



Employment changes on the horizon, or kicked into touch?

The Queen's Speech this year didn't make any mention of an Employment Bill, despite its inclusion in the last Queen's Speech in December 2019. A number of employment reforms are believed to have now stalled, so what if anything is likely to change in the future?

Vulnerable workers are expected to be protected by the creation of a single enforcement body which will have the responsibility for regulating employment agencies and enforcing minimum wage requirements, anti-slavery law and holiday pay.

Rights for pregnant employees and mothers (within six months of returning from maternity leave) are expected to be extended, so that employers have to make available suitable employment for them. There is also expected to be some changes to the rights for those returning from adoption or shared parental leave.

There is also likely to be a new right to receive paid neonatal leave of up to 12 weeks, for parents with babies needing neonatal care.

Carers will have to wait to receive a new right to a week's unpaid leave which was a 2019 Conservative election promise. European neighbours will receive a similar right as part of the EU Work Life Balance Directive which will be introduced in August 2022.

Laws which would require employers in the hospitality sector to pass on all tips received from customers to their staff, along with a statutory Code of Practice will now be delayed. For a sector which is trying to get back on its feet after Covid this delay will no doubt be welcome but in the longer-term, clarity on this topic might help with the recruitment crisis which the sector is facing.

Also delayed are plans to introduce a new right for workers who currently work variable hours, which would have enabled them to ask for more predictable and stable working arrangements after 26 weeks. The EU is introducing similar rights in August 2022 as part of the Transparent and Predictable Working Conditions Directive.

Plans to support more flexible working were also anticipated to be in the Employment Bill and many firms are already considering more

flexible working and hybrid arrangements following the pandemic. Certainly businesses should brace themselves for more requests for flexible working as in many cases it has proved to be successful over the last 18 months.

There have also been a number of other government consultations on a range of subjects including reforms of post-termination non-compete clauses in employment contracts which are expected to form part of a future Employment Bill. Others include extending the ban on exclusivity clauses in zero-hours contracts, new rights to reasonable notice of work schedules and compensation for shift cancellation, non-disclosure agreements and discrimination and harassment laws including the duty to protect employees from third party harassment.

Whilst the government has many priorities to help businesses and the wider economy recover from Covid, employers might want to consider their own policies on some of these issues and the impact of implementing them which may benefit both their employees and their businesses.



No jab, no job

Is it fair to demand all employees have both Covid vaccinations? Pimlico Plumbers are reported to be advertising for new recruits and are including a no jab, no job policy in their adverts. I'm sure up and down the country there will be other examples of employer's considering similar requirements.

Whilst there are a number of employment law issues here, a key issue to consider is access to the vaccines. All adults can now book their vaccinations, but it will still be the autumn before everyone has been given their second dose. Is it therefore fair to those people looking for work now to deny them the opportunity to work due to the availability of appointments, especially given many of them may be in younger age groups and therefore have the protection of age discrimination legislation.

Secondly, what about people who have been advised not to get vaccinated for medical reasons, or those who hold certain religious or ethical beliefs? And then there is the moral debate, should employers dictate what their employees can or can't do?

Employers can't force employees to be vaccinated. They can consider introducing a contractual requirement for existing employees to be vaccinated, but if this is a change to employment terms and conditions employees would need to agree to this change. If they don't, employees would be entitled to resign and make a claim for constructive dismissal.

Assuming an employment contract has been updated and the employee has agreed to the new terms, they could be prevented from working if their contract says they must be vaccinated and employers could consider disciplinary action if the employee then refuses to be vaccinated when it is offered to them.

Employers do not have to give staff paid leave to attend medical appointments however if it is a requirement of the employment contract then it is sensible to facilitate this so that employees don't lose out financially.

New employees do not have the same level of protection as existing workers and therefore employers can change contractual terms and ask that all new starters have been vaccinated. However once again watch out for discrimination claims where the employee does not need two years length of service to bring a claim.

Whilst a no jab, no job policy might be easier to enforce for new employees it may end up causing longer-term resentment in the workplace. People feel very strongly about issues around their human rights and freedoms and the right to choose what goes into their body and when. Many people are still concerned that there isn't enough information to enable them to make an informed decision and it may be wrong not to consider and discuss those views.

Employers are advised to discuss with staff their requirement for them to be fully vaccinated before making any formal contractual changes. What other safeguards can be put in place to reduce risk. After all vaccination does not necessarily mean you cannot catch or spread the virus.

Gender beliefs in the workplace ruling

An area of increasing tension in the workplace is around the subject of gender and the Employment Appeal Tribunal has recently ruled that the belief that 'biological sex is real, immutable and not to be conflated with gender identity' is a protected philosophical belief under the Equality Act 2010.

In the case of Ms M Forstater V CGD Europe & others, the consultant believed a person's sex was a material reality and shouldn't be confused with gender or gender identity and she entered into numerous debates on social media about this subject. Some of her comments were considered offensive to transgender people and her work colleagues complained. Following an investigation, CGD Europe decided not to renew her consultancy agreement with them.

At an Employment Tribunal, Ms Forstater claimed her gender-critical views were a protected philosophical belief under the Equality Act 2010, but the judge found that Ms Forstater was not entitled to ignore the rights of a transgender



person and her claim failed. On appeal, the Tribunal found that the Employment Tribunal had misapplied the requirement for a belief to be worthy of respect in a democratic society and therefore held that her gender critical views which were widely shared did not seek to destroy the rights of trans persons. Whilst trans persons might find her beliefs offensive or distressing, those beliefs did not interfere with their rights.

The Employment Appeal Tribunal also clarified that this judgement does not mean that employees with gender-critical beliefs can freely 'mis-gender' trans persons and it does not mean that trans persons do not have the protection against discrimination or harassment provided by the Equality Act 2010.

Employers should note that employees with gender-critical beliefs are still subject to the prohibition of discrimination and harassment that apply to everyone and that they the employer is still liable for any acts of harassment and discrimination made against trans persons during the course of employment.

A further decision will be made by an Employment Tribunal about whether CDG Europe discriminated against Ms Forstater by not renewing her contract following the complaints which were made about her Tweets.

Employers also need to remember that whilst certain groups with protected characteristics might be offended by the views of one of their employees, those views might be a protected philosophical belief and disciplinary action against the employee might be discriminatory. Also, the employee might be protected from harassment by co-workers for expressing their belief.

This is clearly a complex area for employers to navigate so it is recommended that legal advice is taken at an early stage where there is any disagreement between or complaints made against employees.

Tribunal ruling serves as a reminder on reasonable adjustments



A recent ruling in an employment tribunal should serve as a reminder to all employers that they must consider making reasonable adjustments for members of staff.

In *Mrs S D'Silva V Croydon Health Services*, Mrs D'Silva worked in the Chest Clinic at the NHS Trust and following a long period of sick leave she returned to find her administration role now included patient-facing reception work.

Mrs D'Silva, who was disabled due to stress and anxiety, repeatedly told her manager that she found the reception work too stressful and she said on a number of occasions she would be happy to do a 'back office' role.

After a long period of sick leave, she was told at an absence review meeting that a back office role was unsustainable as all of her colleagues were covering her reception duties, however a member of staff had been appointed to cover the reception position.

Mrs D'Silva tried to find another role within the NHS but nothing was suitable and although the Trust also suggested roles to her, she felt she couldn't do them and therefore didn't apply.

An Occupation Health doctor concluded she wanted to return to work but was 'petrified' of having to deal with patients, which was later diagnosed as 'public phobia'. In January 2019 Mrs D'Silva was dismissed on the grounds of capability due to her ill health.

The Employment Tribunal came to the conclusion that the Trust made insufficient effort to find Mrs D'Silva an alternative role once it knew the full extent of her health issues and left her to try and find a role, but the duty is on the employer.

Whilst it is possible that Mrs D'Silva may have managed to find an alternative role, if the Trust had more robust policies and procedures it would have helped to support her and she would have probably stayed in employment. Mrs D'Silva was awarded a total of £56,684.73 including £24,000 for injury to feelings. Her claims of disability-related harassment and victimisation were dismissed.





Directors duties, a reminder

There has recently been a wave of new entrepreneurs, and figures from Companies House show that in 2020 there were 24,951 new businesses incorporated in Kent, a rise of 32% on the previous year and nationally 772,002 new businesses, an increase of 14%.

Setting up a new business carries with it some element of risk and sadly not all of these businesses will be successful in the future. Being a company director carries a number of duties and obligations and it is important to be aware of these, especially if the business starts to struggle.

When a business is insolvent or on the verge of or likely to go insolvent, the duty owed by a director shifts from what would be in the best interest of shareholders, to what would be in the best interests of creditors. Because of this shift in duty, Directors should not resign from a company in financial difficulties until they have been resolved or until the business enters formal insolvency proceedings as they themselves could become personally liable for the decisions they made, if these go against their duties.

It is important that the business assets are managed to give priority to creditors. Directors cannot dispose of any company assets or make payments to shareholders if provision for creditors hasn't

been made. In reality however, where a company is insolvent, those provisions cannot be made and therefore no type of payment should be made.

As hinted to above, Directors who fail in their duties can have claims made against them by an insolvency practitioner acting as a liquidator or administrator if the business enters a formal insolvency procedure. This could also include a claim against directors for misfeasance - effectively breach of duty.

Claims against directors can also be brought for wrongful trading and many directors fall foul of this in the unrealistic belief that they can trade their way out of difficulties. As tempting as this option may seem when struggling, any Director should be wary of taking such actions without first obtaining legal advice as to what they can and cannot do.

Other issues that can arise include allowing payments to creditors which constitute preferences, ie paying one creditor before another. Directors are advised to take advice from an insolvency specialist if they have any doubts.

Professional advice and assistance, especially when a company is struggling and Directors face the risk of becoming personally liable for missteps, also provides a more objective, third party perspective on what options are available. And, in the event that a claim is made against the directors, taking professional advice early can also help them to defend the claim.

Quick reference section

Statutory minimum notice periods:

An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each complete year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

National Minimum Wage

	April 2020	April 2021
Apprentices	£4.15	£4.30
16-17	£4.55	£4.62
18-20	£6.45	£6.56
21-24	£8.20	£8.36
25+	£8.72	£8.91

Statutory Sick Pay (from April 2021)

Per week £96.35

Statutory Shared Parental/Maternity/Paternity/Adoption Pay

(basic rate) (from April 2021) £151.97

Statutory Holiday

5.6 weeks for a full time employee. This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme for dismissals after 6th April 2021 at £544.00.



CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.



Amanda Finn
 ☎ 01622 689795
 ✉ a.finn@gullands.com
 🐦 @Gullands_HR_Law



Sarah Astley
 ☎ 01622 689727
 ✉ s.astley@gullands.com



Andrew Clarke
 ☎ 01622 689733
 ✉ a.clarke@gullands.com



Jonathan Haines
 ☎ 01622 689736
 ✉ j.haines@gullands.com



Gabriela Alexandru
 ☎ 01622 689716
 ✉ g.alexandru@gullands.com

Gullands Solicitors are Authorised and Regulated by the Solicitors Regulation Authority, Number 50341

16 Mill Street
 Maidstone
 Kent ME15 6XT
 01622 678341

Whitehall Place
 47 The Terrace
 Gravesend Kent
 DA12 2DL
 01474 887688

www.gullands.com
 info@gullands.com



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