

## EMPLOYMENT LAW UPDATE 2011



GAIL ESCOLME  
HAYTON WINKLEY SOLICITORS

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## THE DEMISE OF THE DEFAULT RETIREMENT AGE

- The Default Retirement Age (DRA) will disappear from October 2011.
- Only employees over 65 who were given notice of retirement by 5<sup>th</sup> April 2011 can be retired under the DRA regulations.
- Employers must use disciplinary/capability procedures to dismiss unless fixed retirement age can be objectively justified, e.g. police, air traffic controllers.



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## What you need to do

- Review your retirement practices
- Have a well thought out policy in place
- Communicate the policy to employees
- Support flexible approaches to work and retirement
- Ensure Performance Reviews are meaningful
- Do not be afraid to highlight capability issues BUT

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PUT IN PLACE REVIEW  
PRACTICES

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### What you need to do (cont)

- Offer support where appropriate and a period in which they need to improve their performance.
- If no improvement begin formal procedures
- Treat all employees the same regardless of age
- Be inclusive in your approach so that all employees are aware of procedures.

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### THE EQUALITY ACT

The Equality Act brings together all anti-discrimination legislation under one umbrella.

The "Protected Characteristics" are:-

- |   |  |
|---|--|
| <input type="checkbox"/> Age                          | <input type="checkbox"/> Pregnancy & maternity |
| <input type="checkbox"/> Disability                   | <input type="checkbox"/> Religion & belief     |
| <input type="checkbox"/> Sex                          | <input type="checkbox"/> Sexual orientation    |
| <input type="checkbox"/> Race                         | <input type="checkbox"/> Gender re-assignment  |
| <input type="checkbox"/> Marriage & Civil Partnership |  |

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### SO WHAT'S NEW?



- Disability – has a new definition and changes
- Now easier for a person to show disability
- The Act includes a new protection from discrimination arising from disability – it is discrimination to treat a disabled person unfavourably because of **something connected with their disability**, e.g. a tendency to make spelling mistakes arising from dyslexia.

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## Types of Discrimination

- **Direct Discrimination** – discrimination against someone because of a protected characteristic
- **Indirect discrimination** – a rule or policy that applies to everyone but disadvantages those with a protected characteristic
- **Discrimination by association** – direct discrimination against someone because they are associated with a person who has a protected characteristic
- **Discrimination by perception** – direct discrimination against someone by others who believe that they have a protected characteristic – even if they do not!

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## Discrimination Cont...

- **Harassment** – behaviour deemed offensive by the recipient – even if it is not directed at them.
- **Harassment by a third party** – harassment of staff or customers by people not directly employed by the employer, e.g. contractors.
- **Victimisation** – discrimination against someone because they have made a complaint or supported a complaint under the Equality Act legislation.




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## Gender Re-assignment

The Act no longer requires a person to be under medical supervision to be protected from discrimination. For example a male employee who chooses to live as a woman but has not undergone any medical procedure would still be covered.




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### Positive Action

From April 2011 the Act allows employers to:-  
Take a protected characteristic into account when deciding who to recruit or promote.

—As long as the candidates are as generally as qualified as each other

—Keep evidence to show that those people are disproportionately under-represented in your workforce or in the particular job where there is a vacancy.

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### PRE EMPLOYMENT HEALTH CHECKS

The Act limits the circumstances when the employer can ask health related questions before offering the job. You can ask:-

- If you need to make reasonable adjustments to the selection process
- If the applicant has a disability if you are contemplating taking positive action to assist disabled people




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### Pre Employment Health Checks (cont)

- If the applicant has a disability – to monitor diversity of people applying for jobs
- Whether the candidate can carry out a particular function essential to the job

Job offers can be conditional upon health checks being made but if you, the employer, withdraw the offer without good reason once the medical history is disclosed then you have rather shown your hand and have left yourself exposed to a potential discrimination claim.




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## Pay Secrecy

**TOP SECRET**

- Under the Equality Act you cannot prevent or restrict your employees from discussing salaries to establish if one employee is paid less than another for a reason related to a protected characteristic.
- You can still insist that your employees do not discuss salaries with outside bodies, for example your competitors

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## EQUAL TREATMENT OF AGENCY WORKERS

Agency Workers Regulations 2010 come into force on 1 October 2011.



Who is an Agency Worker? Someone who:-

- Has a contract with an Agency
- Is temporarily supplied to a hirer by the Agency
- Their work is subject to the supervision and direction of the hirer throughout the assignment; and
- Who is NOT in business on their own account

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## What will change?

From Day 1 Agency Workers will be entitled to:-

- Access to facilities e.g. Canteen, car parking, child care
  - Access to vacancies – the right to be notified of any job vacancies with the hirer
- After 12 weeks they must be treated equally to permanent employees in respect of:-



- \*Pay (related to work undertaken on the assignment)
- \*duration of working time
- \*Night work
- \*Rest periods
- \*Rest breaks
- \*Annual leave
- \*Paid time off for antenatal appointments

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## PAY

- Pay for the purposes of these regulations includes:-

- Basic Pay
- Overtime Pay
- Payment for Annual Leave
- Bonuses
- Vouchers or stamps




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## Not included in Pay

- Occupational sick pay
- Occupational Pensions
- Occupational maternity or paternity pay
- Redundancy pay
- Notice pay
- Bonuses not directly linked to the contribution of the individual

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## Working Time and Holiday Pay

After 12 weeks Agency workers will be entitled to:-



- Same rest periods as permanent staff e.g. a lunch hour instead if the 20 minute statutory entitlement.
- Same entitlement to holidays as permanent staff.
- However if holiday entitlement exceeds the statutory minimum those days that do exceed could be paid as a lump sum at the end of the assignment or as part of the hourly pay.

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### Pregnancy

Pregnant agency workers will be entitled to:-

- Paid time off to attend antenatal appointments and classes
- Alternative work where available if she cannot continue with her duties for health and safety reasons

The Pregnant worker must inform her agency and the hirer of her pregnancy. The agency may then request the hirer to carry out a risk assessment.

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### Calculating the 12 week qualifying period

- The qualifying period is triggered by working in the same job with the same hirer for 12 qualifying weeks.
- So even if the temp only works 2 or 3 hours per week each week worked will be a qualifying week.
- A new qualifying period will only begin if a new assignment with the same hirer is substantially different and /or there has been a minimum of 6 weeks break between assignments.
- The 12 week qualifying period is not retrospective and will only accrue from 1 October 2011.

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### Anti Avoidance Provisions

- A hirer can release a temp after 11 weeks to avoid them qualifying under the new regulations.
- However if a deliberate and regular pattern forms e.g. where a hirer releases and then re-hires the same temp after 6 weeks over a period of time, it is likely to be seen as a deliberate attempt to deprive the temp of their entitlements under the Regs.

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### Additional Paternity Leave

In respect of babies born on or after 3<sup>rd</sup> April 2011 qualifying employees are now entitled to:

- Up to 26 weeks Additional Paternity Leave (APL) to be taken in complete weeks in one continuous period.
- to be taken no sooner than 20 weeks after the birth;
- And only if the partner has returned to work from statutory maternity leave.




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### Additional Paternity Leave Cont...

- The latest that APL can end is when the partner's additional maternity leave would have ended.
- Additional Statutory Paternity pay would be payable for the rest of the period the partner would have received ASMP, if it has not already been exhausted.

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### APL Cont.

#### Ordinary Paternity Leave:-

- Eligible employees could take one or two consecutive weeks paternity leave within 56 days of the birth and receive Statutory Paternity Pay for the time off.

#### Eligibility Criteria :-

- Must have been continuously employed for a period of 26 weeks ending in the week immediately prior to the 14<sup>th</sup> week before the expected week of childbirth (EWC)
- Must be the child's father, the spouse of the mother, the partner or civil partner of the mother; and
- Have responsibility for the child's upbringing

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### Additional Paternity Leave

- Eligibility criteria – the same as for OPL and in addition
- the employee must remain employed until the week before the first week of APL.
- The child's mother has been entitled to statutory leave and statutory pay or maternity allowance.
- The child's mother has returned to work.

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### PENSIONS

- New laws coming into force on 1 October 2012 will require employers to automatically enrol employees into a pension scheme.
- All employees between the age of 22 and the State Pension age will need to be automatically enrolled into a suitable pension plan after a maximum of 3 months employment.




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### Compliance Dates

No. of Employees	Date	No. of Employees	Date
120,000 or more	1 October 2012	350-499	1 January 2014
50,000 – 119,999	1 November 2012	250-349	1 February 2014
30,000 – 49,999	1 January 2013	240-249	1 April 2014
20,000 – 29,999	1 February 2013	150-239	1 May 2014
10,000 – 19,999	1 March 2013	90-149	1 June 2014
6,000 – 9,999	1 April 2013	50-89	1 July 2014
4,100 – 5,999	1 May 2013	Under 50*	1 March 2014 – 1 February 2016
4,000 – 4,099	1 June 2013	New employers with PAYE income first payable from 1.4.12	1 March 2014 – 1 September 2016
3,000 – 3,999	1 July 2013		
2,000 – 2,999	1 August 2013		
1,250 – 1,999	1 September 2013		
800 – 1,249	1 October 2013		
500-799	1 November 2013		

\* Depending on payroll reference

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### Which Pension?

- Employers may use existing occupational or personal pension schemes if they meet certain quality requirements.
- Alternatively employers can enrol their job holders in the National Employment Savings Trust (NEST – the central Government established scheme)
- Job holders include permanent and temporary employees and agency workers.




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### Pensions Cont...

- If an employer auto-enrols its eligible job holders in NEST, it must pay contributions of 3% of band earnings (earnings between £5715 and ~~£33540~~ <sup>4200</sup>) each year, phased in over 5 years.
- Job holders will be required to contribute 5% of band earnings, again to be phased in over 5 years.
- There will be an annual limit on contributions of ~~£35600~~ <sup>4200</sup>, though this is due to be abolished in 2017.

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### Opting in and Opting out

- Jobholders who have been automatically enrolled will have a statutory right to opt out of whichever scheme they have joined, within prescribed time limits. Jobholders who have opted out will be automatically re-enrolled every 3 years during a 6 month window.
- Jobholders who are not automatically enrolled (e.g. because they opted out or are under 22) can opt in by giving the employer notice, but they can only do this once in every 12 month period.
- ~Low earners can also opt in to a pension scheme – but will not be entitled to any employer contributions.

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## Enforcing Compliance

• Employers will not be allowed to induce jobholders to opt out of a scheme membership or make job offers conditional upon opting out.

• The Pensions Regulator will police employer compliance. Breach of the new duties will attract compliance notices and penalties that will vary according to the employer's size. Large employers could be liable for escalating penalties of £10000 per day. Criminal penalties could apply in the case of "wilful" failure to comply.




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## Bribery Act

Due in force on 1 July 2011

The BA 2010 introduces 4 new criminal offences, summarised as follows:-

- Bribing another
- Being bribed
- Bribing a foreign public official
- Failure of a commercial organisation to prevent bribery by an "associated person" for its benefit.




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## Bribery Act

- Intended to implement the right culture and behaviour.
- Not intended for trivial cases and a large number of prosecutions are not expected.
- All employers should:-
  - Risk assess
  - Put in place proportionate procedures
  - Communicate and train
  - Carry out due diligence where appropriate
  - Show top level commitment
  - Monitor and review

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## Case Law

### Eversheds Legal Services Ltd v Belin

The Employer went too far when trying to compensate for disadvantage suffered by women on maternity leave during a redundancy selection process.

2 associate solicitors were in the pool for redundancy. One criterion was "lock up". Because the associate on maternity leave's lock up could not be quantified she was given the maximum award for this element which meant that the other associate, a male was selected for redundancy.

The Employer only needed to positively discriminate by offering the female associate a suitable alternative vacancy, in precedence to other employees facing redundancy *in the event that she was selected for redundancy.*




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## Case Law

### X v Mid Sussex CAB

True volunteer arrangements do not create employment relationships.

In the case the COA held that a volunteer could not pursue a claim under the Disability Discrimination Act. She had no contract and the arrangement was not one that specified to whom work should be offered.

It is important that volunteers are not paid for their time in any way. Any expenses paid must be genuine out of pocket expenses and not a flat rate allowance.




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## Case Law

### Gosden v Lifeline Project Ltd

—Held that an employee who sent an racist email to a colleague from his personal computer, which the colleague subsequently passed on to other colleagues at their work emails, was guilty of gross misconduct.

—This despite Mr Gosden arguing that he had sent the email as a joke and was not responsible for the colleague passing it on.




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### NATIONAL MINIMUM WAGE

- National Minimum Wage is to rise from 1 October as follows:-
- Over 21        £6.08
- 18-21        £4.98
- 16-17        £3.68
- Apprentice   £2.60

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