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labour and employment lawflash

13 May 2013

Employee Shareholders: It's Happening, but What Does it Mean?

New Growth and Infrastructure Act introduces employee shareholder provisions that are expected to come into force later this year.

On 25 April, the Growth and Infrastructure Act 2013[1] came into effect and, among other things, introduced employee shareholder or "rights for shares" provisions that are expected to take effect this autumn in the UK. Broadly speaking, these provisions amend the Employment Rights Act 1996 (the ERA) to allow employees to give up some of their employment rights in exchange for shares in their employer company. However, in the absence of any additional guidance, the practical scope and impact of these changes remains unclear.

What We Do Know

Any company with share capital can enter into an agreement with an employee to allow them to become an "employee shareholder". An employee shareholder will receive fully paid-up company shares that have a value of no less than £2,000 on the day of issue.

In exchange, the employee shareholder will give up the right to

- request to undertake study or training;
- request flexible working;
- not be unfairly dismissed; and
- a redundancy payment.

Further, the notice that employee shareholders will need to give before returning to work after maternity, parental, paternity, or adoption leave will be increased to 16 weeks.

Employee shareholders cannot waive their right to claim unfair dismissal where their dismissal breaches the Equality Act 2010 or health and safety legislation or is automatically unfair under the ERA. However, employers can make a job offer contingent on an applicant agreeing to become an employee shareholder. If an applicant refuses to do so, the employer can simply withdraw the job offer.

Before becoming an employee shareholder, each employee (or applicant to whom a job has been offered) must receive independent legal advice paid for by the employer (up to a "reasonable" level). The employer must pay these legal costs whether or not an employee elects to become an employee shareholder. Employees and applicants will then be given a seven-day cooling-off period in which they can withdraw their agreement.

For any acceptance to be valid, the employer must have provided the employee with a statement of particulars that sets out, among other things, the following:

1. View the Growth and Infrastructure Bill at http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0167/2013167.1-4.html.

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- The rights the employee shareholder gives up
- The rights attached to the shares, e.g., voting, dividend, and ability to participate in the distribution of any surplus assets on winding up
- Whether there are any restrictions on the transferability of the shares
- Whether the employee shares are subject to drag-along rights or tag-along rights

Finally, an employee must not suffer a detriment for **refusing** to accept an offer to become an employee shareholder. Moreover, the dismissal of an employee for refusing to become an employee shareholder will be regarded as unfair.

What We Do Not Know

Transfer of Undertakings (Protection of Employment) Regulations (TUPE) Transfers. If employee shareholders transfer across to an employer who does not operate an employee shareholder scheme or does not have any share capital, there is no guidance as to whether that employee shareholder automatically regains their rights or if they must surrender their shares first.

Share Schemes. It is not clear whether companies that operate share schemes can make it a precondition of future participation in any company share scheme that an employee becomes an employee shareholder.

Termination. On termination of the employment contract, a company can buy back shares from an employee shareholder. However, the conditions that must be satisfied before an employer buys back an employee's shares are still unknown.

Potential Impact on UK Employers

- £2,000 seems a relatively small amount when weighed against the potential value of rights that would be forfeited by employee shareholders. Employers can give shares worth more than £2,000, and it is therefore possible that, once the provisions are in force, along with salary, the sticking point in contractual negotiations will be the value of the shares given. That said, any deviation from the £2,000 figure may give rise to significant tax complications.
- The provisions could create a two-tier workforce of employee shareholders and non-employee shareholders, with the former potentially subject to enforced contractual changes and other less favourable treatment that would normally result in potential constructive unfair dismissal claims.
- In theory, an employer undertaking a redundancy exercise could simply select employee shareholders as redundant to avoid any unfair dismissal risk and/or any need to make redundancy payments.
- By making both job offers and participation in employee share schemes conditional upon an employee's accepting employee shareholder status, it is possible that some employers could significantly reduce and ultimately eradicate the risk of "pure" (i.e., non-discriminatory or non-whistleblowing related) unfair dismissal claims and the flexible working rights of their workforce.

Contacts

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