

Quarter in law

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Age discrimination – one year on

It is over 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 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 are using one of the few defences available under the age regulations – that of objective justification. The employer 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. 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 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 to 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 answers 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 in 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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The Corporate Manslaughter and Corporate Homicide Act 2007

The law on corporate manslaughter is changing. Under existing legislation, it is necessary to identify a person who is personally guilty of manslaughter in order for a company to be prosecuted. This creates a significant hurdle and prosecutions have been rare. The new legislation coming into force aims to make prosecutions more straightforward and frequent. Companies should look at their internal management practices and policies to ensure they have appropriate safeguards in place.

Effects and implications

The Corporate Manslaughter and Corporate Homicide Act 2007 has created a new offence of corporate homicide which will hold companies to account where gross negligence in the conduct of their activities has led to death. The Act is expected to come into effect on 6 April 2008.

This will not only see private companies and organisations liable but, for the first time, government bodies will face unlimited fines if they are found to have caused death due to gross health and safety failures.

The new offence will apply to companies, partnerships, employers associations, trade unions, public bodies and government departments, as well as the police. It will not apply to individuals, although they will continue to be liable under the common law offence of manslaughter and existing health and safety legislation.

The new offence will be deemed to have been committed when the activities of an organisation are managed or organised in a way that leads to a person's death, and amounts to a gross breach of a relevant duty of care by the organisation. Furthermore, it must be proved that a substantial element of the breach is due to the way the organisation's activities are managed by its senior management – defined as those people who play a significant role in the management of the organisation's activities.

Both small and large companies can be held liable for manslaughter where gross failures in the management of health and safety lead to death, not just where there are actual health and safety violations. Organisations found guilty of this offence will face an unlimited fine.

The courts can also make a remedial order requiring organisations to remedy management failures and publicity orders can be issued requiring an organisation to publicise their conviction. These can severely tarnish a company's reputation in an environment where corporate social responsibility is increasingly important and a small company could be financially crippled.

The focus for prosecuting under this new offence will be on management or systems failings rather than a specific individual's culpability. More prosecutions are likely, but where a death occurs despite reasonable safeguards, an organisation will not be less likely to be prosecuted under the Act. Organisations should ensure there are safeguards in place and:

- consider who is senior management and provide training to ensure those with health and safety responsibilities are competent and have sufficient authority to ensure risks are properly managed;
- increase board scrutiny of health and safety compliance and consider adding health and safety to the agenda of board meetings; and
- check levels of insurance cover in the light of the unlimited fine.

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A faster track to patent protection

The UK Intellectual Property Office is running pilot schemes for patent prosecution highways with the Japanese and US patent offices. The Japanese pilot scheme has been running since March this year, while the US pilot scheme was launched in September 2007.

The patent prosecution highway allows the patent application process to be sped up, making it more efficient and internationally consistent. A UK applicant will be able to request accelerated examination of its patent by submitting the search and examination reports already issued for the same patent by either the Japanese or US patent office. Examination of a patent application involves considering the patentability of the relevant invention and includes researching existing technology to establish whether the invention is already known. Essentially, this allows the UK patent office to benefit from the work already done by its Japanese and US counterparts. The same acceleration procedure will be available to applicants in Japan and the US who have already had their patents examined in the UK.

This measure is one of a number of initiatives being pursued by the UK Intellectual Property Office in responses to last year's Gowens Review of Intellectual Property. The review made a number of suggestions for improving the approach to intellectual property protection and enforcement in the UK.

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Paid holiday entitlement to increase from October 2007

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 four weeks, plus public holidays.

The UK position has changed, 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 at least the new minimum entitlement.

Some sectors (such as leisure, wholesale and 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 which 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 where long-term contracts involving staff costs are involved. However, there are transitional arrangements that mitigate this.

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

Where an employer's holiday year does not run from 1 October, it 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 for 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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Immigration's revolution

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 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 wish 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 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 employees they want to bring into UK. Registration will be open from January 2008 and detailed guidance on the requirements and procedure is expected imminently. However, the requirements are likely to include a demonstration of strong internal processes and record keeping, as well as a good compliance record. Employers should start reviewing these aspects now.

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Seeing eye to eye on single-letter trade marks

A recent European trade mark decision has held that a single-letter was not necessarily devoid of distinctive characteristics and is therefore registrable.

Generally it has been established in case law that a trade mark consisting of one or two letters or digits, unless represented in an unusual fashion, is devoid of distinctive characteristics and cannot be registered. However in special circumstances this type of trade mark can be sufficiently distinctive and this case has clarified how this should be assessed.

IVG Immobilien AG filed an application for a community trade mark for various services. The trade mark was a single-letter mark, 'I', similar to the form of the times new roman character font and in an intense shade of royal blue.

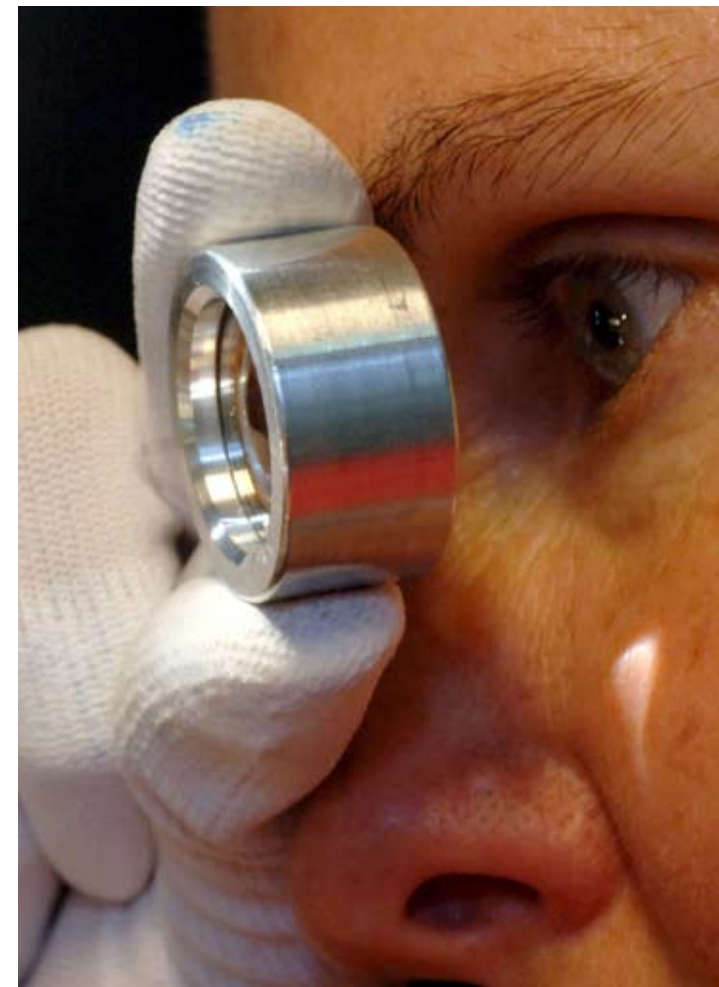
The application had initially been rejected on the ground that the mark had no distinctive character. The applicant appealed and argued that the letter differed from the standard times new roman font, and the shade of blue gave it sufficient distinctiveness to operate as a trade mark. This appeal was rejected as the mark was compared to other single-letter marks which had an additional graphical element to the letter.

On further appeal, it was held that in assessing special circumstances a mark must be assessed by reference to whom the services are being provided to. It was held that in this situation, it was likely that the services would be aimed at an informed public, whose level of attention is higher than the average consumer. This type of consumer would be well informed and reasonably observant and therefore the modifications in the font and the colour used could offer an adequate level of distinctiveness.

There was no clear reason why the sign could not be distinctive given the nature of the mark and the claimed services.

The decision confirms that a minimal degree of distinctiveness can be sufficient to enable a single letter or digit mark to be registered as a community trade mark. A sign does not necessarily need to be unusual or striking in order for it to be distinctive. A crucial point is that all signs must be assessed by the same standard, whatever their nature and there should not be any automatic exclusion of particular categories of signs. Single letter marks must be assessed carefully on a case by case basis where any additional visual elements are involved as there may be greater scope for registration than some previous case law has suggested.

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Trade marks – watch or watch out!

Since 1 October 2007, the trade marks registry in the UK no longer refuses to register a new trade mark application because of the existence of an earlier conflicting trade mark. Instead, it will be left to the owner of the earlier mark to mount an opposition to protect its interests.

Until now, an application to register a UK trade mark would have been rejected where a similar or identical trade mark already existed. After an application is filed, the registry would examine the mark for registrability and search the register for conflicting marks. If an earlier mark were found, the registry would automatically raise an objection against the application. In order to overcome the objection, the onus was on the applicant to prove that the respective marks were not identical or similar.

Since 1 October 2007 the UK Intellectual Property Office (which houses the trade marks registry) has abolished its automatic refusal for registration on relative grounds. The registry will only refuse to register a trade mark on the basis of an earlier conflicting mark if the owner of the earlier mark successfully opposes the application.

As a result of the changes, trade mark owners can no longer rely on the UK registry identifying conflicting application and protecting their interests for them. Applications will proceed to registration, even when the new application exactly mirrors an existing mark, unless the earlier owner takes action. Companies should consider using a trade mark watching service to track publication of conflicting trade mark applications so that they can oppose them if required. Failure to take action could result in registrations being granted for identical and similar marks. If trade mark owners do not use their opportunity to oppose, it will be much more difficult to challenge the mark once it has been registered.

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A new call on data retention

The Data Retention (EC) Regulations 2007 came into force on 1 October 2007. They implement the EU Directive on data retention (2006/24/EC), which was adopted to facilitate the investigation, detection and prosecution of serious crime.

The regulations require public communications providers, such as telephone and mobile phone companies, to retain certain communications data for 12 months. The data to be retained includes the date and time of telephone calls and the names and numbers of callers and recipients. It does not include the content of communications. The relevant data must be stored securely and made available in response to requests.

The UK has postponed implementation of the directive in relation to internet communications data (emails, internet access and voice over internet protocol (VoIP)) and it now has until 2009 to extend the obligations to capture this data.

The new obligations will potentially have a big impact on the costs of storing and managing data. The regulations make provision for reimbursement of expenses incurred for compliance, but it is not yet known the extent of the costs which will be reimbursed in practice.

Fixed and mobile telephone providers will need to review their data management systems and processes to ensure compliance with the regulations. Care also needs to be taken to ensure any new retention procedures do not fall foul of other existing retention and access obligations, such as those under data protection and privacy legislation.

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VAT on fruit smoothies

Recent litigation has successfully challenged the VAT liability of various drinks sold in the UK, and there may be good arguments to extend this decision to the sales of fruit smoothies.

Sales of food and drinks, not supplied in the course of catering, do not attract VAT. However, suppliers of alcoholic and other beverages, such as fruit juice, bottled water, and ingredients for the preparation of beverages, must account for VAT on the sales of their products. HM Revenue & Customs (HMRC) takes the view that fruit smoothies are a beverage and, therefore, suppliers of these products must account for VAT on their sales.

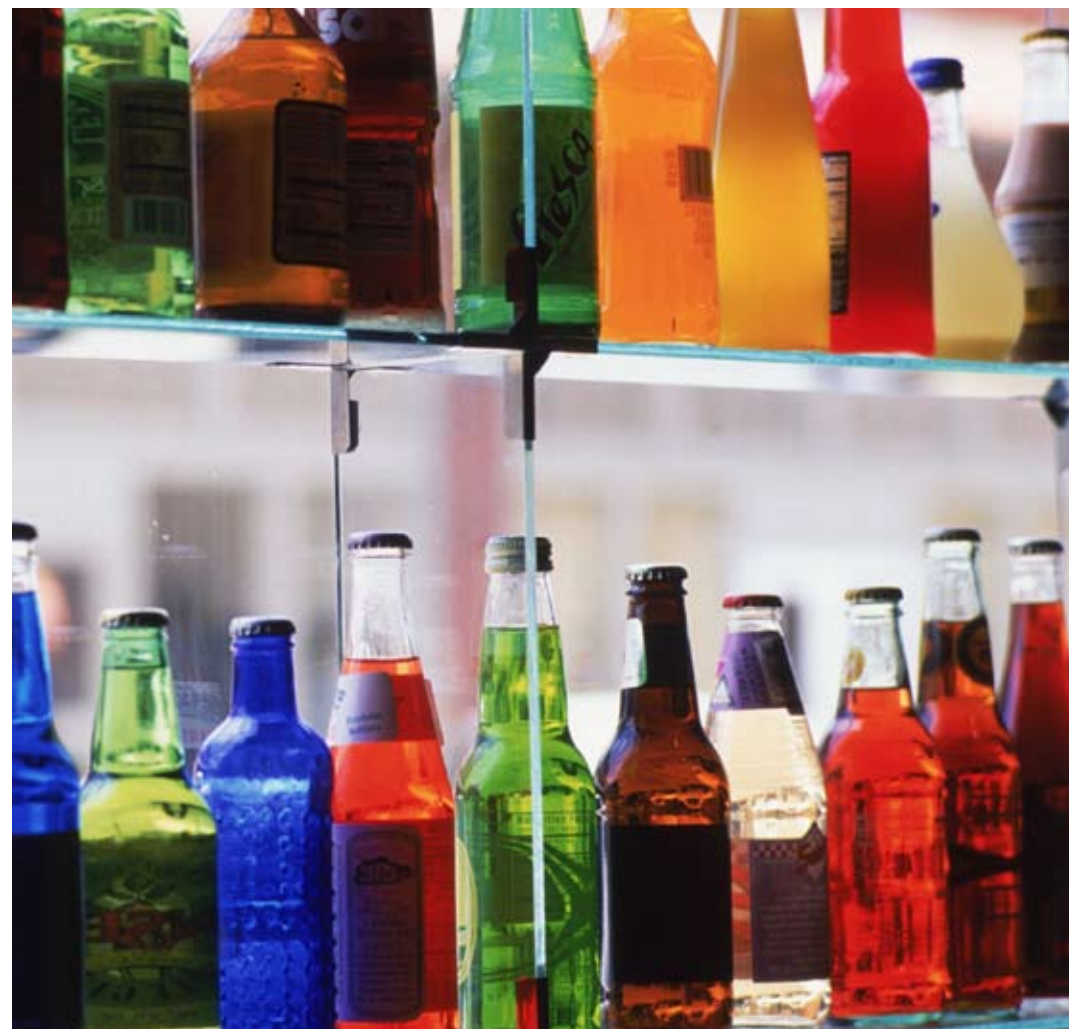
The Courts define a beverage as a product which is 'characteristically taken to increase bodily liquid levels, to slake thirst, to fortify or to give pleasure'. The consideration of this definition by the Tribunal and the higher courts demonstrates that food liability cases need to be considered and interpreted solely on the facts of each case. For example, in a previous case the Tribunal found that a vegetable juice was commonly used as a soft drink and was packaged and marketed as a beverage; and in another case it was found that a fruit blend sold at a smoothie bar was consumed as a beverage. However, a tribunal has also held that flavoured soya milk was not consumed as a beverage and the same ruling was given in relation to a fruit shot.

It appears that the arguments used to successfully challenge the imposition of VAT on drinks before the Tribunal are applicable to fruit smoothies because, unlike alcoholic drinks or sugary drinks, they are not apt to slake thirst, fortify or give pleasure and they are not marketed as beverages. In addition, it has been successfully argued that certain drinks require digestion as a food in contrast to beverages which do not stimulate the digestive system.

Discussions are under way with a number of manufacturers and retailers to determine the degree to which they can also challenge the imposition of VAT on their products. This challenge is being pursued through the VAT & Duties Tribunal.

Manufacturers and retailers of fruit smoothies should examine the VAT treatment of their products and consider whether to challenge the VAT liability of their products.

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UCITS III expands alternative investment opportunities

The Undertakings for Collective Investments in Transferable Securities (UCITS) regime was first developed in the mid-1980s to harmonise the European market in retail orientated open-ended collective investment schemes and to guarantee minimum standards of consumer protection.

To keep UCITS relevant and improve its functionality, the EU has refined the original directive several times. In 2001 further directives were issued concerning the management of UCITS and products available within UCITS, leading to the UCITS III regime. Earlier this year, the EU eliminated certain grey areas around eligible assets under UCITS III through Directive 2007/16/EC (the Eligible Assets Directive), clarifying the eligibility of a number of instruments for UCITS, including derivatives, financial indices and money market instruments.

For product development, the Eligible Assets Directive's major contribution is the confirmation that derivatives are capable of being eligible as an asset class under the heading of liquid financial asset. Conditions apply to the type of underlying asset used and for an asset to be UCITS-friendly, accurate valuation and risk management techniques must be effectively deployed. In addition, the Eligible Assets Directive must be read in conjunction with guidance issued by the Committee of European Securities Regulators (CESR), which aims to ensure that harmonisation occurs at the operational level through the EU member states.

Increased availability of derivatives has enabled the creation of UCITS with hedge fund type asset profiles, for example using techniques emulating shorting through the use of derivatives over shares, and leading to the development of 130/30 UCITS products. As member states are not required to transpose the Eligible Assets Directive until 23 March 2008, it is not known if they will all embrace derivatives equally.

Also, CESR has agreed in principle that hedge fund indices can fall within the UCITS ambit by virtue of being financial indices, and can be included within a UCITS fund, provided that an index meets the requirements listed at article 9(1) of the Eligible Asset Directive, which lays down basic principles on index design. In addition, the index must adhere to a series of supplementary guidelines, including:

- index providers receiving payments from index components for inclusion in exchange for inclusion in the index is prohibited;
- exposure to hedge fund indices via over the counter (OTC) derivatives will require compliance with the derivative-related conditions set-out in the Eligible Assets Directive; and
- the UCITS must carry out due diligence on the index, including considering the comprehensiveness of the index methodology, the availability of information and how the index treats its components.

CESR expects member states to comply with these guidelines when implementing the Eligible Assets Directive. Whether the increased regulatory costs and scrutiny are likely to warrant hedge fund exposure in UCITS funds via indices remains to be seen. Also, given the recent nervousness around the use of derivative products, the traceability of risk, and the failures of some significant hedge funds, it will be interesting to see whether product providers, investors and politicians embrace the use of hedge fund indices within a retail product with enthusiasm.

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Calendar

October

01

The standard rate of national minimum wage will rise from £5.35 to £5.52.

01

The development rate of national minimum wage will rise from £4.45 to £4.60.

01

The young workers rate of national minimum wage will rise from £3.30 to £3.40.

01

The accommodation allowance under the national minimum wage regulations will rise from £4.15 to £4.30 per day.

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.

01

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.

01

Companies Act provisions relating to Directors' duties come into effect.

09

End of public consultation on the Disclosure and Transparency in Private Equity document.

24

All remaining provisions of the Data Protection Act 1998 come fully into force.

2008

6 April

The Corporate Manslaughter and Corporate Homicide Act 2007 expected to come into force.

Publications

A practical guide to the Companies Act 2006

Designed to arm executive and non-executive directors with an understanding of their business and personal legal obligations, particularly in light of the new Companies Act 2006 and actions necessary at each implementation stage up to full implementation in October 2008. The guide will cover important new requirements in areas such as director's duties, financial reporting and business reviews, as well as all legal requirements required when managing shareholder relationships, transactions involving shares and employee share schemes.

A practical guide to the Companies Act 2006 gives clear, lucid and practical guidance to the Companies Act 2006.

Details at a glance

Title: A practical guide to the Companies Act 2006

Author: PricewaterhouseCoopers Legal LLP and PricewaterhouseCoopers LLP

Publication date: December 2007

Format: Available as a single volume book or online.

Prices & codes:

Book Price £ 60+ £4.50 p&p Product code: UP/PWCCA

Online Price £00 Product code: PWCCA9

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