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## May 2019 Update

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

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In this month's edition, we report on:

- Brexit update – employee status
  - What are the pitfalls of dismissing an employee entitled to long-term disability benefits?
  - Positive Action in Recruitment – a reminder of the rules
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### Brexit update – employee status

EU, EEA or Swiss citizens can now apply, at no cost, to the EU Settlement Scheme to continue living in the UK after free movement ends.

The proposed deadline to apply is currently 30 June 2021 in a deal scenario.

If the UK leaves the EU without a deal, applicants will need to have been living in the UK on or before the date the UK leaves the EU (Brexit day) and apply by 31 December 2020. Brexit day is now set for 31 October 2019. Though the aim is to leave the EU before the European Parliament elections on 23 May 2019.

There is a two-step, application process:

Step 1 – Identity: The Home Office needs to verify the applicant's identity by a valid passport or national identity card.

Step 2 – Provide their National Insurance (NI) number to confirm residence.

If the applicant does not have an NI number, they can provide:

- an annual bank statement showing at least six months of payments received / spending in the UK
- an employer's letter confirming employment
- a council tax bill;
- a letter or certificate from a school, college or university showing enrolment dates;
- an invoice for school, college or university fees;
- a residential mortgage statement or rental agreement, and evidence of payment; or
- a letter from a registered care home.

An applicant can't choose whether to apply for settled status or pre-settled status. This will depend on how long the applicant has been living in the UK when they apply.

An online decision should be made within a couple of weeks. No physical document is produced.

#### Settled status

An applicant will usually be granted settled status if they have lived in the UK for a continuous five-year period (known as "continuous residence").

This means that the applicant has lived for a least six months in any 12-month period, over a total period of five years in a row.

#### Pre-settled status

If an applicant does not have five years' continuous residence, they will usually get pre-settled status. A person with settled or pre-settled status will be able to work and travel in and out of the UK.

**Employers:** you may wish to communicate and assist any staff regarding this process, although it is still the individual responsibility to make an application.

**Contact us:** if you need any further guidance.

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## What are the pitfalls of dismissing an employee entitled to long-term disability benefits?

In a recent case of *ICTS (UK) Ltd v Visram*, the Employment Appeal Tribunal (EAT) held that the employer was contractually obliged to provide an employee with long-term disability benefits until he was able to return to his old position and not just until he was able to work again in any role.

This shows the potential risk of dismissing an employee while they are entitled to long-term disability benefits under an employer's permanent health insurance scheme.

In this case, Mr Visram's contract of employment included a long-term disability benefits plan which provided that benefits would start after 26 weeks of absence and continue until the "earlier date of your return to work, death or retirement".

The Policy stated the employee would benefit for as long as he was "incapacitated by an illness or injury which prevents him from performing his own occupation".

The EAT dismissed the employer's appeal and said that based on the wording of the insurance policy, that "return to work" meant a return to the work performed when going absent due to illness. The employee was entitled to compensation.

**Employers:** the definition of incapacity is key in determining whether an employee is entitled to receive any benefits under the policy. Check the wording very carefully.

**Contact us:** if you are unsure about how to handle an employee on long-term sickness.

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## Positive action in recruitment – a reminder of the rules

Mr Furlong was a white, heterosexual male without a disability who interviewed for a job with Cheshire Police and was unsuccessful.

At the time of the interview, the Force wished to diversify its workforce as it was underrepresented by certain groups. A new policy of assessment was implemented for its 2017/2018 intake of police constables, with either a pass or fail.

The Force then offered jobs to all female, black and minority ethnic, LGBT and disabled candidates who passed ahead of other candidates (who had also passed but did not fall within these underrepresented groups).

Mr Furlong claimed the Force had discriminated against him as it had unlawfully treated candidates with protected characteristics more favourably, despite the fact that the other candidates were better qualified.

Positive action in recruitment can only be used in a "tie-break" situation. The Equality Act 2010 allows positive action if all of the following conditions are met:

- The employer reasonably thinks the protected group is underrepresented.
- Both people are equally qualified.
- People who share the protected characteristic are not treated more favourably in connection with recruitment or promotion.
- Taking the action is a proportionate means of overcoming or minimising disadvantage in respect of a person with a protected characteristic.

For example, it would be direct discrimination to offer a job to a woman who is underrepresented in a company's workforce where there was a male candidate who was more qualified.

**Employers:** this is a reminder that positive action in recruitment should only be used in a true tie-break scenario, where candidates are equal.

**Contact us:** we can assist with interview support and selection

**For more information or assistance Email:** [enquiries@employmentlawsupport.co.uk](mailto:enquiries@employmentlawsupport.co.uk)

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Business Forum

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