

WELCOME TO THE OCTOBER 2019 EDITION OF

Deliver



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Welcome to the October edition of *Deliver*, our transport and logistics newsletter.



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Welcome to the latest edition of *Deliver*.

Firstly, to introduce myself, I am the soon to be appointed Head of Regulatory and Corporate Defence at Birketts. I joined the firm a number of years ago from chambers in London and have extensive experience in transport law. I frequently represent operators at Public Inquiry before the Traffic Commissioner and advise transport businesses on regulatory compliance. I look forward to meeting many of you in the near future if we haven't met already!

In this issue, [Liam Green](#) looks at customs penalties regarding the international trade of goods, [Philippa Dyer](#) considers what can be done to avoid bridge strikes and [Sonya O'Reilly](#) from our [Employment Team](#) examines the changes to off-payroll working rules. Finally, [Julie Gowland](#) looks at the outcome of the *DPP v Barreto* case and examines the finer details of driving whilst using your mobile phone.

I hope that you enjoy this edition and, as ever, any feedback or suggestions for our next edition would be gratefully received.

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Employment Law Conference 2019

Tuesday 15 October 2019

Rowley Mile Conference Centre, Newmarket

Register to attend Birketts' Employment Law Conference by clicking the box above or by visiting www.birketts.co.uk/events





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Customs penalties

HM Revenue and Customs actively check and investigate cargo and the associated paperwork to ensure that they correspond with each other.

It is currently the position that if you engage in the international trade of goods or you import or export goods privately, you will be subject to both the European Community rules as well as national legal requirements. Should HMRC discover a misdeclaration, you may face a Customs Civil Penalties Notice (CCPN).

Misdeclaration of cargo

The CCPN system is specifically designed to encourage accurate declarations of cargo to ensure appropriate VAT and duty is paid and, by extension, that compliance with the law has been met.

There are two types of CPP action which can be taken by HMRC:

1. a warning letter; and
2. a financial penalty - up to £2,500 per significant irregularity and up to £1,000 for less serious contraventions.

Clearly, there is the potential to be exposed to significant liability in respect of customs penalties; particularly for more serious contraventions. For example: where the shipping company fails to notify all offences and irregularities to the customs authorities.

However, this is an area where HMRC is keen to work with those who aim to comply with the rules and they will seek to educate them on best practice, rather than penalise.

HMRC will not charge a penalty unless it has issued a warning letter, for a broadly similar irregularity, within the last two years.

In addition, you will not face a penalty where you discover and voluntarily disclose a contravention.

If the issuing of a CPP is likely, there are defences and mitigating circumstances which will be considered by HMRC before any CPP is issued.

There is a second limb to the civil evasion penalty procedure – where HMRC considers whether there has been any dishonesty or an intention to evade duty; in this instance a Civil Evasion Penalty (CEP) may be imposed.

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It should be remembered that the Civil Penalties regime does not prevent HMRC from exercising additional powers which enable it to seize goods and/or launching a criminal investigation.

A penalty can be up to 100% of the evaded duty, but reductions are available for early and truthful explanations (40%) or by fully embracing and meeting responsibilities (40%). As such, there is the potential for a reduction of up to 80% of the original penalty.

It should be remembered that the Civil Penalties regime does not prevent HMRC from exercising additional powers which enable it to seize goods and/or launch a criminal investigation, particularly where a tax evasion offence has been committed.

Aside from ensuring the correct duty is paid, it is vital that cargo is declared accurately. If cargo is in anyway dangerous, it may lead to inappropriate handling and stowage which in turn may cause significant damage to the vessel and injury to the crew.

Illegal cargo

The Civil Penalties regime does not apply where there are active prohibitions and restrictions in place (i.e. licencing requirements) and where goods are smuggled into the UK (i.e. alcohol).

Any cargo which is imported illegally may be subject to criminal investigation and sanctions.

There is a complex regulatory regime in place in respect of customs declarations and penalties. If you require any advice please contact the [Regulatory and Corporate Defence Team](#).



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Aside from the potential tragedy that could unfold ... it is also important to remember that your operator licence could be at risk if you fail to put into place effective systems ...

Stopping strikes

Bridge strikes are a “serious problem for the industry”, according to Senior Traffic Commissioner Richard Turfitt. According to Network Rail, five easily avoidable railway bridge strikes take place each day in the UK.

Bridge strikes cause injury (or worse) to drivers and other road users, create untold misery for train passengers through delays, cost the taxpayer millions of pounds, cause serious damage to infrastructure and significantly damage the reputation of the transport industry.

What can be done about it?

Bridge strikes are entirely avoidable. The onus is on the driver to ensure that their vehicles will fit under a bridge, but every operator has a crucial part to play. Here are our top tips.

1. Ensure you plan routes clearly and effectively
2. Where there are unplanned, unexpected or emerging situations make sure drivers communicate these back to you
3. Avoid placing drivers under pressure which can increase the risk of strikes
4. Clearly display the trailer height on the trailer headboard and the coupler height in the cab
5. Use LGV specific sat nav systems that include information on vehicle height limits on low bridges
6. Ensure that drivers check the maximum height of the vehicle, its load and/or any equipment prior to setting out
7. Ensure drivers have height conversion charts in their cab
8. Instruct and train your drivers on all of the above and make sure they are all provided with the [Network Rail practice guide for professional drivers](#) and trained on it.

Aside from the potential tragedy that could unfold, and the financial implications of a bridge strike, it is also important to remember that your operator licence could be at risk if you fail to put into place effective systems to prevent the same.

For further information, Network Rail publishes useful industry [guides](#).

If you would like to discuss any of the matters raised above in more detail, please contact [Philippa Dyer](#) or a member of our [Regulatory and Corporate Defence team](#).



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In April 2017, the Government replaced the original IR35 legislation with the new off-payroll tax, which was initially introduced in the public sector.

IR35 - are you prepared for the changes to the off-payroll working rules?

IR35 is a term used to describe two sets of tax legislation which were designed to assess whether a contractor is a genuine contractor rather than a 'disguised' employee, for the purposes of paying tax.

The aim of the rules has been, rather unsurprisingly perhaps, to combat tax avoidance by workers, and the organisations hiring them. It is designed to catch those who are supplying their services to clients via an intermediary, such as a limited company, but who would otherwise be an employee if the intermediary was not used.

Contractors who work through their limited company enjoy a level of tax efficiency. While they don't get employee benefits (like holiday and sick pay), they have flexibility and control over their work. This has made it an attractive option for some.

If caught by IR35, they have to pay income tax and National Insurance Contributions (NICs) as if they were employed. The financial impact of IR35 is significant. It can reduce the worker's net income by up to 25%, costing the typical limited company contractor thousands of pounds in additional income tax and NICs.

What is happening?

In April 2017, the Government replaced the original IR35 legislation with the new off-payroll tax, which was initially introduced in the public sector. This change meant that the end user (sometimes called the 'hirer') is responsible for working out whether the contractor falls inside or outside of IR35. If they fall inside, the hirer, agency or other third party who pays the contractor then needs to deduct tax and NICs and report them to HMRC.

So from 2017, public sector bodies have been under the obligation of establishing the employment status of the service provider and, where appropriate, pay the PAYE and National Insurance Contributions for them.

Medium-large private companies

From April 2020, the rules are changing for medium-large sized private companies too. From this point on the rules relating to medium-large private companies will mirror those which already apply to public sector bodies.

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Hirers may wish to rely on HMRC's tool Check Employment Status Tool (CEST) when determining the employment status of an individual providing a service.

The obligation to pay tax is being shifted from the intermediary to the hirer. They will be responsible for determining the employment status of the service provider, deciding whether the off-payroll rules should apply and deducting PAYE and National Insurance where appropriate (on top of the fees that they were already required to pay for the service itself).

Hirers may wish to rely on HMRC's Check Employment Status Tool (CEST) when determining the employment status of an individual providing a service. This is not compulsory but HMRC will respect the result of the tool unless it appears the result has been obtained fraudulently.

It should be noted that where the hirer defaults on the payment of tax, HMRC has the power to shift liability along the line to the intermediary.

Small businesses

At least two of the following must apply:

- annual turnover is not more than £10.2m
- the balance sheet is not more than £5.1m
- the number of employees is not more than 50.

From April 2020 the position will remain as before for small businesses, with the obligation to determine and pay tax remaining with the intermediary.

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Workers may be encouraged to now abandon their use of intermediary companies and opt to be employed directly by the end user instead.

Likely practical impact

As end users will now be responsible for these additional tax payments on top of the fee agreed with the intermediary, it is likely that end users will be looking to terminate existing contracts and enter into new contracts which reflect these increased costs by reducing the level of payment to the service provider.

Alternatively, workers may be encouraged to abandon their use of intermediary companies and opt to be employed directly by the end user instead.

What you can do to prepare?

Look at your current workforce (including those engaged through agencies and other intermediaries) to identify those individuals who are supplying their services through personal service companies. This may be of particular relevance to those driving for the company.

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Such an offence is punishable by imposition of six penalty points and a £200 fine. Those who have held their licence for less than two years will have their licences revoked...

You should also make sure that someone in your company has responsibility for determining the employment status of those individuals providing services through an intermediary and deciding if the regulations will apply.

Start talking to your contractors about whether the off-payroll rules apply to their role.

If you do decide that the regulations don't apply, make sure you can evidence why and consider providing a scheme for dealing with disputes where an individual refutes their employment status determination.

If you would like to discuss any of the matters raised above in more detail, please contact [Sonya O'Reilly](#) or a member of our [Employment team](#).

Using your mobile phone while driving – is it illegal?

The recent decision of the High Court in the case of DPP v Barreto ruled that it was not an offence for a driver to be caught filming a crash on his mobile phone.

In reaching this decision Mrs Justice Thirlwall stated that it is the use of the phone or device (whilst held) for the purpose of a call or other interactive communication that is prohibited, not all use of the phone.

By virtue of Section 41D of the *Road Traffic Act 1988* and Regulation 110 of the *Road Vehicles Construction and Use Regulations 1986* it is an offence to drive a motor vehicle while using a hand held mobile telephone.

Section 41D reads:

“A person who contravenes or fails to comply with a construction and use requirement

(b) as to not driving ...while using a hand-held mobile telephone or other hand-held interactive communication device...

is guilty of an offence.”

Such an offence is punishable by imposition of six penalty points and a £200 fine. Those who have held their licence for less than two years will have their licences revoked and will have to pass both their theory and practical driving test.

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Mr Barreto was initially found guilty ... that conviction was overturned at Isleworth Crown Court. It was held ... that the law only prevented the use of mobile' phones to speak or communicate whilst at the wheel.

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...regulations are confusing and out-dated; drafted in 2003, four years before the release of the iPhone, they only cover a fraction of the functionality of the modern 'smart' phone.

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Repeat offending by drivers within your company may raise suspicions with the Traffic Commissioner ... and the company could be called to a Public Inquiry.

Mr Barreto was initially found guilty in the magistrates' court of driving whilst using a mobile phone; that conviction was overturned at Isleworth Crown Court. It was held by the Crown Court that the law only prevented the use of mobile' phones to speak or communicate whilst at the wheel. The DPP challenged this decision in the High Court in April of this year, submitting that the Judge had misinterpreted the regulations, and it was any use of a mobile phone, not just use for an “interactive communication.”

The decision in Barreto follows the result of the test case *Crown vs Eldarf* where Judges ruled that the key words were “interactive” and “communication” and if the driver was using an internal function of the phone and not using an “external communication function,” for example chatting on the phone or texting while driving, he was not breaking the law.

In the latest case, Mr Barreto's legal team argued that motorists could not be convicted for using mobile phones if they were not using them to communicate. They claimed phone use restrictions only apply if the driver is “performing an interactive communication function” which bans talking, texting and internet use, but not using a mobile phone as a camera.

The prosecution submitted that “the regulation is to guard against unsafe driving caused by drivers holding their phones and using them, thereby distracting themselves from proper concentration and control of their vehicles”. The prosecution claimed that it was illogical for the regulations to be interpreted as they had by the Crown Court.

The High Court formed the view that it is the use of the phone, while held, for the purpose of a call or other interactive communication that is banned, not all use of the phone. However, the court commented that this ruling should not be seen by motorists as a “green light” to make films as they drive – such conduct could still constitute an offence such as careless driving or possibly of dangerous driving, with potentially more serious punishment.

These regulations are confusing and out-dated; drafted in 2003, four years before the release of the iPhone, they only cover a fraction of the functionality of the modern 'smart' phone. This ruling could therefore lead to ministers rewriting the laws surrounding phone use.

What does your mobile phone policy say?

You must ensure that your company's policy sets out clearly the expectation that you have of your drivers in relation to mobile phone (or any other device) use when they are driving. You also need to ensure that your drivers are aware of the policy. Those with a vocational entitlement on their licence would be called to a driver conduct hearing and risk having this entitlement suspended (on a first time offence) for a period of two to four weeks, if they commit the offence of driving whilst using a mobile telephone. Repeat offending by drivers within your company may raise suspicions with the Traffic Commissioner that there is an issue within the business and the company could be called to a Public Inquiry.

If you would like to discuss any of the matters raised above in more detail, please contact [Philippa Dyer](#) or a member of our [Regulatory and Corporate Defence team](#).