

## Recent and expected changes.

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Employers are affected by a number of changes this year. The key changes are set out below:

### Dismissal, Disciplinary and Grievance Procedures

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The much criticised statutory dismissal, disciplinary and grievance procedures, introduced in 2004, have been repealed with effect from 6 April 2009.

From that date, the fairness of a dismissal no longer depends on compliance with the statutory procedures. Instead, tribunals will assess the fairness of dismissals and attempts to resolve disputes in the workplace by reference to the new ACAS Code of Practice on Discipline and Grievance. Either party's unreasonable failure to abide by the Code will allow a tribunal to adjust any order of compensation by up to 25%. (This was up to 50% under the old rules)

The Code is much simpler than the old 'procedures' but it is complemented by a non-statutory Guidance, providing more detail on how to use the Code. One additional feature in the Code is that there is specific reference to the need to investigate matters first before embarking on the disciplinary process. This was not part of the old procedures, although has always been an essential part of a fair dismissal.

### Transition procedures

The statutory disciplinary and dismissal procedures will continue to apply where the first step of a disciplinary/dismissal action has been taken by 6 April 2009. The statutory grievance procedures will continue to apply to grievances where the date of the action about which the employee has complained took place or started before 6 April 2009 and the employee presents a complaint to an employment tribunal, or submits a valid grievance either before 6 July 2009 or 6 October 2009, depending on the nature of the claim. It is therefore important to establish which rules apply.

In essence you should continue to follow the key steps, as before. Use the Code and Guidance.

### Equality Bill

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The Queen's Speech on 3 December 2008 confirmed the Government's commitment to an Equality Bill to "promote equality, fight discrimination and introduce transparency in the workplace to help address the difference in pay between men and women".

The Bill will consolidate the various discrimination strands into one piece of legislation and it is also proposed that:

- in order to tackle pay inequality, clauses preventing employees from discussing their pay will be banned
- the scope of positive action in the workplace will be increased so that, when faced with two or more equally qualified candidates, employers will be able to take into account the under-representation of a particular protected group. However, quota systems and automatically favouring these candidates from under-represented groups will still be unlawful
- the Government will be given the power to make regulations about age discrimination, the provision of goods, facilities and services

- this Bill is expected to be presented to Parliament this month and to become law in 2009/2010.

## Flexible Working

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From 6 April 2009, the right to request flexible working has been extended to parents of children aged up to 16 years. Previously, the right only applied to parents of children under 6 years of age (or 18 years, if the child is disabled). The meaning of 'disabled' is restricted to those in receipt of Disability Living Allowance.

Employees must have 26 weeks continuous employment to make an application for flexible working. There are rules relating to what information the application must contain and the procedure to be followed. These have not changed.

Employees caring for adults have been eligible to make a statutory request to work flexibly since 6 April 2007.

There is no absolute right to work 'flexibly'. There are grounds on which the employer can reject the application.

## Tips and the National Minimum Wage

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The Government has plans to change the law so that tips, gratuities and service charges can no longer be taken into account when deciding if a worker has received the National Minimum Wage.

## Temporary Agency Workers

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There is a renewed commitment to introduce legislation boosting the workplace rights of agency workers. The changes would entitle agency workers to equal basic working conditions with comparable permanent employees, after spending 12 weeks in a job. Watch this space!

## Age Discrimination

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As you may be aware, there has been a longstanding challenge against the UK default retirement age of 65. The challenge is generally known as "Heyday Challenge". Last year the European Court of Justice stated that a national law permitting employers to retire employees aged 65 or over could potentially be objectively justified. The matter has now reverted to the UK High Court to determine whether the default retirement age of 65 (in the Employment Equality (Age) Regulations 2006) is justified and so in compliance with European Law. Numerous tribunal claims have been stayed pending this decision.

With regard to the default retirement age, this does not apply to Partners. However, direct age discrimination can be objectively justified as a proportionate means of achieving a legitimate aim. Last year an employment tribunal held that the compulsory retirement of a partner in a law firm could be justified on the facts of the case. This was because it could, for example, assist in the retention of younger associates as they could then be given the opportunity of partnership after a reasonable period. The Partner successfully appealed. Potentially, therefore, it is much harder for partners to justify the retirement of a fellow partner, than an employee.

## Working Time Opt Out (from a maximum 48 hour working week) and ‘On Call’ Arrangements

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There has been a lot of debate regarding the Working Time Opt Out. In practice the UK is the only EU member who makes use of the opt out. It is not popular with the majority of Europe and so will continue to be under attack. It is not likely to last for long (at least in its current format).

### On Call Arrangements

On call time is also under consideration in Europe. This is not defined in the Working Time Directive or the UK Working Time Regulations and has caused some confusion. Obviously, if an employee is called out, that would be working time, but what about time spent on call at home or at the workplace? The short answer is that the former will not be working time and the latter will be, even if the employee is asleep.

Sometimes, the workplace and the home are one and the same, e.g. where a warden of a rest home is required to occupy on site accommodation. Recent UK cases, based on decisions of the European Court of Justice, say that on call time is still working time in these circumstances. This can have unfortunate consequences because the hours spent on call will count towards the overall weekly working hours and are likely to cause them to exceed the maximum weekly average. Also, unless the on call time is paid for separately, it could result in the employee’s rate of pay falling below the National Minimum Wage. Finally, if an employee is on call, they are not having any proper rest break, as required under the Regulations. The European law makers are considering treating on call time as a special category, being neither working time nor rest time but we could be waiting a long while before this is clarified. Don’t hold your breath.

### Compensation Levels

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The compensation limits are reviewed annually and increases take effect on 1 February each year. The key increases for dismissals, and other trigger events, after February 2009 are as follows:

- maximum Employment Tribunal compensatory award increased from £63,000 to £66,200
- a week’s pay increased from £330 to £350 (this is used for calculation of statutory redundancy pay and the basic award for unfair dismissal) NB – the latest Budget has now raised this to £380 for redundancy (but not clear when)
- maximum statutory redundancy payment increased from £9,900 to £10,500 on 1 February and is due to increase again to £11,400 (but not clear when)

### Statutory Maternity, Paternity and Adoption Pay

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This increased to £123.06 per week from 6 April 2009

### Statutory Sick Pay

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This increased to £79.15 per week (from £75.40) from 6 April 2009

### Holiday Entitlement

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On 1 April 2009, statutory annual leave entitlement increased from 4.8 weeks to 5.6 weeks. This equates to 28 days (including bank holidays) holiday entitlement for full time employees working five days per week.

## Further information

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Please contact James Dyson or Alison Gair on 0118 912 0300 should you have any queries regarding the above or, indeed, if we can provide you with any assistance on any employment matters.

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