

# Legal Developments



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## New employment law rules from 1 October 2009

A number of changes to employment legislation come into effect on 1 October 2009.

1. The National Minimum Wage: the adult rate rose from £5.73 to £5.80 an hour; the development rate for workers aged between 18 and 21 rose from £4.77 to £4.83; the rate for 16 and 17-year-olds rose from £3.53 to £3.57; and the accommodation offset rate rose from £4.46 to £4.51.

The Department for Business, Innovation & Skills ("BIS") has published a [guide](#) on the National Minimum Wage.

2. Tips and the National Minimum Wage: From 1 October, employers are prohibited from counting service charges, tips and gratuities processed through their payrolls towards the payment of the National Minimum Wage.

BIS has published a [Code of Best Practice](#), so that businesses in the hospitality, leisure and service sector ensure that they comply with the new rules.

3. Increase in the maximum weekly amount for calculating unfair dismissal and statutory redundancy payments. The *Work and Families (Increase of Maximum Amount) Order* increases the maximum limit of a week's pay from £350 to £380. This figure will remain unchanged until February 2011.

## Implementation of the Temporary Agency Workers Directive delayed

The Government has announced that it will not implement the EU's *Temporary Agency Workers' Directive* until October 2011.

Earlier this year, the Government consulted on proposals to implement the Directive. It sought views on who should be covered by it; the 12-week qualifying period; how the principle of equal treatment should be established; how pay should be defined; who should be liable for compliance; and means of dispute resolution.

The Government has now published a [consultation paper](#) on draft regulations that will implement the Directive. EU member states have until 5 December 2011 to implement it and the Government intends that the new law will come into force in October 2011 – the latest date possible for implementation into UK law.

The consultation will close on 11 December 2009.

## Government issues response to consultation on time off for civic duties

In October 2008, the Government issued a consultation paper on time off work to stand for civil office. It proposed widening the range of civic duties for which employees are entitled to take time off work and looked at ways to encourage people to take on governance roles in third sector organisations.

In its [response](#) to the consultation, the Government has stated its intention to work with employer organisations on a "hearts and minds" campaign, which will include the production of an information pack for employers explaining what is involved in volunteering and how volunteering can help their businesses.

## BIS issues guidance on problems in the workplace

The Department for Business, Innovation & Skills, in conjunction with ACAS and the Chartered Institute of Personnel and Development, has published two leaflets containing guidance on how to deal with problems in the workplace.

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The [first leaflet](#) is aimed at employers, advising them of the procedures for dealing with discipline, dismissal and grievance issues in the workplace. The [second leaflet](#) offers employees advice on how to resolve grievances and disciplinary issues at work.

## Consultation on draft additional paternity leave regulations

The Government has launched a consultation on draft regulations covering additional paternity leave and pay.

Additional Paternity Leave (APL) is to be introduced for the parents of babies born on or after 3 April 2011. The fathers or co-adopters of a child will be allowed to take up to 26 weeks' paternity leave once the mother (or adopter) has returned to work, although the leave must not begin earlier than 20 weeks after the birth of the child (or placement for adoption).

The Government is consulting on the wording of the draft regulations and is particularly seeking comments on whether the regulations (1) keep the administration of paternity leave and pay relatively simple and (2) give employers sufficient protection against abuse.

Under the draft Regulations:

1. The employee must provide a signed declaration to the employer confirming that they meet the criteria for APL and Additional Statutory Paternity Pay.
2. The mother (or adopter) must sign the declaration to confirm the date she intends to return to work.
3. The employee must provide the name and address of the mother's (or adopter's) employer if requested by his employer.
4. The employee must notify the employer if his circumstances change, in case this affects his eligibility.

The consultation will close on 20 November 2009.

## EHRC launches new flexible working guidance for employers

The Equality and Human Rights Commission has launched a flexible working [guide](#) for employers.

The guide includes a step-by-step process for managers of small and large companies to implement effective flexible working practices. It features case studies from companies that have implemented flexible working policies, including BT, Sainsbury's, National Grid, IBM and Addleshaw Goddard.

## 'Rate your employer website' launches

A free website aimed at gathering honest and anonymous views from employees about their employer has recently launched.

[Employerinformation.co.uk](http://Employerinformation.co.uk), which rates companies on their employment practices, asks employees to answer a set of questions about the way the company they work for is run and is intended to help jobseekers form an unbiased opinion of an employer. Employers are able to purchase information from the website which will provide more detail as to the ranking they receive and any additional comments that their employees make about them.

You must register in order to use the service.

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## Court of Appeal Decision in Heyday Challenge to Age Discrimination Regulations

The High Court has delivered its judgment in the challenge to the statutory retirement age by Heyday.

Heyday (part of Age Concern England) has been pursuing a judicial review application in the High Court challenging the legality of the *Employment Equality (Age) Regulations 2006* since July 2006 (see previous editions of Upload Employment for reports on the progress of the case). The Group argued that the Regulations fail to implement the EU *Equal Treatment Framework Directive*, as they allow a mandatory retirement age of 65, which Heyday argues effectively excludes people over 65 from having a right to work. Their case went to the European Court of Justice, which held that mandatory retirement ages are permitted under EC law as long as their inherently discriminatory nature could be justified but said that it was for the national courts to decide whether such measures were in fact justified on the basis of social policy aims of government.

The High Court has held that the flexibility shown to employers in permitting them to justify direct discrimination was a means of advancing the Government's legitimate social policy aim of protecting the confidence and integrity of the labour market and that the default retirement age of 65 was permitted by the Directive. In giving his judgment, however, Mr Justice Blake commented that "in the light of changed economic circumstances" since 2006, any attempt to keep a default retirement age of 65 beyond the Government's review of that age now scheduled for 2010 will be unlikely to meet the proportionality test under the Directive.

The key questions for the Government to answer when it conducts its review in 2010 will be whether it can justify a higher retirement age (and if so, what that age should be) or, if not, whether a default retirement age should be eliminated altogether. We will continue to report on any further developments.

### Employment status

Following the EAT's decision in the case of *Launahurst Ltd v Larner* that an individual was an employee, despite having signed an agreement portraying him as an independent contractor (see the September edition of the Upload Employment Bulletin), the Court of Appeal has given further guidance on "sham" contracts.

It has been relatively common for individuals who work under contracts describing them as self-employed contractors to try to argue that they were in fact employees (and therefore get the benefit of rights only available to employees), or indeed for HM Revenue & Customs to challenge the alleged self-employment status of contractors who in reality are employees. This has led to a series of judgments describing how to deal with "sham" contracts.

In *Autoclenz Ltd v Belcher*, the Court of Appeal has confirmed that when deciding whether a contract is a sham, an employment tribunal should focus on the actual legal obligations between the parties. It is not necessary that there was a common intention to mislead third parties. In this case, Autoclenz operated a contract to valet cars and used car valeters described as self-employed contractors. The contract provided a right of substitution and said that the contractors were not obliged to provide services on any particular occasion (both of which are terms that would indicate a contractor rather than an employment relationship). The Court of Appeal decided that the employment tribunal had been entitled to find that the reality was that they were in fact employees because the degree of control exercised by Autoclenz fully integrated the valeters into its business.

### Information and consultation obligations under TUPE

The *Transfer of Undertakings (Protection of Employment) Regulations 2006* ("TUPE") state that where there is a transfer of ownership of a business (an "undertaking" in the language of the regulations), anyone employed in the business automatically transfers to the employment of the old owner ("the transferor") to that of the new one ("the transferee"). TUPE also requires the transferor to inform employee representatives of certain information, including the "legal, economic and social implications of the transfer for any affected employees".

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In *Royal Mail Group Limited v Communications Workers Union*, the Court of Appeal considered the scope and nature of this part of a transferor's obligation to inform employee representatives. The Royal Mail Group was planning to transfer a large number of post offices to WH Smith. It believed that no employees would transfer to WH Smith under TUPE because they would either be redeployed under an express contractual mobility clause or take voluntary redundancy prior to the transfer. That belief was legally wrong, but the Court of Appeal held that the Royal Mail Group had not breached its obligation to inform the Communications Workers Union because TUPE only requires transferors to provide information to employee representatives on what they genuinely believe to be the legal, social and economic implications of the transfer.

Whilst this appears to be a helpful case for owners planning to sell their businesses, they will still have to show that they genuinely believe the information they are giving. The Court of Appeal commented that it may be difficult for a transferor to demonstrate this in respect of the "legal implications" of a proposed transfer for employees if it has not taken legal advice.

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