has held that will be *"a very rare case"* where the employer's duty to make an adjustment will require paying a disabled employee full sick pay during a period of sickness absence. The EAT stressed that the Disability Discrimination Act was intended to assist disabled people into the workplace. Providing enhanced sick pay terms would actually create a disincentive to a return to work and would be equivalent to a form of wage fixing for the disabled sick.

Where sickness absence is due to a disability then a reduction in pay in accordance with a pre-existing sick pay policy will amount to disability related discrimination. However, such discrimination can be justified.

Employers faced with sickness absence related to a disability should give proper consideration to the application of its policies and procedures and whether any adjustment should be made. Adjustments include any measures which would assist the disabled employee return to work, including a change of job role and responsibilities. *O'Hanlon v HM Revenue & Customs*

An update on an employer's liability for harassment and bullying

The House of Lords have recently upheld that an employer can be liable for the acts of an employee where those acts amount to harassment and bullying not otherwise protected under the discrimination legislation. In our previous Update Bulletins we reported the Court of Appeal's decision in *Majrowski v Guy's & St Thomas' NHS Trust.* Following on the heels of this decision and very much in the press was the case of the bank employee who was recently awarded over £800,000 damages for personal injury as well as a claim under the Protection from Harassment Act 1997.

The Court found that there had been a *"relentless campaign of mean and spiteful behaviour"* specifically by four female colleagues and *"hostile disrespectful dismissive and confrontational treatment"* by a male colleague which the victim's line managers knew of or ought to have been aware of. Such behaviour amounted to harassment in that it occurred with great frequency, was targeted at the victim and calculated to cause distress. The employer had failed to

intervene and it was found that the bullying and harassment were the operative causes of the victim's breakdown.

The case emphasises the need for employers to take a proactive approach in managing cases of harassment and bullying. This is especially so where the victim is known to be vulnerable. In this case, as often in discrimination claims, the employer had an anti-bullying policy and provided anti-harassment training but it was clear that the policy and training were not effectively implemented or monitored rendering them useless as a defence.

How the Revenue can have its cake and eat it.

The case of *Demibourne Limited v HM Revenue & Customs* reinforces the need for employers to ensure that they have correctly identified the status of any contractor.

Where the employer wrongly views a worker as self-employed HM Revenue & Customs is entitled to charge the employer full PAYE and N.I. without being required to give credit for the tax which may have already been paid directly by the worker.

In this case, both employer and worker genuinely believed there was a self-employed relationship and for almost ten years the worker sent invoices, was paid gross and completed his annual accounts and paid his own tax. In many cases the employee may be able to recover his own payments of tax but in this case some of the payments dated back so far that the employee had lost the right to claim back the overpayments leaving the Revenue with a win - win situation. Even if the employee can claim overpayments, it is another matter whether the employer would be entitled to be reimbursed without an agreement to that effect as part of the contract between employer and employee.

It's Official - Sleep and be paid!

In our Summer Bulletin we highlighted the case of *MacCartney v Oversley House Management* where the live-in residential manager was held to be entitled to be paid for her on call hours which amounted to 24 hours a day, 7 days a week.

Similarly, a hotel night manager was required to sleep in so that he was available in the case of an emergency. Accordingly the hours that he was obliged to be present, albeit asleep, amounted to working time and the manager was entitled to be paid. *Anderson v Jarvis Hotels*

Remember, even ex-employees have employment rights

The employee complained that she had been subjected to various detriments after her employment finished, essentially in relation to a failure to give references, which she believed was due to a protective disclosure (whistle blowing) made many years before whilst an employee.

The Court of Appeal found that the protection against the detriment included in the Employment Rights Act 1996 should be interpreted to include detriments suffered by ex-employees as well as existing employees in order to bring such provisions in-line with discrimination legislation.

This is a clear case of judicial tinkering extending the interpretation of the legislation but in circumstances which clearly reach the right results for the ex-employee. Employers must be aware of their obligations when it comes to providing references. *Woodward v Abbey National Plc*

Our Winter 2005 Update Bulletin highlighted the case of *Dyke v Rickman [2005*] and your obligations when it comes to giving a reference. Mr Dyke's reference claimed that he was "a very difficult person with whom to work. We shall not be sorry to lose his services". Unsurprisingly an offer of employment, made subject to satisfactory references, was withdrawn and Mr Dyke sued his previous employers.

The claims were dismissed when the Tribunal accepted the employer's claim that the reference was true and justified.

Generally an employer is not required to give a reference but a refusal or an improper reference may in certain circumstances give rise to a claim of post-employment discrimination, harassment or victimisation. *Woodward v Abbey National Plc* extends this to include victimisation or detriment arsing in relation to a protected disclosure.

Where a reference is given it must be true and accurate and must not give an unfair or misleading impression. It is not right to say that the truth will always be fair. If allegations of misconduct (however genuinely held) were never identified in any discussions with an employee it is unwise for an employer to include them in a reference as the allegation may well be unfounded or the employee has a satisfactory answer. Including an allegation that has not been put to the employee is likely to be unfair and misleading.

Upcoming Seminars

Wrigleys Charity Governance Seminar will be held on 1st November at Harewood House, Harewood, Leeds. Amongst the topics we will be covering are Charity Mergers and we are delighted to confirm guest speakers from the Charity Commission and the Office of the Information Commissioner. For further details, including a booking form please see our website at www.wrigleys.co.uk or call Julie Mills on 0113 244 6100 or email at julie.mills@wrigleys.co.uk

Employment Equality (2003) Regulations briefing seminars will be held across the Yorkshire and Humber region hosted by Fairplay Partnership, the invited guest speakers at our 2006 Employment Update Seminars. Members of our Employment Team will be providing an overview of the Regulations which cover equality on grounds of Religion and Belief and Sexual Orientation. Further details of these free seminars are on our website, or you can contact Emma Jones at Fairplay Partnership on 0113 262 2789 or at emma@fairplaypartnership.org.uk

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The content of this Update Bulletin is intended to be by way of general guidance and is not a complete statement of the law. Users should not rely upon the content as applicable to any particular circumstances and detailed and expert guidance on any issue should always be sought.

We hope that you have enjoyed this issue of the Wrigleys Employment Update Bulletin. However, if you do not wish to continue to receive copies of our Update Bulletin please e-mail eus@wrigleys.co.uk marking the subject as unsubscribe and providing your name, organisation and address.