outset.

work place news

by Chloe

What does Freedom Day mean for employers?

Every time I hear the term 'Freedom Day' I think of Bill Pullman's speech in Independence Day. Google the YouTube clip - a lot of the words are surprisingly apt. But the 19th July in the real world was, thankfully, less dramatic.

A trip to the town centre was little changed from the day before. Many businesses have decided to keep in place most, if not all, of their COVID measures and there are still a lot of individuals choosing to wear masks, even if not asked to by the premises they're visiting.

So what has changed?

Put simply, new Regulations came into force at 11.55pm on 18 July 2021 that revoked previous regulations, the key implications being (in England):

- Venues which had to remain closed can now open – so places like nightclubs are back
- Legal capacity limits at all events and venues are gone
- Face coverings no longer have to be worn on public transport or indoor venues
- Social distancing between tables at places like restaurants and pubs is no longer a requirement
- Venues are no longer required to ask visitors to check in for test and trace purposes
- The rule of 6 is gone
- People are no longer required to work from home where they can

Essentially, the remaining legal restrictions are around testing, isolation and quarantine.

BUT – the government has clearly stated that it encourages individuals and businesses to continue pretty much all of the measures they've repealed.

Continue reading >

The editor's welcome

After a challenging 2020/early 2021 it's been good to speak to people lately and hear about positive things happening – projects focusing on equality & diversity, businesses looking at options for sponsorship to grow their workforce and employers working with us on a long term basis to support them.

As the year continues to whizz by I'll definitely be focusing on the positives – working with our clients to help support and grow their business. And outside of that - sunshine, BBQs and tackling my jungle of a garden!

As always, please follow us on LinkedIn for our latest updates and latest news.

Chloe Pereira

Senior Employment & Business Immigration Lawyer

This month...

Using personal emails for work

Why using your personal email account for work is risky business...

Read more >

Recent case law - Deliveroo

Deliveroo riders are definitely not workers...

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Updated guidance

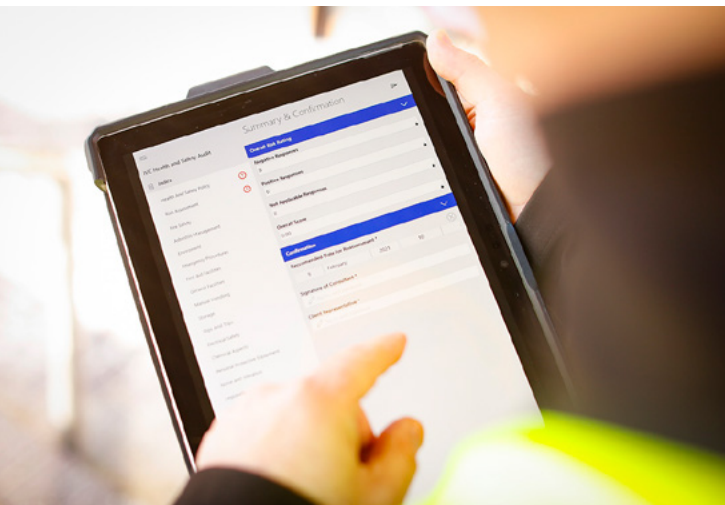
We've compiled links to government guidance that's changed or new in the last month...

Read more >

They want us to take responsibility - only gradually return to work, carry on wearing masks in crowded settings, keep social contact to a minimum, still use the NHS app and access all of the fresh air as much as possible.

In their guidance, the government is also reminding employers that they still have a legal duty to manage risks to those affected by their business. This leaves many businesses in a quandary – lift the restrictions that have been damaging your business whilst simultaneously increasing your risk exposure? Or keep your restrictions in place and continue to see the impact on your bottom line?

Of course, in reality, it will be much more complex than that and there will be lots businesses can do to manage their risk AND focus on rebuilding any damage done over the last 18 months or so.



Advice from our Safety experts

Our Safety experts are advising employers to re-visit their risk assessments and think carefully before dropping all the controls that have been in place over the last year or so.

Whilst there might be some measures you want to relax to help your business to realise its full potential, you still have a duty of care to employees and others that come into contact with your business.

You've probably invested a lot of time and money into your risk management measures, and by now the practices individuals have had to adhere to, like mask wearing, have become habit. You can capitalise on that habit forming repetitive behaviour and help to protect your workforce, customers, visitors as well as the risk your business might otherwise be exposed to.

Did you know?

It can take anywhere from **2 to 8 months to form a habit**, on average, it takes 66 days

Outset news & events

Smiles all round as leading dental expert joins our growing team

We're delighted to welcome Liam Mulvee to our Business Transactions team. With particular expertise in mergers and acquisitions within the dental and wider healthcare sectors, Liam's appointment adds further strength to our healthcare offering.

With over 10 years' experience, Liam brings a solid understanding of the professional and commercial requirements of healthcare transactions, and particular knowledge in dealing with NHS Local Area Teams and the CQC in relation to relevant regulations, partnerships and incorporations.

LIAM MULVEE

Read more about Liam here or click here to send him an email.

Want to know more about sponsoring workers?

If you missed my webinar on 30 June about sponsorship and right to work checks, you can **catch up with the recording here.**

Find out about:

- How to prepare for becoming a licenced sponsor
- How to apply for a sponsor licence
- What costs and process are involved in sponsoring a Skilled Worker
- Conducting right to work checks

You can also download my handy calculator here which will calculate, based on your unique circumstances, the employer and employee costs of sponsorship.

Guest article

Beware of using personal email accounts for business

The Department for Health and Social Care (DHSC) has found out the hard way that using your private email account for work is risky business!

What's the background?

Following recent revelations that Mr Hancock had an affair with his aide, Gina Coladangelo, he - along with some other senior officials at the DHSC, now face accusations of using their private email accounts to conduct government affairs during the Covid-19 pandemic.

While the use of a private email account does not in itself break data protection laws, Elizabeth Denham, the information commissioner, was concerned that information in private email accounts is being overlooked, auto deleted or otherwise not made available. A formal investigation into the DHSC is now underway.

What has this got to do with my business?

While there are key elements to this that can be explored by looking at ministerial guidelines, there are important aspects to highlight from an employment / data protection viewpoint.

In this article I've considered the impact a private email account can have when you receive a Data Subject Access Request (DSAR) in the two following scenarios:

1. You receive a DSAR – you do not allow your employees to conduct business via private email accounts

The ICO does not expect employers to instruct employees to search their private email accounts in response to a DSAR, unless that employer has a good reason to believe they are holding relevant personal data.

2. You receive a DSAR – you allow your employees to conduct business via private email accounts

Depending of course on what personal information the individual has requested, in this context, the employees may be processing that data on your behalf, in which case it may then be within the scope of a DSAR you receive.

Private email accounts can therefore fall within the scope of responding to a Data Subject Access Request - meaning that you may need to instruct your employees to search their private emails in order to comply with the request!

Next time ... How do I minimise the risks?

We are seeing more and more clients asking for advice in this area, so to help you start thinking about how you might counter some DSAR dilemmas we'll be putting together some best practice guidance in our next newsletter.

RACHEL EASTON

Read more about Rachel here or send her an email here.

New guidance

Here are links to new and updated guidance issued in the last month that are relevant for employers:

NEW **Acas guidance on hybrid working** – advice for employers on how to consider, discuss and introduce hybrid working

NEW **Government vaccination guide for employers** - Information and resources for employers to help support their staff and promote the COVID-19 vaccination programme

NEW **Government guidance on moving to step 4 of the roadmap**

UPDATED **Government guidance on protecting the extremely vulnerable** – guidance originally published in March, updated on 20 July

UPDATED **Government guidance on how to stay safe and help prevent the spread** – originally published in March, updated on 19 July

RECENT CASE LAW

The IWU of GB v The CAC

Deliveroo riders are definitely not workers

In 2017 the Central Arbitration Committee rejected an application by the Independent Workers Union of Great Britain to be recognised on behalf of a group of Deliveroo riders for collective bargaining purposes. The CAC ruled that the riders were not workers, the key deciding factor being the unfettered right of substitution.

The IWUGB has continued to challenge the decision with the latest ruling from the Court of Appeal upholding the High Court and the CAC's conclusions. The focus remained on the right of substitution – the riders were under no obligation to provide services personally and the right of substitution was completely unfettered.

Although the Court stated that evidence of substitution wasn't vital, it did of course help in this case that Deliveroo was able to produce examples of the genuine unfettered right of substitution.

This latest judgment will provide some comfort to employers against the recent tendency of decisions determining worker status more often than not. It emphasises the importance of the right of substitution in determining worker status, and of that right being genuine and unfettered. If you have examples of that right being exercised – even better (and keep records).

The judgment came with a word of warning from the Court though – **"there may be other cases where, on different facts and with a broader range of available arguments, a different result may eventuate".**

Believe it or not?

Once you compare national minimum wages around the world it's easy to see why the UK attracts a lots of non-native workers - we're one of the top 10 highest rates.

Here are the top 15 minimum wage rates around the world according to 2020 data*. Falling at the bottom of a much longer list is Mexico, with an hourly minimum wage of around $1.40.

Country	Hourly Minimum Wage (in USD)
Luxembourg	$12.90
Australia	$12.60
France	$12.20
Germany	$12.00
New Zealand	$11.80
Netherlands	$11.30
Belgium	$11.20
UK	$11.10 (£8.72)
Canada	$10.50
Ireland	$10.30
Spain	$9.10
South Korea	$8.90
Slovenia	$8.40
Japan	$8.20
Poland	$8.00

Could you go to prison if your employee hasn't applied for EU Settled Status?

The EU Settlement Scheme (EUSS) enables those EU nationals who were resident in the UK by 31 December 2020 to obtain immigration status allowing them to continue living full lives in the UK.

The deadline for applications was 30 June 2021 – and up until that date employers were able to continue to accept someone's EU passport as evidence of their right to work when starting a new job.

From 1 July 2021 onwards

From 1 July 2021 onwards, any new employee joining will need to give their employer proof of settled status, or proof of an application in progress at least. That's pretty straight-forward to grapple – either the individual can provide you with a share code, or evidence of their application (or other information allowing you to use the employer checking service), or they can't in which case, stay safe, don't employ them.

For EU employees who joined before 1 July

For EU employees who joined before 1 July, you don't need to conduct retrospective checks, you can't insist on your existing employees giving you evidence of EUSS status – and it's probably a can of worms you don't want to open anyway. Carry on as you are.

If the Home Office were to visit you and find one of your employees doesn't have EUSS status, provided your right to work checks were conducted correctly according to the immigration rules in force when that person joined, you won't suffer any civil penalties.

But what if an existing employees tells you they haven't applied? Or you find out another way?

You now know, or have reasonable grounds to believe, that they don't have the right to work in the UK.

Actual knowledge of illegal working trumps the valid check of their EU passport you did when they first joined.

Your check protects your business from any civil penalty – but knowingly employing an illegal worker is a criminal offence and there is no defence to that. The potential penalties are unlimited fines and up to 5 years' in prison for responsible, senior employees who know they're employing an illegal worker.

All in all it's an unenviable situation to be in – because rarely is it so clear cut that you know someone doesn't have the right to work. Perhaps there is some confusion or miscommunication, or the employee might be able to apply to the scheme late, or it just isn't really clear what's going on.

No one wants to risk an unlimited fine or prison sentence, but jumping the gun and dismissing an employee for not having the right to work could lead to claims of discrimination and, for those with at least 2 years' service, unfair dismissal, if you're wrong.

The Home Office says you should tell them about suspicions of illegal working – but what employer wants to attract that scrutiny, especially if they aren't sure?

Bear in mind that if the Home Office finds you are employing an illegal worker, if you do make a report to them they'll take that into account in determining the level of civil penalty to apply. Remember – your only potential defence to the civil penalty of employing an illegal worker is carrying out a compliant right to work check.

Continue reading >

So what should employers do?

Let's say you have strong suspicions that an EU national employee who joined you pre 1 July 2021 didn't apply for Settled Status, or they applied but were rejected. Before moving to dismissal:

- What exactly do you know? How do you know this? Who told you?
- Be careful you aren't being mis-informed – perhaps by a fellow employee with a grudge
- Investigate as fully as possible – review documents, speak to the individual and anyone else relevant (for example, if someone else passed you information)
- Don't make assumptions – just because someone entered the UK after 31 December 2020 that doesn't necessarily mean they don't have residency – there might be prior periods of residency you aren't aware of. They might qualify for status via a family member.
- Can you use the employer checking service to obtain a verification notice? A positive notice will confirm you can continue to employ the individual according to the conditions set out in the notice.
- If they haven't applied, why not? Is there a chance they could make a late application?

Ultimately, if you've conducted a reasonably thorough investigation and you still have reasonable grounds to believe, or you know for certain, that the individual doesn't have the right to work then you will probably want to move to dismissal. It won't be without risk, but if the evidence you've gathered is overwhelming you'll probably prefer the risk of a Tribunal claim, against the risk of an unlimited fine and/or a prison sentence. I know which one I'd pick.

Is it too late to apply for EU Settled Status?

This is obviously a trick question – you know you've read above that the deadline was 30 June, but I must be asking this question for a reason.

It isn't necessarily too late to apply – the EUSS allows individuals to make a late application if they can show they have reasonable grounds for missing the deadline.

So what counts as reasonable grounds?

Here are some examples from the caseworker guidance:

- Where someone was a child at the time of the deadline and an application wasn't made on their behalf by a parent, guardian or Local Authority
- Where a person has/had a serious medical condition which prevented them from applying
- Where someone is a victim of abuse or modern slavery
- Where the individual is isolated, vulnerable or didn't have the digital skills to access the application process
- Where there are compelling compassionate reasons – including COVID related

The guidance makes clear that these are non-exhaustive examples, each case must be assessed on its own facts, and caseworkers must give individuals the benefit of the doubt. Basically – caseworkers must consider a wide range of circumstances and actively look for reasonable grounds to allow late applications.

In fact, if an immigration enforcement officer comes across an individual who has failed to apply for Settled Status, they have to consider whether the person might be eligible (not assess whether they in fact are), and if so give them 28 days to make a late application.

Doesn't this all sound a bit contradictory?

It does, doesn't it?

Don't check evidence again for existing employees, but tell us if you know (or strongly think) they're working illegally. New employees must show you evidence of their settled status, but they can also show you evidence of an application in progress.

The deadline to apply for EUSS status was 30 June 2021, but some people might still be able to apply. Don't dismiss someone just because they can't immediately give you a satisfactory answer – but risk going to prison if you know they're working illegally.

It's almost as though the UK's immigration policy is over complicated and incredibly confusing…