



EMPLOYMENT UPDATE

May 2011

**SQUIRE
SANDERS
HAMMONDS** | LEGAL
COUNSEL
WORLDWIDE

NEW THIS MONTH

- Annual NMW rate increases
- Cases on unfair dismissal – sex discrimination and negligent misstatement

(‘Amendments to existing legislation’ – page 3)

(‘Key Employment Cases (UK)’ – pages 14-15)

UPDATED THIS MONTH

- Equality Act 2010
- Enhanced rights for agency workers
- High Pay Commission Bill 2010-11
- Protection of Freedoms Bill 2010-11
- St George’s Day and St David’s Day Bill 2010-11
- WTR 48-hour opt-out
- Amendments to Pregnant Workers Directive
- Paternity and Carers’ Leave
- Amendments to Posted Workers Directive

(‘New legislation’ – page 1)

(‘New legislation’ – page 2)

(‘Proposed Legislation’ – page 8)

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(‘Proposed Legislation’ – page 9)

(‘EU Legislation’ – page 10)

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(‘EU Legislation’ – page 13)

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 01/10/10	<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>(5) The Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment, and Equal Pay) Order 2011 (SI 0857)</p>	<p>The following key provisions of the Act that are of interest to employers came into force on 1 October 2010:</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. As part of the recent Budget’s ‘The Plan For Growth’ the Government announced that it is to consult on removing this provision from the Act. • Strengthened powers for Employment Tribunals to make recommendations benefiting the wider work force in discrimination case. • Positive discrimination in recruitment and promotion (this provision came into force on 06/04/11). <p>The Government is still considering the best way for the following provisions to be implemented:</p> <ul style="list-style-type: none"> • 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 Act. • Age discrimination outside the workplace. From 	<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 when questions relating to health are relevant, the need to avoid stereotyping (discrimination based on association/dual discrimination) and of the new positive action power in relation to recruitment and promotion • Await implementation of further sections of the Act and consider impact on equal opportunities policies

		<p>April 2012, it will be unlawful to discriminate against someone aged 18 or over when providing services or carrying out public functions. There will be exceptions such as concessions for particular age groups. The Government is currently consulting on the scope of these concessions – see ‘UK Consultation (open)’.</p> <ul style="list-style-type: none"> • Public Sector Equality Duty. 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 came into force on 05/04/11. 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 sufficient information to demonstrate their compliance with the general equality duty, originally due to be implemented on 06/04/11, will now not come into force until July 2011. The Government is currently seeking views on the draft Regulations that will implement the specific duties – see ‘UK Consultations (closed)’. 			
*01/10/11	Agency Workers Regulations 2010 (SI 0093)	<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>The final version of the guidance on the Regulations was published on 06/05/11. It did not contain any significant</p>	<ul style="list-style-type: none"> • Increased payroll costs • Increased turnover of agency staff • Potential difficulty for long-term temporary roles 	High	<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 of equal rights e.g. pay between assignments (what was called the “Swedish Derogation”), outsourcing services or using probationary/training contracts for 12 plus weeks

		changes to the version circulated for consultation in April.			
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					
**01/10/11	National Minimum Wage Regulations 1999 (Amendment) Regulations 2011 (draft awaited)	Annual NMW rate increases <ul style="list-style-type: none"> • Adult rate (workers aged 21 and over) will increase from £5.93 to £6.08, per hour. • Workers aged 18-20 from £4.92 to £4.98. • Workers aged from 16 and 17 from £3.64 to £3.68. • Apprentices from £2.50 to £2.60. 	<ul style="list-style-type: none"> • Increased payroll costs 	High	<ul style="list-style-type: none"> • Review assumptions for wages for workers under 21
2013	Implementing Regulations to the Safeguarding Vulnerable Adults Act 2006 (SVGA) including: The Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Devolution and Miscellaneous Provisions) Order 2010 (SI 1154) Safeguarding Vulnerable Groups (Northern Ireland)	Roll-out of the Vetting and Barring Scheme The first phase of the Scheme was introduced on 12/10/09. From that date: <ul style="list-style-type: none"> • It became an offence for employers 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. The Government has confirmed that the above offence and duty are to be retained.	<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 	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

	<p>Order 2007 (SI 1351)</p> <p>Freedom of Protections Bill 2010-11</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 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>	adults		
05/06/11	<p>Transnational Information and Consultation of Employees (Amendment)</p>	<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</p>	<ul style="list-style-type: none"> • Possible increased complexity of decision-making 	<p>High</p>	<ul style="list-style-type: none"> • Establish whether any procedural changes are required ahead of the June 2011 implementation date

	<p>Regulations 2010 (SI 1088)</p>	<p>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. • 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>	<p>process.</p>		
<p>By 08/03/12</p>	<p>Amending legislation implementing the Revised Directive on Parental Leave (2010/18/EU)</p>	<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). 	<ul style="list-style-type: none"> • Rostering issues re increased statutory period of leave • Additional administration/ procedures re: requests to change terms and 	<p>Low</p>	<ul style="list-style-type: none"> • Await UK implementing legislation and outcome of the 2011 consultation on shared parental leave

		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.	conditions.		
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. In the UK, self-employed workers are not entitled to maternity leave but may be entitled to Maternity Allowance, provided that they have made sufficient National Insurance contributions. The Directive may therefore have some 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.</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
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 	Low	<ul style="list-style-type: none"> Await details of implementing legislation and monitor for future recruitment planning

			the legislation		
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.</p> <p>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	<p>Extended Statutory Maternity Pay etc.</p> <p>Whilst the Additional Paternity Leave and Pay Scheme came into effect for parents of children whose EWC began on or after 03/04/11, no announcement has yet been made on the extension of SMP, Maternity Allowance and Statutory Adoption Pay from 39 to 52 weeks.</p>	<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' (2 nd Reading, House of Commons – 17/06/11)	<p>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.</p> <p>The draft Bill was published on 03/03/11.</p>	<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 (2 nd)	<p>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</p>	<ul style="list-style-type: none"> Rostering issues 	Low	<ul style="list-style-type: none"> Await further progress of Bill

	Reading, House of Commons – 17/06/11)	how any proposed rights will differ to those under existing legislation.			
TBC	Employment 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 – 17/06/11)	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) Bill 2010 -11 (2nd Reading, House of Commons – 21/10/11)	A Private Members' Bill (which means that it is unlikely to become law) to prohibit the use of alternative and positive action in recruitment and appointment processes. This contrasts with the provisions for positive action in the Equality Act which came into force on 06/04/11.	<ul style="list-style-type: none"> If approved may simplify recruitment procedures. 	Low	<ul style="list-style-type: none"> Await printing of Bill prior to Second Reading.
*TBC	High Pay Commission 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 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 – 14/10/11)	A Private Members' Bill (which means that 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 12/05/11)	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 	Low	<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 Lords – (TBA)	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. The draft Bill was published on 26/01/11.	<ul style="list-style-type: none"> • Revised holiday arrangements and rostering issues 	Low	<ul style="list-style-type: none"> • Monitor progress of the Bill.
*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. The draft Bill was published on 03/05/11.	<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 – 09/09/11)	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. The draft Bill was published on 16/03/11.	<ul style="list-style-type: none"> • Could result in lower training costs 	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	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 	Low	<ul style="list-style-type: none"> • Monitor progress of the Bill.

	of Commons – 17/06/11)		successful discrimination claims against employers		
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) and other bodies representing the private and public sectors). A second phase consultation seeking 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 closed on 28/02/11.</p> <p>The social partners will now negotiate on the proposed amendments. If they are unable to reach agreement, the Commission will prepare a legislative proposal to amend the Directive together with an impact assessment. Issue of a draft amending Directive - which would then need to be considered by the European Council and Parliament – is planned for the third quarter of 2011.</p> <p>If the right to opt-out is ultimately ended, the UK would be granted 3 years from the date of the revised</p>	<ul style="list-style-type: none"> Increased staff costs Rostering issues 	Low	<ul style="list-style-type: none"> Await further developments

		Directive to implement it.			
*2013	<p>Amendments to the Pregnant Workers Directive 92/85/EEC (draft)</p> <p>[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 of up 1 years' duration after the end of maternity leave. <p>The EU Council of Employment Ministers rejected the 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</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. 	Low	<ul style="list-style-type: none"> • Await discussion of the proposals by the European Parliament/Member States.

		<p>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>As part of its 'The Plan for Growth', the Government recently stated that it would seek to "prevent costly and regressive changes to maternity rights".</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-case basis whether or not to be involved. We</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.

		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 September 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) [COD/2010/0210]	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 this year with a view to issuing draft legislation in December 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
Eversheds Legal Services Ltd v De Belin	EAT	Sex Discrimination	<p>The claimant was a lawyer at Eversheds. In September 2008 the claimant and his colleague, R, were both put at risk of redundancy. Eversheds' selection criteria included "lock-up" performance, being the amount of time it took for the lawyer to receive payment from a client for any work carried out. At the time of the redundancy exercise R was on maternity leave and it was not therefore possible for Eversheds to measure her current lock-up performance, as she had no active client files. In accordance with its policy for dealing with women on maternity leave, it awarded her the highest score for this criterion. The claimant, on the other hand, was given his actual score. The scoring exercise gave R and the claimant overall scores of 27.5 and 27 respectively. As a result of this the claimant was made redundant. The claimant brought successful sex discrimination and unfair dismissal claims.</p> <p>The EAT upheld the Tribunal's decision that Eversheds had acted unlawfully (and unfairly) in inflating R's score as part of the redundancy process. It acknowledged that women who are pregnant or on maternity leave are in a special position (both the Sex Discrimination and Equality Acts provided for this) which means they will sometimes be treated more favourably than their colleagues (whether male or female), but said that this does not mean that they can be treated more favourably than is "reasonably necessary to compensate them for the disadvantages occasioned by their condition". The approach adopted by Eversheds was not proportionate, as it went beyond what was reasonably necessary to ensure that R did not lose out by being on maternity leave. In its view the most satisfactory alternative would have been to measure the lock-up performance of both candidates as at the last date that R was at work.</p> <p><i>Whilst the EAT's decision is probably sensible, especially on the facts of this case, it does mean that employers continue to be in a very difficult position when it comes to carrying out a redundancy scoring exercise that involves a woman on maternity leave. The principle of proportionality is going to be most relevant if a redundancy scoring exercise involves performance elements (such as hitting specific targets) that cannot be measured because the woman is not there. It means that employers must think about the most appropriate way to measure a woman's performance and not just automatically award her the highest score (not that they would do this anyway). This may involve looking at a period prior to her maternity leave and making a comparison for that period. Provided they address their mind to this issue (and have the notes to support this) they are much less likely to be criticised should the matter end up in Tribunal.</i></p>
McKie v Swindon College	High Court (QBD)	Negligent misstatement	<p>The claimant was employed by Swindon College for a number of years. When he left in 2002 he was provided with a glowing reference. In 2008 he took up a role with the University of Bath which would involve him liaising with and visiting further education colleges, including his former employer, Swindon College. Within a few weeks of starting work at the University, Swindon College's HR Director sent an email to his equivalent at Bath University saying that it would be unable to allow the claimant on to its premises because it had "real safeguarding concerns" for its students and there had been serious staff relationship problems during his employment at the college. Following receipt of this email, the University dismissed the claimant, ostensibly on</p>

the basis that he would be unable to carry out the duties of his new role if Swindon College did not want him on its premises or dealing with its students.

The claimant denied all of the allegations but was unable to bring unfair dismissal proceedings against Bath University, as he had less than a year's service. He therefore brought proceedings against his former employer in the High Court, claiming that its email to Bath University constituted a negligent misstatement and that it was therefore liable to pay him damages for the financial loss he had suffered as a result of losing his job.

It is well established that an employer owes a duty of care when providing references, both to its former employees and to any prospective employers. A failure to do so could result in a claim for negligent misstatement. Here, the Court rejected the claimant's argument that the email in question was a reference. It was, however, prepared to extend the reference principle to other statements made by a former employer. In other words it said that employers may be liable for comments made about ex-employees even if they are not contained in references. The Court held that the College was liable to the claimant for his financial losses (loss of salary, pensions etc.) flowing from his dismissal by the University.

This case is only a first instance decision, but in reaching this conclusion the Judge has extended the existing boundaries of employer liability. Employers must continue to be careful about what they say about ex-employees when giving references (both formal and informal, and both written and oral). This case means that they need to exercise similar care when providing any other communications to third parties about ex-employees. A failure to do so could give rise to a claim for damages for negligent misstatement although in practice ex-employees are only going to bring such claims if they have suffered significant financial costs, bearing in mind the risks of bringing High Court proceedings.

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
03/03/11	25/05/11	'Equality Act 2010: Banning age discrimination in services, public functions and associations – a consultation on proposed exemptions to the ban' (Government Equalities Office).	The Equality Act 2010 contains provisions enabling a ban on age discrimination in the provision of services and public functions. The Government intends to introduce the ban in April 2012, but is consulting about what the exceptions to the ban should be. The proposed exemptions include, for example, age-based concessions such as discounts for over-65s.	<ul style="list-style-type: none"> Risk of discrimination claims from members of the public 	High	<ul style="list-style-type: none"> Await finalisation of draft regulations and consider reminding staff dealing with the public of their obligations/expected standards of service
03/03/11	15/06/11	'Consultation on the Fair Deal Policy: Treatment of pensions on compulsory transfer of staff from the public sector' (HM Treasury)	The consultation examines the current status of the non-statutory 'Fair Deal' policy (which applies to compulsory transfers of staff from the public sector to third party employers (e.g. an outsourcing) - the new employer is required to provide access to a good quality pension scheme for the transferred staff) and asks for comments on whether it should be maintained, altered or withdrawn..	<ul style="list-style-type: none"> Depending on the outcome, could result in reduced pension obligations for the third party employer 	High	<ul style="list-style-type: none"> Await outcome of consultation

UK (CLOSED)

27/01/11	20/04/11	'Resolving workplace disputes: a consultation' (Department for Business Innovation and Skills) (BIS)	Employment Tribunal Reform Key proposals in the wide-ranging consultation are: <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 	<ul style="list-style-type: none"> Potentially increased cost of defending Tribunal claims and potentially increased liability if claims are unsuccessfully 	Medium	<ul style="list-style-type: none"> Await outcome of consultation
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			<p>conciliation must be considered.</p> <ul style="list-style-type: none"> • 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. <p>The Government has also published an ‘Employers Charter’.</p>	<p>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>		
17/03/11	21/04/11	‘Equality Act 2010: The public sector Equality Duty: reducing bureaucracy’ (GEO)	<p>The Government has published a policy review paper seeking views on the new draft regulations imposing specific duties to support better performance of the widened single public sector Equality Duty that came into force under the Equality Act 2010 on 05/04/11.</p> <p>The Government intends to bring the specific duties into force in July 2011.</p>	<ul style="list-style-type: none"> • Increased reporting and administrative tasks to comply with the duties 	High	<ul style="list-style-type: none"> • Await outcome of review
EU						
There are currently no relevant consultations open.						

EU (CLOSED)

. There are currently no relevant closed consultations.

CAMPAIGNS

Campaign Sponsor	Campaign	Details
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No campaigns identified of interest this month.

OTHER NEWS

Call for Employment Tribunal league tables

As part of its submission to the recent Government consultation on the reform of the Tribunal system, the Confederation of British Industry has said that the Tribunal system is failing both claimants and employers and has called for a faster, fairer system that costs less for both sides. The CBI argues that, in order to deliver this, measures need to be introduced to: improve the efficiency and consistency of tribunals; "weed out" weak claims; and encourage settlement at an early stage.

It also added that league tables for Employment Tribunals would show how different regions and Judges perform against set standards, which would encourage best practice and greater efficiency.

EVENT	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR
Equality Act 2010 disability Guidance in force	01/05/11											
Banning age discrimination in services etc consultation closes	25/05/11											
ICE Amendment Regulations come into force		05/06/11										
Fair Deal Policy Treatment consultation closes		15/06/11										
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 Risk Rating Medium = medium-term, action may be required Risk Rating High = imminent, immediate action may be required								** = new Update item * = amendment to existing Update item				

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