

## EMPLOYMENT AND IMMIGRATION UPDATE

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**Jane Laidler**  
Joint Managing Partner and  
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“ This is the first issue of GRM's new style Employment and Immigration Update, following the launch of our new general Legal Update a couple of months ago.

Through this newsletter we aim to keep you informed about a wide range of issues in the fast moving arena of employment law and immigration policy together with news of developments and events here at GRM.

Back issues of each Update will be available on our website at [www.grm.co.uk](http://www.grm.co.uk). Should you prefer to receive the newsletter electronically or if you wish to update your mailing details, please contact our newsletter administrator at [m.baldock@grm.co.uk](mailto:m.baldock@grm.co.uk).

I hope you find these topics of interest and would welcome your suggestions for future articles. Do feel free to let me have your feedback by contacting me at:

[j.laidler@grm.co.uk](mailto:j.laidler@grm.co.uk) or telephone +44 (0) 20 7242 0631 ”



## INTRODUCING THE 2010 EQUALITY ACT

JANE LAIDLER

### **Making the workplace fairer for all.**

As an employer, it can hardly have slipped your notice that the new Equality Act came into force in the UK on 01 October 2010. Despite the fact that, in essence, it has been created to consolidate the provisions of a number of previously unrelated laws and therefore should simplify matters, widespread feedback suggests that many employers still feel unsure about the implications of the new legislation and are concerned about what they ought to be doing.

**“The Government Equalities Office<sup>1</sup> states that the aim of the Act is to: provide a new cross-cutting legislative framework to protect the rights of individuals and advance equality of opportunity for all; to update, simplify and strengthen the previous legislation; and to deliver a simple, modern and accessible framework of discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society.”**

Whilst we applaud these aims, we also recognise that for employers much of the challenge in achieving this comes down to translating the requirements of the Act into policies and practice within their own individual workplace.

In essence the main changes within the Act concern direct, indirect, associative and perceptive discrimination; harassment and victimization, positive action, extension of employment tribunal powers, equal pay direct discrimination, pay secrecy and pre-employment health checks.

Within this newsletter we provide outline guidance relating to the last two of these topics: pay secrecy and pre-employment health checks, which we hope you find useful. Aside from this, if you have any further queries about this or any other employment matter, please do not hesitate to contact us. Our concern, as always, is to provide you with swift, practical, cost-effective solutions.

<sup>1</sup> [http://www.equalities.gov.uk/equality\\_bill.aspx](http://www.equalities.gov.uk/equality_bill.aspx)



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## HOW ARE YOU? JANE LAIDLER

### **Be careful what you say when assessing pre-employment health.**

One of the key provisions of the new Equality Act is that companies must not enquire about a candidate's health prior to making them a job offer unless specific criteria are met, which means that in general questions relating to health should no longer be included on job application forms. If unsuitable questions are asked, the Human Rights Commission can investigate and take enforcement action.

**The exception to the new rule about not asking candidates about their health is if the question specifically relates to their intended job role. This means, for example that you can ask a candidate if they would be able to do heavy lifting if this is to be an intrinsic part of the job for which they are applying, but not ask them if they would experience any difficulties in traveling to work.**

The aim of the legislation is to address issues relating to what is regarded as long-standing discrimination against those with mental or physical disabilities or a record of long periods of illness, i.e. discrimination resulting in a person now being treated unfavourably (not just less favourably) because of something relating to their disability.

Employers are, however, allowed to monitor diversity (including disability) amongst people applying for jobs and to take positive action to assist and support disabled people in carrying out their jobs. They can also ensure that a candidate does have a disability where it is a prescribed element of the job - for example, establishing that a person who is applying for a role counselling people with a certain disability does have that disability if it is considered to be a fundamental requirement.

In the event of a claim relating to a disabled candidate not being offered a job, employers will be assumed to have discriminated, unless it can be demonstrated clearly that there was another reason for their non-selection.

Once a candidate has been appointed, employers are allowed to ask health-related questions. However, an employer that learns of a person's health issues after making a job offer but who is forced to withdraw the offer as a result of their failure to make reasonable adjustments to support that person, may face legal action.

## SUCCESSFULLY ACCOMMODATING SOCIAL MEDIA USE

JANE LAIDLER

### **The challenges - and some commonsense solutions – in this increasingly complex arena.**

The growth of social media: blogs, Twitter, Facebook, Youtube, LinkedIn and more, has been fast and impressive. But every success story has its downside, and for businesses this is manifested in a number of issues relating to the risk and possible damage of using social media – both within the workplace and outside.

The main challenges fall into three distinct areas:

Employees wasting their time on social networking sites when they should be working leading to reduced productivity<sup>2</sup>.

The risk of employees posting comments on social networking sites which may be defamatory to individuals or damaging to the employer's business or reputation.

The possibility of employers using information gathered from social networking sites to inform decisions made about potential or current employees.

The issues involved in each of these points are complex, but not insurmountable. Basically employers should protect themselves by:

- Devising a policy on social networking sites and appropriate behaviour in relation to their use. This should be made clear to all and enforced rigorously and fairly.
- Deciding, as an organisation, how and under what circumstances staff are permitted to use information gleaned from social networking sites to affect recruitment decisions, bearing in mind that the use of details relating to, for example, sexuality or religious beliefs which have come from these sites, could create liability for claims for discrimination.
- Producing clear guidelines relating to the use and publication of an employee's business contacts on sites such as LinkedIn.

Remember, under the Human Rights Act 1998, the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000, you must notify employees if you are monitoring their use of the internet and social networking sites. You should also take into account that individuals may be using their own smartphones to access sites while at work and devise and communicate a policy to address this.

Sound knowledge of the legal implications, commonsense, and clearly communicated preventative measures are the key to success in this increasingly complex arena. Please contact us for more information about effective policies and practice.

“ I suspect there's more than one reason why staff are using social networking sites at work. Of course, there will always be people who take advantage, but bear in mind that employees in the UK work very long hours, so they have to spend some time while at work to organise their lives... Also, for the very busy, using these sites is a good stress reliever; it can take the pressure off for a few moments before they start work again.”

Cary Cooper, Professor of Organisational Psychology and Health,  
Lancaster University:



<sup>2</sup> In 2010 UK and US research revealed that 26% of people admitted that they were spending more than an hour a day at work on social networking sites on matters that had no relation to their job (Source: <http://www.marketwire.com/press-release/Productivity-Suffers-as-Employees-Waste-Time-on-Facebook-Twitter-During-Working-Hours-1299790.htm>)



## WHAT DO YOU EARN?

JANE LAIDLER

### **Lifting the lid on pay secrecy.**

One of the key provisions of the new Equality Act is that it is now unlawful for employers to restrict or prevent employees from discussing their pay and bonuses – a practice which has long been prevalent in particular industry sectors such as financial services where so-called *gagging clauses* frequently have been written into employee contracts.

The driver behind the new provision is to make it easier for employees to compare salaries and for women, in particular, to compare their rates of pay to those of men doing a similar or identical job. Gender pay inequality continues to be a problem with recent figures from the Equality and Human Rights Commission revealing that the national pay gap for all roles currently stands at 16.4%.

Pay gaps can, however, be distorted by different gender work patterns and other contributory factors so employers are advised to protect their position by undertaking a pay audit across their organisation to establish the true position.

Under some circumstances employers can still require employees to maintain confidentiality about their pay rates outside the organisation, for example when communicating with competitor organisations.

### **Reminder: Change to minimum wage**

On 1 October 2010, the adult national minimum wage increased to £5.93 per hour from £5.80 per hour, an increase of 2.2%. At the same time the adult rate was extended to workers aged 21, having previously only been paid to those aged 22 and over. The rate for workers aged 18 to 20 was increased to £4.92 per hour, and to £3.64 per hour for those aged 16 and 17.

An apprentice minimum wage rate of £2.50 per hour was also introduced. According to the Low Pay Commission this is intended to be

*"applied as a single rate to those apprentices currently exempt from the National Minimum Wage. That is all those under the age of 19 and those aged 19 and over in the first 12 months of their apprenticeship. The wage should cover both those employed on traditional contracts of apprenticeship and employed apprentices on government-supported Level 2 and 3 schemes."*

## ASK THE EXPERTS WEBINAR

JANE LAIDLER

### **Jane Laidler participates in Think London's Recruitment and Employment event.**

GRM's Head of Employment Law, Jane Laidler, was delighted to take part in Think London's recent Ask the Experts webinar focusing on Recruitment and Employment in London.

Think London is the official foreign direct investment agency for London and GRM has been proud to be a supporting member since 2009. It is a not-for-profit, private-public partnership and represents a source of unbiased, expert advice on doing business in the capital. And as their website<sup>3</sup> reveals, the latest European Cities Monitor 2010 has ranked London as the number one European city in which to locate a business for the 21st consecutive year.

The question and answer webinar provided an opportunity for business people to find out from industry experts the most effective way to find and retain talent, the opportunities and challenges inherent in UK employment law, and answers and comments relating to a host of other questions linked to a wide range of recruitment and employment needs.

Many people took part in the webinar which was hailed as a great success. Jane commented:

“ The UK remains a popular destination for foreign businesses wanting to set up outside their own countries and London, in particular, in the lead up to 2012, is a favoured option. Whether established in the UK or coming here for the first time, practical and commercial legal advice on employment law issues can help employers and employees achieve workable solutions to the legal challenges they face when recruiting in or to the UK market. ”



<sup>3</sup> <http://www.thinklondon.com>



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## IMMIGRATION UPDATE

HELENA ROSS, SOLICITOR

### **Permanent cap on non EU migrant workers confirmed.**

On 24 November 2010, the level of the permanent cap on the number of skilled workers from outside the European Economic Area allowed into the UK was announced. The figure of 21,700 is a cut of 6,300 on the equivalent figure for 2009 but, in a significant concession, excludes employees transferred by companies from abroad. In future these will be allowed to stay for up to five years if their salary exceeds £40,000.

In the meantime, the temporary cap of 24,100 workers remains in place (introduced on 26 June this year), and many employers have seen their allocation of sponsor certificates revised down to zero. It is still possible to sponsor a non-EU candidate but employers must apply directly to the Home Office for permission and it will be judged on a case by case basis.

If an employer wishes to become a Tier 2 sponsor, they can still register as a sponsor but will be initially allocated zero certificates of sponsorship (unless they specifically request otherwise).

### **Crackdown on non EU student immigration.**

On 5 November, Theresa May, the Home Secretary, announced that there would be further measures to limit the numbers of non EU students coming to the UK. Such students and their families accounted for two-thirds of the visas issued to non-EU migrants under the points-based system last year. Of particular concern are the following areas:

- The standard of courses;
- Entry criteria and English language requirements;
- Ensuring that students return overseas after their course;
- The right to work for students and their dependants.

Details of the proposed measures will be released in due course.

### **New Language requirement for non-EU partners of British citizens.**

From 29 November 2010, any migrant from outside the European Economic Area will need to show that they can speak and understand English if they want to enter or extend their stay in the UK as the partner of a British citizen or a settled person. For the majority, this will be done by way of an English language test and the requirement covers visa extensions as well as initial applications from overseas.