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Employmentnews

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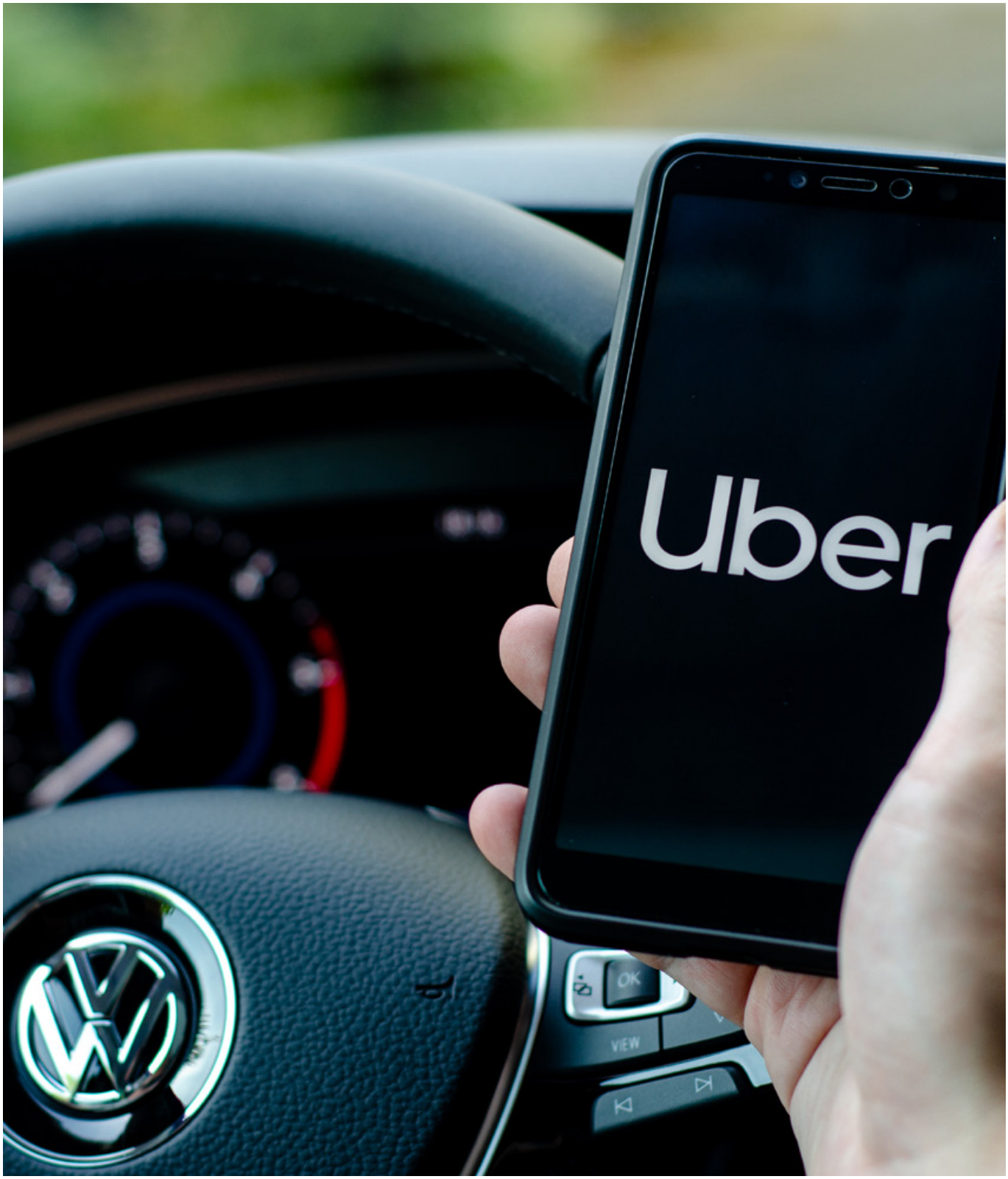

Editorial Welcome note

This month's Employment Update covers a variety of topics, including changes to the bands of awards for injury to feelings, changes to how long certain HR documents must be retained, and an important ruling by the Supreme Court regarding Asda's shop floor workers. We also give the latest on furlough, the fourth self-employed grant, and advise on the possible introduction of Covid passports.

I would also like to remind you that we have distributed our 2021/22 Data Booklet which is designed as a handy guide for HR professionals, managers and business owners. It contains current information about employment legislation and employee rights. If you would like a copy of our Data Booklet or have any other questions or queries and/or need advice, please do get in touch.

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A change to the Vento bands

Claimants in cases of discrimination, whistleblowing detriment and trade union dismissal can seek an award for injury to feelings as well as compensation for financial loss. From April this year the three bands of awards for injury to feelings – known as the Vento bands – have increased to the following:

Lower band - £900 - £9,100
These are less serious cases, usually one-off events or isolated occurrences.

Middle band - £9,100 - £27,400
These are serious cases which don't merit the upper band.

Upper band - £27,000 - £45,600
These are the most serious cases; a lengthy campaign of discriminatory harassment on the grounds of sex or race.

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Are Covid passports a good thing?

Plans to introduce a Covid-status certification - known as a 'Covid passport' - have received much media coverage. If introduced, the 'passport' will indicate if you've had the vaccine, or if you've tested negative recently, or if you have natural immunity through having already had Covid-19.

The Government's hope with the Covid passport is that crowds can return to large-scale events and venues such as festivals, sports events, nightclubs, theatres and orchestral concerts.

Trials are being run this summer, and businesses will no doubt be listening eagerly for any developments. If your business is considering using Covid passports, be aware that the ambiguity surrounding them at present could give rise to discrimination claims, therefore do take advice before putting plans in place.

We in the Employment Team are happy to help with any employee or worker-related queries, and our colleagues in the Commercial Team can answer your consumer or customer-focused questions.

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Further furlough and more self-employment grants

As announced in the Budget, the furlough scheme will be extended until September, with the Government continuing to pay 80% of furloughed workers' wages until June. Thereafter, employers will be expected to contribute towards furloughed workers' pay.

From July, employers will be expected to pay 10%, increasing to 20% in August and September, with the Government making up the remainder – keeping furloughed pay at 80%.

Self-employed people will receive a fourth grant under the Self-Employed Income Support Scheme. Covering February to April 2021, this grant will cover 80% of three months trading, up to £7,500. A fifth grant will cover May to September 2021.

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Document retention period changes

If you are working in HR, it is important that you are familiar with the statutory retention periods for certain documents which have been updated over time and most recently on 6 April 2021. We have set out a summary of the retention periods for key documents below. Ensure that you stick to the legal requirements on how best to retain and organise your HR records, and always keep information safe and well organised so it can be retrieved easily if required.

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Document/information	Previous retention period	Current retention period (correct at time of writing)
Working time and opt-out forms	Two years from the date they were entered into	Three years from the date they were entered into
Records to show compliance with the Working Time Regulations 1998	Two years after the relevant period	Three years after the relevant period
Maternity records	Three years after the end of the tax year in which the maternity pay period ends	Four years after the end of the tax year in which the maternity pay period ends
Any reportable accident, death or injury in connection with work	At least three years from the date the report was made	At least four years from the date the report was made
Consents for the processing of personal and sensitive data	For as long as the data is being processed and up to six years afterwards	For as long as the data is being processed and up to seven years afterwards
Disclosure and Barring Service (DBS), formerly Criminal Records Bureau (CRB), checks and disclosures of criminal records forms	Should be deleted following recruitment process unless assessed as relevant to ongoing employment relationship. Once the conviction is spent, should be deleted unless it is an excluded profession	Six months after notifying candidates of the outcome of the recruitment exercise
Immigration checks	Two years after the termination of employment	Three years after the termination of employment
National Minimum Wage	Three years beginning with the day the pay reference period immediately following that to which they relate ends	Six years beginning with the day the pay reference period immediately following that to which they relate ends

Uber accepts drivers as "workers"

In Uber BV and Others v Aslam and Others, the Supreme Court looked in detail at the relationship between the US lift hailing company Uber and its drivers and ruled unanimously that Uber drivers are workers and are not self-employed.

Uber drivers Mr Aslam, Mr Farrar and others first submitted an employment status claim to the Employment Tribunal (ET) in 2016. The court disagreed when Uber argued that the drivers were independent contractors, holding that they were "workers" under employment legislation.

Following several appeals by Uber the case ended up in the Supreme Court in December 2020, and the court ruled in February that the company's drivers were entitled to basic rights such as paid holiday, rest breaks, the national minimum wage, and pension rights.

The Court set out five key factors in justifying its decision:

1. Uber sets the fares for each ride, not the drivers, whereas self-employed drivers set their own fares;
2. Uber sets the terms and conditions of using its service;
3. drivers can be penalised for cancelling or not accepting rides, which can prevent them from working;

The Supreme Court held that care workers who are expected to sleep at, or near, their workplace but be available "on call" during the night, are not entitled to the national minimum wage for their entire duration of the sleep-in shift. They cannot be described as actually working under regulation 30 of the National Minimum Wage Regulations 2015 - instead they are "available for work" under regulation 32.

Carers can only be entitled to the national minimum wage in situations where they are awake for the purposes of working. This means they need to have duties to perform such as waiting for a call to assist or distributing breakfast to the residents of a care home.

For many years there has been a range of inconsistent authorities on the issue of calculating the national minimum wage for sleep-in shifts. The effect of the Supreme Court's decision is that a number of earlier decisions on sleep-in shifts can no longer be relied upon. Therefore in some respects, the decision has provided welcome clarity and will provide relief to many employers in the care sector who were concerned about claims for underpaid wages.

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That's ASDA's price

In the latest installment of the equal pay claims saga, the Supreme Court rejected Asda's appeal that shop floor workers could not be compared to workers in the warehouse.

The claim, which has been ongoing since 2016, involves some 35,000 claimants who work on the shop floor. The claimants are predominantly female and argue that their work is of equal value to the work undertaken by staff in the distribution centre (who are predominantly male) and therefore they should receive an equal rate of pay. The decision by Lady Arden in the Supreme Court upheld the decisions of the employment tribunal, the Employment Appeal Tribunal and the Court of Appeal that a group of predominantly female retail employees could compare themselves to a group of mainly male distribution employees for the purposes of an equal pay claim.

The Supreme Court was careful to note that its decision does not mean that the claimants will be successful in their equal pay claim, but only that they could use the terms and conditions of employment of the distribution employees as a valid comparison. The claimants would still be required to show that they performed work of equal value and Asda would still be able to rely on any defence available to it.

We will continue to keep you updated about this ongoing case.

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When a "sleep-in" counts as work

In Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad (t/a Clifton House Residential Home), the Supreme Court held that workers on sleep-in shifts are only entitled to pay in respect of the hours in which they were required to be awake for the purposes of working.

The first claimant sought wage arrears for each hour of her sleep-in shift looking after vulnerable adults at their home. The second, an on-call night-care assistant at a residential care home, claimed he was entitled to be paid the National Minimum Wage for each hour he was required to be on-call, even those hours he was permitted to sleep.

Both claimants appealed to the Supreme Court, which held that, as regards National Minimum Wage (NMW), working time during a sleep-in shift is only the time spent awake and working.

The Supreme Court held that care workers who are expected to sleep at, or near, their workplace but be available "on call" during the night, are not entitled to the national minimum wage for the entire duration of the sleep-in shift. They cannot be described as actually working under regulation 30 of the National Minimum Wage Regulations 2015 - instead they are "available for work" under regulation 32.

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Online applications on the line

In the case of Mallon v Aecom Ltd, the Employment Appeal Tribunal was required to delve into the Equality Act 2010 and rule on the case of a job applicant with dyspraxia who claimed there had been failure to make reasonable adjustments for his disability when completing his online application. He said he was at a substantial disadvantage when applying online compared to someone without his neurological disorder – citing difficulty in registering online, having to use a password and dealing with drop-down menus.

The case was at first struck out by the Employment Tribunal on the grounds that the claimant wouldn't be able to demonstrate that the provision, criteria or practice (PCP) in applying online put him at a substantial disadvantage, and there was therefore little chance of success.

The question for the Employment Appeal Tribunal (EAT) was, should this have been an auxiliary aids case as defined by the second and third requirements of section 20 of the Equality Act 2010.
The EAT ultimately upheld the claimant's appeal and ruled that there was sufficient merit to proceed but that did not mean the claim would be successful.

Should you need advice on how to make your recruitment process equal opportunity friendly, come speak to one of our employment lawyers.

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Navigating the business visitor rules

With the free movement of people from Europe no longer possible following the end of the Brexit transition period, and with the sponsored worker routes expensive and time-consuming, European companies are looking at other routes to be able to send its employees to the UK to do business.

One of those routes is the Standard Visitor visa. Under this visa, overseas workers may visit the UK to do business activities for up to six months. They are not permitted to do paid or unpaid work, whether as an employee of a UK company or as a self-employed person, but may carry out a limited number of business activities permitted by the immigration rules.

General business activities that a visitor may do are:
a) attend meetings, conferences, seminars, interviews;
b) give a one-off or short series of talks and speeches (provided these are not organised as commercial events and will not make a profit for the organiser);
c) negotiate and sign deals and contracts;
d) attend trade fairs, for promotional work only, provided the visitor is not directly selling;
e) carry out site visits and inspections;
f) gather information for their employment overseas; and
g) be briefed on the requirements of a UK based customer, provided any work for the customer is done outside of the UK.

Those employees who are part of a multi-national group of companies are able to visit its UK site to participate in internal projects – such as advising and consulting; trouble-shooting; providing training; and sharing skills and knowledge. No work may be carried out directly with clients.

Employees of foreign companies may receive training from a UK-based business in work practices and techniques which are required for their employment overseas, provided such training is not available in their home country.

It is also possible for an employee of a training company based overseas to visit the UK to deliver a short series of training to employees of a UK-based company as part of a global training programme, provided the UK-based company is part of a multi-national group of companies.

A foreign manufacturer or supplier may send its employees to the UK to install, dismantle, repair, service or advise on equipment, computer software or hardware under a contract of purchase or supply or lease with a UK business.

An overseas worker cannot use the visitor rules to live in the UK for long periods so of time through frequent visits and cannot claim benefits while they are here.

As you can see, the visitor rules provide an alternative route into the country to do business with UK-based companies, but there are limitations to what an individual may do. This means that they are susceptible to questions as they go through border control. They do not have to apply for advance clearance before coming to the UK, but do need to be prepared to explain the reason for and length of their visit, and to provide such evidence as may be required to show that the activities they are here to do fall within the business visitor rules.

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Looking forward to life after lockdown

In its 'Roadmap Reviews' paper on 5 April the Government clarified how it intends to manage the pandemic once we take (hopefully) the final step out of lockdown on 21 June – when all restrictions are expected to be lifted.

Included is a COVID-Status Certification Review, which will explore how COVID-status certification might help in reopening the economy and reducing social distancing restrictions. The Government's ability to relax social distancing measures will be tied to decisions made by this review.

Also under way is a Social Distancing Review, to establish how social distancing measures can be reduced in different settings, including the workplace. As part of this review, the Department for Business, Enterprise and Industrial Strategy (BEIS) is consulting with businesses about possible long-term social distancing measures to bring workers back into the office, with ideas including six months of social distancing each year and the longer-term use of masks and transparent plastic screens.

In our webinar following the 17 May coronavirus update we'll be discussing this subject in more detail. Further information will be available on our website where you can find a link to sign up.

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