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# WARNING POTENTIAL CHANGE AHEAD

With the prospect of new rules on employment status and confidentiality clauses, and challenges on harassment, mental health and equal pay, there's plenty for employers to get to grips with this year.

**Douglas Friedli asks four lawyers what to watch out for**

**EQUAL PAY**

Richard Thomas, partner at Capital Law predicts we will see a series of employment tribunal decisions in cases on the issue of equal pay which involve Tesco, Asda, Morrisons and Sainsbury. The claims are being brought by groups of predominately female shop workers who claim they are being paid less than predominately male warehouse staff, despite carrying out a similar role.

Thomas says: "These decisions may well be subject to appeal by the losing party, but they will provide some interesting points on the issue of equal pay and could lead to more claims being brought against private sector employers."

And he predicts the consequences could be substantial for other employers: "Previously, equal pay claims have been brought successfully against public sector employers, such as local councils. However, combined with the requirement for all employers employing more than 250 employees to report annually on their

gender pay gap statistics, a victory for the claimants in the equal pay claims could open the door to many more claims being brought against private sector employers."

**EMPLOYMENT STATUS FOR FLEXIBLE WORKERS**

A follow-up to the UK government's Taylor Review and Good Work Plan will aim to clarify employment status.

And, according to Anthony Rees, partner at law firm Eversheds Sutherland, they are likely to extend certain employment rights for a wider category of workers, and impact on the use of agency workers. Changes may also be made to how zero-hours contracts and flexible arrangements can be used by business.

He adds: "More generally, ongoing economic uncertainty will be the main driver to employees relying on their employment rights, with the recent large rise in employment tribunal claims likely to continue."

Improved conditions for agency workers, zero hours workers and other atypical

workers are picked out by Paul Shuttleworth, associate director at DJM Solicitors as the big change of the year ahead.

Shuttleworth highlights a proposed right for all workers to request "a more predictable and stable contract" after 26 weeks of service, to which the employer must respond within three months.

**MENTAL HEALTH**

The cost of mental health issues to the economy and to individuals has become much more visible over the past five years. A survey by the mental health charity Mind last year found that almost half (48 per cent) of employees had experienced a mental health problem in their current job, but that only half of those had talked to their employer about the problem.

Debra Gers, senior practice support lawyer at Blake Morgan, says: "With no signs of any reduction in poor mental health, this will remain a key issue for employers, staff and government in 2019."

Gers highlights a push from the leaders

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of Mental Health First Aid (MHFA) England and Bauer Media for legislation relating to health and safety at work to encompass mental health as well as physical health. Businesses supporting the change include PwC, WHSmith, Royal Mail and Thames Water.

Gers says: "Poor mental health can be experienced by anyone regardless of age, gender, race or social background. With workplace mental health issues costing the UK economy more and more each year alongside the detrimental and harmful effects on the individual concerned, it is an issue of the highest importance."

**SETTLED STATUS FOR EU NATIONALS**

European workers currently living in the UK will be able to apply for settled status in 2019, allowing them to remain indefinitely in the UK following the end of the Brexit transition period in 2021.

In the event of a no-deal Brexit, says Capital Law's Thomas, "it is very likely that Parliament will still provide similar protections for EU workers".

**HARASSMENT AND CONFIDENTIALITY CLAUSES**

Sexual harassment is a concern "in all types of organisations and sectors", says Blake Morgan's Gers. She highlights work by the House of Commons Women and Equalities Committee which said the UK government needed to act, and proposals from the government. They include a statutory code of practice on sexual harassment, to be developed by the Equality and Human Rights Commission, and a consultation on the evidence base for a new legal duty on employers to prevent workplace sexual harassment.

And in March, a consultation paper was issued on how to prevent misuse of confidentiality clauses in situations of workplace harassment or discrimination. Gers says: "There is concern that some employers have used confidentiality clauses to prevent victims of harassment from speaking out." The consultation period ends on 29 April.

Eversheds Sutherland's Rees says that the government is consulting on restricting the

use of confidentiality clauses in employment contracts and settlement agreements "only to situations where there is a reasonable commercial interest to protect".

And Capital Law's Thomas says: "The perception is that [non-disclosure agreements], which are legal and commonly used in settlement agreements between employers and departing employees, are also used to silence claims of harassment and bullying. The government's response to the consultation will impact on how employers can use such agreements in the future."

**CHANGES TO IR35 IN THE PRIVATE SECTOR**

This will transfer responsibility for determining the tax status of workers who supply services through an intermediary, such as a personal service company, to the ultimate client. Eversheds Sutherland's Rees says: "If your business engages labour through this route, extra tax liability could result if that labour is, in reality, an employment relationship between you and that individual." ■

**HOW MIGHT BREXIT CHANGE EMPLOYMENT LAW?**

**Anthony Rees**  
Eversheds Sutherland

"UK employment law is unlikely to change in the short or medium term as a result of Brexit, whether a deal is agreed or not. Current EU law on employment rights will overwhelmingly remain as part of UK law.

"If anything, the government appears to be suggesting that it is keen to increase employee protection rather than reduce it. In the long term, if there is a deal, the UK will broadly keep pace with future EU law, albeit with some divergence. In the event of no deal, the future of UK employment law depends primarily on the makeup of future UK governments. Based on recent evidence, that may be difficult to predict."

**Richard Thomas**  
Capital Law

"Initially there will likely be little or no impact. If the UK leaves the EU via the withdrawal agreement negotiated by Theresa May, all employment laws will remain the same until at least December 2020.

"If the UK leaves via a no-deal Brexit, it would be free to change its employment laws immediately, but it would need to get

parliament to approve any such changes. Parliament is very unlikely to do so without first having a general election, which would need to produce a majority in parliament for those who would wish to change employment laws."

**Debra Gers**  
Blake Morgan

"Theresa May has stated that there will be no rollback of workers' rights. As recently as 6 March she announced that MPs will be able to vote on any changes to workers' rights after Brexit, and they will be given a say over whether to adopt any new protections introduced in the EU so that the UK stays aligned with EU standards.

"In light of these proposals, there is nothing to suggest that there will be any immediate changes to employment law that are detrimental to workers' rights. In the event that there is no negotiated Brexit deal, the government has identified a couple of areas that are likely to be affected.

"The first would affect employees who are employed by UK employers but work in some EU countries, and they may not be protected on the insolvency of the

employer. The second is that it would not be possible to make a new request to set up a European works council or information and consultation procedure."

**Paul Shuttleworth**  
DJM Solicitors

"The government's approach to workers' rights has been clear in that major employment rights – discrimination, working time, TUPE [Transfer of Undertakings, Protection of Employment] – would be preserved.

"The government published a paper last year which stated that the EU [Withdrawal] Act 2018 would bring across the powers from EU directives. That meant UK workers would continue to be entitled to the rights they have under UK law but which are derived from EU law. Amendments would be made to legislation to reflect that the UK was no longer a part of the EU, but generally it wouldn't change, only really making provisions for redrafting relevant legislation to remove references to the EU."

**Note** Views were given between 11 and 15 March. Facts and opinions related to Brexit may have changed since then.

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## NEWS

### New role for Ferriman

Jon Ferriman, the former hub director of Tata Steel UK, has been appointed integration director of Liberty, the industrial group headed by Sanjeev Gupta. Ferriman served as a board member of Specific, the flagship research and development project involving Tata Steel, Welsh Government, Swansea University, and other industrial companies. In his new role, he will lead Liberty's expansion in continental Europe. Liberty has made a binding conditional offer to acquire seven steel producing sites from ArcelorMittal in six European countries. Liberty also owns works in Newport and Tredegar.

### Carbon Law offers stakes

Carbon Law Partners, the legal services business, has provided its lawyers and staff the opportunity to acquire shares in the firm and its platform. According to Carbon, its stakeholder model enables Carbon's partners to develop their own legal businesses and service their clients



The Institute of Directors (IoD) in Wales marked International Women's Day early with an adventure-flavoured event at Cardiff's Hilton Hotel. On stage were Everest explorer **Tori James**; Eluned Morgan, the Welsh Government's minister for international relations and the Welsh language; IoD Wales director **Robert Lloyd Griffiths**; **Maria Leijerstam**, the first person in the world to cycle to the South Pole; ITV's business and Brexit correspondent **Carole Green** and IoD Wales chair **Jean Church**.

### Millett to head JLL office

Justin Millett has been appointed as lead director of property consultancy JLL's Cardiff office and will remain its head of capital markets in Wales. He replaces **Chris Sutton**, who left to set up Sutton Consulting, which will focus on industrial and commercial property and economic development. Sutton is a former chair of CBI Wales.

# CIPD

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Keep an eye on the website for your chance to enter the 2019 awards.

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