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Employment Matters

When Do the 'Self-Employed' Qualify for National Minimum Wage and Holiday Pay?

This is a hot topic at the moment with three large employers under scrutiny for their pay structures:

1. Uber, the transport company, has been taken to the employment tribunal to face a claim made by two of its drivers, or 'driver partners', that they should be treated as workers, rather than self-employed. The test for a 'worker' is provided for in the Employment Rights Act 1996 and requires work to be done either under a contract of employment or any other contract where the work is done personally and not by a business being run by the worker in question. Obtaining worker status would grant the drivers more employment rights and would protect them from being paid less than the minimum wage, one of the branches of the claim being made. Uber has over 30,000 driver partners in London alone and the case is likely to have large impact on this style of business. Watch this space for updates.

2. Meanwhile, Deliveroo, the restaurant delivery app and firm, has written a clause into its contract that its self-employed delivery drivers cannot bring similar claims against the company to contend that they are either an employee or worker. It's probably only a matter of time before such a provision is challenged, however.

3. Another employer in the firing line is Sports Direct, which has recently admitted that warehouse employees and other staff were effectively paid less than the national minimum wage due to harsh wage docking penalties for being late and being subject to security checks after they'd clocked off. Following negotiations, Unite the Union reported that workers at Sports Direct's Derbyshire base will receive back-pay of about £1m for the missing wages.

What Should Employers Do Next?

Check to make sure people working for you are properly classified as employees, workers or self-employed. Also, stay tuned for the results of the employment tribunal with Uber.

Remember: A Provision, Criterion or Practice Can Be Justified

The Employment Appeal Tribunal (EAT), in the case of *XC Trains Ltd v CD and ASLEF and others*, considered whether indirect discrimination arose when a train company rejected flexible working requests made by a train driver employee who was a single mother. The EAT upheld the earlier tribunal decision in part, holding that the requirement for employees to work rosters with anti-social hours and weekends put women at a particular disadvantage and therefore amounted to indirect sex discrimination.

However, importantly, the tribunal had failed to consider whether the provision, criterion or practice (PCP) that all drivers had to work at least 50% of rosters could be justified by the PCP being a proportionate means of achieving a legitimate aim. The case was remitted back to the Employment Tribunal to determine whether the PCP was proportionate to the legitimate aim of providing a rail service under the company's franchise agreement and considering the rights and needs of the other rail workers.

What Should Employers Do Next?

When turning down flexible work requests, businesses will need to ensure that there are legitimate reasons for doing so, and should consider whether the legitimate needs they are seeking to rely upon outweigh the potentially discriminatory effect of any PCP.

Whistleblowing Workers

In the case of *McTigue v University Hospitals Bristol NHS*, the Employment Appeal Tribunal (EAT) concluded that an agency worker that made a disclosure to its hirer could be a whistleblower, and therefore should be afforded the protection that such a position requires. Ms McTigue was an employee of an employment agency which supplied her to the respondent in this case. After Ms McTigue made a disclosure about malpractice to the respondent, her assignment was terminated. She argued that this was an unlawful detriment consequent upon her disclosure, which would require her to show that despite the fact that she was employed by the agency and not the respondent, she could still qualify as a whistleblower.

As well as her employment agreement with the agency, unusually, Ms McTigue had a contract with the respondent, dictating areas such as standards of behaviour and adherence to certain policies. S43K of the Employment Rights Act 1996 allows a whistleblowing claim to be brought by a worker against an end user if the terms of their contract are substantially determined by the agency, end user or both. The EAT held that the Employment Tribunal had failed to consider whether both parties had determined Ms McTigue's terms, and so the case was remitted back to the tribunal to consider this point.

What Should Employers Do Next?

Treat disclosures by agency workers in the same way as you would from your own employees and ensure that no retaliatory actions are taken against them.

Government Statement on EU Nationals in the UK

Finally, a small piece of employment-related Brexit news for you. The Cabinet Office, Home Office and Foreign & Commonwealth Office have published a webpage with a statement on the status of EU nationals in the UK. In it they state: "When we do leave the EU, we fully expect that the legal status of EU nationals living in the UK, and that of UK nationals in EU member states, will be properly protected. The government recognises and values the important contribution made by EU and other non-UK citizens who work, study and live in the UK".

The webpage also contains questions and answers for those who may be affected, but the position is very much that there has been no change to the rights and status of EU nationals in the UK as a result of the referendum.

What Should Employers Do Next?

If any of your workforce are worried about their future in the UK, point them in the direction of the statement for reassurance.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: Christopher Hitchins at +44 (0) 207 776 7663 or Sarah Bull at +44 (0) 207 770 5222.

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