

# CIPD Legal Update

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# Agenda



- Latest legislative changes
- The Equality Act
- How employers should prepare?
- Forthcoming changes
- Internal Mediation
- Question Time

# Latest legislative changes

# The new 'Fit Note'



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- In force 6th April 2010 – aim to reduce cost of sickness absence
- GPs can state that an employee 'may be fit for work'
- Allows GPs to state how illness will affect ability to work - focus on what tasks employee *can* perform
- GPs can suggest simple adjustments to enable employees to return to work earlier

# The new 'Fit Note'

BUT - employers may be uncertain about

- what adjustment they should make
- how to deal with knock on effects with other employees
- Costs implications in making changes, particularly for smaller companies
- Conflict between employers and employees about sufficiency of adjustments

# Time off for training



# Time off for training



- In force 6 April 2010 for employees with at least 26 weeks' service
- Employers with 250 plus staff must "seriously consider" a formal training request
- Training must be intended to improve employee's *and* employer's performance
- Aim to extend to smaller employers in April 2011

# Time off for training



- No limit on amount of time off can request
- Employer does not have to pay for training
- Similar process to flexible working
- May be repealed in the near future!

# National Minimum Wage



# National Minimum Wage



- NMW increased from £5.80 to £5.93 per hour from 1 October
- Age for which it is payable falls from 22 to 21
- Workers aged 18 – 20: £4.83 to £4.92 per hour
- Workers 16 – 18: £3.64 to £3.75 per hour
- Rate is £2.50 for apprentices employed under a contract of apprenticeship

# The Equality Act 2010



# The Equality Act 2010



- Commencement Order published by government less than 3 weeks ago
- Majority of provisions came into force on 1 October
- Intended to codify & harmonise the complex law on discrimination in one Act
- Will make some fundamental changes to the law

# Changes to the law



Mainly in relation to Disability Discrimination:

- A single objective 'justification' test to replace the different tests currently in use
- 2 new ways to claim disability discrimination to counter the decision in *LB Lewisham v Malcolm* which severely restricted the right to claim less favourable treatment:
  - Indirect discrimination; and
  - Discrimination “*in consequence of that person’s disability*”

# Health questionnaires



- Restrictions on asking about health/ disability when recruiting
- Further health questions can be asked once interview has taken place and an offer made
- Few exceptional circumstances - necessary to establish whether candidate can carry out an "intrinsic function" of the job

# Additional equality obligations



In all strands of discrimination:

- **Associative discrimination**- protects people when they are *associated with* someone from a protected group
- **Perception discrimination**- protects anyone who is *perceived* to have a protected characteristic from discrimination because of that perception

# Harassment



- Extends protection to people with any protected characteristics (except pregnancy, maternity and marriage/civil partnership)
- Protects people from unwanted conduct "related to" a protected characteristic
- Includes protection for people associated with someone with a protected characteristic *or* perceived to have a protected characteristic

# Other changes



- Definition of gender reassignment - removing requirement for medical supervision
- Clearer protection for breastfeeding mothers
- Allowing claims for direct gender pay discrimination where there is no comparator
- Making pay secrecy clauses unenforceable
- Protection in private clubs to include sex, religion or belief, pregnancy/maternity, gender reassignment
- Introducing new powers for tribunals to recommend ways to benefit the wider workforce

# Public sector responsibilities



- Single public sector equality duty
  - Imposes specific duties on public authorities to enable better performance of the single equality duty
  - Example – a requirement to publish equality objectives and the progress made towards them
- Still going through consultation – expected April 2011

# Provisions not in force yet



- Socio-economic inequality duty on public authorities – expected April 2011
- Dual discrimination combining two protected characteristics
- Requirement on private sector employers to publish gender pay gap information
- Positive action in recruitment and promotion

# How to prepare?

- Amend current policies:
  - to refer to the Act and Codes
  - cover the extended definition of disability
  - cover associative discrimination and perception of discrimination and harassment
- Consider what additional training is required for management staff
- Amend health questionnaires if used

# How does it affect us?

- Practically, not a lot of affect
- Many of the changes are legal definitions, affecting lawyers more!
- An employer with good existing anti-discrimination policies and procedures should not have to make many changes

# The future...



- Provisions not coming into force may do so in the future
- Example – requirement to publish pay. What issues may this cause?
- Employers should consider redressing issues in advance of further obligations coming into force

# Forthcoming legislative changes

# Retirement



# Retirement



- Government planning to scrap default retirement age of 65 from October 2011
- Currently, an employer can force an employee to retire at 65 fairly by completing retirement procedure
- No forced retirement notices can be issued after 6 April 2011- 6 months prior to the abolition

# Retirement – Pro's and Cons



- People over 65 to have full employment rights
- Economy will benefit from older workers' precious skills and experience
- Encourage people to work for longer and ease strain on public finances
- BUT- gives employers little time to prepare
- May complicate the management of the workforce and add to overall costs

# Paternity Rights



# Paternity rights



- New regulations in force on 6 April 2010
- Additional Paternity Leave for up to 26 weeks
- Applies for children due on/after 3 April 2011.
- Paid at same rate as SMP if taken before end of 39 week period
- Mother must have returned to work and child must be between 20 weeks and 1 year old

# Paternity rights



- Provides more choice/flexibility in child care
- Designed to minimise administrative burdens on business by use of self-certification – will it?
- Rumour – this may be repealed as well!

# Mediation

# Why mediate?



- An independent, impartial person can help parties to discuss problems with the aim of reaching a solution acceptable to everyone
- Voluntary process:
  - Employees have choice of whether to attend
  - Can stop process at any time
- Both parties have the opportunity to have their say

# Options before mediation



## 1. Talk informally

- Chat with employees individually or together
- Give each employee chance to have their say
- Have a planned approach- use policies or procedures for guidance

## 2. Disciplinary action

- Use only if appropriate
- May nip any conflict in the bud early on

# How a mediation works



- Step 1:** Mediator meets with parties separately to prepare them for mediation
- Step 2:** Mediator introduces everyone, explains process and ground rules
- Step 3:** Parties put their side forward and Mediator draws up a list of issues
- Step 4:** Mediator helps parties to talk through problems in a controlled environment
- Step 5:** By the end, parties should reach a voluntary agreement acceptable to all
- Step 6:** Mediator checks that the agreement is holding at intervals for up to a year

# Advantages of mediation



- 1. Speedy**
- 2. Low cost**
- 3. Parties retain control over the outcome**
- 4. Informal**
- 5. Preserves relationships**
- 6. Preserves privacy**
- 7. Diminishes imbalances of power**

# So employers should....



- Identify where a more relaxed and informal approach to dealing with problems at work may be appropriate
- Consider including a mediation stage in your internal processes
- Train your managers in dealing with initial conflict or better still, in internal mediation

# Question time