Labour & Employment

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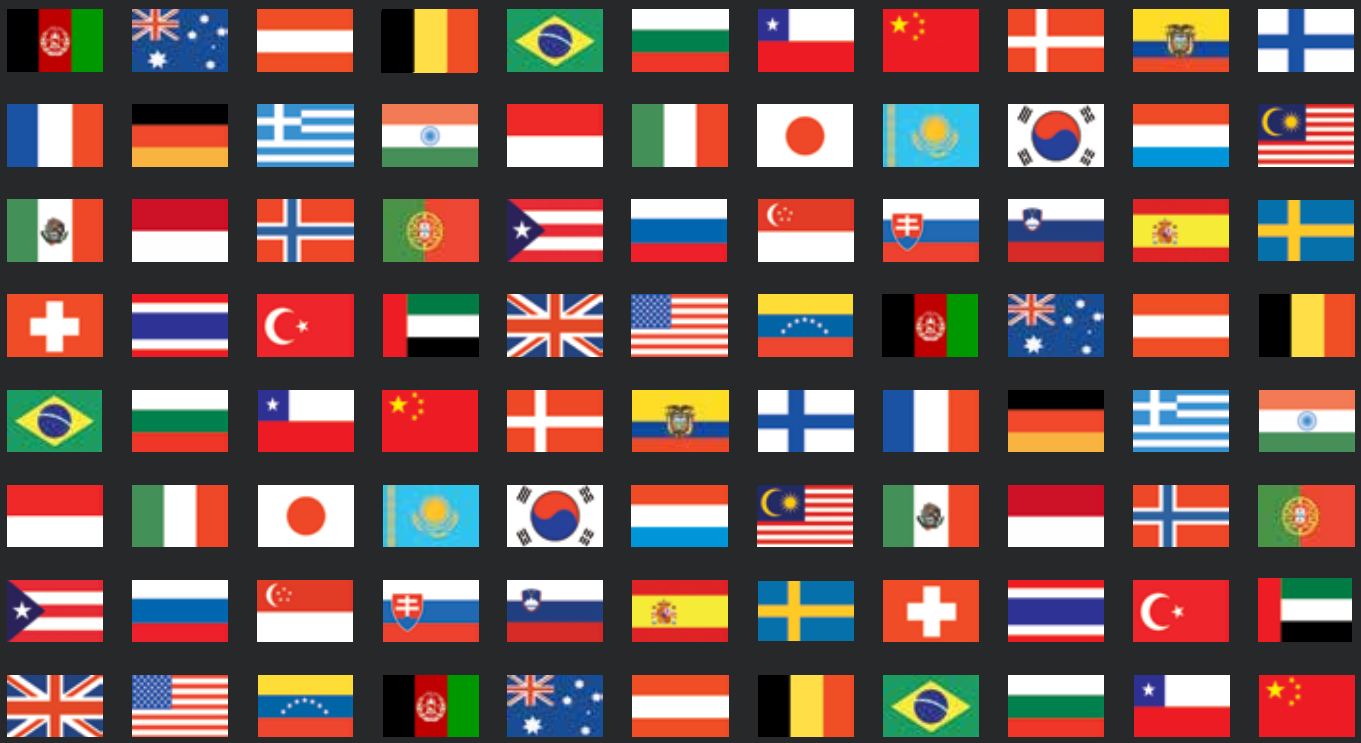

2017

GETTING THE DEAL THROUGH

United Kingdom

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment are the Employment Rights Act 1996, the Trade Union and Labour Relations (Consolidation) Act 1992 and the Equality Act 2010. There are a number of other employment laws and regulations in the United Kingdom, the most important of which are referred to below. Please also note that while employment law in Scotland and Northern Ireland is very similar to that which applies in England and Wales, there are some differences – particularly in Northern Ireland with regard to discrimination law.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

In the United Kingdom, anti-discrimination legislation in the form of the Equality Act 2010 prohibits discrimination across nine 'protected characteristics': age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (which includes colour, nationality and ethnic or national origin), religion or belief, sex, and sexual orientation.

The term 'discrimination' encompasses a number of concepts and causes of action:

- direct discrimination – someone is treated less favourably than another person because of a protected characteristic he or she has (direct discrimination), or is thought to have (perception discrimination), or because he or she associates with someone who has a protected characteristic (discrimination by association) (age discrimination is the only type of direct discrimination which can be objectively justified by showing that it is a proportionate means of achieving a legitimate aim);
- indirect discrimination – applying a provision, criterion or practice that puts those with a protected characteristic at a disadvantage which cannot be objectively justified by showing that it is a proportionate way of achieving a legitimate aim;
- discrimination arising from disability – unfavourable treatment towards a disabled person because of something arising in consequence of his or her disability that cannot be objectively justified by showing the treatment is a proportionate means of achieving a legitimate aim;
- reasonable adjustment (applying only in disability discrimination) – a duty to make a reasonable adjustment to the working environment to ensure that a disabled person is not placed at a substantial disadvantage;
- equal pay – paying one gender less than the other where his or her work is the same work or equally valuable work, or has been rated as equivalent in a professional study and where such disparity in pay is not justified by a material difference;
- victimisation – subjecting someone to a disadvantage in retaliation for that person having availed himself or herself of, or supported, any protections under any discrimination statute;
- harassment – unwanted conduct related to any protected characteristic having the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive working environment (with specific provisions for sexual harassment); and
- third-party harassment – liability of the employer for persistent harassment of an employee by a third party, provided it has happened on at least two previous occasions, the employer is aware that it has taken place and the employer has not taken reasonable steps to prevent it from happening again.

Individuals are also protected from harassment by the Protection from Harassment Act 1997, provided there are at least two incidents of harassment and the harasser must know or ought to know that his or her actions amount to harassment.

Employees will be permitted to ask questions of their employers and it will remain open to a tribunal to consider how an employer has responded to such questions as a contributory factor in deciding a discrimination claim.

In addition, seeking, making or receiving a 'relevant pay disclosure' (aimed at discovering whether discrimination in pay is occurring) is 'protected' under the Equality Act. Clauses in employment contracts that are aimed at ensuring pay confidentiality are unenforceable insofar as they prevent disclosure for this purpose.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The enforcement of most employment rights is through individual claims and actions to and in the UK employment tribunals and civil courts. Some collective matters (eg, trade union recognition under a statutory scheme) are dealt with by the Central Arbitration Committee.

The Equality and Human Rights Commission is a public body that has a statutory duty to promote and monitor human rights and protect, enforce and promote equality across the nine 'protected characteristics' (see question 2).

Worker representation

4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

The Transnational Information and Consultation of Employees Regulations 1999 (and the 2010 amending Regulations) apply with regard to European works councils, and the Information and Consultation of Employees Regulations 2004 apply to domestic works councils.

Works councils are not mandatory and require an 'employee request' or employer initiative for establishment. The Regulations set out thresholds for size and geographical spread of the relevant workforce for the provisions to apply.

5 What are their powers?

There are a number of circumstances in which an employer must inform and consult with employee representatives or recognised trade unions which include but are not limited to:

- business transfers and service provision changes (see question 34);
- collective redundancies (see questions 39 and 41);
- European works council agreements;
- health and safety issues;

- changes to pensions; and
- domestic works council agreements.

Consultation must be undertaken with the aim of reaching an agreement with the employee representatives. There is no requirement to reach an agreement.

Background information on applicants

6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The Rehabilitation of Offenders Act 1974 applies, save in respect of certain exceptions (eg, working with children or vulnerable people and certain other occupations, including professions (such as the medical and legal professions) and particular financial sector occupations). The act prevents certain other employers from refusing to employ someone in a situation in which an employee or candidate has disclosed or has failed to disclose an offence that is 'spent' under the act. The check can be carried out by the employer or a third party. Criminal Records Bureau checks are required before an applicant can work with young children or vulnerable adults, and may be desirable in other circumstances (for example, for those professions and occupations covered by the Rehabilitation of Offenders Exceptions Order – as set out above in this paragraph).

The Asylum and Immigration Act 1996 and the Immigration, Asylum and Nationality Act 2006 require that certain prescribed background checks be conducted and information be kept prior to employment commencing (and thereafter on the expiry of an employee's limited leave to remain) to ensure that the employee may lawfully work in the United Kingdom (see questions 15 to 18 for further information on immigration matters).

7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Pre-employment health checks or questions are specifically regulated under the Equality Act 2010. Save in prescribed limited circumstances, 'pre-employment questions' of or about an applicant for work are prohibited prior to an offer of work to the applicant being made, or prior to his or her inclusion in a pool from which candidates for work will be selected.

Individual offers of employment can be made conditional upon satisfactory health checks, but a recruiting employer may then render itself liable to discrimination claims if it appears that an offer is not confirmed on the basis of information disclosed by the health checks.

Medical reports given by a medical practitioner responsible for an individual's care (rather than by an independent doctor appointed by the employer) are subject to the Access to Medical Reports Act 1988, which essentially allows the patient the right of prior sight and comment on the report.

Medical information about an individual also constitutes 'sensitive personal data' for the purposes of the Data Protection Act 1998's regime of protections.

8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

General principles derived from the Data Protection Act 1998 and the Human Rights Act 1998 suggest that any such checks should be 'justified, necessary and proportionate'. Such checks tend, therefore, to be found in the context of particular roles within the transport and manufacturing sectors (justified by health and safety considerations) and sometimes also for particular roles within the financial and other professional sectors.

During employment, even where such checks are appropriately 'justified', it is recommended that their use also be reflected in an appropriate provision in relevant employment contracts.

It is rarely appropriate for such checks to be undertaken by the individual's doctor as, additionally, the Access to Medical Reports Act rights would apply to the resulting report. Issues can arise, particularly where the requirement to submit such checks appears unjustified or unjustifiably targeted at particular groups.

Hiring of employees

9 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

No; 'positive discrimination' is generally unlawful in the United Kingdom, save that there are certain additional positive requirements imposed on public bodies, and 'reasonable adjustment' in disability discrimination (see question 2) is regarded as a form of partial positive discrimination.

Under the Equality Act 2010, employers in the United Kingdom may (although they are not required to) take under-representation of those with 'protected characteristics' into account when selecting between two equally qualified candidates for recruitment or promotion, provided that there is no automatic selection of under-represented groups, and decisions are not made irrespective of merit (ie, by the use of mandatory quotas, which is an increasingly common phenomenon in mainland Europe). Regardless of the new provisions, the selection of a less-qualified candidate on the grounds that he or she is in a protected category remains unlawful.

10 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

No, there is no statutory requirement for a written employment contract. There must, however, be a statutory statement of particulars incorporating the following:

- names and addresses (employee and employer);
- start date and continuous employment commencement date;
- job title;
- place of work;
- additional details for work outside the United Kingdom;
- remuneration details;
- hours of work;
- holidays and holiday pay;
- sickness and sick pay;
- pension;
- notice period;
- temporary or permanent work;
- collective agreements; and
- disciplinary and grievance procedures.

Therefore, it is common practice in the United Kingdom for all employees to have a written employment contract with their employers that contains at least the terms set out above.

It should be noted that certain types of clauses are unlikely to be enforceable unless they are in a written employment contract, for example, post-termination covenants not to compete, post-termination confidentiality and intellectual property protection (see also questions 27 and 31).

11 To what extent are fixed-term employment contracts permissible?

They are permissible; however, certain rights and protections are given by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. There is no maximum duration of contracts, but successive fixed-term contracts of four or more years will be automatically deemed to be permanent contracts with the employer, unless objectively justified by the employer.

12 What is the maximum probationary period permitted by law?

There is no maximum. Customarily, employers will impose a period of six months or less. This probationary period may be extended at the discretion of the employer if stated in the employment contract.

13 What are the primary factors that distinguish an independent contractor from an employee?

An employee is someone required to perform work under the control of an employer and the employee has no power to substitute his or her labour. An employment relationship is also characterised by the fundamental mutual obligations to personally perform work (employee) and to provide and pay for it (employer). It is important to be aware that

there is no single determining test of employment. All relevant factors will be considered.

An independent contractor is in business on his or her own account, takes profits and bears losses and risks, and controls his or her own work product. He or she normally (subject to limited exception) has the power to substitute labour. Determination of employee or independent contractor status is a question of substance over form.

14 Is there any legislation governing temporary staffing through recruitment agencies?

The Agency Workers Regulations 2010 implements EU law to guarantee that basic employment conditions are no less favourable for temporary agency workers, and that they have equal access to facilities and opportunities as permanent staff. The regulations provide two different classes of rights: those which are provided as soon as the agency worker starts at the company (day-one rights), and those that are granted after 12 weeks' continuous work.

Day-one rights include access to the hirer's collective facilities and amenities and information about vacancies with the hirer. This means that the agency worker must be provided with the same access to collective facilities and amenities that the hirer would offer to its own employees. Agency workers are also protected from less favourable treatment (unless this can be objectively justified) and must be provided with information about job vacancies.

Once a temporary agency worker has completed 12 weeks' continuous work at the hirer, he or she is entitled to the same basic working and employment conditions as a comparable worker employed by the company. This means that he or she is entitled to the same pay, duration of working time, conditions in relation to night work, rest periods and annual leave as a comparable worker employed by the company.

Any breaches of the Agency Workers Regulations will be enforceable against the recruitment agency in the first instance, unless it can demonstrate that it has satisfied conditions in respect of taking reasonable steps to ensure that the hirer complies with the regulations. If this can be shown, then liability will pass to the hirer.

The Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 also regulate staffing through recruitment agencies. In particular, the law:

- prohibits an employment agency or employment business from charging agency workers a fee for finding them work;
- prescribes the terms which must be agreed upon by agency workers;
- prescribes the terms which must be agreed upon by hirers;
- prohibits the use of agency workers to replace individuals taking part in industrial action; and
- limits the transfer fees that may be charged to a hirer if the agency worker becomes directly engaged by the hirer.

Foreign workers

15 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Yes. With effect from 6 April 2011, the number of visas available for non-European Economic Area (EEA) nationals wishing to come to the United Kingdom to work was severely restricted. Briefly, unless an individual satisfies personal criteria to qualify as being 'exceptionally talented', an 'entrepreneur' or an 'investor' in the United Kingdom, employees must be sponsored by an employer before they can obtain entry clearance and authority to work in the United Kingdom. An employer must have obtained a sponsorship licence from the Home Office before it can sponsor employees to work for it in the United Kingdom. The two principal visas available for non-EEA nationals coming to the United Kingdom, which are issued under a points-based system, are known as Tier 2 (general) and Tier 2 (intra-company transfer). Roles for which a Tier 2 (general) visa is being sought with a salary of less than £155,300 are currently subject to an annual limit (during the period of 6 April to 5 April). The limit for 2016/2017 will be 20,700 visas across the United Kingdom.

Tier 2 (intra-company transfer) certificates of sponsorship are available for employees of multinational companies who are transferring from one overseas corporate entity to a skilled job in the United Kingdom for a related entity. The employees must satisfy the points criteria and will be required to demonstrate this as part of the entry clearance process.

Certain Tier 2 (general) migrants are permitted to remain in the United Kingdom for up to six years, following which they must either apply for indefinite leave to remain in the United Kingdom (known as 'settlement') or leave the United Kingdom. A 'cooling-off' period has been introduced to prevent certain Tier 2 migrants from reapplying to return to the United Kingdom under Tier 2 (general) or Tier 2 (intra-company transfer) for 12 months following the date that they permanently left the United Kingdom (sufficient evidence (specified by the Home Office) must be maintained to evidence the date that they permanently left the United Kingdom) or the expiry of their visas, whichever is the sooner.

16 Are spouses of authorised workers entitled to work?

A dependent spouse or partner of a Tier 2 worker is permitted to work in the United Kingdom (except as a doctor or dentist in training), provided that he or she makes an entry clearance application and that the authorised worker can support the spouse without recourse to public funds.

17 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

There are laws in place that prevent illegal working in the United Kingdom. An employer can face penalties if it employs a person aged 16 or over who does not have permission to be in, or work in, the United Kingdom. An employer found guilty of an offence could face a civil penalty of up to £20,000 for each employee who has been employed illegally. There are defences against these penalties if original documents evidencing an individual's right to work in the United Kingdom (such as a passport or biometric residence permit) are checked, verified and copied by the employer before the employee commences work (see question 6). In the case of employees who have only a limited right to remain in the United Kingdom, such checks must be repeated on the expiry of their further leave to remain.

Where, however, an employer is found to have knowingly hired illegal workers, the maximum penalty is a five-year prison sentence or an unlimited fine, or both.

A Tier 1 visa, if granted, is personal to the applicant, meaning that he or she can then work for any employer or work on a self-employed basis for the duration of the visa (two or three-year initial period) (although a Tier 1 Entrepreneur visa only permits an individual to work for the company in which he or she has invested). Tier 2 (intra-company transfer or general) visas are employer-sponsored immigration categories. Permission under Tier 2 only allows the individual to work for the employer entity that sponsors him or her and up to an additional 20 hours a week in a similar role for another employer (provided the additional work is not in place of the original sponsored employment). It is a precondition to Tier 2 that the UK entity has a sponsorship licence (granted by the Home Office).

18 Is a labour market test required as a precursor to a short or long-term visa?

Where a company is issuing a Tier 2 (intra-company transfer) certificate of sponsorship, there is no requirement to carry out a test of the resident labour force. However, in most other cases, in particular for restricted Tier 2 (general) applications, such a test is required before issuing a certificate of sponsorship to a foreign national (limited exemptions exist, for example, where the role on offer will attract a salary of more than £155,300). The UK employer must be able to demonstrate that it has tried and failed to recruit from the resident labour force and that the migrant was selected as the only suitable candidate for the role. To do this, the employer must follow the recruitment guidelines set out in the Tier 2 sponsor guidance. Recruitment must also include advertising on two recruitment platforms for a period of not less than 28 days (if the salary offered is less than £72,500, it is mandatory to place advertisements in Jobcentre Plus offices (and online using Universal Jobmatch)) before it can be offered to workers from outside the EEA or Switzerland (special rules apply for Croatian nationals).

Terms of employment

19 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The Working Time Regulations 1998 limit working hours as follows:

- a 48-hour maximum working week calculated as an average over a 17-week period (the maximum working week is reduced for under-18s); and
- an individual 'opt-out' by written agreement (under-18s cannot opt out).

The regulations also govern shift work, night work and paid annual leave (see question 24).

20 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime pay is not governed by specific legislation but is generally a matter of individual or collective agreement. The National Minimum Wage Act 1998 governs an employer's obligation to pay a certain minimum amount per hour, which may render unpaid overtime unlawful in certain circumstances.

21 Can employees contractually waive the right to overtime pay?

Yes. There is no statutory right to overtime pay – it is a matter for contract so an employment contract will commonly confirm that no overtime pay is payable. It is possible to include a clause within an employment contract to confirm that an employee is not entitled to receive overtime payments in respect of any additional hours that are worked.

22 Is there any legislation establishing the right to annual vacation and holidays?

The Working Time Regulations 1998 establish a statutory entitlement to 5.6 weeks' (or 28 days') leave per annum (inclusive of bank and public holidays), which is paid. Accrual is monthly and is paid in lieu only on termination. Special provision is made for part-time workers.

23 Is there any legislation establishing the right to sick leave or sick pay?

The Social Security Contributions and Benefits Act 1992 governs the UK statutory sick pay scheme. The Act entitles qualifying employees who are absent for four or more consecutive days (including weekends) to receive a statutory minimum weekly payment.

Employees do not receive any payment for the first three days on which they are absent. Statutory sick pay is paid for up to 28 weeks in any period of incapacity or in any series of linked periods of incapacity (any periods which are not more than eight weeks apart). Statutory sick pay stops at three years even if an employee has not yet been paid for 28 weeks of absence.

24 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

The principal statutory leaves of absence are as follows:

- maternity leave – up to 52 weeks; up to 39 weeks 'paid' at the statutory rate;
- adoption leave – same as maternity;
- paternity leave – two weeks 'paid' at the statutory rate;
- shared parental leave – eligible employees are entitled to take up to 50 weeks' leave; up to 37 weeks' 'paid' at the statutory rate (this accounts for the two-week period of compulsory maternity leave and an equivalent two-week period of adoption leave). This leave can only be taken when a mother or adopter has given the requisite notice to end her maternity or adoption leave and the remainder of her leave will be available as shared parental leave. Shared parental leave will enable parents or adopters to take leave together or to split the leave period between them. It is also possible for parents or adopters to determine how the shared parental pay will be divided between them;
- parental leave – 18 weeks for each child (which is available to each parent), unpaid;
- dependant leave – 'reasonable' unpaid time off to deal with emergencies; and
- jury service – length of jury service, unpaid.

'Paid' above does not mean full contractual pay. It is an amount set by the government but paid by the employer. Employers should be able to recover a large percentage of this amount from the government. In addition, some employers may choose to pay enhanced maternity pay, paternity pay, adoption pay, shared parental pay, benefits, etc. Leave may also be provided for by contract or as otherwise agreed.

25 What employee benefits are prescribed by law?

Legislation came into force in October 2012 that requires employers to automatically enrol eligible jobholders into a qualifying workplace pension scheme. The obligations on employers will be brought into force in stages over a four-year period depending on the size of the employer.

Eligible job holders must be between the age of 22 and state pension age and must earn a statutory minimum amount. Employers will need to determine whether existing pension schemes will comply with the requirements to be qualifying pension schemes. Alternatively, the government is setting up the National Employment Savings Trust, which will be available for employers to use to comply with the duty of auto-enrolment.

From October 2017, overall employee and employer contributions to the qualifying pension scheme will have to total 8 per cent with a minimum of 3 per cent being paid by the employer and the remainder being made up of employee contributions and tax relief. From October 2012 to September 2017, reduced contributions will be required. Contributions by the employer and employee are limited to 'qualifying earnings' (earnings between two specific bands, which for the 2015–2016 tax year were £5,824 and £42,385). The earnings thresholds are reviewed each tax year and the Department of Work and Pensions announced on 6 April 2016 that the annual earnings thresholds for the 2016–2017 tax year are £5,824 and £43,000. The proposed annual earnings thresholds for the 2017–2018 tax year are £5,876 and £45,000.

26 Are there any special rules relating to part-time or fixed-term employees?

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 grant employees (unless objectively justified):

- the right to the same terms and conditions as comparable permanent employees; and
- the right not to suffer a detriment or unfair dismissal by reason of their fixed-term status.

Successive fixed-term contracts of four or more years will be automatically deemed to be permanent contracts with the employer, unless objectively justified by the employer.

The rules relating to part-time workers are governed by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which grant such workers (unless objectively justified):

- the right to the same terms and conditions as comparable full-time workers; and
- the right not to suffer a detriment or unfair dismissal by reason of their part-time status.

Post-employment restrictive covenants

27 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-termination covenants are assumed unenforceable as a restraint of trade as a matter of UK public policy unless:

- they go no further than is reasonably necessary in scope, duration and geographical extent to protect an employer's legitimate business interests from the employee in question; and
- they do not otherwise offend public policy.

There is no maximum period for a post-termination covenant. However, restrictions lasting more than 12 months are unlikely to be enforceable in the United Kingdom, except for in exceptional circumstances. Even a full 12 months will only be justified for the most senior employees or

in special circumstances, for example, where an employee may do a great deal of damage to an employer's business because of his or her knowledge of the employer's confidential or proprietary information.

28 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

There is no requirement for an employer to continue to pay a former employee while he or she is subject to post-employment restrictive covenants.

Liability for acts of employees

29 In which circumstances may an employer be held liable for the acts or conduct of its employees?

At common law, employers are vicariously liable to third parties for acts and omissions of employees 'in the course of' their employment. Employers are vicariously liable for the discriminatory acts and omissions (including harassment) by their employees 'in the course of employment' (where 'course of' has a broader meaning than at common law) and where an employer has failed to take reasonable practicable preventive steps.

Taxation of employees

30 What employment-related taxes are prescribed by law?

The deduction at source of income tax and employer and employee national insurance contributions (social security) under the UK 'Pay As You Earn' system is mandated by the Income Tax (Earnings and Pensions) Act 2003.

Employee-created IP

31 Is there any legislation addressing the parties' rights with respect to employee inventions?

Employee 'inventions' are addressed by the Patents Act 1977 and the Copyright, Designs and Patents Act 1988. Generally, any intellectual property that is created by an employee in the course of his or her employment in the United Kingdom will belong to the employer. However, it is common for there to be an express provision in the employment contract to ensure that this is the case.

32 Is there any legislation protecting trade secrets and other confidential business information?

No, confidential information and trade secrets are not governed by statute in the UK.

Data protection

33 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Data Protection Act 1998 ensures the fair and lawful processing of individuals' personal data in accordance with the eight 'principles of fair processing', which are that personal data are:

- to be processed fairly and lawfully;
- to be processed for specified and lawful purposes and not beyond;
- to be adequate, relevant and not excessive;
- to be accurate and up to date;
- not to be kept longer than necessary;
- to be processed in accordance with the rights of the subject of the personal data;
- to be protected with appropriate security measures; and
- not to be transferred outside the EEA, unless the recipient ensures adequate data protection.

Employers are obliged to notify the UK Information Commissioner of the data being processed and the purposes for which processing of data is being carried out. Employers must comply with 'data subject access requests' by individuals for their data, which are requests by employees of their employers for personal information that is held about them.

The new General Data Protection Regulation (GDPR) was adopted on 24 May 2016 and will come into effect on 25 May 2018. The GDPR will supersede the Data Protection Act by harmonising data protection legislation across Europe. The GDPR will provide enhanced data protection rights and protections for employees.

Business transfers

34 Is there any legislation to protect employees in the event of a business transfer?

Where there is no change in the identity of the employer, for example, on a share disposal, the employees' contracts of employment continue. All rights, duties and liabilities owed by, or to, the employees continue, and the buyer of the employer's shares inherits all those rights, duties and liabilities by virtue of being the new owner of the employer.

By contrast, the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (together, TUPE) give special protection for the rights of employees on the transfer of an undertaking (where there is a 'relevant transfer'), which includes a sale of assets or a business activity, or on a change of service provider (outsourcing).

TUPE creates:

- particular unfair dismissal rights in the context of a TUPE transfer;
- the automatic transfer principle whereby (subject to a few exceptions) the buyer inherits all rights, liabilities and obligations in relation to the 'assigned' employees; and
- the obligation to inform and consult with representatives of the affected employees, and liabilities for failure to do so by way of a penal award of up to 13 weeks' actual pay for each affected employee.

Termination of employment

35 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Contractually, at common law an employer can dismiss an employee for any reason, provided appropriate notice is given.

Statutorily, if the employee has the relevant qualifying length of service (if applicable), he or she may be dismissed only for a potentially 'fair reason', that is:

- capability;
- conduct;
- redundancy;
- breach of a statutory enactment by the employee; or
- some other substantial reason.

See question 39 regarding additional procedural requirements.

36 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice of at least the statutorily prescribed minimum must be given prior to dismissal, as follows:

Length of service	Notice period
Up to one month	Nil
One month to two years	One week
Two years to 12 years	One week for each year of completed employment
12 years +	12 weeks

UK employers provide additional notice as a matter of custom in the employment contract. Where this is the case, the contractual notice must be given by the employer. Payment in lieu of notice can be given if set out in the employment contract.

37 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

This may occur only in cases of 'gross misconduct' (ie, misconduct of a very serious nature including that which the employer is justified in treating as very serious in the context of its business). It is important that a non-exhaustive list of examples of gross misconduct be set out

Update and trends

Gender pay gap reporting

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (GPG Regulations) came into force on 6 April 2017. The GPG Regulations will introduce mandatory gender pay gap reporting for private and voluntary-sector employers with more than 250 employees in the UK on the 'snapshot date' of 5 April in the relevant year.

Employers will be required to publish six calculations showing their:

- average gender pay gap as a mean average;
- average gender pay gap as a median average;
- average bonus gender pay gap as a mean average;
- average bonus gender pay gap as a median average;
- proportion of males receiving a bonus payment and proportion of females receiving a bonus payment; and
- proportion of males and females when divided into quartiles ordered from lowest to highest pay.

'Relevant employees' for the purposes of the GPG Regulations will not include partners but will include casual workers or those engaged under a zero hours contract. It is also possible that some self-employed contractors should be included in the calculations.

In addition to the gender pay gap figures that will be prepared in respect of pay and bonuses, employers will have the opportunity to provide a narrative explaining their results. This will provide an opportunity for employers to give details about what steps they are taking to reduce their gender pay gaps and to explain any challenges that the results show. For example, an employer may wish to provide details about what steps it has taken to increase recruitment of experienced senior female hires into parts of its business which are typically male-dominated. Or it might choose to provide details on any changes it has made to its bonus policy. Should further data or analysis be helpful to assist employers in explaining their gender pay and bonus gap figures, they are able to publish more detail; for example, some employers may wish to show data comparing the numbers of male and female employees in different roles or at different grades, or data on numbers of part-time employees.

The gender pay gap report must be published on the employer's website and a government website within 12 months of the snapshot date and will remain accessible for three years. This will not only allow comparisons to be drawn annually to see if employers are managing to reduce the gender pay gaps within their organisations, but will also allow for comparisons to be drawn across industry sectors. This will likely result in retention and recruitment challenges for employers and will need to be monitored carefully.

Employers need to be prepared to collate and manage the data required to produce the report and will need to have communication plans in place to inform employees of the results and also to prepare for press and media enquiries and commentary.

Although the gender pay gap will show the difference in average pay between all men and women and equal pay deals with the difference in pay between men and women who carry out the same jobs, similar jobs or work of equal value, it is inevitable that there will be some confusion between the two when the gender pay gap reports are published. In order to avoid an increase in grievances, subject access requests and possible claims, employers will need to be proactive in addressing this by training human resources staff and managers in these areas to deal with queries from employees and also to ensure that they are mindful of both issues when making pay, bonus, and recruitment and retention decisions for their workforces. In addition, the more transparent employers can be with their employees in respect of their pay review and bonus awards (and how these are calculated), the less concerns employees are likely to raise.

It is expected that the government's next step will be to consult on extending the mandatory reporting obligation to public-sector employers. Accordingly, it would be advisable for any public-sector employer with 250 or more employees to consider preparing a gender pay report to analyse its gender pay and bonus gaps and to consider how it could seek to reduce these gaps, prior to this becoming a mandatory requirement.

by the employer and relayed to each employee; the list is usually contained in the employment contract.

38 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Under the Employment Rights Act 1996, statutory redundancy pay exists for employees with two or more years' service. The exact amount is linked to the length of service, age of the employee and statutory cap on 'weekly pay'.

Redundancy pay may be enhanced by the employer, including by custom and practice.

39 Are there any procedural requirements for dismissing an employee?

Yes, there is a duty for employers to act 'reasonably' pursuant to the Employment Rights Act 1996. Employers carrying out dismissals (except for dismissals on the grounds of redundancy or the non-renewal of a fixed-term contract) must also follow the principles set out in the Advisory, Conciliation and Arbitration Service (ACAS) (a governmental public body) Code of Practice. A failure to follow the ACAS Code does not in itself make an employer liable to a claim; however, employment tribunals will take the ACAS Code into account when considering relevant cases and can adjust any awards they make by up to 25 per cent for unreasonable failure by an employer to follow the ACAS Code.

Prior approval by the UK government is not required by law, but if the employer proposes to make redundancies affecting 20 or more employees within a particular time frame, it must notify the UK Department for Business, Innovation and Skills (BIS). Collective consultation with representatives of affected employees is also required.

40 In what circumstances are employees protected from dismissal?

Ordinarily, employees with two years' service have general statutory protection from unfair dismissal.

The following categories have 'automatic' unfair dismissal protection but require two years' service:

- dismissal due to a 'spent' conviction (see question 6); and
- dismissal in the context of a TUPE transfer (see question 33).

Dismissals in the following contexts have 'automatic' unfair dismissal protection and do not require any qualifying length of service:

- jury service;
- leave for family reasons and related leave for time off for dependants;
- health and safety activities;
- Sunday working;
- asserting certain statutory rights;
- asserting rights under the Working Time Regulations (see the responses to questions 22 and 24);
- employee trustees of occupational pension schemes;
- employee consultation representatives or candidates (including European and domestic works councils);
- whistle-blowers;
- flexible working requests;
- certain discrimination-related dismissals;
- exercising the right to be accompanied at disciplinary or grievance hearings;
- the rights of part-time workers;
- the rights of fixed-term employees;
- in connection with entitlement to a national minimum wage;
- in connection with entitlement to working tax credits;
- in connection with the right to request study and training; and
- trade union membership or activities or official industrial action.

Please note that dismissal is 'automatically' unfair if it is by reason of a protected activity, that is, it is causally connected.

Dismissals can also attract protection under anti-discrimination legislation.

41 Are there special rules for mass terminations or collective dismissals?

Yes, a special information and consultation regime applies where there are 20 or more affected employees who are proposed to be dismissed for a 'non-fault' reason within a particular time frame. 'Protective awards' exist of up to 90 days' pay per affected employee for the employer's failure to consult. This is governed by the Trade Union and Labour Relations (Consolidation) Act 1992, section 188. Also, note the BIS notification set out in question 39.

42 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

There is no direct equivalent to the US class action in the United Kingdom. However, there are procedural means of dealing with group actions of multiparty claims that allow groups of claimants to link the claims to proceed against a single defendant:

- where more than one person has the 'same interest' in a claim, the claim may be begun or the court may order that one or more claimants, or one or more defendants, may bring or defend the claim representing others who have the same interest in the claim. Any judgment will be binding on all individuals represented unless the court directs otherwise; and
- where claims by a number of individuals give rise to common or related issues of fact or law, a court may make a 'group litigation order' to manage the claims. Judgments, orders and directions of the court will be binding on all claims within the group litigation order.

In the context of collective consultation and TUPE (see questions 33 and 41), an employee representative brings the claim for a failure to inform and consult and failure to consult on a collective basis on behalf of the affected employees. If successful, compensation is awarded to each affected employee.

43 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Any age-related compulsory retirement has to be 'justified' under anti-age discrimination legislation (the Equality Act 2010) and must be 'fair' under unfair-dismissal legislation (the Employment Rights Act 1996). Compulsory retirement on medical grounds also has the potential to raise discrimination (principally disability and age discrimination) and unfair-dismissal issues.

Dispute resolution

44 May the parties agree to private arbitration of employment disputes?

In contractual disputes, yes, so long as they do not involve statutory employment protection rights.

Where statutory employment protection rights are affected, an employee cannot validly agree, in advance, to give up his or her right to litigate those rights. So, for example, the employee cannot agree in his or her employment contract, entered into before the dispute arose, not to sue his or her employer for unfair dismissal.

Once a dispute has arisen, private mediation agreed to between the parties is relatively common. Any settlement of a dispute about statutory employment protection rights (including one agreed to during mediation) must satisfy the statutory 'contracting out' requirements referred to in question 45 if the relevant statutory right is to be validly compromised.

45 May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can agree to waive his or her contractual rights. An employee may only waive statutory rights with a valid 'statutory settlement agreement' or through an officer of ACAS (a governmental public body) on form COT3 (an official form used by ACAS to evidence a binding legal settlement between employers and employees).

The requirements for a valid waiver are as follows, with regards to a statutory settlement agreement:

- it must be in writing;
- it must relate to specific proceedings;
- independent legal advice must have been given to the employee;
- the independent adviser must have insurance for negligence;
- the agreement must identify the adviser; and
- the agreement must state that the conditions regulating settlement agreements are satisfied.

46 What are the limitation periods for bringing employment claims?

Employment claim	Limitation period
Ordinary unfair dismissal and automatic unfair dismissal	Within three months from date of termination
Discrimination	Within three months from start of act complained of
Equal pay	Six months from date of termination of relevant contract (note: tribunals can make awards to cover pay disparity going back six years)
Redundancy pay	Six months from date of redundancy
Unlawful deduction of wages	Within three months beginning with date of deduction

There are specific provisions dealing with discrimination by omission and for continuing acts extending over a period of time.

The standard limitation period for a breach-of-contract claim is six years (although some such claims can be litigated in an employment tribunal, but subject to a much shorter limitation period).

The primary limitation period applicable to the various statutory employment protection rights may be extended in appropriate circumstances by an employment tribunal. The tribunal's jurisdiction to extend the time limit applicable to discrimination rights provides the tribunal with a wider jurisdiction to do so than in the context of other statutory employment protection rights.

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