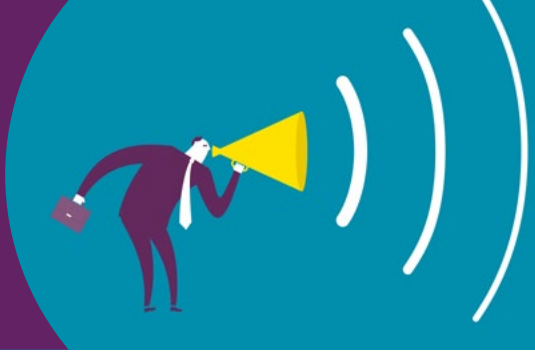
Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

March 2021



HOT TOPIC

What does it mean for employers if vaccines become mandatory by law?

A leaked government paper suggests that care home workers, and potentially frontline healthcare workers, will be legally required to have the COVID jab. This is in response to the relatively low uptake of the vaccine by those working in the care sector, with some of the most vulnerable people.

A government spokesperson has stated that no final decisions have been made, but it's clear that this is a real possibility.

If such a legal requirement is introduced, does this mean employers can safely implement 'no jab no job' policies? There is no simple answer to this. Such a law will be a first – it raises a number of issues including around fundamental human rights and discrimination.

If the government does introduce this requirement it's likely to face a large amount of resistance and legal challenge. It wouldn't be the first time laws have been passed which have later been repealed as being unlawful (remember tribunal fees – the government had to refund fees paid by thousands claimants over a period of 4 years!).

Read the full feature here p2>

Welcome

We're pretty much a quarter of a way through the year already – both a scary and exciting prospect.

Time seems to fly so quickly, but hopefully it continues to bring us closer to getting back to the things we enjoy – holidays, time with friends and family, eating out, sports, celebrations, and more.

No doubt there will be some permanent legacies of the virus, and changes in the world of work is likely to be one of them. In the latest edition of our newsletter we take a look at just some of the issues facing employers in the coming months and years.

We hope you find it an interesting and informative read and as always, please follow us on LinkedIn for our latest updates.

Do you know someone else who might be interested in our newsletter? Please feel free to forward it on and they can click here to subscribe.

outset.

At least for the moment, employers wanting to avoid the risk of claims should steer away from mandatory vaccine policies, and consider different approaches. Take a look at our January newsletter for our suggestions about testing and vaccination policies.

Some employers will be willing to play the numbers game, roll the dice and let the chips fall where they may. One of the largest care home operators in the UK has put in place a 'no jab, no job' policy, and anyone refusing to be vaccinated without a medical reason won't be able to work for them.

Will they get sued and be forced to pay thousands of pounds compensation? Maybe, maybe not. But it will only take one person to bring a claim, and be successful, for the floodgates to open.

As with most scenarios, it's about balancing risk. In this particular scenario, the stakes are potentially much higher, more controversial and unprecedented. But employers are faced with having to make extremely tough decisions – to protect their workforce, clients and business. It's a delicate balancing act, and definitely not a one size fits all situation. We're watching this space with just a little trepidation.

Recent Case Decisions

Are sleep in shifts "working time"?

Royal Mencap Society v Tomlinson-Blake

No, not for the purposes of National Minimum Wage.

Before this decision, several cases had determined that a worker could be entitled to minimum wage even when asleep. But the Supreme Court decision has superseded all of those prior decisions, and determined the following:

- When deciding whether someone is 'working', it doesn't matter that they are at their employer's direction or required to follow instructions
- The Low Pay Commission didn't intend that workers who were allowed to be asleep would be entitled to be paid
- The previous test set out by the EAT to determine whether someone is 'working' just by being present isn't needed and shouldn't be used
- If a worker on call does need to actually carry out duties that will count as 'time work'

The above decision will come as a relief to many employers, particularly those in the healthcare sector.

The previous British Nursing v HMRC case is no longer applicable for situations with similar fact: it is now clear that workers who can be/are asleep, and not actually working, are not entitled to National Minimum Wage simply because they are on site and could be called on if needed.

is it automatically unfair to dismiss an employee due to their refusal to attend work due to COVID fears?

Rodgers v Leeds Laser Cutting Ltd

No, at least not on this occasion.

Mr Rodgers refused to return to the workplace as he had a family members who were required to shield. He had less than 2 years' service and was dismissed by his employer. Mr Rodgers presented a claim for automatic unfair dismissal, alleging he was dismissed for a health and safety reason (so 2 years' service wasn't required).

Mr Rodgers claimed he refused to return to work due to a serious and imminent danger – however the Tribunal found that he didn't believe there was such a danger in the workplace in particular. He raised no complaints about the measures his employer had taken, and on his own evidence admitted it was not difficult to socially distance himself at work. The Tribunal found that Mr Rodgers had refused to return to work regardless of the measures in place there, and his refusal was due to the national situation relating to the pandemic

This is a first instance Employment Tribunal decision, so it won't be binding on any other tribunal. However, decisions relating to the pandemic are few and far between, and until more make their way through the system this provides a helpful insight into how a Tribunal will analyse the facts and apply the law.

Crucially in this case, although EJ Anderson found in favour of the employer, she did make clear that in principle the health and safety protection under the Employment Rights Act can apply to the pandemic, and each case will turn on its own facts.

Employers should therefore exercise caution before dismissing an employee who refuses to return to work in similar circumstances. Appropriate COVID measures taken in the workplace will be key, as will be considering exactly what concerns the individual raises and how these are addressed.

More changes to our immigration system

When our new, post Brexit immigration system was announced the government confirmed that change would come in stages.

It's always been a system which sees frequent modifications, but as the impact of leaving the EU combined with the economic shockwaves caused by the pandemic continue to put pressure on UK businesses, the Budget announcement included some further changes to come.

The government's plan is to modernise our immigration system to help the UK attract and retain the most highly skilled, globally mobile talent – particularly in academia, science, research and technology.

The intention is that this will drive innovation and support UK jobs and growth. To achieve this, the government will:

- by March 2022, introduce an elite points-based visa. This will include a 'scaleup' stream, enabling those with a job offer from a recognised UK scale-up to qualify for a fast-track visa
- reform the Global Talent visa, including to allow holders of international prizes and winners of scholarships and programmes for early promise to automatically qualify
- review the Innovator visa to make it easier for those with the skills and experience to found an innovative business to obtain a visa
- by Spring 2022, launch the new Global Business Mobility visa for overseas businesses to establish a presence or transfer staff to the UK
- provide practical support to small firms that are using the visa system for the first time
- modernise the immigration sponsorship system to make it easier to use. The government will publish a delivery roadmap in summer 2021
- establish a global outreach strategy by expanding the Global Entrepreneur Programme, marketing the UK's visa offering and explore building an overseas talent network

Believe it or not?

Google searches for "holidays" reached a peak on 23 February – the day after the road map announcement. With more cautious commentary about holidays since then, search terms for "glamping" and "holidays in Cornwall" have shot up in recent weeks.

Wherever you might seek your R&R one thing is a must – do you have enough holiday allowance? We take a look at holiday entitlement around the world - no thanks USA, hello Russia!

Andorra:	45 days
Australia:	30 days
France:	36 days
Germany:	30 days
Guyana:	12 days
Iran:	53 days
Italy:	32 days
Japan:	26 days
Mexico:	13 days
New Zealand:	31 days
Northern Russia:	**56 days**
Portugal:	31 days
Spain:	36 days
USA:	**0 days**
UK:	28 days

What do I do about...
returning employees to the workplace?

With restrictions easing bit by bit over the coming months, there are plenty of employers who will be looking to get their people back to the workplace as soon as they can. But many of us have got used to working from home and for some, it's now the preferred option. We take a look at some of the questions employers will be facing on this issue.

Do employees have to be allowed to work from home?

Currently, yes – if it is possible for someone to do their job from home then the employer must take all possible steps to facilitate that.

Under current government restrictions, employers must take all possible steps to enable employees to work from home – this includes providing appropriate equipment. Individuals should only go to work where they cannot work from home, the workplace is open, and its safe to attend (i.e. appropriate covid measures are in place).

The covid roadmap, published on 22 February, confirmed that this will remain the case until at least 21 June 2021.

What about when the restrictions lift?

In most cases the contract of employment will determine the rights and obligations regarding place of work. For many, it will be clear that the place of work is the employer's site, and the arrangement to work from home has been a temporary one enacted in response to the pandemic and, for the majority of the time, a legal requirement.

Strictly speaking, many employees will be contractually obliged to return to their normal place of work once covid restrictions lift.

How quickly can we require employees to return to the workplace?

For some individuals a return to the workplace will be a major adjustment. Many of us will have been working at home for up to around 16 months, and the knock on effect of returning to the workplace may be significant. It might include a spike in travel costs, loss of personal time, issues with pet and childcare, clashes with health and wellbeing activities – the list goes on.

This is unique territory, and it would be best to be reasonable – communicate with employees, give as much notice as possible and take into account any personal challenges individuals may have. Some employees may need a little longer than others to make necessary arrangements.

Although the contractual obligation may be to return to the workplace, employers must be careful not to undermine the implied duty of trust and confidence. For those with at least 2 years' service, unreasonable exercise of contractual powers could potentially lead to resignations and claims for constructive dismissal.

Employers should also be mindful of those with protected characteristics, and how a sudden return to work may indirectly negatively impact certain groups of people. For example, women with childcare issues.

Can employees request to continue working from home permanently?

Any employee with at least 26 weeks continuous service can make one statutory request every 12 months to work flexibly, for any reason. An employee can make a flexible working request which would change the hours they work, the times they work and/or their place of work – this includes a request to work from home (either all or part of the time).

Assuming the employee is eligible, and makes the request in the correct way, the employer may only reject the request for one of 8 specific reasons:

1. The burden of additional costs
2. Detrimental effect on ability to meet customer demand
3. Inability to reorganise work among existing staff
4. Inability to recruit additional staff
5. Detrimental impact on quality
6. Detrimental impact on performance
7. Insufficiency of work during the periods the employee proposes to work
8. Planned structural changes

The employer does have fairly wide discretion – the test of refusal is subjective so as long as the decision is based on correct facts, if the employer considers one of the above reasons applies that will be sufficient.

However, in addition to the flexible working statutory scheme employees remain protected by discrimination laws, and for those with 2 years' service there is the potential risk for constructive dismissal claims. Where an employee has been demonstrably working successfully from home for several months, it may be challenging for an employer to reject a request to work from home permanently and avoid the risk of claims.

Each request to work from home should be handled carefully, on its own facts. When considering its decision the employer should take into account:

- The employee's reasons for wanting to work from home
- Whether the request is linked to protected characteristics
- Whether the employer has experienced any challenges with the employee working from home, and what evidence of that there is
- How any other employee requests have been dealt with – consistency is important
- If the request can't be granted in full, is there a compromise which might work for both parties?