ADDLESHAW GODDARD

EMPLOYMENT LAW: WHAT'S ON THE HORIZON? (1 AUGUST 2016 ONWARDS)

FUTURE KEY LEGISLATIVE DEVELOPMENTS

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
1.	FCA Policy Statement PS15/24 FCA Accountability and Whistleblowing Instrument 2015/46 (amends the following sections of the FCA Handbook: the Glossary, Senior Management, Systems and Controls sourcebook (SYSC) and the Prudential sourcebook for Investment firms (IFPRU)) PRA Policy Statement PS24/15 and Supervisory Statement SS39/15 PRA Whistleblowing Instrument 2015 PRA 2015/81 (amends the following sections of the PRA Handbook: Glossary and SWYC) PRA Rulebook CRR Firms Whistleblowing Instrument 2015 PRA 2015/80 (amends the General Organisational Requirements Part of the PRA Rulebook) PRA Rulebook: Solvency II Firms Whistleblowing Instrument 2015 PRA 2015/79 (introduces a new Whistleblowing Section into the PRA Rulebook)	**Financial services: new whistleblowing framework for financial institutions** New rules will govern how certain financial institutions must manage internal whistleblowing disclosures. The rules require affected firms to institute rigorous internal whistleblowing arrangements, offer protection to all whistleblowers, including those who fall outside the scope of the UK legislation, and appoint a "whistleblowers' champion" to oversee the operation of the internal arrangements. The new rules will come into force on 7 September 2016 and the appointed whistleblowers' champion will have responsibility for overseeing the firm's preparatory steps from 7 March 2016. Looking ahead, the FCA intends to publish a consultation on whether to extend the regime to the other firms it regulates. For further information about the new whistleblowing framework you can read our briefing here.	**September 2016** The rules will come into force on 7 September 2016.

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2.	A new statutory instrument will be required to give effect to the new wage rates (not yet published)	**Pay: national minimum wage rates** New national minimum wage rates will come into force on 1 October 2016. The rates are: • National living wage rate for workers aged 25 and over: £7.20 per hour. • Wage rate for workers aged 21 – 24: £6.95 per hour. • Development rate for workers aged 18 – 20: £5.55 per hour. • Young workers rate (above compulsory school age up to 18): £4.00 per hour. • Apprenticeship rate: £3.40 per hour. • Accommodation offset: £6.00 per day.	**October 2016** The new rates will come into force on 1 October 2016.
3.	*Cap:* The Enterprise Act 2016 inserts new sections 153A-C into the SBEEA, which will permit the introduction of new regulations Public Sector Exit Payments Regulations 2016 (draft) *Repayment:* The SBEEA (sections 154-157) permits the introduction of new regulations The Small Business, Enterprise and Employment Act 2015 (Commencement No 3) Regulations 2015 The Repayment of Public Sector Exit Payments Regulations 2016 (draft)	**Termination payments: restrictions on public sector exit payments** *Cap:* 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). *Repayment:* 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. The Government has not yet responded to this consultation. *Calculation:* A consultation ran from 5 February 2016 to 3 May 2016 seeking views on proposed restrictions	**After 1 October 2016 (expected)** *Cap:* The Enterprise Act 2016 came into force on 4 May 2016. The Public Sector Exit Payments Regulations 2016 are intended to come into force on a date to be confirmed which will not be before 1 October 2016. *Repayment:* Sections 154-157 of

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		on the calculation of public sector exit payments. The proposals included: (i) introducing a maximum tariff for calculating exit payments at 3 weeks' pay per year of service; (ii) capping the number of months' salary used when calculating redundancy payments at 15 months; and (iii) setting a maximum salary for the calculation of exit payments. The Government has not yet responded to this consultation.	the SBEEA were brought into force on 1 January 2016. This gives the Secretary of State the power to make the relevant regulations. It is not yet known when The Repayment of Public Sector Exit Payments Regulations 2016 will come into force. *Calculation:* Further details are awaited.
4.	FCA Policy Statement PS16/5 and PRA Policy Statement PS5/16	**Financial services: regulatory references in the financial services sector** The FCA and PRA published a joint consultation paper on regulatory references within the financial services sector. The proposals would change the way that affected firms and insurers obtain and provide references for candidates for certain roles. The consultation closed on 7 December 2015. On 15 February 2016 the PRA and FCA issued a joint policy statement which contained a "first tranche" of the new rules on regulatory references. These rules broadly reflect the requirements that were in place under the Approved Persons regime. The final "second tranche" of rules are expected later in 2016.	**By end of 2016 (expected)** The "first tranche" of the rules came into force on 7 March 2016 The "second tranche" of the rules have yet to be published.
5.	The SBEEA amends the Companies Act 2006 (sections 81, 87 and 89) and the Company Directors Disqualification Act 1986 (sections 104 – 108)	**Company directors**	**Some already in force. Remainder in force by end of**

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	Small Business, Enterprise and Employment Act 2015 (Commencement No. 2) Regulations 2015 Small Business, Enterprise and Employment Act 2015 (Commencement No. 3) Regulations 2015	The following changes will be made: • All companies will be obliged to keep a public register of "persons with significant control" over the company (s.81 SBEEA). • All company directors must be natural persons and not corporate entities (s.87 SBEEA). • The general directors' duties in the Companies Act 2006 will apply equally to shadow directors (s.89 SBEEA). • There will be new grounds for a director to be disqualified (s.104 - 106 SBEEA). • The period of time for applying to court for disqualification of an unfit director of an insolvent company will be increased from 2 to 3 years (s.108 SBEEA).	**2016 (expected)** The following provisions have already come into force: (i) section 81 came into force on 6 April 2016; (ii) section 89 came into force on 26 May 2015; and (iii) sections 104 and 108 came into force on 1 October 2015. However, section 87 has not yet come into force. It was due to come into force in October 2016 but has been delayed.
6.	The Equality Act 2010 (Commencement No. 11) Order 2016 SI/2016.839 Section 78 of the Equality Act 2010 Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 (draft)	**Equality: compulsory gender pay gap reporting** It is intended that employers with 250 or more employees will be required to publish gender pay information on an annual basis. Employers will be required to report: • The overall gender pay gap within their business calculated by reference to the specified pay period. • The overall bonus gap within their business calculated by reference to a 12-month period. • The proportion of men and women that received a bonus in a 12-month period. • The numbers of men and women working across salary quartiles.	**April 2017** The Equality Act 2010 (Commencement No. 11) Order 2016 SI/2016.839 will bring section 78 into force on 22 August 2016. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 are expected to

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		Employers will be required to take their pay snapshot on 30 April 2017 and will need to publicly report the results on, or before, 30 April 2018. On 12 February 2016 the Government published a consultation on the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016. The Government has yet to respond to that consultation and publish the final regulations. The regulations were originally intended to come into force on 1 October 2016, but this has recently been delayed until April 2017. For further information about gender pay gap reporting you can read our briefing here.	come into force in April 2017.
7.	The Finance Bill 2016	**Apprenticeship levy** The Finance Bill 2016 will include provisions introducing an annual apprenticeship levy, payable through PAYE alongside income tax and national insurance, with effect from April 2017. The levy will be payable by all private and public sector employers in the UK at the rate of 0.5% of their total pay bill, with an annual allowance of 15% to offset against the levy payment. The result is that the levy will be payable on pay bills of £3 million or more. In this context, "pay bill" means gross pay, excluding benefits in kind. The money generated from the levy will be used to fund 3 million new post-16 apprenticeships. The money will be available to employers to fund the apprenticeships, however, there will be a 2-year period within which to use the funding before it is made available to other employers. On 12 August 2016 the Government published a consultation on: (i) how the levy will be funded; (ii) the support available to employers; and (iii) what type of training can be funded and how. This consultation closes on 5 September 2016. For further information about the apprenticeship levy you can read our briefing here.	**April 2017** The levy is expected to come into force on 6 April 2017.
8.	Amendments will be made to the Income Tax (Earnings and Pensions) Act 2003	**Termination payments: simplification of the tax and national insurance treatment of termination payments** In July 2015 HM Revenue and Customs and HM Treasury launched a public consultation on the simplification of the tax and national insurance treatment of termination payments. On 10 August 2016, the Government published its response to the consultation, together with a second consultation on the amendments to the law which will be required to implement the planned changes in April 2018.	**April 2018** The second consultation closes on 5 October 2016. The new rules are expected to come

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		The changes include: • Clarifying the scope of the exemption for termination payments to prevent manipulation, by making the tax and National Insurance contributions (**NICs**) and consequences of all post-employment payments consistent. This will mean that all types of payments in lieu of notice (**PILONs**) will be taxable and subject to Class 1 NICs. • Aligning the rules for income tax and employer NICs so that employer NICs will be payable on 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. • Removing foreign service relief. • Clarifying that the exemption for injury does not apply in cases of injured feelings.	into force in April 2018.
9.	Trade Secrets Directive (EU) 2016/943 If the UK is a member of the EU at the relevant time then domestic legislation will need to be introduced to comply with the Directive	**Trade secrets** A new European Directive introducing an EU-wide definition of "trade secret" and setting out rules on the unlawful acquisition, disclosure and use of trade secrets came into force in June 2016. The definition is potentially wider than what is regarded as a "trade secret" under English common law, but somewhat narrower than the types of "confidential information" that may qualify for protection in the domestic courts. The Directive prohibits the acquisition of a trade secret through unlawful access to materials or other conduct which is contrary to "honest commercial practices" (a term that is not defined in the Directive); the use or disclosure of a trade secret where this would breach any contractual or other duty, or where the trade secret was acquired unlawfully; and the exploitation of goods produced using the trade secret where the user (for example, a subsequent employer) knew or ought to have known that the trade secret was acquired unlawfully. The Directive also includes enforcement measures, procedures and civil remedies, including interim injunctions and precautionary seizure of infringing goods. The proposal also covers the preservation of confidentiality during the litigation process.	**June 2018** The Directive came into force in June 2016. Member States have 2 years from this date to implement the Directive into national legislation, meaning the UK must comply by June 2018 (assuming that the UK is still a member of the EU at this point).
10.	Various shared parental leave and pay regulations	**Shared parental leave: extension of leave and pay to working grandparents**	**By 2018**

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		The Government has announced that they will 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 when the consultation will commence.	
11.	The Small Business, Enterprise and Employment Act 2015 (**SBEEA**) (section 148) permits the introduction of new regulations The Small Business, Enterprise and Employment Act 2015 (Commencement No 3) Regulations 2015 The Prescribed Persons (Report on Disclosure of Information) Regulations 2015 (draft)	**Whistleblowing: requirement for regulators to report annually** There will be a new requirement for regulators (also known as "prescribed persons") who receive whistleblowing disclosures to report annually (and report to Parliament) on the disclosures they receive. The content of such a report has not yet been finalised. However, it is expected that as a minimum, these bodies will be obliged to disclose information such as the number of whistleblowing complaints received and the action taken in response, if any. Regulators will not be required to determine whether or not a disclosure is in the public interest. Also, the reports will not reveal the identity of the whistleblower or the employer.	**Unknown** Section 148 was brought into force on 1 January 2016. This gives the Secretary of State the power to make the relevant regulations. It is not yet known when the draft regulations will come into force.
12.	New legislation would be required	**Restrictive covenants** On 25 May 2016 the Government published a Call for Evidence seeking views on how non-compete clauses are operating in practice. The aim is to ensure that when such clauses are used they are: "justified, well-constructed, targeted and reasonable" and fairly balance employer and worker interests. Although the Call for Evidence referred to "non-compete clauses", its scope was not restricted to restrictions preventing workers from working for a competing business. Within the scope of the Call for Evidence are: • Restrictions which prevent an ex-worker from working for, or setting up, a competing business (including area-based restrictions).	**Unknown** The Call for Evidence closed on 19 July 2016. Further details are awaited from the Government.

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		• Restrictions which prevent an ex-worker from dealing with the employer's customers. • Restrictions which prevent an ex-worker from employing employees of the employer. The Call for Evidence was silent on whether restrictions which prevent the ex-worker from soliciting clients or employees of the employer are covered, although it is likely that the intention is that they will be addressed as part of this review. Confidentiality clauses and intellectual property provisions were not within scope on the basis that these are considered "separate policy areas". If the evidence received suggests that such clauses are operating as a barrier to flexibility, the Government may introduce legislation designed to regulate the use of such restrictions.	
13.	Collective Redundancies Directive 1998/59/EC Acquired Rights Directive 2001/23/EC Information and Consultation of Employees Directive 2002/14/EC	**Collective redundancies and TUPE: potential consolidation of three EU Directives** The European Commission opened a public consultation on 10 April 2015 on the potential consolidation of: (i) Collective Redundancies Directive 1998/59/EC; (ii) Acquired Rights Directive 2001/23/EC; and (iii) Information and Consultation of Employees Directive 2002/14/EC. The aim of the proposal is to strengthen the legislation relating to the information and consultation of employees. The consultation closed on 30 June 2015 and a response is awaited as to whether the proposal will be pursued.	**Unknown** Further details are awaited from the European Commission.

FUTURE KEY CASES

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
1.	First Group plc v Paulley	**Disability discrimination: goods and services** The Court of Appeal held that a bus operator who had a policy of requesting, but not requiring, bus passengers to move out of wheelchair spaces to make room for a wheelchair bound passenger was not in breach of the Equality Act 2010. The duty to make reasonable adjustments did not mean that the bus operator had to *require* passengers to move out of the wheelchair area. The claimant was granted permission to appeal to the Supreme Court. The Supreme Court hearing took place on 15 June 2016 and the decision is awaited.	The Supreme Court hearing took place on 15 June 2016. The judgment was reserved and is expected in Autumn 2016.
2.	Brierley v Asda Stores Limited	**Equal pay: large-scale claim against private sector employer** This case concerns whether women working in Asda stores should be paid the same as men working in its distribution warehouse 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. Earlier this year, Asda applied to have the Employment Tribunal proceedings stayed indefinitely on the basis that the claims should be heard by the High Court. Asda argued that the High Court should hear the claims because of the complexity of the issues, covering points of both EU and domestic law, and because of the potential significance of the outcome of the case for Asda and other private sector retail employers. The application was heard by the Court of Appeal on 26 May 2016, with judgment handed down on 22 June. The Court of Appeal unanimously dismissed Asda's appeal. The substantive Employment Tribunal hearing commenced on 20 June 2016 and the decision is awaited.	The Employment Tribunal hearing took place on 20 June 2016 (for 10 days). The judgment was reserved and is expected in Autumn 2016.
3.	Lock v British Gas Trading Limited	**Holiday pay: can the Working Time Regulations 1998 be interpreted to provide that commission payments must be included in holiday pay?**	The Court of Appeal hearing took place on 11

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		The Employment Tribunal ruled that the Working Time Regulations 1998 could be purposively interpreted to provide that workers should receive normal remuneration during periods of annual leave. This includes commission or similar payments. An appeal of this decision was heard by the EAT on 8 and 9 December 2015. The EAT upheld the decision of the Employment Tribunal. For further information on the EAT's decision you can read our briefing here. British Gas appealed again to the Court of Appeal. The hearing took place on 11 July 2016 and the decision is awaited. If the appeal is unsuccessful (and there is no further appeal to the Supreme Court), the case will return to the Employment Tribunal for a further hearing to determine, amongst other things, the appropriate reference period to be used in the calculation of Mr. Lock's holiday pay.	July 2016. The judgment was reserved and is expected in Autumn 2016.
4.	Achbita v G4S Secure Solutions	**Religious discrimination: dress code prohibiting Islamic headscarves** The Belgian Courts asked the ECJ to rule on whether it was directly discriminatory for an employer to prohibit the wearing of Islamic headscarves on the basis of a strict policy disallowing employees from wearing signs of political, philosophical or religious beliefs at work. The Advocate General gave an Opinion on 31 May 2016, deciding that the dress code policy was not directly discriminatory as the ban affected all employees equally. The Advocate General also said that even if the ban was directly discriminatory, it could be considered a genuine, determining occupational requirement under the Equal Treatment Framework Directive. The Opinion also stated that the ban was potentially indirectly discriminatory, but could be objectively justified.	The ECJ hearing took place on 15 March 2016. The Advocate General's Opinion was given on 31 May 2016. The ECJ's judgment is expected in Autumn 2016.
5.	Chesterton Global Ltd and another v Nurmohamed	**Whistleblowing: meaning of the public interest test** The EAT held that it is not necessary to show that a disclosure was "of interest to the public as a whole" in order to satisfy the public interest test contained within the whistleblowing legislation. A relatively small group (in this case 100) may be sufficient. Further, the test does not require the	The Court of Appeal hearing will take place on 11 or 12 October 2016.

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		disclosure to be objectively in the public interest. Instead, all the worker has to demonstrate is that they "reasonably believed" that the disclosure was in the public interest. For further information about the EAT's decision you can read our briefing here. An appeal of this decision is due to be heard by the Court of Appeal on 11 or 12 October 2016.	
6.	British Airline Pilots' Association (**BALPA**) v Jet2.com Ltd (**Jet2**)	**Collective bargaining: the scope of collective bargaining and rostering arrangements** The High Court handed down an important decision on the scope of statutory collective bargaining under Schedule A1 of TULRCA, and, in particular, whether it extended to pilots' rostering arrangements The High Court dismissed BALPA's claim, holding that the provisions of the rostering policy were not contractual and did not, therefore, need to be collectively bargained. It was clear from paragraph 3(2) of Schedule A1 of TULRCA that the scope of the statutory collective bargaining regime should be construed narrowly and restricted to the three express provisions in the legislation (i.e. "pay, hours and holidays"). Although some parts of the rostering policy were apt for incorporation as contractual terms (e.g. those dealing with annual leave entitlement), the Court upheld Jet2's argument that outside of these core terms, the provisions of the rostering policy were non-contractual, because of the flexibility expressly provided for within the policy. An appeal of this decision is due to be heard by the Court of Appeal on 9 and 10 November 2016.	The Court of Appeal hearing will take place on 9 and 10 November 2016
7.	R (UNISON) v Lord Chancellor and another	**Tribunal fees: judicial review challenges to the Tribunal fees system** The public sector union UNISON applied for judicial review of the introduction of the fees system in the Employment Tribunals and EAT. On 7 February 2014 the High Court dismissed the judicial review proceedings. UNISON appealed and the appeal was due to be heard between 10 September 2014 and 10 December 2014. However, in September 2014, UNISON sought to introduce further Tribunal statistics as new evidence. The outcome was that the appeal was stayed and UNISON launched a second judicial review challenge. The High Court dismissed the	The Supreme Court hearing will take place on 7 and 8 December 2016.

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		second judicial review challenge on 17 December 2014 and granted permission to appeal. An appeal of the second High Court decision was heard on 17 June 2015. On 26 August 2015 the Court of Appeal dismissed UNISON's appeal on the grounds that there was a lack of evidence of the actual unaffordability of fees for typical individuals. On 26 February 2016, UNISON was granted permission to appeal to the Supreme Court. The Supreme Court hearing is due to take place on 7 and 8 December 2016. Separately, the Government commenced its own post-implementation review of the fees system. The results of the review have yet to be published. Also, in June 2016, the Justice Committee published the results of its inquiry into the effects of the changes court and tribunal fees. The Committee's report was highly critical of the fees regime and recommended a number of modifications to the existing system to make it less onerous.	
8.	Pimlico Plumbers v Smith	**Employment status: self-employed or employee?** The EAT held that an Employment Tribunal was correct to take into account the degree of personal financial risk taken by the plumber and also the fact that the actions of both parties and the contractual documentation indicated that the parties considered that the plumber was self-employed, rather than an employee. The claimant has appealed to the Court of Appeal.	The Court of Appeal hearing will take place on 17 January 2017.
9.	Donelien v Liberata UK Ltd	**Disability discrimination: constructive knowledge of disability** The EAT held that an employer was not fixed with constructive knowledge of an employee's disability despite a failure to follow up on a weak occupational health report. Overall, the employer had taken reasonable steps to reach a decision on the employee's disability status. Whilst a different employer may have chosen to revisit the unanswered questions posed to the occupational health advisor, the failure to do so was not fatal. The test was one of reasonableness, not perfection. The claimant has appealed to the Court of Appeal.	The Court of Appeal hearing will take place on 19 January 2017.
10.	BT Managed Services Ltd v Edwards	**TUPE: assignment to the organised grouping**	The Court of Appeal hearing will take place on

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		The EAT held that an employee absent from work on permanent sickness absence was not assigned to the organised grouping of employees subject to the service provision change. The EAT held that whilst assignment can arise on the basis of a link between the employee and the work carried out by a group, something more than a mere administrative or historical connection was required. There had to be some level of participation or, an expectation of future participation in carrying out the relevant activities of the organised group. The claimant has appealed to the Court of Appeal.	16 or 17 May 2017. (It has been reported that this case settled on 16 August 2016).
11.	United States of America v Nolan	**Collective redundancies: what is the trigger point for collective redundancy consultation?** This case concerns the question of whether the obligation to consult collectively about redundancies arises once the employer: (i) is proposing to make a strategic business or operational decision that will foreseeably lead to collective redundancies; or (ii) has already made that strategic decision and is proposing consequential redundancies. A Supreme Court hearing took place on 15 and 16 July 2015, to consider whether foreign sovereign states were exempted from the duty to collectively consult about redundancies with their UK employees. The Supreme Court held that the obligation to consult in relation to collective redundancies under section 188 of TULRCA applied even in cases where redundancies arose due to the strategic decisions of foreign governments. The key point for most employers, regarding when the obligation to consult collectively about proposed redundancies arises, will now be heard by the Court of Appeal.	The Court of Appeal hearing is yet to be listed.
12.	R v Forsey	**Collective redundancies: criminal prosecution for failing to file an HR1 form** Criminal proceedings were brought against David Forsey, former director of USC in respect of a failure to notify the Secretary of State (via the HR1 form) of proposals to make collective redundancies. Under section 194 of the Trade Union and Labour Relations (Consolidation) Act 1992, an organisation commits an offence if it fails to file the HR1 form within the correct timescale. If the offence is done with the consent or connivance of, or is attributable to neglect on the part of any director (or similar officer), then the individual is subject to an unlimited fine and/or disqualification from acting as a director for up to 15 years.	Unknown

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		A Magistrate's Court hearing was due to take place between 14 and 16 March 2016, however, the case was adjourned to consider the scope of the Carltona Principle.	

If you would like more information on the above, please contact **Amanda Steadman**, Professional Support Lawyer at amanda.steadman@addleshawgoddard.com or on 020 7160 3310.

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