

The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

New holiday pay regulations and the new Worker Protection Act.

- Lucy 00:08 – 00:12
Hello and welcome to our In-House Employment Lawyers Coffee Break. I'm Lucy Lewis...
- David 00:12 – 00:14
...and I'm David Lorimer
- Lucy 00:14 – 00:46
and you're joining us for a 10-minute coffee break to talk through the latest developments and practical takeaways for this month. This is the second episode of our new podcast series for In-House Employment Lawyers. Lewis Silkin has been running an In-House Employment Lawyers Community known as IHELC for 20 years and in that time it's grown to over 500 lawyers. So welcome to you all.
David, let's get going! You're going to cover our first development this month which is news that the Workers Protection Act finally became law on the 26th of October.
- David 00:47 – 04:51
Yes, thanks Lucy I'm going to talk about the snappily titled Worker Protection (Amendment of Equality Act) Act. The name is a bit misleading though by the time it passed it was a play of one act not two, introducing as it does a single new duty. That's the duty to take reasonable steps to prevent sexual harassment of your employees in the course of their employment. It's one of those reasonably rare things - an obligation on employers to take proactive measures. In this case to prevent sexual harassment.
It's going to come into force in October 2024 so there is almost a year to get ready. But we say, I think there's plenty to do in that time!
The million dollar question is: what does reasonable steps mean? Well, characteristically and helpfully, there's no current guidance on this. Either in the new law or outside it. The Equality and Human Rights Commission has said it's going to update its technical guidance on sexual harassment to reflect the new duty. So, I'm sure we'll all look forward to tucking into that in the new year.
So practically what should we be getting on with now then? Well look, there's no silver bullet as is always the case but we think the closest thing to it is proper training. Now training is no longer just a buzzword for something that an employee does when they join and they never do again. So, the 'one and done' or even a kind of generic training repeated annually approach, well that's increasingly being criticized by employment tribunals.
Instead, we think employers should be providing up-to-date tailored and situational training where they can. It should aim to clearly identify what sexual harassment in the workplace looks like, it should help staff avoid the threat of harassment and it should give bystanders the means to support the victim or even, if appropriate in some circumstances, safely Intervene. There's also a role for reporting, so creating central reporting registers for complaints about all forms of harassment. Not just sexual harassment. As well as making sure there's clear, well publicized and accessible avenues for reporting complaints about harassment. Well, those steps are also important.

Now the lawyer's answer to the question of 'what should we do?' is always - carry out risk assessments. But in this case, I think that's pretty prevalent. They can really help in proactively identifying hazards and really showing that you thought through what the risks were to your workforce. So, for example, you might dive into the risk of gender and power imbalances, or customer-facing roles giving rise to extra risk of harassment and inform steps to reduce risks on that front.

Of course, as always, you should make sure that policy decks are up to date and they're not just sat in a dusty company handbook that no one's read since 1999. Policies should make it clear who they apply to they should be regularly updated. They should be communicated clearly and signposted and they should focus really on the positives of inclusion as well as equality.

Now, even though the proposed part of this act that related to liability for third party harassment, well that fell away during the debates in action in response to harassment by, for instance, members of the public. Well, that can still lead to liability as the audience will well know so we think it would also be sensible to think about third party facing steps and that might include visible signs in customer areas explaining that harassment is not tolerated and providing a means for bystanders to report instances for example.

Finally, for now do check in with your employee resource groups if you have them. And and ask them for their view on the steps you propose to take never forget the old adage when it comes to DE and I: "*nothing about us without us*".

We've produced [an insight article covering the new act](#) and the links in the notes so please do check that out for more information.

Lucy 04:52 – 09:14

Thank you David!

I've got the lovely job of discussing the government's just-announced plans to legislate on holiday entitlement and pay! And in what's an early Christmas present for employment lawyers, the government has finally responded to its consultation on holiday pay and it set out some draft regulations.

Now those regulations are going to come into force on the 1st January next year. That's because as you'll know we see the end of EU supremacy on the 31st December so the government has had to legislate and the changes are going to impact the majority of employers.

The important thing to say is we've got a [very lengthy article covering all the changes on our website](#). So I'm just going to focus on 3 key points:

1. The first one is that what is included in holiday pay has finally been decided. So, you'll know that EU case law saying that holiday pay must include overtime and commission is the position that we've got at the moment. That position is going to be enshrined in UK legislation. But interestingly only for the four weeks of EU leave not the additional 1.6 weeks (or eight days) UK leave that sits up on top of that. One of the things the government looked at in the consultation was whether to merge those two pots of leave, so lose this distinction between EU leave and UK leave. The government have decided not to do that.

So we'll still have these 2 pots of leave and the UK additional leave could be paid at basic pay only, but we know in speaking to you, most employers don't distinguish between pay rates. It's too difficult from a systems perspective so we would expect most people will want the rules to apply across the board.

We know that most employers have already adjusted the holiday approach to reflect the EU rules - in that case it doesn't affect you so directly. But if you're one of those people that didn't do that, if you were taking a watch and wait approach then you are going to need to take some steps quite quickly to put your holiday pay calculation onto a more compliant footing. And if you're in GB, remember that

claims for miscalculating holiday pay could only look back 2 years so there is some comfort in limitation on liability there.

2. The second point rolled up holiday pay is going to be allowed for some people. I think this will probably be welcome to lots of you. As you know, rolled up holiday pay (so paying holiday pay at the same time as basic pay) was held to be unlawful by the ECJ. It was thought that it discouraged workers from taking time off. It is now going to be allowed **but only** for irregular hours or part year workers. So it's not going to be allowed for everybody and the calculation will be 12.07% of all the work done. That in our experience is the calculation that people were using. So no big surprises there.

It's important to remember that rolled up holiday pay doesn't mean that workers can start working 52 weeks of the year and not take any holiday. Will still be an onus on employers to ensure that workers take holiday but the difference is that if they take holiday, they wouldn't then be paid for it because the pay would already have been accounted for

3. And the third point is about how you accrue holiday and it addresses that quite difficult Harper v Brazel decision. The government has decided to introduce a brand-new provision for how irregular and part year workers will accrue leave and this will take effect from holiday years that start from the 1st April 2024.

And if you're a regular hours or part year worker, you'll accrue annual leave on the last day of each pay period, and you'll accrue that leave at the rate of 12.07% of the number of hours that you worked in the pay period and that's subject to a maximum of 28 days per year. That's the bit that addresses the Harper v Brazel point that you couldn't, prorate holiday down and the slightly odd results of that.

There are some difficulties that aren't worked through. So, there's no clearly defined way of converting those accrued hours into a requisite amount of absence or annual leave How do you do that?

Also difficult in terms of how your book and take leave particularly if you're one of those workers that you know has total freedom to work as much or as little as you want, you choose the time of you're working. How in practice you'll deal with that we still don't really know.

That that is my whistle stop tour through the changes! Please, please do look at the more detailed notes. Some of you are going to have to take action quite quickly in this period before Christmas so just get in touch with us if you've got any questions.

David 09:14 – 10:06

Thanks Lucy that's some fantastically timely content given the upcoming festive holiday season! Normal pay for periods of holiday to all and to all normal holiday pay!

Well thank you all so much for joining us today, as Lucy says the In-House Employment Lawyers Coffee Break will be back on the agenda in the new year and we're going to look at what you need to be looking out for in 2024. We might even tell you what the end of EU supremacy looks like if we can work it out ourselves!

If you'd like to be part of our In-House Employment Lawyers Community please do get in touch with us. We'd love to know what you thought of today's episode please do leave us a review (as long as it's a nice one) wherever you get your podcasts, and lastly visit lewissilkin.com to keep on top of the latest issues impacting the world of work. Wishing you all a safe, happy and incident free festive party season when it comes.