

In Brief—UK Employment and HR Newsletter

Talkback

In this issue of our employment and HR newsletter, we focus on the new legislation that has come into force this year and we highlight future legislation. It is clear to all that the Equality Act 2010 which came into force on 1 October 2010 is this year's key legislative change. We cut through the hyperbole to highlight what it really means for employers. We also look ahead to future proposed legislation and the coalition Government's employment law agenda in the 'Under Discussion' section below.

**For more information
please contact:**

Ann Bevitt
+44 20 7920 4041
abevitt@mof.com

Suzanne Horne
+44 20 7920 4014
shorne@mof.com

The Equality Act 2010

The purpose of the Equality Act 2010 is to harmonise and strengthen discrimination law. On 1 October 2010, the coalition Government implemented most of its provisions without any amendments. Although a lot has been written about the Act, in reality it does not change a great deal but the devil is in the detail. For example, it remains unlawful to discriminate because of age, disability, gender re-assignment, marriage or civil partnership, pregnancy or maternity, race, religion and belief, sex or sexual orientation (the 'protected characteristics') but there are also new concepts of indirect disability discrimination and discrimination arising from disability. We set out below the Act's main provisions and key changes:

- Harmonises key concepts in respect of defining discrimination including direct, indirect, justification, victimisation, harassment and discrimination by association or perception
- Redefines the concept of disability discrimination and introduce new concepts of indirect disability discrimination and discrimination arising from disability
- Permits employers to discriminate lawfully where there is an occupational requirement defence
- Encourages greater pay transparency by making pay secrecy clauses unenforceable in some situations and creates the power to compel employers to disclose details of the gender pay gap
- Prohibits employers from asking certain pre-employment health-related questions

The Equality and Human Rights Commission has issued three draft statutory Codes of Practice on employment, equal pay and services, and public functions and association

The draft Codes are currently before Parliament and are expected to come into force at the end of November.

In addition, the following provisions which are set out in the Act are expected to come into force in 2011 and 2012:

- Introduction of a new concept of 'dual discrimination' where an individual has at least two protected characteristics
- Extension of the concept of positive action in respect of recruitment and promotion
- Introduction of gender pay transparency regulations
- Creation of a single equality duty for public sector bodies and a new duty to consider social and economic inequalities when taking strategic decisions
- Prohibition of age discrimination in relation to goods, services and public functions

Action required & key considerations

As with most legislative changes, employers do need to consider the impact of the Act. In particular, the employer should consider:

- Reviewing recruitment processes and documentation, including any questionnaires on health-related issues or equality and diversity monitoring
- Updating the equality and diversity, harassment and bullying policies
- Having an awareness of changes in respect of any on-going or threatened disciplinary or grievance matters
- Holding internal training for HR and key line managers
- Updating any standard form documents which reference the 'old' discrimination legislation

Additional Paternity Leave

Eligible employees (fathers, partners and civil partners of children due on or after 3 April 2011) will be entitled to additional paternity leave and pay ('APL&P'). On 30 September 2010, the coalition Government announced that it would retain the APL&P legislation. It gives a right to eligible employees of a minimum of two weeks' and a maximum of 26 weeks' leave to care for a child, if the child's mother returns to work without exercising her full entitlement to maternity leave. Some of the leave may be paid if it is taken during the mother's maternity pay period. See a summary of the key details in [In Brief Volume 3, No. 1 Spring](#).

Action required & key considerations

It is clear that the APL&P legislation has made the coalition cut—at least for now. Therefore, employers need to review their maternity, paternity and family friendly policies as these babies are already on the way. Employers will also have to grapple with some problematic areas such as the operation of enhanced maternity pay schemes, the impact on redundancy exercises and scorings, costs of providing enhanced benefits for all employees, pay rises, bonuses and pensions.

For example, is an employer required to offer a male employee equivalent enhanced benefits such as pay for the duration of the additional paternity leave period if a female employee is already entitled to enhanced maternity leave benefits? Arguably yes, if you draw an analogy with the recent ECJ case of *Roca Alvarez v Sesa Start Espana ETT SA*.

Under Discussion

The formation of the coalition Government on 6 May 2010 left most legislative proposals in a state of flux. On 20 May 2010, Ed Davey, a Liberal Democrat, was appointed as the new employment minister and the Government published 'The Coalition: our programme for government' (the 'programme'). The programme gives an indication of what the coalition considers the hot topics in employment. Since May 2010, the Government has made numerous announcements in respect of various changes, reviews, commissions and consultations. Therefore, we summarise below the current state of play...

So, what does the programme say?

Employment & Employment-Related Pledges and Commitments	Progress & Latest Developments
Bankers Bonuses —Robust action to tackle “unacceptable” bonuses in the financial services sector.	On-going, e.g. reform of the financial services sector and Government request to FSA to examine further options in its review of the FSA's Remuneration Code. Consultation on Code closed in October 2010.
Default Retirement Age —Phase out the default retirement age.	Due to come into force on 1 October 2011. Currently the subject of consultation.
Directors' Duties —Investigate further ways of improving corporate accountability and transparency.	No update.
Employment Law Review —Review employment and workplace laws for employers and employees, to ensure they maximise flexibility, protect fairness and provide the competitive environment for enterprise to thrive.	On-going, e.g. The Agency Workers Regulations 2010 (see below).
Equality —Promote equal pay and take a range of measures to end discrimination in the workplace, such as <ul style="list-style-type: none"> extension of the right to request flexible working to all employees undertaking a fair pay review in the public sector so that no public sector worker can earn over 20 times more than the lowest-paid person in their organisation promoting gender equality on the boards of listed companies. 	Retained most parts of the Equality Act 2010. Remaining parts (as set out above) under consideration. <ul style="list-style-type: none"> Announced that the right to request flexible working will be extended to all parents of children under 18 years of age from April 2011. Consultation due to start later this year Proposals on fair pay review and gender equality at future date.
Family Friendly —Encourage shared parenting from the earliest stages of pregnancy by promoting a system of flexible parental leave.	Retaining the APL&P legislation as an 'interim' measure.

Employment & Employment-Related Pledges and Commitments	Progress & Latest Developments
Human Rights —Establish a commission to investigate the creation of a British Bill of Rights to incorporate, build on and enshrine obligations under the ECHR, and protect and extend British liberties.	The Home Office is working closely with colleagues in the Ministry of Justice and the Office of the DPM as they work to establish a commission to investigate the creation of a UK Bill of Rights.
Immigration —Introduce an annual limit on the number of non-EU economic migrants admitted in the UK to live/ work and transitional controls for persons from all new EU member states.	Consultation closed September 2010. The limit is expected this year and it is likely to come into force in April 2011.
Legislation —A cut in ‘red tape’ by introducing a ‘one-in’ and ‘one-out’ rule for new regulation.	On-going, e.g. Right to Request Time Off for Training (see ‘On the Horizon’ below).
National Minimum Wage —Continued support for it.	New rates published (see below).
Pensions —Restore the earnings link for the basic state pension from April 2011, establish a commission to review long-term affordability of public sector pensions, review to set the date at which the state pension age starts to rise to 66, simplify pension rules and regulations, encourage companies to offer high-quality pensions to all and work to support auto-enrolment.	In progress. Announcement in budget on 22 June 2010 to restore link, preliminary finding from the Hutton review published October 2010, annual pensions allowance will be lowered from £255,000 to £50,000 and the lifetime allowance will drop from £1.8 million to £1.5 million. Auto-enrolment and minimum employer contributions now due 1 October 2012.
Public Sector Workers —Re-negotiate the GP contract, review police officers’ Ts & Cs, reform the national pay and conditions rules for teachers, introduce new protections for public sector whistleblowers, and give workers a new right to form employee-owned co-operatives to take over the services they deliver.	On-going, e.g. consultation on amendments to the NHS constitution in respect of whistleblowing in the NHS due to end January 2011. Other aspects, no announcement as yet.
Self-Employed —Review of IR35, seek to replace it with simpler measures.	Plans to address issue at a future date.
Working Time Directive —Work to limit its application in the UK, examine balance of EU’s existing competencies.	Government commissioned independent review into impact of the Working Time Directive on the quality of training for health professionals.

As is evident from the above, the coalition’s legislative programme remains a ‘work in progress’. So far, there is no mention of Conservative proposals to abolish the application of TUPE to service provision changes, give additional incentives to employer and employees to look for suitable alternative employment in a redundancy situation or reform the employment tribunal system. Discussions about the repeal of the Agency Worker Regulations 2010 have now been abandoned. On 19 October 2010, Ed Davey, Minister for Employment Relations, Consumer and Postal Affairs, announced that the coalition Government would not be proceeding with any amendments to the regulations. Therefore, for now we shall be keeping a close eye on developments.

Paying the Penalty: Latest Median and Maximum Awards for Tribunal Claims

The Employment Tribunal and Employment Appeal Tribunal’s Annual Statistics for 1 April 2009 to 31 March 2010 show that there has been an increase of 56% in claims on 2008/09. This dramatic increase is said to be largely as a result of multiple claims but also the changing economic climate.

Type of Claim	Median	Maximum
Unfair Dismissal	£4,903	£234,549
Disability Discrimination	£8,553	£729,347
Sex Discrimination	£6,275	£442,366
Race Discrimination	£5,392	£374,922
Religious Discrimination	£5,000	£9,500
Sexual Orientation Discrimination	£5,000	£163,725
Age Discrimination	£5,868	£48,710

Know Your New Limits

Type of Claim	Amount / Award
One week's pay (where capped)	£380
Compensatory award for Unfair Dismissal*	£65,300
Redundancy payment	£11,400
Discrimination	No limit
Breach of contract in employment tribunal	£25,000
Failure to inform/consult in redundancy	90 days' actual pay (no cap)
Failure to inform/consult in TUPE transfer	13 weeks' actual pay (no cap)
Failure to provide employee liability information on TUPE transfer	£500 minimum for each employee (no maximum)

*Compensatory awards for Unfair Dismissal claims where dismissal for health & safety or for making a protected disclosure are unlimited. This figure is down from last year due to the lower retail prices index.

Other Current Rates

Statutory Payment	Amount
Statutory Maternity, Adoption & Paternity Pay	£124.88 per week
Statutory Sick Pay	£79.15 per week
National Minimum Wage	£5.93 workers 22 years and over, £4.92 for workers aged 18 to 21 years

On the Horizon

5 April 2011: European Works Council ("EWC") Directive—Member states have until 5 April to give effect to a 'recast' Directive.

6 April 2011: Workplace childcare schemes—Reduced tax relief for higher/additional rate taxpayer employees.

6 April 2011: Right to Request Time Off for Training—Extension of right to all employees to request time off for training, regardless of size now under review. As of 6 April 2010, employers with 250 or more employees have statutory right to request time off akin to the flexible working process.

April 2011: The Bribery Act 2010—Introduction of a new corporate offence of failing to prevent bribery by individual

acting on behalf of an organisation. Possible defence if the organisation can show that it has 'adequate procedures' in place which are designed to prevent bribery. Draft guidance refers to risk assessments, top level commitment, training, clear policies, monitoring and review.

1 October 2011: Agency Workers—Final version of the Agency Workers Regulations 2010 now published and the coalition Government has announced it will not amend the legislation. The Regulations currently provide for the right to equal treatment in relation to holidays, hours, breaks and pay if agency workers satisfy the 12 week qualifying period. There are also rights of equal access to facilities and to be informed of vacancies for which there is no qualifying period. Claims are to be heard by the employment tribunal within three months of the treatment complained about.

In Brief is for the benefit and information of clients and friends and is not legal advice or legal opinion on specific facts or circumstances. The contents are intended for information purposes only.

To change mailing information, add a subscriber, or unsubscribe, please send an e-mail to rhall@mofocom.

About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, *Fortune* 100 companies, investment banks and technology and life science companies. Our clients count on us for innovative and business-minded solutions. Our commitment to serving client needs has resulted in enduring relationships and a record of high achievement. For the last seven years, we've been included on *The American Lawyer's* A-List. *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers share a commitment to achieving results for our clients, while preserving the differences that make us stronger. This is MoFo.