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UK Employment Flash

Insights into the latest employment news

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'Good Work Plan': Reforming the UK Labour Market

On December 17, 2018, the U.K. government published the long-awaited "Good Work Plan," which proposes reforms to labour laws to protect workers who are not engaged in a traditional employment relationship.

The name draws on the July 2017 report "Good Work: The Taylor Review of Modern Working Practices" (the Taylor Review), which was published by former political strategist Matthew Taylor. The Taylor Review was written in response to the U.K. government's 2016 "Independent Review of Employment Practices in the Modern Economy" and provided a number of recommendations for improving working practices in the U.K.

The "Good Work Plan" also takes into account feedback from the consultation launched by the secretary of state for business, energy and industrial strategy, who had sought views on how to implement the Taylor Review's recommendations.

Proposals for reform include:

- The repeal of the "Swedish derogation," in order to guarantee pay for all long-term agency workers that is equal or comparable to that of permanent workers. The Swedish derogation currently excludes agency workers with guaranteed minimum pay between assignments from the right to be paid the same as permanent staff.
- The right for all workers (including agency workers and workers on zero hours contracts) to have a contract guaranteeing minimum hours of work after 26 weeks' service.
- Extending the "day one" right to a written statement of employment particulars to all workers, not just employees. The current requirement for the employer to provide a written statement of certain employment terms will also be expanded to include the length of notice an employer or worker is required to give to terminate the relationship and details of all remuneration (not just basic pay).
- Extending the period (from one to four weeks) of any break in service that is allowed when calculating an employee's qualifying period for continuous service. This break in service is relevant when calculating whether an employee has accrued sufficient service to claim unfair dismissal and redundancy pay, and would benefit casual employees who work intermittently for the same employer.
- Reducing the threshold for establishing a permanent employee forum (also known as a works council). The U.K. has less stringent information and consultation obligations than most other European countries, but it is possible for employees to require their employer to enter into discussions about establishing a permanent employee forum or works council if the greater of 10 percent of the workforce or 15 employees make a request. The proposal would reduce the threshold to 2 percent of the workforce but maintain the 15-employee minimum.

- A new "name and shame" scheme for employers that do not pay employment tribunal awards within a reasonable time.

The Good Work Plan proposes new legislation to "improve the clarity of the employment status tests" that are applied to determine who has employment or worker rights, and to align the employment and tax status tests. Though this aspect is not meaningfully addressed in the "Good Work Plan," many commentators believe that the relevant test for employment rights purposes is adequately covered by evolving case law.

Brexit and Employment Law: What Would 'No Deal' Mean?

At the end of 2018, the Employment Rights (Amendment) (EU Exit) Regulations 2018 was laid before Parliament. The regulations are intended to come into force on the day the U.K. exits the EU and will amend U.K. employment law to reflect that withdrawal. The regulations anticipate a "no deal" withdrawal from the EU and will be revoked or amended if the U.K. leaves the EU with a withdrawal agreement.

The regulations make largely technical changes to U.K. employment law, for example by removing references to EU legislation that will no longer be applicable following Brexit.

The most important changes relate to European Works Councils and the Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323). In short, no new requests to set up a European Works Council or information and consultation procedure can be made after exit day. Existing European Works Councils governed by English law and with U.K. central management would require reciprocal arrangements with the EU to allow the European Works Council regime to continue to operate in its present form. The regulations make changes to the statutory framework assuming that no such reciprocal arrangements will be reached, but it will depend on the EU as to whether U.K.-based European Works Councils will be recognised in the rest of the EU following Brexit.

The Wates Principles: Corporate Governance for Large Private Companies

On December 10, 2018, the Financial Reporting Council published the final version of the Wates Corporate Governance Principles for Large Private Companies (the Wates Principles). The first corporate governance code for unlisted companies, the Wates Principles apply to financial years starting on or after January 1, 2019.

In particular, the Wates Principles include guidance on executive compensation and recommend that the board promote executive remuneration structures aligned to the long-term and sustainable success of the company, while also taking into account pay elsewhere in the workforce. The principles suggest that remuneration should be linked to the achievement of company strategy and should also consider the reputational risks to the company that can result from excessive rewards or inappropriate pay structures.

To Whom Do the Wates Principles Apply?

The Wates Principles aim to help those companies that are subject to the thresholds in the Companies (Miscellaneous Reporting) Regulations 2018 and now have to report on their corporate governance arrangements in their directors' report. This new reporting requirement applies to all companies that satisfy either or both of the following conditions:

- more than 2,000 employees;
- a turnover of more than £200 million and a balance sheet of more than £2 billion.

The Wates Principles are expected to apply to an estimated 1,700 U.K. private companies.

Core Principles

The Wates Principles are made up of six core principles covering the following areas, each supplemented by associated guidance:

- purpose and leadership
- board composition
- director responsibilities
- opportunity and risk
- remuneration
- stakeholder relationships and engagement

Implementation

The Wates Principles and accompanying guidance acknowledge that a one-size-fits-all approach to corporate governance in large private companies is not appropriate, given the differing ownership and management structures of private companies. The principles aim to move away from a "tick box" approach to corporate governance and instead provide broad and flexible principles, with an "apply and explain" approach to compliance. Companies should apply the principles in a way that fits their individual circumstances and explain how they have addressed each principle in the context of their own corporate governance practices.

There is no supervisory authority to oversee and enforce compliance with the Wates Principles, and the penalties for noncompliance are likely to be insufficient to ensure full compliance. However, the Financial Reporting Council has said that it hopes a wider range of companies than those required to report under the principles will follow them.

The Financial Reporting Council has indicated that it would prefer a "name and fame" approach to give credit to those companies that have complied with the new regime and followed best practice as opposed to a "name and shame" approach.

Pensions Master Trust Authorisation Deadline Looms

Since 2012, employers in the U.K. have been required to automatically enrol their employees into a so-called auto-enrolment pension. Many employers — particularly those with a small workforce in the U.K. — have provided these pensions through a commercial pension product known as the "master trust." A master trust is an occupational scheme, provided under trust and administered by a commercial provider, in which different (unconnected) employers participate. These providers were initially attractive to employers because they provided a relatively simple pensions product with limited administration by the employer and at low cost.

There are a large number of these products in the market, with significant disparity in infrastructure and their management's experience and skill sets. Some have not done as well as expected and are highly likely to be wound up in the near future. (A few have done so already.)

The Pension Schemes Act 2017 increased the regulation of these products and required all master trusts to apply for authorisation from the U.K. Pensions Regulator starting in October 2018. The deadline for applications is April 2019, and those schemes that do not apply by the deadline or are refused authorisation must cease to operate after that date. Authorisation costs £41,000 and takes up to six months. Pensions industry commentators have predicted that up to 30 master trusts (out of a total of about 60 in the market) could disappear altogether to avoid the increased regulatory burden.

An employer that uses a master trust that is refused authorisation or that does not seek authorisation by April 2019 will need to find a new master trust for future use and may need to consult with impacted employees for at least 60 days before changing providers. Employers that use a master trust should contact their provider immediately to check on authorisation status and determine whether the provider is aware of any reason why it might not obtain authorisation.

2018 UK Annual Report on Modern Slavery

The U.K. government has published its 2018 U.K. Annual Report on Modern Slavery (the Report), providing a detailed overview of how U.K. companies have responded to modern slavery issues in the last year, since the introduction of the reporting requirement under the Modern Slavery Act 2015 (the Act).

Companies with a U.K. operation and revenues of over £36 million are required to publish a statement on their website within six months of their financial year-end about their approach to modern slavery. Modern slavery is an often hidden crime that includes slavery, servitude, forced and compulsory labour and human trafficking. Labour exploitation typically involves poor working conditions, extremely low pay and some form of coercion.

It is estimated that only 60 percent of in-scope companies have published a statement to date. The Home Office recently wrote to the CEOs of more than 17,000 companies that are required to publish this statement requesting that they do so (or produce an updated statement) and submit it to a specified transparency database. Failure to do so will result in being named and shamed on a list of noncompliant companies.

The Report acknowledges that the prevalence of modern slavery in the U.K. and abroad continues to be difficult to measure. However, some useful and reliable sources of data relating to modern slavery are considered. These include the referral of potential victims under the Act's "duty to notify" provision and the number of modern slavery crimes reported to the police (although some of this data is limited to England and Wales only).

The Report identifies the following significant developments in the last year:

- Large companies are implementing and publishing the steps they are taking to identify, tackle and prevent modern slavery. In particular, there have been sector-led initiatives such as "Tech Against Trafficking," in which technology companies and nongovernmental organisations have paired up to examine how technology can help eradicate modern slavery.
- An increase in enforcement action under the Act as a result of successful collaborative operations among a number of different resources (including Immigration Enforcement, Her Majesty's Revenue and Customs and the U.K. police forces) led by the National Crime Agency. In 2017, 130 defendants were prosecuted — almost three times as many as in 2016.
- An increase in the availability of specialist and financial support and advocacy services to victims of modern slavery and human trafficking.

The U.K. government has commissioned an independent review of the Act that will consider whether it should be updated or strengthened in specific areas. This review is due to be published in March 2019.

GDPR Update

There have been a number of welcome updates, clarifications and new guidance notes since the General Data Protection Regulation (GDPR) came into force on May 25, 2018. We take a look at some of the key developments for organisations that control or process employee records or other personal data.

EU-US Privacy Shield Remains Adequate

The EU-US Privacy Shield is one of the mechanisms that organisations can rely on to demonstrate that they have adequate protection in place if they transfer personal data (which comprises any information about an identifiable individual and would include, for example, human resources records) from the EU to the U.S. The Privacy Shield replaced the self-certified safe harbour regime that had previously been found to be inadequate. On December 19, 2018, the European Commission (the EC) concluded its second annual review and confirmed that that the Privacy Shield framework ensures an adequate level of protection for personal data under the GDPR. The EC noted that several practical aspects of the framework have improved since the first annual review, and the Privacy Shield can be relied on as one of the available transfer mechanisms for at least another year. This is welcome news to over 4,000 companies that are Privacy Shield-certified.

The chief criticism levied against the U.S. government is its failure to appoint a permanent Privacy Shield ombudsman. Unless one is nominated by February 28, 2019, the EC has threatened to take "appropriate measures" in accordance with the GDPR.

Despite the notable improvements since its first annual review, the EC will continue to monitor the effectiveness of the U.S. Department of Commerce's enforcement mechanisms and its ability to detect false claims of participation in the framework. The EC will also monitor the progress of the U.S. Federal Trade Commission's sweeps to detect substantive violations of the Privacy Shield.

ICO Publishes New Guidance on GDPR and Data Protection Act 2018

The Information Commissioner's Office (ICO) (the U.K.'s supervisory authority for data protection) has published new and more detailed guidance since the GDPR was enforced, which has been amalgamated into the ICO's "Guide to the General Data Protection Regulation." The new guidance now makes reference to the European Data Protection Board (EDPB) (instead of the Article 29 Working Party, which it replaced) and provides comprehensive and user-friendly analysis on a number of key areas, including what constitutes personal data, the core data protection principles and international transfers.

New Guidance Clarifies Territorial Scope of GDPR

The EDPB recently released new guidance (subject to consultation) aimed at helping companies outside the EU determine whether they will be subject to the GDPR's rules for processing data. Article 3 of the GDPR provides that the "regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not," and that language had previously caused extensive uncertainty about the territorial scope of the GDPR.

The new guidance clarifies that the applicability of the GDPR to a non-EU data controller requires a fact-based analysis and is not automatic. For example, if a U.S.-based company makes one-off use of an EU-based processor, the processor can comply with its GDPR obligations without those obligations necessarily attaching to the U.S. company. In addition, the guidance clarifies that the GDPR will apply to an establishment outside the EU where the establishment intends to target a data subject in the EU.