Employment Newsletter

March 2019

BACKHOUSE JONES

Home Office Updates – Guidance on Preventing Illegal Working

The Home Office has replaced the Code of Practice (last issued in May 2014) in relation to preventing illegal working.

This guidance sets out the prescribed checks that you as employers should carry out to help prevent the risk of you being subjected to a civil penalty if one of your employees is found to be working in the UK illegally.

Immigration (Restriction on Employment) (Code of Practice and Miscellaneous Amendments) Order 2018

The Code has been updated to reflect the above Order, which provides that employers may establish a statutory excuse against liability for an illegal working civil penalty by conducting an online right to work check, by using the Home Office online right to work checking service. So, what does this mean for you and your business?

As you are probably aware, it is unlawful for you to employ someone who does not have the right to reside and the appropriate right to work in the UK, or who is working in breach of their conditions of stay under the Immigration Act 2016.

In order for you to comply with your obligation, you are required to carry out right to work checks on all prospective employees **before** the employment starts, conduct follow up checks on any employees with a time-limited permission to live and work in the UK, keep records of all checks carried out and not to employ anyone you know or have reasonable cause to believe is an illegal worker.

You should note that different regimes apply where employment started before 16 May 2014, as different legislation was in place.

These checks are simple yet extremely important, as an immigration officer can issue a notice of liability to pay a civil penalty, if you employ an individual aged 16 or over who is subject to immigration control or who is not entitled to undertake the work for which they are employed because they have not been granted a UK immigration permission (or the permission is invalid, revoked, cancelled or expired).

The maximum penalty is £20,000 for each illegal worker. If you are issued with such a notice of liability to pay a civil penalty, you will be required to provide the immigration officer with documents to evidence that employee's right to undertake the work.

If you receive a civil penalty, you will have 28 days to either pay up, object to the penalty or lodge an appeal. You may object the penalty on the following grounds:

1) You are not liable to pay the penalty;

2) You need not pay because you have established a statutory excuse; or

3) The amount of penalty is too high.

You will be excused from paying a civil penalty if you can show that you complied with any prescribed requirements in relation to the employment of the individual found to be working illegally. Up until very recently, you would be able to establish a statutory excuse if you firstly obtained the employees original

documents as prescribed by the Home Office, checked that these documents relating to the individual were original, valid and unchanged, and that a safe copy of these documents are kept for follow up checks.

However, the Home Office has introduced a new online right to work checking service (launched 28 January 2019) as an alternative to requesting and retaining right to work documents from the individual.

This will enable you to check a prospective employee's right to work online. Provided you receive a positive confirmation upon carrying out such checks, you will establish a statutory excuse to a civil penalty for illegal working.

Commentary

This Home Office update makes it much simpler for you as employers to identify and confirm your prospective employees have the correct right to work in the UK. The service is a step taken to modernise the immigration system and will provide you with greater

security when checking migrants' status. It avoids the risk of you being presented with fraudulent or forged documents at the checking and recruitment stage, then being stung later down the line if you are found to be liable to pay a civil penalty.

With the 29 March fast approaching, this is a useful online tool to ensure you remain compliant following Brexit. If you need further guidance on this new update, the Code of Practice can be found following the link below, more specifically at page 18: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774078/Code_of_practice_on_preventing_illegal_working_-_January_2019.pdf

The EAT reviews time in the name of Science

If you think Professor Brian Cox now sit in the Employment Appeal Tribunal (EAT) you'd be wrong. We can confirm that the well-known professor of Physics and Astronomy is still currently on his UK arena tour.

The review came in the form of the question; *"How is 'long term' to be judged for the purposes of the definition of disability?"*

The question was raised in the recent case of *Nissa v Waverly Education Foundation*. Mrs Nissa was a Science teacher within Waverly Education Foundation. From December 2015 she suffered from symptoms of Fibromyalgia, a long-term condition that causes pain all over the body.

As well as widespread pain, people with fibromyalgia may also have:

- increased sensitivity to pain
- fatigue
- muscle stiffness
- difficulty sleeping
- problems with mental processes
- headaches
- irritable bowel syndrome (IBS)

Mrs Nissa resigned effective from 31 August 2016 after which she brought a claim for disability discrimination, claiming her impairment caused her to suffer a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Under the Equality Act 2010, "long-term" mean has lasted or is *likely* to last at least 12 months. The employer disputed this claim.

The Employment Tribunal (ET) found that a medical diagnosis of "Fibromyalgia" was not made until 12 August 2016. The diagnosis was subject to a caveat in October 2016 that her symptoms might slowly improve now she was no longer in employment. The ET held that it could not therefore be said that the effects were "likely" to be long term. If the effects of the Claimant's impairment had been found to be long-term, the ET would have alternatively found that Mrs Nissa had failed to establish that they had given rise to the relevant substantial effect. The ET therefore rejected her claim.

Mrs Nissa appeal the decision. The EAT considered that the ET had in actual fact taken the wrong approach with the case. It looked towards the House of Lords determination in the case of *SCA Packaging Ltd v Boyle*. Here it clarified that in considering whether something was "likely", it must be asked whether or not it could well happen.

The ET had focused on the question of diagnosis with Mrs Nissa rather than the effects of the impairment. Prior to the 31 August 2016 diagnosis, the ET should have looked at the reality of the risk, whether it could well happen with a much broader view of the evidence available – in this case, Mrs Nissa's testimony that attempting to carry out many of her daily chores was in fact "extremely difficult, painful and exhausting".

The case has since been remitted to a different tribunal for reconsideration.

Many employers may have a mistaken belief that if an employee's diagnosis is recent then they would not be covered by the Equality Act and they can therefore not fall foul of a

discrimination claim. This case serves as a reminder that this approach is not safe by any means.

If you have questions about how to accommodate and help employees who may have a disability, please don't hesitate to get in touch with the Employment team on 01254 828 300.

ACAS provides useful guidance on Age Discrimination

Many of you are no doubt aware that under the Equality Act 2010 it is unlawful for an employer to directly or indirectly discriminate against its employees because of their age, their perceived age or the age of person with whom they are associated. In the transport sector, this tends to manifest in the mistreatment of drivers who are deemed a potential liability as a consequence of their age.

There are also instances where age discrimination can occur between employees in the form of harassment and victimization. For example, referring to younger employees as 'snowflake' or being given menial tasks as a consequence of their age, or referring to older employees to as 'past it' and have their thoughts and opinions ignored can leave you liable to a claim for harassment due to so-called 'banter' between wok colleagues.

Likewise subjecting an employee to a detriment because they have, for example, complained about alleged discrimination can also be unlawful.

ACAS Guidance

ACAS has recently published guidance to assist employers in understanding how age discrimination can happen, how it can be prevented and how different treatment because of age can be allowed in limited circumstances.

The five most prominent areas where discrimination can occur are (1) recruitment; (2) training and promotion; (3) performance management; (4) managing under-performance; and (5) retirement.

As there is now no fixed retirement age, the latter area is often a problematic area for the industry in general when considering the older driver.

The guidance includes sections on key considerations for employers to reduce the chance of age discrimination occurring and the top ten myths relating to age.

When Age Discrimination may be lawful

The Guidance also refers to certain instances where a mistreatment of individuals justified by their age may be allowed. These are as outlined below:

- Where the need for certain types of discrimination because of age can be lawfully justified – for example if it is able of objective justification as it is a 'proportionate means of achieving a legitimate aim'.

- Pay and any extra benefits and perks linked to certain periods of time with the employer. However, this is only permitted up to five years of employment.

- Where being a particular age or within a particular age range, or not a particular age, is a legal requirement of the job, e.g. driver age being over the legal requirement. This is likely in only very limited circumstances. In law, this is known as an 'occupational requirement'

- Some circumstances in redundancy. For example, deciding to keep staff who have been with the employer for longer, and making redundant staff with less time with the firm. This is likely to discriminate against younger employees. However, it could be allowed if the employer can prove a lawful business reason in the circumstances - for instance, keeping the most experienced staff who are fully trained and skilled as they are essential to the future of the restructured company.

The guidance can be found at www.acas.org.uk/agediscrimiation and is well worth a read for any employer. For further advice on the subject, contact our Employment Department at Backhouse Jones on 01254 828300.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice

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