

HR and employment: your 2018 to-do list



Here's our summary of the key actions and developments HR teams should look out for in 2018.

Users of Workbox, our online HR and employment law site, can access detailed practical guidance on these topics at any time.

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| <p>Data protection: GDPR</p> | <p>The EU General Data Protection Regulation will apply from 25 May 2018. In preparation, HR teams will need to review, for example:</p> <ul style="list-style-type: none"> • What personal data is held, where, by whom, how and why it is being processed • Contracts of employment, employee privacy notices and data protection policies • Recruitment procedures • Procedure for subject access requests • Employee monitoring • Contracts with recruitment agencies. |
| <p>Brexit and immigration</p> | <p>Certain changes to UK immigration rules come into effect from 11 January 2018.</p> <p>On Brexit, and immigration issues arising from that, we will provide updates on significant developments throughout 2018.</p> |
| <p>Gender pay gap reporting</p> | <p>The gender pay gap will remain high profile in 2018.</p> <p>Private / voluntary sector employers with 250+ employees must publish their first gender pay gap report by 4 April 2018. Public sector employers in England with 250+ employees must publish their first report by 30 March 2018.</p> |

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| | <p>The Equality and Human Rights Commission's draft enforcement strategy is open for consultation until 2 February 2018. It plans to engage informally in the first instance but may use its enforcement powers, which in extreme cases can lead to the commission of an offence and fines. For the coming year it plans to focus on employers who have not published the required information, but may also take action in respect of inaccurate data.</p> |
| Race pay gap reporting | <p>The Conservative Party election manifesto indicated that it would introduce mandatory race pay gap reporting for large employers, although no further details are available.</p> |
| Increase in employment tribunal claims | <p>Be aware of the 64% increase in employment tribunal claims (from single claimants) since employment tribunal fees were declared unlawful.</p> <p>The scheme to refund tribunal fees is open (including for respondents who were ordered to reimburse claimants' fees by a tribunal). We also understand that the tribunal service may write to claimants whose claims were rejected or dismissed for non-payment of a fee, asking if they want their claim reinstated.</p> |
| Employment status, gig economy, IR35 | <p>Look out for:</p> <ul style="list-style-type: none"> • Government discussion paper on clarifying the employment status tests for employment rights (i.e. whether someone is an employee, worker or self-employed) and for tax (i.e. whether someone is taxed as an employee or self-employed). • More cases, including the Pimlico Plumbers and Uber appeals. • Consultation on IR35 non-compliance in the private sector, which could lead to a private sector rollout of the IR35 changes introduced in 2017 for the public sector. • More discussion on the possibility of equalising self-employed / employee NICs. |
| Tax on termination payments | <p>From April 2018, changes will take effect regarding tax on termination payments. These will include subjecting all PILONs to income tax and employer and employee NICs.</p> <p>Also, currently, if you are making a non-contractual payment in connection with termination, the first £30,000 is exempt from tax, and no employer or employee NICs are due on any part of the payment. The government intends to start charging employer NICs on any balance over £30,000, but has delayed this until April 2019.</p> |
| Public sector exit payments | <p>In Scotland, expect the Scottish Government's response to its consultation on severance arrangements across the devolved public sector.</p> |

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| | <p>In England, there should be an announcement on implementation dates for the new cap on public sector exit payments, and rules on repayment where someone is re-employed within 12 months. We understand the government also still intends to implement further reforms.</p> |
| Childcare voucher scheme | <p>Childcare voucher salary-sacrifice schemes will close to new entrants from 6 April 2018, but can continue for existing users. The new tax-free childcare scheme does not involve employers – individuals apply themselves.</p> |
| Sexual harassment | <p>Clearly, one of the most high profile issues of 2017. Employers will be keen to ensure they have the right policies, training and procedures in place to prevent sexual harassment and deal effectively with issues that arise.</p> |
| Holiday pay | <p>Holiday pay – overtime, commission etc We may see more cases considering the point at which voluntary overtime and other payments become regular enough to be included in holiday pay. If you're still not including payments such as these in your holiday pay, we would recommend that you speak to us to work out a strategy.</p> <p>Claims for back-pay For now, claims for statutory holiday pay are limited to deductions in the last 2 years, and a gap of more than 3 months between underpayments cuts off earlier claims. European case law has cast doubt on these limits and this may prompt a challenge.</p> <p>12-week average Whether you can use a 12-week average calculation for holiday pay is currently a grey area, and we may see more case law on this. Also, the Taylor Review recommended increasing the reference period for calculating holiday pay for those without normal working hours from 12 to 52 weeks. The government is still to respond.</p> <p>Untaken holiday The European Court of Justice found that, on termination, a worker could claim holiday pay in respect of untaken holidays going back to the start of the engagement where he had been deterred from taking them because they would not have been paid. This case will now return to the UK Court of Appeal.</p> |
| Mental health | <p>The government intends to:</p> <ul style="list-style-type: none"> • Encourage employers to adopt mental health 'core standards'. • Establish a framework for employers with 500+ employees to voluntarily report on their actions on workplace mental health and disability. • The Health and Safety Executive will raise awareness of the duty to assess and manage work-related mental ill- |

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| | <p>health.</p> <ul style="list-style-type: none"> • Explore options to extend protections from discrimination in the workplace for people with mental health conditions, and look at compliance by employers with current legislation. |
| Statutory sick pay | <p>The government intends to:</p> <ul style="list-style-type: none"> • Consult on reforms to statutory sick pay, in particular around phased returns to work. • Consider recommendations that SSP should be available to all regardless of income, and should accrue based on length of service. • Increase statutory sick pay to £92.05 per week from 9 April 2018. |
| Sickness absence – right to return | <p>The government has indicated that it will consider the Taylor Review recommendation that there should be a ‘right to return’ following sickness absence.</p> |
| Fit notes | <p>The government intends to reform fit notes to facilitate returns to work, including extending certification powers to other healthcare professionals.</p> |
| Fit for Work service and occupational health | <p>Fit for Work assessments are to end due to low referral rates.</p> <p>In England and Wales, the service stopped accepting new referrals on 15 December 2017, but will continue to deal with ongoing referrals until 31 March 2018. In Scotland, the service is due to end on 31 May 2018, but they may stop accepting new referrals before this (still to be confirmed). In all locations, Fit for Work will continue to provide telephone advice, webchat, email service and online resources.</p> <p>The government is establishing an expert working group to consider how to develop occupational health.</p> |
| Minimum wage and statutory rates for family leave | <p>The national minimum / living wage rates will increase in April 2018, along with the statutory rates for family leave.</p> |
| Continuity of employment and breaks in service | <p>It can be difficult for casual employees to establish the minimum continuous employment they need to qualify for some employment rights. There have been calls to increase the current permitted gap of one week (after which continuity is broken) to one month. We await the government’s response.</p> |
| Written statements of particulars | <p>The Taylor Review called for:</p> <ul style="list-style-type: none"> • Workers to have similar rights to employees to a written statement of particulars |

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| | <ul style="list-style-type: none"> • A written statement to be a 'day 1' right, rather than within 2 months of starting • Standard format written statements • Standalone right to compensation for failure to provide a statement. <p>The government is still to respond.</p> |
| Zero-hours contracts | <p>The Taylor Review suggested that:</p> <ul style="list-style-type: none"> • The government should investigate a higher national minimum wage for non-guaranteed hours. • Zero and short-hours workers should be entitled to request a guaranteed-hours contract after 12 months. <p>The government is still to respond.</p> |
| Agency workers | <p>The Taylor Review suggested that:</p> <ul style="list-style-type: none"> • Agency workers should have the right to request a direct contract of employment after 12 months with the same hirer. • The 'Swedish derogation' should be abolished. <p>The government is still to respond.</p> |
| Equal pay in the private sector | <p>Equal pay claims by over 7000 Asda employees will be heard at the Court of Appeal in 2018, raising the profile of equal pay claims in the private sector.</p> |
| Grandparent leave | <p>There were plans to extend shared parental leave and pay to working grandparents by 2018, but the government hasn't provided any further detail or timescale for this.</p> |
| Trade unions and check-off – public sector | <p>Expected to take effect in 2018 are new rules that public sector employers will only be able to operate 'check-off' (where they deduct union subscriptions from salaries and pay these to unions) if workers have the option to pay subscriptions by other means, and arrangements have been made for the union to make reasonable payments to the employer in respect of its operation of check-off.</p> |
| Financial services and regulatory references | <p>The senior managers and certification regime is being extended to all persons and firms authorised under the Financial Services and Markets Act 2000. The full regulatory reference rules will be extended to other authorised firms.</p> |
| Corporate governance | <p>The government is planning certain measures, including:</p> <ul style="list-style-type: none"> • A duty for quoted companies to report annually the ratio |

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| | <p>of CEO pay to average pay of the company's UK workforce.</p> <ul style="list-style-type: none"> • Requiring all companies of a significant size (private and public – its initial view is to have a threshold of 1,000 employees) to explain how their directors have regard to employee and other interests. • A voluntary set of corporate governance principles for large private companies. • Companies of a significant size will need to disclose their corporate governance arrangements, including whether they follow any formal code. |
| Failure to prevent the facilitation of tax evasion | <p>A new corporate offence of failure to prevent the facilitation of tax evasion came into force in September 2017. You'll have a defence if you have reasonable prevention methods (or it is unreasonable for you to have these). Have you considered what steps you need to take (which might include updating contracts of employment, policies or codes of conduct)?</p> |
| We're waiting for the government to respond to: | <ul style="list-style-type: none"> • Consultation on caste discrimination • Call for evidence on 'returning to work after caring' • Consultation on tips and gratuities • Report on e-balloting for industrial action |
| Additional cases to look out for... | <p>We're expecting court and tribunal decisions on:</p> <ul style="list-style-type: none"> • Is it discriminatory not to enhance shared parental pay for men if women can access enhanced maternity pay? • Should pregnant workers be protected from dismissal before they have informed their employer of their pregnancy? • Could an employee's dismissal be direct disability discrimination if the decision-maker did not know he was disabled? • In a reasonable adjustments claim, did an employer have 'constructive knowledge' of an employee's disability where it had not investigated discrepancies in the occupational health report, but had taken other steps? • Was an expectation (rather than a strict requirement) to work long hours a 'provision, criterion or practice' that might have to be adjusted for a disabled employee? • Did a bakery directly discriminate on grounds of sexual orientation when it refused to bake a cake with the caption 'Support Gay Marriage'? • Should overseas employees be included in collective redundancy consultation? • Was a company liable for an employee's assault on a colleague at an 'impromptu' drinking session after the company Christmas party? • Was it reasonable to dismiss a head teacher for not disclosing her relationship with a person convicted of making indecent images of children? • If a contract doesn't state when notice of termination takes effect, does it only take effect when the employee |

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| | <p>personally takes delivery of the notice letter?</p> <ul style="list-style-type: none">• Are 'sleep-in workers' only entitled to the national minimum wage when awake and carrying out duties?• When is 'on-call' time working time? |
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