



Employment Update - January 2020

What should members expect by way of Employment Law developments in 2020?

Extending the Reference Period for calculating Holiday Pay

Since the Working Time Regulations introduced the concept of paid annual leave, way back in 1998, there has been a string of Employment Tribunal cases challenging how holiday pay should be calculated. For those working irregular working patterns, with fluctuating hours and payments, such as NAECI employees, it was initially difficult to assess this fairly. The consistent message from the European Court of Justice has been that the pay received whilst on leave for holiday should reflect the pay that the individual would have received if at work. Otherwise, the individual may be deterred from actually taking the holiday.

The Employment Appeals Tribunal judgment in the case of Bear Scotland v Fulton in 2014, eventually delivered legal clarity and certainty about how NAECI employers should make this calculation.

One area that continued to be an area of dispute was about the length of the reference period and whether looking back 12 weeks fairly reflected the average pay of a worker. The courts have generally considered that it did not and consequently the legislation will be changed from 6 April 2020, to allow a 52-week period to be taken into account instead. This is likely to give a more accurate reflection of average pay as fluctuations in work and pay throughout the year should effectively be smoothed out.

Hopefully the Government will provide some additional guidance before 6 April because clarity is still required about whether the practice of “discounting” certain weeks from the reference period and including an earlier one needs to continue or not.

Statement of Written Particulars

One big change this year will be around contracts of employment, formally known as statements of written particulars of employment. The November 2019 edition of Employment Briefing contained full details of the forthcoming change that will apply to new joiners only, from 6 April 2020.

All workers, as well as employees, will be entitled to a written statement of terms. It must be provided on or before the first day of the engagement, rather than within two months - as currently required in relation to employees. There is also an increase in the level of

information that must be included in the statement, with much more information now required in relation to working patterns and training requirements.

New IR35 rules

Changes to the operation of IR35 regime will take effect from 6 April 2020. Private-sector businesses engaging contractors who supply their services personally via an intermediary (e.g. a personal services company) will become responsible for determining whether IR35 is applicable. If the end-user considers IR35 applies, the end-user paying the intermediary will be responsible for operating PAYE and national insurance on the fees it pays. Companies affected should urgently prepare for these important changes by, for example: auditing their labour supply chain to identify contractors using intermediaries; deciding on a methodology for assessing their status (HMRC do have an online CEST tool [Checking Employment Status for Tax]); and reviewing their onboarding process and documentation for contractors going forward. Before the general election, the Chancellor Sajid Javid said there would be a review of the proposed IR35 changes to ensure they were 'right to take forward'. However, with no further post-election comments, it now seems very likely the reforms will proceed in April, so it remains sensible for members to continue preparations.

Termination payments

There were significant changes to the tax treatment of termination payments introduced in April 2018, however, a related requirement for employers to pay employer NICs on any part of termination payments exceeding £30,000 was put on hold. This change will now come in on 6 April 2020, making termination payments more expensive.

National Minimum Wage

National Minimum Wage (NMW) rates will increase on 6 April 2020. At the highest rate, known as the National Living Wage and applicable for those aged 25 and over, it is a 6.2% increase from £8.21 to £8.72.

Other tiers of NMW are also subject to increase on 6 April:

21-24 years old increase from £7.70 to £8.20

18-20 years old increases from £6.15 to £6.45

Under 18 years increases from £4.35 to £4.55

NMW for Apprentices increases from £3.90 to £4.15