

IN DEPTH

January 2021 Newsletter

Elcons Employment Law Consultants Ltd

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Recent and forthcoming changes

2020 was more than an interesting year and by anyone's standards had more twists and turns than any of us could ever have predicted, however, change will continue... Hopefully, this summary will assist you and your business in checking everything is in order following recent changes and in anticipation of forthcoming changes.

All things covid:

- Right to carry over statutory annual leave for two years introduced (26th March 2020)
- (The temporary amendment to the Working Time Regulations 1998 (WTR) will allow workers to carry over up to 4 weeks of holiday for up to 2 years if issues relating to COVID-19 have meant it was "not reasonably practicable" for a worker to take some or all of their leave). The additional 1.6 weeks' leave can be carried over by agreement between the employer and employee.
- Entitlement to statutory sick pay for those who are "shielding" introduced (16th April 2020)
- Rules on calculating normal weekly earnings for family-related benefits for those who are furloughed introduced (25th April 2020)
- Recovery of statutory sick pay for coronavirus cases introduced (26th May 2020)
- Right to statutory sick pay when self-isolating due to contact with coronavirus (28th May 2020)
- Clarification that furloughed employees are entitled to notice pay (subject to the length of their notice period), and redundancy payments based on their normal weekly pay (31st July 2020)
- Right to SSP for 10-day self-isolation due to coronavirus (5th August 2020)
- Right to SSP when self-isolating prior to a hospital admission (26th August 2020)
- The Coronavirus Job Retention Scheme, which was due to close at the end of October 2020, has been extended until 30 April 2021. Employers can furlough employees from November 2020 even if they had not previously made use of the scheme. The scheme will cover 80% of furloughed employees' wages (capped at £2,500 per month).
- Claims for furlough days in December 2020 must be made by 14 January 2021.
- You can no longer submit claims for claim periods ending on or before 31 October 2020.

Coronavirus Job Retention Scheme Guidance and Notice periods

Any employer claiming for employees on or after 1st December 2020, cannot claim for any day that an employee is serving notice up to 31st January 2021, when guidance will be reviewed again.

This includes both Statutory and Contractual notice periods, redundancy, dismissal, retirement, resignation. You may therefore only claim furlough for employees who are still employed and not leaving the company at this stage.

Recent changes:

- Employment Tribunal procedures are to be relaxed in order to assist with clearing the backlog of cases (8th October 2020)
- On the 5th November 2020 upon extending the Coronavirus Job Retention Scheme, the government announced that the Job Retention Bonus has been cancelled as it no longer applied and that a new retention incentive would be introduced at an appropriate time.
- ACAS early conciliation to be extended from one month to 6 weeks (1st December 2020)



Modern slavery statements: Section 54 Modern Slavery Act 2015

Under section 54 of the Modern Slavery Act 2015, certain businesses are required to publish an annual Modern Slavery Act statement, setting out the steps they have taken to identify and address their modern slavery risks.

The supply chain provisions apply to commercial organisations, which are defined as a body corporate or partnership (wherever incorporated or formed) that conducts a business (including a trade or profession), or part of a business, in any part of the UK, and which also:

- Supply goods and services
- Has a total annual turnover of £36 million or more (the turnover figure is calculated by taking into account the turnover of the organisation and its subsidiary undertakings)

The statement does not need to follow a prescribed form, but the suggested content includes describing:

- The organisation's structure, its business, and supply chains
- Policies and staff training relating to slavery and human trafficking

- Due diligence processes relating to slavery and human trafficking in the company's business and supply chains
- The parts of its business and supply chains that are at risk of having slavery and human trafficking occur, as well as the steps taken to assess and manage that risk
- The organisation's effectiveness in ensuring that slavery and human trafficking are not occurring in its business or supply chains, measured against identifiable performance indicators

On 20 April 2020, the UK government published guidance for companies on how to approach their Modern Slavery Act statements during the COVID-19 pandemic. The government has stressed that businesses should continue to identify and address risks of modern slavery in their operations and supply chains; however, businesses can delay publishing their statements by up to six months without penalty, if necessary, because of the pandemic. The government also provided recommended mitigation measures for areas of increased modern slavery risk.

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Forthcoming changes BREXIT...

It happened and it has employment implications: New immigration law affecting recruitment of people from overseas.

As of 1st January 2021, free movement ended resulting in foreign nationals wishing to work and live in the UK needing to meet specific criteria in order to work or remain in the UK.

This involves being offered a job from an approved sponsor. If a company intends to take on foreign workers from the beginning of 2021, then they will need to apply for a license as soon as possible. The points-based immigration system can be viewed here: <https://www.gov.uk/guidance/the-uks-points-based-immigration-system-information-for-eu-citizens#working-in-the-uk>
See immigration article for further detail



IR35 – check your contracts



Originally scheduled for implementation in April 2020, this was bound over to now take effect on the 6th April 2021. Changes to the off-payroll tax legislation require you to identify self-employed consultants who offer their services through a limited company (personal service company) to your company. Please defer to the government online tools to determine if you have an obligation as a company to deduct income tax and national insurance contributions at source when paying the contractor <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm11000>

You will also need to make clear in all consultant contracts whether the relationship falls inside or outside IR35. The changes will only affect medium to large companies, and it has been indicated that similar criteria as used in the Companies Act 2006 will be applied to define a medium/large business, which broadly indicates that a company will fall into this category if it has two or more of the following:

- a turnover of more than £10.2m;
- a balance sheet total of more than £5.1m;
- 50 employees or more.

Statutory rate changes...

New National Minimum Wage rates will apply from 1st April 2021. Please note that National Living Wage will now apply to 23- and 24-year olds (having previously been for those aged 25 and over).

National Living Wage	£8.91
21-22 year old rate	£8.36
18-20 year old rate	£6.56
16-17 year old rate	£4.62
Apprentice rate	£4.30
Accommodation offset	£8.36

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Possible New Legislation

In December 2019 the Queen's speech heralded a number of proposed pieces of legislation. Some of these may have been overtaken by the events of the last nine months, but the key ones for HR are:

- **Extension to redundancy protections to prevent pregnancy/maternity discrimination** - Although it is not impossible to make a woman who is pregnant/on maternity leave or just returned from maternity leave redundant, the government intends to extend the enhanced protections (namely to be placed into a vacant role for which they have the skills without competitive interview), for six months after the woman returns from maternity leave.
- **Introducing an entitlement to one week's leave for unpaid carers** - A consultation paper in 2020 proposed allowing unpaid carers to have an additional one week unpaid leave a year.
- **Allowing parents to take extended leave for neonatal care** - A response to consultation was published in March 2020 confirming that parents of babies that are admitted into hospital as a neonate (28 days old or fewer) will be eligible for neonatal leave and pay if the admission lasts for a continuous period of seven days or more. They will be entitled to this from day one of their employment and up to a maximum of 12 weeks. We await further details...
- **Flexible working the default unless employers have a good reason not to** - This proposal failed to complete its passage through parliament however the Queen announced that legislation would be implemented to give effect to this. We will again watch out for further news although flexibility has been at the forefront of most employers' minds in the midst of the pandemic.
- **A new, single enforcement body for employment rights** - Consultation closed in October 2019 regarding an intention to have one body enforcing minimum wage, unpaid tribunal awards and the tribunal penalty scheme, regulating statutory sick pay and publicising employment rights. We await further news.
- **Tips and Gratuities** - Specially referred to in the Queen's speech ensuring that tips and gratuities are distributed to staff.
- **A new right for all workers to request a more 'predictable' contract** - No details have yet been published, but this is to address the perceived imbalance of zero-hours contracts.
- **Increase in the length of time needed in order for there to be a break in continuity of service of an employee** - initial proposal to go from one week to one month
- **Protection for whistle-blowers** when applying for roles in the children's social care sector



Brexit... employing those from outside of the UK... the rules are changing...

We are currently in the Brexit “transition period” but from the 1st January 2021, the UK will no longer be part of the EU. As such, businesses are urged to prepare where:

- Your business imports good into the UK
- Your business exports good into the UK
- You will employ people who are not UK nationals

The UK’s points-based system for immigration will come into force on the 1st January 2021. This will impact on how you will be able to recruit from overseas.

- You will need to be a licensed sponsor to hire eligible workers from outside the UK. This normally takes 8 weeks and fees apply.
- New job, salary and language requirements will apply to anyone that you want to hire from outside the UK. Check that the people you want to hire will meet the requirements for coming to the UK for work.

The new system will not apply to hiring Irish citizens, or EU citizens already living and working in the UK who are eligible under the EU Settlement Scheme.

If you find your business is eligible to sponsor a worker from overseas, you may choose to submit an application for a licence.

Types of licence

The licence you need will depend on whether the workers you want to fill your jobs are:

- Tier 2 - skilled workers with long-term job offers
- Tier 5 - skilled temporary workers

You can apply for a licence covering either tier or both.

Tier 2

Tier 2 is for skilled workers who you want to employ long-term or permanently. It’s split into:

- General - the role must meet the job suitability requirements
- Intra-Company Transfer - for multinational companies which need to transfer employees to the UK
- Minister of Religion - for people coming to work for a religious organisation (for up to 3 years)
- Sportsperson - for elite sportspeople and coaches who will be based in the UK

Tier 5

Tier 5 is for skilled workers you want to employ on a temporary basis. It’s split into:

- Creative and Sporting - to work as a sportsperson (up to 1 year), entertainer or artist (up to 2 years)
- Charity Worker - for unpaid workers (up to 1 year)
- Religious Worker - for those doing preaching, pastoral and non-pastoral work (2 years)
- Government Authorised Exchange - work experience (1 year), research projects or training, for example practical medical or scientific training (2 years) to enable a short-term exchange of knowledge

- International Agreement - where the worker is coming to do a job which is covered by international law, for example employees of overseas governments

If your application is successful, you will need to uphold a variety of responsibilities. You will need to nominate someone (or more than one person if you wish), in your business to manage the sponsorship process when you apply for a licence. They will have access to the “Sponsorship management System”. Before being appointed, you will need to ensure that they pass the suitability test as outlined on [gov.uk](https://www.gov.uk) <https://www.gov.uk/uk-visa-sponsorship-employers/sponsorship-management-roles>

You need to pay for a fee when you apply for a licence:

Type of licence	Fee for small/charitable sponsors	Fee for medium/large sponsors
Tier 2	£536	£1,476
Tier 5	£536	£536
Tier 2 + Tier 5	£536	£1,476
Add T2 to existing T5	No fee	£940
Add T5 to existing T2	No fee	No fee

NB Your business will usually qualify as a small business if:

- your annual turnover is £10.2 million or less
- you have 50 employees or fewer

Your licence rating

You’ll get an A-rated licence if your application is approved which is a full sponsor licence, this allows you to start assigning certificates of sponsorship and your business will be listed on the “register of sponsors”

Downgrading to B-rating

Your licence may be downgraded if you do not continue to meet your sponsor duties. If this happens, you will not be able to issue new certificates of sponsorship until you’ve made improvements and upgraded back to an A-rating. You’ll still be able to issue certificates to workers you already employ who want to extend, or who are switching from a Work Permit.

Upgrade to an A-rating

You need to follow an ‘action plan’ (at a cost of £1,476 payable within 10 days of your notice of downgrade) provided by UK Visas and Immigration (UKVI) to upgrade your licence. If you comply with the action plan and no further improvements are found to be required, you will regain your A rating. If reassessment finds that you need to make other improvements, you may be given a further action plan (again making a further payment of £1,476). You will lose your licence if you still need to make improvements after your second action plan.

You can only have 2 B-ratings in the 4 years that your licence is valid.

How to reapply

You cannot appeal if your application is unsuccessful, but you can reapply. You may have to wait before reapplying and the time will depend on the circumstances.

You will need to start a new application.

You have to wait up to 12 months before reapplying if you've been fined for employing illegal workers and lost your licence.

Further reading:

To assess whether your business is eligible and to see full guidance, please visit <https://www.gov.uk/uk-visa-sponsorship-employers>

Positive Discrimination vs Positive Action

Positive action may involve actively inviting applicants from under-represented groups such as women or those from minority ethnic groups. It includes advertising roles in places where those who are under-represented are likely to see them. Positive Discrimination however such as appointing someone into a role just because they have a protected characteristic. The only time a candidate's protected characteristic should be considered, and Positive Discrimination should be applied is in a 'tie break' situation when there is no other way of separating two candidates.



Consultations which are currently open to you for your input! Don't miss out, have your say!!!

Measures to reform post-termination non-compete clauses in contracts of employment

Measures to reform post-termination non-compete clauses in contracts of employment This consultation closes at 11:45pm on 26 February 202

Consultation description

Non-compete clauses are used in contracts of employment to restrict an individual's ability to work for a competing business, or to establish a competing business for a defined period after they leave.

To **support** economic recovery from the impacts of COVID-19, the government is exploring avenues to boost innovation, create the conditions for new jobs and increase competition.

The purpose of the consultation is to seek views on:

- proposals to make non-compete clauses enforceable only when the employer provides compensation during the term of the clause, and whether this could be complimented by additional transparency measures and statutory limits on the length of non-compete clauses
- an alternative proposal to make post-termination, non-compete clauses in contracts of employment unenforceable

<https://www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment>



Measures to extend the ban on exclusivity clauses in contracts of employment

Measures to extend the ban on exclusivity clauses in contracts of employment This consultation closes at 11:45pm on 26 February 2021

Consultation description

The government is seeking views on a specific proposal to extend the ban on exclusivity clauses beyond zero hours contracts, to contracts where the workers' guaranteed weekly income is less than the Lower Earnings Limit, currently £120 a week. The intention is to allow low-income workers who are not able to secure the number of hours they would like from their current employer to seek additional work elsewhere.

These reforms will affect businesses and organisations who use exclusivity clauses in their contracts of employment, and low-income workers who are subject to exclusivity clauses and are looking to take on additional work to boost their income.

<https://www.gov.uk/government/consultations/measures-to-extend-the-ban-on-exclusivity-clauses-in-contracts-of-employment>



Roles in the disciplinary process: It's not what you do, it's the way that you do it...

Bob has backed his work van into the CEO's car in the car park and left the scene swearing at his manager. Bob's manager, Harry, tells him to get his things and that he is sacked. Bob has been with the company for 12 years. What can go wrong?

Unfortunately, without following the ACAS Code of Practice, it is highly probable that a Tribunal is likely to deem it to be an unfair dismissal. Within the process there are key roles to be appropriately allocated.

You will need:

1. An investigating officer
2. A disciplinary chair
3. An appeal chair (should the employee appeal)

ACAS Code of Practice outlines that each role should be carried out by a different person. Typically, the roles go up the company hierarchy for example a supervisor may carry out an investigation, a manager may carry out the disciplinary and a senior manager, board member or CEO may carry out appeals. Your contracts or disciplinary processes will outline the position of the person who will conduct disciplinaries and appeals.

Impartiality should be seriously considered. For example, using the manager, Harry, as the disciplinary chair would not be appropriate if other more impartial managers are available to do this. After all, Harry will provide a statement regarding his observations and interactions with Bob. Having someone who is providing a witness statement or evidence to the disciplinary to then also be chairing the disciplinary could result in direct conflict and arguably diminished impartiality.

ACAS Code of Practice which is referred to at Tribunals allows an exception to small companies only where their structure does not allow for such impartiality.

If you are concerned about your organisation being unable to support impartiality and a three-tiered approach to the disciplinary process, please call your Advisor. We can advise in line with ACAS Code of Practice and the small business exception. We also have a few out of the box ideas that could be helpful!



I was only joking... It was just a bit of banter... We were having a laugh...

Let's take a look at a few situations which led to Tribunals...

"You're gay then"...

In *Austin v Samuel Grant (North East) Ltd*, a heterosexual male employee, won a sexual orientation and religion/belief harassment claim after repeated inappropriate remarks were made verbally and by email. In one exchange, the claimant was told he was gay if he didn't like football. During the grievance process, the HR Director dismissed the comment as "office banter" adding that evidence gathered indicated that the expression was "quite normal in North East England football circles" and is treated as a joke.

"You're not 25 anymore"

The one-off comment about age was held to be discriminatory. In *Clements v Lloyds Banking plc and others*, the claimant was an employee in his 50s. His manager, who had concerns about his performance, said to him during a conversation "you are not 25 anymore" and suggested moving him to a different role. The claimant resigned and claimed constructive dismissal following further conduct by the bank.

The tribunal decided that the claimant was constructively dismissed but the dismissal was not tainted by age discrimination. However, the comment about age was discriminatory, showing that a one-off comment can amount to discrimination.

Employee compared to women on "My Big Fat Gypsy wedding" was harassed

In *Harper v Housing 21*, the claimant complained about the attitude of her line manager in relation to her Irish nationality. The offensive behaviour included repeatedly likening of the claimant to women on the TV programme "My Big Fat Gypsy Wedding". The line manager said that her comments were office banter and that she did not intend any malice. The employment tribunal upheld claims of direct race discrimination, racial harassment and constructive dismissal.

"I would like to eat her like a marshmallow"

In *Furlong v BMC Software Ltd*, the claimant complained about a number of incidents, including that a senior vice president of the company groped her bottom and told her "he would like to eat her like a marshmallow". She was also told by a manager that colleagues suspected her of having a relationship with a married male colleague. The tribunal upheld the claimant's various claims including direct sex discrimination and sexual harassment. It made recommendations to the employer including that it reviewed its equal opportunities training given to managers.

"Monkey/cheeky monkey" comments amounted to harassment

In *Basi v Snows Business Forms Ltd*, the employment tribunal awarded an employee who worked in sales over £2,000 for office banter that spilt over into racial harassment. It commented that the office environment was conducive to "healthy banter" but found that the claimant, a Sikh of Indian origin, was harassed when he was called a "monkey" or "cheeky monkey" during a golf match at which business matters were discussed. The employer did have a "rudimentary policy", but there was "no satisfactory guidance, no training, no monitoring and no policing of this policy".

Employee was subjected to harassment compared to banter in "Carry On" films

In *Minto v Wernick Event Hire Ltd*, a female employee was subjected to daily remarks that were of the same sexual nature as the theme of the "Carry On" films. Her manager gave evidence that banter, including strong language, was an everyday fact of life. The tribunal found that this amounted to sex discrimination and harassment.

The tribunal said: "Banter' is a loose expression, covering what otherwise might be abusive behaviour on the basis that those participating do so willingly and on an equal level. It can easily transform into bullying when a subordinate employee effectively has no alternative but to accept/participate in this conduct to keep his or her job."



The Elcons team would like to thank all of its clients for their support during this time. We are grateful that our relationship continues and that we can be here for you when you need us the most. Please do call when you need advice and support, we are always here to help.

THANK YOU

We are happy to announce that we have continued to grow our online training offer and have the following courses available. All are on Wednesdays starting at 10am and finishing at 12 noon. To book on to a course, please email rachelh@elcons.co.uk

TRAINING OVERVIEW	ONLINE DATES	
AN INTRODUCTION TO EMPLOYMENT LAW AND BEST PRACTICE. This course takes us back to the basics of Employment Law, covering recruitment, management of employees and the need to follow 'best practice' through to termination of employment.	6th Jan	7th Apr
THE DISCIPLINARY PROCESS. A closer look at the disciplinary process – this course is ideal for managers who have authority to act in disciplinary matters. It covers the legalities, investigations and appeals, as well as the need to follow ACAS guidelines.	13th Jan	14th Apr
MANAGING PERFORMANCE. Thousands of pounds are lost each year due to employees being absent from work. On this course we look at how to manage absenteeism, including employees on long term sick.	20th Jan	21st Apr
MANAGING ABSENTEEISM. Thousands of pounds are lost each year due to employees being absent from work. On this course we look at how to manage absenteeism, including employees on long term sick.	27th Jan	28th Apr
REDUNDANCY, SHORT TIME WORKING AND LAY OFF. This course looks in greater detail at the reasons for redundancy and how to manage the process from start to finish.	3rd Feb	5th May
RECRUITMENT AND SELECTION PROCESS. Employers are wide open to a discrimination claim even before an individual is employed. In this course we take a closer look at the protected characteristics and give best practice guidance on how to avoid a discrimination claim.	10th Feb	12th May
AVOIDING DISCRIMINATION CLAIMS. Employers are wide open to a discrimination claim even before an individual is employed. In this course we take a closer look at the protected characteristics and give best practice guidance on how to avoid a discrimination claim.	17th Feb	19th May
FAMILY FRIENDLY ENTITLEMENTS. This course is designed to give you an overview of the various topics within family friendly entitlements, such as Maternity, Paternity, Adoption leave and Shared Parental Leave. During the course we talk about eligibility, entitlements and payments. one not to be missed!	24th Feb	26th May
AN INTRODUCTION TO DEVELOPING MANAGEMENT CAPABILITIES. This session covers: Effective employee management - Support & Challenge model, Effective investigation skills., Negotiation Skills, Conflict Management - Resistance behaviours, learn what they are and how every manager can use these to grow and develop the business.	3rd Mar	2nd Jun
CONDUCTING WORKPLACE INVESTIGATIONS. An interactive session to help you understand your obligations in relation to workplace investigations, the ACAS Code which guides process and key stages of the investigation process.	10th Mar	9th Jun
RESIGNATIONS... and all the catches NEW How to analyse the risk of a resignation, how to apply notice periods, PILON, Garden Leave, post termination restrictions and deductions. A comprehensive guide to the end of the employment relationship.	17th Mar	16th Jun
DEVELOPING & COACHING TEAMS NEW Identifying behaviours and characteristics of a Team. Gaining insight in to developing a team and analysing its effectiveness using a variety of diagnostic tools. Looking at the managerial role for coaching and shaping a team	24th Mar	23rd Jun
MANAGING CHANGE NEW This course looks at what changes you may have to make within the business e.g., restructure, amending role/terms & conditions, changes within the sector/processes etc and what steps you should take to get there safely whilst helping employees to accept and embrace the change.	31st Mar	30th Jun