WRIGLEYS
SOLICITORS

EMPLOYMENT LAW BULLETIN

APRIL 2023

Welcome to Wrigleys' Employment Law Bulletin, April 2023.

This month, we round up the key rates and limits changes that took effect in April, which impacts, amongst other things, on the maximum damages tribunals can award in unfair dismissal cases.

We also take a look at proposed reforms by the government to the benefits system in a new publication called 'Transforming support: the health and disability White Paper', which aims to help those with disabilities and health conditions return to and stay in work via a package of support.

Our cases this month includes ***Meaker v Cyxtera Technology***, in which the EAT considered whether a 'without prejudice' letter sent by an employer to an employee dismissed the employee despite erroneously referring to the employment as 'terminating by mutual agreement'.

We also look at the interesting case of ***Randall v Trent College*** in which an employment tribunal considered the claim of a school chaplain of discrimination on the grounds of his religious belief after preaching that pupils did not have to agree with 'LGBT ideologies'.

Finally, we round off this month's bulletin by taking a look at data protection reforms which are currently making their way through Parliament, as the government attempts its first changes to the data protection regime following the UK's withdrawal from the EU.

We would also like to take this opportunity to invite you to join us for our forthcoming employment law conference themed 'leading through change'. This event will be our first in-person conference since the pandemic and will be held in central Leeds on 29 June 2023. As well as listening to our fantastic key note and guest speakers, attendees will be able to engage with the employment team to explore issues of equity, diversity and inclusion, hybrid working, whistle blowing, data protection and dealing with grievances through presentations and case studies.

Our conference is designed for all members of the senior leadership team and trustees who oversee people management within their organisation. The full agenda has been released, and we'd be delighted if you would take the time to have a look by clicking the below event link.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinar:

29 June 2023 | 09:00 - 16:30 | In-person conference
Wrigleys' Annual Employment Law Conference for Charities
Leading Through Change
Key note speaker: Ruth Busby, People and Transformation Director for Great Western Railway
Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

Contents

A round-up of employment law rates changes

Article published on 27 April 2023

We review key rates and figures changes in employment law

April is an important month for businesses up and down the UK as the traditional marker of the end of one Financial Year and the start of another. Many important changes relevant to employers happen at this time as well. Below, we summarise some of the most noteworthy and scan ahead to changes expected in the next 12 months.

National Living Wage and National Minimal Wage rate increases

From 1 April 2023 these rates increased in line with recommendations from the Low Pay Commission, as accepted by HM Government in its Autumn statement of 17 November 2022.

National Living Wage	workers aged 23 and over	£9.50 to £10.42 p/h
National Minimum Wage	workers aged 21 to 22 years old	£9.18 to £10.18 p/h
	workers aged 18 to 20 years old	£6.83 to £7.49 p/h
	workers aged 16 to 17 years old	£4.81 to £5.28 p/h
Apprenticeship rate		£4.81 to £5.28 p/h
Accommodation offset		£8.70 to £9.10 p/h

Also of note, the Department for Business and Trade (DBT) published a report concerning the figures around National Minimum Wage and Living Wage enforcement during the 2021-2022 financial year.

£16.3 million in arrears was identified for over 120,000 workers, with HMRC issuing nearly 700 penalties totalling £13.2 million. This led to 399 employers being 'named and shamed' for £3.3 million of wage arrears owed to 46,000 workers.

Increases to rates and limits

The following key rates and limits were increased in April.

Family-friendly leave-related pay and statutory sick pay

Following an announcement by HM Government in December 2022, proposed increases to parental leave pay and statutory sick pay were implemented in April 2023.

From 2 April, statutory maternity, paternity, adoption, shared parental and parental bereavement pay increased from £156.66 to £172.48 per week

Statutory sick pay increased from £99.35 to £109.40 per week from 6 April.

Redundancy

From 6 April the maximum payment for a statutory redundancy payment increased from £17,130 to £19,290.

Unfair Dismissal

The caps for payments for successfully claiming unfair dismissal increased as follows from 6 April:

- Basic award (calculated on the same basis as statutory redundancy payments) increased from £17,130 to £19,290
- Compensatory award increased from £93,878 to £105,707
- Additional award (issued for failure to comply with a re-instatement or re-engagement order) increased from a min/ max of £14,846 to £29,692 to £16,718 to £33,436

These caps reflect increases to the statutory limit on a gross week's pay, which also increased on 6 April from £571 to £643.

Injury to feelings (Vento guidelines)

From 6 April, injury to feelings awards, which are included in damages packages for discrimination and detriment known as the 'Vento guidelines' increased as follows:

Lower band	(less serious cases e.g. one-off)	from £990 to £9,900 to £1,100 to £11,200
Middle band	(for serious cases that do not merit a higher band award)	from £9,00 to £29,600 to £11,200 to 33,700
Upper band	(for the most serious cases including lengthy campaigns of discriminatory harassment)	from £29,600 to £49,300 to £33,700 to £56,200

Increases to the limits applicable to unfair dismissal and discrimination show a significant trend upwards, reflecting the broader inflationary effects seen in the UK economy over the last 12-18 months. Particularly of note, a compensatory award can, for the first time, now exceed £100,000, and significant increases to the Vento guidelines means employers face considerable damages awards costs if claimants are successful in establishing serious cases of discriminatory treatment.

Health and disability White Paper published

Article published on 28 April 2023

Government has set out proposals to help retain those with disabilities and health conditions in work.

In July 2019 the Department for Work and Pensions and the Department of Health and Social Care published a joint consultation called 'Health is everyone's business: proposals for reducing ill health-related job loss'.

Our article covering the paper can be found on our website (here), where we invited employers to provide their input and collated this for the purpose of the consultation.

The consultation sought views on proposals to reduce the costs of occupational health services to Small and Medium Enterprises via a subsidy or voucher system and whether this may improve engagement and retention of those with disabilities in the workplace.

The DWP and DHSC published a joint response to the consultation in July 2021, highlighting how the COVID pandemic further created a need for reforming access to OH services.

White paper

In July 2021 DWP also published its 'Shaping future support: the health and disability Green Paper' setting out proposals to improve outcomes for people with disabilities or health conditions through the work and benefits system.

On 15 March 2023 the DWP published 'Transforming support: the health and disability White Paper' which sets out the government's aims to support unemployed disabled people and those with long-term health conditions back to work.

The central methods of delivery of these aims are:

- Increasing employment support for those with disabilities or health conditions; and
- Reforming the benefits system to make it easier for disabled people to access support when applying for and receiving health and disability benefits and to work while retaining health-related benefits.

'Start, stay and succeed in work'

In the white paper, the government has set out the following measures to help people with disabilities or health conditions to "start, stay and succeed in work", including:

- Working with the occupational health sector and employers to reform and improve access to OH services. DWP is piloting a financial incentive and support model to help SMEs and the self-employed overcome affordability barriers to OH services. If successful, the pilot may be expanded nationally.

- A new digital advice and information service is being developed for employers to help with the management of health and disability in the workplace. The service is reportedly in national live testing and is designed to help employers 'self-serve' by taking them through common scenarios and signposting them to more detailed guidance.

- Allowing remote and in-person access to the Access to Work Mental Health Support Service to employees. The service provides tailored support for up to nine months and includes support for employers to enable them to fully understand an employee's health condition.

- Creating a new Access to Work initiative which provides, amongst other things:

  o an application for disabled contractors and freelancers, which removes the requirement for applicants to reapply under the Access to Work scheme every time they begin a new period of work;

  o the introduction of 'adjustment passports', which contain a person's workplace adjustments and general working requirements, which can be shared with employers to provide information of an employee's particular needs and remove the need for an Access to Work assessment where in-work support needs remain the same;

  o an enhanced package for those needing support, including support from a work coach;

  o Introducing a new health element for those in receipt of both Universal Credit and Personal Independence Payment (PIP) in order to remove the need to be found to have limited capability for work and work-related activity, removing barriers that prevent people from entering or remaining in employment.

  o Developing a Disability Action Plan in 2023. A consultation is expected to be launched later in the year to assist with this.

Commentary

The announcement of the White Paper has broadly been welcomed by charities and groups that promote the interests of those with disabilities and health conditions. In particular, the change in emphasis towards what people can do as opposed to can't do has been seen as a positive step.

Some have flagged that the White Paper has omitted reference to the role of assistive technologies in supporting jobseekers with disabilities, and are cautious about welcoming initiatives such as the adjustments passport, highlighting that workplace attitudes to adjustments and the flexibility sometimes required around disability and health conditions needs to be advanced further if this measure is not to have the unintended consequence of further excluding those it is designed to help.

In addition, concerns have been raised at the lack of engagement by the DWP with mental health groups and the potential impact of the White Paper on those with mental health issues. The mental health charity Mind have highlighted concerns in a recent article with the i newspaper that the scrapping of the Work Capability Assessment and replacing it with PIP risks making support harder to obtain for those with mental health conditions, on the basis that the threshold for PIP is more rigid and generally applies to those who struggle with physical mobility issues.

It should be noted that the details of the changes to the benefits system-related assessments outlined in the White Paper have not been set out yet.

School chaplain was not discriminated against because of his religious belief after preaching that pupils did not have to agree with "LGBT ideologies"

Article published on 18 April 2023

Disciplinary action was taken because of objectionable manifestation of religious beliefs rather than the beliefs themselves.

We are seeing an increasing number of queries from employers about cases where there is a perceived clash of protected characteristics in the workplace. The employment tribunals too are dealing with what seems to be a rise in employees bringing claims alleging they have been subjected to religious or philosophical belief discrimination by being disciplined for expressing their views, including in relation to same sex marriage and trans rights.

We reported in 2021 on the significant decision of the EAT in *Forstater v CGD Europe and others* (available on our website: Claimant's gender-critical belief is protected under the Equality Act). This decision made clear that a belief that people cannot change their sex can be a protected philosophical belief.

Religious or philosophical beliefs are protected only if they are: genuinely held; a belief rather than an opinion or viewpoint; relate to a weighty and substantial aspect of human life and behaviour; are cogent, serious, cohesive, and important; are worthy of respect in a democratic society; are not incompatible with human dignity; and do not conflict with the fundamental rights of others.

In *Forstater*, the EAT stated that only beliefs that would be "an affront to [European Convention on Human Rights (ECHR)] principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms" will be such as are not worthy of respect in a democratic society. Beliefs which are "offensive, shocking or even disturbing to others" are not excluded from protection.

In schools and other organisations with a religious ethos, conflict may arise when communicating orthodox faith teachings on marriage, sexuality and gender, while pursuing policies which aim to ensure that differences are tolerated and celebrated, and that LGBT people are protected and valued.

A recent employment tribunal case is useful in illustrating how tribunals will approach religion and belief discrimination cases. In particular, the distinction to be made between detrimental treatment because of the way beliefs are manifested, and that which is simply because the employee holds the beliefs.

Case details: ***Randall v Trent College***

Dr Randall was a school chaplain at Trent College, an independent school which was established with the object of the advancement of education in accordance with the principles of the Church of England.

In 2016, Dr Randall preached a series of sermons to Years 7 – 13, focusing on gender equality, same sex marriage and LGBT rights. The tribunal noted that these sermons "strongly implied that it is sinful to alter the body given by God, implied that marriage can only be between a man and a woman and that family works best when a woman, with her tone of voice, looks after the children", had an underlying message that homosexuality is sinful, and stated that those who believe same sex marriage is right were in the minority globally.

A number of complaints were received from pupils, parents and staff. These concerns were shared with Dr Randall, in particular the potential distress and harm which could be caused to vulnerable LGBT pupils by delivering these messages in a Chapel sermon. He was asked to avoid "anything controversial" in his sermons in future.

In 2018, the school began to use the Ofsted and Department for Education recognised programme, "Educate and Celebrate". This was a whole-school approach to "tackling homophobic, biphobic and transphobic bullying and ingrained attitudes in schools". Dr Randall strongly opposed this programme. He expressed his concerns and was encouraged to share his views on the programme, but he was not included on the Educate and Celebrate steering group.

In 2019, Dr Randall delivered a further series of sermons on the theme of "competing ideologies". The sermons stated that pupils did not have to accept the ideas of "LGBT activists", that some LGBT activists "happily lie" about gender identity being a protected characteristic, and that no one had the right to tell pupils to lie – that was "the tactic of totalitarianism and dictatorship".

After complaints were raised about the first sermon to Years 7 and 8, Dr Randall was asked to moderate the next sermon. However, Dr Randall delivered much the same sermon to the other year groups two days later.

An unprecedented number of complaints from pupils and staff were received. A pupil commented that: "Some people listening might be coming to terms with their sexuality. They may now think they're not 'right' or may feel even more uncertain. People might also feel afraid to come out. It creates a hostile environment."

When asked for his reflections on the complaints, Dr Randall stated that he took his authority from Canon Law and that he had said nothing that was not true and in line with church teachings. He blamed the introduction of Educate and Celebrate for the situation the school was facing. He showed no regret that his sermons had caused distress.

Dr Randall was suspended and a disciplinary investigation took place into allegations that he had delivered sermons which caused distress to pupils and staff and that he had disregarded advice from senior pastoral staff about the content of the sermons.

Following a disciplinary hearing, Dr Randall was summarily dismissed for gross misconduct. The reasons for dismissal included that Dr Randall had, despite advice, preached sermons which might have caused harm to pupils and were too complex for the age groups concerned, had undermined school policies and initiatives, had preached a message which was not in line with the school's obligations under the Education (Independent School Standards) Regulations 2014 (ISSR) to promote respect for others and to have particular regard to the protected characteristics in the Equality Act, had not shown empathy for pupils and staff, and risked damaging the reputation of the school. Issues such as those in the sermons should have been addressed in class, rather than in chapel where there was no time or room for discussion or questioning.

After seeking advice from the Local Authority, the school made a referral to Prevent on the basis of Dr Randall's anger about Educate and Celebrate, his entrenched views, his lack of empathy for pupils, his lack of reflection or regret, and his belief that Canon Law took precedence over pupil welfare. Prevent considered that there was no risk of radicalisation and did not take the referral further. The school also referred Dr Randall to the Local Authority Designated Officer, but received no feedback on this referral.

Dr Randall appealed against his dismissal and a decision was taken to downgrade the sanction to a final written warning as he had not received any formal warnings for earlier incidents. His return to work was subject to adherence with a number of management instructions.

During the height of the Covid pandemic, the school decided to furlough a large number of staff. It then undertook restructuring and redundancy consultations based on the financial situation of the school. As part of these, and following a review of faith provision in the school, Dr Randall was dismissed on the ground of redundancy.

He brought a number of claims to an employment tribunal, including direct religious belief discrimination, harassment, victimisation and unfair dismissal. He also alleged that his rights to freedom of thought, conscience and religion and to freedom of expression under the ECHR had been unlawfully interfered with. There was no dispute in this case that Dr Randall's beliefs were protected under the Equality Act.

Objectionable manifestation of beliefs

Case law shows that a crucial question when considering direct religion or belief discrimination claims, in the light of human rights law, is whether the treatment in question was because of the belief itself (which would be unlawful), or because of the way in which the claimant manifested their belief.

The tribunal judgment sets out very clearly the questions to be asked in cases of this kind:

1. Was the reason for the treatment the Claimant's beliefs or their manifestation of those beliefs?
2. If the reason for the treatment arose from the manifestation of the Claimant's beliefs, was the manifestation of those beliefs the reason for the treatment, or was the reason the particular way in which the Claimant manifested their beliefs?
3. If the reason for the treatment was the way in which the Claimant manifested their beliefs, was the employer's objection to that manifestation justified? (There is no justification defence to a direct discrimination claim, but this consideration of justification follows from a requirement on the tribunal to interpret the Equality Act in a way which, so far as possible, is compatible with the ECHR.)

In this case, the tribunal found that the school's treatment of Dr Randall had not been because of his beliefs. The reason for the treatment was the objectionable way in which Dr Randall had manifested his beliefs.

The tribunal found that Dr Randall's human rights had not been infringed, as any interference with

those rights had been justified in meeting the school's legitimate objectives. The tribunal took into account the obligations on the school to comply with the ISSR, particularly the requirements to encourage respect for other people, paying particular regard the protected characteristics, and to deliver education in an age-appropriate manner. It also took into account the paramount obligation on the school to safeguard its pupils.

Dr Randall's other claims were also dismissed. This is a first instance decision of the employment tribunal and may be appealed.

Comment

It is by no means easy for organisations to deal with cases where the expression or manifestation of protected beliefs by one individual may pose a risk of harm to staff or beneficiaries, including children and vulnerable people. Strength of feeling on both sides is perhaps more likely to lead to complaints and claims, and it can be very difficult for senior managers to navigate between what appear to be competing protected characteristics.

It is important to be clear that staff should not be subjected to a detriment or dismissed for holding a particular protected belief. However, where it is justifiable to object to the way in which the belief is manifested, employers should take steps to protect those who may be harmed by that manifestation and to make clear that such conduct is contrary to the employer's values and policies.

Employers should have clear, accessible policies which help staff to understand the aims behind those policies and the values or legal obligations they are seeking to uphold. Regular training should be undertaken to communicate those policies, aims and values. Clear reference should also be made to these policies when discussing issues with staff in performance management and in any disciplinary proceedings. Taking these steps should assist in lowering the risk of claims and in defending such claims as are brought.

Letter headed "without prejudice" and offering settlement agreement was a dismissal letter

Article published on 20 April 2023

EAT: claimant was dismissed by means of letter which wrongly referred to termination by mutual agreement.

Conducting "without prejudice" negotiations can be tricky for employers. It can be difficult to appreciate the distinction between those discussions and documents which are part of on the record HR processes, and those which are off the record and seeking to resolve a dispute between employer and employee.

A recent EAT case provides a useful reminder that documents headed "without prejudice" might nevertheless be wholly or partly on the record or "open" documents, and highlights the need for clarity about the status of such documents, particularly where they include arrangements for termination and a dismissal date.

The without prejudice rule

The without prejudice rule will apply to make communications inadmissible as evidence in a court or tribunal if there is an existing dispute between the parties at the time of the communication and the communication is a genuine attempt to settle the dispute in question.

For more detail on what is meant by "without prejudice", please see our recent article which remains available on the Wrigleys website: Will the without prejudice rule apply to make settlement

negotiations inadmissible as evidence?

When does dismissal take effect?

Proposed settlement terms will usually include a proposal for employment to terminate by mutual agreement on a specified date. If such terms are agreed, employment will terminate without a dismissal or resignation. If the settlement terms are not ultimately agreed, employment will continue under the terms of the employment contract until one party terminates the contract or the contract expires.

There are a number of reasons why having clarity on the date of termination of employment is important. Not least, determining the date when dismissal took effect is crucial when working out whether an unfair dismissal claim has been brought within the three-month time limit (subject to the time for Acas Early Conciliation being added).

Interestingly, case law indicates that termination of an employment contract for contract law purposes can take place on a different date to the statutory "effective date of termination" (EDT) under the Employment Rights Act 1996. It is the EDT which is the key date when working out how long a claimant has to bring an unfair dismissal claim.

The EDT takes place:

- If notice has been given by employer or employee, on the date when notice expires;
- If termination is without notice, on the date termination takes effect;
- If a fixed term contract expires without being renewed, the date on which the term expires; and
- If a limited-term contract terminates by virtue of the limiting event occurring without being renewed, the date on which the termination takes effect.

Under contract law, in a case of repudiatory breach by the employer, the contract can continue beyond the EDT if the employee does not accept the breach and treat the contract as terminated.

Case details: ***Meaker v Cyxtera Technology***

Mr Meaker was employed by Cyxtera Technology UK Ltd (Cyxtera). He was off sick for an extended period due to back injuries which meant his ability to carry out the heavy manual duties entailed in his role was permanently limited.

Cyxtera advised Mr Meaker that it was considering terminating his employment and raised the possibility of a settlement agreement. Cyxtera sent Mr Meaker a letter headed "without prejudice" on 5 February 2020. The letter stated that Mr Meaker's employment would terminate "by mutual agreement" by reason of capability on 7 February 2020. It stated that he would receive payment in lieu of notice and accrued untaken holiday and that his P45 would be issued following his last salary payment.

The letter enclosed a settlement agreement with an offer of an ex-gratia payment. Mr Meaker rejected this offer. Cyxtera paid Mr Meaker his notice and holiday pay on 14 February 2020. A week later, it acknowledged Mr Meaker's rejection of the settlement offer and explained why it could not allow him to return to work.

Mr Meaker brought a claim for unfair dismissal to an employment tribunal. At a preliminary hearing, his claim was dismissed on the basis that it was brought out of time and there was no reason to extend the time limit in this case. The tribunal took the time limit for the claim as running from the EDT of 7 February 2020. If the dismissal had taken place on 14 February, Mr Meaker's claim would have been in time.

EAT decision

On appeal, the EAT upheld the decision of the employment tribunal.

The EAT made clear that the statutory concept of the EDT is not impacted by ordinary contractual principles. Where there has been a repudiatory breach of contract by the employer, the EDT is not dependent on the employee accepting that breach. In other words, there can be cases where the contract has terminated for the purposes of the EDT and an unfair dismissal claim, but carries on under contract law. In this case, the EDT was 7 February as set out in the letter.

Although the letter including the termination date was expressed to be "without prejudice", the EAT held that it was open to the tribunal to find on the facts that the letter was a letter of dismissal. The EAT noted that:

- The letter was sent in a factual context where it was reasonable to conclude that the employer had decided to terminate Mr Meaker's employment.
- Even though it may be safer and clearer to convey open and without prejudice communications in separate documents, it is possible for a single letter to contain some open content and some without prejudice content. This depends on the content of the letter rather than the label attached to it. The tribunal was entitled to find the letter fell into two distinct parts: a part that dealt with the termination and Mr Meaker's legal entitlements on termination; and a part proposing further payments to which the claimant would only be entitled if he agreed to the settlement agreement.
- The letter stated that employment would terminate by "mutual agreement". However the tribunal was entitled to find that other details given in the letter clearly communicated that dismissal for capability reasons would occur on the stated date and that this was not dependent on Mr Meaker's agreement.

The EAT also agreed with the tribunal's decision that the time limit should not be extended in this case. There was no suggestion that it was not reasonably practicable for him to bring the claim within the time limit and so the test for extending the time limit had not been met. Mr Meaker had trade union and legal advice and should in any event have known that his employer considered his end date to be 7 February, particularly when his final salary was paid up to that date.

Comment

It is not uncommon for there to be confusion about when an employment contract terminates for contractual and/or statutory purposes and this can lead to uncertainty and risk, for example in relation to salary payments, holiday accrual, notice payments and redundancy payments. As in this case, there can also be doubt as to the time limit for potential claims.

The employer was fortunate in this case that the tribunal interpreted the letter as being an effective letter of dismissal on the earlier date, and that the employee was therefore time-barred from bringing his claim. However, if the employer had not intended to dismiss and simply to propose terms for termination by mutual agreement, the letter could have unnecessarily increased the risk of an unfair dismissal claim.

It is advisable to seek specialist legal advice to ensure communications with employees about termination of employment are clear and do not create unnecessary risk. This is particularly the case where there are complex employment relations issues, and where there are parallel or overlapping on the record and off the record discussions and documents.

Data protection reforms make their way through Parliament

Article published on 19 April 2023

*After a false start last year, the Data Protection and Digital Information (No.2) Bill ("**the Bill**") has passed through its first major parliamentary hurdle as it looks to update data protection laws in the first major change since Brexit. The Bill was given its second reading on Monday 17 April and will now proceed to the committee stage for line-by-line scrutiny.*

Changes proposed in the Bill

The Bill is very much 'evolution' rather than 'revolution' of the existing data protection regime, nevertheless it will change the way in which organisations must ensure data protection compliance. The Bill, as drafted, makes several changes to data protection law including:

- ***Examples of legitimate interests*** – organisations currently have to justify each legitimate interest they identify as a lawful basis for processing personal data, balancing each against the rights and freedoms of a data subject. Many tasks relying on legitimate interests are clearly necessary for the functioning of an organisation. The Bill introduces examples of legitimate interests, which, whilst still requiring balancing against the data subject's rights and freedoms, are identified explicitly as being an acceptable legitimate interest to pursue (e.g. where personal data is shared within a company group).

- ***Recognised legitimate interests not requiring a balancing of data subject rights*** - the Bill also introduces a limited number of recognised legitimate interests, for example preventing or detecting crime, which will not require the balancing with data subject rights and freedoms before being able to be relied upon.

- ***Making further scientific research easier to undertake*** – the Bill modifies the standard of consent required for scientific research purposes to allow those undertaking such research greater flexibility where the exact use of the information is not able to be determined at the point of the consent.

- ***The end of the DPO?*** Data Protection Officers are no longer to be appointed, however in their place organisations that would previously have needed to appoint a DPO (e.g. public authorities and those processing large amounts of sensitive personal data) will need to appoint a "senior responsible individual".

- ***Records of processing activities*** – currently, organisations with more than 250 employees or which process personal data which risks the rights and freedoms of data subjects are required to keep a record of their processing activities. Anecdotally, many organisations have found that these records duplicate many other documents kept by organisations (such as retention policies and privacy notices). This obligation is removed in the Bill, replaced with a duty on organisations who undertake processing activities likely to result in a high risk to the rights and freedoms of individuals to keep "appropriate records".

- ***Vexatious or excessive requests by data subjects*** – the Bill introduces a new definition of vexatious or excessive requests, so that data subject access and similar requests can be refused or charged for more easily than the "manifestly unfounded or excessive" test currently in place, providing factors organisations should take into account when deciding whether a request is vexatious or excessive. This definition builds on and develops existing guidance on when an organisation may consider a request "manifestly unfounded or excessive". Such clarity is to be welcomed in what is a particularly difficult area for small organisations to handle.

- ***Direct marketing changes – a welcome update for charities*** – charities (and political parties) will be able to send electronic marketing communications to individuals who have previously

expressed support for the cause being promoted to them without requiring explicit consent (unless they have opted out of receiving such communications). This brings charitable donations into line with commercial promotions relying on the so-called 'soft opt-in', though charities will still need to ensure compliance with the particular requirements of the direct marketing and data protection legislation and should also consider the fundraising code when sending such communications.

- ***Direct marketing – a bigger stick*** – the maximum direct marketing fines have been increased to align with the maximum fines under the UK GDPR, such that an organisation can now be fined up to £17.5 million or, if higher, 4% of their global turnover for a breach of the electronic direct marketing regime.

- ***The end of cookie, cookie, cookie?*** Constant requests to accept cookies are widely recognised both as a nuisance and a poor way of regulating the use of cookies online. The Bill seeks to reduce the number of cookies which require users' consent but, crucially, consent is still required for advertising cookies.

- ***A new Information Commission*** – reforms are made to the Information Commissioner's Office, which will become the Information Commission. Many of the changes amend the internal running of the body responsible for ensuring compliance with the UK's data protection regime.

Next stages

The Bill will now proceed to the Committee stage for line-by-line scrutiny by the House of Commons. Once it has passed this hurdle, the legislation will also need to go through the House of Lords before it becomes law.

As the Bill makes its way through Parliament, it will be interesting to see how this first, tentative step to reform data protection law following Brexit is received. Many organisations find data protection obligations a significant burden, but as our personal data becomes increasingly valuable to organisations, appropriate regulation of its use becomes increasingly important.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk