

## UK: EMPLOYMENT UPDATE

This month we take a brief look at proposals to extend redundancy protection for women on maternity leave and new parents and flag likely developments in relation to NDA's, family friendly issues and employment status.

### Maternity leavers: proposals to extend redundancy protection

The Government has launched a consultation on how best to extend redundancy protection for women and new parents. At present, in broad terms there are two forms of legal protection against maternity and pregnancy discrimination.

The Equality Act 2010 (EqA) sets out a 'protected period' during which women who are pregnant or have recently given birth are explicitly protected from discrimination. The 'protected period' runs from the start of a person's pregnancy until she returns to work from ordinary or additional maternity leave (if she is entitled to either form of leave), or, two weeks after the end of her pregnancy, if she is not entitled to maternity leave.

During the 'protected period' a woman is protected against maternity/pregnancy discrimination that arises because of: her pregnancy, any illness related to her pregnancy, or absence because of that illness; being on compulsory maternity leave; or seeking to take, taking or having taken ordinary or additional maternity leave.

This protection will also apply if a woman is subjected to less favourable treatment after the end of the protected period where it stems from a decision taken during the protected period.

The second form of protection arises in the form of 'redundancy protection'; this requires employers, before making an employee on maternity leave redundant, to offer the employee (not just invite them to apply for) a suitable alternative vacancy, where one is available with the employer (or an associated employer). This gives the woman priority over other employees who are also at risk of redundancy. The alternative vacancy must be both suitable and appropriate for the woman to do in the circumstances, and the terms and conditions must not be 'substantially less favourable' than her previous role.

The Consultation proposes to extend the 'redundancy protection' beyond maternity leave itself to a defined period after the employee returns to work. The Government is seeking views on the length of the protected period; however its initial view is that this enhanced protected period should be 6

#### Key issues

- Maternity leavers: proposals to extend redundancy protection
- Additional developments on NDA's, 'family friendly' rights and employment status issues to look out for in 2019

months following the return to work. It is acknowledged that if this proposal is taken forward some thought will need to be given to when the return to work period will commence in cases where a variety of different family related leave has been taken; e.g. shared parental leave, parental leave and so on.

The Consultation is seeking views on when the period of redundancy protection should commence; with an initial view that it should be when the employer is notified in writing about the pregnancy.

The Government is also seeking views on whether similar protection should be afforded to other groups such as employees taking adoption or shared parental leave. If it does elect to take this proposal forward it is unclear whether it will provide legislative or other guidance on how an employer should prioritise employees on different forms of family related leave who are both at risk of redundancy but who both enjoy redundancy protection and therefore should receive priority in relation to any suitable alternative employment?

The Consultation closes on 5 April 2019 and can be found [here](#).

## **Additional developments on NDA's, 'family friendly' rights and employment status issues to look out for in 2019**

### ***Non-disclosure agreements***

The use of confidentiality clauses (or as the Press like to refer to them: NDA's) in settlement agreements where claims of sex (or other prohibited) discrimination and/or harassment are compromised is likely to be the subject to much more stringent requirements in the future. It is unlikely that they will be prohibited entirely, however it is possible that companies may have to publish details of the number of such agreements entered into annually regardless of the context of the agreements. If such a proposal were to be taken forward this would clearly have serious reputational implication for those employers who make frequent use of NDA's in routine settlement agreements used for example in the context of redundancy exercises where the payment of an enhanced redundancy pay is often conditional upon concluding a settlement agreement with an NDA provisions.

The government's intention to consult on the better regulation of NDA's was reiterated by the Minister for Women on 8 February, although no commitments on timing were given.

### ***Family Rights: shared parental leave***

The vexed question of whether an employer is susceptible to a claim of direct sex discrimination if it operates an enhanced maternity pay scheme but does not provide a similarly enhanced shared parental pay scheme will be determined by the Court of Appeal in May.

### ***Family rights: parental leave and pay policy publication***

Following the October [announcement](#) of the Business Secretary it is anticipated that there will now be a formal consultation on proposed new requirements that companies with 250 or more staff publish their policies on parental leave and pay on an annual basis so job applicants can make informed decisions about whether they can combine the role with caring for their family. In practice it is likely that the measure would cover policies on maternity leave, paternity leave, adoption leave, shared parental leave, 'ordinary' (unpaid) parental leave and possibly even flexible working.

### **Family rights: parental leave and pay policy publication**

Following the same October [announcement](#) we may see further developments on the creation of a new duty on employers to consider whether a job can be done flexibly, and to make that clear when advertising.

### **Employment status**

#### **IR35**

The Autumn Budget announced the extension of the public sector IR35/off payroll working regime to the private sector with effect from April 2020. It is understood that the extended regime will apply to medium and large businesses and will shift the onus on to them to assess whether the relationship between them and the individual supplied to them via the intermediary company is one of employment (for tax purposes) thereby triggering an obligation to deduct tax and NIC's from the fee payable and to pay employer's NIC's. The Government is now expected to publish a detailed consultation on how the private sector IR35 scheme will operate in practice addressing amongst other matters what qualifies as a medium and large company. HMRC is also expected to revise its online tool 'Check Employment Status for Tax' (CEST) with a view to assisting employers in reaching the employment status assessment.

#### **Determining employment status**

In late December the Government's published the Good Work Plan; amongst various proposals was the stated intention to align the framework for determining employment status for the purposes of employment rights and tax together with the provision of improved guidance and online tools to help individuals understand their employment status. No timeframe for this was indicated however in light of the proposals to improve the CEST tool (see above) for the determination of employment status for tax purposes there must be a possibility that these various initiatives will be progressed together this year?

Further clarity on the tests to be applied to determine employment status may also be provided by the Supreme Court which is expected to hear the 'Uber' driver employment status case.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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