HR Compliance Navigator Report Q3 2022

UK Employment Update:
Laws, Regulations, Compliance and Best Practice to Know During 2022

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Introduction

The employment market remains tight, continuing to present recruitment challenges in many sectors. HR departments must address poor mental health amongst workers while advising managers on home/hybrid and flexible working models. Also, turnover rates keep organisations on their toes, especially in sectors that have not previously faced labor shortages. As employee expectations mount up and employers compete to retain and attract the best talent, HR specialists' inboxes have never been so full.

Today, businesses and HR departments operate in a more uncertain world than they did 12 months ago.

Now, they look forward to a 'return to normal,' which is yet to happen in many cases. Rising fuel and food prices, the continuous spikes in Covid infection rates, problems with the availability of domestic and international flights and public transport strikes have all affected the UK business environment. These events add to employee concerns, some of which call for HR support. This is especially true for lower paid staff.

This report covers several topics that will interest those working within HR and workforce management. Our Compliance Navigator series acts as a reference document for employers to access when they need advice & information.
In this report, we have introduced a useful checklist for employers to refer to, which references tasks that they may have overlooked or may need attention during 2022. We know that our audience likes to know of potential new development in employment law.

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Employment Data

June 2022 Unemployment rate in the UK

fell to **3.8%**

June 2022 Percentage of economically active employed

75%

- Those aged over 50 are more likely to be not working than younger people which is a reversal of pre-pandemic trends.
- The rate of economic activity due to long term sickness has increased.
- The number of part-time roles reduced significantly at the beginning of the pandemic but has slowly increased during the last quarter.
- The number of people unemployed is now lower than the number of vacancies.

Number of vacancies in July 2022 **1.3 m**

Health and social care sectors continue to have the largest number of vacancies from the previous quarter.

Consumer Price Index:

10.1%

in July from previous 12 months.

Median pay awards expected during 2022

+3%

Interviewing for a Neurodivergent Workforce

Recruitment is still challenging in many sectors, where there is stiff competition amongst employers to attract the best candidates. This has required employers to take a new look at their recruitment practices and employee branding strategy. One area ripe for employer scrutiny is the many barriers faced by employees and candidates who are "neurodivergent"—which refers to people who interact with the world around them in ways different to "neurotypical" people. It includes those with autism, Asperger's, dyslexia and ADHD.

With as many as 20% of the population falling into this category, any employer who overlooks this potential pool of job applicants may be missing an opportunity. Many businesses already employ neurodivergent workers, and accommodating people based on their needs is now becoming more of a priority for employers who understand the benefits of doing so.

Leaders are coming to appreciate the advantages of employing staff who happen to be neurodivergent. Studies have suggested that those with autism may be more productive than their colleagues. Neurodivergence is often seen in employees who are very clever, who have excellent attention to detail, who can spot errors and patterns more quickly than others, who can concentrate on tasks that may be repetitious and who are able to keep that high level of concentration for longer periods of time. They may be highly creative individuals or excel in technical roles, such as in finance, engineering or manufacturing.

Interviewees may not be aware that they are neurodivergent and may never have considered that they are different to neurotypical people. Many people live for years without a diagnosis of any neurodivergent condition. Some may suspect that they are neurodivergent and a medical/psychological assessment does not need to have taken place. For those reasons, employers should not make assumptions about the existence of neurodivergence in individuals for interview purposes.

Neurodivergent workers find some workplace practices difficult to deal with, and this may include the traditional interview format. They may struggle with being in a noisy environment, speaking to several people at once (such as in a panel interview), or answering abstract questions or questions they do not find precise enough. Keeping eye contact with the interviewer or remaining still for any length of time may be difficult and lead to fidgeting. They may also need longer to answer questions. Measuring how they 'handle pressure is therefore best done in other ways, outside of the interview.

So, as a way of making the interview process a more level playing field for all candidates, employers may choose to send over a list of interview questions in advance. The opportunity to give prior thought to their answers allows candidates to be under less pressure on the day, and employers will then gain better insight into the true skills and experiences of job applicants. Putting the focus on skills and experience and avoiding judgement of the candidate's ability to interact socially means the neurodivergent employee is more likely to perform well at interview.

This approach to holding interviews is now commonplace in the public sector and in larger firms wishing to attract technical specialists, such as accountancy practices and banking. Assembly and manufacturing plants may also benefit from hiring neurodivergent employees, who are often attracted to repetitive work. By making the interview process less daunting, such employers will be able to beat their competitors in finding job applicants who are more likely to thrive in those environments.

Proposed Employment Law Changes

Data Protection

The government is considering the introduction of wide-ranging changes to arrangements for data protection and how they are applied within the workplace. For once, these changes may make life simpler for the employer. The changes will be welcomed by HR departments who still grapple with the complexities of, and time spent on, dealing with data protection issues, especially in relation to data subject access requests (DSARs) and processing data. The changes may include:

- Ending the requirement for businesses with over 250 staff to appoint a Data Protection Officer; instead, obligations in overseeing compliance with the regulations can be undertaken by a senior employee
- Eliminating the need for data impact assessments and putting in place a less-burdensome framework for data protection risk assessments to be carried out
- Making it easier for an employer to refuse to comply with a DSAR.

Employers are advised to contact the Information Commissioner's Office (ICO) with any questions about specific DSARs to make sure they comply with the law. The ICO keeps up to date an extensive website and provides an extremely useful telephone helpline.

Planning Ahead

Employers may need to:

- Undertake training and a review of current responsibilities
- Appoint a suitable manager to oversee data protection compliance
- Audit HR compliance to data protection principles and best practice with a view to updating knowledge base, processes and procedures
- Continue to train staff (all managers and employees) where their work is impacted by any change to data protection regulations
- Ensure that compliance and audit departments are aware of potential changes.

Settlement agreements

There is concern over the use of settlement agreements to deal with cases that hinge around sexual harassment or discrimination at work. Well-publicised historic cases both in the UK and abroad highlight the problems in making settlements to those who may later wish to file a complaint. There may be new rules to put more emphasis on the consequences for individuals who agree to a settlement, clarifying that such an agreement limits their scope to take legal action against their employer at some later date. Individuals may still be permitted to report their concerns to other named regulated bodies and groups of professionals such as solicitors. Employers and their legal advisers may also be subject to restrictions over the drafting of confidentiality clauses contained within settlement agreements.

Planning Ahead

Employers may need to:

- Consider the impact of the proposals alongside any required changes to reduce workplace sexual harassment
- Limit the use of settlement agreements to trained staff conversant with the new rules and their implications
- Train all managers; HR is likely to be involved in any processes around the use of settlement agreements, such as use of protected conversations
- Ensure that legal advice is taken at the appropriate time to ensure that new clauses are compliant
- Audit the use of settlement agreements to ensure that out-of-date, non-compliant copies of agreements are no longer available for use.

Proposed Employment Law Changes (Cont.)

Neonatal Leave

Proposals to implement neonatal leave now have government backing after they were introduced to Parliament via a Private Member's Bill. The bill is now in line for its second reading. Parents will be able to take a maximum of 12 weeks' neonatal leave, for the time that their baby is in neonatal care.

It is likely that the leave will be taken in one block. Those with more than 26 weeks' service will receive statutory pay for their time on neonatal leave. This will be welcomed by anyone who must work through the difficulties that an early birth or other health complications can lead to.

Changes to Flexible Working Request Process

The current limit of one flexible working request per employee per year may be removed. It is not yet known how many requests may be allowed under any new proposals.

For many employers, this may have little impact as they already allow employees to make more than one flexible working request each year. Other businesses may find that increasing the potential number of requests will make it difficult to accommodate all the requests their employees make. The current three-month limit in completing the statutory flexible working process may also be altered.

Clearly flexible working remains a key area of government interest in relation to proposed changes. See also the proposed change below regarding possible 'day one' rights.

Planning Ahead

Employers may wish to:

- Review their overall approach in accommodating flexible working requests and assess how challenging any extension to current employees' rights may be
- Educate managers, HR and senior staff in the advantages of accommodating flexible work patterns
- Identify where current requests have been accommodated successfully, where challenges arose and how these were overcome
- Consider the impact on future processes, policies and procedures.

Statements on Modern Slavery

Public sector organisations may be brought within the regulations regarding the publication of Modern Slavery statements. It is possible that the content of the statements may also become more prescriptive.

Update from the Spring Report

A widely anticipated government Employment Bill was not announced as expected, disappointing many commentators, campaign groups and trades unions. As always, parliamentary time and political appetite will affect the timeframe for legislative changes. As mentioned in our Spring Report, we may still see new legislation on the following issues:

- **Workplace sexual harassment regulations.** This is largely a response to the issue of so-called gagging clauses that women have been persuaded to sign to prevent discussing settlement agreements around sexual harassment claims. Confidentiality clauses are common features of settlement agreements. (Sexual harassment does not, of course, refer only to men harassing women.) The 'MeToo' movement has made governments take notice of issues facing individuals in the workplace, and it's expected there will be new protections from third-party harassment, which is particularly challenging to handle from an HR perspective. The time limit on bringing a claim may be extended to six months from the current three months, and there may be a new code of practice around the duty to prevent sexual harassment at work, along with guidance for employees to access.

Proposed Employment Law Changes (Cont.)

This will help support an employer facing a claim if they can show they have taken 'all reasonable steps' in preventing harassment from taking place.

- New right to **Carer's Leave.** This may become a 'day one right,' meaning that there is no length of service required for an employee to assert this right. Employees could be able to take up to five days per year in half or full days to care for someone with long-term care needs, such as an elderly or sick/injured relative (or dependent). This leave will be unpaid, and employees will need to give notice to take this. Notice will need to be twice as long as the amount of time needed plus a day. The criteria will be different to the current Time Off for Dependants leave, where no notice is required as it is for emergencies only.
- There will be regulation around **tips in the hospitality sector**, including a Code of Practice. This is a move to ensure that workers keep their tips. Employers must use a transparent process and keep records to show that they have adhered to their policy. The way tips are dealt with in that sector has been a matter of debate and disagreement for many years leading to numerous employment tribunal cases.
- A right to **request flexible working from day one.** This has been given a lot of support in the press and will be of interest to many who champion home working. As under current law, the right will be to make one request only—the change is in removing the requirement for six months' service. The government recognises that not all businesses will be able or want to accommodate requests for flexible working.
- **Redundancy protection extended to women who are pregnant** (from the date they notify their employer of their pregnancy) and for six months after they have returned from maternity leave. They will receive the same protection as those currently on maternity leave. A woman on maternity leave *can* be made redundant, but the law requires she be given every opportunity to secure an alternative role rather than be dismissed on the grounds of redundancy. This will also apply to those on shared parental leave and on adoption leave.
- Right to request **more predictable hours of work** and a stable contract of employment after six weeks. Referred to in the Good Work Plan (published in April 2019), this potential right is again only a right to request, in the same way that there is a right to request flexible working. Other measures from the Good Work Plan have already been introduced, such as the updated contract of employment implemented in April 2019.

Reminders for Employers 2022

- Ensure that your most up-to-date contact details are available to the Pensions Regulator. They require two contact names and addresses—an 'employer contact' and an 'additional contact'. Make sure that email and postal addresses are still valid for both.
- Remember to renew your business's registration with the Information Commissioner's Office. All employers must be registered on the basis that they will be processing the personal data of their employees.
- Review your compliance with IR35 and ensure non-compliance risks are monitored. The risk of non-compliance does not extend to the engagement of sole traders.
- Ensure professional subscriptions paid for by the employer are paid promptly for relevant employees to avoid personnel having difficulties in accessing member services.
- Ensure all new starters are issued with a compliant contract of employment that includes provisions introduced in April 2020.
- If your handbook or employment policies have not been reviewed since the start of the pandemic, they may need to be updated.

Reference Checking

The importance of reference checking appears to have fallen off the radar of many employers, who see little point in engaging in a process that seems to provide so little. Employers became more conscious of the risks of providing a reference that may be eventually accessed by the subject, so HR departments and managers now often provide scant information—usually just the bare facts, such as start date, end date, job title and perhaps the reason for leaving. The reason for leaving may be left out in some cases, especially where that information might breach the terms of a settlement agreement.

Firms may be reluctant to give an opinion of the candidate's performance or ability, usually on the basis that good performance in one role does not guarantee continuing success in any future organisation. Discussions over sick absence and attendance are also discouraged in case the employee is then discriminated against by potential future employers.

Employers generally do not want to be the reason former staff find it hard to secure alternative employment. In some sectors, however, employers have a regulatory responsibility to provide more than "bare facts" information to future employers—often due to safeguarding or other regulatory factors.

But even with access to only basic employment information, reference checking is not a waste of time. It serves as an initial honesty check by confirming the employee has actually worked where and when they said they did. Also, validating a previous job title gives some credence to an employee's claims of having certain skills and experiences. Employers know that they are fairly limited in terms of the checks that they undertake on potential recruits so it makes sense to take advantage of the checking that can take place. Too much emphasis might be given to a candidate's online presence during recruitment rather than to the facts which an employer is still able to access via a previous employer.

Short Service Dismissal

HR specialists and managers are often unsure of the process to be followed when wishing to dismiss an employee with short service (less than two years' service). 'Short service' means that the employee would not have accrued enough service to be entitled to unfair dismissal rights, and therefore the full three-stage disciplinary procedure need not apply. However, even in the absence of unfair dismissal rights, an employee could make a claim against their employer if the dismissal were deemed to be 'automatically unfair' or discriminatory, amongst other reasons.

There is a degree of risk to all dismissals. To reduce risk, employers often use a one-stage dismissal process. This allows the employee to at least have their side of the story heard before any dismissal takes place. A dismissal meeting also allows the employer to be able to demonstrate that they had a genuine reason to dismiss and to outline what that reason is. Given that the absence of a reason for dismissal for which there is documentary evidence, is likely to be helpful to any employee wishing to bring a claim on the grounds of discrimination; plugging that gap is essential.

Employers would usually allow the employee to be accompanied to the meeting in line with their usual procedure. Opinions differ as to whether an employer benefits from allowing employees to appeal against dismissal even when they have not accrued unfair dismissal rights. The employee will not have the right to an appeal if they do not have unfair dismissal rights.

Some will argue that it is giving access to further procedure that is time-wasting for the employer; given the limited risk in terms of legal challenge. It allows the employee to raise concerns over any number of matters that had not previously been bought to the attention of the employer—which the employer would then need to respond to. Some might argue that it is far better for the employee to make their thoughts known at this stage than via ACAS of the Employment Tribunal. Had a senior employee not been aware of the facts leading to the dismissal of an employee they may genuinely feel that the individual was unfairly treated and look to uphold any appeal.

However, in cases where an Employment Tribunal claim is made, having allowed an appeal potentially strengthens the employer's defence, especially where the appeal chair is independent from the original decision maker. For that reason, some employers choose to use third party consultants to hear appeals on their behalf, although this cost may be an additional expense that many employers would rather avoid incurring.

Good relations with the workforce might also be strengthened by using a 'proper' process in order to handle all dismissals. Most workers feel slightly uneasy working in an environment where people disappear from the workplace without any discussion or explanation from their employer. Demonstrating that some thought and consideration has been used when exiting employees is a good thing. It might be better to have too much process involved than no process at all.

Employment Tribunal Cases 2022

The tribunal service is still struggling to deal with a backlog of cases, with some now taking over two years to reach a full hearing. It should be remembered of course that many employment disputes are settled well before they reach the courts.

Sunderland v Superdry: Age discrimination at work

Rachel Sunderland was employed by Superdry as a knitwear designer with over 30 years' experience in that industry and brought a claim of age discrimination against her employer. At Superdry, decisions relating to promotion opportunities were based on whether the employee was a 'flight risk'; in other words, someone who was more likely to leave. More promotion opportunities were given to the employees Superdry was worried about losing, as incentive for them to remain. This practice is not unknown in other organisations.

Sunderland's claim was centred around the fact that the employee had been assessed as a 'low flight risk' by her employer and as a result, had been overlooked for promotion and then moved from knitwear design to designing knitwear accessories which she said felt like a demotion. She also felt humiliated when younger designers would ask her why she had not been promoted to 'Lead Designer' at any point - something that less experienced colleagues had achieved. She had always had very good appraisal markings and her ability to perform in her job role was never in question.

Her claim led to the Company's talent management process being examined by the Court. They concluded that the way that employees were marked/assessed by managers had led to Ms Sunderland being discriminated against based on her age. The Tribunal judge criticised the fact that the process was based on what appeared to be 'managerial conjecture' with no objective assessment taking place. The employees themselves did not contribute to this process, and the scoring system itself was unclear. None of the reasons given by the employer for Ms Sunderland's lack of promotion stacked up after the court had looked at Ms Sunderland's career, skills and experiences. She consequently won her claim against the Company.

Employers with similar assessments in place judging 'flight risk' purely based on management guesswork, may wish to revisit this approach. Using unclear phrases and terminology in relation to managing and assessing staff is bound to lead to dispute at some point and leave the employer open to criticism at an Employment Tribunal.

British Bung Company v Finn: Sex discrimination at work

In this well-publicised case, Tony Finn accused his ex-employer of sexual harassment on the basis that a supervisor had made several unkind references to his baldness. In some instances, he was also sworn at and spoken to in a threatening way.

It is usually thought that sexual harassment claims will only be successful if bought by women, usually because they have been harassed by men based on their sex. Sexual harassment is typically seen as the result of a woman receiving unwanted sexual attention from a man; sometimes relating to her appearance, or to comments that the harasser has made in relation to her to sexual attractiveness or the lack of it. The term 'sexual harassment' might also suggest that there has been physical contact.

Under the law, of course, either sex is free to bring a case of sexual harassment, and the sexes of complainant and accused do not have to be different. In this case, the complainant made a successful claim because he argued that he had been harassed because of his sex. The Court noted that either sex can be bald but that men are more likely to be bald; to make references to baldness is therefore bringing unwanted attention to a man based on his sex.

Employment Tribunal Cases 2022 (Cont.)

"Mr Finn's conduct was unwanted, it was a violation of the claimant's dignity, it created an intimidating environment for him, it was done for that purpose, and it related to the claimant's sex."

Kocur v Angard Staffing Solutions Ltd and another: Temporary workers' rights

Temporary workers have the right to be informed of open vacancies that exist when they are undertaking an assignment at a company. This right takes place from the first day that they work for the 'end user': that is, the hirer of the temporary worker (rather than the agency through which they work). This case reached the Court of Appeal for a judgement as to whether the employee had the right to apply for any posts that they see advertised, especially posts that employees of the end user were able to apply for.

Mr Kocur worked via his agency for Royal Mail, where he was prevented for applying for an internally advertised role because he was not employed directly by Royal Mail.

The Court ruled that temps do not have the right to apply for an internally advertised role and that they need not be given any opportunity to apply before the employer advertised externally. The judgement may lead temporary workers to question the point of having legislation in place which did not create an advantage for them in applying for permanent work. The Court answered that point by stating that the worker was still given an advantage as they had advanced notice over external candidates that a job was likely to be advertised.

Employers must provide temp workers easy access to information about vacancies even if they cannot yet apply for them (e.g. posted on a staff room noticeboard).

Pay Transparency and Pay Inequality

The government has launched an initiative to level up employment prospects for women in the UK. They believe that implementing ideas to tackle pay inequality is central to this and that focusing on pay transparency will help address the imbalance in pay rates between men and women.

Many employers are uncomfortable with the idea of full transparency around the salaries that they pay their staff. Employees, on the other hand, want nothing more than to know how much they earn in relation to their colleagues. Understanding how much more or less they are paid in relation to others can help an employee understand how much they are valued by their employer. Though transparency can open the door to disagreements over fairness, equality over pay is much harder to demonstrate when employers keep a veil of secrecy over their pay policies.

Gender pay reporting has gone some way in helping larger businesses in the UK understand where inequalities over pay may exist. In OECD member states, there is still a difference of 13% in pay rates between men and women. In response to this problem, the UK government is undertaking a trial to reduce that gap. Businesses involved in the trial include salary ranges on all job advertisements and avoid asking the job applicant about their current/last salary.

Basing salary decisions for new recruits on the pay they currently earn means any past pay discrimination follows the employee from one role to the next. The Fawcett Society has found that women, the disabled, and people of colour are more likely to suffer from pay inequality and often do not have the confidence to negotiate a better pay deal for themselves.

Employers who are taking part in the government's pilot in dealing with salary inequalities are committed to publicising salary ranges for the roles they hope to recruit for. Posting salary ranges for advertised jobs does offer more transparency than the typical 'competitive salary' statement, but there are advantages to going further and publishing exact salaries:

- It sets expectations at the right level for job applicants
- It reduces the number of job applicants to those who are more likely to proceed to interview and saves time by screening out unsuitable CVs
- It saves employers from going through the lengthy recruitment process only to see the chosen candidate withdraw because the salary offer is lower than they expected
- There is less scope for candidates to negotiate salary increases before they accept a role

Employers cannot in practice stop staff from discussing their salaries, and any clauses put in place to prevent such information being discussed might be illegal in cases where employees are attempting to uncover pay discrimination. If, instead of clamping down on intra-employee salary discussions, employers made salary info for all roles fully available, it may lead to less tension and suspicion regarding pay.

Pay Award Highlights for 2022

Both employers and employees have a keen interest in the pay awards that competing businesses and other industries are giving—especially when inflation has been rising steeply. Some ministers have been urging "wage restraint," based on the theory that compensatory pay rises may lead to a disastrous "wage-price spiral". Employees, their unions and even some employers, however, find that argument hard to accept in the face of notable declines in employee standard of living. Further, some employees have gone without a rise since the start of the pandemic due to employer affordability or other issues. So, this year pay increases are gaining even more attention as organisations try to stay ahead of the game in a difficult recruitment environment.

Supermarket minimum wage rates for staff

Tesco, Lidl and Morrisons: £10.10 per hour from end July 2022, up by 55p per hour for their lowest paid workers. Delivery drivers and click-and-collect assistants will be paid £11.00 per hour.

Sainsburys: Pays the real living wage (and London living wage) to employees after shareholder pressure.

Railways

Train drivers in England and Wales have been offered a 3% pay rise but have taken industrial action as unions ask for 7%.

ScotRail drivers accept a 5% pay rise.

Other public sector organisations and civil servants

A 3% rise was offered by the government, leading unions to point out that in real terms the offer is effectively a salary reduction.

HGV Drivers

£15 an hour, which is a 13.6% rise over the last 12 months; made in response to well-publicised driver shortages nationwide.

Nationwide employers

BT: Some employees to receive an 8% increase, which is the biggest rise for 20 years.

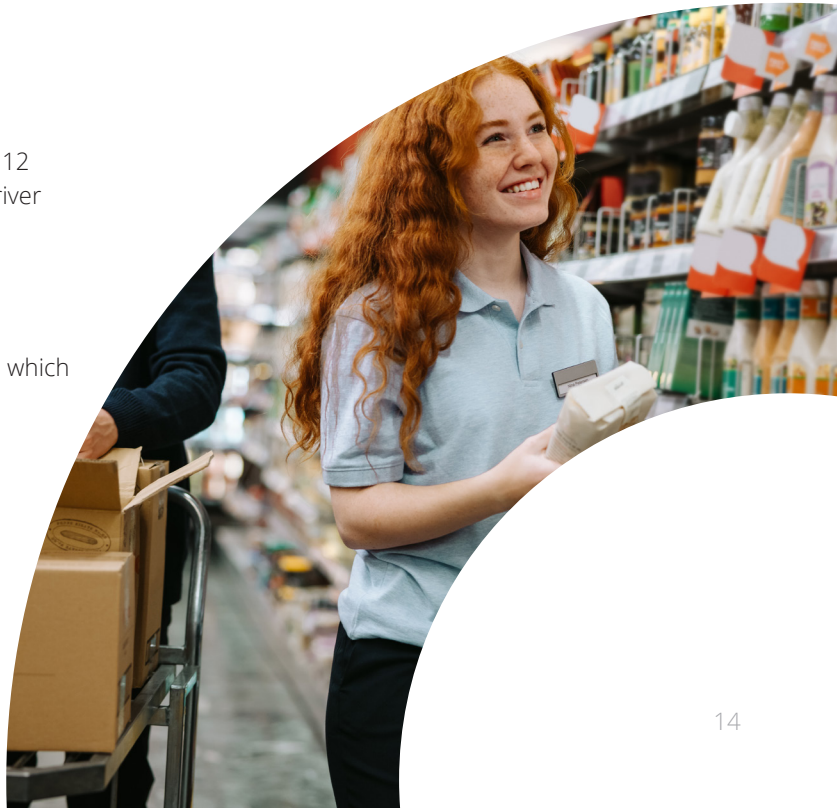
PWC: 9% pay rise for over half of employees announced in June 2022.

BP: 3% to 8% rises for staff.

Goldman Sachs: Take-home pay falls as smaller bonuses are paid due to falling investments.

Microsoft: Significant increases to keep mid-career staff from leaving.

CEO pay: Some firms are criticised for huge rises in overall compensation packages.



‘Banter’ at Work

Employees can challenge their employer over harassment from colleagues and other members of staff based on a range of protected characteristics:

- Age
- Disability
- Gender reassignment
- Marriage or civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

The general principle in handling claims of harassment is that the intention of the harasser is irrelevant when defining whether harassment has taken place or not. For example, arguing that something was said ‘as a joke’ does nothing to undermine the complainant’s assertion that harassment has taken place as far as the law is concerned.

Even so, managers often attempt to portray instances of harassment as mere ‘workplace banter’ in attempt to trivialise the impact that the incident or incidents leading to the complaint has caused.

This also attempts to portray the language used as ‘normal’ and suggests that most employees in most workplaces would expect to find such language acceptable and all in the name of creating a convivial workplace. For some on the receiving end of such banter, such as name calling or reference to factors pertaining to certain groups, employees may eventually complain.

Employees may sometimes go along with the jokes made by colleagues in an attempt to fit in until the strain of constant harassment gets too much. Complainants often refer to how the harassing behaviour has impaired their mental health. Unfortunately, in some workplaces being the target of bullying is rife and those who protest at such treatment would then be ostracised, making the workplace even more unpleasant. It’s critical for employers to take complaints about bullying and harassment seriously. Employees left to fend for themselves will at some point leave, raise grievances, become ill with stress and/or become disengaged and less productive at work.

Employment Tribunals do not accept the argument that an employee should have to put up with ‘office banter’ (or similar) if they have a valid complaint in line with legislation. Employers are quick to use this as their first reaction when such complaints arise, to paint the worker as unreasonable in their reaction.

Though this argument will not help the employer, the phrase may appear in media reports about incidents of unacceptable workplace behaviour.

There is now a greater appreciation of the effect banter can have on mental health, and this is particularly evident in some male-dominated workforces. Over the lockdown greater awareness of mental health in general has made employees more likely to admit that they find the workplace stressful, and if this goes some way to resolve issues at an early stage it must be a good thing. All employers need to ensure that their policies around dispute resolution are workable and accessible for all workers. The most important step, however, for an employer to take in combatting the problem is training managers in dealing with instances of inappropriate banter or harassment before they escalate to more serious complaints.

Do Employees Have the Right to an Appraisal?

Outside of contractual obligations or within industries where annual reviews are part of a regulatory compliance framework, there is no inherent right to have an appraisal, and of course many workplaces do not have any formal performance management system.

However, many organisations benefit from using a well-designed appraisal system to measure performance against set targets, set goals for a coming period, determine training and development needs, uncover performance issues, or ascertain if pay rises or bonuses are warranted. Systems vary and can include the employee's participation in the scoring process, online evaluation tools, regular reviews to measure progress against objectives, and/or peer or client feedback regarding the employee's contribution to the team, project or workplace.

Some employees may see the appraisal process as a significant annual event in their calendar, particularly those who are keen to progress in their organisation or want assurance from their employer that they are doing a good job. It can also be an opportunity to talk about things that are holding them back at work or request opportunities to broaden their skills, gain exposure to new working practices, receive more advanced training, etc.

Note that when an organisation has a published policy of conducting annual appraisals, employees then expect them as part of their employment. Putting off or simply never scheduling the review can lead to employee dissatisfaction—particularly if receiving pay increases, bonus payments or other advantages is based on appraisals. This is especially true where some employees are given appraisals by their managers and other team members are not—that sort of disparate treatment could lead to legal trouble for the employer.

Arguably employees benefit from an annual assurance from their employer that they are still 'doing OK' at work, which can help reduce work-induced stress. The appraisal process itself can be stressful in the moment, for managers as well as employees, but that is transient. Boosting the career development of employees and providing actionable performance data to companies, on the other hand, can have a lasting impact.

Fertility Leave

There is currently no statutory right to take paid or unpaid fertility leave in the UK.

Japan introduced paid fertility leave last year in a bid to tackle a falling birth rate. Its public sector workers receive 10 days leave per year for the purposes of fertility treatment or investigative appointments.

Undergoing treatment is known to be mentally and physically challenging for many, and the number of hospital or clinic visits makes it difficult to take time off work. This applies most to the person receiving the fertility treatment, but the person's partner might also want to take leave to accompany the patient. Appointment times are rarely set for the patient's convenience and so people cannot choose when they need to go.

Campaigners in the UK are paying attention to this issue, and some employers are already offering paid or unpaid leave; or even unpaid leave where this is not otherwise allowed to those undergoing fertility treatment. Mamas and Papas, the University of Dundee, and Tesco are some of the employers who offer this paid leave. Companies with formal policies in place are few and far between, and support for these employees is at best patchy. Some only find out it is available when they ask for it. Partners of the person receiving treatment are even less likely to get support and are often afraid to ask for the additional time off.

Falling birth rates tend to alarm governments, so there is some likelihood of legislation being passed in favour of supporting employees to take fertility treatment. At this point few European countries are considering this option, but if they change direction, it can add pressure for change in the UK.

UK MP Nickie Aiken has put forward a bill in this current parliament to ensure employees are given paid time off work for fertility treatment. She argues that treating fertility leave the same as a cosmetic procedure, as many employers do, is wrong. It should be seen as medical treatment, necessary for the health and well-being of the patient and partner. Changing the way that we view fertility leave is a step toward engaging more people in the need for change—it is not a 'nice to have' but rather is essential for those who have problems conceiving.

The second reading of this bill will take place in November. Private Members' bills, which are put forward by MPs rather than by the government, are rarely allotted enough time in the Parliamentary timetable to result in an Act of Parliament. So it may well be that this bill does not result in paid fertility leave for UK employees. However, the fact that a bill has been raised gives publicity to the issue and may increase public pressure for later governmental action.

In the meantime, more employers may start granting requests for fertility leave. The snowball effect of more and more businesses having a sympathetic ear will add pressure on their competitors to do the same. The cost of supporting a person going through this treatment is not that high overall, and only a small percentage of employees will ever need or ask for fertility leave. Also, offering this type of leave strengthens a business' family friendly credentials and helps show that it cares about its staff.

Dealing with HR Overload

HR departments have never been so busy—looking after employees, working on strategy, keeping up to date with new initiatives, responding to pressure from managers, meeting service expectations and dealing with the usual long 'to-do' list.

- Focus has been shifting to retention and talent management—keeping those critical to the business engaged and motivated.
- Recruitment challenges remain in many organisations and many will need to rethink the total employee value proposition as they are unlikely to be resolved soon.
- Pay and reward remains a central factor for HR managers whilst finance managers, facing rising costs and falling revenue, struggle to free up funds for the next pay and bonus rounds.
- COVID-19 keeps reappearing with new variants, causing sick absence issues and a lack of available replacement staff.
- Whispers of restructures and headcount reduction are becoming louder and may turn into reality for some businesses.

So many new challenges to focus on makes HR an exciting place to work, with great opportunity to prove the function is indispensable, valued, and at last appreciated for what it can achieve. People are still entering the profession and see it as a place to make a difference to the working lives and experiences of those that they advise and serve.

Rage Quitting

Use of the term 'rage quit' outside of video games is relatively new. The phenomenon it now describes—walking out of a job on the spot without offering to serve the required notice—has always been around. The phrase was first applied to frustrated players in online action games who would abruptly (and often angrily) quit in the middle of a match, and it is easy to see how the term jumped to the working world.

Rage quitters do not all have the same motivations. Some are likely to be anxious, stressed or depressed at the time that they make the decision. Some simply want to make their mark by leaving in a fashion that might cause chaos to their employer. It may be a once-in-a-career response for one person but an established pattern of behaviour for another. Sometimes employers get an inkling that an employee might walk by their behaviour leading up the event. Other times, it comes as a complete shock.

The legal position of an employer's response to rage quitting has long been established. It is never good practice to rely upon the resignation of someone who has resigned in response to having 'had enough'. Pressure usually builds for some time in the minds of in those who make the decision to suddenly resign. Employers need to respond reasonably in cases where employees subsequently signal that they regret their actions.

Those who rage quit do not always do so in writing, so their real intentions are not always clear. Being too quick in confirming a 'resignation' without it being in writing may lead to challenge by the (ex) employee. Some employees may walk out and refuse to have any further contact with their employer, even when the employer offers an olive branch in the hope that they regret their decision. However, in many cases that regret is real; so it is good practice to allow room for a valuable employee to return with as little fuss as necessary.

Any employee who leaves must be paid correctly, even though they will have breached their contract of employment. They should still be paid any accrued untaken holiday and treated as any other leaver. Employers need to consider what response they give to any requests for information from potential new employers as to the individual's reason for leaving. Most employers would simply avoid revealing that information and provide their usual factual statement for reference purposes.

Multiple instances of staff rage quitting may suggest issues with the employer, such as unreasonable workloads, poor training, lack of resources, failure to deal with bullying or general poor management. A focus on developing a more supportive work environment may be a good place to start solving the problem, and this is possible for all businesses regardless of sector, size or turnover. The cost of replacing disengaged staff is usually more than the cost of identifying the reasons for high levels of staff dissatisfaction and taking appropriate measures to address them. This is where HR comes in, using well-established practices around welfare, well-being, retention strategies, management education, effective policies and good communications.

Business Etiquette

Formality in some businesses has taken a back seat post-Covid.

Employees have become used to dressing more casually, working more flexibly and interacting with each other only via electronic means.

- Ought a business let its employees set the tone for how they want to work, dress and communicate with each other?
- Or does the business still have in place rules and an established culture to which they want their employees to return?

Businesses vary in their responses to this challenge. Some businesses have always followed a more casual approach and consciously moved away from expecting to see their employees in ties and business suits. Start-ups, creative industries, IT businesses and others have long seen a more casual workplace as being key to helping them to attract the right employees.

For many other employers, however, having to think hard about what they want their culture to look and feel like is new territory. They had accepted the pre-Covid way that people work and interact formally as the way that work is done. Those working in consultancies and the service sector are now torn between allowing less formality to help with retention and recruitment and maintaining the structures and expectations that allowed the business to flourish in the past. There still must be guidance to be adhered to, values to steer employee behaviour and principles that need to be satisfied (and equality, diversity and inclusion always need to be in the forefront of our minds as we grapple with balancing conflicting needs).

Many sectors will find that the changing needs and assumptions of their clients and customers will incrementally lead to their business changing. Businesses have always had to react to change internally—the current problem is having to undertake so much change in such a brief period. There will be little point in being the only business that still requires their employees to wear a suit and tie or to have in-house email styles and rules on etiquette, and no one wants their business to seem out of touch and old fashioned. If a business is failing to keep up with the style adopted by their employees within the workplace—is it also failing to keep up with its customers? It is yet to be seen how many of these changes will be temporary; people may well slot back into previous patterns of behaviour in time. It may in fact be the case that the prevailing fashion for casual eventually fizzles out and that more formality returns both in our private and personal lives.

Update on Medical Certification

Employees can be signed off by medical professionals other than their GP, due to a rule change introduced by the government in July 2022. The aim of this change is to reduce the workload of GPs. Health care workers who are employed to treat employees under the NHS can now undertake this task—nurses, physios, pharmacists and physiotherapists are included. Pharmacists working at high street pharmacies are not included in the list of approved Health Care Professionals (HCPs) who have been given training and support to undertake this new duty. Managers and HR professionals who wish to see a full explanation of the changes to the fit note (Med 3 form) can access 'Getting the most out of the fit note: guidance for employers and line managers' on the gov.uk website.

Employers can, if they choose, also allow their employees to seek opinion from a wide range of other professionals who may, as part of their role, engage with employees who may be unfit for work. This list includes dieticians, osteopaths and paramedics. Instead of providing the employee with a fit note, the employee will be given an Allied Health Professional (AHP) Health and Work report. A full list of these individuals can be found on the gov.uk website under 'Taking sick leave'. Employers do not have to accept authorisation from this group of professionals but may consider the merits of doing so.

In conjunction with these changes, the appearance of the fit note will change. Rather than requiring a signature from the authorising individual (previously the GP only), the Med 3 form will require the name of the individual, the name of their profession and their address. Employers may wish to see a copy of the new form for reference; again refer to 'Taking sick leave' on gov.uk.

These changes present a timely opportunity for employers to familiarise themselves with the purpose of fit notes, which since their introduction have focused on ways to encourage employees back to work. The government guidance stresses, for example, that employees do not need to be 100% fit to return to work and that there are several accommodations employers might consider to help hasten an employee's return to work. Managers may need additional training to understand the changes to the Med 3 form and to carefully consider their approach to sick absence management as a result.

Annual Leave Judgement

Tribunal claims over holiday pay continue to gain interest from HR professionals who are keen to reduce their organisations' risks of facing expensive legal challenges.

Holiday calculations can be complex for some employees. The recent case of Harpur v Brazel has confirmed how holiday must be calculated for term-time workers and others who do not work for a full year. The latter may be those on casual worker, zero hours or temporary contracts ('casuals') and will typically work for a variable number of weeks in the year. This case applies only to those workers—calculations for part-time staff, fixed-term workers and others who work to continuous contracts are not affected by this judgement.

Note that this judgement is simply confirming that the judgment made by the lower courts in 2019 was the correct decision. Many employers have already adopted the approach recommended by the lower courts since that decision was made; whilst others have been waiting for the outcome of the appeal process.

The Supreme Court judgement reminds HR and managers that there are two principles behind working out holiday pay for term-time and casual staff. First, all employees get 5.6 weeks holiday per year, regardless of the number of weeks that they work during that year. So an employee may only

Annual Leave Judgement (Cont.)

work 36 weeks during a year (as a seasonal worker, for example), but their holiday entitlement must be based on a 52-week holiday year. Employees who have been given their holiday allocation based on a pro-rata 36-week year have not received their full entitlement (assuming there has been a contract in place throughout the year).

The second principle is that when calculating a week's pay, employers need to use a set method to make this calculation. A week's pay will vary for some employees who do not work set hours each week. The employer must decide how much to pay the employee for each week that they are on holiday, and this has historically been calculated by multiplying the number of hours by 12.07%.

The reason for this was partly because ACAS advised employers to do so. In Harpur, the employee argued successfully that the calculation should not take into account the weeks where they had not worked due to the fact that they were on holiday. The employee in this case was a term-time-only worker as well as a worker with no fixed hours. She was in effect entitled to 17.5% of pay as holiday pay, proportionally higher than full-time employees by working out an average over the preceding weeks. That oddity made need careful explanation when employees encounter it.

Instead of using the 12.07% calculation to determine the rate for a weeks' pay, employers must use an average of hours worked over the previous 52 weeks. Where there is no work in a particular week, they must refer to the weeks before the 52 weeks (to a maximum of 104 weeks).

Working out holiday pay for those on atypical work patterns will remain a challenge for many employers. Some will now be concerned over potential historical claims and what their response should be to their workforce.

Don't forget ...

Arrangements for Christmas or midwinter celebrations and parties will already be well underway within many businesses. The pros and cons of holding a party (or not), allowing (or banning) Secret Santa gift giving, accepting hospitality and gifts from suppliers and offering hospitality to clients are well worn within the HR and business community. The last two years have put even more focus on creativity as the lockdown prevented the usual Christmas party.

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