MAYER·BROWN

UK Employment Round-Up

April 2016

Our monthly review of key cases and new law affecting employers

For our April monthly update, we thought it would be helpful to consider the introduction of the National Living Wage that came into force at the start of April 2016. This update looks at the impact this initiative is likely to have on businesses and the Employment Law issues it has raised so far.

Background

The National Living Wage (the **"NLW"**) was a significant surprise to come out of George Osborne's July 2015 Budget. The Budget set out that the NLW would apply to workers aged 25 and over (so there is no need for employers to apply the initiative to any of their workers aged 24 or younger). It proposed to raise the National Minimum Wage (the **"NMW"**) annually for this age category over a four year period. The rise introduced in April of this year was from the current NMW of £6.70 an hour to a NLW rate of £7.20 per hour. This is a 10.8% increase and the largest uplift since 2001, which was the highest ever increase made. But what does this new NLW actually mean for employers on a practical level? In effect, the NMW has now become the 21 to 24 year olds' rate and the NLW is the new legal wage floor for all workers aged 25 and over. The Government's new NLW is expected to affect around 6 million people but what will the consequences be of the new NLW on businesses and employers? In this update, we consider the impact on both small organisations with employees at the lower end of the pay scale as well as also considering the potential ramifications for employers with higher paid employees, who may not expect this new legislation to have any impact on their operations.

Practical steps for employers

Employers now need to ensure that they are paying their employees the correct wage in accordance with the new NLW, as well as paying the NMW for workers under the age of 25. Although the new law came into force on 1 April 2016, this does not necessarily mean that all workers aged 25 and over will receive a pay rise from that day. Payment of the NLW will operate in the same way as the law on minimum wages, around the pay reference period system. Workers are therefore entitled to receive the minimum rate which applies to them at the start of the relevant pay reference period. For example, if your payroll date is the 27th day of each month, then you must start paying the living wage to eligible employees from 27 April so as not to fall foul of the new NLW legislation.

The View From Mayer Brown

MAYER·BROWN UK Employment Law

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Episode 92

This episode looks at the award of damages for breach of a restrictive covenant; the right to manifest religious belief at work; and whether an employer who was unsure of an employee's right to work in the UK could dismiss.

Episode 91

This episode looks at an employer raising performance concerns about sick leave, whether an employer can dismiss an employee believed to be "pulling a sickie" and interim relief applications and what a Claimant has to prove to obtain an interim relief order.

UK Employment Law: for HR and in-house lawyers

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Impact of the nlw on employers

The higher wage costs could result in a number of issues for employers and companies' business models. The extent of the impact from this legislative change will be dependant on the nature of the business and different sectors will have varied levels of concern. Employers with large numbers of low-paid employees will be the most affected, in particular, manufacturing, retail, hospitality and social care sectors. However, it has been suggested that a number of employers are proposing to cut overtime rates, shift allowances and benefits across their workforce (and not just in respect of those who will qualify for the National Living Wage) to offset the cost of the introduction of the NLW. This could potentially create claims for breach of contract and unfair dismissal.

Another issue that we have seen arise as a consequence of the new NLW comes as a result of the interplay between Pensions Regulations and the new living wage legislation. With such a hike in the minimum wage as a result of the NLW and the separate requirement under Pensions Regulations for employees to be making minimum contributions into their pension of at least 2% of their salary, employers with employees contributing via a salary sacrifice scheme could end up falling foul of the NLW inadvertently. This is one to watch out for in respect of both employers with low paid employees, whose minimum contributions bring them below the new NLW, or for employers with higher paid employees but whose employees are making such large contributions into their pension that their salaries fall under the new higher NLW threshold.

Restructuring benefits or bonuses - what could this mean for employers?

Some organisations have reportedly set out to restructure their budgets with the aim of saving costs following on from the introduction of the NLW. For some, this involves reducing overtime pay or benefits to fund the increase in basic pay. Other contractual changes as a result of employers' facing organisational challenges include discontinuing bonuses. A recent survey by XpertHR showed 15% of employers were pursuing a "zero-cost approach" to the new NLW by proposing to cut bonuses or discretionary payments and/or benefits. A large high street coffee chain recently stated that they will no longer provide their staff with free lunches following the implementation of the NLW. Removing benefits in this way would raise the question of whether such action can be deemed to be subjecting employees to an unlawful detriment, or whether the employers maintain the discretion to offer and withdraw benefits of this kind. One option could be that if workers suffer a financial detriment, they can be compensated in another way. For example, the coffee chain's current employees will instead receive substantial discounts on food and drink bought during their shift. A supermarket chain, who took similar measures following the introduction of the new NLW and proposed to reduce overtime rates, announced to its staff who were negatively affected that they would receive a lump sum covering 18 months of the pay difference. However, rates of overtime are often provided for contractually and so these would be difficult to amend without first obtaining employee consent, or going through the cumbersome dismissal and re-employment route.

30 seconds with...

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How long have you been at Mayer Brown?

I started at Mayer Brown in September 2012, so just over three and a half years.

Why did you become a lawyer?

It is a long story involving Darcey Bussell, Katherine Jenkins and a night out at Birmingham NEC.....!

What is the best thing about your job?

The colleagues and the clients, coupled with a wonderful blend of legal academia and human behaviour

What job would you be doing if you weren't a lawyer?

A physiotherapist

What is your favourite box set/book/film?

A Fine Balance by Rohinton Mistry. A really beautiful book

What is the best holiday/trip you have been on?

Horse riding safari in Botswana. So much to look at and the best "tent" I've ever slept in!

What super-power would you like to have and why?

Invisibility – oh the fun that could be had.....!

A flexible benefit - such as free lunches - may be given by a company as a gesture of good will and as an "employee perk". Therefore, on the face of it, they may not necessarily appear to be a contractual right. However, where such benefits have become a longstanding feature of the company culture that employees have got used to receiving, employers should be reminded that such benefits (even where they are stated to be non contractual and simply perks), can become contractual. If an action has become company custom and practice, such as employees receiving free lunches over a number of years, a tribunal may decide that the employer's discretion to provide these benefits can in fact be construed as contractual.

Bonuses, even if stated to be discretionary, can also present difficulties if employers are looking to change their approach to such remuneration in light of the new NLW. There have been many recent cases on the issue of non-payment of employee bonuses, with financial institutions in particular coming under scrutiny in the courts and in the media. If the employee has a contractual right to receive a bonus or a benefit, they may be able to enforce payment by claiming breach of contract if the benefit or bonus is then withdrawn. Where a contractual right to a bonus is established, the employer must pay it even if it is not in its best interests to do so. Even if the employer has discretion as to whether to give out bonuses, the courts will consider the nature and extent of any discretion, as in the recent case of Hills v Niksun. Employers have to satisfy the courts that they have carried out a fair decision making process and that they exercised reasonable discretion. Further, in the event that the payment of a bonus is held to be at the employer's discretion, there remains a restriction in that the employer has to exercise that discretion in good faith and should not act irrationally or perversely. Employers' failure to exercise caution with discretionary bonuses has led them to incur further costs in the Employment tribunals and employers should approach any changes to their remuneration structure with care in light of the new NLW.

Discussions with employees are essential when it comes to any changes employers are proposing to make. Although a legal obligation to consult with employees only arises in situations where contractual changes are being made, it often remains good practice to consult with employees on any significant changes in the workplace from an employee relations perspective. If employees have become accustomed to receiving certain allegedly discretionary benefits, such as a free lunch, it may be appropriate for consultation to take place before employers make changes to such benefits. Under section 23 of the National Minimum Wage Act 1998, employees have the right not to be subjected to a detriment at work as a result of their employer avoiding having to pay the NMW. Although it is currently unclear whether removing employee benefits on account of the rise in minimum wage under the new NLW could amount to an unlawful detriment under statutory provisions, this is an easy point for employers to overlook and they should remain mindful of this risk. Our view is that a tribunal will have to grapple with this issue in the near future.

In addition to lower paid workers having their pay and benefits packages varied, changes in pay may also affect more senior staff, as managerial structures may be distorted if the pay gap between lower paid workers and their managers becomes narrower. Further, there may be an impact on recruitment patterns as employers, especially smaller firms who will be the most affected, could seek workers under

Events

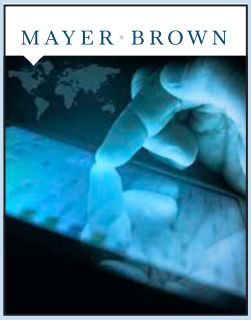
Our current upcoming events are below, all to be held at our offices. Invites are usually sent out one to two months in advance.

28 September 2016
Breakfast Briefing: Team Moves

Team moves and restrictive covenants, including the use of forensic searches.

30 November 2016
Seminar: Sickness and Disability

Global Tools & Resources



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25 years of age who are not eligible for the NLW. For workers under the age of 25, the current rates of NMW will continue to apply, ranging from £5.30 to £6.70 for 18 – 24 year olds. However, this change in recruitment may bring an increased risk of age discrimination claims for employers, as the law prevents candidates from being refused a job because of their age. Similarly there is a risk to employers of potential age discrimination claims if they choose to restructure and dismiss employees aged 25 and over because of the higher levels of minimum wage. Of course, an employee is automatically unfairly dismissed if the reason (or principal reason) for dismissal is that they qualified (or will or might qualify) for the national minimum wage or a particular rate of it.

Consequences of non-compliance with the nlw

From 1 April 2016, HMRC compliance officers may carry out inspections of employers at any time, and without reason, to ensure that they are complying with this new legislation. Equally, an employer can be subject to challenge from an employee or a third party if considered not to be complying with the NLW. Any breach of the new NLW legislation will result in a penalty payment and a Notice of Underpayment being issued to the employer. This could be up to 200% of the amount underpaid to each affected worker, subject to a maximum penalty of £20,000 per worker.

In addition, there are more than just financial risks involved. HMRC has introduced a new team of HMRC compliance officers to investigate the most serious cases of non-compliance. A failure to comply with the new NLW now means that HMRC can bring criminal prosecutions against employers for deliberate non-compliance and Business Secretary Sajid Javid has said that there is "no excuse for employers flouting minimum wage rules". He has confirmed that the new measures "will ensure those who do try and cheat staff out of pay will feel the full force of the law".

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update, or contact either of the authors below.

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