Age Discrimination

The Equality Act 2010 replaces all previous equality legislation, including the Employment Equality (Age) Regulations 2006. The Equality Act covers age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. These are now called 'protected characteristics'.

The Act protects people of any age, however, different treatment because of age is not unlawful if you can demonstrate that it is a proportionate means of meeting a legitimate aim. Age is the only protected characteristic that allows employers to justify direct discrimination.

Employers need to ensure they have the appropriate policies and procedures in place to deal with age discrimination and should raise awareness of it so that acts of discrimination on the grounds of age can be prevented.

Discrimination

Discrimination occurs when someone is treated less favourably than another person because of their protective characteristic. There are four definitions of discrimination:

Direct Discrimination: treating someone less favourably than another person because of their protective characteristic

Indirect Discrimination: having a condition, rule, policy or practice in your company that applies to everyone but disadvantages people with a protective characteristic

Associative Discrimination: directly discriminating against someone because they associate with another person who possesses a protected characteristic

Perceptive Discrimination: directly discriminating against someone because others think they possess a particular protected characteristic

Examples of Age Discrimination

An example of direct discrimination would be where someone with all the skills and competencies to undertake a role is not offered the position just because they completed their professional qualification 30 years ago. Other examples could include refusing to hire a 40 year old because of a company's youthful image, not providing health insurance to the over 50's and not promoting a 25 year old because they may not command respect.

A business requiring applicants for a courier position to have held a driving licence for five years is likely to be guilty of indirect discrimination. A higher proportion of people aged between 40 and above will have fulfilled this criteria than those aged 25. Other examples of indirect discrimination could include seeking an 'energetic employee', requiring 30 years of experience or asking clerical workers to pass a health test.

An example of perceived discrimination could be where an older man who looks much younger than his years is not allowed to represent his company because the Managing Director thinks he is too young.

However, different treatment because of age is not unlawful if it can be objectively justified and you can demonstrate that it is a proportionate means of meeting a legitimate aim. For example, an employer might argue that it was appropriate and necessary to refuse to recruit people over 60 where there is a long and expensive training period before starting the job. However, cost by itself is not capable of justifying such an action.

Harassment

Harassment on the basis of age is equally unlawful. For example, a mature trainee teacher may be teased and tormented in a school on the grounds of age during the teaching experience. If no action is taken by the head teacher, this may be treated as harassment. An employee may be written off as 'too slow' or 'an old timer'. This too could be seen as harassment.

The Equality Act 2010 covered harassment by a third party, making employers potentially vicariously liable for harassment of their staff by people they don't employ. However, this has been repealed with effect from October 2013, and employers will no longer have the risk of being held responsible if an external third party harasses an employee. However, employers must continue to take "all reasonable steps" to ensure that employees don't suffer harassment at work; therefore it is recommended that your harassment policy still states that you show "zero tolerance" towards such behaviour.

Recruitment

Employers must be aware of the significance of the legislation at all stages in the recruitment process and to avoid breaking the age rules they should consider:

- removing age/date of birth from adverts for example: 'Trainee Sales Representatives…. envisaged age 21-30 years'
- reviewing application forms to ensure they do not ask for unnecessary information about periods and dates
- avoiding asking for 'so many years of experience' in job descriptions and person specifications for example: 'graduated in the last seven years'

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- avoiding using language that might imply a preference for someone of a certain age, such as 'mature', 'young', 'energetic' or 'the atmosphere in the office, although demanding, is lively, relaxed and young'
- ensuring that other visible methods are used to recruit graduates as well as university milk rounds, to avoid limiting opportunities to young graduates
- focusing on competencies to undertake a role and not making interview notes that refer to age considerations
- never asking personal questions nor make assumptions about health or physical abilities
- never ask health related questions **before** you have offered the individual a job.

Service related benefits

Employers are allowed to use a length of service criterion in pay and non-pay benefits of up to five years' service. Benefits based on over five years service are also allowed if the benefit reflects a higher level of experience, rewards loyalty or increases or maintains motivation and is applied equally to all employees in similar situations. It is for the employer to demonstrate that the variation in pay/benefits over five years can be objectively justified.

Employers are recommended to review their pay and benefits policies to ensure that they are based on experience, skills and other non-age related criteria.

Redundancy

The existing statutory payment provisions remain in place. Employers can, as before, pay enhanced redundancy payments. However, to avoid discriminating, employers should use the same age brackets and multipliers as used when calculating statutory redundancy pay.

Retirement

The default retirement age and the statutory retirement procedure were abolished from 6th April 2011.

Employers that wish to prescribe a compulsory retirement age may do so only if it is a proportionate means of achieving a legitimate aim.

Action for employers

Employers need to undertake the following to ensure that they are not breaking the law:

- review equality policies
- review employee benefits
- review policies and procedures on retirement
- undertake equality training covering recruitment, promotion and training.

How we can help

We will be more than happy to provide you with assistance or any additional information required. Please contact us for more detailed advice.

Agency Workers Regulations

Regulations which took effect from 1 October 2011 mean that workers supplied to a company, or to any other entity, by an agency will become entitled to receive pay and basic working conditions equivalent to any directly employed employees after a 12 week qualifying period.

Guidance for businesses and other employers

Under the Agency Workers Regulations workers supplied to a company (or to any other entity) by an agency will become entitled to receive pay and basic working conditions equivalent to any directly employed employees after a 12 week qualifying period.

Where an agency worker is at the entity for less than 12 weeks, a minimum break of more than six weeks between assignments with the same employer will be necessary for the rights not to be available.

Supporting guidance

Guidance can be found on the BIS website www.bis.gov.uk

Impact of the Regulations

As explained below, most of the additional work, and much of the risk and liability, will be the responsibility of the agencies but it seems certain that they will pass the cost on by way of higher fees.

More directly, where the 'Employer' (see below) hires staff for more than the 12 week period, typically the costs of hiring staff will be greater. The Employer will also need to monitor the period of time the 'Agency Worker' has been at their premises and there may be additional risks and costs as a result.

Terms used in the Regulations

Much of the guidance uses terms such as 'Temporary Work Agency' (the Agency supplying the workers), the 'Agency Worker' and the 'Hirer' (being the entity or business where the Agency Worker is working). In this summary we have generally used the term 'Employer/Hirer' when we mean the 'Hirer' although it is not strictly the correct legal term. We have also used the word 'Agency' rather than 'Temporary Work Agency'.

Rights of Agency Workers under the Regulations

Under the Regulations, from their first day working at the Employer/Hirer, the Employer/Hirer will be required to ensure that the Agency Worker can access what are called 'collective facilities' such as canteens, childcare, transport services, car parking, etc and that they are able to access information on all job vacancies.

The right is to treatment in relation to these relevant facilities that is no less favourable than that given to a comparable worker, which is an employee or worker directly employed by the employer.

Then, after 12 weeks in the same job, the 'equal treatment entitlements' described below come into force.

Equal treatment entitlements and the 'Qualifying Clock'

After completion of the 12 week qualifying period the Agency Worker is entitled to the same basic terms and conditions of employment as if they had been directly hired by the Employer/Hirer. These would include:

- key elements of pay
- duration of working time
- night work
- rest periods
- rest breaks
- annual leave
- pregnant workers will be entitled to paid time off for antenatal appointments.

If a particular entitlement commences only after a period of service, for example, additional annual leave arises after one year of employment, then the entitlement would only start after one year plus 12 weeks.

The term 'Qualifying Clock' is used to illustrate the working of the guidance.

The guidance refers to extensive anti-avoidance provisions preventing a series of assignments being structured in such a way as to prevent an Agency Worker from completing the qualifying period and describes when the Qualifying Clock can be reset to zero, where the clock 'pauses' during a break, and where it continues to 'tick' during a break.

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The examples given are extensive but include, for example:

- the clock is reset to zero where an Agency Worker begins a new assignment (and a new Employer/Hirer for this purpose is closely defined) or there is a break of more than six weeks
- the clock would be paused for a break of no more than six weeks and the worker returns to the same Employer/Hirer, or a break of up to 28 weeks because the worker is incapable of work because of sickness or injury
- the clock continues to tick as a result of breaks to do with pregnancy, childbirth, maternity or paternity leave.

There are many more examples given in the BIS guidance.

Identification of basic working and employment conditions and pay

Equal treatment covers basic working and employment conditions included in the relevant contracts of direct recruits, which would normally mean terms and conditions laid out in standard contracts, pay scales, collective agreements or company handbooks. Where available this would be the same pay, holidays, etc as if the Agency Worker had been recruited as an employee or worker to the same job. There does not have to be a comparable employee (called a 'comparator') but it would be easier to demonstrate compliance with the Regulations where such a person is available.

Pay is defined as including and excluding a number of elements, most of which are shown below.

To be included in pay for this purpose:

- basic pay based on an annual salary equivalent
- overtime payments
- shift / unsocial hours allowances
- payment for annual leave
- bonus or commission payments
- vouchers or stamps with monetary value which are not salary sacrifice schemes.

Not to be included:

- occupational sick pay
- occupational payments (agency workers will be covered by Auto-enrolment which started to phase in from October 2012)
- occupational maternity, paternity or adoption pay
- redundancy pay / notice pay
- majority of benefits in kind
- payments requiring an eligibility period of employment.

Working time and holiday entitlements

In addition to an agency worker's existing rights under the Working Time Regulations 1998, after 12 weeks, the worker becomes entitled to the same rights for working time, night work, rest periods and rest breaks, annual leave and overtime rates, as directly employed employees.

The guidance recognises that some Agency Workers already receive these benefits from the date they join the Employer/Hirer and mention as an example that Employers/Hirers often offer a lunch hour rather than the minimum 20 minute rest under the Working Time Regulations. The guidance also includes a reminder that the statutory entitlement to paid holiday leave is 5.6 weeks per year.

Pregnant workers and new mothers

After the 12 week qualifying period pregnant workers will be allowed paid time off for antenatal appointments and classes and if they can no longer carry out the duties of their original assignment they will need to be found alternative sources of work. If no such alternative work is available from either the Employer/Hirer or the Agency, the Agency should pay the pregnant woman for the remaining expected duration of the assignment.

The provisions of the Equality Act also apply, meaning that there is a risk that either an Agency or the Employer/Hirer could be guilty of discrimination if a worker were to receive less favourable treatment as a result of their pregnancy or maternity.

If the nature of the assignment is such that there is a risk to the worker's health and safety, the Agency will need to ask the Employer/Hirer to carry out a workplace risk assessment, which they will need to do.

Permanent employment contract with the Agency

If the Agency Worker has a permanent contract of employment with the Agency then the equal treatment provisions do not need to be complied with by the Employer/Hirer.

Information likely to be requested by an Agency

To comply with these Regulations, agencies may need to collect certain information from the Employer/Hirer before an assignment begins. This is in addition to their existing obligations under what are known as the Conduct Regulations 2010 and the Gangmasters Licensing Regulations (for the food, agricultural and shellfish sectors).

Where an assignment is likely to last for more than 12 weeks, it will probably be good practice for the Agency to ask for information at an early stage though the Regulations do not refer to any particular timescale.

Existing regulations require information about:

- hirer's identity, business and location
- start date and duration
- role, responsibilities and hours
- experience, training, qualifications etc
- health and safety risk
- expenses.

The details now required to comply with the Agency Workers Regulations after the 12 week period are:

- basic pay, overtime payments, shift/unsocial hours allowances and any risk payments
- types of bonus schemes
- vouchers with monetary value
- annual leave entitlement.

It is likely that the Agency will also ask for information about any day one entitlements which may be available, even though they are the responsibility of the Employer/Hirer.

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Liability and remedies

The responsibility lies with the Employer/Hirer to provide day one entitlements and claims would probably be against the Employer/Hirer.

Claims with regard to basic working and employment conditions could be against either the Employer/Hirer, or the Agency, or against both, depending on the nature of the breach and whether, for example, the Employer/Hirer had failed to provide information to the Agency. Claims would be made to an Employment Tribunal if not resolved through grievance procedures and/or possibly through the involvement of ACAS.

Employment Tribunals would be able to award financial compensation or recommend action that should be taken.

How we can help

If you would like to discuss the implications of the new Regulations for your business in more detail please contact us.

Annual Leave

Background

Under the Working Time Regulations 1998 (as amended) workers are entitled to paid statutory annual leave of 5.6 weeks (28 days if the employee works five days a week), this basic entitlement is inclusive of bank holidays. This annual leave entitlement is now closer to that of workers in other European countries, where holiday allowance is typically more generous. Workers in Ireland are entitled to 29 days; the highest minimum entitlement is in Austria at 38 days.

Payment for annual leave

A worker is entitled to be paid in respect of any period of annual leave for which they are entitled, at a rate of one week's pay for each week's leave. For employees with normal working hours a week's pay is the pay due for the basic hours the employee is contracted to work. Any regular contractual bonuses or allowances (except expense allowances) which do not vary with the amount of work done are also included. Voluntary overtime and commission payments are excluded.

Under the Regulations any statutory annual leave may not be replaced by a payment in lieu, except on termination of employment. In such cases, a payment can be made for any untaken leave in the leave year that termination occurs, payment may also be due for any carried over leave because of maternity/adoption leave or sickness.

Rolled up leave

The ECJ has ruled that it is unlawful for employers to roll up workers' annual leave payments. In accordance with this it is recommended that employers renegotiate contracts involving such pay for existing workers as soon as possible so that payment for statutory annual leave is made at the time when the leave is taken.

Requesting leave

Employees should be allowed to choose when they take some of their leave although many employers do set certain conditions, for example that only a certain number of workers may take leave at the same time or that workers may not take more than a certain number of consecutive working days off in one go.

It is common for employers to have a procedure in place for these instances and it should include the procedure for notification. If this is excluded then the legal position is that an employee requesting a period of leave must give notice of at least twice the period of leave to his or her employer. A similar arrangement of notice must be given by the employer if they are requesting the employee to take leave at specific times.

First year of employment

Workers accrue their annual leave entitlement on a pro rata basis during their first year of employment. This is calculated in relation to the proportion of the employment year worked. Therefore, the annual leave entitlement will accrue over the course of the worker's first year of employment at the rate of 1/12 of the annual entitlement starting on the first day of each month. If the calculation does not result in an exact number of days then the figure will be rounded up to the nearest half day.

Annual leave and part time employees

Under the Regulations time off for bank holidays should be pro rated. Part time workers are currently entitled to 5.6 weeks' holiday, based on the hours a week that they work, regardless of whether they work on days on which bank holidays fall.

Contractual annual leave entitlement

An employer can increase a worker's statutory annual leave entitlement via a contractual arrangement. In such cases any unused additional annual leave may be carried over to the next leave year. This is often a matter of employer discretion and will depend on the terms of the contract.

Annual leave and maternity

An employee continues to accrue their statutory annual leave entitlement of 5.6 weeks and any additional contractual annual leave entitlement throughout both ordinary maternity leave (OML) and additional maternity leave (AML).

Sickness during holiday

Employees are now entitled to reclassify statutory holiday as sick leave if they fall ill whilst on prearranged statutory holiday. This means that they are entitled to take the statutory holiday they have missed at a later date. If they are unable to take the rest of their statutory holiday that holiday year they can carry it over to the next holiday year. If you offer more than 5.6 weeks holiday a year, you do not have to allow an employee to reclassify any additional (contractual) holiday as sickness absence. However, you will have to ensure that they can take their full statutory holiday at other times. If you pay contractual sick pay, you can minimise the scope for abuse by making contractual sick pay in these circumstances contingent on the employee notifying you on the first day of illness that they are ill and, possibly, requiring them to provide a medical certificate from day 1.

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Employees who are on sick leave can ask their employer to re-classify their absence as statutory holiday in order to receive holiday pay. If an employee on sick leave does not want to take their outstanding statutory holiday before your current leave year ends, they should be permitted to carry it over into the next leave year. Employees returning from sick leave can take their statutory holiday entitlement for the current year on their return but, if there is insufficient time for them to take it, they should be allowed to carry it forward to the next leave year.

Recovery of overpayment of holiday

Employee contracts should make clear that if an employee takes more holiday than he or she is entitled to during the course of a leave year, the company will be entitled to recover the overpayment of holiday pay by deducting it from the employee's wages or salary. It is advisable for the company to consult with the employee before making the deduction.

How we can help

We will be more than happy to provide you with assistance or any additional information required. Please contact us for more detailed advice.

Dismissal Procedures

There have been many changes to employment law and regulations over the years. A key area is the freedom or lack of freedom to dismiss an employee.

An employee's employment can be terminated at any time but unless the dismissal is fair the employer may be found guilty of unfair dismissal by an Employment Tribunal.

In November 2011, the qualifying period for unfair dismissal increased from one to two years continuous service for employees who joined on or after 6th April 2012. However, there is no length of service requirement in relation to 'automatically unfair grounds'.

We set out below the main principles involved concerning the dismissal of employees including some common mistakes that employers make. We have written this factsheet in an accessible and understandable way but some of the issues may be very complicated.

Professional advice should be sought before any action is taken.

The right to dismiss employees

Reasons for a fair dismissal would include the following matters:

- the person does not have the capability or qualification for the job (this requires the employer to go through consultation and/or disciplinary processes)
- the employee behaves in an inappropriate manner (the company/firm's policies should refer to what would be unreasonable behaviour and the business must go through disciplinary procedures)
- redundancy, providing there is a genuine business case for making (a) position(s) redundant with no suitable alternative work, there has been adequate consultation and there is no discrimination in who is selected
- the dismissal is the effect of a legal process such as a driver who loses his right to drive (however, the employer is expected to explore other possibilities such as looking for alternative work before dismissing the employee)
- some other substantial reason.

Claims for unfair dismissal

Upon completion of the required qualifying period, employees can make a claim to an Employment Tribunal for unfair dismissal within three months of the date of the dismissal and if an employee can prove that he/she has been pressured to resign by the employer he/she has the same right to claim unfair dismissal or constructive dismissal.

In addition to the increase in qualifying period, the government has also introduced plans for details of claims to be submitted to ACAS where the parties will be offered pre-tribunal conciliation before proceeding to a Tribunal. However, there is no obligation of either party to take it up. Since 29 July 2013 the government has introduced fees for claimants bringing tribunal claims.

There are two levels of claim, depending on the complexity of the case. For straightforward claims with one claimant there will be two fee points, an issue fee of £160 and a hearing fee of £250, for more complex claims (including unfair dismissal and discrimination claims) these figures rise to £230 and £950, for multiple claims the fee per claimant is discounted on a sliding scale. The tribunal may order the fees to be repaid to the claimant if he or she is successful with his or her claim. Fees are also payable for appeals submitted to the Employment Appeal Tribunal. These are £400 on submitting a notice of appeal and a further £1200 hearing fee. Claimants can benefit from the remission system which provides a complete exemption for those on certain state benefits and partial remission on a sliding scale for those on low incomes.

If the claim proceeds to Tribunal and the employee wins his/her case the Tribunal can choose one of three remedies which are:

- re-instatement which means getting back the old job on the old terms and conditions
- re-engagement which would mean a different job with the same employer
- compensation where the amount can be anything from a relatively small sum to a maximum cap of 12 months' pay, which will apply where the amount is less than the overall cap. Where the dismissal was due to some form of discrimination the award can be unlimited.

If the dismissal is demonstrated as being due to any of the following it will be deemed to be unfair regardless of the length of service:

- discrimination for age, disability, gender reassignment, race, religion or belief, sex, sexual orientation or marriage and civil partnership
- pregnancy, childbirth or maternity leave
- refusing to opt out of the Working Time Regulations
- disclosing certain kinds of wrong doing in the workplace
- health and safety reasons
- assertion of a statutory right.

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Statutory disciplinary procedures

The Employment Act 2008 introduced the ACAS Code of Practice which saw a change to the way employers deal with problems at work. It also saw the removal of 'automatic unfair dismissal' related to failure to follow procedures. Tribunals may make an adjustment of up to 25% of any award, where they feel the employer has unreasonably failed to follow the guidance set out in the ACAS Code.

The ACAS Code of Practice sets out the procedures to be followed before an employer dismisses or imposes a significant sanction on an employee such as demotion, loss of seniority or loss of pay.

The ACAS Code does not apply to redundancy or expiry of a fixed term contract.

Standard procedure

Step 1 Employers must set out in writing the reasons why dismissal or disciplinary actions against the employee are being considered. A copy of this must be sent to the employee who must be invited to attend a meeting to discuss the matter, with the right to be accompanied.

Step 2 A meeting must take place giving the employee the opportunity to put forward their case. The employer must make a decision and offer the employee the right to appeal against it.

Step 3 If an employee appeals, you must invite them to a meeting to arrive at a final decision

There may be some very limited cases where despite the fact that an employer has dismissed an employee immediately without a meeting, an Employment Tribunal will very exceptionally find the dismissal to be fair. This is not explained in the regulations but may apply in cases of serious misconduct leading to dismissal without notice. What this means in practice awaits the test of case law.

Modified procedure

Step 1 Employers firstly set out in writing the grounds for action that has led to the dismissal, the reasons for thinking at the time that the employee was guilty of the alleged misconduct and the employee's right of appeal against the dismissal

Step 2 If the employee wishes to appeal against the decision, the employer must invite them to attend a meeting, with the right to be accompanied, following which the employer must inform the employee of their final decision. Where practicable, the appeal meeting should be conducted by a more senior or independent person not involved in the earlier decision to dismiss.

The only occasions where employers are not required to follow the ACAS Code of Practice are as follows:

- they reasonably believe that doing so would result in a significant threat to themselves, any other person, or their or any other person's property
- they have been subjected to harassment and reasonably believe that doing so would result in further harassment
- because it is not practicable within a reasonable period
- where dismissal is by reason of redundancy or the ending of a fixed term contract
- they dismiss a group of employees but offer to re-engage them on or before termination of their employment
- the business closes down suddenly because of an unforeseen event
- the employee is no longer able to work because they are in breach of legal requirements eg to hold a valid work permit.

Common mistakes that employers make

For many the regulations have caused some confusion and practical difficulties. Some of the most common mistakes include:

- not applying the procedures to employees with less than the qualifying period of continuous service for unfair dismissal (ie two years). Whilst such employees are often unable to claim unfair dismissal (unless the reason for their dismissal is one of the automatically unfair reasons for which there is no qualifying period of employment such as pregnancy), they may be able to bring other claims such as discrimination with compensation increased accordinglyfailure to invite employees to disciplinary hearings in writing or supply adequate evidence before the disciplinary hearing. The standard procedure requires the employer to set out the 'basis of the allegations' prior to the hearing
- excluding dismissals other than disciplinary dismissals (eg ill-health terminations)
- not inviting employees to be accompanied
- not including a right of appeal
- not appreciating the statutory requirement to proceed with each stage of the procedure without undue delay
- failure to appreciate that an employee may have right to appeal even if it is requested verbally rather than in writing and is after a timescale set down by the employer
- not appreciating that paying an employee a lower bonus for performance related reasons could potentially amount to 'action short of dismissal' by the employer
- failure to treat as a grievance any written statement/letter (for example a letter of resignation) which raises issues which could form the basis of a tribunal claim to which statutory procedures apply. This means that the employer must be alert to issues being raised in writing even if there is no mention of the word grievance.

How we can help

We will be more than happy to provide you with assistance or any additional information required so please do contact us.

Health and Safety

It is very likely that owners and managers of many smaller businesses are not aware of just how demanding health and safety regulations can be.

We provide an overview of these below and highlight some practical tips and processes on how your business can remain (or become!) compliant.

Legislation governing health and safety

The main statutes are:

- The Health and Safety at Work Act 1974 (HSWA)
- The Management of Health and Safety at Work Regulations 1999 (Risk Assessment)
- Regulatory Reform (Fire Safety) Order 2005
- The Health and Safety (Consultation with Employees) Regulations 1996
- Safety Representatives and Safety Committee Regulations 1977
- Corporate Manslaughter and Corporate Homicide Act 2007

There are many other regulations relating to specific areas of health and safety, for example, manual handling, safety signs, employment of children, display screen equipment, control of substances hazardous to health, reporting of incidents, control of noise and first aid. There are also approved codes of practice (ACOPS) which provide practical advice on compliance and have special legal status.

Minimum requirements

A business with at least five employees must have all of the following in place to avoid problems with a health and safety inspector:

- a written health and safety policy, which should be specifically tailored for the employer
- assessments of risks from workplace activities
- records of any significant findings from such assessments
- consultations with employees or their representatives on health and safety matters
- health and safety training programmes
- employer's liability insurance, evidence of which is on display
- health and safety posters on display
- a competent person appointed to assist with health and safety responsibilities.

Sanctions for Non-Compliance

If inspectors arrive from either the Health and Safety Executive (the HSE is responsible for factories, farms and building sites) or the local authority (responsible for offices, shops, hotels and catering) and find a business in breach of health and safety regulations there are a number of types of enforcement action they can take, in increasing order of severity, as follows:

- offer advice, either face to face or in writing
- issue a warning, highlighting a failure to comply with the law
- serve an improvement notice
- withdraw approvals to undertake certain activities
- vary licencing conditions or exemptions
- issue formal cautions (a formal statement of an offence having been committed, acknowledged by the recipient)
- serve a prohibition notice (to stop activities in order to prevent serious personal injury)
- prosecute at the magistrates or Crown Court. This may lead to fines from £5,000 up to a maximum of £20,000 in the lower courts and unlimited fines in the Crown Court and/or up to 2 years imprisonment.

At the same time employees may take civil actions against their employer if they suffer injury or illness and the employer has breached the Management of Health and Safety at Work Regulations 1999.

Why managing health and safety makes sense

In addition to avoiding legal sanction, statistics in 2011/12 show:

- **1.1 million** working people were suffering from a work-related illness.
- **173** workers killed at work.
- **111,000** injuries were reported under RIDDOR.
- **212,000** reportable injuries (over 3 day absence) occurred (LFS).
- **27 million** working days were lost due to work-related illness and workplace injury.
- Workplace injuries and ill health (excluding cancer) cost society an estimated £13.4 billion (in 2010/11)

Accidents and ill health can be very damaging to business because, in addition to personal injury claims and the direct costs, productivity can be severely compromised. The less visible costs are many and varied and include increased overtime working and temporary labour, stress

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and more staff absence, production delays, repairs to equipment, costs of management time, customer dissatisfaction and loss.

These are compelling reasons why it makes sense to manage health and safety proactively.

Five-step process to managing health and safety

The HSE has produced 'Successful health and safety management' (HSG65) which is an excellent guide on how to plan for and audit health and safety.

It suggests a five-step process as set out below.

Step 1

Set your policy. This demonstrates to staff that you take health and safety issues seriously, have identified the risks associated within your business, have assessed those risks and will continue to eliminate or control them.

Step 2

Organise your staff. The effectiveness of your policy depends upon the involvement and commitment of your staff.

Step 3

Plan and set standards. This involves setting health and safety objectives, identifying hazards, assessing risks and implementing standards of performance.

Step 4

Measure your performance. This is about looking at whether your assessments are showing an improvement or the same issues are repeating themselves. Regular inspections and checks should be made to ensure your standards are being met.

Step 5

Learn from experience. If things have gone wrong, this is about reviewing how effective your procedures are and then making changes to improve the effectiveness of these policies and procedures.

Practical tips

The following are some practical actions you could and should be taking today:

- removing items from the work area such as cables and other loose items, which can cause tripping and slipping accidents
- repairing torn carpets and broken edges on staircases to avoid the risk of serious falls
- making sure that workstations are stable, don't give off a reflective glare and ensuring there is suitable seating and hand and foot-rests so that staff maintain good posture whilst working
- insisting that staff take regular breaks, particularly if working for long stretches at a VDU screen
- undertaking regular fire drills and ensuring first aid training is updated regularly
- keeping the first aid box(es) fully stocked and readily available
- ensuring that health and safety signs are kept relevant and up to date, including the display of non-smoking signs at each staff entrance
- setting up a system to regularly check all electrical appliances and fire extinguishers
- ensuring that staff are aware of the potential risks of performing certain tasks and checking that they are fit to undertake those tasks or know how to do them safely.

How we can help

Health and safety is an important, if sometimes neglected, area. To help you meet your responsibilities we have provided a simple checklist that you may wish to complete to identify areas within your business that need attention.

Please contact us if you would like any additional information.

Health and Safety Checklist

If not already in place, the following are practical steps you should take today:

UNDERTAKEN BY: _____ DATE: _____

	Yes	No
1 Is an Employer's Liability Insurance Certificate displayed?		
2 Is a Health and Safety Poster displayed?		
3 Have all outstanding tasks from previous risk assessments been completed?		
4 Are there sufficient Fire Marshals?		
5 Are there sufficient Fire Action Notices displayed to inform staff of the procedures to take in the event of a fire?		
6 Are all new recruits advised of the Health and Safety procedures?		
7 Is the fire alarm tested regularly?		
8 When was it last tested and by whom?		
9 When were the fire extinguishers last tested?		
10 Is the first aid box complete and available to all staff?		
11 Are there sufficient trained First Aiders?		
12 Is there an accident book and is it being used?		

	Yes	No
13 When was the last time portable electrical equipment was tested by an electrician?		
14 Is the electrical equipment labelled and dated with the test?		
15 Have risk assessments of display equipment been undertaken within the last 12 months?		
16 Is everyone aware of their right to free eye tests?		
17 Are all items of mechanical cutting equipment adequately guarded (shredders, guillotines etc.)?		
18 Are filing cabinets where more than one drawer can be opened at a time bolted down?		
19 Have staff been advised to take precautions when changing toner cartridges?		
20 Are trolleys etc. provided to assist in the manual handling of loads?		
21 Are heavy, frequently used items stored on waist level shelves?		
22 Are steps available for reaching items stored at height?		
23 Is lighting adequate and in good working order?		
24 Is there a suitably marked drinking water supply available?		
25 Are passage ways clear of tripping hazards eg cables, boxes, rubbish etc.?		
26 Are the tops of cabinets clear of heavy items that could fall?		
27 Are all entrances and exits in good working order (no grease, broken slabs, poor lighting etc.)?		

Legal Working in the UK

In line with the Immigration, Asylum and Nationality Act 2006, it is a criminal offence to employ anyone who does not have an entitlement to work in the UK, or undertake the type of work you are offering. Any employer who does not comply with the law may be facing a fine of up to £10,000 per offence. Further, if employers knowingly use illegal migrant labour it could carry a maximum 2 year prison sentence and/or unlimited fine.

We provide an overview of the documentation required to ensure that your business does not fall foul of the law.

The rules

The increasing trend of illegal immigrants entering the UK has led to a rise in forged documentation, as well as grounds for certain employers to take advantage of cheap labour.

To combat this, the Home Office reviewed the law in this area and regulations were introduced on 1 May 2004.

Documentation requirements

An employer must obtain and retain a certified copy of any one, or combination of the original documents included in List A or List B. Those validated from List A will require no further checks, however, documents provided from List B must be followed up at least once every 12 months.

List A

- an ID Card or British passport identifying the holder is a British citizen; or
- an ID Card or EEA national passport or national identity card identifying the holder as a national of the EEA or Switzerland; or
- a residence permit, registration certificate or document certifying permanent residence issued by the Home Office or Border and Immigration Agency to a national of a EEA country or Switzerland; or
- a permanent residence card issued by the Home Office or Border and Immigration Agency to a family member of a national of a EEA country or Switzerland; or
- a Biometric Immigration Document issued by the Border and Immigration Agency indicating their right to stay indefinitely in the UK or has no time limit on their stay; or
- a passport or other travel document endorsed to show the holder is exempt from immigration control, is allowed to stay indefinitely in the UK or has no time limit on their stay

Or a combination of the following:

An official document giving the person's permanent national insurance number and name, plus

- an immigration status document issued by the Home Office with an endorsement indicating that the person named in it can stay indefinitely in the UK, or has no time limit on their stay; or
- a full UK birth certificate or a birth certificate issued in the Channel Islands, the Isle of Man, or Ireland; or
- a full adoption certificate issued in the UK which includes the name(s) of at least one of the holder's adoptive parents; or
- an adoption certificate issued in the Channel Islands, the Isle of Man, or Ireland; or
- a certificate of registration or naturalisation stating that the holder is a British citizen; or
- a letter issued by the Home Office which indicates that the person named in it can stay indefinitely in the UK or has no time limit on their stay.

List B

- a passport or other travel document endorsed to show that the holder is able to stay in the UK and is allowed to do the work in question provided it does not require the issue of a work permit; or
- a Biometric Immigration Document issued by the Border and Immigration Agency which indicates that the holder is able to stay in the UK and is allowed to do the work in question; or
- a work permit or other approval to take employment issued by the Home Office or Border and Immigration Agency when produced in combination with a passport or other travel document endorsed to show that the holder is able to stay in the UK and is allowed to do the work in question or a letter issued by the Home Office or Border and Immigration Agency to the holder, or the employer confirming the same; or
- a certificate of application issued by the Home Office or the Border and Immigration Agency to or for a family member of a national of a European Economic Area country or Switzerland, stating that the holder is permitted to take employment, which is less than 6 months old, when produced in combination with evidence of verification by the Border and Immigration Agency Employer Checking Service; or

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- a residence card or document issued by the Home Office or the Border and Immigration Agency to a family member of a national of a European Economic Area country or Switzerland; or
- an Application Registration Card issued by the Home Office or Border and Immigration Agency stating the holder is permitted to take employment, when produced in combination with evidence of verification by the Border and Immigration Agency Employer Checking Service; or
- a letter issued by the Home Office which indicates that the person named in it can stay in the UK and this allows them to do the type of work you are offering when produced in combination with an official document giving the person's permanent national insurance number and name; or
- an Immigration Status Document issued by the Home Office with an endorsement indicating that the person named in it can stay in the UK and this allows them to do the type of work you are offering when produced in combination with an official document giving the person's permanent national insurance number and name.

The points-based system

The Government has introduced a merit-based points system for assessing non-European Economic Area (EEA) nationals wishing to work in the UK. The system consists of five tiers, each requiring different points. Points will be awarded to reflect the migrant's ability, experience, age and when appropriate the level of need within the sector the migrant will be working.

The five points-based system tiers consist of:

- tier 1 - highly skilled workers, for whom no job offer or sponsoring employer is required, for example doctors, scientists and engineers;
- tier 2 - skilled individuals with proven English language ability who have a job offer, to fill gaps in the UK labour force, for example nurses, teachers and engineers;
- tier 3 (currently suspended) - low skilled workers filling specific temporary labour shortages, for example construction workers for a particular project;
- tier 4 - students;
- tier 5 - youth mobility and temporary workers, for example musicians coming to play in a concert.

Sponsorship

Under tier 2 the employer sponsors the individual, who makes a single application at the British Embassy in his or her home country for permission to come to the UK and take up the particular post. The individual's passport will be endorsed to show that the holder is allowed to stay in the UK (for a limited period) and is allowed to do the type of work in question.

UK based employers wishing to recruit a migrant under tiers 2 or 5: Temporary Workers will have to apply for a sponsor licence. To gain and retain licences employers are required to comply with a number of duties, such as appointing individuals to certain defined positions of responsibility, having effective HR systems in place, keeping proper records and informing the UK Border Agency if a foreign national fails to turn up for work.

There is a charge of £1,545 (£515 for charities and for employers with no more than 50 employees) for a licence to sponsor tier 2 migrants. This fee buys a four-year licence.

Once an employer has obtained its sponsorship licence, it can access an online system operated by the UK Border Agency through which it can issue its own certificates of sponsorship to potential migrant workers. The UK Border Agency determines the number of certificates to be allocated to a particular employer. Each certificate of sponsorship takes the form of a unique reference number to be provided by the employer to its potential recruit, who will then be able to apply for entry clearance into the UK at the British Embassy in his or her home country.

The fee for each application for a certificate of sponsorship for a tier 2 worker is £184.

Employers that do not hold a licence cannot recruit non-EEA workers.

Identity cards

Identity cards for foreign nationals are currently issued to some categories of foreign nationals from outside the European Economic Area (EEA) and Switzerland. Other immigration applicants continue to receive a sticker (vignette) in their passport.

With effect from 1st January 2014 EEA nationals from Bulgaria and Romania who wish to work in the UK no longer need an accession worker card or registration certificate.

Since July 2013, EEA nationals from Croatia were able to move and reside freely in any EU State. However, the UK is applying transitional restrictions and as such Croatians wishing to work in the UK will need to obtain an accession worker authorisation document (permit to work). Therefore, employers will need to make document checks to confirm if the Croatian has unrestricted access to the UK labour market as they are exempt from work accession or they hold a valid work authorisation document allowing them to carry out the type of work in question before starting employment.

If you are licensed to sponsor skilled workers or students from outside the EEA or Switzerland under the points-based system, you can use a migrant's identity card - which provides evidence of the holder's nationality, identity and status in the UK - to check their right to work or study here.

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Checking procedures

The following checks must also be taken to ensure that each document also relates to the prospective employee in question:

- ensure that any photograph and date of birth is consistent with the appearance of the individual
- if more than one document is produced ensure that the names on each are identical. Otherwise further explanation and proof will be necessary, for example, a marriage certificate
- check expiry dates
- carry out ongoing checks on individuals who joined on or after 29 February 2008 and who have been granted only limited leave to remain and work in the UK
- take copies of original documents only, sign and date to certify
- before employing an individual who requires a tier 2 visa, be prepared to demonstrate that a recruitment search has been carried out according to the requirements under tier 2 of the points-based system
- where a recruitment agency is used to recruit an overseas national, ask the agency to prove that it has carried out all the necessary checks on the individual to ensure that he or she has the right to work in the UK

To ensure that there is no discrimination, it is recommended that all potential employees are asked to produce original documents indicating they have the right to work in the UK.

If you have any doubts as to whether documents are genuine or sufficient to prove an employee's entitlement to work in the UK you are encouraged to access the Employer Checking Service, which is provided through the Border and Immigration Agency's Employers' Helpline – 0300 1234 699.

How we can help

We will be more than happy to provide you with assistance or any additional information required. Please do not hesitate to contact us.

Managing Absence

Recent surveys indicate that the adverse impact of absence on business profitability today is significant, with thousands of man hours lost every day. Recent statistics show that an average of 7.6 days are lost each year per employee with a median cost of £595 per employee. Approximately two-thirds of working time lost to absence is accounted for by short-term absences of up to seven days.

We consider below the main principles of effective absence management.

Good absence management procedures

The majority of businesses surveyed (94%) confirm that tightening of policies to review attendance has a major influence on controlling levels of absence, particularly when three fifths of all absence is for minor illness of less than five days duration.

The difference between short and long-term absence

When managing sickness absence issues, employers need to distinguish between short-term and long-term absences. Where the absence consists of short but persistent and apparently unconnected absences then, after suitable investigation, disciplinary action may be appropriate. However, this is not a suitable course of action in relation to longer-term sickness absence management.

Short term absence procedures

There are a number of key steps in managing short-term absence.

- Establish a clear procedure that employees must follow, for example, the use of a return to work interview with line management and completion of self-certification forms even for one day of absence. This will ensure that everyone is aware that monitoring takes place and there is a complete record of absence.
- Establish a system of monitoring absence and regularly review this for emerging trends. Frequent absences could perhaps be evidence of malingering but on the other hand could be a symptom of a deeper problem. Tangible statistics can provide useful warning signals to prompt early action and avoid problems in the future.
- Return to work interviews should always be undertaken by the individual's immediate line manager, which will ensure that clear reasons for taking time off from work emerge. This will give managers the opportunity to get to the root cause of an absence which could be a symptom of a deeper problem.
- If the issues are personal and not work related, the employer should decide on the amount of flexibility he or she is prepared to give to enable the individual to address their issue.
- If there may be an underlying medical condition the employer should consider requesting a medical report to support the level of absence; there may be a hidden underlying condition and links to disability discrimination may not be immediately apparent.
- All employees should be made aware that any abuse of the sick pay provisions will result in disciplinary action.
- If there is no good medical reason for the absences the employee should be counselled and told what improvement is expected and warned of the consequences if no improvement is seen.
- If there are medical reasons for the absence, consider any links to the Equality Act 2010, for example, does the absence relate to hospital appointments or treatment required; if so, the employer is required to make reasonable adjustments which includes allowing time off for treatment.
- If the situation reaches a stage where the employee is to be dismissed and there is no defined medical condition, it may be on the grounds of misconduct. Here the employer must be able to show that a fair procedure has been followed taking into account the nature and length of the illness, past service record and any improvement in the attendance record.
- If the employee has a recognised medical condition that is not a disability but the absence rate is unacceptably high, it may be possible to dismiss fairly for some other substantial reason after following the due process. Again length of service and the availability of suitable alternative employment are relevant factors to consider before reaching a decision.

Long-term absence procedures

The key steps in managing long-term absence include:

- absence procedures, monitoring and return to work interviews are as important as in the case of short-term absence
- it is always prudent to gather medical advice to assess whether the employee's condition amounts to a disability and also the capability of the employee to undertake their role going forward
- it is important to be specific about the information required from the medical report for example the nature of the illness, the ability of the individual to undertake their role, having provided a detailed description of responsibilities, the length of time the illness is likely to last, and any reasonable adjustments that would ease the situation

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- upon receipt of the medical evidence a process of consultation and discussion should take place with the individual (welfare visit) subject to any recommendation of the doctor
- it is important to listen to the employee's proposals for their return to work
- if the cause of the illness is work related, the root cause should be investigated. Employers should discuss ways to reduce the influencing factors, for example, increased support, training or reallocation of duties. Could the employee return to work on a staged basis or on a part time basis for a short period?
- ensure all steps are recorded in writing to confirm what is expected of the employee and also what steps the employer is going to take, so there is no confusion and all actions taken are seen to be reasonable
- if the employee is to be dismissed it is likely to be on the basis of capability, however care will be needed to ensure all the requirements of the Equality Act 2010 have been considered and to demonstrate that a fair procedure has taken place.

Health and Work Service

The Government plans to introduce a new Health and Work Service (HWS), which is expected to be available by the end of 2014. The HWS will make independent expert health and work advice more widely available to employers, employees and general practitioners.

Definition of disability

The definition of what constitutes a disability can be split into three parts:

- the employee must be suffering from a physical or mental impairment
- the impairment must have a substantial effect on the ability to carry out normal day-to-day activities, which would include things like using a telephone, reading a book or using public transport. Substantial means more than minor or trivial
- the effect must be long-term, in other words have already lasted for at least 12 months or be likely to last that long.

The Equality Act 2010 includes new protection from discrimination arising from disability. This includes indirect discrimination, associative discrimination and discrimination by perception.

Discrimination arising from disability

A person discriminates against a disabled person if:

- a person treats a disabled person unfavourably because of something arising in consequence of the disabled person's disability, and
- a person cannot show that the treatment is a proportionate means of achieving a legitimate aim.

However, this does not apply if a person shows that they did not know, and could not reasonably have been expected to know, that a disabled person had the disability.

Reasonable adjustments

If a medical report identifies a disability, in accordance with the Equality Act an employer has a duty to make reasonable adjustments. This is quite broad and may mean physical adjustments to premises or the provision of equipment to assist the employee in carrying out their duties. It can also mean adjustments to the role itself by removing certain duties and reallocating them, changes in hours or place of work, or the provision of further training and supervision. It may also include transferring to any other vacant post subject to suitability.

In other words quite a number of steps are required of an employer if they are to establish a fair dismissal for capability in relation to an employee who has been absent for a long term of sickness.

How can we help

Please contact us if we can provide any further assistance or additional information.

National Minimum Wage

The National Minimum Wage (NMW) was introduced on 1 April 1999 and is reviewed each year by the Low Pay Commission. Any changes normally take place on 1 October. There have already been a number of instances of employers being penalised for not complying with the legislation. HMRC are the agency that ensures enforcement of the NMW.

We highlight below the main principles of the minimum wage regulations.

Please contact us for further specific advice.

What is the National Minimum Wage?

There are different levels of NMW, depending on your age and whether you are an apprentice. The rates are given in the following table:

	Rate from 1 October 2013	Rate from 1 October 2014
the main rate for workers aged 21 and over	£6.31	£6.50
the 18-20 rate	£5.03	£5.13
the 16-17 rate for workers above school leaving age but under 18	£3.72	£3.79
the apprentice rate, for apprentices under 19 or 19 or over and in the first year of their apprenticeship	£2.68	£2.73

The apprentice rate applies to:

- apprentices under 19
- apprentices aged 19 and over, but in the first year of their apprenticeship.

If you are of compulsory school age you are not entitled to the NMW.

In addition, there is a fair piece rate which means that employers must pay their output workers the minimum wage for every hour they work based on an hourly rate derived from the time it takes a worker working at average speed to produce the work in question. The entitlement of workers paid under this system is uprated by 20%. This means that the number reached after dividing the NMW by the average hourly output rate must be multiplied by 1.2 in order to calculate the fair piece rate.

There are no exemptions from paying the NMW on the grounds of the size of the business.

Key questions

Who does not have to be paid the National Minimum Wage?

- The genuinely self-employed.
- Child workers - anyone of compulsory school age (ie. until the last Friday in June of the school year they turn 16).
- Company directors who do not have contracts of employment.
- Some other trainees on government funded schemes or programmes supported by the European Social Fund.
- Students doing work experience as part of a higher education course.
- People living and working within the family, for example au pairs.
- Friends and neighbours helping out under informal arrangements.
- Members of the armed forces.
- Certain government schemes at pre-apprenticeship level, such as:
  - in England, Programme Led Apprenticeships
  - in Scotland, Get Ready for Work or Skillseekers
  - in Northern Ireland, Programme Led Apprenticeships or Training for Success
  - in Wales, Skillbuild
- Government employment programmes.
- European Community Leonardo da Vinci, Youth in Action, Erasmus and Comenius programmes.
- Share fishermen.
- Prisoners.
- Volunteers and voluntary workers.
- Religious and other communities.

Please note that HMRC have the power to serve an enforcement notice requiring the payment of at least the NMW, including arrears, to all family members working for a limited company.

What is taken into account in deciding whether the NMW has been paid?

The amounts to be compared with the NMW include basic pay, incentives, bonuses and performance related pay and also the value of any accommodation provided with the job.

Overtime, shift premiums, service charges, tips, gratuities, cover charges and regional allowances are not to be taken into account and benefits other than accommodation are also excluded.

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What records are needed to demonstrate compliance?

There is no precise requirement but the records must be able to show that the rules have been complied with if either the HMRC or an Employment Tribunal requests this to be demonstrated. Where levels of pay are significantly above the level of the NMW, special records are not likely to be necessary.

It is recommended that the relevant records are kept for at least six years.

Normally there is not likely to be any serious difficulty in demonstrating compliance where employees are paid at hourly, weekly, monthly or annual rates but there may be difficulties where workers are paid on piece-rates and where, for example, they work as home-workers.

Where piece rates are used, employers must give each worker a written notice containing specified information before the start of the relevant pay period. This includes confirmation of the 'mean' hourly output and pay rates for doing their job.

What rights do workers have?

Workers are allowed to see their own pay records and can complain to an Employment Tribunal if not able to do so.

They can also complain to HMRC or to a Tribunal if they have not been paid the NMW. They can call the confidential helpline 0800 917 2368.

What are the penalties for non-compliance?

Enforcement notices can be issued if underpayments are discovered and there can be a penalty equivalent to twice the hourly amount of the NMW for each worker that has been underpaid multiplied by the number of days that enforcement notices are not complied with.

There could also be a maximum fine of £20,000 for having committed a criminal offence.

Employers who refuse to pay the NMW may also face a fine in excess of £200 for every worker they underpay. Employers have to pay back arrears they owe to workers and those who refused to pay up could be penalised.

How we can help

We will be more than happy to provide you with assistance or any additional information required. We also offer a full payroll service - please contact us if you would like more information.

Recruitment Procedures - Employment Law

Most claims for discrimination in recruitment have no maximum limit.

Can your business afford compensation of perhaps £20,000 because you made a simple mistake?

How do you make sure you don't break the law?

We set out below the main principles involved in the recruitment of employees. We have written this factsheet in an accessible and understandable way but some of the issues may be very complicated.

Professional advice should be sought before any action is taken.

Good recruitment procedures

Employers recruiting staff can make simple but very expensive mistakes in all sorts of ways when trying to take on new staff. Sound recruitment procedures help avoid mistakes, as well as ensure that your recruitment process improves and you take on better staff as well.

Where can things go wrong?

You can easily make mistakes at various stages in the recruitment process that would probably mean you would lose your case at an Employment Tribunal.

These stages include:

- defining the job itself or identifying the person required
- attracting candidates by advertising
- how you assess the candidates you see
- making the actual selection decision
- the terms of employment that you offer.

The danger, quite apart from the cost of recruiting the wrong person and then having to get rid of them and recruit again, is that someone whom you have turned down at some point in the process may complain to an Employment Tribunal that you discriminated against them in accordance with the Equality Act 2010. If the Tribunal finds the claim to be valid then compensation can be awarded not just for actual loss but also to compensate for projected future loss and what is known as 'injury to feelings'.

Equality Act 2010

The Equality Act 2010 replaces all previous equality legislation, and covers age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. These are now called 'protected characteristics'.

Discrimination

Discrimination occurs when someone is treated less favourably than another person because of their protective characteristic. There are four definitions of discrimination:

Direct Discrimination: treating someone less favourably than another person because of their protective characteristic

Indirect Discrimination: having a condition, rule, policy or practice in your company that applies to everyone but disadvantages people with a protective characteristic

Associative Discrimination: directly discriminating against someone because they associate with another person who possesses a protected characteristic

Perceptive Discrimination: directly discriminating against someone because others think they possess a particular protected characteristic

Acts of discrimination would involve either establishing different, unjustifiable and therefore discriminatory recruitment criteria or deliberately excluding certain categories, for example, 'men only may apply'. Indirect Discrimination is not as obvious (and indeed employers can find themselves committing indirect discrimination quite unintentionally and innocently).

Examples of indirect discrimination would include:

- setting recruitment criteria which are not actually justified by the job or job description but which have the effect of discriminating against certain groups of people (eg requiring exam qualifications suggesting skills which are not actually needed by the job and which could discriminate against individuals with learning difficulties)
- using assessment tests measuring abilities not required by the job but which could discriminate against groups of people (ie reasoning ability tests for unskilled manual jobs which could discriminate against those without English as a first language)

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- setting different tests for different applicants for a job (eg female applicants cannot be asked to carry out tests of physical strength if male applicants are not asked to do the same)
- asking questions of some applicants and not of others (the classic and very common example being that of asking a female applicant when she intends starting a family).

In considering whether an act of indirect discrimination has occurred or not, an Employment Tribunal can draw reasonable inferences from an employer's normal practices in addition to looking at the facts of the particular case.

The Tribunal members might for example, in the case of a claim for racial discrimination, look at the ethnic makeup of the existing workforce and compare this with the ethnic makeup of the local community. A significant difference between these proportions could suggest to the Tribunal that discrimination is more likely to have happened.

Possible but strictly limited exceptions where applicants can be chosen on grounds of sex, sexual orientation, religion race or age

Whilst direct and indirect discrimination are generally prohibited, the legislation accepts that in some occupations it may be necessary to be of a particular sex, sexual orientation, religion, racial group or age. These limited exceptions are referred to as being Genuine Occupational Reasons (GORs) (there are no such exceptions for disability). None of the legislation actually allows discrimination to be used to maintain a balance between the sexes, the religious or the racial mix.

If a discrimination claim is brought, the burden of proof is on the employer to prove there is a GOR. You must decide whether a GOR exists before advertising the job. All roles in an organisation must be considered separately; if there is a GOR relating to one role, it will not necessarily apply to all roles within the organisation.

GORs should be reviewed each time the job becomes vacant, as circumstances may change. If only a few tasks require that the employee have a particular characteristic, you should consider whether duties could be reallocated so to other employees who do meet the requirement.

Examples of GOR's in relation to varying types of discrimination are as follows:

Sex

- physiology - for example in modelling
- decency or privacy - where there is likely to be physical contact between the job holder and persons of the opposite sex to which the latter might object such as lavatory attendants - care needs to be taken here if there are a number of posts meaning that such contact would not necessarily happen
- single sex establishments - such as prisons
- working outside the UK
- where a job involves living in and the premises which are available do not allow for appropriate privacy or decency - again care needs to be taken as the GOR will not be upheld if the employer could reasonably be expected to make suitable facilities available
- personal services such as welfare/personal/educational where these can best be provided by a man or woman - this GOR is used by social services and welfare providers

Religion or Belief

- A hospital wishes to appoint a chaplain to minister the spiritual needs of the patients and staff. The hospital is not a religious organisation but decides a chaplain ought to have a religion or similar belief. The hospital may be able to show that it is a GOR within the context of the job for the post holder to have a religion or similar belief.
- A Christian school may be able to show that being a Christian is a requirement of the teachers whatever subject they teach.

Sexual Orientation

A scenario whereby a business advertising an opportunity to work in a middle eastern country. Because gay sex (even between consenting adults) is criminalised in that country, the business may be able to demonstrate it is a GOR for the person taking the job not to be gay, lesbian or bisexual.

Age

Where there is a requirement for a position as an actor for an old or young part.

Race

- dramatic performance where an individual of a particular ethnic background is required
- authenticity such as the requirements for a particular modelling assignment
- ambience - such as an ethnic restaurant
- providing welfare services to people of a particular racial group, where services can most effectively be provided by a member of the same racial group due to their understanding of cultural needs and sensitivities.

Positive Discrimination

Since April 2011 Section 159 of the Equality Act 2010, permits employers to treat individuals with a protected characteristic more favourably than others in connection with recruitment or promotion. This applies only to candidates of equal merit and the more favourable treatment must enable or encourage an individual to overcome or minimise a disadvantage or participate in an activity where he or she is under-represented in that activity.

Disability

The definition of what constitutes a disability can be split into three parts:

- the employee must be suffering from a physical or mental impairment
- the impairment must have a substantial effect on the ability to carry out normal day-to-day activities, which would include things like using a telephone, reading a book or using public transport. Substantial means more than minor or trivial

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- the effect must be long-term, in other words have already lasted for at least 12 months or be likely to last that long.

The Equality Act 2010 includes new protection from discrimination arising from disability. This includes indirect discrimination, associative discrimination and discrimination by perception.

The meaning of disability

The Equality Act 2010 covers discrimination against disability which insists that employers may not treat a person with a disability less favourably than other persons without justifiable reasons. However, this does not apply if an employer shows that they did not know, and could not reasonably have been expected to know, that a disabled person had the disability.

The Act requires employers to make 'reasonable adjustments' to the workplace where these would overcome the practical effects of an individual's disability. If an applicant for a position believes that he/she has been discriminated against they may make a complaint to an Employment Tribunal.

What are 'reasonable adjustments'?

In this context the word reasonable means whether or not such steps would be practicable and would actually have an effect, and are reasonable given the resources of the employer. For example the local branch of Marks & Spencer would probably be expected to have more resources than would a small local retailer.

Reasonable adjustments to the workplace that employers might be expected to make include:

- transferring the individual to fill another vacancy or to a different place of work
- altering working hours
- allowing them time during working hours for rehabilitation or treatment
- allocating some duties to another person
- arranging for special training
- acquiring or modifying premises, equipment, instructions or manuals
- providing readers or supervision.

Claims against employers for discrimination

Applications can be made to an Employment Tribunal from someone who was not selected for an initial interview, for a final short-list or offered the job, and who believes it was because of age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, trade union membership or lack of such membership. The application must be made within three months of the alleged discrimination and the Tribunal will take into account reasonable inferences from the actual employment practices of the employer as well as from the particular facts of the individual case.

How we can help

We will be more than happy to provide you with assistance or any additional information required so please do contact us.

Recruitment Procedures - Seven Steps for Good Procedures

In order to avoid the danger of discriminating in some way, particularly unconsciously, employers must take care to develop and use recruitment procedures which will avoid the risk. Using sensible procedures will also inevitably improve recruitment decisions and the quality of the people, taken on.

Professional advice should be sought before any action is taken.

Seven Steps

Sensible procedures would include the following:

1. always produce **clear job descriptions** which identify both the essential activities of the job and the skills and attributes needed by candidates. It should be possible to see from this whether a disabled candidate would be able to deal with those essential activities. Avoid gender references such as he or she and only refer to qualifications and/or experience which are clearly required by the job. The danger is that any such attributes which cannot be shown to be essential could be inferred as being there to deter women, candidates from ethnic minorities or those with a disability

2. in seeking candidates ensure that **any wording used does not imply that some category** (such as men or women) **are favoured candidates**, and be careful with words like energetic (unless this is a genuine requirement of the role) which might deter candidates with disabilities. The process for seeking candidates must also be non-discriminatory and not restricted in a way which could be seen to be discriminatory. An obvious error would be to put an advertisement in a place where it would only be seen by, for example, males (such as an all male golf club)

3. **selection methods must be chosen** which will enable the appropriate skills and attributes to be assessed but should avoid anything which would in effect be discriminatory. An example could be written tests involving English comprehension for a basic cleaning job where the skills assessed by the test would be irrelevant. Where tests are used all candidates need to be given the same tests to avoid any suggestion of discrimination

4. be careful to **avoid discriminatory questions** at interview (eg when do you expect to have a family?) and generally try to ensure that all candidates are asked the same questions

5. do not ask candidates **health related questions** during the interview process or before an offer of a job is made, this would include questionnaires or general questions such as 'the number of days sickness during the last 12 months'. Enquiries as to whether any adjustments are required to enable candidates to attend interview are permitted

6. consider **modifying the workplace** to make it suitable for candidates with disabilities - the code refers to a reasonable cost as being what the extra costs involved in recruiting a non-disabled person might be. You should also look critically at the physical arrangements for recruitment to assist candidates with disabilities to apply more easily (eg wheelchair ramps) and consider whether changes may need to be made to application forms. These should not ask questions which do not impact on the suitability of the candidate for the particular job and should not ask if a candidate is registered disabled

7. it is essential that **good records** are kept for an appropriate period of time about applications, reasons for rejection and performance in any assessments and at interviews, and that these complement the job description and the skill requirements for the job. Obviously such processes help with selection anyway but these records may be essential if anything goes to an Employment Tribunal.

How we can help

We will be more than happy to provide you with assistance or any additional information required so please do contact us.

Statutory Sick, Statutory Maternity and Statutory Paternity Pay

Statutory Sick Pay (SSP), Statutory Maternity Pay (SMP) and Statutory Paternity Pay (SPP) are important regulations to understand as they enforce minimum legal requirements on employers. Each operates in a different way.

This factsheet sets out the main principles of the regulations and what an employer needs to consider.

Statutory Sick Pay (SSP)

SSP applies to all employers regardless of size and represents the minimum payments which should be paid by law.

It is possible to opt out of the scheme but only if an employer's occupational sick pay scheme is equal to or more than SSP. There would still be a requirement to keep appropriate records etc.

We have outlined the general principles below but first we need to explain some of the special terms used.

Glossary of terms

Period of incapacity for work (PIW)

A PIW consists of four or more calendar days of sickness in a row. These do not have to be normal working days.

Linking

Where one PIW starts within eight weeks of the end of a previous PIW the periods can be linked.

Qualifying days (QDs)

These are usually the employee's normal working days unless other days have been agreed.

SSP is paid for each qualifying day once the waiting days have passed.

Waiting days (WDs)

The first three QDs in a PIW are called WDs. SSP is not payable for WDs.

Where PIWs are linked it is only the first three days of the first PIW which are WDs.

Who qualifies for SSP?

All employees who, at the beginning of a PIW or linked PIWs, have had average weekly earnings above the Lower Earnings Limit (£111 in 2014/15).

Employees must have notified you about their sickness - either within your own time limit or within seven days.

They must give evidence of their incapacity. Employees can self-certify their absence for the first consecutive seven days, thereafter form Med3 (Fit Note) is required from their general practitioner.

How much SSP is payable?

The weekly rate of SSP for the 2014/15 tax year is £87.55 but it is computed at a daily rate.

The daily rate

The daily rate may vary for different employees. It is calculated by dividing the weekly rate by the number of qualifying days in a week. For example an employee with a five day working week would normally have a daily rate of £17.51 for 2014/15.

Only QDs qualify for SSP and remember the first three days (WDs) do not qualify.

Maximum SSP

The maximum entitlement is 28 weeks in each period of sickness or linked PIW.

Recovery of SSP

With effect from 6 April 2014 the Percentage Threshold Scheme (PTS) which enables employers falling within certain limits of the scheme to recover some of their SSP is to be abolished.

The PTS enables employers to recover some of the SSP paid to their employees if the total SSP paid in a tax month is greater than 13% of their gross Class 1 NICs (employers' and employees') liability for that month.

After the PTS is abolished, employers will have until the end of 2015/16 to recover SSP paid for sickness absences occurring before the end of 2013/14.

Continued >>>

PAYE and records

SSP is included in gross pay and PAYE operated as normal.

In line with the abolition of the Percentage Threshold Scheme and the introduction of the Statutory Sick Pay (Maintenance of Records) (Revocation) Regulations, with effect from 6 April 2014, employers will no longer be required to maintain minimum statutory SSP records to demonstrate compliance with SSP obligations. However, it is best practice to continue to monitor sickness absence and maintain detailed records as these will be required for PAYE purposes.

Statutory maternity pay (SMP)

SMP is paid to female employees or former employees who have had or are about to have a baby.

The payment of SMP is compulsory where the employee fulfils certain requirements.

The requirements

SMP is payable provided the employee has:

- started her maternity leave
- given 28 days notice of her maternity leave (unless with good reason)
- provided medical evidence with a form (MATB1)
- been employed continuously for 26 weeks up to and including her qualifying week
- had average weekly earnings (AWE) above the Lower Earnings Limit in the relevant period.

It is important to note that mothers have a legal entitlement to take up to 52 weeks off around the time of the birth of their baby whether or not they qualify for SMP. This means that mothers can choose to take up to one year off in total.

The amount payable

SMP is payable for a maximum of 39 weeks. The date the baby is due, as shown on the MATB1 certificate, determines the maternity pay period entitlement and not the date the baby is born. The rates of SMP are as follows:

- first six weeks at 90% AWE (see below)
- up to a further 33 weeks at the lower of:
  - 90% of AWE
  - £138.18 per week for 2014/15

SMP is treated as normal pay.

Average weekly earnings (AWE)

AWE need to be calculated for two purposes:

- to determine if the employee is entitled to SMP (earnings must be above the Lower Earnings Limit)
- to establish the rate of SMP.

The average is calculated by reference to the employee's relevant period. This is based on an eight week period up to the end of the qualifying week. In some instances subsequent pay rises have to be taken into account when calculating SMP. Earnings for this purpose are the same as for Class 1 NIC and include SSP.

Recovery of SMP

92% of SMP paid can be recovered by deduction from the monthly PAYE payments.

Employers may qualify for Small Employers' Relief (SER). SER is 100% of SMP plus 3% compensation for 2014/15.

To qualify for SER, the current limits are:

- total gross Class 1 NIC for the employee's qualifying tax year must be less than £45,000
- the employee's qualifying tax year is the last complete tax year that ends before the start of her qualifying week.

Glossary of terms

Week baby due

The week in which the baby is expected to be born. This starts on a Sunday.

Qualifying week (QW)

The 15th week before the week baby due.

The week baby due and QW are easy to establish from HMRC SMP tables or online calculators.

Maternity Pay Period (MPP)

The period of up to 39 weeks during which SMP can be paid

MATB1

Maternity certificate provided by a midwife or doctor. This is available up to 20 weeks before the baby is due. SMP cannot be paid without this.

Ordinary Statutory Paternity Pay (OSPP)

OSPP is paid to partners who take time off to care for the baby or support the mother in the first few weeks after the birth. OSPP was previously known as Statutory Paternity Pay.

It is available to:

- a biological father
- a partner/husband or civil partner who is not the baby's biological father
- a mother's female partner in a same sex couple

The partner must have

- given 28 days notice of their paternity leave (unless with good reason)
- provided a declaration of family commitment on form SC3
- been employed continuously for 26 weeks up to and including their qualifying week
- had average weekly earnings above the Lower Earnings Limit in the relevant period.

Continued >>>

The amount payable

OSPP is payable for a maximum of 2 weeks, it must be taken as a block either 1 week or a complete fortnight but not 2 single weeks at the following rates:

- the lower of:
- 90% of AWE
- £138.18 for 2014/15

OSPP is treated as normal pay.

The calculation of average weekly earnings and the recovery of OSPP are subject to the same rules as for SMP.

Additional Statutory Paternity Pay (ASPP) and leave

Employees can start their additional paternity leave any time from 20 weeks after the child is born. The leave must have finished by the child's first birthday. A minimum of two weeks and a maximum of 26 continuous weeks' leave can be taken.

For an employee to qualify for additional statutory paternity leave they must:

- be the father of the baby and/or the husband or partner (including same-sex partner or civil partner) of a woman who is due to give birth or who has received notification that they have been matched with a child on or after 3 April 2011
- have, or expect to have, the main responsibility for the baby's upbringing, apart from any responsibility of the mother
- have at least 26 weeks' continuous employment with the employer ending with the qualifying week
- continue to work for you from the qualifying week into the week before they wish to take additional paternity leave - weeks run Sunday to Saturday
- be taking the time off to care for the baby

The baby's mother must also:

- be entitled to statutory maternity leave, SMP or maternity allowance
- return to work at least two weeks after the child's birth, but with at least two weeks of unexpired statutory maternity leave entitlement remaining.

ASPP is payable to eligible workers who meet the eligibility criteria for additional paternity leave and:

- they are taking time off to care for their child during their partner's 39 week SMP period
- their partners have returned to work

The current rate is the lower of either:

- the standard weekly rate - £138.18 for 2014/15
- 90% of their average weekly earnings

Adoptive parents

To qualify for Statutory Adoption Pay (SAP) an employee must meet the same earnings and service criteria as an employee seeking to qualify for SMP. An employee must provide his or her employer with evidence of the adoption and a declaration that he or she has elected to receive SAP. HMRC form SC4 provides a declaration form that can be used. A matching certificate from the adoption agency must be produced to the employer. SAP is paid at the lower rate of SMP and follows the same rules with regard to recovery.

How we can help

As the schemes are statutory it is important that rules are adhered to and we will be more than happy to provide you with assistance or any additional information required. Please do not hesitate to contact us.