



Legal update — January 2018

# Employment What to expect in 2018

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## It's the beginning of another year, so what's new on the employment law front?

**First up is the introduction of a new data protection regime for the 21st century, which will confer more rights on individuals and give authorities greater enforcement powers. There are also changes afoot to the way in which the taxation of termination payments are dealt with, which will affect all those of you entering into settlement agreements over the coming months.**

As always there will be new case law to challenge accepted practices, the impact of which will need to be absorbed into your working practices. And finally a quick reminder, have you reported on your gender pay gap yet? If not it's time to get those figures prepared.

### Data protection

UK data protection law will change on 25 May 2018, when the new General Data Protection Regulations (GDPR) take effect. On the domestic front, the Data Protection Bill (which is currently still making its way through Parliament) will repeal and replace the Data Protection Act 1998 and provide "a comprehensive and modern framework for data protection in the UK". The Bill supplements the GDPR. When the UK leaves the EU, the Bill allows for the continued application of GDPR standards and the GDPR will be incorporated into the UK's domestic law under the European Union (Withdrawal) Bill.

The purpose of the Bill is to ensure that UK and EU data protection regimes are aligned post Brexit. The aim is to demonstrate that the UK is an adequate jurisdiction for EU data and so achieve uninterrupted data flows once the UK has left the EU.

The GDPR focuses on control and accountability. Under the former heading it sets out detailed conditions for the use of consent, provides employees with more

transparent information about the purposes for which data is processed and the legal basis for its processing, and extends the rights of data subjects and makes them more explicit.

There will be a data subject access right, similar to the existing one, but there will be an obligation to comply without undue delay and within a month (currently there's a 40 day limit), extended to two months if necessary. The £10 fee will be abolished.

There will be greater accountability with a tougher enforcement regime. The maximum penalty for non-compliance will be 20 million euros or 4% of an undertaking's turnover, whichever is the highest. An employer must prove evidence of compliance, as well as fulfilling their duty to comply with data protection principles. Employers will also be expected to take steps to build data protection into system design. They will need to build in safeguard to comply with the rules, subject to what is technically practicable and to cost.



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### Changes to the taxation of termination payments

The way in which termination payments are taxed will change from 6 April 2018.

Currently termination payments can be paid tax free up to the first £30,000, and anything above that is subject to income tax. Non-contractual payments in lieu of notice (PILONs) can sometimes fall within s.403 and be paid tax free.

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The new law which will be introduced via the Finance (No.2) Act 2017 modifies this and says that s.403 will only apply to payments not falling within s.402B ITEPA (s.402B essentially catches termination payments where the sum could be deemed to be notice pay). Therefore sums representing notice pay, whether contractual or not, will fall within s.402B (and be subject to income tax and employee and employer NICs). Otherwise, termination payments will still fall within s.403.

The NIC position is also due to change (although this is not going to take effect until 6 April 2019). Where payments fall within s.403 and benefit from the £30,000 tax free exemption, not only will the sums in excess of that (i.e. over £30k) be subject to income tax they will also be subject to class 1A NICs (Employer NICs).

Those of you entering into settlement agreements from 6 April will need to be aware that all sums in relation to notice pay will be subject to income tax and NICs, and will not fall within the £30,000 tax-free exemption.

### Interesting cases

2017 was a year in which the gig economy dominated the press. Uber lost its appeal to the Employment Appeal Tribunal (EAT) and failed in its petition to "leapfrog" to the Supreme Court. Meanwhile, decisions that those labelled as "self-employed contractors" were in fact workers became de rigueur, with not only Uber, but also CitySprint, Addison Lee and Pimlico Plumbers falling foul of their own employment models.

It's no surprise then that gig economy cases will continue to come through this year. The Court of Appeal is due to hear the Uber appeal against the decision that its drivers are workers, while the Supreme Court is set to hear Pimlico Plumber's appeal against the decision that although its plumbers were described as "self-employed" they had worker status entitling them to bring claims for discrimination, holiday pay and unauthorised deduction of wages.

The Court of Appeal is also set to consider the case of Shannon v Rampersad to determine whether it agrees with the EAT's analysis on sleep-ins. This case involves a night care assistant who was required to be "on-call" in his flat on the premises between the hours of 10pm to 7am and to respond to calls for assistance, was only entitled to the national minimum wage when he was awake for the purposes of working. It will consider the case of Royal Mencap Society v Tomlinson-Blake at the same time to determine whether the EAT's multi-factorial approach is the correct one to work out whether employees doing sleep-ins engage in "time work" for the duration of the shift or whether they are only entitled to the NMW when they are awake and carrying out relevant duties.

Another interesting case concerns shared parental pay and whether or not it is discriminatory not to enhance it in line with maternity pay. In *Capita Management Ltd v Ali* the tribunal held that a male employee was subjected to sex discrimination when his employer refused to allow him any period of shared parental leave at full pay (when a woman on maternity leave would have received 14 weeks' full pay). The EAT heard the appeal towards the end of December and its decision is awaited. It will be interesting to see the outcome as the EAT is also due to hear the case of *Hextall v Chief Constable of Leicestershire Police*, an appeal against a decision that the police force's policy of giving a period of full pay to mothers on maternity leave, but paying only statutory shared parental pay to partners is not discriminatory.

In the meantime disability discrimination is firmly on the agenda. The Court of Appeal is due to hear the appeal in *Donelien v Liberata UK Ltd* against a decision as to whether an employer who took reasonable steps, but not every step possible, to ascertain whether an employee was disabled, did enough to avoid having constructive knowledge of the disability. The Court is also due to hear an appeal against the EAT's decision in *Peninsula Business Service Ltd v Baker* that a claimant cannot succeed in a claim of disability harassment where they have asserted that they have a disability (in this case dyslexia) but it has not been shown that their condition satisfies the definition contained in the Equality Act 2010.

The long-running saga of the "gay cake" case also continues, with the Supreme Court due to hear an appeal against the Northern Ireland Court of Appeal's decision that the Christian owners of a bakery's refusal to bake a cake with the caption "Support Gay Marriage" was contrary to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006.



Source: Shutterstock

These are just a few of the decisions we can look forward to in 2018!

**And finally, gender pay...**

The Equality Act 2010 (Gender Pay Information) Regulations 2017 came into force on 6 April 2017 and private or voluntary sector employers with more than 250 employees must report their gender pay gap data by 4 April 2018. The duty is extended to public sector employers with more than 250 employees under the Equality Act 2017 (Specific Duties and Public Authorities) Regulations 2017. These employers have to report their gender pay gap data by 30 March 2018.

As a quick reminder employers are required to report:

- The overall gender pay figures calculated using both the mean and the median based on the snapshot date of 5 April. The median is thought to be the best representation of the typical difference between the genders as it is not distorted by the small number of very high earners
- The number of men and women in each of four salary quartiles, based on the employer's overall pay range. This will show how the gender pay gap differs across the organisation, at different levels of seniority
- Separate information on the mean and median gender pay gap relating to bonuses.

The report must be signed by the CEO and will appear on the Government's dedicated website and the employer's own website for at least three years. You can also include a narrative (for internal and external audiences) explaining your figures and any plans to address the gender pay gap.

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