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changes to the Sex Discrimination Act



The Sex Discrimination Act 1975 (Amendment) Regulations 2008 came into force on 6 April 2008 making changes to the Sex Discrimination Act 1975.

The definition of sexual harassment has been expanded to include unwanted conduct that is 'related to her sex or that of another person'. This will enable a claim to be made by someone who is not the subject of the unwanted conduct but where its effect is to violate that person's dignity or to create an intimidating environment for them.

It becomes unlawful for an employer to fail to take reasonably practicable steps to protect an employee from harassment by a third party where such harassment is known to have occurred on at least two other occasions. The person responsible for the harassment does not have to be the same on each occasion.

The requirement for a comparator who is not pregnant or not on maternity leave, when a woman brings a claim for discrimination on these grounds, has been removed.

There must also be no difference between the contractual benefits allowed to women who are on compulsory, ordinary or additional maternity leave, which will affect employers who provide non-pay benefits to employees whilst on ordinary maternity leave (e.g. contractual annual leave above the statutory minimum, company cars, gym membership, mobile phones etc.) but who cease providing them during additional maternity leave. Women will also be able to bring a discrimination claim if their employer fails to pay them a discretionary bonus during their two-week period of compulsory maternity leave.

The amendments relating to terms and conditions during maternity leave will be brought into effect by changes to the Maternity and Parental Leave etc. Regulations 1999 and will apply to employees whose expected week of childbirth begins on or after 5 October 2008. This will give businesses time to prepare for these changes.

We can advise you on making sure that your discrimination policies and procedures are up-to-date.

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definition of disability – is it likely to recur?

For the purposes of the Disability Discrimination Act 1995, someone has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. If an impairment ceases to have such an effect, it is to be treated as having that effect if it is likely to recur.

In *Richmond Adult Community College v McDougall*, the Court of Appeal examined what evidence can be taken into account by the Employment Tribunal (ET) when deciding whether or not an employee does have a disability that is likely to recur.

The Employment Appeal Tribunal had judged that it is relevant to consider events occurring up to, and including, the date of the ET hearing. The Court of Appeal disagreed. The ET should make its judgment as to whether unlawful discrimination on the part of the employer has been established on the basis of evidence as to circumstances prevailing at the time of the employer's decision. Subsequent events should not be taken into account.

We can advise you to ensure that your actions do not lay you open to a claim of unlawful disability discrimination.

in brief

informing and consulting employees

The EU Information and Consultation Directive 2002 establishes minimum requirements for consulting and informing employees on a wide variety of subjects. The Information and Consultation of Employees Regulations 2004 implement the Directive in the UK and from 6 April 2008 apply to public and private undertakings that carry out an economic activity where there are more than 50 employees. The undertaking does not have to be operating for gain.

new minimum wage rates announced

The Government has announced increases in the National Minimum Wage rates that will apply from October 2008. The adult National Minimum Wage will increase from £5.52 to £5.73 an hour. The minimum rate for 18- to 21-year-olds will rise from £4.60 to £4.77 an hour and for 16- to 17-year-olds the rate will be £3.53 an hour instead of £3.40.

unfair dismissal and retirement on grounds of ill health

The Employment Appeal Tribunal has ruled (*First West Yorkshire Limited t/a First Leeds v Haigh*) that where an employee is on long-term sick leave and his pension scheme contains provisions entitling him to an ill health pension on grounds of permanent incapacity, an employer will generally be expected to give consideration to ill health retirement before dismissing the employee for incapacity.

annual increase in tribunal awards

The order detailing the annual inflation-linked increase in limits on the amounts which can be awarded by Employment Tribunals has been published. The new rates apply where the appropriate date falls on or after 1 February 2008. The maximum compensatory award for unfair dismissal has increased from £60,600 to £63,000. The full list of the increases can be found at: www.opsi.gov.uk/si/si2007/uksi_20073570_en_2

the employment status of agency workers

Protection against unfair dismissal is only afforded to employees. For this reason, the exact employment status of an agency worker is often at issue in the courts.

The Court of Appeal has handed down its judgment in *James v Greenwich Council*, which dealt with the employment status of a worker involved in a triangular agency relationship. Similar cases had been put on hold pending this decision and it was hoped that it would give guidance on what many saw as conflicting authorities on this issue. However, the Court of Appeal saw no conflict in the earlier decisions and upheld the ruling of the Employment Appeal

Tribunal that the agency worker did not have an implied contract with the Council as no mutuality of obligation existed.

The passage of time is not sufficient to establish any mutual undertaking of legal obligations between an agency worker and end user. A contract should only be implied where this is necessary to give business reality to the relationship between the parties, which was not necessary in this case as the work done could be explained by the existing contracts.

Contact us for assistance in reviewing your temporary or permanent staff agreements.