

The Good Work Plan (GWP)

What it is and what it means for your business

With areas of the GWP already in effect, more to follow and yet more at consultation stage, this is everything you should have in place, and what you need to be working towards.

A Citation White Paper

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Introduction - Fair and Decent Work

In July 2017, Matthew Taylor CBE and his team, published their review of modern UK working practices - what would be referred to as the Taylor Review and would form the basis of the Good Work Plan (GWP). Taylor - who was appointed Interim Director of Labour Enforcement on 1 August 2019 - has been head of the RSA since 2006 and previously served as head of the Number 10 Policy Unit after nomination by Tony Blair. He was commissioned to carry out the review in October 2016 by then Prime Minister Theresa May.

This resulted in a government commitment, made in February 2018, to develop a legislative response to issues raised by the Taylor Review on matters pertaining to the rights of various types of workers. In addition to a response from the Secretary of State for Business, Energy and Industrial Strategy, there were a series of consultations announced and further rounds of consultations to follow.

The initial review focused on employment law dealing with four areas:

- Employment status
- Holiday and sick pay
- Legal enforcement
- Rights for atypical workers

What resulted was a review that made recommendations that can be broadly categorised as aiming to achieve a better standard of working conditions for employees who may otherwise have been at risk of exploitation.

Why was the Taylor Review commissioned?

The way we work is changing - from the impacts of technology and the application of employment to the increasing number of workers that are considered 'atypical' i.e. self-employed, bank workers, agency workers etc. The move away from traditional employment relationships required that the UK government rethink the way it protected the labour force.

Commentary

"The aim of the review was not to discourage labour flexibility, which is recognised by the government as a major driver for economic growth, but to ensure that this flexibility did not result in unfair working practices, with much risk transferred to the individual at the expense of their financial and mental wellbeing."

Gillian McAteer - Head of Employment Law, Citation

As such, it was decided that there should be a review of employment law to ensure that it was fit for purpose for what is a new and different era of employment. As the head of the RSA - an apolitical organisation dedicated to finding solutions to the social challenges of the modern day - Taylor and his team were a natural choice for the undertaking.

What is the Good Work Plan (GWP)?

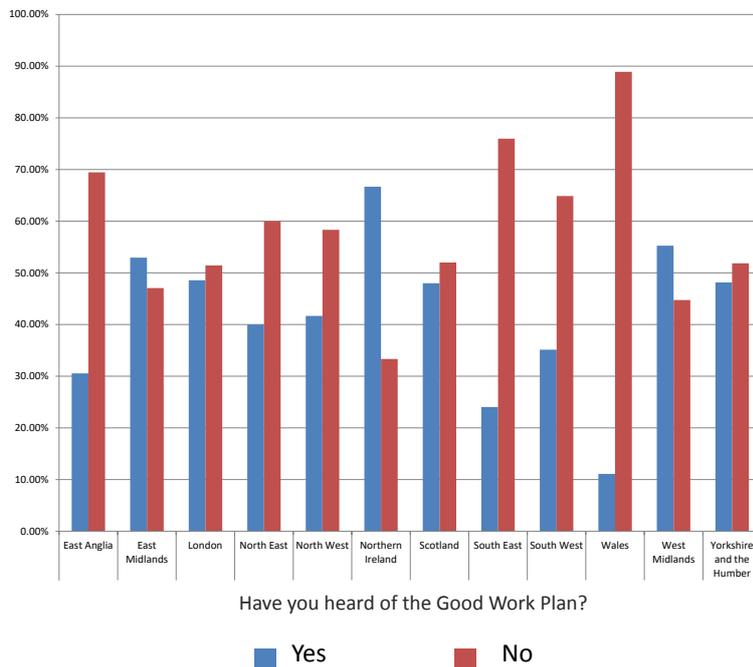
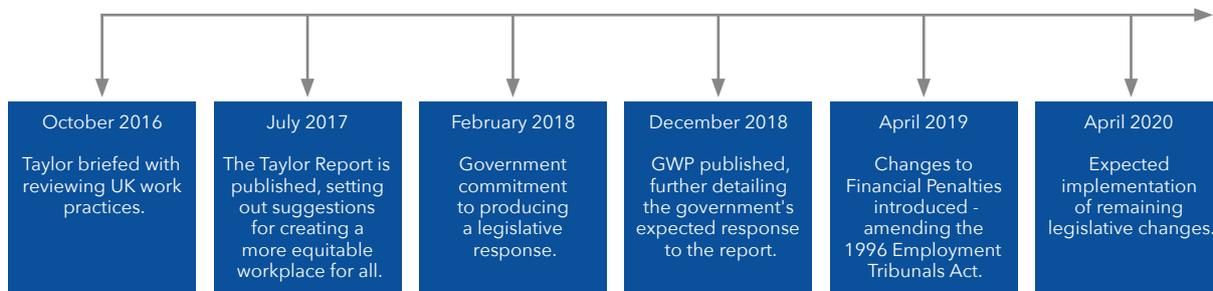
If you're not sure what the GWP is, then you're in good company. Over half (59%) of respondents to a recent Citation survey said they had not heard of the GWP, despite some of its recommendations having already entered law. In addition to this, however, 11% of those that had heard of the GWP were unsure of how it would change their legal obligations.

In short, the GWP is the government's plan on how it will implement the vast majority of Taylor's recommendations.

Initially released in December 2018, the GWP outlined a 'Vision for the future of the UK labour market' and promised a phased roll-out of measures intended to ensure:

- Access to fair and decent work
- Greater clarity on the nature of working relationships
- Fair and fit for purpose enforcement systems

While some changes were made to the Employment Tribunals Act in April of 2019 and Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018, the majority of reforms will be rolled out over the coming months, with some very significant changes coming into force on 6 April 2020 - with employers required to supply employees and workers with additional information on terms of engagement and benefits.



Commentary

"This will affect every business in the country as it brings changes to who they need to give statements of main terms to, when they give it and what information needs to be provided."

Gillian McAteer - Head of Employment Law, Citation

While the following document is intended to bridge some of the gaps in communication between the government and employers, many of the changes rely upon a good understanding of employment status and there remains uncertainty even at the highest levels of the courts, and definitive information is, as yet, thin on the ground.

Commentary

"In the GWP the government acknowledged that the state of confusion surrounding the issue of employment status was entirely unsatisfactory and committed to introducing new legislation and guidance for employers to clarify the position. Unfortunately there is no information as to when this will be forthcoming."

Gillian McAteer - Head of Employment Law, Citation

Your present GWP obligations

While the majority of the legislation is either pending, expecting compliance by 6 April 2020, or subject to consultation, there are aspects of the GWP which employers are expected to have implemented as of April of 2019. While for many businesses this should be no issue, it is imperative that those not currently meeting required standards implement the necessary changes as soon as possible to avoid any potential financial risk.

Payslips

With fewer than 30% of respondents to a recent Citation survey stating that they do not employ one or more type of indirectly employed workers, changes to the Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018 should make employers sit up and take notice, as they mean it is now incumbent upon employers to ensure that all workers are supplied with a written payslip as of April 2019.

These payslips, regardless of the worker's status within the organisation in question, need to be itemised to contain the number of hours paid for (where a worker is paid hourly). This is partly a response to the section of the Taylor Review that mentioned that, despite increases to the minimum wage, there were still workers who either were not, or were at least concerned they were not, being paid the appropriate minimum wage for their age. It also directly addresses Recommendation 6 of the Taylor Review, which advised that the "right to a written statement [should apply] to the dependent contractor as well as employees".

Penalties

In 2014, the Enterprise and Regulatory Reform Act 2013 introduced s12A Employment Tribunals Act 1996 which gave employment tribunals the right to impose a financial penalty if they conclude that an employer has breached any worker rights relating to a claim and the tribunal believes the breach has one or more aggravating features. This right has been refused sparingly by tribunals

Recommendation 24 of the Taylor review suggested that the government should create an obligation on employment tribunals. Tribunals, the report suggested, should consider using 'aggravated breach penalties' and cost orders in cases where an employer had already previously lost a case on broadly comparable facts. Effectively, this is an effort to have the government implement a method for the punishment of employers who have ignored the law. The government accepted this recommendation, and as of April 2019, the maximum limit for penalties of this kind has been increased from £5,000 to £20,000.

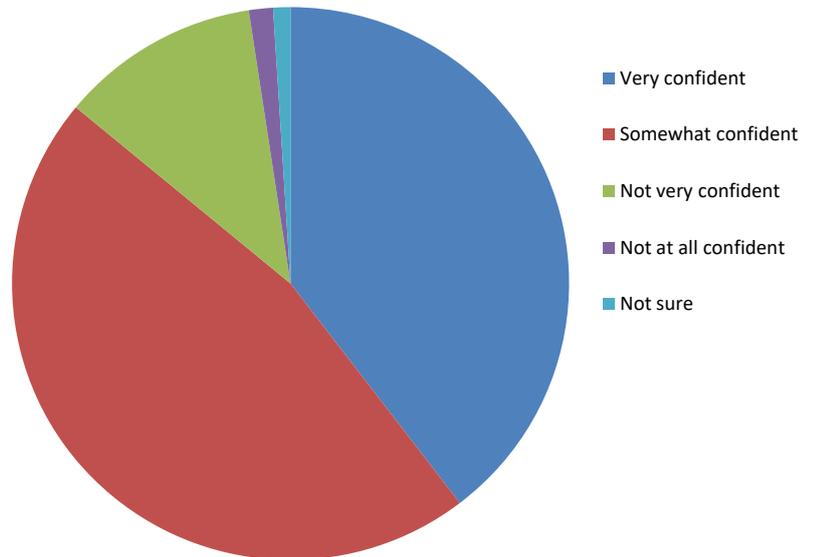
The government response on this recommendation made clear that due to the small proportion of employers found to be at fault during tribunals and the even smaller proportion found at fault multiple times, it could reasonably be assumed that such employers were ignoring the law and that the increased fine was, in those cases, warranted.

Guidance and notes on current obligations

Citation found that approximately 93% of respondents were either very confident or somewhat confident of the legal distinction between employee, worker and (potential) self-employed people in their business. The number of respondents who were either very or somewhat confident they could make changes to contracts, when and if the law required it, fell to 86%.

While 14% of respondents is a reassuringly low figure, this does suggest that there are potentially thousands of businesses in the UK that should be worried about their ability to correctly implement the minimal changes that are currently required of employers. With much more complex changes set to be required by 6 April 2020, it is imperative that this figure reaches 100% or that businesses are in the process of briefing external agencies to oversee the coming transition.

How confident would you be if you needed to make changes to your contracts, policies and procedures when the law requires it?



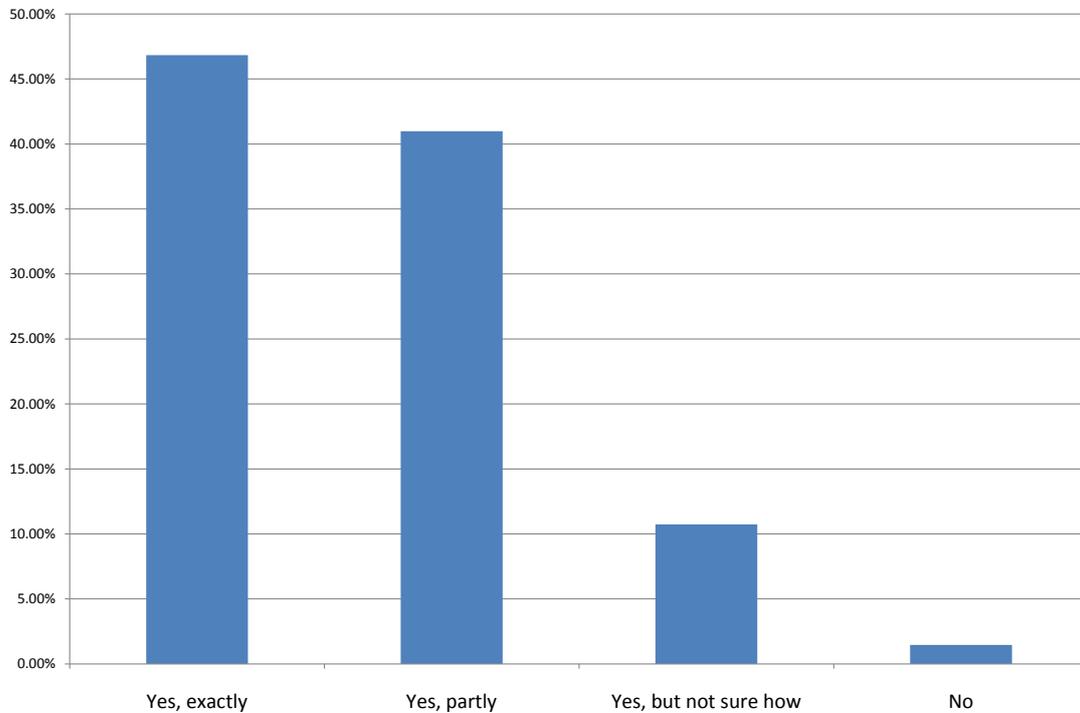
Commentary

"The percentage of employers confident of the distinction between employee, worker and self-employed to some degree is surprisingly high and contrary to the findings in the Taylor review that this is an area of great confusion for business. I think it is likely that many businesses feel confident in the classification of employment status because they assume it is dependant on factors such as the nature of the contract documentation, description of their status and the parties intentions rather than the detailed examination of all relevant factors which is the test the employment tribunal would apply."

Gillian McAteer - Head of Employment Law, Citation

Review of recommendations and governmental responses

Do you know how the Good Work Plan could potentially change your legal obligations as an employer?



Before we move on to address the obligations that businesses will have in relation to the GWP from April 2020 and beyond, we’re going to contextualise the coming changes by reviewing those recommendations from the Taylor Review. In addition, we will add in the governmental responses to the more impactful recommendations that we feel have led to the biggest new requirements of the GWP.

While the upcoming changes are considerable, we feel it important to state that these are not changes for their own sake, but important adaptations of legislation to the current employment landscape that have the potential to benefit employers and workers alike. A full list of the recommendations and responses can be found [here](#).

Recommendation 1

“The government should replace their minimalistic approach to legislation with a clearer outline of the tests for employment status, setting out the key principles in primary legislation, and using secondary legislation and guidance to provide more detail.”

Government response reviewed

Accepted in principle, the government committed to legislation aimed at improving clarity on employment rights to better reflect modern working practices. However, after consultation with a joint BEIS (Business, Energy and Industrial Strategy) and DWP Select Committee, it decided not to implement adaptations of piece rates legislation. It should surprise no one that improved clarity around employment rights can facilitate increased feelings of security in employees and, in addition, represents a method of reducing issues caused by misunderstandings between employers and workers.

Recommendation 6

“The government should build on and improve clarity, certainty and understanding of all working people by extending the right to a written statement to ‘dependent contractors’ as well as employees.”

Government response reviewed

As discussed, this is a change that businesses are expected to have already implemented, with all hourly paid workers entitled to itemised payslips from day one of their employment.

Recommendation 10

“The government should do more to promote awareness of holiday pay entitlements, increasing the pay reference period to 52 weeks to take account of seasonal variations and give ‘dependent contractor’ the opportunity to receive rolled-up holiday pay.”

Government response reviewed

One of the more wide-ranging of the recommendations - which we'll discuss further in the following section - the government accepted that the change was needed and promised it would be made.

Recommendation 12

"The government should introduce a right to request a direct contract of employment for agency workers who have been placed with the same hirer for 12 months, and an obligation on the hirer to consider the request in a reasonable manner."

Government response reviewed

Another potentially massive change may result from this recommendation - with the government response stating that not only will there be a requirement for a route to direct employment, but that all workers will have the right to request more stable hours.

Recommendation 21

"The burden of proof in Employment Tribunal hearings, where status is in dispute, should be reversed so that the employer has to prove that the individual is not entitled to the relevant employment rights, not the other way round, subject to certain safeguards to discourage vexatious claims."

Government response reviewed

The response from the government, though it defers action (until an online tool exists to determine employment status), proposed a shift of the burden of proof from employee to employer, which must stress, for all businesses, the necessity of maintaining exacting and regularly updated records of employee status.

Commentary:

"The development of an online tool to help employers determine employment status is likely to be extremely difficult. One only has to look at the controversy surrounding HMRC's online tool CEST (Check Employment Status for Tax) designed to identify whether an individual should be classed as an employee or self-employed."

Gillian McAteer - Head of Employment Law, Citation

Recommendation 24

"The government should create an obligation on employment tribunals to consider the use of aggravated breach penalties and cost orders if employer has already lost an employment status case on broadly comparable facts - punishing those employers who believe they can ignore the law."

Government response reviewed

As previously stated, aggravated or repeated breaches represent not an ignorance, but a disdain for the law, and repeat offenders can now be punished as such.

Recommendation 32

“The government should consider accrediting a range of platforms designed to support the move towards more cashless transactions with a view to increasing transparency of payments, supporting individuals to pay the right tax.”

Government response reviewed

While the government’s response here was lukewarm, there was a generally positive response to one of the more interesting recommendations from the review. Though there was no commitment, the government did suggest that such a concept is consistently reviewed.

Recommendation 40

“As part of the statutory evaluation of the Right to Request Flexible Working in 2019, the government should consider how further to promote genuine flexibility in the workplace. For example, it should consider whether temporary changes to contracts might be allowed, to accommodate flexibility needed for a particular caring requirement. The government should work closely with organisations like Timewise and Working Families to encourage flexible working and initiatives like “happy to talk flexible working” to a wider range of employers.”

Government response reviewed

While, again, there is little concrete commitment in the response to Recommendation 40, with the government making the same vaguely positive noises as it does regarding a few of the more radical suggestions, the ‘commitment to consider’ in this case may be worth paying attention to. With the rise in employees claiming flexibility is very important to them (77% according to a survey by Opinium in March 2018 and 61% from the same poll stating their ‘employer should accommodate their needs and life stage’), it is clearly an issue that will require re-examination by the government – and the idea that ‘all jobs [should] be advertised as flexible from day one, unless there are solid business reasons not to’ would seem to be the only sensible response in the long run.

Recommendation 41

“The government should review, and in any event, consolidate in one place guidance on the legislation which protects those who are pregnant or on maternity leave to bring clarity to both employers and employees. In parallel with the range of non-legislative options set out above, the government should consider further options for legislative interventions. If improvements around leadership, information and advice do not drive the culture change we are seeking, the government will need to move quickly to more directive measures to prevent pregnancy and maternity discrimination.”

Government response reviewed

Another of the responses we'll deal with in a later section, the government's response to Recommendation 41 is among the most positive and definitive in its wording – with a commitment to 'continue to support the Equality & Human Rights Commission's work on pregnancy and maternity discrimination' as well as the publishing of a further consultation to look at the possibility of extending women's and new mothers' redundancy protections.

In January 2019 the government launched a consultation on extending the protections for pregnant women and new parents returning to work. Following on from this, the government announced in July this year that they would introduce legislation to extend the legal protections against redundancy by 6 months for new mothers returning to work.

Recommendation 43

“The government should reform Statutory Sick Pay so that it is explicitly a basic employment right, comparable to the National Minimum Wage, for which all workers are eligible regardless of income from day 1. It should be payable by the employer and should be accrued on length of service, in a similar way to paid holiday currently. The government should ensure that there is good awareness of the right amongst workers and businesses.”

Government response reviewed

Suggesting that they are aware problems with SSP as it exists, the government response gives a relatively firm response to this recommendation. Not only was there an admission that SSP needed to be improved, and that a consultation will be held to explore the options, they agreed with the thrust of the recommendation as well as stating that, ideally, SSP should form part of an employer's responsibility to help reintegrate people that are managing illness, health conditions and disabilities. In July the government launched the 'Health is everyone's business' consultation which covers potential reforms to SSP within the broader context of a range of proposed measures aimed at reducing health related job losses. The consultation is due to close in October 2019.

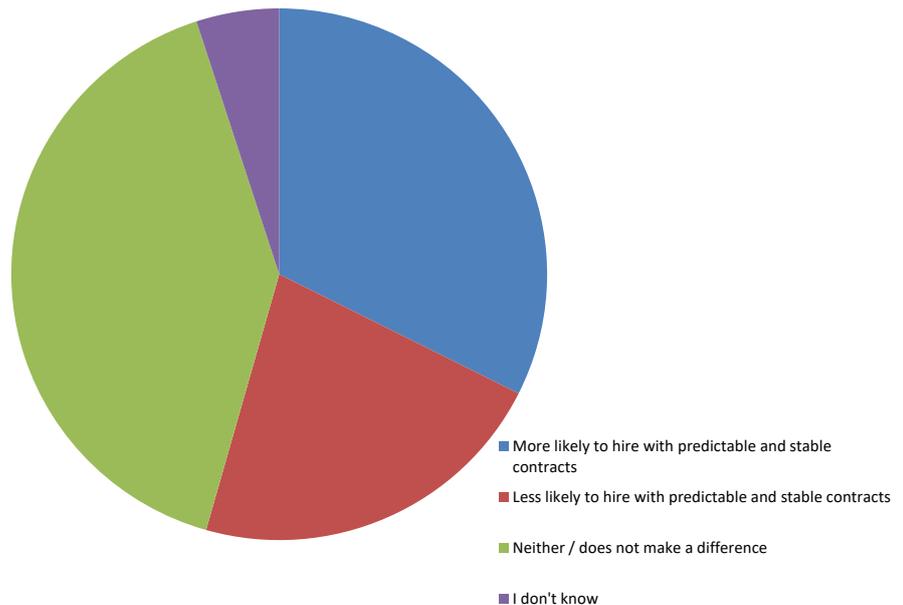
Your GWP obligations from 6 April 2020

While there are substantial changes coming to what will be required of employers as of the 6 April 2020, there are a number of changes which may require more work than others. Therefore, we're going to concentrate our efforts on detailing three of the most complex areas.

Agency workers

Firstly, the Agency Workers (Amendment) Regulations 2019 are set to become law on the 6 April 2020, and overturn the 'Swedish derogation'. The Swedish derogation - which excludes agency workers from the right to have parity of terms after 12 weeks in a particular assignment if they work under a contract which provides for payment between assignments - had been exploited by some employers (who had imposed inordinately severe requirements on qualification), leaving very few agency staff actually qualifying for the interim pay. The government is set to revoke regulations 10 and 11 of the Agency Workers Regulations 2010 in order to remove the option.

Would you be more or less likely to hire casual/flexible workers if they had a right to request more predictable and stable contracts compared to what they have now?



To comply with this change, agencies will need to supply workers currently covered by the Swedish derogation with a written statement advising them that they are entitled to the rights outlined in regulation 5 - and the statement must be supplied by the 30 April 2020 at the latest or the worker will be entitled to raise a tribunal claim.

Prior to this, however, from the 6 April 2020, the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019 will require all employment businesses to supply new workers with what is referred to as a 'key information document' outlining information on benefits, costs, deductions, fees and pay - as well as an example statement in keeping with the remuneration they can expect to receive.

Key takeaways:

- All workers currently covered by the Swedish derogation need to have been supplied with a statement outlining their rights in accordance with regulation 5 of the Agency Workers Regulations 2010 by 30 April 2020 at the latest.
- As of the 6 April 2020, all new workers should be supplied with a key information document that details important information regarding the role as well as an example statement that reflects the remuneration they could receive.

Holiday pay

The next major change relates to the way we will calculate holiday pay. This is to both counter an area which has been exploited by some employers and also to offer greater clarity in a situation that can be difficult with regards to atypical workers.

Paid time off from work is a basic right for all employees, however, though it is rarely a case of conscious manipulation, there are problems with the way we have historically applied the rules to atypical workers.

The example the government provides to exemplify this change is of a zero-hours worker who will typically work more during one period of the year than others.

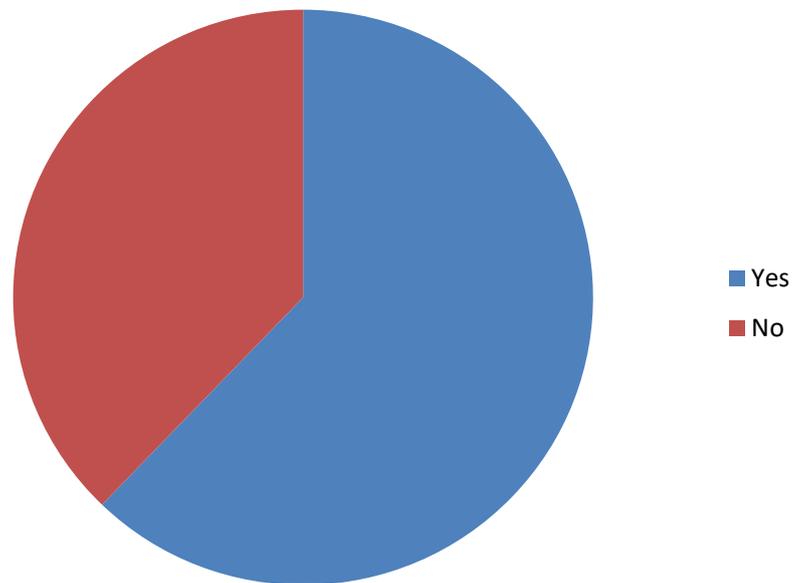
If, following one of the slower periods and entering a busier period, the employee wanted to book a holiday, her holiday pay would be calculated on the hours worked in the 12 week quiet period - potentially causing the worker to lose out. However, with a 52-week calculation period, the pay she would receive would be a representative average of the work undertaken over a full year and is therefore fairer.

However, one of the main issues the review found in relation to holiday pay is that of awareness - therefore the government has committed to running awareness campaigns featuring real-life examples.

Key takeaways:

- You will need to use a 52-week rather than 12-week average to calculate holiday pay.
- The government intends to tackle a lack of awareness around holiday pay. Employers should ensure that workers have access to clear holiday information.

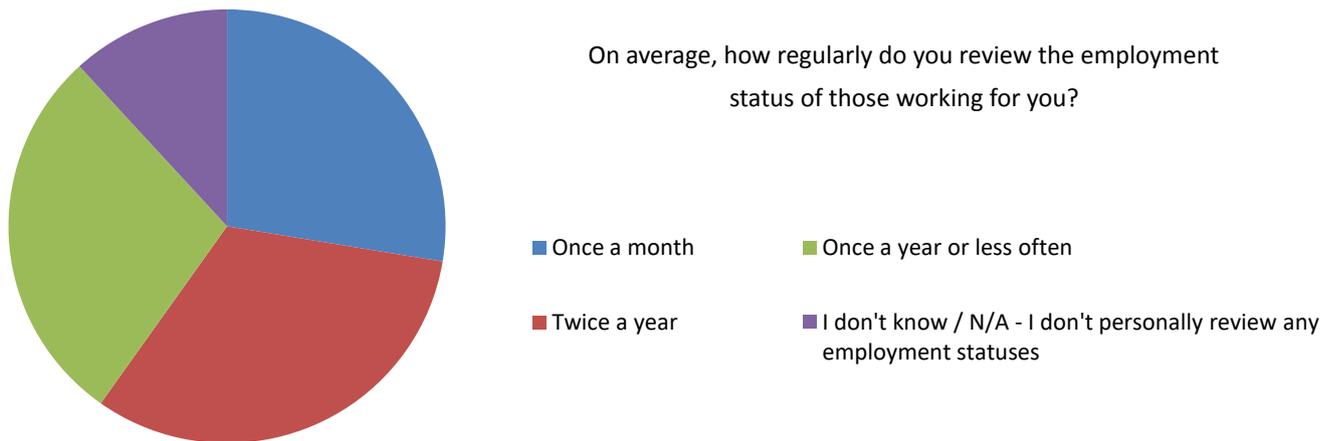
Are you aware of recent changes to how holiday pay is calculated with regards to overtime and commission?



Commentary:

"Extending the pay reference period to 52 weeks has largely been welcomed as a fairer way to calculate holiday pay for those who work variable hours. However, this is by no means the most problematic area of concern for employers when it comes to holidays. Over the last few years we have seen a number of cases extend the UK's concept of holiday pay to include commission and overtime but as is often the way with incremental reform through case law, there are gaps which make it difficult for employers to know the extent of their obligations. This is particularly problematic given the government's commitment to introduce state enforcement of holiday pay for vulnerable workers."

Gillian McAteer - Head of Employment Law, Citation



Statement of main terms

As mentioned in the response discussion, one of the primary changes taking effect from 6 April 2020 is the introduction of an obligation on employers to give a statement of main terms to all workers as well as employees. In addition, this statement will now have to be given on the first day of work (as opposed to the current position of within 2 months) and extending the types of information which needs to be included.

Of course, to comply with the new requirements, businesses need to be able to correctly identify those who are employees, workers and those who are genuinely self-employed.

While there has been a rise in 'self-employed' workers, the Taylor Review raised concerns around whether all such workers were actually, or in name only, self-employed. As such, the GWP has characterised a self-employed worker as:

[An] individual who [...] does not require legal protection to treat themselves fairly [...] runs and manages their own business and, for example, has control over how, when and who carries out the work and negotiates the price of the work to be undertaken. They must comply with employment law if they use staff to carry out work.

An atypical worker, however, is simply a more casual employee, but still entitled to day one rights - including the National Minimum Wage, paid holiday and rest breaks.

Commentary:

"Many employers believe that employment status is largely derived from factors such as how the individual is treated for tax purposes or how they are described in documentation. Unfortunately, the question of status is much more complex and involves a multifactorial examination of all matters relevant to the working relationship. To increase complexity, it is not a static question and individuals may well come into the business under one status but over time the working arrangements become much more consistent with another employment status. This is why it is so important to keep working arrangements for atypical workers under regular review."

Gillian McAteer - Head of Employment Law, Citation

Key takeaway:

- Once employees have worked for the same employer for in excess of one month, they are automatically entitled to a written statement detailing their employment contract and rights. This must be received within two months of commencement of service.

Coming consultations and possible impact

Measures to address one-sided flexibility

These measures are designed to address what has come to be considered a misuse of flexible working arrangements – which can leave workers with undesirable, unpredictable working hours and income insecurity. Not only are there the initial impacts of income insecurity, but employees can often feel that these insecure, unpredictable hours are themselves at risk if the employee attempts to assert basic employment rights.

In order to address these issues, the consultation aims to collect submissions dealing with the following subjects:

- The right to receive reasonable notice of working hours
- The right to compensation when and if a shift has been cancelled without reasonable notice
- How adoption of best practice can be encouraged and what guidance could be supplied to employers to facilitate this

This particular consultation applies to England, Wales and Scotland, and closes on 11 October 2019.

Analysis

There is little doubt that ‘zero-hour contracts’ and similar flexible work schemes have become a hot-button issue politically over the last decade – especially as the Office of National Statistics (ONS) found that as of September 2017, some 900,000 workers were on such contracts, and various new organisations have found some level of exploitative practice at brands such as Sports Direct, JD Wetherspoon and even Buckingham Palace.

With a lot of often negative publicity surrounding what most zero-hour contract employers would insist were outliers, the move to a more equitable distribution of power in the relationship between employer and worker in this kind of contract can only be a good thing on all sides.

Commentary:

"However, we must be careful that when imposing obligations and strengthening enforcement provisions, the government must also give the necessary guidance and clarity to businesses as to what the extent of their obligations are. Employment status clarity is therefore urgently required."

Gillian McAteer - Head of Employment Law, Citation

Establishing a new single enforcement body

This consultation intends to consider whether it is necessary to establish a single body to improve oversight and enforcement of employment rights for vulnerable workers – as well as ensuring an equal standard for all employers regardless of geographical location by ensuring equitable enforcement of relevant obligations throughout the UK.

The new body could be expected to oversee:

- National Minimum Wage compliance and enforcement
- Discriminatory employment practices
- Holiday pay for vulnerable workers
- Regulation of umbrella companies

Analysis

As things stand, employment rights in the UK are enforced by several bodies (HMRC enforces the National Minimum Wage (NMW), for example, while the Equality and Human Rights Commission deals with discriminatory employment practices). While each may perform its responsibilities to the very best of its ability, the fact that there are multiple agencies makes mistakes difficult to avoid.

For this reason, a single governing body - with equal geographic presence could ensure that the problems presently dealt with by employers, employees and workers alike could be substantially reduced (complete eradication being unlikely in all but a utopian scenario).

Proposals to support families

With the UK lagging behind many European counterparts with regards to parental leave; it should not be surprising to find such a consultation on the list. This consultation is intended to seek guidance in the following three areas:

- Possible methods of reforming existing entitlements around parental leave with the intention of assisting parents in the distribution of leave between them
- The possibility of a new 'neonatal care' leave - and the pay entitlements for parents that may be necessary
- Whether employers should be compelled through legislation to assess whether and advertise if a role could be performed flexibly, as well as whether organisations of more than 250 employees should be required to publish family related leave and pay, their flexible working and relevant policies

The neonatal leave and pay, transparency on flexible working and related policies consultation closes on 11 October 2019. While the consultation around parental leave and pay closes on 29 November 2019.

Analysis

As stated, the UK lags behind some of the leading EU countries in various ways in terms of dealing with the pay and benefits surrounding maternity and paternity pay and/or adoption leave. With the population typically starting families later, it is also worth considering that new parents of any sex are increasingly likely to hold senior roles within organisations.

Not only, therefore, is change around parental benefits desirable for parents, but it may well be necessary based on the demographic make-up of new parents. While it has been apparent for some time that disruption to the careers of mothers specifically is of societal detriment, there has been little real movement toward the improvement of support for families since the introduction of paternity and adoption leave in 2002 other than the move to allow shared parental leave in 2015.

For this reason, it is possible that early adoption of improved leave and pay for parents could not only serve to prepare businesses for coming changes, it could serve them well in recruitment and lower staff turnover rates in the interim.

Conclusion

While the results of our survey were mixed - with more than half either completely unaware of the GWP or uncertain as to their obligations regarding its implementation, there is - as you can see from this document - ample scope for employers to begin implementing the changes to ensure they will meet requirements that are either in effect now or soon will be.

The GWP offers employers the chance to overhaul or augment their existing employee and worker documentation, making it an excellent opportunity to update a section of many businesses' HR documentation that may have drifted from their core values - especially as this is the first shakeup of the relevant legislation since the mid-90s.

The important thing to remember, however, is that while these changes represent the chance to make a really positive impact on a business' relationship with employees and workers, it will take time and effort for thing to be done properly. With potential benefits to the business that gets it right likely to include happier employees and workers and, therefore, potentially improved retention and productivity, there have been few occasions for such legislative change to provide the opportunity to positively impact your business.

Have you heard of the Good Work Plan?

