Employment Law update May 2016

Drivers' Checks

The recent fatal accident inquiry into the Glasgow bin lorry crash which killed six people heard that the driver was unconscious when his lorry veered out of control. The driver's health was central to the inquiry. The incident raises important issues for businesses employing drivers, especially in the light of the alarming statistic that up to 33% of road accidents involve somebody who was working at the time.

So what can employers do to minimise risks?

When taking on new drivers they can use the Access to Medical Reports Act 1988 to request a report from the GP on a prospective employee. The GP is obliged to reveal relevant medical information, provided the individual consents.

It is unlawful under the Equality Act 2010 for a company to ask job applicants about their disability or health until they have been offered a job. However, health questionnaires and occupational health reports that relate to the candidate's ability to carry out a function that is intrinsic to the job are permitted. In this context, referrals must be limited solely to establishing whether the employee is fit to drive and holds an appropriate licence.

Employers could independently verify any declaration of good health by requiring candidates, whether recruited directly or via an agency, to complete a health checklist that discloses any medical history that might affect their ability to drive. Any job offers would be made subject to a satisfactory medical report.

For drivers already employed by the business, a company can request a medical report from the employee's GP or a report from occupational health. Employers can also carry out regular health assessments to ensure that employees remain fit to drive, thereby reducing the risk of any relevant condition going unnoticed.

Incorporating medical checks into the recruitment process and enforcing regular health assessments will give companies greater control and certainty that employees are fit to drive. Such action should be approached in a positive manner – not only to support employees but also to ensure, as far as possible, the safety of the public.

Are you confident that you are correctly checking eligibility to work in the UK?

The attempts of the Home Office to simplify right-to-work checks, and to make it harder for illegal migrants to work in the UK, have put employers on the front line of tighter immigration controls.

New proposals in the Immigration Bill 2015-16, currently progressing through Parliament, reinforce the idea that employers bear responsibility for the UK status of those they employ. The difficulty is the ever-changing nature of the right to work checks, which means employers can make mistakes.

Organisations have a statutory obligation to prevent illegal working by carrying out document checks on their employees' right to work here. Failing to do so can result in a £20,000 civil penalty and, in some circumstances, a criminal conviction. The |Immigration Bill, which could be law by this summer, will bring in a whole host of changes to this checking regime, together with additional powers for immigration enforcement officers. The consequences for employing illegal workers were always serious, but the proposed measures add a new level of severity to the situation.

Businesses employing a high number of low skilled workers, for example retailers, hotels, restaurants and manufacturing companies, should start preparing now for the changes because the repercussions of failing to ensure there are no illegal immigrants in their workforces will be severe.

If implemented in its current form, the legislation allows immigration officers to seize the earnings of anyone found to be working illegally and tightens the rules that determine if a worker has been employed illegally. Currently, an employer commits a criminal offence if it knowingly employs an individual who does not have permission to work in the UK. The bill amends this, so in future an employer may be found guilty if it had 'reasonable cause to believe' someone was an illegal worker.

The bill also increases the maximum prison sentence for an employer's criminal conviction from two to five years and gives immigration enforcement officers the power to issue an illegal working closure notice which will effectively shut down a business for 48 hours. The closure notice can be extended if the Home Office makes a successful application to the courts.

Most employers who receive a civil penalty only do so due to poor practices – all of which can be avoided with some careful planning and training.

There are a number of common pitfalls which can trap unwary employers:

- forgetting to record the date on which a check was carried out (this can be done on the actual photocopy of the document or noted on an internal HR system)
- forgetting to make follow-up checks at the correct time (employers should diarise when these need to happen)
- not carrying out the additional checks required if the employee is a student with work restrictions. Employers must also obtain, copy and retain details of the student's academic term and vacation times so that they can ascertain independently when it is that a student can work full time
- getting caught out by not retaining evidence of checks for the necessary period of time or by not retaining copies in a secure manner (for example, the evidence and copies should not be kept in an unlocked cabinet in an unlocked office)
- making photocopies of documents that are unclear or not complete. At one time a partial right to work check would be considered 'mitigating circumstances' (in other words, something which may reduce the severity of the charge) but this leniency has since been removed - so checking and copying documents correctly is now more important than ever

- only conducting right to work checks after the employee has already started work. Employers should ensure that all initial right to work checks are carried out prior to new recruits commencing work.

QUESTION AND ANSWER CORNER

Q: ***We are looking to change our payment date for payment of staff salaries and have advised staff of this but have been met with some unrest. How should I have handled this?***

A: Changing the date that you pay your employees would constitute a fundamental change to the terms and conditions of their contracts. Consequently, this means that as the employer you cannot force the change through without consulting with the workforce with a view to gaining their agreement to the change. There are numerous consequences of changes to the pay date, including; giving employees time to rearrange bill/mortgage payments and preparing employees to organise their finances to accommodate longer/shorter months over which pay needs to spread.

A consultation process is nearly always necessary before changing contract terms. It is good practice to allow the employee to be accompanied by another employee or a union representative to consultation meetings. The consultation process must be with a view to reaching agreement. Where employees accept the change, express acceptance occurs by issuing an amendment to existing terms or new terms that contain the changes as agreed. The employee will usually constitute agreement to vary the contract by signing the document to indicate their acceptance.

Q: ***We have an employee on a six-month fixed term contract that is due to expire in two weeks and which will not be renewed. Before we were able to inform the employee that the fixed term contract would not be extended and would, therefore, end on its expiry date, the employee resigned. Under the contract the employee is required to give four weeks' notice of resignation. As the employer we are only required to give one weeks' notice of termination. How much notice do we as the employer have to pay the employee bearing in mind that the notice period the employee has given is longer than the duration left to run under the contract?***

A: As the fixed term contract has a definite end date then that is the date that the employee's employment with you will end. Therefore, you are only required to pay the employee up to and including the date the contract ends. The business would not be required to pay the employee for the remainder of the notice period which exceeds the duration of the contract.

If you have a particular question that you would like answered email training@scottishwholesale.co.uk or call 0800 9995 121 and we will publish next month – all names will be removed to ensure confidentiality.