

Labour & Employment 2020

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

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Contributing editors**Matthew Howse, Sabine Smith-Vidal, Walter Ahrens,
K Lesli Ligorner and Mark Zelek****Morgan Lewis**

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Belgium, Ghana, Israel, Kenya, Myanmar, Netherlands, Poland, Slovenia, Turkey and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek of Morgan Lewis, for their continued assistance with this volume.



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For further information please contact editorial@gettingthedealthrough.com

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United Kingdom

Lee Harding and Matthew Howse

Morgan Lewis

LEGISLATION AND AGENCIES

Primary and secondary legislation

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 also a number of other employment laws and regulations in the United Kingdom. Although 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.

Protected employee categories

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 that 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 that 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 as a 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 him 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 are permitted to ask questions of their employers, and it will remain open to a tribunal to consider how an employer has responded to those 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 2010. Clauses in employment contracts that are aimed at ensuring pay confidentiality are unenforceable insofar as they prevent disclosure for this purpose.

Enforcement agencies

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. HM Revenue and Customs is responsible for the enforcement of the national minimum wage.

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 provided for in the Equality Act 2010.

WORKER REPRESENTATION

Legal basis

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. These Regulations set out thresholds for size and geographical spread of the relevant workforce for the provisions to apply.

After the Brexit transition period has lapsed, the statutory framework that governs European works councils will no longer apply in the United Kingdom. The government has advised that it intends to protect existing European works councils rights but intends to amend the Regulations so that no new requests to set up a European works council or information and consultation procedure can be made.

Powers of representatives

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;
- collective redundancies;
- 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

Background checks

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, except 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. Disclosure and Barring Service checks are required before an applicant can work with young children or vulnerable adults, and may be desirable in other circumstances (eg, for those professions and occupations covered by the Rehabilitation of Offenders Exceptions Order).

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.

Medical examinations

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. Except 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 a special category of personal data for the purposes of the regime of protections of the Data Protection Act 2018 (the DPA), in accordance with the EU General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR).

Drug and alcohol testing

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

General principles derived from the DPA (and the GDPR) 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 rights afforded under the Access to Medical Reports Act 1988 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

Preference and discrimination

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; however, there are certain additional positive requirements imposed on public bodies, and 'reasonable adjustment' in disability discrimination 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, which must be provided to the employee or worker on 'day one' of their employment, incorporating the following:

- the names and addresses of the employee or worker and the employer);
- the start date and the continuous employment commencement date;
- the job title;
- the place of work;
- the length of the temporary or fixed-term work;
- terms relating to work outside the United Kingdom for a period of more than one month;
- remuneration details;
- the hours of work;
- the days of the week on which he or she is required to work and whether working hours or days may be variable;
- any probationary period that starts at the beginning of the engagement, including any conditions and its duration;
- holidays and holiday pay;
- sickness and sick pay;
- the pension;
- any part of any training entitlement that the employer requires him or her to complete, including any training that it requires but does not pay for;
- any other benefits provided by the employer;
- the notice period;
- whether the work is temporary or fixed term;
- collective agreements; and
- the 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.

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.

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 automatically be deemed to be permanent contracts with the employer, unless objectively justified by the employer.

Probationary period

12 | What is the maximum probationary period permitted by law?

There is no maximum period. 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.

Classification as contractor or employee

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). There is no single determining test of employment. Various factors will be considered, including the amount of control exercised over an individual by the hirer, whether the individual is required to personally provide the services and the extent to which the individual is integrated within the business.

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.

Temporary agency staffing

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 that 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. From 6 April 2020, agency workers who have entered into a 'pay between assignments contract' (previously exempt from pay parity) will also be entitled to equal treatment with regard to pay.

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 (as amended) 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 that must be agreed upon by agency workers;
- prescribes the terms that 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

Visas

- 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 £159,600 are currently subject to an annual limit (during the period of 6 April to 5 April the following year). The limit for 2019–2020 was 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.

Spouses

- 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.

General rules

- 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, 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. In the

case of employees who have only a limited right to remain in the United Kingdom, these 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 Global Talent 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 Start-up or Innovator 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). A precondition to Tier 2 is that the UK entity has a sponsorship licence (granted by the Home Office).

Resident labour market test

- 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 £159,600). 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 £73,900, it is mandatory to place advertisements on the government recruitment website, Find a Job, before it can be offered to workers from outside the European Economic Area or Switzerland).

TERMS OF EMPLOYMENT

Working hours

- 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).

These Regulations also govern shift work, night work and paid annual leave.

Overtime pay

- 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 and the National Minimum Wage (Amendment)

Regulations, as amended, govern 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.

Vacation and holidays

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.

Typically, the four weeks' statutory entitlement may only be taken in the leave year in which it is due, or else it is lost; however, the government introduced emergency legislation on 26 March 2020 that enables employees to carry over their four weeks' statutory leave into the next two years, provided it is 'not reasonably practicable' to take it in the leave year 'as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)'.

Sick leave and sick pay

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

The Social Security Contributions and Benefits Act 1992, as amended, and the Statutory Sick Pay (General) Regulations 1982, as amended, govern the UK statutory sick pay scheme. The 1992 Act entitles qualifying employees who are absent for four or more consecutive days (including weekends) to receive a statutory minimum weekly payment. Employees cannot 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 that 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.

Leave 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 and up to 39 weeks paid at the statutory rate;
- adoption leave: same as maternity leave;
- paternity leave: two weeks paid at the statutory rate;
- shared parental leave: eligible employees are entitled to take up to 50 weeks' leave and 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;
- parental bereavement leave: two weeks paid at the statutory rate;
- 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.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Legislation came into force in October 2012 (the Pensions Act 2008) that requires employers to automatically enrol eligible job holders into a qualifying workplace pension scheme. The obligations on employers have been brought into force in stages over a five-and-a-half-year period, depending on the size of the employer.

Eligible job holders must be between the age of 22 and the 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 has set up the National Employment Savings Trust, which is available for employers to use to comply with the duty of auto-enrolment.

Overall employee and employer contributions to the qualifying pension scheme must 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. Contributions by the employer and the employee are limited to 'qualifying earnings' (earnings between two specific bands, which for the 2020-2021 tax year, are £6,240 and £50,000, respectively). The earnings thresholds are reviewed each tax year.

In a review published by the Department of Work and Pensions in December 2017, two legislative changes were announced. First, the lower age threshold will be reduced from 22 to 18. Second, the lower end of the qualifying earnings band for auto-enrolment will be changed from the lower earnings limit to the first pound a worker earns. The amendments are not expected until the mid-2020s.

Part-time and fixed-term employees

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 automatically be 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 these 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.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Yes, the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (the Regulations) impose an obligation on private or voluntary-sector employers with 250 or more employees on the 'snapshot date' (which is 5 April in the relevant year) to publish certain data in respect of the employers' gender pay gap on an annual basis. 'Relevant employees' for the purposes of the Regulations does not include partners but does include casual workers and certain contractors.

Employers are required to publish the following information on their own websites and upload it to the government's gender pay gap services website:

- the gender pay gap (mean and median averages between men's and women's hourly pay);
- the gender bonus gap (mean and median averages between bonus pay awarded to men and women);
- the proportion of men and women receiving bonuses; and
- the proportion of men and women in each quartile of the employer's pay structure.

The data will remain accessible to the public for three years, which will allow comparisons to be drawn year on year and across industry sectors.

Employers are required to provide a written statement confirming that the gender pay gap information is accurate. The confirmation statement must be signed by a senior individual, such as a director. Although it is not mandated by the Regulations to include an accompanying narrative, many employers choose to do so, and the Advisory, Conciliation and Arbitration Service (ACAS) guidance on the reporting requirements encourages the provision of a narrative to contextualise the data.

The Regulations do not contain any enforcement mechanisms or sanctions for failure to comply with the reporting obligations or for publishing inaccurate data. However, the government has indicated that it will run periodic checks to assess non-compliance, and the Equality and Human Rights Commission has stated that it will use its existing powers to take enforcement action in respect of a failure to comply with the Regulations.

In response to a recommendation of the House of Commons select committee report on strengthening the Regulations, in January 2019, the government confirmed that it would not make any immediate amendments to the Regulations. It further confirmed that it would not be extending the reporting obligations to companies with 50 or more employees at that time, but may consider revisiting the issue in the future.

Following the success of the mandatory gender pay gap reporting obligations, the government has announced proposals to introduce mandatory ethnicity pay reporting alongside gender pay gap reporting. Consultation on the proposals closed on 11 January 2019. It is anticipated that a trial or phased approach will be introduced to test the process prior to the introduction of a mandatory obligation.

Additionally, listed companies have certain reporting obligations in respect of gender diversity and equality matters under the UK Corporate Governance Code, Provision B.2.4 and Supporting Principle B.6. Listed companies with an average of more than 250 UK employees in their group are also subject to the Companies (Miscellaneous Reporting) Regulations 2018. These Regulations came into force on 1 January 2019 and amend the directors' remuneration reporting requirements

under Schedule 8 of the Large- and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008. The Companies (Miscellaneous Reporting) Regulations require the ratios of total CEO pay to be calculated against the 25th, median and 75th percentile of UK employees' pay. The ratios must be disclosed in a prescribed table, building up to 10 years of data. There must be an accompanying narrative, including justifying and explaining the employee pay calculations.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

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

Post-termination covenants are assumed to be 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.

Post-employment payments

29 | 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

Extent of liability

30 | 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

Applicable taxes

31 | 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

Ownership rights

32 | 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.

Trade secrets and confidential information

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

Yes, confidential information and trade secrets are governed by the Trade Secrets (Enforcement, etc) Regulations 2018 (SI 2018/597) (the Trade Secrets Regulations), which came into force on 9 June 2018 and implement the Trade Secrets Directive (Directive (EU) 2016/943). The Trade Secrets Regulations are intended to operate alongside the common law of confidence.

DATA PROTECTION

Rules and obligations

34 | 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 2018 (the DPA) and the EU General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) are the primary legal instruments that protect employees' data. The DPA provides a comprehensive and modern framework for data protection in the United Kingdom, with stronger sanctions for malpractice than under the previous regime.

There are six data processing principles provided by the GDPR, which are that personal data is:

- to be processed fairly, lawfully and in a transparent manner;
- to be processed for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes;
- to be adequate, relevant and not excessive;
- to be accurate and up to date;
- not to be kept longer than necessary; and
- to be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

Yes. The GDPR creates an obligation on employers (the data controller) to notify employees of its personal data handling practices through a privacy notice at the time the data is collected from the employee. If data is collected from another source, privacy information must be provided to the employee within one month.

Candidates at the recruitment stage will also need to be provided with a privacy notice. This can be a short-form privacy notice in relation to the processing of their personal data for only the purposes of the recruitment exercise.

A privacy notice informs candidates and employees about how the employer collects, uses, stores, transfers and secures personal data.

Employers are advised to undertake an information audit to find out what personal data they hold and what they do with it. The GDPR stipulates what information must be included in a privacy notice and requires the information to be presented in a concise, transparent, intelligible and easily accessible form. As a matter of good practice, employers should publish their privacy policy on their business website.

36 | What data privacy rights can employees exercise against employers?

Employees (and indeed all data subjects) have the rights listed below, under the GDPR, otherwise known as 'delete it, freeze it, correct it'. These rights are generally exercised or triggered if there is non-compliance with data protection principles. These rights are the right:

- to erasure or to be forgotten;
- to rectification;
- to restriction of processing;
- to object to processing;
- to information;
- to access their own personal data;
- to receive a copy of their personal data;
- not to be subject to automated decision-making; and
- to be notified of a data security breach.

Employers must take particular note of an employee's right to a data subject access request (DSAR) to their employers, for disclosure of personal data and certain information regarding the personal data that is held about them. Employers are under an obligation to comply without undue delay and within one month, with an extension of two additional months if necessary. Given the complexity of most DSARs in an employment context, the likely normal period for compliance will be up to three months. However, where a request is 'manifestly unfounded or excessive', employers may either charge a reasonable fee, taking into account administrative costs, or may refuse to act on the request altogether.

BUSINESS TRANSFERS

Employee protections

37 | 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). The 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

Grounds for termination

38 | 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.

Notice

39 | 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 1 month	Nil
1 month to 2 years	1 week
2 to 12 years	1 week for each year of completed employment
More than 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.

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

Severance pay

41 | 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, the age of the employee and the statutory cap on 'weekly pay'.

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

Procedure

42 | Are there any procedural requirements for dismissing an employee?

Yes, there is a duty for an employer to act 'reasonably' pursuant to the Employment Rights Act 1996 for a potentially fair reason if it is dismissing an employee with at least two years' continuous service.

Employers carrying out dismissals (except for dismissals on the grounds of redundancy or the non-renewal of a fixed-term contract) should also follow the principles set out in the Code of Practice of the Advisory, Conciliation and Arbitration Service (ACAS) (a government public body). 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; however, if the employer proposes to make redundancies affecting 20 or more employees within a particular time frame, it must notify the Department for Business, Innovation and Skills (BIS). Collective consultation with representatives of the affected employees is also required.

Employee protections

43 | 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 owing to a 'spent' conviction; and
- dismissal in the context of a transfer under 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).

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 1998;
- 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.

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.

Mass terminations and collective dismissals

44 | 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.

In addition, if the employer proposes to make redundancies affecting 20 or more employees within a particular time frame, it must notify the Department for Business, Innovation and Skills (BIS). Collective consultation with representatives of the affected employees is also required.

Class and collective actions

45 | 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, as follows:

- 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, 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.

Mandatory retirement age

46 | 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 must 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

Arbitration

47 | 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; for example, an 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 if the relevant statutory right is to be validly compromised.

Employee waiver of rights

48 | 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 the Advisory, Conciliation and Arbitration Service (ACAS) 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.

Limitation period

49 | What are the limitation periods for bringing employment claims?

Employment claim	Limitation period
Ordinary unfair dismissal and automatic unfair dismissal	Within 3 months of the date of termination
Discrimination	Within 3 months of the date of the act complained of
Equal pay	6 months from the date of termination of the relevant contract (tribunals can make awards to cover pay disparity going back 6 years)
Redundancy pay	6 months from the date of redundancy
Unlawful deduction of wages	Within 3 months beginning with the 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 it with a wider jurisdiction to do so than in the context of other statutory employment protection rights.

UPDATE AND TRENDS**Key developments of the past year**

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

In November 2016, the Independent Review of Employment Practices in the Modern Economy, led by Matthew Taylor (the Taylor Review), was launched. The Taylor Review published its report in July 2017 and made more than 50 recommendations, primarily focused on vulnerable workers, such as agency workers, casual workers and zero-hours workers in the 'gig economy'. The government published the Good Work Plan in December 2018, which adopted many of the recommendations set out in the Taylor Review of 2017 and set out the government's vision for the future of the UK labour market, including how it will address the various challenges facing the 21st century workforce.

Section 1 statement

With modern recruitment methods becoming increasingly complex, the Good Work Plan emphasised the importance of allowing individuals to make informed choices so that they can fully understand the terms they are signing up to. To achieve this goal, the Plan introduces reforms to section 1 of the Employment Rights Act 1996, which took effect on 6 April 2020.

Some of the key updates are as follows:

- in addition to employees, any workers engaged by the employer will be entitled to a section 1 statement;
- the right to a section 1 statement will become a 'day one' right, meaning that the employer will be required to provide the section 1 statement to the employee or worker before or on the day that their employment or engagement commences; and
- further information will need to be included in a section 1 statement, such as details of probationary periods, whether working hours are variable and any training obligations.

Parental bereavement leave

Parental bereavement leave, otherwise known as 'Jack's Law', is a new statutory entitlement for bereaved parents. Effective from 6 April 2020, parents of a child who has died will be entitled to take two weeks' leave, paid at the statutory minimum rate.

IR35

Changes to the off-payroll working rules (IR35) are being introduced to crack down on 'disguised employment'. Disguised employment is a form of perceived tax avoidance whereby individuals avoid paying employee income tax and national insurance contributions by supplying their services through an intermediary and paying themselves in dividends. It was originally intended to come into effect in April 2020, but this has now been postponed until 6 April 2021 to allow employers time to deal with the economic impact of the covid-19 pandemic.

The new changes will ensure that where a contractor works like an employee but provides services through an intermediary, he or she will pay the same tax and national insurance contributions as an equivalent employee. From April 2021, the responsibility for determining whether IR35 applies will shift to large and medium-sized companies, bringing the private sector in line with the public sector. The end user will need to determine the IR35 status of all of its off-payroll workers, while the fee-payer (usually a recruitment agency) will be responsible for deducting the relevant tax and national insurance contributions at source.

Morgan Lewis

Lee Harding

lee.harding@morganlewis.com

Matthew Howse

matthew.howse@morganlewis.com

Condor House
5-10 St Paul's Churchyard
London EC4M 8AL
United Kingdom
Tel: +44 20 3201 5000
Fax: +44 20 3201 5001
www.morganlewis.com

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