

EMPLOYMENT, INCENTIVES AND IMMIGRATION HORIZON SCANNER

1 JULY 2018 ONWARDS

FUTURE KEY LEGISLATIVE DEVELOPMENTS

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
1.	The Time Off for Public Duties Order 2018 SI 2018/795 will amend the Employment Rights Act 1996 (ERA).	<p>Time off for public duties</p> <p>Unpaid time off work will be granted for groups of volunteers in the criminal justice system who monitor the conditions of those in custody. The volunteer groups are:</p> <ul style="list-style-type: none"> • lay observers who monitor conditions in court custody and cellular vehicles; • independent prison monitors who monitor conditions in Scottish prisons; • immigration visiting committees who monitor conditions in Immigration Removal Centres; and • short term holding facilities visiting committees who monitor conditions at immigration facilities at ports and airports. 	1 October 2018
2.	The Small Business, Enterprise and Employment Act 2015 (SBEEA) (section 87) will amend the Companies Act 2006.	<p>Company directors</p> <p>All company directors must be natural persons and not corporate entities.</p>	<p>2018?</p> <p>Section 87 was due to come into force in October 2016 but has been delayed.</p>
3.	<p>Cap:</p> <p>The Enterprise Act 2016 inserted new sections 153A-C into the SBEEA which permit the introduction of new regulations.</p> <p>Public Sector Exit Payments Regulations 2016 (draft).</p>	<p>Termination payments: restrictions on public sector exit payments</p> <p>Cap:</p> <p>The Enterprise Act 2016 will introduce a cap on the pre-tax value of public sector exit payments (including voluntary and compulsory redundancy and severance payments) of £95,000. This will apply broadly across the public sector as defined by the list of public sector bodies set down by the Office of National Statistics (although some bodies may be exempted).</p>	<p>2018?</p> <p>Cap:</p> <p>The power to make regulations under the Enterprise Act 2016 came into</p>

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	<p>Repayment:</p> <p>The SBEEA (sections 154-157) permits the introduction of new regulations.</p> <p>The Small Business, Enterprise and Employment Act 2015 (Commencement No 3) Regulations 2015.</p> <p>Repayment of Public Sector Exit Payments Regulations 2016 (draft).</p>	<p>Repayment:</p> <p>New regulations will be introduced by way of the SBEEA to require the repayment of exit payments (e.g. redundancy payments) where a high earning public sector employee or office holder (defined as any individual earning above £100,000) is subsequently re-employed in the public sector within 12 months, on a pro rata basis. A consultation on this issue closed on 25 January 2016. Amongst other things, this consultation proposed reducing the minimum earnings threshold to £80,000. Draft regulations have been published but are not yet in force.</p>	<p>force on 1 February 2017.</p> <p>The Public Sector Exit Payments Regulations 2016 are intended to come into force on a date to be confirmed.</p> <p>Repayment:</p> <p>Sections 154-157 of the SBEEA were brought into force on 1 January 2016. This gives the Secretary of State the power to make the relevant regulations.</p> <p>It is not yet known when The Repayment of Public Sector Exit Payments Regulations 2016 will come into force.</p>
4.	Enterprise Act 2016 (section 33, schedule 5).	<p>Sunday trading: protection for shop workers</p> <p>There will be an extension of rights of shop workers in respect of Sunday working as follows:</p>	2018?

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		<ul style="list-style-type: none"> they will be given the right to opt out of working compulsory additional hours (in excess of normal working hours) on a Sunday; and the duties on employers to notify workers of their rights about Sunday working will be extended. 	
5.	<p>The Trade Union Act 2016 (section 19) will amend the Trade Union and Labour Relations (Consolidation) Act 1992 to allow regulations to be introduced.</p> <p>The Trade Union (Financial Penalties) Regulations (draft).</p>	<p>Trade unions: financial penalties</p> <p>Regulations will be introduced which will empower the Certification Officer to impose financial penalties of up to £20,000 on trade unions if they fail to comply with certain statutory requirements.</p>	2018?
6.	Companies (Miscellaneous Reporting) Regulations 2018.	<p>New company reporting requirements</p> <p>New company reporting requirements will be introduced requiring:</p> <ul style="list-style-type: none"> quoted companies with more than 250 UK employees to report annually on the ratio of CEO pay to the average pay of their UK workforce; large public and private companies to explain how their directors comply with the Companies Act 2006 requirement to have regard to employee and other stakeholders' interests; large private companies to report on their corporate governance arrangements (a company is treated as "large" if it has either more than 2,000 employees, or a turnover of more than £200m and a balance sheet total of more than £2billion); and listed companies to show what effect an increase in share prices will have on executive pay. 	The Regulations will apply to companies with accounting periods beginning on or after 1 January 2019.
7.	<p>European Union (Withdrawal Act) 2018.</p> <p>The Employment Rights (Amendment) (EU Exit) Regulations 2018 (draft).</p>	<p>Britain's withdrawal from the European Union</p> <p>The European Union (Withdrawal) Act 2018 sets out the approach for converting existing EU legislation into UK law when Brexit takes place on 29 March 2019.</p>	29 March 2019

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	The Employment Rights (Amendment) (EU Exit) (No.2) Regulations 2018 (draft).	<p>The draft employment-specific regulations specify the technical changes to be made to employment laws post-Brexit. The changes are technical in nature only, for example, removing EU-related references that will no longer be valid. The aim of the amendments is to ensure that the existing statutory framework continues to operate effectively in its current form after Brexit. However, as far as European Works Councils are concerned, the Government acknowledges that a reciprocal agreement from the EU would be required for the statutory framework to continue as it presently does.</p> <p>You can read the Government's explanatory note here.</p>	
8.	Pensions auto-enrolment legislation.	<p>Pensions: auto-enrolment</p> <p>From 6 April 2019 the minimum contribution rates for defined contribution schemes will increase to 3% for employers (previously 2% as of 6 April 2018) and an overall total of 8% (previously 5% as of 6 April 2018) of the jobholder's qualifying earnings.</p>	6 April 2019
9.	<p>The Employment Rights Act 1996 (Itemised Pay Statement) Order 2018 SI2108/147.</p> <p>The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018.</p> <p>These regulations will amend the ERA (section 8).</p>	<p>Itemised pay statements</p> <p>These regulations will require itemised pay statements to:</p> <ul style="list-style-type: none"> • to be given to all workers (not just employees); and • contain information regarding the number of hours worked by the worker for which they are being paid. However, this will only apply where the worker's pay varies according to the number of hours worked. 	6 April 2019
10.	National Insurance Contributions Bill.	<p>Termination payments: changes to the national insurance treatment of termination payments</p> <p>Employer NICs will become payable on all termination payments above £30,000 (which are currently only subject to income tax). The first £30,000 of any termination payment will remain exempt from income tax and the entirety of the payment will remain exempt from employee NICs.</p>	6 April 2019

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11.	<p>Children and Social Work Act 2017 (section 32) will introduce section 49C into the ERA.</p> <p>New regulations will be required to extend the protection to children's social care job applicants.</p>	<p>Whistleblowing: protection for job applicants in children's social care positions</p> <p>Regulations will be introduced which prohibit relevant children's social care employers from discriminating against a job applicant because it is thought they have previously made a protected disclosure.</p>	2019?
12.	Workers (Definitions and Rights) Bill.	<p>Private Members' Bill amending the definition of worker</p> <p>This Private Members' Bill was introduced by Chris Stephens MP and seeks amendments to the definition of worker by defining what rights are available and creating a single statutory definition of worker.</p>	<p>2019?</p> <p>The second reading of the bill is due to take place on 26 October 2018.</p>
13.	Shared Parental Leave and Pay (Extension) Bill.	<p>Private Members' Bill on extended to shared parental leave and pay to self-employed contractors</p> <p>This Private Members' Bill was introduced by Tracy Brabin MP and seeks to extend shared parental leave and pay to self-employed contractors.</p>	<p>2019?</p> <p>The second reading of the bill is expected to take place on 26 October 2018.</p>
14.	Unpaid Work Experience (Prohibition) Bill 2017 – 19.	<p>Private Members' Bill prohibiting unpaid internships</p> <p>This Private Members' Bill was introduced by Stewart Malcolm McDonald MP and will prohibit unpaid trial work periods in certain circumstances. The Bill provides that individuals undertaking work experience for a period exceeding 4 weeks must be paid the national minimum wage rate for their age group.</p>	<p>2019?</p> <p>The second reading of the bill is expected to take place on 23 November 2018.</p>

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15.	Employment and Workers' Rights Bill 2017 – 2019.	<p>Private Members' Bill on employment and workers' rights</p> <p>This Private Members' Bill was introduced by Stephanie Peacock MP and seeks to make provision about employment conditions and workers' rights.</p>	<p>2019?</p> <p>The second reading of the bill is expected to take place on 23 November 2018.</p>
16.	National Living Wage (Extension to Young People) Bill 2017 – 19.	<p>Private Members' Bill extending the National Living Wage to young people</p> <p>This Private Members' Bill was introduced by Holly Lynch MP and seeks to extend the higher National Living Wage rate (currently £7.83 per hour) to those aged between 19 and 24.</p>	<p>2019?</p> <p>The second reading of the bill is due to take place on 23 November 2018.</p>
17.	Parental Bereavement (Leave and Pay) Bill 2017 – 19.	<p>Private Members' Bill on statutory parental bereavement leave and pay</p> <p>This Private Members' Bill was introduced by Kevin Hollinrake MP and would entitle employed parents who lose a child below the age of 18 (including a still birth after 24 weeks) to 2 weeks' statutory leave to be taken within 56 days of the child's death. Employees who have at least 26 weeks' service at the time would also be entitled to receive 2 weeks' statutory pay at the lower of either the prescribed rate or 90% of their average earnings. Employers will be able to recover some or all of this payment from the Government.</p> <p>You can read our full report on the Bill here.</p>	<p>During 2020</p> <p>The second reading of the bill in the House of Lords took place on 29 June 2018 and will now move to Committee stage.</p>
18.	Various shared parental leave and pay regulations will be affected.	<p>Shared parental leave: extension of leave and pay to working grandparents</p> <p>In 2015 the Government announced plans to extend shared parental leave and pay to working grandparents by 2018. A public consultation on this proposal was due to commence in May 2016, but was postponed until after the EU referendum. It is not yet clear if or when the consultation will commence.</p>	<p>Unknown</p>

FUTURE KEY CASES

NO	CASE	SUMMARY AND IMPACTS	CURRENT STATUS
1.	Uber B.V. v Aslam	<p>Worker status: are Uber taxi drivers workers?</p> <p>The EAT decided that taxi drivers engaged by Uber were workers, rather than self-employed contractors. The consequence is that the drivers will be entitled to certain employment rights such as to be paid in accordance with the National Minimum / Living Wage and protections under the Working Time Regulations 1998 (e.g. rest breaks and paid holiday). You can read our full report on the decision here.</p> <p>Uber were refused permission to appeal directly to the Supreme Court and so the appeal will proceed to the Court of Appeal in 2018.</p>	<p>The Court of Appeal hearing is due to take place on 30 October 2018.</p>
2.	Boxer v CitySprint	<p>Worker status and TUPE: was a cycle courier a worker or self-employed and, if a worker, did he automatically transfer under TUPE?</p> <p>An Employment Tribunal claim has been lodged by a cycle courier seeking a determination of whether he had worker status and, if so, whether he automatically transferred to the transferee under the TUPE regulations.</p>	<p>The Preliminary Hearing to determine employment status took place on 13 – 15 June 2018. Decision awaited.</p> <p>Awaiting Employment Tribunal listing of full merits hearing.</p>
3.	Independent Workers of Great Britain (IWGB) and University of London	<p>Worker status: are outsourced staff also workers of the end-user?</p> <p>The IWGB applied to the Central Arbitration Committee (CAC) for trade union recognition. As part of that application the CAC had to decide whether outsourced staff (security guards, porters, receptionists, post-room staff and AV staff) employed by Cordant Security were also</p>	<p>Awaiting decision on permission to judicial review.</p>

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		<p>workers engaged by the University of London. If they were not workers of the University then the application for trade union recognition would fail.</p> <p>On 10 January 2018, rejected the application on the grounds that the staff were not workers of the University due to the absence of a contract between the parties. You can read our full report on the CAC decision here.</p> <p>The IWGB applied for permission to have the CAC's decision judicially reviewed.</p>	
4.	Jones Meads v Rooffoods Ltd t/a Deliveroo	<p>Worker status: are Deliveroo riders workers?</p> <p>An application was made to the CAC in 2017 by the IWGB for trade union recognition. In order for that application to proceed, the Deliveroo riders in the proposed bargaining unit had to be workers for the purposes of TULRCA 1992. The CAC decided that the riders were self-employed and were not workers. You can read our full report on the CAC decision here.</p> <p>The IWGB were given permission to have the CAC's decision judicially reviewed.</p>	Awaiting High Court hearing date.
5.	The Sash Window Workshop Ltd v King	<p>Holiday pay: can a worker carry over paid annual leave where they have been deterred from taking it because it is unpaid?</p> <p>The ECJ ruled that workers who are denied the right to take paid annual leave are entitled to bring claims in respect of accrued but untaken leave. There is no requirement on them to take the leave on an unpaid basis in order to bring a claim. Further, the right to paid annual leave for such workers accrues and carries over without limitation. This case has important implications for employers who have not yet adjusted holiday pay to include variable payments such as overtime and commission. It is also of concern to employers who engage individuals on a self-employed basis but who could be deemed to be "workers" for employment law purposes. You can read our full report on the decision here.</p> <p>The case will return to the Court of Appeal in 2018.</p>	<p>The ECJ judgment was handed down on 29 November 2017.</p> <p>The Court of Appeal hearing is due to take place on 20 – 21 November 2018.</p>

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6.	Lock v British Gas Trading Ltd	<p>Holiday pay: inclusion of commission payments in holiday pay</p> <p>The Court of Appeal ruled that the Working Time Regulations 1998 can be interpreted to provide that holiday pay must include relevant commission payments. The Court decided that when faced with the question of whether a conforming interpretation can be adopted, the Courts should not confine themselves to the literal meaning of the legislation, but should consider whether such an interpretation is in line with the "grain" of the law. The Court decided that it could be presumed that the UK Government intended to fulfill entirely the obligations arising under the Working Time Directive, including those which were not apparent at the time the Directive was implemented such as the requirement for holiday pay to be "normal pay". You can read our full report on the decision here. British Gas was refused permission to appeal to the Supreme Court. You can read our report on the implications of the refusal here.</p> <p>The case is due to return to the Employment Tribunal to assess how Mr. Lock's holiday pay should have been calculated, however, there has been speculation that the parties are close to settling.</p>	Awaiting Employment Tribunal listing.
7.	International Petroleum Ltd v Osipov	<p>Whistleblowing: are co-workers personally liable for post-dismissal losses flowing from a detriment?</p> <p>The EAT held that fellow workers, including non-executive directors, could be liable for whistleblowing detriment where the detriment is a dismissal. This was the case where the non-executive directors were instrumental in the decision to dismiss the employee who had made the protected disclosure. It was also held that the non-executive directors were jointly and severally liable with the employer for post-dismissal losses. You can read our full report on the decision here.</p> <p>An appeal of the decision will be heard by the Court of Appeal in 2018.</p>	The Court of Appeal hearing is due to take place on 9 July 2018.
8.	Royal Mail Group Ltd v Jhuti	<p>Whistleblowing: knowledge of a protected disclosure and detriment claims</p> <p>The Court of Appeal held that a dismissal will not be automatically unfair for having made a protected disclosure where the dismissing officer: (i) did not know that protected disclosures had been made;</p>	The Court of Appeal decision was handed

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		<p>and (ii) had been misled by the employee's line manager to believe that the reason for dismissal was poor performance.</p> <p>Separately, the Court also decided that a claimant can bring a detriment claim in respect of a co-worker's actions which led to the dismissal (in this case, the line manager's alleged manipulation of the process) and they could pursue post-dismissal losses against the colleague and/or the employer (who is potentially vicariously liable for a co-worker's detriments unless there is a "reasonable steps" defence).</p> <p>An appeal of part of the decision will be heard by the Supreme Court.</p>	<p>down on 20 October 2017.</p> <p>Awaiting Supreme Court listing.</p>
9.	Asda Stores Ltd v Brierley	<p>Equal pay: female supermarket workers able to compare themselves to male depot workers</p> <p>This case concerns whether women working in Asda stores should be paid the same as men working in its distribution warehouses on the grounds that the roles are of equal value. The case is notable as it is the first large-scale equal pay claim brought against a private-sector employer.</p> <p>A Preliminary Hearing was held in June 2016, and judgment delivered in October 2016, where it was decided that the female retail workers were entitled to compare themselves to the male depot workers. The Tribunal's decision was subsequently upheld by the EAT who decided that the male depot workers were appropriate comparators for an equal value claim both under the Equality Act 2010 and under EU law. You can read our full report on the decision here.</p> <p>An appeal of the decision will be heard by the Court of Appeal in 2018.</p>	<p>EAT judgment handed down on 31 August 2017.</p> <p>The Court of Appeal hearing is due to take place on 10 October 2018.</p>
10.	Ali v Capita Customer Management Hextall v Chief Constable of Leicestershire Police	<p>Sex discrimination and shared parental leave: is it discriminatory to pay enhanced maternity pay to women and statutory shared parental pay to men?</p> <p>In <i>Ali</i> the EAT held that the practice of differentiating pay was not directly discriminatory because the male employee was not entitled to compare himself to a woman on maternity</p>	<p>(<i>Ali</i>) The Court of Appeal hearing is due to take place by 1 May 2019.</p>

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		<p>leave. However, in <i>Hextall</i> the EAT overturned a decision that such a practice was not indirectly discriminatory and remitted the claim for a rehearing. You can read our report on both decisions here.</p> <p>An appeal in <i>Ali</i> will be heard by the Court of Appeal in Ali in 2019. Permission to appeal has been sought in <i>Hextall</i>.</p>	<p>(<i>Hextall</i>) Awaiting decision on permission to appeal.</p>
11.	Colino Sigüenza v Ayuntamiento de Valladolid and others	<p>TUPE: is there a transfer of an undertaking where there is a gap of 5 months between the cessation of the old contract and the start of the new contract?</p> <p>The Advocate General gave an opinion that there was no transfer of an undertaking under the Acquired Rights Directive (ARD) where there was a gap of 5 months between the termination of a contract with contractor 1 and the beginning of a new contract for the same service with contractor 2. This was in circumstances where the service, premises, equipment and resources used remained the same, but the staff changed. The Advocate General decided that following the termination of the contract with contractor 1 there was no entity that was capable of transferring for the purposes of the ARD.</p> <p>The ECJ's judgment is awaited.</p>	<p>The Advocate General's Opinion was handed down on 6 December 2017.</p> <p>Awaiting ECJ judgment.</p>
12.	Seahorse Maritime Ltd v Nautilus International (a trade union)	<p>Collective redundancy consultation: the territorial scope of TULRCA 1992</p> <p>The EAT held that the <i>Lawson v Serco</i> principles which apply to determining the territorial scope of rights under the ERA also apply to the territorial scope of rights to a protective award for failure to consult under s.188 of TULRCA 1992. In this case it meant that seafarers employed under employment contracts governed by English law and living on ships stationed in the UK were international commuters who had a "sufficiently strong connection" to the UK to be able to bring claims before the Employment Tribunal. In practice, this means that employers will be obliged to carry out a collective consultation exercise if, at any one establishment anywhere in the world, it is proposing to dismiss as redundant 20 or more employees within a period of 90 days, who each individually have a sufficiently strong connection with the United Kingdom.</p>	<p>The Court of Appeal hearing is due to take place on 26 July 2018.</p>

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		An appeal of the decision will be heard by the Court of Appeal in 2018.	
14.	Bellman v Northampton Recruitment Limited	<p>Vicarious liability: was the employer liable for assault on employee which occurred at an ad hoc drinks party following an official Christmas party?</p> <p>The High Court held that an employer was not liable for an assault by an employee on a co-worker at a drinks party which took place directly after the official Christmas party at a separate location. Although many employees were present, attendance was voluntary and third parties were also present. You can read our report on the decision here.</p> <p>An appeal of the decision will be heard by the Court of Appeal in 2018.</p>	The Court of Appeal hearing was listed to float on 18 – 19 July 2018.
15.	Various claimants v WM Morrison Supermarkets Plc	<p>Vicarious liability: was the employer liable for a data breach committed by a rogue employee?</p> <p>The High Court held that the employer was vicariously liable for a data breach committed by a rogue employee which resulted in the personal data of almost 100,000 of the employer's staff being shared online. The information shared online include employees' bank, salary and national insurance details.</p> <p>An appeal of the decision will be heard by the Court of Appeal in 2018.</p>	The Court of Appeal hearing is due to be heard on 9 October 2018.
16.	Tillman v Egon Zehnder	<p>Restrictive covenants: was a covenant which prevented the employee from having a minor shareholding in a competing company too wide?</p> <p>The Court of Appeal overturned the High Court's decision that a 6-month non-compete restriction enforceable against an employee who rose from consultant to partner within a relatively short period of time. The Court of Appeal overturned this decision on the basis that the covenant prohibited the employee from holding a minor shareholding in a competing business for investment purposes. This meant that the covenant was impermissibly wide and unenforceable. On the question of severance, the Court held it was only able to sever separate covenants, which was not the case here. It was not prepared to rewrite the covenant to make it work. In any event, even if the offending words ("<i>interested in</i>") could be severed, the remainder of the phrase ("<i>engaged or concerned</i>") would still be too wide on the grounds that</p>	The Supreme Court hearing is due to take place on 22-23 January 2019.

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		<p>a minor shareholder can be said to be "<i>concerned in</i>" the company. You can read our report on the Court of Appeal's decision here.</p> <p>An appeal of the decision will be heard by the Supreme Court in 2019.</p>	
17.	Chief Constable of Norfolk v Coffey	<p>Disability discrimination: does direct disability discrimination encompass perceived disability discrimination?</p> <p>The EAT found that section 13 of the Equality Act 2010 was "<i>wide enough to encompass perceived discrimination</i>" and "<i>makes no distinction....between the protected characteristic of disability and other protected characteristics</i>". However, a complaint of perceived disability discrimination will be no less challenging than a complaint of actual disability discrimination. The fact that the perception must encompass the requirements of section 6 of the Act indicates that these cases will turn on the alleged discriminator's precise understanding of the claimant's health. You can read our report on the EAT's decision here.</p> <p>An appeal of the decision will be considered by the Court of Appeal in 2019.</p>	The Court of Appeal hearing is listed to float on 19 – 20 February 2019.
18.	Agoreyo v The Mayor and Burgesses of the London Borough of Lambeth	<p>Conduct: did a knee-jerk suspension amount to a breach of the implied term of trust and confidence?</p> <p>The High Court found that the suspension of a teacher amounted to a breach of the implied term of trust and confidence. The suspension letter stated that the purpose of the suspension was to ensure a fair investigation. The Court rejected the notion that the employer was bound to suspend the employee of on child-safety grounds, given the stated purpose of the suspension. Furthermore, in the lead up to the suspension there had been no attempt to obtain the employee's version of events, no consideration of alternatives to suspension and the suspension letter did not explain why an investigation could not be conducted fairly without a suspension. This led to the conclusion that the suspension was a knee-jerk reaction sufficient to amount to a repudiatory breach of trust and confidence.</p> <p>An appeal of the decision will be considered by the Court of Appeal in 2019.</p>	The Court of Appeal hearing is due to take place on 29 January 2019.

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