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PRACTICAL LAW COMPANY®

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SCOPE OF EMPLOYMENT REGULATION

1. Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Laws applicable to foreign nationals

Most UK employment laws will apply to foreign nationals working in the UK, irrespective of any choice of law clause in the employment contract, including the right not to be discriminated against, protection against unfair dismissal, minimum wage rights and restrictions on working hours.

Laws applicable to nationals working abroad

Some UK employment laws may apply to UK nationals working abroad depending on the closeness of the connection between the employment relationship abroad and the UK.

RESTRICTIONS ON MANAGERS AND DIRECTORS

2. Are there any restrictions on who can be a manager or company director?

Age restrictions

There are no age restrictions on who can be a manager. For company directors, there is no upper age limit but there is a minimum age limit of 16.

Nationality restrictions

There are no nationality restrictions on who can be a manager or a company director.

RECRUITMENT INCENTIVES

3. Are any grants or incentives available for employing people? If so, please give details.

There is some funding available to support apprenticeships. Further information can be obtained from the National Apprenticeship Service (*see www.apprenticeships.org.uk*).

The government runs some schemes to encourage employers to employ people, for example, the Regional Employer National Insurance contributions scheme which aims to encourage private sector employment in areas hardest hit by cuts in public spending by offering new businesses a reduction in National Insurance contributions (*see www.businesslink.gov.uk*).

PERMISSION TO WORK

4. What prior approvals do foreign nationals require to work in your country?

Citizens of the European Economic Area and Switzerland do not require prior approval to work in the UK. Bulgarian and Romanian nationals are still currently required to obtain permission to undertake most categories of employment.

With limited exceptions, other foreign nationals must usually obtain prior approval to work in the UK under the Points-Based System (PBS).

Visa

Procedure for obtaining approval. The PBS consists of five tiers with Tier Two being of most relevance to employers:

- Tier One: general, entrepreneur, investor, persons of exceptional talent and post-study workers. Tier One (general) was closed to new applicants on 5 April 2011 although those who currently hold these visas can apply to extend their leave under this category.
- Tier Two: general and intra-company transfer. This is for skilled individuals who will fill gaps in the UK workforce and have a job offer from an employer with a sponsor licence.
- Tier Three: low-skilled workers filling specific temporary labour shortages (this category is currently on hold).
- Tier Four: students.
- Tier Five: youth mobility, government authorised exchange and temporary workers.

A UK employer intending to sponsor a non-EEA national under Tier Two of the PBS must hold a sponsor licence. A licence can be obtained by applying online to the UK Border Agency (UKBA) and submitting specified documents to demonstrate that the organisation is a properly established employer. Once issued, a sponsor licence will remain valid for four years.

The Tier Two (general) visa category normally requires the sponsor to fulfil a resident labour market test which involves advertising the role in a specified format and location to demonstrate that it cannot be filled by a suitably qualified EEA resident worker. This category is restricted to an annual limit of 20,700 entrants for any role with an annual salary of GB£149,999 or less and where the migrant worker does not already have permission to switch or extend their visa category from within the UK.

The Tier Two (intra-company transfer) category is for employees of overseas businesses linked by common ownership to an employer in the UK. This category is not subject to a resident labour market test. It has four sub-categories: long term, short term, skills transfer and graduate trainee.

Licensed sponsors can issue Tier Two certificates of sponsorship to eligible foreign nationals through their own access to the UKBA's online Sponsor Management System as soon as they are satisfied that the foreign national fulfils the relevant eligibility criteria. Once the certificate of sponsorship has been issued, the foreign national must then obtain either entry clearance from their normal country of residence before entering the UK to work or further leave to remain if they are already in the UK in an immigration category that permits them to switch or extend their current immigration status.

Cost. The costs depend on the type of visa:

- Sponsor licence: from GB£310 to GB£1,025 depending on type and size of company.
- Tier Two certificate of sponsorship: GB£175.
- Tier Two entry clearance: from GB£315 to GB£400 depending on nationality and visa category.
- Tier Two further leave to remain: from GB£315 to GB£850 depending on nationality, category and whether the application is submitted via the premium or postal service.

Time frame. Licence applications are usually processed within six to eight weeks. However, the UKBA sometimes carries out pre-licence audits of the applicant sponsor, in which case the processing time can be as long as 16 weeks.

The entry clearance process requires applicants to enrol their biometric data and submit supporting documents to the British Embassy or Consulate in their country of residence. Processing times vary from 24 hours to 30 days depending on the country in which the application is submitted.

Applying for further leave to remain from within the UK requires the applicant to enrol their biometric data and submit supporting documents to the UKBA. This can be done via a premium "same-day" service or by post which can take up to six weeks or even longer during peak times.

Permits

The terminology "permits" is no longer relevant to UK immigration law.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5. How is the employment relationship governed and regulated?

Written employment contract

Within two months of hiring an employee, an employer must provide them with a written statement of employment terms, including the following information:

- The names of the employer and employee.
- The date when the employment contract began and when the period of continuous employment began, if earlier.
- Remuneration details, including scale and rate of remuneration and the intervals at which it is paid.
- Terms and conditions relating to hours of work.
- Terms and conditions relating to the employee's holiday entitlement (including public holidays and the basis of calculation on termination of employment).
- Terms and conditions relating to sickness and sick pay.
- Terms and conditions relating to pensions (including whether the employee's pension is covered by a contracting-out certificate).
- Notice periods.
- Job title or a brief description of the work to be performed.
- For non-permanent employment, the expected duration of the employment or if it is for a fixed term, the date on which it is to end.
- Place of work and the employer's address.
- Any applicable collective agreements and the parties to those agreements.

Some additional information must be provided for employees working outside the UK for a period of more than one month.

Employers are also required to give employees details of their grievance and disciplinary procedure.

Implied terms

Certain terms are implied into every contract of employment. The most common of these are:

- The employee's duty to:
  - serve the employer faithfully;
  - obey lawful and reasonable orders;
  - exercise reasonable skill and care.
- The employer's duty to:
  - pay wages and provide work;
  - provide a safe system of work;
  - not destroy the relationship of trust and confidence between employer and employee.

Collective agreements

Collective agreements are not commonplace in the UK. They are more prevalent in the public sector and heavily-unionised industries, for example, manufacturing or transport.

Most collective agreements are not legally binding between the parties. However, certain terms can be incorporated into individual contracts of employment and become legally enforceable through that route.

6. What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

As a general rule, an employee's contractual terms and conditions of employment can only be changed materially if the employee agrees to the change. If an employer simply imposes a change it runs the risk of a number of claims being brought against it, including unfair constructive dismissal.

If an employer is unable to obtain agreement the only "safe" way to make the change (from a contractual point of view at least) is to serve notice to dismiss the employee in accordance with their terms and conditions of employment and offer to re-engage them on the new terms. Dismissing employees in these circumstances is potentially a fair reason for dismissal provided the employer can show both a good business reason for the change and that it followed a fair procedure. This process may trigger the obligation to consult collectively under the Trade Union and Labour Relations (Consolidation) Act 1992.

MINIMUM WAGE

7. Is there a national (or regional) minimum wage?

There is a National Minimum Wage that applies to all UK workers who are over school leaving age.

The current rate per hour is based on the employee's age, as follows:

- Main rate for workers aged 21 and over: GB£5.93.
- 18 to 20-year-olds: GB£4.92.
- 16 to 17-year-olds: GB£3.64.
- Apprentice rate (for apprentices aged 19, or aged 19 or over and in the first year of their apprenticeship: GB£2.50).

The rates per hour from 1 October 2011 are as follows:

- Main rate for workers aged 21 and over: GB£6.08.
- 18 to 20-year-olds: GB£4.98.
- 16 to 17-year-olds: GB£3.68.
- Apprentice rate (for apprentices aged 19, or aged 19 or over and in the first year of their apprenticeship: GB£2.60).

There are no regional variations to the minimum wage.

RESTRICTIONS ON WORKING TIME

8. Are there restrictions on working hours?

Working hours

Working hours are restricted under the Working Time Regulations 1998 (WTR). These state that workers must not work on average more than 48 hours per week (normally calculated over a 17-week reference period). Workers have the right to opt-out of the weekly working limit and usually do, but they can cancel their opt-out by giving three months' notice at any time.

Rest breaks

Any worker whose working day is longer than six hours is entitled to a 20-minute rest break.

Workers are also entitled to a daily rest period of 11 consecutive hours in each 24-hour period and a weekly rest period of not less than 24 hours' uninterrupted rest in each seven-day period (or 48 hours in each 14-day period).

There are exemptions for certain kinds of workers, for example, those who work in sectors which involve the need for continuity of production. There are also special provisions governing young workers (those who are over compulsory school age but under 18).

Shift workers

The provisions governing daily and weekly rest periods do not apply to shift workers when they change shift and are unable to take a rest period before they start their next shift. However, they are entitled to take equivalent periods of compensatory rest wherever practicable.

HOLIDAY ENTITLEMENT

9. Is there a minimum holiday entitlement?

Minimum holiday entitlement

Under the WTR, all workers are entitled to 5.6 weeks' paid holiday in each holiday year. A week means the normal working week for that worker, not necessarily five working days. Workers cannot opt-out of this requirement or receive a payment in lieu of holiday, except on termination of the employment relationship.

Public holidays

Public holidays (of which there are normally eight in England and Wales) can be included in the minimum holiday entitlement.

ILLNESS AND INJURY OF EMPLOYEES

10. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

Entitlement to time off

Employees do not have a statutory right to take time off in the case of illness or injury. An employee's contract usually sets out any entitlement to paid sick leave.

Entitlement to paid time off

If employees are unable to work due to illness or injury they will be entitled to Statutory Sick Pay (SSP), provided they meet the qualifying conditions. Employees do not receive SSP for the first three days of any absence. The maximum entitlement is to 28 weeks' SSP in any period of incapacity for work or in any series of such periods.

Employees may also be entitled to contractual sick pay if their employer operates this type of scheme and they satisfy the eligibility criteria.

Recovery of sick pay from the state

An employer can only recover any SSP if, and to the extent that, the SSP paid is above 13% of its total Class 1 National Insurance contributions' liability in a month. This, therefore, only applies to those employers with a high percentage of their staff off sick at any one time.

STATUTORY RIGHTS OF PARENTS AND CARERS

11. What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

Maternity rights

Pregnant employees have a right to take 26 weeks' Ordinary Maternity Leave (OML) followed immediately by 26 weeks' Additional Maternity Leave (AML). No qualifying period of service is required.

Employees may also be eligible to receive Statutory Maternity Pay (SMP) for up to 39 weeks. To qualify, they must have at least 26 weeks' continuous service at the end of the 15th week before the Expected Week of Childbirth (EWC) and earnings above the lower earnings limit for National Insurance contributions (currently GB£102 per week).

SMP is payable at 90% of the employee's normal weekly earnings for the first six weeks, then whichever is the lower of either:

- The flat rate set by the government (currently GB£128.73 per week).
- 90% of the employee's normal weekly earnings.

Some employers also operate enhanced maternity pay schemes.

During OML and AML employees are entitled to receive the benefit of all their contractual terms and conditions of employment, except remuneration (pay).

As a general rule, employees have the right to return after maternity leave to the same job on the same terms and conditions as they would have been on if they had not been away or, in certain circumstances, to a suitable alternative job.

Paternity rights

Employees who meet certain qualifying conditions are entitled to one or two weeks' Ordinary Paternity Leave (OPL) following the birth or adoption of a child.

An employee must have at least 26 weeks' continuous service ending with the 15th week before the EWC (or, in the case of adoption, by the end of the week in which the employee is notified of a match).

OPL must be taken within 56 days of the child's birth or placement for adoption.

Fathers may also be eligible to take up to 26 weeks' Additional Paternity Leave (APL). This must be taken in multiples of complete weeks and in one continuous block. The earliest it can be taken is 20 weeks after the date of birth of the child (or placement for adoption).

The eligibility requirements for APL are broadly similar to those for OPL, but in addition the employee must remain in employment until the week before the first week of APL and the mother (or adopter) must have returned to work.

Employees may also be eligible to receive Ordinary Statutory Paternity Pay (during OPL) and Additional Statutory Paternity Pay. It is payable at the flat rate set by the government (currently GB£128.73 per week). Additional Statutory Paternity Pay is only payable for the balance of the mother's 39-week SMP period.

During OPL and APL employees are entitled to receive the benefit of all their contractual terms and conditions of employment, except remuneration.

As a general rule, employees have the right to return after paternity leave to the same job on the same terms and conditions as they would have had if they had not been away, or, in certain circumstances, to a suitable alternative job.

Surrogacy

Surrogate mothers are entitled to take maternity leave and receive SMP, provided they meet the normal eligibility criteria.

Parents under a surrogacy arrangement can be eligible to take adoption and paternity leave if they adopt the child. The adopting mother will not be entitled to maternity leave (or pay) as this is only available to pregnant employees.

Adoption rights

Employees who meet certain qualifying conditions are entitled to take 26 weeks' Ordinary Adoption Leave (OAL) followed immediately by 26 weeks' Additional Adoption Leave (AAL). If a couple is adopting jointly then only one member is entitled to take statutory adoption leave. The other member may be eligible to take statutory paternity leave.

A qualifying period of service is required: employees must have at least 26 weeks' continuous service by the end of the week in which they are notified of a match for adoption.

Employees may also be entitled to receive Statutory Adoption Pay (SAP) for up to 39 weeks. SAP is paid at the flat rate set by the government (currently GB£128.73 per week).

During OAL and AAL employees are entitled to receive the benefit of all their contractual terms and conditions of employment, except remuneration.

As a general rule, employees have the right after adoption leave to return to the same job on the same terms and conditions, or in certain circumstances, to a suitable alternative job.

Parental rights

Eligible employees are entitled to take unpaid parental leave of up to 13 weeks per child (18 weeks if the child is entitled to disability living allowance).

A qualifying period of service is required. An employee must usually have been continuously employed for at least a year and in most cases the leave must be taken before the child's fifth birthday.

As a general rule, employees must take parental leave in blocks of a week and can take no more than four weeks' leave in any one year.

Employees also have the right to take a reasonable amount of unpaid time off work to deal with domestic emergencies, for example, a breakdown in childcare arrangements. What is "reasonable" will depend on the particular facts of each case.

Employees with 26 weeks' service have a right to make a flexible working request (that is, to request a change in hours or place of work) to care for a child under 17 years old (or 18 years old if disabled). Employers are not obliged to agree to such requests, but they must follow a statutory procedure in dealing with any request and can only reject it for one of the eight business reasons set out in the legislation (*sections 80F-I, Employment Rights Act 1996*).

Carers' rights

Employees who meet certain qualifying conditions can make a request to work flexibly to care for an adult who is their spouse, partner or civil partner, another relative or a person who lives at the same address as them. The definition of relative is broad and includes step-relatives, adoptive relatives and immediate relatives.

CONTINUOUS PERIODS OF EMPLOYMENT

12. Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

Benefits created

Once an employee has one year's continuous service with their employer they have the right not to be unfairly dismissed (*Employment Rights Act 1996*). Certain other rights, such as the right to a statutory redundancy payment, are also linked to an employee's length of service.

Many employers also link benefits such as sick pay and holiday entitlement to an employee's length of service.

Consequences of a transfer of employee

If an employee transfers to an associated employer (that is, a company within the same group of companies) their continuity of service is preserved.

Equally, if an employee is transferred to another employer by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (for example, on the sale of a business or in an outsourcing situation) they retain their continuity of service.

TEMPORARY AND AGENCY WORKERS

13. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

From 1 October 2011, agency workers will be entitled, after a 12-week qualifying period, to the same basic employment conditions as if they had been employed directly by the end-user client (*Agency Workers Regulations 2010*).

From the first day of an assignment agency workers will also have the same rights as permanent employees to be informed about suitable vacancies in the hirer's establishment and to access collective facilities, for example, childcare and catering services.

Agency workers will also be entitled to paid time off for antenatal appointments.

Fixed-term employees have the right to be treated no less favourably than comparable permanent employees (*Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002*), unless that less favourable treatment can be objectively justified.

DATA PROTECTION

14. What data protection rights do employees have?

Employers must satisfy certain conditions before they can process any data about employees (*Data Protection Act 1998*) (DPA). Usually employees will be asked on the commencement of employment to give their consent to the processing of their personal data, but employers can usually also rely on one of the other conditions in the DPA, for example that the processing is necessary for the performance of the contract. "Processing" includes storage and transmission to other bodies.

Employees have the right to access any personal data held on them by making a subject access request. Employers can charge up to GB£10 for responding to such a request.

DISCRIMINATION AND HARASSMENT

15. What protection do employees have from discrimination or harassment, and on what grounds?

Protection from discrimination

The Equality Act 2010 (EA) makes it unlawful to discriminate against employees because of any one or more of the following protected characteristics:

- Age.
- Disability.
- Gender reassignment.
- Marriage and civil partnership.
- Pregnancy and maternity.
- Race (which includes colour, nationality and ethnic and national origin).
- Religion or belief.
- Sex.
- Sexual orientation.

There are various types of discrimination which are unlawful under the EA, including direct discrimination, indirect discrimination, harassment and victimisation. Employers can justify certain types of discrimination if they can show their actions are objectively justified.

No qualifying period of service is required to bring a discrimination claim and there is no cap on the amount of compensation that can be awarded.

Protection from harassment

Harassment is a form of unlawful discrimination. There is no qualifying period of service to bring a claim.

The general definition of harassment applies to all the protected characteristics except marriage and civil partnership and pregnancy or maternity. An employer will be liable for harassment if it engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating another employee's dignity or which creates an intimidating, hostile, degrading, humiliating or offensive environment for that other employee.

Employers will also be liable for persistent harassment of their employees by third parties if the harassment has occurred on at least two occasions, the employer is aware that it has taken place, and it has not taken reasonably practicable steps to prevent it from happening again.

WHISTLEBLOWERS

16. Do whistleblowers have any protection?

Whistleblowers are protected under the Public Interest Disclosure Act 1998. To qualify for protection, an employee must have made a protected disclosure as defined by that Act. Employees have the right not to be subjected to a detriment or dismissed for having made such a disclosure.

There is no minimum qualifying period of service and no cap on the amount of compensation that can be awarded if a whistleblowing employee is subjected to a detriment or is dismissed for having made such a disclosure.

DISMISSAL OF EMPLOYEES

17. What rights do employees have when their employment contract is terminated?

Notice periods

Section 86 of the Employment Rights Act 1996 sets out the minimum notice that employers must give when terminating a contract of employment. This is:

- One week if the employee has been employed for less than two years.
- One week per year of service if the employee has been employed for two years or more, up to a maximum of 12 weeks.

If the employment contract sets out a longer notice period, the contractual provision will apply.

An employee is not entitled to any notice if they have committed a repudiatory breach of contract (that is, gross misconduct).

Severance payments

Employees may be entitled to a severance payment on the termination of employment, depending on the terms of the contract and the circumstances of the termination.

If an employee has one year's continuous service and brings a claim for unfair dismissal in the Employment Tribunal they may be entitled to a compensation payment if the Employment Tribunal finds the dismissal to be unfair, for example, because the employer did not have a potentially fair reason for dismissal and/or it did not follow a fair procedure.

Compensation for unfair dismissal includes a basic award (calculated in the same way as a statutory redundancy payment (*see Question 19*)) and a compensatory award (based on an employee's financial losses) which is currently capped at GB£68,400.

Procedural requirements for dismissal

It is important that an employer follows a fair procedure when dismissing an employee. The procedure to be followed will depend on the grounds for dismissal. A failure to follow the minimum procedural requirements could render a dismissal unfair. It could also give rise to a breach of contract claim if the employer's disciplinary or redundancy procedure is contractual (though this is rarely the case). In misconduct and poor performance cases, employers should ensure they comply with the Acas Code of Practice on Disciplinary and Grievance Procedures. Under the Code, a fair procedure involves conducting a reasonable investigation, informing employees of the allegations against them, holding a disciplinary hearing and allowing the opportunity to appeal.

18. What protection do employees have against dismissal? Are there any specific categories of protected employees?

Protection against dismissal

Employees who have one year's continuous service have the right not to be unfairly dismissed (*Employment Rights Act 1996*).

Protected employees

Certain categories of employee do not require one year's continuous service to bring an unfair dismissal claim, for example, where the dismissal relates to an employee because:

- They have participated in union-related activity.
- They have participated in health and safety related activity.
- They are:
  - taking maternity, paternity, adoption or parental leave;
  - taking time off to care for dependants or to study or train;
  - exercising their right to flexible working.
- They have performed functions as an employee representative, or are a candidate in an election for an employee representative.
- They have claimed discrimination.
- They are a whistleblower.

REDUNDANCY/LAYOFF

19. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

Definition of redundancy/layoff

The definition of redundancy (*section 139(1), Employment Rights Act 1996*) covers three specific situations:

- The closure of a business.
- The closure of a particular place of work.
- A diminishing need for employees to carry out work of a particular kind.

Procedural requirements

A dismissal for redundancy will be unfair if an employer does not follow the proper procedure prior to taking the decision to dismiss. A fair procedure involves carrying out a fair selection process, consulting with the affected employee(s), considering suitable alternative employment and allowing the opportunity to appeal.

In certain circumstances employers are obliged to carry out collective consultation with appropriate representatives in addition to individual consultation with the affected employee(s) (*see Question 24*).

Redundancy/layoff pay

Employees with at least two years' continuous service will be entitled to a statutory redundancy payment. The amount is based on an employee's age, salary and length of service.

An employee is entitled to receive:

- Half a week's pay for each year of completed employment under the age of 22.
- One week's pay for each year of completed employment between the ages of 22 and 40.
- One-and-a-half weeks' pay for each year of completed employment after the age of 41.

There is a statutory cap on the amount of a week's pay (which is currently GBP£400).

TAXATION OF EMPLOYMENT INCOME

20. What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Foreign nationals

Whether a foreign national is subject to UK income tax during their secondment in the UK largely depends on whether they are resident and/or ordinarily resident in the UK for tax purposes and the nature of their duties in the UK. Broadly, the secondee is unlikely to be subject to UK income tax where they are spending only 183 days or less in the UK, and the UK company is not the employer and does not bear any cost in relation to the secondee. However, where the secondee will be spending more than 183 days in the UK then generally PAYE will need to be operated from day one of the secondment.

Nationals working abroad

Even though the secondee is working outside the UK, they may still remain subject to UK income tax in certain circumstances. Generally, the secondee will cease to be subject to UK income tax from the day they leave the UK until the day they return if they leave to take up full-time employment abroad for at least a whole tax year (tax years run from 6 April to 5 April). Any visits to the UK during the secondment must not exceed 183 days in any one tax year, or 91 days per tax year on average. However, this would not cover, for example, an employee who was seconded abroad from December 2010 to March 2012: that employee would potentially remain subject to UK income tax during the secondment meaning that PAYE may still need to be operated during that time (because that employee would not have been outside of the UK for one whole tax year: April 2011 to April 2012).

21. What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees?

Income tax

The income tax rate depends on the level of income after any allowances and reliefs. Income is taxed at:

- 20% up to GB£35,000.
- 40% on income of between GB£35,001 to GB£150,000.
- 50% on income over GB£150,000.

Social security contributions

Social security contributions are payable by both employees and employers. The employee rate is 12% of earnings between GB£138 and GB£817 per week and 2% of earnings above GB£817 per week. The employer rate is 13.8% of earnings above GB£136 per week, although a lower rate may apply where the employee is contracted out of the state pension.

EMPLOYER AND PARENT COMPANY LIABILITY

22. Are there any circumstances in which:

- **An employer can be liable for the acts of its employees?**
- **A parent company can be liable for the acts of a subsidiary company's employees?**

Employer liability

At common law, an employer can be held vicariously liable for damage caused by the negligent acts of its employees carried out in the course of their employment.

Under discrimination law, employers can also be held vicariously liable for discriminatory acts carried out by their employees in the course of their employment. This can include conduct outside the workplace. An employer has a defence if it can prove that it took such steps as were reasonably practicable to prevent the employee from committing the act or acts of that description. This is known as the "statutory defence".

Parent company liability

As a general rule, a parent company will not be held liable for the acts of a subsidiary company's employees.

HEALTH AND SAFETY OBLIGATIONS

23. What are an employer's obligations regarding the health and safety of its employees?

Employers are under a general duty under section 2 of the Health and Safety at Work Act 1974 to ensure, as far as reasonably practicable, the health, safety and welfare at work of all their employees.

EMPLOYEE REPRESENTATION AND CONSULTATION

24. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management representation

Employees have no statutory right to management representation.

Consultation

If an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, it is required to consult trade union or employee representatives about the proposed dismissals.

It may also be required to consult employee representatives if there is a works council in place or an information and consultation body set up under the Information and Consultation of Employees Regulations 2004.

Major transactions

There is no obligation to consult employees in connection with a share sale.

If there is a transfer of an undertaking or an outsourcing situation that is covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) the outgoing employer and the incoming employer have obligations to inform, and in certain circumstances consult, the trade union or employee representatives of the staff affected.

25. What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

If an employer fails to comply with its obligations to consult collectively in a redundancy situation it could face a claim in the Employment Tribunal and be ordered to pay up to 90 days' (actual) pay to each affected employee.

A failure to comply with its TUPE obligations could lead to an award of up to 13 weeks' (actual) pay for each affected employee.

Employee action

Employees cannot prevent any proposals from going ahead.

CONSEQUENCES OF A BUSINESS TRANSFER

26. Is there any statutory protection of employees on a business transfer?

Automatic transfer of employees

TUPE protects employees on a business transfer (and in an out-sourcing situation). TUPE does not apply to share sales.

Any employees who transfer have the right to be employed on the same terms and conditions of employment (although any terms relating to old age, survivors or invalidity benefits under an occupational pension scheme are excluded from this obligation).

Protection against dismissal

If the reason for a dismissal is the business transfer, or a reason connected with it, then the dismissal will be automatically unfair unless there is an "economic, technical or organisational reason entailing changes in the workforce" (an ETO reason).

If there is an ETO reason, the dismissal will not be automatically unfair, but it may still be unfair under the normal rules governing unfair dismissal claims.

Harmonisation of employment terms

Employers frequently want to harmonise the incoming terms and conditions following a TUPE transfer with the terms and conditions of employment of their existing workforce. Any purported variation of the contract of employment will be void if the sole or principal reason for the variation is the transfer itself or a reason connected with the transfer that is not an ETO reason.

PENSIONS

State pensions

27. Do employers and/or employees make pension contributions to the government in your jurisdiction?

Contributions paid to the government

National Insurance contributions are paid by both employees and employers to build up entitlement to certain benefits, including the state pension. The level of contributions depends on a number of factors, including how much an employee earns and whether they are employed or self-employed. National Insurance contributions are deducted from an employee's wages.

Taxation of contributions

An employee's earnings are used to determine the National Insurance contributions due. Employer's National Insurance contributions are deductible from profits when calculating corporation tax liabilities.

Monthly amount of the government pension

The state pension consists of the basic state pension and the state second pension (formerly the state earnings related pension scheme), and the amount received depends on the number of years a person has been paying National Insurance contributions or has been credited with National Insurance contributions by the government.

For the year 2011-2012, a single person could receive a basic weekly state pension of up to GB£102.15.

Supplementary pensions

28. Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do these schemes provide pensions, the value of which:

- **Is linked to the employee's salary?**
- **Is linked to employer and/or employee contributions and investment return on those contributions?**

Most employers provide access to a work-based pension plan for their employees. The design of the plan varies from employer to employer.

Linked to the employee's salary

Defined benefit plans provide pension entitlements which are linked to employee's salary and years of service. The salary component can be salary at or near retirement or an average during employment.

Linked to employer and/or employee contributions

Defined contribution (or money purchase) plans generate benefits based on employer and employee contributions plus investment return.

Employers are currently obliged to offer their employees access to a stakeholder pension plan (a type of low-cost, contract-based defined contribution plan) if they have more than five employees and there is no work-based pension plan available. However, the employer is not obliged to contribute to that stakeholder pension plan.

From October 2012, employers will be obliged to automatically enrol their eligible employees into a qualifying pension plan and to pay minimum employer contributions.

29. Is there a regulatory body that oversees the operation of supplementary pension schemes?

Regulatory body

The Pensions Regulator, established by the Pensions Act 2004, is the regulatory body for work-based pension plans.

Regulatory framework

The Pensions Regulator's specific objectives are:

- To protect the benefits of members of occupational and certain personal pension plans.
- To promote and improve understanding of the good administration of work-based pension plans.
- To reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund.
- To maximise compliance with employer duties.

Tax on pensions

30. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)?

Tax relief on employer contributions

An employer's contributions to a registered pension scheme can normally be deducted as an expense, and therefore reduce the amount of the employer's taxable profit.

Tax relief on employee contributions

Tax relief at the employee's marginal rate of income tax applies on contributions to a registered pension scheme. However, this relief is capped so in certain circumstances tax is levied on excess contributions. This is the case in respect of any contributions

made above an employee's "annual allowance" (for the tax year 2011-2012 this stands at GB£50,000 plus any unused personal allowance carried forward from previous years). In addition, the "lifetime allowance" limits the amount of pension which can be built up over a lifetime, from all pension arrangements, without attracting a punitive tax charge. The lifetime allowance will reduce in April 2012 from GB£1.8 million to GB£1.5 million.

31. Is there any legal protection of employees' pension rights on a business transfer?

Automatic transfer of pension rights

On a share sale, if the company and the pension plan transfer, the buyer assumes responsibility for the pension plan (including its historic liabilities) and benefit entitlements should not change for the employees regarding either past or future rights. Even if the plan is left behind, the contractual rights carry over on a share transfer.

Other protection for pension rights

With a sale of business and assets, the position is slightly different. The accrued benefits of the employee will normally remain in the seller's plan. Employees will be entitled to certain minimum pension rights in respect of future service set out under the Pensions Act 2004 and supplemented by the 2012 pension reforms. Where the former employer provided a defined benefit pension plan, or a defined contribution plan under which employer contributions were paid (and in either case, the employee was an active member of the plan, eligible to be an active member or in a waiting period for active membership), the employee must be offered membership in a defined benefit plan or a defined contribution plan (where the employer contribution matches the employee contributions up to 6%) in relation to future service. In certain circumstances, liability to provide certain defined benefits can pass to the buyer. These potentially include early retirement pensions and enhanced pensions payable on redundancy.

32. Can the following participate in a pension scheme established by a parent company in your jurisdiction:

- **Employees who are working abroad?**
- **Employees of a foreign subsidiary company?**

Employees working abroad

Under the Pensions Act 2004, a pension plan which has its main administration in the UK must apply for approval and authorisation from the Pensions Regulator before contributions are received in respect of members based elsewhere in Europe. If a plan applies for authorisation it must be able to meet the statutory funding objective (basically demonstrating that it can pay its liabilities as they fall due). This is an onerous test which most plans will not be able to meet.

However, if a member is seconded overseas from the UK, they will still be subject to the UK's social and labour law, and therefore the above regime will not apply. The member must satisfy certain criteria to count as a seconded employee, including working in another EEA state for a limited period of time.

If the employee/employer is subject to income tax/corporation tax in the UK, the tax reliefs referred to in *Question 30* above may potentially be available.

Employees of a foreign subsidiary company

See above, *Employees working abroad.*

33. Is there any protection provided for pension scheme benefits where the sponsoring employer becomes insolvent? If so, who provides the protection, and how does this operate?

The Pension Protection Fund provides compensation to members of defined benefit pension plans whose employer becomes insolvent and where there are not sufficient assets in the pension plan to provide members with the same level of compensation as they would receive from the Pension Protection Fund.

Part of the funding of the Pension Protection Fund is received from the compulsory annual levies charged on all eligible plans. The Pension Protection Fund also takes over the assets of the plans which are admitted following the insolvency of the employer.

BONUSES

34. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

Bonuses continue to be a widely used way of incentivising employees. In order to give themselves some flexibility many employers operate discretionary (as opposed to contractual) bonus schemes. While such labels are helpful the courts have made it clear that an employer's discretion is not absolute.

As a general rule there are no restrictions on what bonuses can be awarded, but the Financial Services Authority Remuneration Code places restrictions on the payment of bonuses in the banking sector.

INTELLECTUAL PROPERTY (IP)

35. If employees create IP rights in the course of their employment, who owns the rights?

If employees create IP rights in the course of their employment, those rights will generally belong to their employer. However, it is advisable to include express provisions to confirm this in the contract of employment.

RESTRAINT OF TRADE

36. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

The UK courts recognise that employers are entitled to protect their trade connections with customers or suppliers, their goodwill and their business secrets or confidential information both during and post-employment. The key to protecting the employer's legitimate business interests is to include appropriate restrictions and obligations within the employee's contract of employment.

Post-employment restrictive covenants

Post-employment restrictive covenants will be enforceable only to the extent they are designed to protect an employer's legitimate business interests and go no further than is reasonably necessary for that purpose. There is no statutory requirement to continue to pay an ex-employee while they are subject to any such restrictions.

PROPOSALS FOR REFORM

37. Are there any proposals to reform employment law or pensions law in your jurisdiction?

The Agency Workers Regulations 2010 (*see Question 13*) are due to come into force on 1 October 2011.

From October 2012, employers will be obliged to automatically enrol their eligible employees into a qualifying pension plan (*see Question 28*).

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Recent transactions

- Advising a global hotel group on their employment issues across Europe, including the rationalisation and integration of two workforces, covering 50 UK hotels and 10,000 employees, the combination of operations in Germany and the UK, and contract and policy roll outs across Europe.
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Recent transactions

- Procuring by mediation a US$1million-plus settlement for a City trader.
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- Project managing the transfer of staff from all jurisdictions including the UK to locations across the globe using an international network of specialist immigration advisers.
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Recent transactions

- Acting for UK companies (quoted and unquoted) on the tax aspects of corporate and property acquisitions and disposals and the tax efficient structuring of such transactions.
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- Designing and implementing a restructuring of the Professional Footballers' Pension Scheme.
- Training the trustee directors of the Cadbury Pension Fund on latest developments.
- Advising on the implementation of an asset backed pension funding vehicle by a listed FTSE 250 engineering company in the UK.