EMPLOYMENT LAW SUPPORT

PROVIDING EMPLOYMENT LAW SOLUTIONS

February 2019 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

In this month's edition, we report on:

- Variation of employment contracts – working under protest?
- Employing foreign nationals – How will this be affected by Brexit?
- Are restricted covenants in unsigned contracts enforceable?

Variation of employment contracts – working under protest?

If an employee works without protest after a company imposes a variation to their contract, can we assume they have accepted it?

The recent Court of Appeal case of *Abrahall v Nottingham City Council* said not necessarily.

When Nottingham City Council tried to implement a single pay system to regularise it and a two year pay freeze, the court found that just because employees did not take industrial action, employees' acceptance should not be inferred from the lack of action.

The Court of Appeal set out a number of helpful principles on whether acceptance should be inferred, including:

- the question of acceptance is to be determined objectively;
- acceptance of a variation of contract should only be inferred from conduct where that conduct means that there is no other reasonable explanation apart from acceptance;

- where the variation is wholly disadvantageous, acceptance is less likely to be inferred;
- collective protest may be sufficient to negate the inference of acceptance, even if the individual employees say nothing;

Employers: If you wish to vary a major contract term, make sure you have adequate consultation and try to reach an agreement.

Contact us: We can advise on varying terms and conditions of employment.

Employing foreign nationals – How will this be affected by Brexit?

With all the political chaos after the rejection of the Brexit plan by Parliament on Tuesday 15th January 2019, there is concerns and confusion to the business community employing foreign nationals.

How does this affect the position of employing or continuing to employ EEA nationals, especially if there is a "no deal?" The alternative of sponsorship of overseas workers through the UK's Points-Based System, is complicated, expensive and long drawn out.

If the withdrawal agreement had been approved, then there would have been a transitional period running from 29th March 2019 to 31st December 2020 and following that from 1st January 2021 there would have been more stringent immigration control over EEA and non-EEA nationals.

The Prime Minster had indicated that during the transition period EEA nationals currently in the UK would continue to be able to work and live in the UK as they do now. But during this transition period, EEA nationals would need to ensure that they apply for settled or pre-settled status by no later than 30th June 2021.

It seems unlikely the Government would go back on matters related to settled or pre-settled status under its new plans (to be debated before Parliament) hence we set out an explanation of this status.

Settled status would be available to those with five years continuous residence in the UK prior to 31st December 2020. EEA nationals moving into the UK prior to 31st December 2020 but who have not yet lived in the UK for five years, would be eligible for pre-settled status. This gives them the right to remain until they reach the five-year mark, when they can apply for settled status. Permanent residence documents will no longer be valid after 31st December 2020.

Settled status is not the same as permanent residence. EEA nationals who fail to apply for settled status / pre-settled status before the deadline may no longer have a legal right to live in the UK.

Applications for the settled status scheme will be open by 30th March 2019 and the deadline to apply for settled status would be 30th June 2021. Criminal background checks will also be conducted for applicants over the age of 18.

The following non-EU family members will also be eligible for settled status:

- Spouses, civil partners and unmarried partners (with residence cards)
- Children, grandchildren or great-grandchildren under 21
- Children over 21 who are dependants
- Parents, grandparents or great-grandparents who are dependants
- Dependant relatives who hold a residence card
- It is important to note that the scheme currently only covers EU nationals. Separate agreements are likely to be agreed with the governments of Norway, Iceland, Lichtenstein and Switzerland and it is expected that nationals of these countries will be able to participate in the scheme.

EEA nationals can apply for permanent residence if they have lived and worked lawfully in the UK for a continuous period of five years. Permanent residence is confirmation that the EEA national would have indefinite leave to remain in the UK and are permanent residents of the UK. It would then be very difficult for the UK Government to go back on this status.

For EEA employees who have not worked in the UK for five years, they can also look to applying for a document called an EEA Registration Certificate. This certificate confirms their status under EU law and that they have a right to reside and work without immigration control, but the better route would be pre-settled status.

No Deal Brexit.
It seems likely that EEA nationals already in the UK by 29th March 2019 will be able to remain, the implication being that employers will not need to make additional right-to-

work checks on EEA nationals. It is unclear whether free movement will continue for EEA nationals arriving post-Brexit.

It appears that the UK government is not ready to introduce a new immigration system for EEA workers and their families, if there is "no deal" and the likelihood is that the 'settled status' and 'pre-settled status' provisions would still apply, regardless of the outcome of the Brexit negotiations. However, this could change if the EU does not agree to a transitional period on its side in the event of a "no deal" and impose immigration controls on British nationals coming into the EEA for work after Brexit, and the UK Government then look at a tit for tat response.

Employers: Get your EU employees to review their UK immigration status if they wish to continue working in the UK after June 2021.

Contact us: If you wish to discuss any of these issues.

Are restricted covenants in an unsigned contract enforceable?

We often get asked this question when an employee has moved on to work for a competitor. The starting point is where employees have signed their employment contracts, they are bound by its terms even if they do not bother to read it.

To decide if an unsigned contract would be enforceable, the court will consider the behaviour of both the employer and employee. Such as, has salary has been paid and the employer and the employee conducted themselves within the terms of the contract to give rise to presumed acceptance of the terms?

Where the contract remains unsigned and the employer wishes to enforce restrictive covenants which prevent an employee doing something after they leave, case law suggests that there are certain circumstances when terms in an unsigned contract may be enforceable. Each situation will be looked at on the particular facts.

In the case of *FW Farnsworth v Lacy 2012*, the employee was promoted to a senior position and later offered a new employment contract which incorporated new benefits to include private medical insurance and pension contributions. New post termination restrictive covenants, such as a non-competition provision was added.

The employee never signed the new contract but did opt in for two new benefits offered. After the employee left and started working for a rival company in breach of the restriction the court found by taking the benefits the employee was bound by the new restrictions as well.

Employers: To prevent uncertainties, follow up on unsigned contracts and when updating contracts meet with the employee to obtain their signature.

Contact us: We can help with contracts of employment and post-termination restriction clauses.

For more information or assistance Email: enquiries@employmentlawsupport.co.uk

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