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SOLUTIONS

Your monthly update from Croner July/August 2016

A word from our CEO

Our mantra at Croner is “that we maximise business outcomes” for our clients and that we are truly “better together”. We know from experience that with our help, clients become more successful.

Why is that? Well, no one starts a business because they want to get bogged down with the intricacies of employment or health & safety law. People go into business to make their visions become a reality, to create something new, to offer something different, to develop a great product or sell a great service and, of course, to make money. That's why we went into business; I've spent my entire career doing something I really love and, almost twenty years later, still feel passionate about.

But the reality is that many business owners find themselves spending vast amounts of their precious time dealing with legislation; issues they don’t understand, they don’t want to handle or both. That’s where we come in.

Here at Croner we love employment and health & safety law; it’s all we do and have done for the last seventy years. Operating as the leader in this market, there’s very little we haven’t seen; and with our help and expertise, our clients can focus on what they do best - grow and maximise their business.

Share your story with me

We want to learn more about our clients. We want to hear how about your business and why it’s successful. We want to know how you’ve grown, what drove you to go into business, what's happened along the way and how we are better together. We have more than 5,000 clients and we want to showcase how fantastic and diverse they are by telling their stories in this publication, Solutions newsletter (It goes out to more than 20,000 readers – great for your marketing and raising your profile. If you're reading this, then someone else is too).

So send me an email at media@croner.co.uk – let us know briefly what your business does and why you’re proud of it, then we’ll message you back and work with you to write a feature on your business – don’t worry we’ll do all the hard work!

We are proud to assist our clients in maximising their business outcomes and remain the professional’s first choice since 1941.

We are better together so let’s share it.

Kind regards,

Alan Price
CEO, Croner Group Limited

In this issue:

Islamic headscarves in the workplace

The case of Bougnaoui v Micropole SA Case C-188/15, by Amanda Beattie

In the case of Bougnaoui v Micropole SA, an Advocate General provided an opinion on whether it was discriminatory to dismiss an employee for continuing to wear an Islamic headscarf, notwithstanding a direct instruction not to do so and whether the employer's decision to dismiss could be defended on the grounds of "genuine and determining occupational requirement under Article 4(1) of the EU Equal Treatment Framework Directive ("the Directive").

Background

Ms Bougnaoui worked for Micropole SA as an engineer in France. During the recruitment process, it was expressly made clear that she could not wear her headscarf due to the customer-facing nature of the role. Subsequently a customer visiting the premises made a complaint and she was asked not to wear it in future. However, Ms Bougnaoui refused to do so and Mircopole dismissed her.

Ms Bougnaoui issued an unsuccessful claim of religious discrimination at the French Labour Court. She appealed the decision, which was also dismissed, and then appealed to the 'Cour de Cassation' who referred it to the ECJU.

ECJU opinion

The Advocate General's opinion was that the dismissal was directly discriminatory on the grounds of religion, as it was linked to a prohibition on wearing religious apparel and the prohibition on direct discrimination in the Directive covers the manifestations of religion or belief, which the headscarf was. Therefore, Ms Bougnaoui was treated less favourably because of her religion than another individual would have been treated in a comparable situation.

In relation to the defence of 'genuine occupational requirement', the Advocate General outlined that although she accepted that the difference in treatment was on the grounds of a 'characteristic related to a religion or belief' within Article 4(1), she did not agree that it was a 'genuine occupational requirement'. The Advocate General considered that this defence could only be available in very limited circumstances, such as when there are significant health and safety concerns and it cannot be used to justify a blanket exception for all activities.

The Advocate General considered that Mircopole were relying on commercial interests, as it was to appease their customer complaint and direct discrimination cannot be justified on the basis of financial loss. Therefore, Mircopole's conduct of dismissing Ms Bougnaoui for refusing to remove her headscarf was directly discriminatory on the grounds of religion and could not justified as it was not a genuine occupational requirement.

However, this opinion is contrary to the opinion of another Advocate General, who in the case of Achbita v G4S Secure Solutions NV [2016] (Case C-157/15), determined that prohibiting wearing an Islamic headscarf could be justified on the basis of the general policy of neutrality and which was shown to be applied to all visible signs of religious or philosophical beliefs. Therefore there still remains an uncertainty of what the exact position is in relation to this issue and how it can or cannot be justified.

Did you know?

In the case of British Gas Trading Ltd v Lock – the Employment Appeal Tribunal upheld the decision that a worker's commission can be included in their holiday pay calculation, this decision was appealed to the Court of Appeal and the hearing took place on 11th July. The Judgment is expected to be delivered in the next two to three months.

David Davis, the Secretary of State for Exiting the European Union has indicated the Government's attitude to employment law post-Brexit and has advised that employment legislation in the UK is not a target for reform.

There is a new illegal working offence which came into force on 12 July, pursuant to the Immigration Act 2016, this extends the current criminal offence of knowingly employing an illegal migrant to the circumstance whereby an employer has a reasonable cause to believe that a person is an illegal worker.

Maximum working temperatures?

MPs have tabled an early day motion (EDM) calling for the introduction of a maximum working temperature, beyond which employers would have a statutory duty to introduce effective control measures.

The EDM noted that at present there is no statutory maximum temperature at which employers need to introduce control measures, such as breaks, access to water or air conditioning.

The Approved Code of Practice (ACOP) to the Workplace (Health, Safety and Welfare) Regulations 1992 suggests the minimum temperature in a workplace should normally be at least 16°C and if the work involves rigorous physical effort, the temperature should be at least 13°C.

The MPs who tabled the EDM have argued that there should be a corresponding upper temperature limit, given that excessive heat in the workplace is responsible for heat stress and thermal discomfort, and can impact seriously on health, wellbeing and productivity.

The EDM calls for a maximum working temperature of 30°C or 27°C for those doing strenuous work, beyond which employers would have a statutory duty to introduce effective control measures.

What does Brexit mean for Health & Safety?

By Stephen Thomas

Remain campaigners, Trade Unions and the Labour Party itself prior to the Brexit vote were concerned that worker's rights would be eroded or removed; conversely Leave proponents were playing down the impact that leaving the EU could have, promoting the fact that the UK would have complete sovereignty over its laws. But what exactly will happen to health & safety law post-Brexit?

H&S law fit for purpose?

Roughly two thirds of our Health and Safety laws are borne out of EU legislation, the requirements of which are implemented through UK-specific Regulations. Reports such as 2010's Government-commissioned report "Common Sense, Common Safety and the subsequent Löfstedt review in 2011 have shown that UK H&S law is broadly fit for purpose therefore it is unlikely that the majority of our laws would be significantly changed.

What changes could we see?

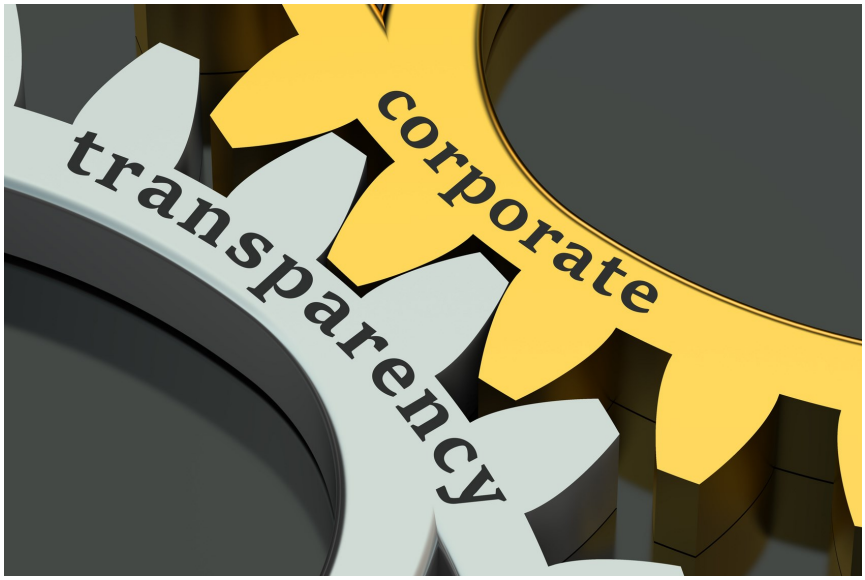
Realistically any immediate changes will focus on eliminating contentious 'regulatory burdens' where employers feel that they are disadvantaged compared to other countries or the cost of compliance is too great compared to the risks.

Possible areas of focus include:

- The Working Time Regulations 1998, which are estimated by the Open Europe think tank to cost the economy £4.4bn each year
- Directive 2006/25/EC - artificial optical radiation, the requirements of which the UK has struggled to implement
- The Construction, Design and Management Regulations 2015 which were amended to include temporary structures and private households within the scope of 'construction work' in order to comply with EU Directives
- The requirement for Employers to meet the cost of eye and eyesight tests for Display Screen Equipment work.

The Small Business, Enterprise and Employment Act 2015

By Liam Holland



The Small Business, Enterprise and Employment Act 2015 ("the Act") is a wide-ranging piece of legislation dealing with many areas of law. As the name implies, it has a corporate slant and this article will give a brief summary of some of the more important changes for companies. While the Act also deals with aspects of childcare, education, employment and access to finance, these matters are beyond the scope of this article.

Corporate register

The Act, importantly, introduces a new corporate register of persons with significant control ("PSC register"). The requirement to keep a PSC register applies to almost all incorporated entities including limited liability partnerships but not dormant companies.
Schedule 3 amends the Companies Act 2006 and is expanded upon by The Register of People with Significant Control Regulations 2016 (for companies) and the Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016 (for Limited Liability Partnerships). If a business is required to maintain a PSC register and is uncertain as to which individuals are included then they should seek professional advice but, in brief, a person with significant control includes any person or corporate entity which directly or indirectly owns at least 25% of the shares, or who directly or indirectly controls at least 25% of the voting rights, or who directly or indirectly has the right to appoint or remove the majority of the directors, or who has the right to exercise (or actually exercises) significant influence or control over a company either personally or through the activities of a trust or firm which itself meets one of the other conditions. Slightly different, albeit similar, conditions exist in respect of LLP's. Companies and LLP's will be required to keep and
maintain their own PSC register from 6th April 2016 and, further, will be required to provide this information to Companies House from 30th June 2016 in their annual statement of confirmation (which replaces the old annual return). The company may either maintain its own PSC register at its registered office, or keep the register centrally with Companies House. In any event a company must inform Companies House of the location at which its PSC register is available for inspection. It is also worth noting that there is an obligation on the company, or other corporate entity to which these provisions apply, to take reasonable steps to identify people they know or suspect to have significant control.

Natural people

Other changes introduced by the Act introduce what effectively amounts to a prohibition on the use of corporate directors. From now on, directors will have to be natural people. It is expected that there will be some very limited exceptions to this rule, from October 2016. Further, the statutory duties owed by directors are now extended to apply, to the fullest extent possible, to shadow directors. The Act also prohibits the use of bearer shares and requires existing bearer shares to be cancelled after a 'grace period' has expired.

Summary

All of the above measures are designed to increase corporate transparency in light of a current climate of distrust around corporate activities by the public. The Act also introduces some streamlining of the registration and filing requirements for companies such as the replacement of the annual return with a statement of confirmation with an option to indicate nothing has changed since the last statement and a simpler company registration process to be implemented by Companies House.

Student work placement schemes:

What you need to know

Eligible scheme

Those under school leaving age may only take part in schemes if the arrangements have been made as part of the student's education, by the Local Education (LEA) or school's governing body - so you need to ensure that is the case, preferably in writing, with the school supplying the student.

Health and Safety

A proper preparation and briefing would be useful, especially given the Management of Health and Safety at Work Regulations 1999, which require employers to identify key hazards/risks to the young person and how they will endeavour to reduce or eliminate these risks before they start work. As such you will need to know some information about the student before they begin - they may have special requirements which increase the level of risk.

Work experience for 14–16 year olds does not fall within the rules on child employment. However, that work experience must still comply with the rules on the employment of young persons i.e. the child on work experience has the protection as if a young worker (per the Education Act 1996, s 560) in relation to matters such as working time and Health and Safety.

Briefing the student at the outset of a placement is advisable and should include areas such as:

- ensure the student is advised of who their line manager will be, given any safety policies and literature, advised of key personnel and prohibited or hazardous areas/work tasks;
- workplace hazards such as machinery, substances or lifting requirements and policies should be discussed, as well as general housekeeping on H&S, precautions, safety equipment and PPI to be used and any special hygiene requirements to be complied with should be advised.
- General emergency procedures e.g. fire/accident reporting/ evacuations procedures should be set out to the student.

Working Time

Regarding the employment of young people, while doing that work experience, a young person is defined as someone who is over compulsory school age but under the age of 18. A person is over 'compulsory school age' on the last Friday in June in the school year in which he has his 16th birthday (Education Act 1996, s 579(1)).

Young workers are usually entitled to:

- a 30 minute rest break if they work more than 4.5 hours (if possible this should be one continuous break)
- daily rest of 12 hours
- weekly rest of 48 hours

The student should not be asked to work long or unnecessarily unsocial hours, as the Working Time Regulations 1998 also apply to work experience students and they should not be asked to work for more than five consecutive days out of seven.
Payments

Work experience is part of the students' education; employers should make no payment for work performed, whether to students, the school or the LEA. In addition, school-age work experience students are not eligible for the National Minimum Wage ("NMW") and work experience placements of less than a year's duration undertaken by students as part of a UK-based further or higher education course are also specifically exempted from the NMW regulations.

Data Protection and Confidentiality

Obligations under the Data Protection Act 1998 are the same for work experience and other volunteers as they are for employees. Organisations should adopt the same policies and procedures in relation to data protection for work experience students and other volunteers as they do for paid staff.
Dependent upon the tasks the student will be involved in, you may require to ensure they are made aware of their obligations of confidentiality (preferably in writing with them signing and dating an acknowledgement and understanding of same) - for example if involved in work for customers with specific confidentiality requirements or with personal data and so on.

Insurance

Lastly, it would be advisable to check on your employers insurance. The principal risks of students visiting the workplace are injury to the student or others on/who may enter the premises, loss of employer's property, or other property (student's or customer's for example). As such your insurer (e.g. for public liability/ employers liability/material damage liability and employee cover) may only provide cover if they are advised in advance and of the placement and type of activity planned for the student (i.e. disclosing material facts to the insurer under the policy terms). You should check this directly with your insurer. Most insurers will require your students to be treated as employees for the insurance purposes and as such compliance with the Education Act 1996 (see above) will be necessary.

Legislation Tracker

Area	Legislation	Details	Date
Employment Appeals Tribunal	The Criminal Justice and Courts Act 2015 (Commencement No. 4 and Transitional Provisions) Order 2016 (SI 2016/717)	Section 65 of the Criminal Justice and Courts Act 2015 becomes effective, which provides in relation to EAT judgments made on or after this date, there is a power to appeal directly from the Employment Appeal Tribunal to the Supreme Court in specific circumstances.	8 August 2016
Whistleblowing	Accountability and Whistleblowing Instrument 2015 (FCA 2015/46)	New rules on whistleblowing for the financial sector, which includes an obligation to appoint a whistle blowers' champion and for all UK-based staff and their managers to receive training on blowing the whistle.	7 September 2016
Pay	Equality Act 2010	Employers are required to publish information showing whether or not there are differences in pay between male and female employees. The new requirement will apply to private companies and voluntary sector organisations that employ 250 or more employees.	1 October 2016
Migrant Workers		The minimum salary threshold for tier 2 migrant workers increases to £25,000 in autumn 2016, rising to £30,000 by April 2017. There are also changes to the Tier 2 route, including introduction of the Immigration Health Surcharge.	Autumn 2016
Exit payments	Draft Repayment of Public Sector Exit Payments Regulations 2016	Employees in the public sector with annual earnings of £80,000 or more are required to repay exit payments where they return to work in the public sector within one year of leaving.	Potentially in 2016
Immigration	Immigration Act 2016	Sections 77 to 84 make provision for an English language requirement for public authority workers in customer-facing roles. The Act will be brought into force by regulations.	Potentially in 2016
Apprenticeship	Finance Bill 2016	An apprenticeship levy of 0.5% of their wage bill to be paid by all large employers in all sectors to fund apprenticeships from 6 April 2017.	6 April 2017
Pay	National Minimum Wage	Future Changes to the hourly rate of the National Minimum Wage and the National Living Wage will take place at the same time in April each year.	April 2017
Tax Free Childcare	Draft legislation: The Childcare Payments (Eligibility) Regulations 2015	Working families where both parents work and each parent earns less than £100,000 per year are eligible to receive 20% of their yearly childcare costs.	Early 2017

If you have any questions about any of the upcoming changes in legislation, please contact our Advisory Service on **0844 856 5130**

Your questions answered

Q: I have an employee who took what we say was an unauthorised absence – we do not want to pay him for this absence, however are we obliged to?

A: If it is certain that the absence was unauthorised, there is no requirement for you to pay this employee for that period. For periods of unauthorised absence, it is not generally a breach of contract to not pay the employee nor is it a unlawful deduction from wages, as the payment would not be "properly payable" as provided by the Employment Rights Act 1996.

Q: I have been asked to provide a reference for one of my ex-employees – I do not mind doing it, but what are my legal duties if I do supply a reference?

A: As an employer, you have a 'duty of care' to ensure that the reference is true, accurate and fair and is not misleading or could give a misleading impression. If you give a negligent or careless reference, then the recipient of the reference can bring a claim against you for any financial losses they have suffered as a result of the reference. Similarly, you also owe a duty of care to your ex-employee to ensure that you have prepared the reference with reasonable care, which includes ensuring that the information in the reference is not inaccurate or misleading. If it is, then the ex-employee could make a claim against you if they suffer any financial losses because of it (i.e. they fail to secure a new job because of the reference you provide).

Q: I have heard that employees have a right to make a request for time off for training or study – is that right?

A: Since April 2010, there has been a statutory right for an employee to make a request for time off for training or study if the following criteria Is satisfied:

- The employer has employed an average of 250 or more employees over the previous 12-months;
- The employee must have been employed continuously by the employer for at least 26 weeks.

The right does not apply to individuals who are of compulsory school age employees aged 16 and 17 who are obliged to participate in education or training under the terms of the Education and Skills Act 2008 (or who have reached 18 and are still pursuing a course for these purposes), agency workers and employees who are aged between 16-17 years old and qualify for the right to time off for study or training under section 63A of the Employment Rights Act 1996.

Q: I have a number of employees who are EU Nationals, what is the impact going to be for them and me as their employer post Brexit?

A: There are no immediate changes to EU Nationals in relation to the right to live and work in the UK. This is also the position for Nationals of other countries of the European Economic Area ("EEA"), (such as Norway and Iceland) and Switzerland.

Britain will have a two year period in which to negotiate the terms of the country's withdrawal from the EU, which starts when Britain triggers article 50 of the Treaty of the European Union. This has not happen yet and it is not clear when this will specifically happen.

Q: I am conducting a grievance hearing and the worker has informed that she is bringing a colleague to this hearing, I know this colleague and she has a reputation of being very outspoken, therefore what will colleague's role will be at hearing.

A: The Employment Relations Act 1999 sets out what a companion to a disciplinary or grievance hearing is permitted to do. The companion is allowed to address the hearing to put the employee's case, respond on the employee's behalf to any view expressed at the hearing and sum up the case. The companion must also be permitted to confer with the employee during the hearing if necessary.

The companion does not have the right to answer questions on behalf of the employee, or prevent the employer explaining its case nor can they address the hearing if the employee does not wish them to do so.

Contact Us

If you have any questions about the topics covered in Solutions please call **0844 856 5130**.

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