

Winter 2007



# Employment law matters

Welcome to the winter edition of our revamped newsletter. Please click on the tabs to read recent case updates and about current regulatory issues affecting employers.

## News

Summary of regulatory developments affecting employers ... [click here](#)

## Employment law case update

Round-up of recent employment law cases ... [click here](#)

## What's next for EU employment law?

The answer lies in a recently issued Green Paper ... [click here](#)

## Ensuring long-term incentive plans meet EU age discrimination laws

Companies with international long-term incentive plans need to consider the effect of employment law in the different countries in which the plan's participants are based ... [click here](#)

## New maternity and paternity rules – impact on employers

The maternity rules have changed again after a relatively short period of stability ... [click here](#)

## Impact of the new Companies Act on employing people

The Companies Act 2006 is a significant piece of law, it introduces ... [click here](#)

## Pension Protection Fund levy – increases on the way

Last year's Pensions Protection Fund levy was much lower than many employers expected. However this may have been a temporary respite ... [click here](#)

## Revisions to the Highly Skilled Migrant Programme

In December 2006, the Highly Skilled Migrant Programme became the first immigration category to be significantly revised ... [click here](#)

To give your feedback or to be removed from the *Employment law matters* mailing list [click here](#).

## News

From 1 February new **Tribunal award limits** apply. The maximum figure for a week's pay used, among other purposes, for the calculation of unfair dismissal basic awards and statutory redundancy payments is now £310. The maximum compensatory award for unfair dismissal purposes is now £60,600.

On 1 January 2007 **Bulgaria and Romania** joined the European Union. Although citizens of Bulgaria and Romania have the right of free movement throughout Europe, the UK has decided to limit their access to the labour market. Low skilled migration from Bulgaria and Romania will be subject to a quota of 20,000 workers a year. Workers on these schemes will have the right to work for six months and will not be given access to benefits and public housing.

Skilled Romanian and Bulgarian workers will continue to be allowed to come to the UK on work permits to take up specific jobs where no suitable UK applicants can be identified. In addition Romanian and Bulgarian workers with particularly high levels of skills and experience will continue to be admitted under the Highly Skilled Migrant Programme scheme (available to citizens of all countries outside the European Union).

From April 2007 the increased rates for **statutory payments** will apply. The flat rate of statutory sick pay will increase to £72.55 per week. The flat rate of statutory maternity, paternity and adoption pay will become £112.75 per week.

Attempts to limit employers' ability to operate a **mandatory retirement age of 65** under the age discrimination regulations has started. The question has been referred to the European Court to determine whether the mandatory age is consistent with the Equality Directive.

Another case on its way to the European Court of Justice for a ruling relates to whether **employees on long-term sick leave** continue to accrue holiday under the Working Time Regulations. The Court of Appeal has said they should not.

In November 2006 Britain successfully won a reprieve for its **48 hour week opt out** (the widely used right of employees to agree to work longer than 48 hours). This was in face of fierce objections, in particular from France and Spain.

The Disability Rights Commission (DRC) has released details of a survey it conducted among small and medium sized employers on **mental health in the workplace**. Over 60% said they had no procedures in place for handling staff with mental health problems and 81% said that a free employers' helpline to advise on the issue would be helpful. In light of these findings the DRC called on the Government to take action to tackle the issue.

In December 2006, the **pensions aspects of the age discrimination regulations** came into force. These were significantly amended from the original version, planned for October, after considerable lobbying from employers and the pensions industry. Revised guidance for employers was also issued. However, this did not offer clarification of the requirements related to flexible retirement in defined benefit schemes and the pension rights for employees who work beyond normal pension age (especially those who want to draw their pension while working). The Government's views on how this should work are expected in the spring.

cont...

## News (continued)

---

The **2006 Pensions Bill** has been published. Amongst its highlights are proposals to:

- increase state pension ages to 68;
- increase access to basic state pension;
- abolish contracting-out on a protected rights basis; and
- permit occupational schemes to convert guaranteed minimum pensions (GMPs) into actuarially equivalent scheme entitlements.

---

On 2 April 2007 new rules for **settlement in the UK** will come into force. The rules will require applicants to show they have a sufficient knowledge of language and life in the UK in order to qualify for settlement. The effects of the new criteria remain to be seen, although a raft of issues from residents who have been in the UK for a number of years but cannot pass the tests, should not be ruled out.

---

From 1 July 2007, **smoking in enclosed public places** will become unlawful, the Department of Health has announced.

---

---

The Government has announced its proposals for **cash equivalent transfer values under occupational pension schemes**. The framework for transfers will remain largely unchanged. Members will retain their statutory right to transfer, and the principles underlying their calculation are likely to remain largely as they were. Members will be provided with more information, although the details are as yet unclear. The Department for Work and Pensions (DWP) accepts that schemes should not be overburdened and will consider whether generic information provided to regulators could be used.

---

The **Pensions Act 2004** changed some of the requirements relating to member nominated trustees and directors from 6 April 2006. Critically it will bring an end to remaining opt-out arrangements by 31 October 2007. For schemes which still have an employer opt-out in place, the new requirements will apply from 31 October 2007. Schemes will then have a period of six months in which to implement the new arrangements. Employers with a scheme in this situation who have not already put provisions in place to comply with the new requirements need to consider this urgently.

---

---

There have been immigration regulatory changes for **naturalisation and the registration of minors**. The main changes include:

- the good character requirement has been extended from 4 December 2006 to all applicants over the age of 10;
- each applicant will require a separate application, including separate forms for each applicant in a family application; and
- identity checking will be enhanced to reduce fraudulent applications. This will include the use of passport style photographs and endorsement by referees.

---

The Government has issued draft regulations relating to the **increase of the statutory minimum holiday entitlement** to 5.6 weeks (28 days for employees working five days a week). The proposal is to phase the increase in in two stages: October 2007 and October 2008.

---

## Employment law case update

The **Dacas case** in 2004 exposed employers and employment agencies to serious financial risks on the basis that **temporary agency staff** could be found to be employees of the end user under an **implied employment contract**. In *James v Greenwich Borough Council (UKEAT/0006/06/ZT)*, the President of the Employment Appeals Tribunal (EAT) gave guidance on the circumstances in which there will be an implied contract of employment. In short, it is his view that the circumstances are limited. In particular, the President stated that the fact an individual works for an end user for a long period does not create an employment relationship if one otherwise does not exist. In *Cairns v Visteon Ltd (UKEAT/0494/06/JOJ)* the EAT did not allow a person who was employed by the agency to argue successfully that she had an implied employment contract with the end user of her services as well. There was no policy or business reason to imply such a contract.

As a general rule, the **national minimum wage** (NMW) can only be paid in the form of cash, and not benefits in kind. While there is a limited exception for the provision of living accommodation, this does not extend to payments towards utility costs out of workers' wages. Wages are net of compulsory deductions of this kind for NMW compliance purposes (*Revenue & Customs Commissioners v Leisure Employment Services Limited - UKEAT/0106/06/MAA*).

New cases continue to show how little an employee must do to be regarded as having raised a **formal grievance under the statutory grievance procedures**. In *Lipscombe v Forestry Commission (UKEAT/0191/06)*, the employee's letter of resignation was held to be enough to amount to a written statement of grievance.

It is worth remembering that a lodged grievance extends the period within which an employee can bring an unfair dismissal claim by three months, even if the grievance is made before the employment ends (*HM Prison Service v Barua [2007] – UKEAT/0387/06/MAA, I.R.L.R. 4 (EAT)*).

The fact that an employer is responsible for an employee's **long-term sickness** does not preclude it from fairly terminating that person's employment. The case of *Royal Bank of Scotland PLC v McAdie (UKEAT/0268/06/ZT)* concludes that the cause of the absence and the fairness of the termination are two different things.

The need for **compromise agreements** to be drafted carefully is apparent from *Palihakkara v BT plc (UKEAT/0185/06DM & UKEAT/0186/06/DM)*. The agreement in that case settled all claims arising out of the termination of employment, but no reference was made to the period before termination. The employee was able to continue to bring a claim based on alleged racial harassment occurring before the employment ended.

*Commerzbank AG v Keen [2006] (EWCA Civ 1536)* provides good news for employers who operate **discretionary bonus schemes**. It demonstrates that it will often be difficult for employees (or ex-employees) to interfere with the employer's exercise of its discretion, and that conditions on eligibility for bonus (in this case a requirement to be in employment at the payment date to qualify) will be upheld. It also determined that the Unfair Contract Terms Act does not apply to employment contracts.

A question often asked is how long after a **TUPE** transfer is it possible to **harmonise terms and conditions** without the harmonisation being regarded as related to the transfer (in which case any changes, even agreed ones, can be invalid)? The answer to the question is that there is no specific period – it is the reason for the change which is relevant, not when the change occurs. In *London Metropolitan University v Sakur (UKEAT/0286/06/ZT)*, changes made two years after the transfer were still related to it.

## What's next for EU employment law?

Age discrimination law is now in force, completing the implementation of the EU Equality Directive, a major piece of EU legislation to have been implemented in the last five years. Information and consultation laws now exist across Europe. TUPE, also based in EU law, has been updated. So what does Brussels have in store for us next?

The answer lies in a recently issued Green Paper in which the EU Commission sets out a framework for *Modernising labour law to meet the challenges of the 21st century*. This will form the basis of a public consultation in 2007.

The emphasis of the document is on the commercial drive for the labour market in Europe to be flexible, resulting in increasingly diverse forms of employment. Rather crudely, the Commission refers to the possibility of a two-tier labour market divided between the permanently employed 'insiders', and the flexibly employed 'outsiders' whose security and rights may be more precarious.

The purpose of the paper, and the directives which may emanate from it, is to look at how labour law can advance 'flexicurity', supporting flexibility and offering workers security. The paper also invites debate on how labour law and different contractual structures could facilitate job creation, labour market flexibility and the transitioning of workers from one type of relationship to another. It also places better regulation on the agenda, which might help reduce the administrative burden.

Among the specific issues raised are the following:

- Should there be clearer rules on whether a person is employed or self-employed?
- Should there be a floor of rights, applicable to all workers regardless of the type of contract under which they are engaged?
- Should the employment status of temporary agency workers be clarified?
- Should there be a consistent definition of 'worker' across the EU so that workers who move across borders receive employment rights consistently?

There will be those who may regard increased labour flexibility and increased security and rights for workers as incompatible. The Agency Workers Directive, for example, aimed at giving temporary agency staff equal treatment with permanent employees, was very unpopular within UK business and has been continually resisted by the UK Government. The Commission is tackling some complex issues in this Green Paper but some of the messages it will receive from employers are likely to be plain and simple.

[darryl.f.evans@pwclegal.co.uk](mailto:darryl.f.evans@pwclegal.co.uk)



## Ensuring long-term incentive plans meet EU age discrimination laws

Companies with international long-term incentives plans (LTIPs) have to consider the effect of employment law in the different countries in which the plan's participants are based. An employee working in a particular country is generally entitled to benefit from the laws of that country, even if the LTIP is operated by a company (probably the parent in the group) registered in another country.

For example, a US company with LTIP participants in a number of EU countries has to look at the laws in each of those countries despite the fact that the plan itself may be governed by US law.

This is not news for many companies who for some years have had to ensure their LTIPs comply with laws protecting, for example, part-time and fixed-term employees receiving special protection under EU directives.

The latest, and potentially most significant laws to impact LTIPs across the EU, concern age discrimination. Since December 2006, all countries in the EU should have laws on age discrimination in place. These rules are important because nearly all LTIPs have some age related provisions. These can relate to who may participate in the plan, through to the treatment of people leaving the company. It is not only the provisions in the plan itself that can amount to unlawful discrimination – the way in which a company (and a remuneration committee) exercises its discretions behind the scenes can also lead to a legal challenge.



If there is a breach of the rules on age discrimination, there can be major financial penalties and in some countries, even criminal liabilities. What should a company be doing to ensure that it will not be faced with legal claims?

An important preliminary point to note is that the rules on age discrimination differ from country to country, even within the EU. A 'one size fits all' approach may be dangerous. The framework of the law in the EU has material differences from the law in the US. Therefore, a US company cannot assume that because it has a plan that is legally compliant in the US, it will also comply with the rules of other countries.

Given this, an affected organisation should look at the participant population in each country and assess the risk of a claim from those individuals. It should review the plan rules (including those of any branch plan in place) and look at how the plan is operated in practice. It may be necessary to consider what strategy the company wants to adopt for retiring employees and those nearing retirement, as the treatment of these groups is most likely to involve the risk of a legal claim. If there is to be a change, will this be for future grants under the plan or will it be retrospective? The tax and accounting impact of changes must be considered.

[nick.p.willis@pwclegal.co.uk](mailto:nick.p.willis@pwclegal.co.uk)

## New maternity and paternity rules – impact on employers

The maternity rules have changed again after a relatively short period of stability. The changes will apply to employees who give birth from April 2007.

A major change will remove the length of service requirement that applies before an employee is entitled to additional maternity leave (AML). This means that from the first day of employment, all employees will be entitled to a full year's maternity absence.

Statutory maternity pay (SMP) will increase from 26 week's pay to 39 weeks. The ability to be reimbursed most, if not all, SMP means this may be of limited concern to many employers.

The most innovative element of the new rules is the introduction of keeping in touch days. These will enable employees to work for up to ten days during maternity or adoption leave (consecutive or otherwise) without ending maternity leave or losing the right to SMP. This is further enhanced by the new provisions that clarify an employer can make reasonable contact with an employee on leave. Together this may help employees keep up-to-date with technical or other developments at their place of work, maintain relationships and thereby encourage mothers to return after leave.



Employers will benefit from an increase in the length of notice, from 28 days to eight weeks, that an employee must give if she wishes to return to work before the end of her full maternity leave period. This should help employers manage their staff cover arrangements and allow time to adjust to the employee's early return.

The other development relates to the extension of paternity leave for fathers. From later in 2007, fathers (used in its broad sense – it will apply to partners of mothers and women with same sex partners) will have the right to take up to 26 weeks' leave and may also be entitled to additional statutory pay if the mother or adopter has not used all her entitlement to SMP.

The rules on how this will operate have yet to be clarified, but the idea is to support mothers who wish to be absent for a shorter period and leave the childcare responsibility with the father. It will be interesting to see whether this reduces discrimination against women. If the right to maternity leave might deter an employer from employing women, the fact that significant periods of leave may be taken by men might alter that employer's perception.

Becoming familiar with the new requirements, and amending policies accordingly, will be a responsibility for employers. However, some of these changes should help them manage their business during an employee's absence.

[marian.fertleman@pwclegal.co.uk](mailto:marian.fertleman@pwclegal.co.uk)

## Impact of the new Companies Act on employing people

The Companies Act 2006 is a significant piece of law. It introduces extensive changes to the regulation of business, with the intent of simplifying and improving company law, making it more flexible and accessible to smaller businesses. A handful of its provisions are now in force and the remainder are planned to come into effect by October 2008.

Some of its provisions will impact on those responsible for the employment of people in their businesses. Some of the key points are discussed below.

### Directors' service contracts

Shareholder approval for directors' service contracts will be required for those in excess of two years, rather than five as now. Approval will not be required by the members of a non-UK company or a wholly owned subsidiary. If approval is not obtained the contract will be deemed to be terminable on reasonable notice.

From 6 April 2007 the prohibition on a company agreeing to pay a director's remuneration free of income tax, or agreeing to vary the director's remuneration in line with changes to income tax will be repealed. This will be of particular interest in expatriate situations where net pay and gross-up arrangements are often used.

Sections of the 1985 Companies Act, prohibiting directors dealing in share options, will also be repealed from 6 April 2007. However, regulations may be enacted which require provision of information on gains made by directors on share plans in the company's annual accounts.

### Directors' duties

One of the Act's most significant proposals is the codification of directors' duties. The codified duties will be owed to the company, and only the company will be able to enforce them. Some of the codified duties are new and directors will require training on their duties and responsibilities. Board processes may need to change.

When making decisions, directors will have a statutory obligation to have regard to a list of prescribed factors, including the interests of the company's employees. This strengthens the existing duty to have regard to the interests of employees in general.

Companies may want to ensure performance metrics in annual bonus and other incentive arrangements reflect these prescribed factors.

### Business review

Companies, other than those subject to the small companies' regime, must include a business review within the directors' report for all financial years starting on or after 1 April 2005. A business review should include an analysis using other key performance indicators, where appropriate. These could include employee-related key performance indicators, where such indicators are used to measure the success of the company's strategies or in managing the business.

In addition, the Act will bring in further reporting requirements for quoted companies. They should include information about the company's employees, including policies and the effectiveness of them, to the extent necessary for an understanding of the development, performance or position of the company.

This reflects the growing emphasis on good corporate governance and social responsibility. Companies will need to give increasing thought to the extent to which employee management impacts upon the company's external image of sustainable financial performance.

### Financial assistance

Private companies will no longer be prohibited from providing financial assistance to purchase their own shares or shares in their parent, as long as the parent is a private company. The prohibition for public companies remains, however. This relaxation may make the structuring of finance for share incentive schemes easier for private companies.

### Loans to directors

The general prohibition on loans to directors is replaced with a requirement for member approval for both private and public companies (although no member approval is required by members of a company which is not a UK-registered company or a wholly-owned subsidiary). The restrictions that exist for public companies (and private companies associated with public companies) under the 1985 Act in relation to quasi-loans and credit transactions will remain under the 2006 Act, although they will be permitted with shareholder approval.

Again, this relaxation may make the structuring of finance for share incentive arrangements easier for companies.

[sarah.holmes@pwclegal.co.uk/](mailto:sarah.holmes@pwclegal.co.uk)

[tom.pugh@pwclegal.co.uk](mailto:tom.pugh@pwclegal.co.uk)

### Pension Protection Fund levy – increases on the way

Last year's Pension Protection Fund (PPF) levy was much lower than many employers expected. However, that may have been temporary respite. The PPF has announced it intends to raise £675 million in total through the levy in 2007/08 (£540 million from the risk based levy and £135 million from the scheme based levy) – over double what it collected in 2006/07. It follows that many schemes can expect a corresponding increase in this year's levy invoice.

The £675 million is still an estimate and may change to reflect further deficit reduction contributions or certifications of contingent assets. The increase to the levy is not unexpected, although its magnitude may come as a blow to some schemes.

In addition to the levy increase, the cap on scheme liability is to increase from 0.5% in 2006/07 to 1.25% in 2007/08. The PPF has indicated that the scaling factor will also be increased from 0.53 to an indicative 2.02.

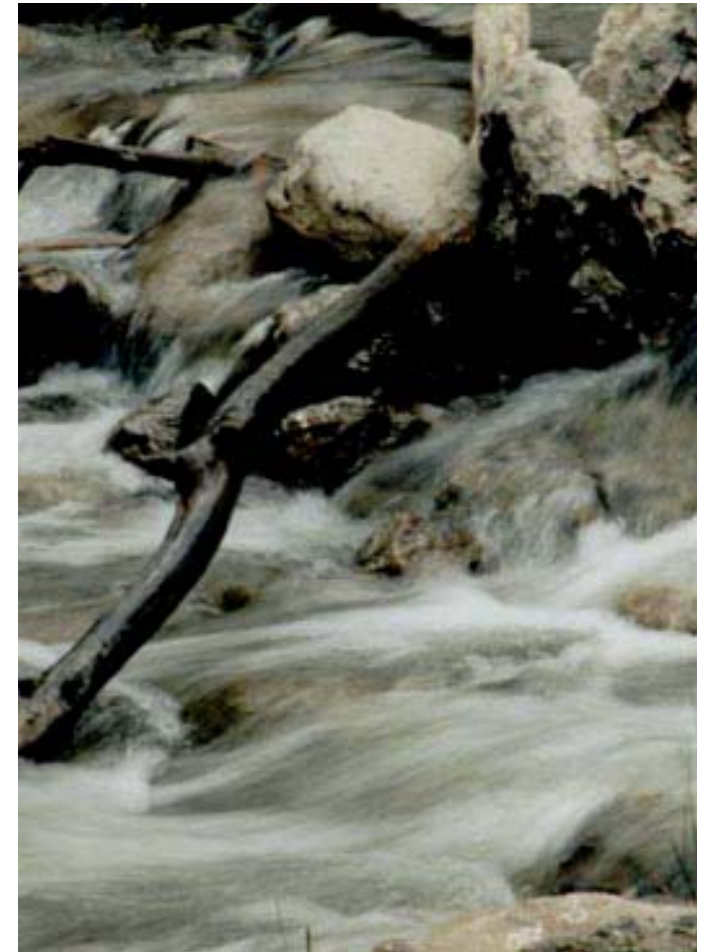
This means many schemes can expect an increase in this year's levy invoice – and will make a corresponding call on employers to pay.

Employers have a short window of time before 30 March 2007 in which to minimise their levy. This can be done in a number of ways:

- Making additional contributions. However, employers who decide to do this should try to make it part of a bigger discussion on scheme funding. Deficit reducing contribution forms must be submitted to the PPF by 5 April 2007.
- Putting in place a PPF compliant contingent asset. These need to be in a standard form and must be accompanied by a legal opinion.
- Ensuring you have the best Dun and Bradstreet (D&B) score – get a full report on your score now from D&B and look at ways to increase it before the end of March 2007.

The case of *Robins v Secretary of State for Work and Pensions* is an attempt by distressed pension scheme members, not entitled to PPF compensation, to have Europe agree that the UK Government has incorrectly implemented an earlier EU Insolvency Directive and that the Government should make good their loss. The European Court has ruled that full compensation is not required, although a minimum level of protection – undefined by the Court but now a matter for the UK courts – is needed. It remains to be seen how much extra burden this will place on the PPF.

[louise.inward@pwclegal.co.uk](mailto:louise.inward@pwclegal.co.uk)



## Revisions to the Highly Skilled Migrant Programme

In February 2004 the Government announced its five year strategy to reform the UK's immigration system. It aims to make the system more objective through a transparent points-based approach. In December 2006, the Highly Skilled Migrant Programme became the first immigration category to be significantly revised under this reform policy.

The Highly Skilled Migrant Programme allows well-qualified individuals to work in the UK without an offer of employment, often to pursue self-employment opportunities. The previous method of assessment gave considerable weight to factors including previous graduate-level work experience. In line with the five year strategy, the Home Office considered the previous criteria were too subjective and did not reflect the key indicators of whether a new migrant worker in the UK was likely to be successful. In addition, it was felt that the previous criteria were subject to abuse.

Significant differences in the new scheme are as follows:

- The categories in which points are awarded have been reduced from seven to three: academic qualification, previous earnings and age.

- There is a new mandatory requirement for all applicants to hold either an International English Language Testing System (IELTS) certificate at band 6 or above, or a bachelors degree taught in English (a post-graduate degree taught in English does not comply with this requirement).
- All applications to extend time in the UK will be subject to these tests as well.
- A revised list of acceptable documentation is provided, with tax returns and wage slips required as evidence of income.
- The points requirement is increased from 65 to 75 points.

There are some limited transitional provisions to assist existing applicants who no longer qualify under the new rules.

Professionals over the age of 28 will generally benefit from the new criteria, which favours those on high salaries. Applicants with lower salaries but substantial work experience are likely to be disadvantaged. Applicants who do not score points within the new salary requirements, and whose previous application would have been based on graduate-level work experience, will no longer qualify. Academics, artists or experienced public sector workers, in

particular, are likely to be affected by these changes. Furthermore, professional applicants who earn high salaries but do not hold degrees are no longer eligible even if they have a number of years' managerial level work experience.

Extension applicants are obliged to re-qualify on each extension application and will need to ensure they meet the new requirements. The previous test required individuals to be economically active in the UK during the past 12 months. This test was interpreted sufficiently broadly that almost any circumstances which involved generation of funds either in the UK or elsewhere appeared to qualify. As a result, an entrepreneur setting up in the UK who had yet to generate UK-based income would qualify for an extension through the previous system. This is unlikely to be the case under the new regime.

There will be a new policy which will oblige applicants for further leave to remain, to provide a written undertaking that they intend to make the UK their country of habitual residence.

Given the more stringent criteria and requirements for specific evidence to demonstrate eligibility, clarification has been sought by employers and applicants on the new requirements. The Home Office will provide clarification shortly.

[anjali.raman@pwclegal.co.uk](mailto:anjali.raman@pwclegal.co.uk)

## Calendar

### February

01

The limit on an unfair dismissal compensatory award increased from £58,400 to £60,600. The maximum amount of a week's pay for unfair dismissal or statutory redundancy pay increased from £290 to £310.

01

New employment tribunal award limits came into effect.

### March

DWP expected to issue guidance on how age discrimination ties in with flexible retirement.

01

Publication expected of final PPF levy determination and a summary of responses to 2007/08 levy estimate consultation exercise.

30

Deadline for submission of contingent asset and valuation certificates, and any updates to the most recent Annual Scheme Return submitted to the Pensions Regulator.

### April

01

The Work and Families Act 2006 comes into force. Among other changes, paid maternity leave will be extended from six months to nine months. The qualifying period for additional maternity leave will also be removed meaning that all pregnant employees will be entitled to 12 months' maternity leave.

01

Statutory maternity pay, statutory paternity pay and statutory adoption pay will increase from £108.85 to £112.85 per week (or 90% of normal weekly earnings if lower).

05

End of 2006/07 tax year.

05

Deadline for submission of Actuarial Certificate of Deficit-Reduction Contributions in respect of PPF levy.

06

The standard rate of statutory sick pay will rise from £70.05 to £72.55.

06

The Information and Consultation of Employees Regulations 2004, which oblige employers to institute a formal information and consultation procedure, will apply to businesses employing at least 100 employees (the threshold is currently 150 employees).

06

The right to request flexible working will extend to those who care for certain adults.

17

Employees' 2006 US Tax Returns and outstanding payments due to avoid an interest charge.

17

First quarterly payment of US tax due for 2007.

19

Last date for any outstanding 2006/2007 PAYE (including modified PAYE for expatriates) and Class 1 NIC to reach Accounts Office. Interest arises on late payments after today.

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers Legal LLP, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.