the employment edition

upfront

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A LIBERAL APPROACH TO CONSERVATIVE POLICIES?

The new Cameron – Clegg Coalition Government presents interesting possibilities for the future direction of employment law. Traditionally the two parties have clashed on a number of issues and it remains to be seen how the coalition will work in practice. A Coalition Agreement outlining the terms of agreement reached between the parties was published on 12 May 2010, which gives an indication of the policies that the parties intend to implement.

During the election campaign, both the Conservatives and the Liberal Democrats emphasised the importance of family friendly policies. It is anticipated that there will be some movement in this area of law. In particular, both parties indicated that they intended to extend the right to request flexible working. The Liberal Democrats seek to extend the right to all employees rather than just parents and carers.

The Coalition Agreement confirms that the default retirement age of 65 years will be "phased out". The Agreement does not explain how the parties propose to do this but it is likely that the default retirement age will cease to exist. This is in line with the recommendations of the High Court following the widely-publicised Heyday case. The parties have also agreed to hold a review to set the date at which the state pension age will rise to 66, however this will be no sooner than 2016 for men and 2020 for women.

The Coalition Agreement states that there should be no further transfer of power to Europe during the next Parliament and that the Government will work to limit the application of the Working Time Directive in the UK. Both parties have also expressed a desire to "make employment law simpler" and in particular, end the 'gold-plating' of European Directives by ensuring that domestic legislation goes no further than necessary in order to implement European law. We may therefore see an attempt to water down some of the legislation introduced by the Labour Government.

The Agency Workers Regulations 2010 are likely to be a potential target for review. In particular, the 12 week qualifying period for agency workers to receive the same employment rights as if they had been recruited directly. During their opposition, the Conservatives opposed the Regulations and David Cameron put forward an Early Day Motion seeking to repeal the Regulations entirely. Whilst the Government's obligations under the Agency Workers Directive mean that they must implement some form of legislation to protect agency workers, it is likely that they will seek to minimise the impact of the 2010 Regulations and delay their implementation until the deadline of December 2011.

Some provisions of the Equality Act 2010 may also be vulnerable under the new Government. The Conservatives made various statements prior to the election indicating that they would make changes to the Act. In particular, they said that they would not bring into force provisions relating to the socio-economic duty on public sector authorities; positive action in the recruitment process and gender pay reporting. By contrast, the Liberal Democrats supported the idea of compulsory equal pay audits therefore it may be difficult for these positions to be reconciled. The Labour Government did not intend to implement compulsory gender pay reporting until 2013; so this issue may be put on hold for the time being.

It remains to be seen how and when many of these policies will be implemented, and indeed how effectively the two parties will work together in Government. For now it is simply a case of 'watch this space'.

> "both parties have also expressed a desire to make employment law simpler"

For advice or assistance regarding the ever-changing field of employment law, please contact Jonathan Holden on 01254 54374

A **NEW RIGHT** TO REQUEST TIME OFF FOR TRAINING

On 6 April 2010, the right for employees to request time off for training came into force in respect of employers with 250 or more employees. This right will extend to all employers in April 2011. Employees with at least 26 weeks' service have the right to make a formal application for unpaid time off work to undertake training or study in order to improve their effectiveness at work and the performance of their employer's business.

There is no limit on the amount of time that employees can request, but employers do not have to pay for the training or the time that employees are off work for the training unless they choose to do so.

An employee's request must be dealt with in a similar manner to a request for flexible working. A request may only be refused if an employer thinks that one or more of the permissible grounds for refusal applies. The permissible grounds replicate those under the flexible working regime, e.g. the burden of additional costs; detrimental impact on quality or performance; or that training would not improve the performance of the business.

If an employer refuses a request for time off to train, the employee may appeal against their decision. The employee may also challenge the refusal in the employment tribunal if the proscribed procedure was not followed or the refusal was based on an impermissible reason or "incorrect facts".

It remains to be seen how many employees will exercise their right to request time off for training. As there is no right to be paid during the time off, it is unlikely that employers will face a flood of applications; however undoubtedly the right will be exercised from time to time.

It is vital that requests for time off to train are dealt with in the appropriate manner.

If you require advice on the correct procedure to be followed, please contact Ruth Rule-Mullen on 01254 54374

From a HR practitioners point of view:

At Forbes, we have developed a pro-forma based on our Flexible Working Application pro-forma, so if and when a request is made, employees will be sent the pro-forma which asks the employee to answer the questions set out in the article. The completed form is then copied to the employee's Manager and the HR Department. This ensures that the process (in terms of reviewing the request, any meetings required and ensuring the employee is made aware of the appeal process, if appropriate) is carried out in line with the regulations.

On a further note, the Government is encouraging employers to sign up to the Skills Pledge – which is a voluntary, public commitment made by an organisation to invest in the skills of its workforce. There are four stages to the Skills Pledge Process:

- **Making the Skills Pledge - so far 5,000 firms in the North West have made the Pledge**
- **Diagnostic**
- **Action Plan**
- **Implementation and Achievement**

Forbes, having made the Skills Pledge, are kept up to date by government agencies on what funding is available for training, this may be relevant and useful for organisations, particular those employing less than 250 employees, where more funding in relation to training is available. For example there is currently funding up to £1000 via the European Social Fund (ESF) to support non-mainstream funded training for eligible SMEs (Small Medium Enterprises) across the North West (excluding Merseyside phasing-in area). For more information, contact Business Link Advisors – 0845 600 9006.

From a practical point of view, if you require any assistance, please contact Joanne Pickering on 01254 580000

PATERNITY LEAVE
SIGNIFICANT DEVELOPMENTS

The Additional Paternity Leave Regulations came into force on the 6th April and represent a significant shake up of paternity rights.

The regulations will apply to children born or adoptive parents notified of a match on or after 3rd April 2011. They give fathers, civil partners or adoptive parents up to 6 months additional paternity leave. Their aim is to allow parents to share the care arrangements of a child at an earlier stage.

In order to qualify for this right fathers must have been continuously employed for 26 weeks at the 14th week before the child's expected week of birth. The mother must still take 20 weeks off before the father can take the leave and this must be a continuous period, they cannot swap between themselves.

There are similar notice requirements for maternity leave. Fathers must not give less than 8 weeks notice which will include a mother and employee declaration. The employers can then within 28 days request the child's birth certificate and mothers employment details.

For fathers to take the leave the mother must have permanently returned to work without taking full maternity leave. Where leave is taken during the mothers 39 weeks maternity pay period this will be paid at the same rate as Statutory Maternity Pay.

Employers will need to be adequately prepared for these changes and start to think about amending their policies towards the end of this year.

For further information and assistance in putting together relevant policies contact Amy Crabtree on 01254 54374

Diary

Keep up to date online at www.forbessolicitors.co.uk/stay-informed/events

SEPT

Sale and Succession

14th September 2010, Stanley House Hotel, Mellor, Blackburn
8am - 10am

In conjunction with Enterprise Ventures and PM & M.

A full programme is yet to be finalised but to register your interest early, please email catherine.butler@forbessolicitors.co.uk

OCT

Annual Employment Law Updates

5 October, Deepdale, PNE FC, Preston
21 October, Stanley House Hotel
9am - 1.30pm

The experienced team will be covering all the latest UK and European employment law developments and the implications for your organisation.

A full programme is yet to be finalised but to register your interest early, please email ashleigh.harris@forbessolicitors.co.uk

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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

FIGHTING FIT

The new system requires employers to consider adjustments at a much earlier stage than under the old system.

On 6 April 2010 the new "fit note" replaced the "sick note" previously issued by GPs. The fit note aims to provide more useful information about how an employee's condition affects them, and how they may be able to return to work whilst recovering from their condition.

In the past, doctors could only advise whether an employee should or should not work due to their sickness. Under the new fit note system, a doctor certifies whether an employee is either "unfit for work" or "may be fit for work" taking account specific advice. A "may be fit for work" statement will be made if the doctor believes that the employee could return to work if they received adequate support from their employer.

The fit note lists four common types of adjustments that employers may make in order to facilitate an employee's return to work: a phased return to work; altered hours; amended duties; and workplace adaptations. It also allows the doctor to make comments about the effect of the employee's condition on their ability to carry out their role and suggestions as to what adjustments could be made to help them return to work.

The new system requires employers to consider adjustments at a much earlier stage than under the old system. The new system may well put increased pressure on employers in terms of the time and resources required to consider reasonable adjustments and manage the return to work process.

As ever, employers will also need to consider the Disability Discrimination Act. The fit note system may increase the likelihood of an employer being deemed to know that an employee was disabled for the purpose of the Act and the duty to make reasonable adjustments will engage. The employer must consider any adjustments suggested by the employee's doctor. If these are reasonable and would assist the employee in carrying out their role, the employer must put them in place as a failure to do so could amount to disability discrimination. There is no limit on the level of compensation awarded in discrimination claims.

From a HR practitioners point of view:

We would encourage you to circulate a copy of a blank "fit note" to all your Managers/Payroll etc explaining the changes. We also suggest that should any of your Managers receive a "fit note" they contact your HR person so that any request for an "adjustment" is considered. In our experience of working with clients, employees are turning up to work with their "fit note" which, in one case suggested "lighter duties". The employee took this as being able to move from his manual job to an office based job. His immediate manager was not in a position to be able to accommodate this adjustment, so the HR person got involved, however, no "lighter duties" were available and the employee was sent home. It would appear, in some cases the "fit note" is raising expectations with the employee and these need to be carefully managed. We would also encourage you to make a note of what was discussed with the employee and include your reasons as to why the decision, as in this case, was to send him home.

From a practical point of view, if you require any assistance, please contact Joanne Pickering on 01254 580000

If you require advice on the correct procedure to be followed, please contact Peter Byrne on 01254 54374