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## August 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:

- Agency workers are they entitled to be offered the same hours as employees?
  - Right to Privacy – WhatsApp
  - Calculating holiday pay for term time workers
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### Agency workers are they entitled to be offered the same hours as employees?

The Agency Workers Regulations state that after agency workers have been there for 12 weeks, they are entitled to the same basic conditions that employers give to permanent employees who carry out the same role.

A recent case looked at whether agency workers, after 12 weeks, have the right to be offered the same hours of work as employees.

The Court of Appeal found that employers did not. Although the 2010 Regulations ensured that agency workers are offered the same basic rights as permanent employees, including but not limited to basic pay, annual leave and rest breaks, this doesn't extend to hours of work.

There is nothing to say that agency workers should be entitled to receive the same hours of work as a directly employed comparator.

**Employers:** it is worth checking that agency workers receive the same basic terms after 12 weeks.

**Contact us:** we can help with advice on agency workers

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### Right to Privacy – WhatsApp

When you send a private message to a WhatsApp group, you expect it to go no further than to the members of the group and certainly not end up with your employer. However, this is exactly what happened in a recent case involving the police force.

As part of an investigation into a sexual offence charge in the police force, a detective discovered WhatsApp messages on a phone belonging to one of the suspects. The messages were found in separate group chats with other officers and described as "blatantly sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability". The discovery of these messages led to internal misconduct charges being brought against officers, who complained that using their WhatsApp messages was an infringement of their right to privacy.

The court stated that the officers had a reasonable expectation of privacy (even when a group chat is used), despite the content. However, as it involved police officers, this justified limiting their right to privacy, so the employer could rely on the messages to take action.

Does this give employers the right to look at private WhatsApp messages?

It all depends on what job the employee does and the circumstances.

**Employers:** if your business involves codes of conduct you may need to issue guidance

**Contact us:** we can help with guidance on social media

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## Calculating holiday pay for term time workers

Should holiday entitlement for 'part-year' workers (e.g. visiting music teacher) be calculated on a pro rata basis at 12.07% of annual pay under the Working Time Regulations?

No, found the Court of Appeal in the case of *Harpur Trust v Brazel*.

It was held that a music teacher, in permanent employment (working term time only but irregular hours - around 32 hours per week), that holiday pay should be calculated based on a 12-week average of hours worked, in this case her holiday pay was around 17.5% of annual pay, rather than 12.07% for staff working a whole year (based on 5.6/46.4 weeks).

The School's argument that a pro rata principle should be applied to the accrual of leave for 'part-year workers' was rejected.

**Employers:** taking on permanent employees rather than free-lancers may lead to higher holiday pay costs

**Contact us:** We can advise on holiday pay

**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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