



EMPLOYMENT UPDATE

March 2011

**SQUIRE
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HAMMONDS** | LEGAL
COUNSEL
WORLDWIDE

NEW THIS MONTH

- Protection of Freedoms Bill 2010-11
- Cases on redundancy/alternative employment and dual discrimination

(‘Proposed Legislation’ – page 13)

(‘Key Employment Cases (UK)’ – pages 18-19)

UPDATED THIS MONTH

- Equality Act 2010
- Right to request time off for study
- Roll-out of the Vetting and Barring Scheme
- Tiers 1 and 2 PBS limits
- Phase-out of the Default Retirement Age
- Apprenticeships and Skills (Public Procurement Contracts) Bill 2010-11
- Guidance on matters to be taken into account in determining questions relating to the definition of disability
- Women on Boards: Call for evidence

(‘New legislation’ – page 1)

(‘New legislation’ – page 4)

(‘Amendments to existing legislation’ – page 5)

(‘Amendments to existing legislation’ – page 6)

(‘Amendments to existing legislation’ – page 7)

(‘Proposed Legislation’ – page 12)

(‘UK Consultations (closed)’ – page 21)

(‘UK Consultations (closed)’ – page 21)

LEGISLATION TRACKER

Effective Date (Parliamentary stage where relevant)	Title(s) of relevant legislation	Summary	Potential Impact	Risk Rating	Next steps following Risk Rating
NEW LEGISLATION					
*From 1 October 2010	<p>(1) Equality Act 2010</p> <p>(2) The Equality Act 2010 (Commencement No. 4 etc) Order 2010 (SI 2317)</p> <p>(3) The Equality Act 2010 (Disability) Regulations 2010 (SI 2128)</p> <p>(4) The Equality Act 2010 (Commencement No.5) Order 2011 (SI 0096)</p>	<p>The following key provisions of the Act that are of interest to employers came into force on 1 October:</p> <ul style="list-style-type: none"> • Pre-employment disability and health questionnaires. • Discrimination based on association or perception of a protected characteristic. • Pay secrecy clauses. • Harassment of employees by 3rd parties. • Strengthened powers for Employment Tribunals to make recommendations benefiting the wider work force in discrimination case. <p>The Government is still considering the best way for the following provisions to be implemented:</p> <ul style="list-style-type: none"> • Dual discrimination. The Act provides for discrimination claims to be brought in relation to a combination of two protected characteristics (from age, disability, gender reassignment, race, religion or belief, sex or sexual orientation). We understand that this provision will not now be implemented in April 2011 as originally planned. • Caste discrimination. The Government Equalities Office published research findings in December 2010 on caste prejudice and discrimination in Great Britain. The Government is now considering the report findings and whether to legislate under the 	<ul style="list-style-type: none"> • Increased risk of Tribunal claims and need for additional internal monitoring resources 	High	<ul style="list-style-type: none"> • Ensure Managers are trained on the impact of pre-employment health questions and the need to avoid stereotyping (discrimination based on association/dual discrimination). • Await implementation of further sections of the Act and consider impact on equal opportunities policies, gender gap reporting and recruitment procedures.

Act.

- **Positive Action in recruitment or selecting for promotion.** If they wish, employers will, subject to certain conditions, be able to use 'positive action' to pick someone for a job (or select them for promotion) from an under-represented group when it has the choice between two or more candidates who are equally suitable. This provision will come into force on 06/04/11. The Government Equalities Office has issued "quick start" [guidance](#) and also [practical guidance](#) intended to help employers.
- **Public Sector Equality Duty.** Coming into force on 06/04/11, the new public sector Equality Duty replacing the current separate public sector duties relating to race, disability and sex and also covering age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment more fully. The Duty consists of a general duty and specific duties to be imposed through regulations. The specific duties include a requirement for listed bodies to publish by 31/07/11 sufficient information to demonstrate their compliance with the general equality duty.
- **Age discrimination outside the workplace.** From April 2012 (TBC), it will be unlawful to discriminate against someone aged 18 or over when providing services or carrying out public functions.

The Equality and Human Rights Commission has published a series of non-statutory guidance documents (including guidance for employers) to accompany the Act. Final versions of the Employment, Equal Pay and, Services, Public Functions and Associations Statutory Codes of Practice came into force on 28/02/11. Copies of all of the guidance can be downloaded from the [EHRC website](#).

03/04/11	<p>Work and Families Act 2006</p> <p>Key secondary legislation:</p> <p>(1) Additional Paternity Leave Regulations 2010 (SI 1055)</p> <p>(2) Additional Statutory Paternity Pay (General) Regulations 2010 (SI 1056)</p>	<p>Additional Paternity Leave (APL) and Pay Scheme</p> <p>Regulations implementing the new Scheme came into force on 06/04/10 although the Scheme will only apply to parents of babies whose EWC begins on or after 03/04/11.</p> <p>Key features of the Scheme:</p> <ul style="list-style-type: none"> • In order to be eligible to take APL, fathers (which includes partners, civil partners and adoptive parents) will have to have been eligible for Ordinary Paternity Leave (presently known as Statutory Paternity Leave) with the same employer (i.e. six months' service at the 15th week before EWC) and still be in employment with that employer until the week before the first week of APL. • A mother must return to work for a father to be able to take APL and receive Additional Statutory Paternity Pay (ASPP). • APL can be taken no earlier than 20 weeks after the child's birth but must be taken within the first year. • A father taking APL can agree to work for up to 10 days during his APL ('Keeping in Touch ' or KIT days). If both father and mother work for the same employer, this will potentially result in 20 KIT days during the combined period of maternity/additional paternity leave. • A father taking APL and ASPP will be entitled to the benefit of his terms and conditions (except for remuneration) and will be entitled to return to the same job on the same terms and conditions. <p>The Government has confirmed that the Scheme will be introduced this April as planned albeit as an "interim" measure pending the outcome of a consultation on a new system of "shared parental leave". Detailed plans on the latter will be developed by December 2011 and any changes will not come into force until 2015 at the earliest. BIS has recently updated its guidance leaflets</p>	<ul style="list-style-type: none"> ○ Increased staff costs. ○ Rostering issues 	<p>High</p>	<ul style="list-style-type: none"> • Consider the extent to which APL may be abused and measures to counter this • Investigate whether existing payroll software will be able to cope with these variations • Risk of abuse as the Scheme allows self-certification rather than independent verification of the fact that the mother has actually returned to work. Employers are, however, also entitled to ask the father to provide a copy of the child's birth certificate and details of the mother's employer. HMRC will also undertake compliance checks and be able to impose financial penalties where there is evidence of fraudulent claims by employers or employees • Consider the impact any enhanced maternity pay and whether men should receive the same benefits as comparable women
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		on 'Pregnancy and Work' to include APL.			
*06/04/11 & 2013	<p>(1) Apprenticeships, Skills, Children and Learning Act 2009</p> <p>(2) Employment Rights Act 1996 – as amended in relation to the right to study or train</p> <p>(3) The Employee Study (Procedural Requirements) (SI 0155) and (Eligibility, Complaints and Remedies) (SI 0156) Regulations 2010</p>	<p>Right to request time off for study or training/apprenticeships</p> <p>The Act amends the Employment Rights Act 1996 to include a right for employees to request time off (which can be unpaid) to study or train. The right is modelled on the existing right for making and rejecting flexible working requests.</p> <p>The right applies to employers with more than 250 staff from 06/04/10 and was due to apply to all other employers from 06/04/11. The Government consulted on the future of the right during 2010 and on 16/02/11 it announced that the extension to smaller firms was being delayed to allow further evaluation of the right.</p> <p>The Act also introduces, by 2013, an entitlement to an apprenticeship place for all suitably qualified 16-18 year olds.</p>	<ul style="list-style-type: none"> Increased payroll costs and administration Rostering issues Potentially significant impact on available pool of labour which could give rise to staff shortages, particularly in relation to unskilled roles 	High	<ul style="list-style-type: none"> Await outcome of consultation to establish scope of extension of right Await secondary legislation in relation to apprenticeship places
01/10/11	<p>Agency Workers Regulations 2010 (SI 0093)</p>	<p>Enhanced rights for agency workers</p> <p>The Agency Workers Directive was passed by the European Parliament on 22/10/08 – giving temporary workers in the UK equal rights to permanent staff after 12 weeks with a hirer (occupational benefits that recognise the long-term relationship that permanent staff have with an employer, such as sick pay, certain insurances and pensions will however be excluded).</p> <p>The final UK Regulations include an anti-avoidance provision intended to deter hirers from depriving agency workers of their right to equal treatment (e.g. by rotating them between different jobs every 11 weeks). Penalties of up to £5,000 can be imposed for such breaches.</p> <p>On 19/10/10, the Government announced that despite calls for amendments from various parties, the</p>	<ul style="list-style-type: none"> Increased payroll costs Increased turnover of agency staff Potential difficulty for long-term temporary roles 	Medium	<ul style="list-style-type: none"> Consider reviewing contracts with agency staff suppliers Consider current use of agency workers and what measures can be implemented to mitigate risk e.g. the Swedish derogation

		Regulations will <u>not</u> be amended ahead of the October 2011 implementation. We understand that draft guidance on the regulations will be published in March.			
Expires 16/12/11	Superannuation Act 2010	The Act received Royal Assent on 16/12/10. It caps temporarily compensation payable under the Civil Service Compensation Scheme at a maximum of 12 months' pay for compulsory redundancy and 15 months' for voluntary exits. As the cap is an interim measure, pending implementation of a revised CSCS, the Act further provides for the cap to expire after 12 months, unless repealed, extended or revived using order-making powers.	<ul style="list-style-type: none"> • Could result in lower redundancy costs for public bodies using the Scheme 	High	<ul style="list-style-type: none"> • Review existing redundancy packages for compliance with the Act

AMENDMENTS TO EXISTING LEGISLATION

*2013	<p>Implementing Regulations to the Safeguarding Vulnerable Adults Act 2006 (SVGA) including:</p> <p>The Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Devolution and Miscellaneous Provisions) Order 2010 (SI 1154)</p> <p>Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 (SI 1351)</p> <p>Freedom of Protections Bill 2010-11</p>	<p>Roll-out of the Vetting and Barring Scheme</p> <p>The first phase of the Scheme was introduced on 12/10/09. From that date:</p> <ul style="list-style-type: none"> • It became an offence for an employer to allow a person to engage in a regulated activity whom it knows (or has reason to believe) is on the Independent Safeguarding Authority's (ISA) barred lists. • A mandatory duty was introduced requiring employers to refer to the ISA information about individuals working with children or vulnerable adults in a regulated or controlled activity where they have caused or put at risk of harm. <p>The Government has confirmed that the above offence and duty are to be retained.</p> <p>From April 2010, employers who do not know whether or not a new entrant or mover into a controlled activity (see also below) is barred from regulated activity have had to apply to the CRB for enhanced disclosure with an ISA barred list check on that individual.</p> <p>On 15/06/10, the Home Office announced that registration under the scheme was being halted whilst a</p>	<ul style="list-style-type: none"> • Risk of fines/prosecution • Relevant to employers if they operate crèche facilities • Employers should also consider implications where staff deal specifically with children or vulnerable adults 	Medium	<ul style="list-style-type: none"> • Ensure compliance of recruitment procedures and that the necessary ISA reporting procedures are in place • Identify roles which may fall within the scope of the Scheme
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		<p>Government review was undertaken. The findings of that review were published on 11/02/11. Key recommendations – incorporated into the 'Protection of Freedom Bill' (see 'Proposed Legislation' below) – include:</p> <ul style="list-style-type: none"> • A large reduction in the number of positions requiring checks to just those working most closely and regularly with children and vulnerable adults ("regulated activities"). • Registration with the Scheme to be scrapped. • Portability of CRB checks to be introduced. • The "controlled activity" category to be abandoned. It will be up to employers to decide as part of their recruitment processes whether to obtain additional information on employees who are not performing a regulated activity but may still have contact with children or vulnerable adults. <p>Subject to Parliamentary approval, the Government hopes the Bill will become law in November 2011. It then intends to roll out the Act during 2012, with the new disclosure and vetting service beginning in 2013.</p> <p>Some parts of the SVGA do not extend to Northern Ireland and corresponding legislation replicates those provisions.</p>			
*06/04/11	<p>Amended Immigration Rules and Guidance</p> <p>Tier 2 PBS Statement of Intent</p>	<p>Tiers 1 and 2 PBS limits</p> <p>On 15/02/11, the Government set out the criteria for its annual limits on migrant workers coming into effect on 06/04/11:</p> <ul style="list-style-type: none"> • Annual limit of 20,700 on "restricted" Tier 2 (General) visas, divided into 12 monthly allocations (which will replace the current pre-allocation system), 4,200 in April, 2011, 1,500 per month thereafter. • All roles under Tier 2 must be at graduate level or above. 	<ul style="list-style-type: none"> • Reduced opportunities to recruit non-EEA workers via Tiers 1 and 2 of PBS 	High	<ul style="list-style-type: none"> • Tier 2 (ICT) – consider if applications needed before April 2011 in light of the salary/length of permission restrictions • As Tier 1 (General) is to be closed, migrant workers should be encouraged to make applications sooner rather than later and in any event no later than 6 April 2011

		<ul style="list-style-type: none"> • Vacancies attracting a salary of £150,000 or more are not subject to the limits or the resident labour market test. • Annual limit of 1,000 Tier 1 visas under the new “Exceptional Talent” sub-category. • Tier 2 (ICT) (deemed “unrestricted” and therefore not subject to the annual limit) will be amended so that: <ul style="list-style-type: none"> ○ only those paid more than £40,000 can stay for more than 12 months (up to a maximum of 5 years) ○ those paid between £24-40,000 can work in the UK for up to 12 months but must then leave and cannot re-apply for 12 months. <p>Further details, together with Formal Guidance, are to be issued on 16 March.</p>			
03/04/11 & 06/04/11	The Social Security Benefits Up-rating Order 2011 (draft awaited)	<p>Increased benefit rates for 2011/12</p> <ul style="list-style-type: none"> • SMP, SAP, OSSP and MA will increase from £124.88 to £128.73 with effect from 03/04/11. The new rate will also apply to ASPP. • SSP will increase from £79.15 to £81.60 with effect from 06/04/11. 	<ul style="list-style-type: none"> • Increased payroll costs 	High	<ul style="list-style-type: none"> • Ensure payroll systems updated
*06/04/11	The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (draft – 2nd version)	<p>Phase-out of the Default Retirement Age</p> <p>The Government has issued the draft Regulations that will repeal the statutory Default Retirement Age (DRA) provisions. They largely reflect what was contained in its response to the recent consultation (but see below):</p> <ul style="list-style-type: none"> • employers will not be allowed to issue new notifications of retirement using the DRA procedure on or after 6 April 2011. • the associated statutory retirement procedures will also be abolished. • the current rule which allows employers to refuse 	<ul style="list-style-type: none"> • Increased risk of Tribunal claims in relation to “retirement”-related dismissals • DRA retirements not made in accordance with the 	High	<ul style="list-style-type: none"> • Ensure any retirement notifications are sent out before 06/04/11. • Consider how and when any contractual retirement age will be phased out/abolished. • Consider practical implications of abolition e.g. succession and workforce planning etc. • Consider whether

		<p>the employ an applicant for a job vacancy who is aged 64 and a half or more will be removed.</p> <ul style="list-style-type: none"> • “retirement” will be removed from the current list of potentially fair reasons for unfair dismissal. • there will be an exception to the principle of equal treatment on the grounds of age for group risk insured benefits such as life assurance, income protection etc. Employers will be allowed to withdraw the provision of such benefits for employees aged 65 or the State pension age, whichever is greater. <p>The Government has issued two sets of draft Regulations as the first set contained a major drafting error in relation to the transitional provisions.</p> <p>The revised Regulations make it clear that <u>provided</u> an employer has notified an employee of its intention to retire him on or before 05/04/11 <u>and</u> the employee in question has already turned 65 (or the Company’s normal retirement age, if higher) or will do so before 01/10/11, the transitional provisions will apply and the dismissal will be lawful.</p> <p>The Government has also taken the opportunity to introduce a new provision which effectively says that employees will be unable to make requests to continue working beyond their intended retirement date under the DRA procedure after 04/01/12 (assuming they were given the maximum period of 12 months’ notice of an intention to retire). If their employer agrees to a request – of not more than 6 months – this means that the last possible date for retiring an employee under the DRA provisions is 05/10/12. Employers should not agree to an extension of more than six months because in such circumstances they would be required to issue a fresh notice of intention to retire – and this will not be lawful after 05/04/11.</p> <p>Acas has published guidance on how employers can work without the DRA.</p>	<p>transitional arrangements (and therefore ineffective)</p> <ul style="list-style-type: none"> • Potential health and safety issues relating to an ageing workforce 		<p>performance management processes are sufficiently robust and managers trained to deal with falling performance</p>
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06/04/11	Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2010 (SI 2991)	<p>Extension of flexible working rights</p> <p>The Government has announced that the right – currently available to qualifying parents of children under 17, parents of disabled children under 18 and carers of certain adults – is to be extended to qualifying parents of children under 18 from 06/04/11.</p> <p>The Government is also to consult during January-March 2011 on how the right can be extended to all employees, with a view to developing detailed plans by December 2011.</p>	<ul style="list-style-type: none"> Potentially increased administration and rostering issues, though there may be limited impact until the right possibly extends to all employees at a later date. 	<p>High</p>	<ul style="list-style-type: none"> Amend family friendly policies and train relevant staff
05/06/11	Transnational Information and Consultation of Employees (Amendment) Regulations 2010 (SI 1088)	<p>The recast European Works Council Directive (2009/38/EC) came into force on 05/06/09. It clarifies the scope of “transnational” so that where an EWC is in place and a closure/restructuring decision is taken in one Member State (e.g. at a multinational Head Office in the UK) but affects workers in another Member State (and has no impact on the workers in the decision-making Member State), the closure/restructuring will fall within the scope of the Directive and the employer will need to consider their transnational consultation obligations.</p> <p>The response to the second-stage consultation in relation to the UK implementing legislation was issued in April 2010. The final Regulations include the following changes:</p> <ul style="list-style-type: none"> A legal regime applicable to EWC’s with pre-existing agreements and to other EWC’s created or amended during the 2-year period prior to 05/06/11 (the implementation date for the new Regulations) The definitions of ‘information’ and ‘consultation’ have been further amended to bring them in line with the Directive. 	<ul style="list-style-type: none"> Possible increased complexity of decision-making process. 	<p>High</p>	<ul style="list-style-type: none"> Establish whether any procedural changes are required ahead of the June 2011 implementation date

		<ul style="list-style-type: none"> The time limit for making complaints to the Central Arbitration Committee about a failure to comply with the Regulations is increased from 3 to 6 months The maximum penalty for breach of the Regulations is increased from £75,000 to £100,000. <p>The Government has also published guidance on the new Regulations. Link to the guidance here.</p>			
By 08/03/12	Amending legislation implementing the Revised Directive on Parental Leave (2010/18/EU)	<p>Parental Leave extended</p> <p>On 30/11/09, EU Ministers approved the Revised Directive. Key changes are:</p> <ul style="list-style-type: none"> An increase in parental leave from 3 to 4 months, one month of which will be non-transferable. Member States will still be able to decide whether the leave is paid or unpaid. The current UK entitlement is to 13 weeks' unpaid leave. Parents returning to work after parental leave will be given the opportunity to request a change to their working conditions (e.g. hours). <p>The UK and other Member States have until 08/03/12 to implement the Directive. The Government has announced that it will be consulting on a new system of flexible parental leave during 2011.</p>	<ul style="list-style-type: none"> Rostering issues re increased statutory period of leave Additional administration / procedures re: requests to change terms and conditions. 	Low	<ul style="list-style-type: none"> Await UK implementing legislation and outcome of the 2011 consultation on shared parental leave
By 05/08/12	Equal Treatment Directive between men and women engaged in a self-employed capacity (Directive 2010/44/EU)	<p>The Directive is intended to give female self-employed workers and 'assisting' spouses (e.g. farmer's wives etc) (including life partners, as recognised by national law), the same maternity leave entitlement as provided to employees under the Pregnant Workers Directive. Member States can decide whether to provide maternity benefits on a mandatory or voluntary basis</p> <p>It is aimed at Member States where self-employed women do not enjoy the same maternity leave rights as employees. This is not the case in the UK where self-employed workers are entitled to maternity leave and also to Maternity Allowance, provided that they have made sufficient National Insurance contributions. The</p>	<ul style="list-style-type: none"> Limited impact as only applies to self-employed women and UK legislation already provides protection 	Low	<ul style="list-style-type: none"> Await any UK implementing legislation

		Directive should therefore have little impact upon UK employers. Member States have an additional period of 2 years (i.e. until 2014) if they experience difficulties in implementing the Directive.			
2013/2015	Implementing legislation pursuant to the Education and Skills Act 2008	<p>The Act received Royal Assent on 26/11/08. Its main purpose is to raise to 18 the minimum age at which young people can leave education or training. The leaving age will rise to 17 by 2013 and to 18 by 2015.</p> <p>Employers will be under a duty to:</p> <ul style="list-style-type: none"> not employ a person unless they have taken reasonable steps to check the person has made appropriate arrangements to participate in relevant education or training; and permit an employee to participate in education or training. <p>Local education authorities will be able to issue penalty notices to employers who fail to comply with their duties. There will be an appeals procedure.</p>	<ul style="list-style-type: none"> Potentially significant impact on available pool of labour which could give rise to staff shortages Additional administrative costs Risk of penalties for failure to comply with the legislation 	Low	<ul style="list-style-type: none"> Await details of implementing legislation and monitor for future recruitment planning
TBC	Road Transport (Working Time) Regulations 2005 (draft amending regulations awaited)	<p>Regulations extended to self-employed drivers</p> <p>Self-employed drivers were due to fall under the scope of the Regulations from March 2009. However, the European Commission has proposed amending the Working Time Directive for Mobile Workers (2002/15/EC) to remove the requirement that self-employed workers come within the scope of the Directive and to introduce a more precise definition of mobile workers. The Government has indicated that it was minded to support the Commission's proposal. The Commission's initial proposal was rejected by both the European Parliament and the Employment and Social Affairs Committee. A vote of the full Parliament on 16/06/10 also rejected the Commission's proposal and called for it to be withdrawn and for a new proposal to be submitted.</p>	<ul style="list-style-type: none"> Reduced driver availability/ increased delivery times due to their need to comply with the Regulations 	Low	<ul style="list-style-type: none"> Monitor progress of the proposals to amend the Directive

PROPOSED LEGISLATION					
TBC	Work and Families Act 2006	Extended Statutory Maternity Pay etc. Whilst the Additional Paternity Leave and Pay Scheme will come into effect for parents of children whose EWC begins on or after 03/04/11, no similar announcement has been made on the extension of SMP, Maternity Allowance and Statutory Adoption Pay from 39 to 52 weeks.	<ul style="list-style-type: none"> Increased staff costs 	Low	<ul style="list-style-type: none"> Await further Government announcement
*TBC	‘Apprenticeships and Skills (Public Procurement Contracts) Bill 2010-11’ (2nd Reading, House of Commons – 17/06/11)	A Private Members’ Bill (which means that is unlikely to become law) to introduce require certain public procurement contracts let by public authorities to include a commitment by the contractor to provide apprenticeship and skills training.	<ul style="list-style-type: none"> Additional training obligations for contractor employers 	Low	<ul style="list-style-type: none"> Await further progress of the Bill
TBC	Carers and Employment Bill 2010-11 (2nd Reading, House of Commons – 17/06/11)	A Private Members’ Bill (which means that is unlikely to become law) to make provisions for carers’ rights to flexible working. Until the Bill is published, it is not clear how any proposed rights will differ to those under existing legislation.	<ul style="list-style-type: none"> Rostering issues 	Low	<ul style="list-style-type: none"> Await further progress of Bill
TBC	Equal Opportunities Bill 2010 – 11 (2nd Reading, House of Commons – 17/06/11)	A Private Members’ Bill (which means that is unlikely to become law) to introduce more freedom, flexibility and opportunity for those seeking employment in the public and private sectors.	<ul style="list-style-type: none"> Likely to be minimal 	Low	<ul style="list-style-type: none"> Await further progress of the Bill
TBC	Employment Retention Bill 2010-11 (2nd Reading, House of Commons – 13/05/11)	A Private Members’ Bill (which means that it is unlikely to become law) to introduce a statutory right to an employment retention assessment to determine entitlement to a period of rehabilitation leave for newly disabled people and people whose existing impairments change.	<ul style="list-style-type: none"> Rostering issues 	Low	<ul style="list-style-type: none"> If Bill approved, ensure procedures comply with the new right
TBC	Equality and Diversity (Reform)	A Private Members’ Bill (which means that it is unlikely to become law) to prohibit the use of alternative and	<ul style="list-style-type: none"> If approved may simplify 	Low	<ul style="list-style-type: none"> Await printing of Bill prior to Second Reading.

	Bill 2010 -11 (2nd Reading, House of Commons – 21/10/11)	positive action in recruitment and appointment processes. This contrasts with the provisions (currently on hold) for positive action in the Equality Act.	recruitment procedures.		
TBC	High Pay Commission Bill 2010-11 (2nd Reading, House of Commons – 18/03/11)	A Private Members' Bill (which means that it is unlikely to become law) to make provision for the establishment of a High Pay Commission.	<ul style="list-style-type: none"> If approved, could result in lower salary costs if salaries are capped in some way 	Low	<ul style="list-style-type: none"> Await further progress of the Bill
TBC	Minimum Wage (Amendment) Bill 2010-11 (2nd Reading, House of Commons – 04/03/11)	A Private Members' Bill (which means that it is unlikely to become law) to enable the NMW to be varied to reflect local labour market conditions. The draft Bill was published on 01/03/11.	<ul style="list-style-type: none"> May result in lower wage costs in certain regions but with increased administrative complexity 	Low	<ul style="list-style-type: none"> If Bill approved, wage systems may need to be amended to reflect local variations.
TBC	National Service Bill 2010-11 (2nd Reading, House of Commons – 16/03/12)	A Private Members' Bill (which means that it is unlikely to become law) to provide a system of national service for young persons.	<ul style="list-style-type: none"> If approved, could impact on available pool of labour which could give rise to staff shortages 	Low	<ul style="list-style-type: none"> Monitor progress of Bill for further recruitment planning.
**2012	Protection of Freedoms Bill 2010-11 (Committee Stage, House of Commons – TBA)	The wide range of measures included in this Government Bill includes proposed restrictions to the scope of the vetting and barring scheme and changes to the system of criminal records checks. See also ' Roll-out of the Vetting and Barring Scheme ' above.	<ul style="list-style-type: none"> Reduced costs and administration if scope of VBS is reduced 	Medium	<ul style="list-style-type: none"> Monitor further progress of the Bill
TBC	Remembrance Sunday (Closure of shops) Bill [HL] 2010-11 (2nd Reading, House of Commons – 18/03/11)	A Private Member's Bill (which means that it is unlikely to become law) to provide for the extension of Christmas Day restrictions on the opening of retail premises to Remembrance Sunday.	<ul style="list-style-type: none"> Revised holiday arrangements and rostering issues 	Low	<ul style="list-style-type: none"> Monitor progress of the Bill.

	Lords – (TBA)				
2012	St George's Day and St David's Day Bill 2010-11 (2nd Reading, House of Commons – 13/05/11)	A Private Member's Bill (which means that it is unlikely to become law) to designate, from 2012, St George's and St David's Days, or the nearest working day, as annual public holidays in England and Wales respectively.	<ul style="list-style-type: none"> Increased starting costs and rostering issues 	Low	<ul style="list-style-type: none"> Monitor progress of bill
TBC	Training Wage Bill 2010-11 (2nd Reading, House of Commons – 18/03/11)	A Private Members' Bill (which means that it is unlikely to become law) to make provision that persons receiving a training wage are exempt from NMW legislation.	<ul style="list-style-type: none"> Could result in lower training costs though this will not be clarified until the Bill is published 	Low	<ul style="list-style-type: none"> Await printing of the Bill prior to Second Reading.
TBC	Tribunals (Maximum Compensation Awards) Bill 2010-11 (2nd Reading, House of Commons – 17/06/11)	A Private Members' Bill (which means that it is unlikely to become law) to enable maximum limits to be established for compensation in Tribunal awards for cases involving unlawful discrimination.	<ul style="list-style-type: none"> Could result in reduced compensation costs in successful discrimination claims against employers 	Low	<ul style="list-style-type: none"> Monitor progress of the Bill.
EU LEGISLATION					
Effective Date	Title(s) of relevant legislation	Summary	Potential Impact	Risk Rating	Next steps following Risk Rating
Ongoing	<p>(1) Working Time Directive 2003/88/EC</p> <p>(2) Working Time Regulations 1998</p> <p>[COD/2004/0209]</p>	<p>WTR 48-hour opt-out</p> <p>The European Commission first put forward proposals to amend the Working Time Directive in 2004. Despite considerable subsequent discussion, in April 2009, EU government representatives and the European Parliament concluded that they could not reach agreement and the amending Directive lapsed.</p> <p>On 24/03/10 the European Commission launched a first-phase consultation with social partners (such as the European Trade Union Confederation (ETUC)). A</p>	<ul style="list-style-type: none"> Increased staff costs Rostering issues 	Low	<ul style="list-style-type: none"> Await further developments

		<p>second phase consultation was launched at the end of 2010 – see ‘EU Consultations (closed)’.</p> <p>If the right to opt-out is ultimately ended, the UK would be granted 3 years from the date of the revised Directive to implement it.</p>			
2013	<p>Amendments to the Pregnant Workers Directive 92/85/EEC (draft) [COD/2008/0193]</p>	<p>On 20/10/10, the European Parliament voted in favour of a number of amendments (initially proposed by the European Commission in 2008 and revised by Parliamentary Committee) to the Pregnant Workers Directive.</p> <p>The proposed amendments include:</p> <ul style="list-style-type: none"> • A minimum period of continuous maternity leave of 20 weeks on full pay (the Commission had proposed 18 weeks; the current Directive provides for 14 weeks). Whilst UK maternity leave at 52 weeks easily exceeds the proposed minimum, only the first 6 weeks are at near full pay (90%). • Member States will no longer be able to apply eligibility criteria to maternity pay (e.g. 26 weeks continuous service in the UK). • Fully paid compulsory maternity leave of 6 weeks (currently 2 weeks in the UK and not full pay under the statutory scheme) irrespective of the number of days worked before confinement. • Two separate one hour periods of time off for breastfeeding (presumably per working day, though this is not clear from the proposals) subject to any other arrangements agreed with the employer. • Stronger protection against dismissal, a right to return to the same job or an equivalent one after maternity leave (as is presently the case in the UK) and a right to ask the employer for flexible working patterns lasting for up to 1 year after the end of maternity leave. <p>The EU Council of Employment Ministers rejected the</p>	<ul style="list-style-type: none"> • Increased costs/risk of litigation, especially if leave at full pay is approved - but the UK already exceeds the minimum requirements in a number of the current proposals. 	Medium	<ul style="list-style-type: none"> • Await discussion of the proposals by the European Parliament/Member States.

		<p>proposal on 06/12/10 – strongly resisted by the UK – to extend fully-paid maternity leave to 20 weeks. Ministers were also sceptical of the 18 week period originally proposed by the European Commission and have agreed to review the proposals during 2011 (expected in June). Until the Council adopts its first reading position on the proposals, the proposals cannot proceed further.</p> <p>If the Commission's proposals are ultimately approved, Member States will have 2 years to introduce the legislation into national law.</p>			
To be confirmed	Anti-discrimination Directive [APP/2008/0140]	<p>In July 2008, the European Commission issued a proposal for extending anti-discrimination legislation on grounds of age, disability, sexual orientation, and religion or belief beyond employment and training to areas such as access to, and supply of, goods and services that are commercially available to the public.</p> <p>The matter was discussed at a meeting of EU Ministers on 30/11/09, when it was acknowledged that “extensive” work needs to be done in this area ahead of any legislation.</p> <p>The UK has already legislated domestically in some of the proposed areas.</p>	<ul style="list-style-type: none"> Increased risk of claims (although the proposals are already reflected in some UK legislation) 	Low	<ul style="list-style-type: none"> Monitor progress of Directive and consider impact on anti-discrimination policies
To be confirmed	Directive on intra–corporate transfers from outside EU (draft) [COD/2010/0209]	<p>In July 2010, the European Commission proposed a Directive aimed at making it easier for multinational companies to temporarily transfer skilled workers from companies outside the EU to branches or subsidiaries in Member States. The proposed fast-track procedure would apply to managers, specialists and graduate trainees only.</p> <p>Ministers held a first exchange of views on 07/10/10. The first reading in the European Parliament is awaited and may take place in April.</p> <p>The draft Directive is part of the EU's common immigration policy. The UK and Ireland have a form of opt-out from this policy and can decide on a case-by-</p>	<ul style="list-style-type: none"> May be minimal, given the UK's likely opt-out 	Low	<ul style="list-style-type: none"> Pending confirmation of the UK opt-out, monitor progress of the draft Directive.

		case basis whether or not to be involved. We understand that the UK has decided not to take part in the adoption of the Directive or to be bound by it, which is not surprising given that it has its own intra-corporate transfers procedures under the Points Based System.			
To be confirmed	Draft proposals awaited [COD/2010/0210]	Paternity and Carers' Leave As part of its ongoing actions on the "reconciliation between work, family and private life", the European Commission is to launch a new round of consultations in 2011 on further legislative measures to improve work-life balance, including paternity and carer's leave. It may then issue legislative proposals in 2012.	<ul style="list-style-type: none"> Potential risks for employers cannot be identified at this stage 	Low	<ul style="list-style-type: none"> Await further developments
To be confirmed	Directive on non-EU Seasonal Workers (draft)	In July 2010, the European Commission issued a draft Directive on a common procedure for the entry into and residence in the EU of non-EU seasonal workers, and on the rights of such workers. Ministers held a first exchange of views on 07/10/10. The first reading in the European Parliament is awaited any may take place in April. The draft Directive forms part of the EU's common immigration policy. The UK and Ireland have a form of opt-out from this policy and can decide on a case-by-case basis whether or not to be involved. We understand that the UK has decided not to take part in adoption of the Directive or to be bound by it.	<ul style="list-style-type: none"> Unlikely to have any impact for employers given the UK's apparent opt-out 	Low	<ul style="list-style-type: none"> Pending confirmation of the UK opt-out, monitor progress of the draft Directive.
To be confirmed	Amendments to the Posted Workers Directive (96/71/EC)	In its Work Programme for 2011, the European Commission has indicated that it plans to issue an unspecified "legislative initiative" on the posting of workers. The current 1996 Directive gives workers sent by their employer on a temporary basis to carry out work in another Member State the protection of the basic employment rights applicable in the country which they are posted. The Commission is likely to consult on its proposals during 2011.	<ul style="list-style-type: none"> Potential increased costs of temporary workers if UK employment rights are more favourable than worker's home country 	Low	<ul style="list-style-type: none"> Await further development

KEY EMPLOYMENT CASES			
UK			
Case name	Current Stage	Subject/Issue	Summary
Morgan v The Welsh Rugby Union	EAT	Redundancy/ alternative employment	<p>The Welsh Rugby Union restructured its Coaching Department and created the single post of National Coach Development Manager. It put together a job description and interview plan for the new role and invited the claimant and two other candidates to interview. When the claimant was turned down for it and then made redundant he brought an unfair dismissal complaint, claiming that the decision-making process lacked the objectivity and fairness appropriate to a redundancy dismissal. He pointed out in particular that the successful candidate had not satisfied the criteria set out in the job description for the new role and that the interview panel had not stuck to the job description or the agreed format for the interview. The WRU accepted that it had not done either of these things, but maintained that it had nonetheless followed a fair procedure. Whilst both main candidates were capable of doing the new role, the claimant was simply not the better of the two.</p> <p>The EAT upheld the Tribunal's decision that the dismissal was fair. It said the normal rules on selecting employees for redundancy do <u>not</u> apply when selecting potentially redundant employees for alternative employment. In its view, the latter is more akin to a recruitment process and, as such, employers have much more flexibility as to how and whom they pick. The EAT pointed out that if the WRU had been recruiting externally for the new role, it would not (absent a claim of discrimination at least) have been bound by a job description or a person specification. Further, if an outstanding candidate had emerged who did not meet some aspect of the person specification, it would still have been entitled to appoint him.</p> <p><i>The EAT's observations give employers a clearer idea of what they are able to do when selecting employees for alternative roles. It means that employers are not bound by objective selection criteria as they would be if selecting which of two or more employees to make redundant. This is not to say that employers can adopt an entirely subjective approach. Previous case law makes it clear that the selection process must meet <u>some</u> criteria of fairness, as ultimately the selection for alternative employment is determinative of who is made redundant. Any appointment process should be sufficiently objective to avoid a decision which might be seen as capricious, discriminatory or arising out of favouritism and that makes it advisable to try and stick to any job description as much as possible. To do otherwise is simply inviting any unsuccessful candidates to challenge the fairness of the decision or to argue that the decision was discriminatory. This case will only apply where new or different roles are being created, where the employer can legitimately argue that it is entitled to take a more forward-looking approach, focusing upon the candidate's ability to perform the new role.</i></p>

O'Reilly v BBC	ET	Dual Discrimination	<p>The 51-year-old former Countryfile presenter claimed she had not been offered a presenting role when the show moved to a new primetime slot because of the combination of her age and sex, i.e. because she was a woman over 40. The BBC argued that her claim should fail because the dual discrimination provisions were not in force. The Tribunal disagreed. It said that on the BBC's analysis it would be unlawful for an employer to have policies in place which said that neither women nor people over 40 could apply for a particular job (which would obviously be direct sex and age discrimination) but not one which excluded "women over 40" on the basis that not all women nor everyone over 40 had been excluded. It said that such a result would be "surprising" and would not accord with a Tribunal's obligation to "root out" discrimination. If the claimant had been overlooked for a presenter's job because she was a "woman over 40", said the Tribunal, then this constituted unlawful direct sex and age discrimination because both her sex and her age had clearly played a part in the decision.</p> <p>In the end the Tribunal was satisfied that the claimant's gender played no part in the BBC's decision not to offer her a presenting job on the new show. It said that a man of the same age would also have been overlooked because the BBC was clearly looking for a younger age profile for its presenters, in an attempt to attract a wider audience. The Tribunal accepted that the BBC's desire to appeal to a wider (including younger) audience was a legitimate aim for age discrimination purposes, but that it was not proportionate for it to "do away with older presenters simply to pander to the assumed prejudice of some younger viewers". The BBC would be expected to address that aim through programming content and style before seeking to achieve it by manipulating the age of its presenters. The claimant's age discrimination claim was therefore upheld.</p> <p><i>Whilst only a Tribunal decision (and thus not binding) this case suggests that even though the dual discrimination provisions in the Equality Act 2010 are not yet in force, employers may still face an increase in the number of claims presented on a dual discrimination basis. This does not mean that they need to consider each and every combination of protected characteristics which could arise in order to ensure they do not discriminate unlawfully. Provided they make decisions based on relevant considerations and not on stereotypical or irrelevant factors they should be confident they will not breach the law. Employers should continue to document their reasons for recruitment/promotion/dismissal decisions, just in case they are subsequently challenged.</i></p>
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EU

No relevant cases of interest this month.

CONSULTATION TRACKER

UK (OPEN)

Date Issued	Closing Date	Title (Consulting Body)	Summary	Potential Impact	Risk Rating	Next steps following Risk Rating
27/01/11	20/04/11	‘Resolving workplace disputes: a consultation’ (Department for Business Innovation and Skills) (BIS)	<p>Employment Tribunal Reform</p> <p>Key proposals in the wide-ranging consultation are:</p> <ul style="list-style-type: none"> • Qualifying period for bringing an unfair dismissal claim increased from 1 to 2 years. • A statutory period before a claim can be submitted to the Tribunal where pre-claim conciliation must be considered. • Introduction of fee charging mechanisms in the ET and EAT. • Increased flexibility in the use of strike out powers and Deposit Orders to deal with weaker cases. • Cost awards cap is increased to £20,000. • Schedule of Loss included in ET1 when compensation sought. • Respondents will be permitted to refer to an offer to settle where they are successful in Tribunal, as a means to encourage settlement. • Shortened Tribunal times as witness statements would generally be taken as read. • Introduction of punitive penalties (of up to £5,000) – payable to the Exchequer- for employers breaching fundamental employment rights. 	<ul style="list-style-type: none"> • Potentially increased cost of defending Tribunal claims and potentially increased liability if claims are unsuccessfully defended. This may be offset if potential claimants are deterred from bringing claims (e.g. through mediation) or more pressure for claimants to settle earlier or faces a costs penalty 	<p>High</p>	<ul style="list-style-type: none"> • Await outcome of consultation

			The Government has also published an ‘Employers Charter’ .			
UK (CLOSED)						
*09/08/10	31/10/10	‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (Office for Disability Issues)	<p>The Government has issued its consultation response on the statutory guidance (which does not impose any legal obligations in itself but must be taken into account by Tribunals where it appears to be relevant) to accompany the Equality Act 2010 in relation to the definition of disability and which will replace the current Disability Discrimination Act 1995 guidance.</p> <p>As a result, the draft guidance has been amended to:</p> <ul style="list-style-type: none"> • Provide greater detail on the meaning of “a particular disability” and sharing “the same disability”. • Acknowledge that work-related activities can be “normal day-to-day” activities e.g. interacting with colleagues. • Clarification in the guidance that the Equality Act 2010 covers perceived and associative discrimination. <p>Subject to Parliamentary approval, the new guidance will come into effect on 01/05/11.</p>	<ul style="list-style-type: none"> • Likely to be minimal as there are no substantive changes to the existing guidance 	High	<ul style="list-style-type: none"> • Ensure that relevant staff are aware of the new Guidance coming into force
*08/10/10	30/11/10	‘Women on Boards: Call for Evidence’ (BIS)	<p>The ‘Women on Boards’ Review was published on 24/02/11. Its recommendations include:</p> <ul style="list-style-type: none"> • FTSE 100 boards should aim for a minimum of 25% female representation by 2015. • All Chairmen of FTSE 350 companies should set out percentage of women they aim to have on their boards in 2013 and 2015. • Chairmen should announce their aspirational goals by September 2011. 	<ul style="list-style-type: none"> • Depending on any future steps taken by the Government, may require a review of board composition and/or appointment procedures 	Medium	<ul style="list-style-type: none"> • Await Government response to the Review’s recommendations.

			<ul style="list-style-type: none"> All Chief Executives should review the percentage of women they aim to have on their Executive Committees in 2013 and 2015. Quoted companies should be required to disclose each year the proportion of women on the board, women in Senior Executive positions and female employees in the whole organisation. 			
07/12/10	31/01/11	'The Student Immigration System' (UK Border Agency) (UKBA)	<p>Points-based System: Students</p> <p>As part of the Government's aim to reduce net migration, the consultation document includes proposals to:</p> <ul style="list-style-type: none"> Raise the level of courses students can study. Introduce tougher entry criteria for students other than other than child students Limit the entitlements to work including permitting only on-campus working during the week in term time and increasing the permitted study to work placement ration from 50:50 to 66:33. 	<ul style="list-style-type: none"> Staff shortages/rostering issues where reliance is placed on student labour due to increased restrictions on their permissible work activities 	High	Await outcome of consultation
EU						
There are currently no relevant consultations open.						
EU (CLOSED)						
21/12/10	28/02/11	Review of Working Time Directive	Following its first phase consultation on a review of the Working Time Directive – which found that an urgent review of the EU working time rules is needed and that the working time rules should allow greater flexibility for social partners (e.g the European Trades Union Council) to negotiate on the details of implementation or any amended Directive – the European Commission has launched a second phase consultation with	<ul style="list-style-type: none"> Increased staff costs and rostering issues 	Low	<ul style="list-style-type: none"> Await outcome of consultation

			<p>social partners.</p> <p>The consultation document seeks views on two alternative approaches based on either a “focused” review (concentrating on on-call time and compensatory rest) or a “comprehensive” review tackling a wider range of issues including the maximum 48-hour working week opt-out, better reconciliation of work and family life and clarifying areas where the law appears unclear.</p>			
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CAMPAIGNS

Campaign Sponsor	Campaign	Details
USDAW	‘Supporting Parents and Carers’	As part of its ongoing campaign to improve the lives of workers with either parental or caring responsibilities, USDAW will be holding its annual ‘Spotlight Day’ on 23/03/11.

OTHER NEWS

Unions critical of plan to shift Bank Holiday to October	Unions have criticised a proposal to scrap the May Day Bank holiday in favour of an alternative Bank Holiday in the Autumn – possibly as part of the half-term holiday – and called ‘UK Day’ or ‘Trafalgar Day’. A White Paper is to be published shortly and the Department For Culture, Media and Sport may then hold a public consultation. Any change would not take place before 2013 at the earliest.
More people working overtime than ever before	25 February was ‘Work Your Proper Hours Day’ and according to TUC analysis of official figures, a record 5.26 million people worked unpaid overtime in 2009 – the highest since records began in 1992. Workers in London are most likely to do unpaid overtime (26.3%), followed by the South East (25.3%) and East of England (23.7%).

EVENT	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB
PBS Tiers 1 and 2 limits introduced		01/04/11										
Additional Paternity Leave & Pay Scheme in force		03/04/11										
Revised SMP etc and SSP rates in force		03 & 06/04/11										
DRA notifications must be given by this date		06/04/11										
Right to request flexible working extended to parents of children aged 17 and under.		06/04/11										
Equality Act 2010 positive action provisions in force		06/04/11										
Public Sector Equality Duty in force		06/04/11										
'Resolving Workplace Disputes' consultation closes		20/04/11										
Equality Act 2010 disability Guidance in force			01/05/11									
ICE Amendment Regulations come into force				05/06/11								
Agency Workers Regulations in force								01/10/11				
Amended Parental Leave Directive must be implemented by this date	08/03/12											
Equal Treatment Directive on workers engaged in a self-employed capacity must be implemented						05/08/12						
KEY:												
Risk Rating Low = long-term, no action currently required									** = new Update item			
Risk Rating Medium = medium-term, action may be required									* = amendment to existing Update item			
Risk Rating High = imminent, immediate action may be required												

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