Birketts

WELCOME TO THE NOVEMBER 2019

Employment and Immigration Law Update

IN THIS ISSUE

Welcome to the November 2019 edition of Employment and Immigration Law Update, our monthly newsletter for HR professionals.

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This month's edition includes a look at a decision of the European Court of Human Rights on covert monitoring in the workplace. We also look at decisions from the Employment Appeal Tribunal on employers' liability for third party harassment, dismissal for trade union activities and the tricky requirements applying to statutory trial periods in a redundancy situation.

Legislative developments have ground to a halt in light of the forthcoming general election. It remains to be seen how many of the Government's various uncompleted consultation exercises will progress any further, depending on the outcome of the election.

In the meantime, our 'quick fire' items include a round-up of the employment-related proposals by the main political parties, as well as the latest guidance from Acas on how to support staff with menopause symptoms at work. We also include the latest update from our immigration experts.

Also in this edition, read about Best Employers Eastern Region 2020 and how to get involved, and take a look at our checklist on how to update your GDPR procedures for Brexit.

As always, we would love to hear any feedback you have on this month's newsletter.

IN THIS ISSUE

Covert monitoring

The European Court of Human Rights (ECtHR) has considered whether an employer's covert surveillance of its employees resulted in a breach of their Article 8 right to privacy under the European Convention of Human Rights.

López Ribalda and others v Spain (applications 1874/13 and 8567/13)

Facts

This case concerned a group of Spanish supermarket cashiers who had been dismissed as a result of covert CCTV footage of them stealing from their employer. The employees' unfair dismissal claims were dismissed by the Spanish courts. They pursued a claim against Spain to the ECtHR, which held that their rights to privacy under Article 8 had been infringed (see our previous summary of the decision). Spain applied for the case to be reheard by the Grand Chamber of the ECtHR.

ECtHR decision

> *...the measures taken by the employer in this case were both necessary and proportionate.*

The Grand Chamber has overturned the previous decision of the ECtHR, finding that there was no infringement of the employees' Article 8 right to privacy.

The Court was satisfied that the measures taken by the employer in this case were both necessary and proportionate. It agreed with the domestic courts that the employer had legitimate reasons for using the video surveillance, namely the suspicion of theft that had resulted in significant losses to the business over several months. The monitoring took place in a public area where expectations of privacy were lower than places such as a cloakroom or toilet. In addition, it had only lasted for a period of ten days until the culprits were identified. The recordings were not used for any other purpose and had only been viewed by the supermarket manager, the company's legal representative and the union representative prior to commencing disciplinary proceedings.

In most cases, individuals should be clearly informed in advance of the video surveillance, but the court was satisfied in this case that the employer's reasonable suspicion of serious misconduct, combined with the extent of the losses, constituted weighty justification.

Employers should address their mind to the question of whether covert monitoring is justifiable in advance of taking such measures.

Consequences

Whilst this decision is good news for employers who suspect employees of serious misconduct, it should still be treated with some caution. It does not permit covert monitoring of employees other than in the limited circumstances when it might be justifiable, taking into account the type of factors referred to above. Employers should address their mind to the question of whether covert monitoring is justifiable in advance of taking such measures. The Information Commissioner's Employment Practices Code (paragraph 3.4) expressly states that it will be rare for covert monitoring of employees to be justified.

It is estimated that around two million women aged over 50 experience difficulties at work due to their menopause symptoms...

QUICK FIRE

Acas: new menopause guidance

To coincide with World Menopause Day on 18 October, Acas has published new guidance intended to help employers and managers support those affected by menopause symptoms in the workplace.

It is estimated that around two million women aged over 50 experience difficulties at work due to their menopause symptoms causing them to feel ill, lose confidence in doing their job, or making them feel stressed, anxious or depressed.

The guidance includes the following top tips:

- create and implement a menopause policy
- provide awareness training for managers to deal with any concerns in a sensitive way
- create an open culture of trust within the team
- make changes where possible, such as altering working hours
- implement low-cost environmental changes such as providing desk fans
- boost awareness of employment laws that relate to menopause issues at work, such as the risk of sex, disability or age discrimination.

Employer's liability for third-party harassment

When is an employer potentially liable for third-party harassment under the Equality Act 2010? The Employment Appeal Tribunal (EAT) has recently considered the circumstances when employers might be found liable.

Bessong v Pennine Care NHS Foundation Trust, UKEAT/0247/18

Facts

The claimant was employed as a mental health nurse. While on duty, he was physically and (with reference to his colour) verbally assaulted by a patient, resulting in hospital treatment for a facial injury.

He brought claims against the Trust for direct and indirect race discrimination and harassment. His claim for indirect discrimination was upheld; the Trust had failed to take adequate steps to ensure that all staff reported each and every incident of racial abuse by patients on an incident reporting form. This failure contributed to an environment in which racial abuse from patients was more likely to occur, which amounted to unwanted conduct on the part of the Trust for the purposes of harassment. However, this unwanted conduct was not 'related to' race, as required to establish a claim for harassment under the Equality Act 2010. The claimant's claims for direct discrimination and harassment were dismissed. He appealed to the EAT.

> *...the Trust had failed to take adequate steps to ensure that all staff reported each and every incident of racial abuse...*

EAT decision

The claimant's appeal was dismissed by the EAT. The Trust was not liable for the racial harassment by a patient, because its failure to take adequate steps to prevent the harassment (by not ensuring all such incidents were reported) was not because of race. An employer can only be liable for a third party's harassment of one of its employees where the employer's action or inaction is because of the relevant protected characteristic, which was not found to be the case here.

> *...its failure to take adequate steps to prevent the harassment...was not because of race.*

Consequences

This decision confirms that an employee will only be able to establish an employer's liability for third party harassment in quite limited circumstances. However, employers should still take action to deal with incidents of third party harassment, as a failure to do so may give rise to other grounds of complaint (such as constructive dismissal).

The Government has recently conducted a consultation on proposals to reintroduce third-party harassment provisions in the Equality Act 2010. The consultation closed on 2 October 2019 and the Government's response is still awaited.

Redundancy: statutory trial periods

The Employment Appeal Tribunal (EAT) has considered whether an individual had been dismissed prior to starting a trial period in alternative employment, as required under the relevant statutory provisions.

East London NHS Foundation Trust v O'Connor UKEAT/0113/19

Facts

The employee in this case was informed that as a result of a reorganisation his role would be "deleted" with effect from 3 July 2017, meaning that he was at risk of redundancy. On that date he began a trial of a different role, which he contested as not being "suitable alternative employment". The employer proposed to extend the trial period by a further four weeks. The employee went off sick and brought a grievance, which was not upheld. His employment was eventually terminated on 22 December 2017, when he was paid in lieu of his 12 weeks' notice entitlement but he was not paid any redundancy payment. The employee brought a claim in the employment tribunal seeking a declaration that he was entitled to a statutory redundancy payment.

...it did not comply with the requirements of a statutory trial period.

As a preliminary issue, the tribunal held that the claimant had not been dismissed prior to starting the trial period on 3 July 2017, meaning that it did not comply with the requirements of a statutory trial period. The employer brought an appeal against that decision, claiming that the notification of the decision that the employee's role would be deleted was sufficient to amount to notice of dismissal.

EAT decision

The EAT has dismissed the appeal. Taking into account the facts and circumstances of the case, notification that his role was being deleted did not amount to a communication of the employee's dismissal, meaning that the trial of the new role starting on 3 July 2017 was not the start of a statutory trial period. The case was remitted to the tribunal to determine whether the employee's dismissal in December 2017 was a redundancy dismissal, and whether a redundancy payment was due.

...notification that his role was being deleted did not amount to a communication of the employee's dismissal...

Consequences

This case illustrates the complexities of the legislation relating to statutory trial periods in redundancy situations. The finding that there was no statutory trial period applicable to the employee means that his entitlement to a redundancy payment has not automatically been extinguished by his employment continuing to December 2017.

For the statutory trial period to apply, an individual must have been dismissed or been given notice of dismissal by reason of redundancy. Employers must make any offer of alternative employment before the individual's employment under the previous contract comes to an end. The trial period must start no later than four weeks after the end of the previous contract, and last for a period of four weeks. It can only be extended in limited circumstances where retraining is required; both parties must agree to an extension beyond the four week period in writing before the new contract starts.

QUICK FIRE

Election 2019

Employment law proposals made by the main political parties so far, ahead of the General Election on 12 December include:

Conservative

- Increase the National Living Wage to £10.50 by 2024 and extend it to every worker over the age of 21.
- Implementing the Government's Good Work Plan on worker rights, including proposals to address one-sided flexibility in worker contracts, requiring employers to pass on tips and service charges to workers and introducing a single enforcement body for employment rights.
- Consult on making flexible working available by default unless employers have good reasons not to allow it.
- Allowing parents to take extended leave for neonatal care and looking at ways to make it easier for fathers to take paternity leave.
- Extending the entitlement to leave for unpaid carers.
- Creating a new National Skills Fund worth £3 billion to provide matching funding to individuals and SMEs for high-quality education and training.

Labour

A very wide-ranging list of proposals, heralded as the "biggest extension of employment rights in history".

- "Giving everyone full rights from day one on the job" (unspecified).
- Introducing a single status of 'worker' for all other than the genuinely self-employed.
- Giving all workers the right to flexible working.
- Introducing four new bank holidays.
- Reducing the average full-time weekly working hours to 32 and setting up an independent Working Time Commission.
- Strengthening unfair dismissal and whistleblowing protections, with extra protections for pregnant women, those going through the menopause and terminally ill workers.
- Introducing a statutory real living wage of £10 per hour by 2020 for all workers over 16.
- A ban on unpaid internships and zero hours contracts, and introducing a right to regular hours after 12 weeks of service.
- An increase in the period of statutory maternity pay from nine to 12 months, doubling paternity leave from two to four weeks and increasing statutory paternity pay.

QUICK FIRE

- Establishing a new Workers' Protection Agency, to ensure workplace rights.
- Requiring large companies to set up Inclusive Ownership Funds (IOFs), where up to 10% of a company will be in collective ownership by employees.
- Introducing sectoral collective bargaining to agree legal minimum standards on issues such as pay and hours of work.

Liberal Democrats

- Establishing an independent review to consult on how to set a genuine Living Wage across all sectors.
- Establishing a new Worker Protection Enforcement Authority to protect those in precarious work.
- Make flexible working open to all from day one in the job.
- Modernise employment rights, including a new 'dependent contractor' employment status with minimum earnings levels, sick pay and holiday entitlement, and shifting the burden of proof in relation to employment status from the individual to the employer.
- A right for zero hours and agency workers to request fixed hours after 12 months.
- Increase statutory paternity leave from two weeks to six weeks and making parental leave a day-one right.
- Requiring organisations to publish parental leave and pay policies.
- Requiring companies with 250 or more employees to monitor and publish data on pay gaps and employment levels in relation to gender, race and sexual orientation.
- The introduction of a £10,000 "skills-wallet" for every adult to spend on education and training during their lifetime.

Dismissal for trade union activities

The Employment Appeal Tribunal (EAT) has considered whether a manager's anti-union motivation, leading to the employee's dismissal, could properly be attributed to the employer.

Cadent Gas Ltd v Singh UKEAT/0024/19

Facts

The claimant was employed as a gas safety engineer. He was also the health and safety representative and shop steward for the GMB trade union. He was dismissed after arriving on a job one minute outside the one hour requirement specified under the applicable service level agreement.

A senior manager (H) had raised the prospect of disciplinary action against the claimant and appointed an investigation officer. The disciplinary hearing and subsequent appeal were conducted by other senior managers, but H had remained involved in the process. He had changed the terms of reference for the investigation so that it made reference to the claimant being a "trained health and safety rep". He had also informed the claimant that a case of gross misconduct was being brought against him, before the investigation officer had delivered his report.

The claimant brought a claim for (automatic) unfair dismissal on the grounds of his trade union activities, claiming that it was motivated by H's negative attitude towards the trade union and citing a history of conflict with H due to his trade union activities. The tribunal upheld his claim, finding that the employer had failed to establish another fair reason for the dismissal. The leading role taken by H in the investigation meant that the claimant had faced a charge of gross misconduct when others in similar circumstances had faced less serious disciplinary action.

"...the employer had failed to establish another fair reason for the dismissal.

The employer appealed on the grounds that the tribunal had found neither the disciplining nor the appeal manager to have been motivated by the claimant's trade union activities in their decision, and therefore it was wrong to attribute H's trade union animosity to the company.

EAT decision

The EAT has dismissed the employer's appeal, upholding the tribunal's finding of automatic unfair dismissal. While the disciplining and appeal hearing managers had not themselves been motivated by prejudice against the claimant for his trade union activities, the tribunal had been entitled to find that it was still a factor in reaching the decision to dismiss. The claimant had been held to a higher standard because of his trade union activities and his dismissal followed a wholly inadequate investigation.

Even if the claimant's trade union activities had played no part in the managers' reasoning, the EAT was satisfied that the decision had been manipulated by H, meaning that his knowledge and motivation could be attributed to the employer and form the basis of a finding of unfair dismissal.

Consequences

"...an important reminder of conducting a thorough and impartial investigation of disciplinary allegations.

The EAT in this decision made reference to the previous case of Royal Mail v Jhuti, concerning the dismissal of a whistle-blower. In that case, the Court of Appeal held that the fairness of the dismissal had to be judged in light of what the decision-maker actually knew, rather than what knowledge should be attributed to them. However, the Court also recognised that there may be circumstances where a decision is manipulated to the extent that it becomes unfair. The EAT was satisfied here that H's manipulation of the dismissal decision was sufficient to render the employer liable. It serves as an important reminder of conducting a thorough and impartial investigation of disciplinary allegations.

We are awaiting the Supreme Court's decision following an appeal in the Jhuti case, on the question of when an employer is deemed to have knowledge of whistle-blowing disclosures.

Best Employers Eastern Region

Birketts is delighted to be partnering with Pure, Eras Ltd and Archant on the 2020 Best Employers Eastern Region employee survey.

What is Best Employers Eastern Region 2020?

Best Employers Eastern Region 2020 is a free biennial employee survey measures employee engagement, company culture and values. It's easy for employees to complete online and because it is 100% confidential it encourages open and honest answers.

You decide the number of questions. You can run an in-depth survey or a pulse survey without losing the opportunity to benchmark your engagement scores against other organisations in the region.

Who can participate?

The survey is open to organisations from all sectors across Cambridgeshire, Essex, Norfolk and Suffolk.

Why should we get involved?

The survey gives your organisation the opportunity to actively evolve workplace culture, increase engagement and monitor employee satisfaction against your own previous survey results and the results of other businesses in the region. What's more, it's free!

What will my organisation get?

Each organisation receives a tailored report summarising the findings of the survey and an action plan with any opportunities for further development. Participating businesses also have the unique benefit of not only accessing valuable data on their own organisation, but can also benchmark their scores against other organisations in the region.

Participating organisations become part of a growing network of Best Employers which shares the latest thinking on employee engagement.

In 2018, 140 organisation's participated, more than 15,000 individuals completed the survey, eight organisation's won awards and 40 organisation's achieved accreditation.

Discover more about the businesses who took part in Best Employers in the Eastern Region 2018-2020 in Your Guide to The Best Employers in the Eastern Region.

Can we win anything?

All participants are automatically entered for a series of prestigious awards, presented at a high-profile event. The winners are selected based on the employee feedback from the survey – so staff effectively vote for their organisation to win by sharing their experiences of what it is really like to work there.

A panel of advisers has been appointed to endorse platinum and gold kitemark accreditations for organisations who submit further evidence in conjunction with the results of the employee engagement survey.

As well as being celebrated at the awards events, the Best Employers Eastern Region winners and accredited organisations will be showcased on the Best Employers portal

How can we find out more?

To discover more about Best Employers Eastern Region 2020 visit the dedicated web pages.

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Immigration update

Right to work checks - family members of EEA nationals

Badara v Pulse Healthcare Limited [2019] UKEAT/0210/18/BA

Facts

Mr Badara was a Nigerian national, married to an EEA national residing in the UK. Divorce proceedings had commenced, but the marriage had not been dissolved. Under EU free movement rules he therefore had the right to work in the UK.

He worked for Pulse Healthcare Limited (Pulse) as a healthcare support worker. There was a clause in his contract that required him to provide evidence of his right to work in the UK upon request. When he started work, he had a residence card which confirmed his status. This expired on 20 January 2015. Pulse refused to let him work after this date, on the basis he had not supplied evidence of his right to work. Pulse made various enquiries of the Home Office's Employer Checking Service (ECS), which were all negative.

Mr Badara brought various claims against Pulse, including for unlawful deduction of wages and direct and indirect discrimination on the grounds of race and/or nationality.

The Employment Tribunal found that Mr Badara did have an ongoing right to work in the UK. However, in light of the penalties that may be imposed on employers if found to have employed an individual who did not have the right to work, the Tribunal nevertheless found it was reasonable for Pulse to require proof of Mr Badara's right to work, in the form of positive ECS checks. Therefore his claims were dismissed. Mr Badara appealed.

EAT Decision

The EAT found that the ET had failed to properly consider the case of Okuoimse, in which it was held that the provisions of the penalty scheme are irrelevant in circumstances where the individual has the right to work in the UK.

> *"...the provisions of the penalty scheme are irrelevant in circumstances where the individual has the right to work in the UK.*

...individuals with a right to work under EU law do not have to register with or obtain documentation from the Home Office.

The EAT also noted that the Home Office guidance on right to work checks expressly states that individuals with a right to work under EU law do not have to register with or obtain documentation from the Home Office.

Therefore, the EAT found it was properly arguable that in a case where the individual had the right to work in the UK under EU law, it would be sufficient for them to prove that they met the EU rules (for example by proving they were a family member of an EU national) and the employer was not entitled to require a positive ECS check. If that were the case then it would not have been reasonable for Pulse to deny work (and wages) to Mr Badara in the absence of positive ECS checks.

The EAT also noted that by requiring a positive ECS check for non-EU nationals, Pulse had applied a provision, criterion or practice which placed Mr Badara at a substantial disadvantage when compared to someone who was an EU national. The EAT acknowledged the potentially legitimate aim of complying with immigration control and Home Office requirements, but queried whether the practice of relying on ECS checks was a proportionate means of meeting that legitimate aim.

The direct discrimination claim was dismissed. The claims for unlawful deduction from wages and indirect discrimination were remitted back to the Tribunal for reconsideration.

...it is not unusual to come across cases where the information provided by the ECS is incorrect.

Comment

We now need to wait for a further ET decision, as to whether Pulse should have accepted other evidence of Mr Badara's right to work in the UK, or if it was proportionate for them to require a positive ECS check.

The case is complicated by the fact that Pulse received negative replies from the ECS. When using the ECS, the outcome may be that the individual has the right to work, that they do not have the right to work, or that the ECS cannot confirm whether they have the right to work. Given the ECS erroneously told Pulse that Mr Badara did not have the right to work, it is perhaps understandable that Pulse felt compelled to stop him working.

In our experience it is not unusual to come across cases where the information provided by the ECS is incorrect. This places employers in a very difficult position, where the individual is adamant they can work, but the ECS is saying otherwise. In such cases we would recommend that employers take specialist advice to help them reach their own conclusion about the individual's right to work.

The position is particularly complicated in cases involving family members of EU nationals.

The position is particularly complicated in cases involving family members of EU nationals. This is because their rights stem from EU law, not from a visa or document issued by the Home Office.

It can be difficult for employers to assess if the EU requirements are met. The EAT judgment suggested it would have been sufficient for Mr Badara to prove he was an EU family member. But it is not as simple as that. In our view he would also need to prove that his EU family member was exercising EU treaty rights in the UK, for example by working. In some cases that is easy to do, but in cases such as this, where the couple are estranged but not yet divorced, it may be difficult for the individual to obtain evidence from the EU national, to share with the employer.

Assuming Brexit goes ahead, so that free movement ends and we have a new system from 2021 which requires all migrants to hold a UK issued status (such as pre-settled or settled status), then it should become easier for employers to complete right to work checks.

Our experience in both immigration and employment law means we have particular expertise in advising on tricky right to work issues. If you have any queries please contact Clare Hedges, Senior Associate, Head of Immigration.

Promises, promises...

With the Election campaign now in full swing, we take a quick look at the various parties' policies on immigration.

1. Conservatives

The Conservative party has vowed to reduce or at least control immigration, but has moved away from the previously stated intention to reduce migration to the 'tens of thousands'.

The main thrust of their policy is the end of free movement from the EU and the introduction of a points based system to encourage skilled and qualified workers to the UK. There has been particular emphasis on ensuring those coming to the UK have a job offer. Furthermore EU citizens would be brought in line with other foreign nationals with a prohibition on the ability to claim public funds until they have achieved settled status or Indefinite Leave to Remain in the UK.

"Under the Tory proposals, the immigration health surcharge...would be raised from £400 to £625 a year.

Under the Tory proposals, the immigration health surcharge - the payment charged to migrants to use the NHS - would apply to all migrants, both EU and non-EU, and would be raised from £400 to £625 a year.

Meanwhile they have promised to introduce a new "fast track" NHS visa, to ensure the NHS is able to source doctors and nurses once EU free movement comes to an end post-Brexit. The decision process itself will be fast tracked so a decision is made within two weeks. A priority visa service is already available for such applications and currently costs an additional £220. It remains unclear from the reports as to whether applicants applying under this new route will be exempt from paying this fee, for the new fast track which will apparently give a decision in under two weeks. The proposed visa will cost £464, which is exactly half the current fee. Those applying through this way will be able to repay the immigration health surcharge in instalments via their salary once in the UK, instead of paying it all upfront with their visa application.

2. Labour

"Labour has pledged to implement a declaratory system, granting EU nationals the automatic right to continue living and working in the UK.

The Labour Party has stated an intention to re-negotiate a Brexit Deal and has indicated that free movement of EU nationals may remain an option in one form or another.

Labour has pledged to implement a declaratory system, granting EU nationals the automatic right to continue living and working in the UK. The settled status scheme would then become optional. Assuming free movement does end, this could however create problems when assessing who is deemed to have these rights and who is a new arrival and so who does not have them. Those problems may be reduced if Labour follows through on its promise to end the "hostile environment" for example by removing the obligation on landlords to carry out right to rent checks.

Labour has also pledged to end the £18,600 minimum income threshold for family visas, restore the overseas domestic worker visa and give asylum seekers the right to work and access public services.

3. Liberal Democrats

"The Liberal Democrats have vowed to stop Brexit. If this were to happen, free movement from the EU would therefore continue.

The Liberal Democrats have vowed to stop Brexit. If this were to happen, free movement from the EU would therefore continue. Liberal Democrat leader Jo Swinson has described immigration as a "mutual good thing" and her party would oppose all of the changes to benefits and NHS charges being talked about by the Conservatives. They have agreed a "Remain Alliance" with the Green Party and Plaid Cymru, with a view to trying to return as many pro-remain MPs to Parliament as possible.

They also plan to scrap the "hostile environment" and the minimum income requirement for family visas. They would repeal the immigration exemption in the Data Protection Act and limit how information is shared for the purposes of immigration enforcement.

The Liberal Democrats have also suggested reducing the remit of the Home Office. Responsibility for policy on work permits would move to the Department for Business, with the Department for Education taking on responsibility for student policy. They also envisage creating a new arms-length, non-political agency to process visa applications.

The costs for children to register as British citizens (£1,012) is currently subject to challenge in the courts. The Liberal Democrat policy is to reduce that fee to reflect the cost of administration and remove any profit element.

4. Green Party

...the SNP is keen to attract migration to Scotland.

The Green Party support a second referendum and would campaign to remain in the EU. Their manifesto states they have plans for "reducing migration in the long term, by correcting imbalances caused by labour-market inequalities across Europe. EU policies hold the key to this, including an EU-wide minimum income guarantee, EU-wide minimum wages, and fiscal transfers via the Euro."

6. Plaid Cymru

Plaid Cymru supports a second referendum and would campaign to remain in the EU.

6. SNP

Also opposed to Brexit, the SNP is keen to attract migration to Scotland. The SNP leader Nicola Sturgeon has said Scotland needs to maintain a healthy level of inward migration to avoid a long-term decline in the working age population and the negative impact this would have on taxpayer funded public services.

7. Brexit Party

The Brexit Party obviously wishes to pursue Brexit and has promised a cap on permanent immigration of 50,000 a year. Nigel Farage has however conceded that temporary work permits may also be needed to fill vacancies where there are "genuine shortages".

Post study work

...there is currently no legislation in place to back up the plans and therefore they may be subject to change...

Further details have now been released regarding the Government's plans for a new post-study work visa. However, we note that there is no currently no legislation in place to back up the plans and therefore they may be subject to change, particularly in light of the forthcoming General Election.

The Graduate Immigration Route would be launched in the summer of 2021. It will be available to international students who have completed a degree at undergraduate level or above at a Higher Education Provider with a track record of compliance. Students who are already in the UK will be eligible, providing they complete their degree-level course at a qualifying institution in the summer of 2021 or thereafter. The student must have valid Tier 4 leave at the time of application.

Applicants will be required to pay a visa application fee and the immigration health surcharge on application but the exact fees are set to be released in due course.

Successful applicants will be able to stay and work (or look for work) in the UK at any skill level for a maximum of two years. The route however will not count towards settlement but graduates who find an "appropriate job" will be able to switch into skilled work. Appropriate work is likely to be Tier 2 General employment, or whatever the equivalent will be in January 2021 when the new Immigration Rules come into force.

When asked why the route cannot be introduced earlier, the Home Office advised that it takes time to develop a new route and "ensure the framework is in place for it to successfully operate". However it is disappointing that students graduating before summer 2021 will not be able to enjoy the opportunities offered by this route.

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EU Settlement Scheme update

Many EEA nationals will be delighted to hear that the EU Exit ID document check app is now finally available for iPhone as well as Android. The new version of the app is designed to work on iPhone models 7 and above.

...the EU Exit ID document check app is now finally available for iPhone...

As we approached a potential no-deal Brexit on 31 October 2019, the number of applications soared, with over 590,300 applications being submitted in October alone, taking the total number of applications submitted up to 31 October 2019 to 2,450,500. However, there is a difference between the number of applications and the number of individual applicants, as some people may need to apply more than once.

The highest number of applications has been made by Polish, Romanian, Italian, Spanish and Portuguese nationals, with these countries together representing 60% of all applications received.

Within the East of England, the highest numbers of applications have been made in Luton and Peterborough, followed by Cambridge and Bedford.

Of the 1,925,300 applications that had been decided by the end of October, four had been refused, 60% were granted settled status and 40% pre-settled.

As the system comes under more pressure, there are now over 525,200 pending applications awaiting a decision. Inevitably the time taken to get a decision is starting to increase. We are aware that applications for different family members are not necessarily being decided at the same time. In particular, applications by third country national family members are taking longer.

As a reminder, EEA citizens and their family members have until at least 31 December 2020 to apply, even if there is a no-deal Brexit.

"As things currently stand, we are due to leave without a deal on 31 January 2019, although of course in practice this is likely to depend on the outcome of the General Election...

No-deal Brexit

On 24 October 2019 a Statement of Changes in Immigration Rules was published to reflect the changes required should the UK leave the European Union without a deal being agreed. Initially aimed at the 31 October deadline, the rules will nonetheless apply whatever the date, in the event of a no-deal exit from the EU. As things currently stand, we are due to leave without a deal on 31 January 2019, although of course in practice this is likely to depend on the outcome of the General Election - it is possible a deal will be agreed, or a further extension negotiated.

"...if there is a no-deal Brexit, it will be easier for the Government to refuse entry to new arrivals from the EEA or Turkey who have a criminal record...

The changes cover three key areas.

The first change is in respect of criminality thresholds, i.e. offences which lead to an individual being barred (or deported) from the UK. The current rules are more lenient for EEA nationals, compared to non-EEA nationals. The Government wants to apply the stricter standard to both groups.

In practice this means that if there is a no-deal Brexit, it will be easier for the Government to refuse entry to new arrivals from the EEA or Turkey who have a criminal record, whenever the offences were committed. EEA nationals already living in the UK will benefit from the more generous rules in respect of pre-Brexit conduct, but will have to meet the stricter standard in respect of post-Brexit conduct.

The second change is to reflect the Home Office's existing policy on the rights of family members who are coming to join an EU national who was living in the UK before a no-deal Brexit.

If the relationship existed before the no-deal Brexit, spouses, civil partners, durable partners, children, parents and grandparents, have until 31 March 2022 to join their family member. This deadline also applies for children born overseas after Brexit.

If the relationship as a spouse, civil partner or durable partner (or other dependant relative) was formed after the no-deal Brexit then the deadline is 31 December 2020.

Finally, the changes provide for the introduction of the European Temporary Leave to Remain Scheme, for EEA citizens, and their close family members, moving to the UK after a 'no deal' Brexit. This was previously covered in our September update.

The new rules do not change the position already advised of a deadline, in the event of no-deal, of 31 December 2020 for applications by those in the UK prior to Brexit to apply for pre or settled status.

"The Home Office has recently introduced a new priority service for Tier 2 migrants wishing to apply for Indefinite Leave to Remain (ILR).

Tier 2 - Indefinite Leave to Remain

The Home Office has recently introduced a new priority service for Tier 2 migrants wishing to apply for Indefinite Leave to Remain (ILR). This aims to provide a decision within five working days from the date of the migrant's biometric appointment, although this timescale is not guaranteed. The priority service costs £500 in addition to the application fee, which is currently £2,389.

This new service is warmly welcomed as, when applying for ILR previously, migrants only had the option of standard service, which takes up to six months, or super priority service, which comes with a hefty price tag of £800 on top of the application fee. Although this does provide a decision in 24 to 48 hours, it is largely prohibitive due to cost.

It is important to note, even when using a priority service, the migrant will still have to wait five to ten working days after approval of their application before their new Biometric Residence Permit (BRP) arrives, preventing any travel in the interim. The extra fee for priority and super priority services do not guarantee increased promptness in the issuing of the BRP unfortunately, just a decision on the application, thereby reducing the effectiveness of these services if the migrant has upcoming travel or last minute plans.

Overall, the introduction of the new priority service is extremely positive as UKVI now provides Tier 2 migrants with a greater choice of service standards suitable for individual timescales and budgets – standard service, priority service and super priority service. However it remains a source of frustration that priority services are not available for all types of ILR; for example, Tier 1 Entrepreneurs can only use the standard service.

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team. Law covered as at 22 November 2019.

Brexit and GDPR: what you need to know

Understand and identify the steps relevant to your organisation with our checklist

Key contact

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Many organisations have yet to update their GDPR procedures for Brexit. Whilst the justifications for this are many and varied, one consistent message we are hearing is that organisations simply do not know what is required of them. This is perhaps unsurprising given that, as with so many aspects of data protection compliance, there is no one size fits all solution. The situation is, of course, not helped by the ongoing uncertainty as to whether and when the UK will actually exit the EU and the terms of the deal, if any, under which it will leave.

Free guidance

In an effort to bring some clarity to the situation, Birketts has published a free guide, 'Brexit and GDPR: What you need to know and do.' The guide comprises a summary of the headline issues and terms that organisations planning for Brexit need to be aware of, together with a practical checklist enabling organisations to identify what compliance steps they will need to take.

Advice in brief

1. Many organisations will need will need to update their data protection compliance measures for Brexit.
2. It is important that you familiarise yourself with the issues that Brexit poses for GDPR compliance now. These are summarised in the *Headline Issues* section of our guide. It will take you less than 10 minutes to read.
3. Use the *Checklist* section of our guide to identify what changes you need to make to prepare for Brexit.
4. If the UK exits the EU without a deal in place, you will need to have implemented the changes by exit day.
5. If the UK exits the EU with a deal in place, you will have a little more time to make changes and the specific changes required may vary slightly. Look out for Birketts updated guidance.

Click here to download Brexit and GDPR: what you need to know and do. For individual legal advice please email Kitty Rosser or call directly on 01603 756 559