



# Employment Law Matters

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## News update

Eyes in the financial services sector have been cast across the sea to Ireland. Davy Stockbrokers' attempts to defer part of the bonus of its employee, Eamon Finnegan, for a year were not upheld by the High Court in Dublin. The decision was mainly based on whether, in deferring bonus payments, Davy was varying the terms of the bonus arrangements, which it was not permitted to do. An issue also raised was the deferral might be a restraint of trade and therefore potentially unlawful. Employers with **deferred bonus arrangements** should consider them carefully in light of this ruling and the possibility of employees making similar arguments in the UK.

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The **Religion or Belief (Questions and Replies) Order 2007** is now in force. The order prescribes forms by which a person who has brought, or is considering bringing, proceedings under Part 2 of the Equality Act 2006 (discrimination on grounds of religion or belief) and may question a respondent or a potential respondent.

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The Government has carried out a consultation on the administration of **additional paternity leave and pay**, under which fathers could be allowed to take up to 26 weeks additional paternity leave. If the mother returns to work some of the leave will be paid. A consultation paper invited practical comments on the preferred administration process and how to minimise burdens on businesses. The consultation period ended on 3 August 2007 and further consultation on the draft regulations will follow.

The Government issued a consultation document making proposals for amendments to the law and the creation of a **Single Equality Act**. The proposals cover equality law in its widest sense and extend to the positive duties of public authorities and the provision of goods and services, as well as employment. The consultation ended on 4 September 2007.

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The **employment simplification bill** has been published. This includes the implementation of the Gibbons review of workplace dispute resolution, including the repealing of the statutory dispute resolution procedures and the implementation of an alternative – yet to be determined.

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The National Minimum Wage Act 1998 (Amendment) Regulations 2007 came into force on 17 July 2007. These provide that those aged 26 and over, undertaking a course of higher education which requires attendance for work experience, are excluded from qualifying for the **national minimum wage**.

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The Working Time (Amendment) Regulations 2007 have now been published, together with explanatory notes. The regulations will amend the Working Time Regulations 1998 to **increase the statutory annual holiday entitlement** from four weeks to 5.6 weeks.

The increase will take effect in two stages: workers will become eligible for the first additional 0.8 weeks from 1 October 2007) and the second 0.8 weeks from 1 April 2009 (making a total of eight additional days for employees working a five day week).

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The House of Lords European Union Committee has suggested that the recent paper by the European Commission considering **'flexicurity'** – the concept of giving workers security and flexibility in the workforce – are not relevant to the UK. They argue that flexicurity will have little impact on UK labour law and that the UK should focus on other areas, such as management skills and developing an innovative workplace.

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Employers can breathe easily following the Government's decision to issue exempting regulations from requirements imposed under Section 253 of the Pensions Act 2004. The requirements could have caused problems for employers (UK and overseas) making **contributions to non-EU pension schemes for seconded workers**. The promised regulations are still awaited, but are expected to be broadly the same as the draft Occupational Pension Scheme (Exemption) regulations issued in 2005. Once the regulations are issued, arrangements for contributions to any non-EU pension scheme should be reviewed to ensure that an exemption is available.

## Case law update

The question of **whether someone is an employee or self-employed** cannot be decided by simply looking at one or two clauses in a consultancy agreement. That is the conclusion to be drawn from the decision in *Consistent Group Ltd v Kalwak and others* (UKEAT/0535/06/DM).

The contract included the right for the individual to send someone else to provide the services (to overcome a requirement of personal service) and a provision to the effect that there was no obligation on the company to offer, and no obligation on the consultant to accept, any work (to avoid a mutuality of obligation). Despite a contract which apparently excluded two fundamental elements of an employment relationship, the claimants were found to be employees. The Employment Appeals Tribunal (EAT) held that there was no 'realistic possibility' of the individual providing a substitute or refusing work. The contract therefore did not reflect the reality of the situation and could be seen as having been varied in practice or even a sham.

On the basis of this case there is no contractual quick fix in determining employment status and no alternative to ensuring that all the factors – commercial, practical and legal – point towards self-employment if that is the desired outcome.

Cases around **implied contracts of employment** have arisen in the past few months. In *Astbury v Gist* (UKEAT/0619/06/DA) the EAT concluded that the fixed term assignment is entered into by Mr Astbury and the employment agency was a contract for services. That prevented the conclusion, asserted by Mr Astbury, that the agency had acted as agent for the end user and potentially created an employment contract between him and it. Such a conclusion would have conflicted with the express terms of the temporary worker agreement entered into by Mr Astbury and the agency.

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*Morrish v NTL Group* (2007 CSIH 56 XA143/06) confirmed that a **payment in lieu of notice** (PILON) clause will rarely be inserted into a contract where there is an express term relating to the duration of the contract and the necessary notice period. The employer argued that it had an implied right to terminate the contract in accordance with its terms by making a payment in lieu of notice. The court disagreed and held that there had been a breach of contract, with Mr Morrish having an entitlement to damages. Provisions will only be implied into a contract where there is a good reason. The decision is helpful to anyone facing arguments from HM Revenue & Customs about implied PILON clauses in relation to the tax treatment of notice pay.

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The Court of Session in Scotland has considered the question of **whether bank holidays should be apportioned for part-timers**. Capita employed Mr McMenemy on a part-time basis. He was not allowed time off in lieu when public holidays fell on Mondays (when the majority fall) although full-time workers in the team who normally worked on Mondays were given the day off. Mr McMenemy claimed that he had suffered detriment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 as he had not received days in lieu for public holidays.

The Court decided that the detriment Mr McMenemy suffered was because he did not work Mondays and not because of his part-time status. It was legitimate to conclude that, had there been a full-time employee in Mr McMenemy's team who did not work on Mondays, that employee would not have been given days off in lieu of public holidays either.

This appears to give some scope to employers who do not to give days in lieu of bank holidays to those who, due to the days they work, benefit from proportionately fewer. This case may be unusual, though, because Capita had full-time workers who did not work Mondays. A query also arises as to whether an employer may reduce the entitlement for those who happen to benefit from more than their proportionate share. (*McMenemy v Capita Business Services Limited*, UKEAT 0079/05/0803, 8 March 2006.)

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## Case law update - cont'd

In *O'Hanlon v Commissioners for HM Revenue & Customs* (2006 UKEAT/0109/06/0408, 4 August 2006) the Court of Appeal held that when Mrs O'Hanlon's entitlement to sick pay had been exhausted under HMRCs sick pay policy, the employer's failure to continue to pay Mrs O'Hanlon was lawful – it was neither a failure to make a reasonable adjustment nor disability-related discrimination. A disabled employee will now find it very difficult to claim full **pay during sick leave**, once any contractual entitlement to full pay has been exhausted, unless the employer has caused the absence by failing to make reasonable adjustments which would have enabled the employee to remain at work.

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The decision of the Court of Appeal in *Richard Millam v The Print Factory (London) 1991 Ltd* (2007 EWCA Civ 322) has created some uncertainty in an area of the transfer of undertakings (TUPE) regulations which previously had been reasonably clear. To summarise, the company which employed Mr Millam was transferred to the ownership of another company. They remained separate entities, but were operated closely together – the parent company took on various management decisions of the subsidiary, for example. When both companies went into administration Mr Millam was made redundant by the subsidiary but the next day the parent company was sold and Mr Millam argued he had transferred into its employment under TUPE.

The Court found that he had. A lack of independence did not of itself demonstrate that the holding company owned the business of the subsidiary and the legal structure of a group is important, but that could not be conclusive when trying to determine whether control had been transferred as a matter of fact.

The facts in this case were quite extreme, but it does raise the prospect of **inadvertent transfers under TUPE** arising from the way group companies are managed.

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Two cases have highlighted the care needed to ensure the **'without prejudice'** tag attached to negotiations will be enough to allow privilege to be claimed and discussions kept away from the eyes of the court.

*Framlington Group Limited & AXA Framlington Group Limited v Ian Barnetson* (2007 EWCA Civ 502) concerned the question of when, in the course of a dismissal, a dispute can be said to exist, so that the parties can be genuinely seeking to resolve it 'without prejudice'. The court concluded that it would uphold the privilege if there was a clear and potential danger of litigation, even if the parties have not formally acknowledged that they were negotiating to avoid a court dispute. The crucial consideration was whether, in the course of negotiations, the parties contemplated litigation if they could not agree. This is a reminder that a conversation about a negotiated exit will not be regarded as 'without prejudice' if it occurs too early in the dismissal process.

*Brunel University v Webster & Vaseghi* (2007) EWCA Civ 482) is an example of where the privilege in 'without prejudice' situations can be waived. Here, the University attached copies of a grievance panel's 'without prejudice' report to its employment tribunal response (ET3) and was found to have waived its privilege on the report, particularly because it had put the document into the public eye and had given up its confidentiality.

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There has been more good news for employers with **discretionary bonus schemes** after the decision in *Ridgway v JP Morgan Chase Bank National Association* (2007 EWHC 1325 (QB)). Mr Ridgway made a number of complaints about the way he was treated following the end of a sabbatical, including a claim for constructive dismissal. Of particular interest, the court held that the bank had not acted in breach of the implied term of trust and confidence when it failed to award the employee a bonus when he had been on sabbatical for most of the bonus year. The bank had fulfilled its obligation to consider him for a bonus. The bank was under no contractual obligation to carry out a full formal appraisal and it had considered the main factors relevant to determining a bonus: the income generated (Mr Ridgway had made losses) and 'add-on' contribution (there were no factors to justify uplift). The bank's decision regarding the discretionary bonus was not irrational or perverse.

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## Case law update - cont'd

*Hynd v Armstrong & Others (CSIH 16)* reasserted the established principle that any **dismissals in a TUPE situation** are more safely carried out after the transfer occurs.

Mr Hynd was employed by a firm of solicitors with offices in Edinburgh and Glasgow. The two offices decided to dissolve the partnership and form a separate partnership based only in Edinburgh. Mr Hynd was made redundant by the transferor on the date of dissolution in 2002. The following day a new partnership was formed with the reduced employee structure. The fact that Mr Hynd had been dismissed by the transferor immediately before the dissolution was held to be a dismissal by reason of the transfer and consequently unfair. The transferor was unable to rely on TUPE regulation 8(2) (economic technical or organisational reason) for several reasons, including the fact that allowing the transferor to dismiss pre-transfer would mean that only employees of the transferor would be in the redundancy selection group.

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*Hunt v Storm Communications Ltd and others (ET/2702546/06)* is a reminder that the new TUPE laws, in particular their provisions dealing with **service provision changes**, cut deep. A person who worked for a marketing company predominantly, although not exclusively, on one account was transferred to another marketing company that successfully pitched for the client. This was despite there being a gap in the provision of the services. All service providers must bear this in mind on bidding for and winning new accounts.

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At last we have a case which shows there is life in the **Information and Consultation of Employee Regulations 2004**, which came into force in 2005. Macmillan Publishing was found to be in breach of the regulations in failing to hold a ballot to elect an employee information and consultation representative. Earlier complaints had been made in relation to the failure of Macmillan to give information to employee representatives. The EAT considered the relevant provisions were being ignored at almost every stage. McMillan was fined a penalty of £55,000. (*Amicus v Macmillan Publishers Limited, UKEAT/0185/07/RN*).

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The recent European Court of Justice judgment in *JP Morgan Claverhouse plc (C-363/05)* has raised the possibility that **investment management services supplied to pension funds are exempt from VAT**.

The JP Morgan case concerned investment trusts and whether they had the necessary status as special investment funds in order to receive investment management services exempt from VAT. It is arguable that pension funds may also be properly regarded as special investment funds. Pension funds suffering significant amounts of irrecoverable VAT should consider their position.

There are complex issues regarding retrospective claims that pension funds may make and whether claims should be made against the investment manager or HMRC or both. It is arguable that claims may be made going back to 1990. Sponsoring employers who are partly exempt (such as financial services and healthcare companies) may also have incurred additional amounts of irrecoverable VAT. Both they and trustees need to consider the potential for VAT recoveries to be claimed for their benefit.



## Paid holiday entitlement to increase from October 2007

### Key points

- Paid holiday entitlement in the UK will increase from 1 October 2007 to 4.8 weeks a year, and to 5.6 weeks a year from April 2009.
- Around six million people are expected to benefit from this change, with the impact being most noticeable in sectors such as leisure and retail, recruitment agencies and businesses who employ people on atypical employment contracts.
- Employers must factor these additional holiday costs into their budgets and pay reviews, as well as incorporate them into their contractual arrangements, employment policies and procedures.

The current minimum entitlement to paid holiday in the UK is four weeks per annum, inclusive of public holidays. This is a lower number than in many EU countries, where the figure tends to be at least four weeks plus public holidays.

The UK position is to change, with an increase in paid holiday entitlement from 1 October 2007. Employees will be entitled to an increase from four weeks a year to 4.8 weeks. This will be increased to 5.6 weeks from April 2009.

Government figures suggest that around six million people (employees and those holding 'worker' status such as agency workers) will benefit from this change, although the majority of the workforce already receives the new minimum entitlement.

Some sectors (such as leisure and wholesale/retail) will be affected more than others and employers of certain groups will have to pay particular attention to the new rules. These include recruitment agencies and businesses who employ people on 'zero hours' or other atypical employment contracts. For these organisations, payroll costs will increase significantly. This should be taken into account immediately, particularly where long-term contracts involving staff costs are involved. However, as explained below, there are transitional arrangements that mitigate the impact of this.

So how do the rules increasing holiday entitlement work in practice?

Where a holiday year does not run from 1 October, the employer will need to calculate an employee's holiday entitlement for the years in which the changes take effect. So, for example, if the holiday year runs from 1 January until 31 December, an employee will be entitled to 4.2 weeks' holiday in 2007, 4.8 weeks in 2008 and 5.6 weeks in 2009.

As with the existing holiday regulations, a part time worker's entitlement is reduced on a pro-rata basis. The maximum entitlement is capped at 28 days, thereby limiting the entitlement of individuals working six days a week.

There is some flexibility to assist the transition. Employers can pay in lieu of the extra 0.8 weeks holiday until 1 April 2009. This extra entitlement can also be carried forward to the following holiday year (but no later).

Employers must factor these additional holiday costs into their budgets and pay reviews, as well as incorporate them into their contractual arrangements. They will also need to consider whether any changes are necessary to their employment terms and policies, in addition to informing employees in writing of any increase to their entitlement.

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## Age discrimination – one year on

### Key points:

- Over 1,500 age discrimination claims have been filed since the rules came into force last October, and the number of claims over the next year is expected to exceed 8,000.
- As expected, many allegations have been made by aging senior executives.
- The impact on benefit plans, especially the treatment of retirees as 'good leavers', has also proved to be a difficult area.

It has been almost a year since age discrimination became unlawful in UK. Since the introduction of the regulations on 1 October 2006, more than 1,500 claims have been filed in the employment tribunals. The Department for Business, Enterprise and Regulatory Reform estimates that there may be as many as 8,000 age discrimination cases filed within the next year.

One of the most high profile cases (and one of the first age discrimination claims filed after 1 October 2006) is Mr Bloxham's claim against a city law firm. Mr Bloxham claims that the firm, in which he was a partner, discriminated against him on the grounds of his age when they made changes to their pension scheme. He maintains that the changes affected partners differently according to their age. It is understood that the firm is using one of the few defences available under the age regulations – that of objective justification. The

firm needs to show that the changes to the pension scheme, despite being potentially discriminatory, are a proportionate means of achieving a legitimate aim. Before the introduction of age discrimination, Mr Bloxham would have had no grounds on which to claim discrimination.

The decision in the case is eagerly awaited. This is not just because of the fact that a highly respected law firm may have fallen foul of the law. But the case should provide an early indication of judicial guidance into the circumstances in which discrimination will be regarded as justifiable and therefore lawful – one of the great unknowns of these new rules.

As the above case suggests, senior executives are proving to be among those most commonly invoking the new laws. The opportunity to argue that termination is linked to age is available for many people, but the biggest risk is often with senior executives. This is partly because the higher paid will have higher value claims. In addition, a traditional dismissal lacking clear reasons can leave questions which an executive and their lawyer answer with the assertion that age must be a factor. Armed with this, and the requirement that the statutory termination procedures must be followed, lawyers advising senior executives are often including age discrimination with their unfair dismissal claims. By doing so, they can claim the unlimited compensation available in an age claim and seek to apply a multiple to that (up to a 50% increase) if the statutory procedures are breached.

Another area where employers are facing difficulties is in long-term and other incentive plans. The main sticking point relates to the 'good leaver' provisions, where a scheme treats retirement as a good leaver event, either by specifying an age or length of service at which retirement is deemed to occur or simply referring more generally to retirement with the consent of the employer. Such provisions potentially discriminate against younger employees who leave employment, especially those who might be stopping work or downshifting – arguably they are in no different a position to the retiring, older, employee.

Another legal argument related to the regulations concerns the legitimacy of the UK allowing a mandatory retirement age of 65. This, and other issues, are being addressed in the so-called 'Heyday' challenge, a case referred by the High Court to the European Court of Justice (ECJ). The ECJ decision on this is not expected until 2009.

When the age regulations were initially introduced, there were a number of uncertainties that employers had to live with until the courts and tribunals gave clear guidance on the correct interpretation of several provisions. Until we have the benefit of actual decisions we are no further forward regarding those uncertainties. Decisions are on the way, but, in the meantime, employers need to be alert to possible claims.

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## Is the end of the statutory dismissal procedures in sight?

### Key points

- An independent review into the statutory dismissal and disciplinary procedures recommends that the procedures be revoked.
- Although the procedures are troublesome and burdensome for all employers, their impact is exacerbated for small employers. The procedures exemplify the disproportionate burden on small, compared to large, businesses under current UK employment laws.
- It is important that employers of all sizes continue to follow the procedures while the final outcome of the review is awaited.

On 1 October 2004, new dismissal, disciplinary and grievance procedures came into effect with the aim of improving workplace dispute resolution and reducing the number of claims going to the employment tribunal. Almost three years after their introduction, has this aim been realised?

Ask any employer, employment lawyer, or, indeed, employee who is involved in a disciplinary or grievance process and the answer to this question is likely to be no. This view has been supported by Michael Gibbons in his independent review of the dispute resolution regulations (*Better Dispute Resolution: a review of the employment dispute resolution in Great Britain*), with the leading recommendation being to repeal the statutory dispute resolution procedures.

Other findings of the review will probably come as little surprise to those who have come across the procedures.

- The regulations exacerbate and accelerate disputes.
- Both large and small businesses have reported that the number of disputes has risen. For example, the review found that 30% to 40% increases have been typical in the retail sector.
- The complexity of the procedures has led to increased costs, mainly as a result of legal advice being sought earlier in the process.
- The procedures are mandatory for some situations in which they are arguably not applicable, for example agreed departures and the expiry of fixed-term contracts.

While it is generally agreed that the dispute resolution regulations should be revoked, there is no consensus on what should replace them. One option is to revert to the position prior to the introduction of the regulations, but many favour a complete review of the law relating to the process for unfair dismissal.

### Impact on small businesses

Some of the practical problems associated with the regulations are exacerbated when it comes to small businesses. The review finds that the requirement to put matters in writing is counter-cultural for a small business and can lead to greater conflict, rather than act as a route to resolution. In addition, when it comes to holding an appeal, it is often an unnecessary burden, especially as the appeal may have to be heard by the same person who made the original decision.

In addition to the burdens imposed on them by the dispute resolution regulations, small employers have to comply with many other obligations arising out of changes in UK employment law in the last decade. These include the requirement to pay employees the national minimum wage and disability discrimination following the removal of the small employer exemption. They also have to provide paid holiday, which is about to increase. There is no provision in any of these areas of law to take into account the size of a business. As a result, the proportionate effect on small businesses is often greater than it is on larger businesses.

Employers should watch this space and be prepared to make changes to their disciplinary, performance, dismissal and grievance procedures. In the meantime, whatever the size of an employer, whether it has a handful of employees or a sophisticated HR department, the procedures, and all other employment laws, must be followed.

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## Immigration's revolution

### Key points

- Immigration is at the top of the political agenda and UK migration routes have been systematically reviewed over the last year.
- The Government intends to simplify the existing body of law with the principal aim of making it easy for immigrants to understand how they can come to the UK or remain here legitimately.
- A new points based system is due to roll out from the beginning of 2008.
- Employers should review their processes and record keeping in preparation for registration as a sponsor.

The Government is committed to dispensing with all existing immigration laws, rules and guidance and replacing them with a simple legal framework. This is one of the most ambitious and radical projects government lawyers have ever undertaken. The rationale for simplification is logical, but the consequences for immigrants and their employers may not be wholly positive.

Immigration remains at the top of the political agenda and for the past year the UK's migration arrangements have been systematically reviewed. The Government has established a new Border and Immigration Agency to replace Work Permits (UK) with a regional structure, and introduced measures to strengthen border control and enforcement. There has been a major reform of processes, including a new approach to asylum casework and a points based system for managed migration. The points based system will consolidate 80 existing work and study routes into five tiers with points awarded for aptitude, experience, age and the level of need in any given sector. There will be a system of sponsorship by employers and educational institutions to ensure compliance.

In line with these major changes, the Government intends to simplify the existing body of law to make it easy for immigrants to understand how they can come to the UK, or remain legitimately.

Currently, the immigration legal framework consists of three layers: immigration statutes, immigration rules and the immigration directorate's instructions as to how

to interpret the rules. Without doubt this is a complex system, but it is a system which contains substantial discretion, as many points are not covered by any part of the legal framework. For example, there is little practical detail about investor applications (applications for high net worth individuals who want to make the UK their main home) and much is left to the discretion of the caseworker. There is also scope in the current system for appeals.

Critics of the simplification project argue that if the intention was solely to consolidate the existing law, the tight timetable for implementation (the system is due to be rolled out from early 2008) would be uncontroversial. They are concerned, however, that the additional simplification will see a withdrawal of appeal rights and the exercise of discretion. Advocates of the project maintain that the current system lacks public confidence; they say that protracted appeals and inconsistencies in decision-making due to the exercise of discretion must be tackled. In addition, a new simplified system will underpin the aims of the new transparent and objective points based system.

Under the proposals, employers will need to register as sponsors for foreign employees they wish to bring into UK. Registration will be open from January 2008 and detailed guidance on the requirements and procedure is expected in October 2007. However, the requirements are likely to include a demonstration of strong internal processes and record keeping, as well as a good compliance record. Employers are well advised to start reviewing these aspects now.

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## Pension scheme governance – putting it on the corporate agenda (and keeping it there)

### Key points

- Following recent legislation and guidance from the Pensions Regulator on the importance of governance in pension schemes, trustees are now focused on having a good governance framework in place. It is time for sponsoring companies to pick up this gauntlet too.
- The absence of a clear governance structure on the employer side can result in nasty surprises and difficult decisions having to be made at short notice.
- The first step on this path is to identify what the company's pension objectives are, including the medium- and long-term objectives.

Governance has been thrust into the spotlight by the Pensions Regulator. Hot on the heels of issuing the *Code of Practice on Internal Controls*, the Pensions Regulator has recently published a discussion paper which reiterates the importance it places on governance and sets out its key regulatory priorities for the coming years. This gives pension schemes a firm anchor for the development of good governance. While it is necessary for trustees to have a good governance framework in place to safeguard pensions, it is time for sponsoring companies to pick up the gauntlet too.

Trustees have placed governance high up on their agenda – particularly now that legislation gives them greater responsibility on issues including employer pension contribution levels and pension scheme investment strategy. However, governance is not yet hitting the employer's radar sufficiently. It is seen as an issue for trustees to address and companies are yet to embrace it with the same zest and zeal.

Why should companies take a proactive approach to their pension scheme governance when this seems a matter for trustees? To answer this question we need to start at the beginning. What is governance? In short, it is all about compliance, best practice and integrity – it is as much about culture and behaviour as it is about policies and processes (although they help too). One of the key areas is the decision-making process – how conflicts of interest are managed and whether the right questions are being asked. Good governance should ensure communication happens effectively, processes are in place to reduce risks and everyone shares a common platform of knowledge and understanding.

It used to be that the employer knew more about managing a pension scheme and the trustees were pedalling hard to keep up. Increasingly, it seems that it is companies who have not yet grasped the importance and necessity of having a sturdy governance framework in place. Indeed, a company's need for fresh ideas, help and advice on the pensions front has never been more pressing. Today's complex pensions landscape has thrown up many challenging problems, in particular scheme funding. With the change in dynamics of company and trustee relationships, it is imperative that a connected approach is taken in relation to decisions that need to be made on a pension scheme.

Is it really all bad news if companies do not have a good governance structure in place? Well, yes. Without a clear governance structure covering how the pension scheme is controlled, the company can face nasty surprises and have to make difficult decisions at short notice. The fact is decision makers need information. Companies and trustees need to maintain an open dialogue with each other. They also need to know who has authority to speak for the other, to have access to the right people and to have confidence that what they are told is the collective view of the other. Lack of communication can result in devastating repercussions. Take the example of the organisation for whom it was unclear how the trustee would consult on investment strategy with the company. As a result, the change in strategy that the trustee requested was not put in place for several months and ended up costing the pension fund over £100m – all because there was no clear communication channel in place.

## Pension scheme governance – putting it on the corporate agenda (and keeping it there) - cont'd

So, how should companies start to manage their governance structure effectively? The first step is to identify what their pension objectives are, resisting the temptation to concentrate on short-term costs for this purpose. For example, one objective might be to establish the balance between reducing cost and reducing risk. From there, the company can tackle important strands of the governance process: decision making and communications; risk and controls; compliance and monitoring; and service delivery.

It is time for companies to get their house in order by starting to ensure the foundations of a good governance structure are in place. The rewards are then there to be reaped. Good governance will provide the opportunity to maximise business value and minimise business risk. Set against a backdrop where almost all trustee bodies are reporting a much sharper focus on improving scheme governance, there is no better time to start.

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## Managing your employment tax risks

### Key points

- Risk intervention is firmly on HMRC's agenda, with a shift in the way PAYE audits are conducted.
- Organisations need to appoint someone to be responsible for employment tax risks, and who will work with the key stakeholders and understand the compliance requirements of the organisation.
- Clear communication with the tax department is essential, in order to understand tax technical elements of employment taxes.

Risk intervention is firmly on the agenda of HM Revenue & Customs (HMRC). Following the publication of *Making A Difference: delivering the review of links with large business*, around 15,000 businesses can expect to receive a formal risk assessment in the next 12-18 months. The largest businesses can expect to receive a risk assessment by the end of the year. This change in approach signals a shift in the way that PAYE audits will be conducted.

The introduction of the risk based approach to PAYE audits, combined with an increase in the use of specialist units to review specific areas of employment compliance, will enable HMRC to obtain a better understanding of operations. PAYE compliance audit teams are already supported by the resource and technical expertise of specialists in expatriate tax, share plan reporting (and accounting), terminations, status issues and more.

So what steps can you take to assess the level of employment and HR tax risks within your company? The first step, and the biggest challenge for most organisations, is to assign someone to take overall responsibility and ownership for employment tax risks. This person should work with key stakeholders to identify the relevant data sources and fully understand the compliance requirements of the organisation.

The next step is to be clear about what employment and HR taxes include. In many organisations these taxes are commonly grouped together under the heading 'payroll taxes' and are often assumed to be the responsibility of the payroll function. However, many of the risks associated with inaccurate or incomplete reporting and non-compliance are controlled by the business itself and stem from errors of judgement and failures in implementation and communication.

Environmental factors can also contribute to risks such as regulatory and legal demands, industry sector issues, complexity of operations and organisational structure. Nevertheless, most tax risks (and certainly all controllable tax risks) tend to have an element of commonality and it is likely that different functions will be inherently more prone to particular risk drivers. For example, compliance carried out within a tax department is more likely to be prone to data errors than technical errors, whereas employee reward planning (e.g. a new long-term incentive plan or salary sacrifice scheme) implemented incorrectly by the HR department might be more prone to errors of judgement in delivering the scheme. Communication with the tax department to obtain confirmation that the scheme works technically and has approval from HMRC is essential.

Finally, consideration of the following is required to understand the number of different elements of tax compliance in any reward structure:

- what the elements of reward are;
- who has responsibility for controlling the costs and expenses, and for making decisions about the PAYE tax and NIC treatment of those payments;
- who will ensure that all benefits are reported on time (including share transactions), and by what means (whether by forms 42, P9D, P11D or PSA); and
- how the payments and benefits accruing and paid to foreign workers will be captured and reported.

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## Dates for your calendar

September	01	November
26	The Commission for Equality and Human Rights will assume the powers and functions of the three current equality commissions – the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission.	06
New relaxed dispute resolution procedure takes effect		Queen's Speech and State Opening of Parliament
October		December
01	01	New Regulations making changes to section 75 of the Pensions Act 1995 expected to come into force
The standard rate of national minimum wage will rise from £5.35 to £5.52.	Consultation on amendment to employer debt Regs ends	
01	03	
The development rate of national minimum wage will rise from £4.45 to £4.60.	Consultation on future development of PPF levy ends	
01	09	
The young workers rate of national minimum wage will rise from £3.30 to £3.40.	End of public consultation on the Disclosure and Transparency in Private Equity document.	
01	24	
The accommodation allowance under the national minimum wage regulations will rise from £4.15 to £4.30 per day.	All remaining provisions of the Data Protection Act 1998 come fully into force.	
01		
The Working Time (Amendment) Regulations 2007 will take effect. Workers will be entitled to an increase from four weeks a year to 4.8 weeks of holiday per year.		

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