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upfront

the employment edition

ALL CHANGE?

Over the past few months the Coalition Government has announced a series of potential changes to the employment landscape in a bid to "hack through the excessive red tape and regulation that prevents too many businesses from creating new jobs"; but what do the proposals really mean for your business and will they have the intended impact?

Business Secretary, Vince Cable, announced the Government's radical proposals to reform employment law. Mr Cable estimates that the changes will deliver approximately £40 million in direct savings to employers each year and aims to make the tribunal system the "last resort, not the first option".

One of the key changes for employers and businesses is the extension of the qualifying service period to bring an unfair dismissal claim from one year to two. The aim of this proposal is to create a 'flexible workforce' and give greater confidence to employers in recruiting new employees, as they will have an extended period to ensure an employee is up to scratch.

However, some commentators consider that, whilst this proposal will attract headlines, it will have little real weight. In most cases, the existing time period of 12 months allows ample time for an employee to decide whether an employee is appropriate for a role. The two year limit will also, statistically, have a disproportionate affect on women, ethnic minorites and disabled employees. As a result, we are predicting a rise in the number of discrimination cases, which require no qualifying period, and are often more difficult and costly for businesses to deal with.

The Department for Business, Innovation and Skills recently confirmed that this change will come into effect on 6th April 2012. However, the increase to two years will only apply to those starting on or after 6th April 2012 - employees whose employment began before this date will still be subject to the one year qualifying period.

The Government has also pledged to introduce fees for anyone wishing to bring a claim to an employment tribunal. A consultation is currently underway as to the nature of the fees; either a payment at the outset and a further fee to take the claim to a hearing, or one main fee, with Claimant's seeking to recover over £30,000 paying substantially more. The Government hopes that the fees will root out spurious claims and encourage potential claimants to fully consider their case, leading to more realistic expectations. It will also help to fund the running costs of the employment tribunal which, at present, are funded solely by the tax-payer.

There will be assistance for those who cannot afford to pay the fees, similar to that available in the county court system. The very nature of an Employment Tribunal claim means that claimants are often out of work when they bring a claim; it is likely, therefore, that a considerable number of claimants will qualify for this assistance.

Mr Cable has also suggested that current dismissal procedure processes are too onerous and has put forward various options to address this. Two of these are compensated no-fault dismissals for 'micro-firms' and the option for employers to have 'protected conversations' with employees who are at risk of dismissal. The former would allow employers with less than 10 employees to prevent an employee from bringing an unfair dismissal claim in return for a compensation payment, likely to be similar to a redundancy payment. The latter aims to allow employers and employees to have frank conversations about performance and ongoing employment, without the employer fearing his words will be used against him in a constructive dismissal claim.

Continued overleaf

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ALL CHANGE? (Continued)

These options will be open to consultation, with Mr Cable stressing that we have to "strike a sensible balance" between the needs of the employer and the employee.

However, if implemented, the concepts of no-fault dismissals and protected conversations are likely to produce a raft of case law in respect of their implementation and use. It is also being argued by some critics that these options will do little to help the reasonable employer and only encourage bad employee management.

Further proposals have also been announced including: the compulsory lodging of all claims through ACAS for mediation before they can progress to a tribunal; a 'rapid resolution' scheme to provide quicker, cheaper determinations in low-value, straightforward claims; a call for evidence on reducing the minimum period for redundancy consultation to 60, 45 or 30 days and also for simplifying the TUPE legislation; and maternity and paternity leave to be 'modernised' with emphasis on greater involvement for fathers.

We are yet to see the outcome of many of the consultations and exactly how these changes will be implemented. The Government hopes that, by reducing the regulation and 'red tape' in employment legislation, it will encourage businesses to hire employees without the fear of an employment tribunal claim. It remains to be seen how effective the proposals will be at boosting recruitment and reducing tribunal claims.

For further information please contact Peter Byrne on 01254 54374 or email **peter.byrne@forbessolicitors.co.uk**

From an HR practitioners point of view:

Encourage your management to document what goes on. Regardless of the extension to the timescales, best practice is to continue to monitor new starters. As a suggestion, have a "formal review" or mini-appraisal after three months. This is when the "honeymoon period" is over and the person has got their feet under the table! Recap with the person on how they are progressing and what they need to focus on going forward. Also ask if they require any further training at that stage to help them to continue to improve their performance. If required, have the "difficult conversations" along the way and document if appropriate.

Forbes supports the Lancashire HR Forum, organised by Community Business Partners. The next meeting is on Wednesday, 7 March 2012 where their will be a session on having "difficult conversations". Should you wish to attend this free meeting please contact Amin Vepari at Community & Business Partners on either 01254 505062 or email ***amin@cbpartners.org***

EVENTS

Annual Employment Law Updates

We will be holding our annual employment law updates in October. Details and dates will be confirmed in the coming months but please check the events page of our website for further information

www.forbessolicitors.co.uk/stay-informed/events

Preventative Medicine

13th March 2012. 9:30 am–1:00 pm
Chambers Fylde Coast Office
1-2 Lockheed Court
Amy Johnson Way Blackpool
Lancashire FY4 2RN

This workshop will ensure that you are getting it right in relation to grievance, investigation, disciplinary and the appeal process in the hope that should your employee's take you to an employment tribunal, procedurally you will have nothing to worry about. This workshop is not just for HR Professionals. As a business owner or Manager you need to be aware of what could happen if you do not follow the correct procedures, which could cost your company a great deal of money.

Price: Members £55+vat, Affiliate £75+vat, Non-Members £110+vat

Contact Sharon Brook to book a place - 01253 347063 or sharonb@lancschamber.co.uk

Lancashire HR Employer's Forum supported by Forbes Solicitors

Wednesday 07 March 2012
11.40am for prompt 12.10pm start to 2.00pm Clayton Park Conference Centre,
Junction 7 Business Park, Clayton Le Moors,
Accrington, BB5 5JW

Business Owners/Directors/Managers and HR Practitioners across Lancashire are invited to the HR Employers' Forums.

The aim of these forums is to keep you up to date with changes and developments in Employment Law along with bringing you key speakers who can inspire you and your business.

Agenda

- Buffet Lunch and Networking
- Welcome and General Introduction
- Mark Makin, ACAS (Advisory, Conciliation and Arbitration Service) Providing a summary of key employment law updates
- Helen Bailey, Director, Pinna Ltd Interactive session on 'How to Have Challenging Conversations', using the PRO Model
- Mussurat Zia, Director, Practical Solutions Forced Marriage - tips for HR Managers in response to a member of staff bringing this to their attention
- Joanne Pickering, Head of HR & Training, Forbes Solicitors Chair's Report
- Any Other Business

This forum, organised by Community and Business Partners and supported by Forbes Solicitors, is FREE and includes a buffet lunch. To book a place contact Amin Vepari on amin@cbpartners.org or 01254 505050.

COMPULSORY RETIREMENT - STILL A POSSIBILITY?

From October 2011 employers are no longer able to institute a compulsory retirement policy in the UK. However, a recent European Court of Justice ("ECJ") ruling in the case of Prigge v Lufthansa has confirmed that compulsory retirement in certain professions can be lawful, provided it is necessary and proportionate.

The case in question was referred by the German Federal Labour Court and involved several pilots working for Deutsche Lufthansa airline. The airline was a party to a collective agreement which automatically terminated their pilots' employment when they reached the age of 60. When the Claimants' employment contracts were terminated when they turned 60, they brought a claim on the basis they were victims of discrimination on the grounds of age, contrary to the European Equal Treatment Directive and national legislation.

The German national courts dismissed the pilots' claims on the basis the airline had an objective justification for the termination at the age of 60; namely, that the age-limit, and physical capabilities, for pilots is necessary for the proper performance of the activity (flying planes), as well as for the protection of the life and health of crew members, passengers and persons in the areas over which aircraft fly.

The ECJ considered the case in the light of two of the articles of the European Directive. Article 2(5) allows Member States to institute national measures which may discriminate, but are necessary for public security, including the protection of health. Article 4(1) allows a difference in treatment if such a characteristic (in this case age) constitutes a genuine and determining occupational requirement, provided it is objective and proportionate.

The ECJ found that air traffic safety and preventing aeronautical accidents by monitoring pilots' aptitude and physical capabilities was a measure designed to ensure public security. Therefore, collective agreements in respect of these aims could be justified. However, in this case, it was found that national and international law did not consider it necessary to prohibit pilots from flying until the age of 65. As a result, terminating the pilots' employment at the age of 60 was not necessary to protect public security.

Similarly, the ECJ considered that age could be a genuine and determining occupational requirement for pilots, as it is undeniable that the physical capabilities necessary to fly a plane naturally diminish with age. So a compulsory retirement policy could be a necessary and proportionate requirement for acting as an airline pilot. Again, however, in this case, the ECJ found that this was disproportionate before the age of 65.

It is evident that in certain professions compulsory retirement may be justified if it is in the wider public interest, such as in the case of protecting public safety. In English law, this is likely to fall under the 'some other substantial reason' for dismissal. However, employers will have to approach this with extreme caution and need to consider very carefully whether this is proportionate to the interests they are trying to safeguard, and ensure that, if necessary, they are implemented at the appropriate time.

For further information or advice please contact Jonathan Holden on 01254 54374 or email **jonathan.holden@forbessolicitors.co.uk**

NEWS FROM COMMUNITY AND BUSINESS PARTNERS

Guardian Angels - Free Business Mentoring Service for Blackburn with Darwen Businesses

Guardian Angels is a free scheme allowing new and existing businesses to access an experienced business mentor who will assist them with growth plans and also support on a wide range of issues facing business owners in these challenging economic conditions. The mentors who have a proven industry track record come from a wide variety of backgrounds and disciplines and work on a voluntary basis to help local businesses prosper.

For further details please contact Amin Vepari at Community & Business Partners on either 01254 505062 or email **amin@cbpartners.org**

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with you every step of the way

For legal advice that is straight to the point:

Blackburn Office t: 01254 54374
Preston Office t: 01772 220022
www.forbessolicitors.co.uk

SOCIAL NETWORKING GUIDANCE FOR EMPLOYERS

ACAS have recently produced guidance in relation to social networking, offering tips on how to manage the impact of social networking at work.

The guidance has been produced following research from the Institute for Employment Studies ("IES"), commissioned by ACAS, into the implications of social networking for employment relations. The report explores a range of issues including the impacts of social networking on managing performance, recruitment, disciplinary and grievance issues and bullying.

Over the past decade the use of the internet, social networking sites and blogging sites has increased hugely, with Twitter and Facebook being amongst the most popular sites. A high proportion of employed people have access to the internet at work. The IES report notes that in a 2010 survey of employees, 55 per cent admitted accessing social networking sites whilst at work, with 16 per cent spending over 30 minutes on the sites. With the introduction of smartphones it is becoming more and more accessible for employees to use social networking sites at work.

There have also been a number of high profile cases in the media of employers taking disciplinary action as a result of employees social media usage (often outside of work); and several successful Tribunal claims have been brought by employees.

Given the extensive use and prominence of social networking, it is prudent for employers to address the potential implications of employees using social networking sites. ACAS recommends that employers have a written policy on the acceptable use of social networking at work in place. This will help employers protect themselves against liability for the actions of their workers, give clear guidelines for employees on what they can and cannot say about the company, as well as managing performance and complying with the law on discrimination and data protection.

A good social networking policy should cover:

- network security;
- acceptable behaviour for the internet, emails, smart phones and social networking sites;
- data protection and monitoring;
- the company's business objectives;
- disciplinary procedures and implications of breaching the policy.

It is not necessary to draw up a policy from scratch, this can be incorporated into an existing email and internet policy.

ACAS stresses the need to draw a distinction between business and private use of social media. Employers should also consider issues that could be raised under the Human Rights Act 1998, which gives a right to respect for private and family life, and the Data Protection Act 1988. Above all, the report advises that employers adopt a "common sense stance" to regulating behaviour and to work within "norms that might apply in non-virtual settings".

From an HR practitioners point of view:

In addition to revisiting and updating your policies, ensure these are circulated and staff are made aware of these, so when you find yourself, as a Manager, having to deal with a grievance or disciplinary in relation to social media, you can use the policy as a basis for that conversation. You can also remind the member of staff that this policy was updated and circulated. This can support the action you are taking with the employee. Also, regular reminders of the Policy will keep the area, which is increasingly becoming a daily occurrence, at the forefront of staff's minds, hopefully preventing breaches of the Policy from your staff.

If you require any assistance from a HR point of view please contact Joanne Pickering on 01254 580000 or email **joanne.pickering@forbessolicitors.co.uk**

If you would like help or guidance in implementing a social networking policy or any other policies or procedures, please contact Amy Crabtree on 01254 54374 or email **amy.crabtree@forbessolicitors.co.uk**