



# Employment Law Update

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# Employment Law Update

## CURRENT RATES

### National Minimum Wage

The National Minimum Wage is increased on 1 October of each year. The rates for **October 2008** are as follows:



Age Group of Worker	From 1 Oct 2007 Hourly Rate	From 1 Oct 2008 Hourly Rate
Aged 22 & Over	£5.52	<b>£5.73</b>
Aged 18 - 21 and those aged 22 and over doing accredited training in the first 6 months of employment	£4.60	<b>£4.77</b>
Aged 16 & 17	£3.40	<b>£3.53</b>
Accommodation off-set (maximum deduction per day from NMW where the employer provides accommodation)	£4.30	<b>£4.46</b>

### Maternity and Paternity Pay

Statutory Maternity Pay and Statutory Adoption Pay are payable for a period of 39 weeks. Statutory Paternity Pay is payable for a period of two weeks. SMP, SAP and SPP are increased in **April** of each year. The rates from **6 April 2008** are as follows:

Type of Payment	Current Rate	Payment Period
Statutory Maternity Pay and Statutory Adoption Pay	90% of normal weekly earnings <b>£117.18 per week</b>	First <b>6 weeks</b> Next <b>33 weeks</b>
Statutory Paternity Pay	<b>£117.18 per week</b>	<b>2 weeks</b>

### Employment Protection Awards

The maximum limits on employment awards were increased on **1 February 2008** and apply to all dismissals after this date. The current rates are:

Award	Current Rate
Unfair Dismissal Compensatory Award (maximum)	<b>£63,000</b>
One week's pay for statutory redundancy pay and basic award	<b>£330</b>
Maximum amount for the basic award and statutory redundancy payment	<b>£9,900</b>

Awards for discrimination claims have no maximum limit.

## National Minimum Wage and Tips

Employees in the restaurant sector usually receive tips in addition to their basic wage. To avoid the deduction of National Insurance Contributions (NICs) on tips, a scheme is often set up through which a third party (usually the head waiter) apportions the tips between the staff. This is known as a “tronc scheme”.



Employers are under an obligation to ensure that they pay their employees the national minimum wage. However, some employers have been using their employees' tips to make up the national minimum wage. This was subject to a legal challenge in the case of *Commissioners for HMRC v Annabels (Berkley Square) Ltd & Ors 2008*. This has now clarified when tips can count towards the national minimum wage.

### Decision

The Employment Appeals Tribunal determined that only those tips that are distributed by the employer through its payroll system can count towards the national minimum wage.



This would not include tips distributed through the tronc scheme.

To get around this, once the employees' share of tips has been calculated under the tronc scheme these should be passed back to the employer who would then pay the tips to the employees through the payroll system. Tax would be deducted under PAYE, but not the NICs.

If the employer adds a service charge to the bill then the service charge will only count towards the national minimum wage if it is distributed through the payroll. The employer will still be liable for NICS on the service charge if paid through the payroll.

### Comment

The case makes it clear that only tips distributed through the payroll count towards the minimum wage. Employers who rely on tips to discharge their national minimum wage liability should now review their arrangements in the light of this case.

Of course, there is no guarantee that if you leave a tip, the waiter will get it!

## Changes to Sex Discrimination Law – Harassment and Maternity Rights

The legislation governing sex discrimination law in the UK is the Sex Discrimination Act 1975 (the “SDA”).

The SDA has remained largely unchanged for over 30 years. However, this has now changed with the Sex Discrimination Act 1975 (Amendment) Regulations 2008 (“the Regulations”) which became law on the **6 April 2008**.

The Regulations have changed the law in relation to protection from harassment and maternity rights.



### Definition of Harassment

Under the SDA an individual making a claim for harassment needed to be the victim of the harassment itself. The Regulations have expanded the protection so that an individual can now make a claim if she (or he) feels that her dignity has been violated or that the alleged conduct creates an offensive and degrading environment, even if the harassment is not aimed directly at her, for example, overhearing sexist comments in the work place, even if not directed at the individual. Clearly, this will have far reaching consequences if “innocent” by-standers are now able to make a claim for sex discrimination.

### Harassment from Customers or Clients

The Regulations also expand protection under the SDA from harassment by third parties, so that if an employer



knows that a customer has harassed one of its employees on at least two previous occasions, the employer will need to take reasonable steps to prevent further harassment. If further harassment does occur the employer will be liable to its employee for the harassment even though it was carried out by its customer and not another employee. This will increase the monitoring that an employer will need to undertake in the way that its business is operated.

As a result of the Regulations, an employer will now need to be vigilant about the behaviour of its customers towards its employees.

It is advisable for employers to ensure that they keep records of any complaints from staff concerning a customer’s conduct towards them.

### Comment

This change in the law puts the employer in a very difficult position. A client reception could now open up the

floodgates to claims of sex discrimination arising from the conduct of the employers, clients and customers, even though such conduct is out of the employer's control. However, it remains to be seen how this will work in practice.

### Changes to Maternity Law

Previously, the law stated that to claim pregnancy/maternity discrimination, a woman needed to show that she would not have been treated in a particular way, if she was not pregnant or on maternity leave. This is a conceptual argument which is often hard to prove in practice.



The Regulations have simplified the law so that in order to claim pregnancy/maternity discrimination, a woman will only need to show that she is being denied a right or being treated in a particular way because she is either pregnant, or has taken or is looking to take maternity leave. Effectively, if a woman has particular requirements as a result of her pregnancy or needs to take maternity leave and these requirements are denied, she will be able to claim sex discrimination.

For example, if a risk assessment needs to be taken out for a pregnant employee because she is pregnant and this is denied, it may be construed as sex discrimination. Further, if a pregnant woman's job requires heavy lifting, and she is asked to continue to do this whilst

pregnant, this could also be construed as sex discrimination.

### Maternity Leave - Extension of Benefits

These apply to employees whose expected week of childbirth is on or after **5 October 2008**.



All pregnant employees are entitled to 12 months maternity leave. The first six months maternity leave is termed as "ordinary maternity leave" ("OML"). The second six months is termed as "additional maternity leave" ("AML").

During the period of OML, an employee is entitled to statutory maternity pay and all other benefits under her contract of employment, e.g. health insurance.

Previously, during the period of AML the employee was entitled to statutory maternity pay for 15 weeks but not any benefits under her employment contract which was suspended during this period.

This has now changed under the Regulations. An employee on maternity leave is now entitled to the same benefits (excluding wages) during her additional maternity leave period as she would get during her ordinary maternity leave period. For employees who have extensive benefits e.g. company car or a health club membership, this will have a significant impact.

## FUTURE PROPOSALS

### Flexible working – revamped and extended



Currently, all employees (male and female) who care for children under 6 or who care for a disabled child under 18, have the right to request flexible working. The employer is obliged to consider the request but does not have to agree to it, subject to certain criteria.

Following the Walsh Review, the government has announced an intention to extend an employee's right to request flexible working so that it will apply to carers of children under 16. The current age limit of 18 for disabled children is unlikely to change. This is likely to come into force in **April 2009**.

The Walsh review recommended that much of the current procedure should remain the same. This includes the right for the employer to refuse the request on the grounds of:-

- The burden of additional costs
- A detrimental effect on ability to meet customer demands
- Inability to reorganise work among existing staff
- Detrimental impact on performance
- Insufficiency of work during the periods the employee proposes to work.
- Planned structural changes.

The government has already announced its intention to launch a campaign to raise awareness of the right to request flexible working among employees, especially fathers, as well as helping business understand how such requests should be handled.



The proposals are currently under public consultation but this period ends on 18 November 2008. Any employers who want to contribute to this should visit the Business Enterprise & Regulatory Reform Website ([www.berr.gov.uk](http://www.berr.gov.uk))

## Improved terms for Agency Workers

From **27 October 2008** all agency workers employed under fixed term contracts will be entitled to statutory sick pay (“SSP”).

SSP is payable if an employee is incapable of working for 4 or more consecutive days. The entitlement starts from the fourth qualifying day and is payable up to a maximum of 28 weeks. As from 1 April 2008 the rate of statutory sick pay is **£75.40** per week.

Further legislation on agency workers is expected as the government, the CBI and the TUC announced on 20 May 2008 that they had reached an agreement to extend some employment rights to agency workers.



Following this, the European Union’s Employment Council has agreed the draft wording of the Agency Workers’ Directive which had been stalled by negotiations for over six years.

The draft Directive entitles an agency worker (probably after 12 weeks service) to:

- Equal treatment in terms of pay, annual leave and maternity leave.
- Equal access to collective facilities (e.g. a canteen, child care facilities and transport service).
- To be informed about other employment opportunities available with the employer.



**NB:** Neither proposal covers pension rights.

The Directive will now be placed before the European Parliament for approval.

### Comment

The proposed new rights will not affect agency workers covering short periods of leave, but will make a difference for those workers on long term assignments e.g. maternity leave cover.

## EMPLOYMENT TEAM AT GSC

This update was produced by GSC's employment team. Members of the team are: Tessa Fry (Partner), David Nathan (Senior Solicitor), Nadia Adil (Assistant Solicitor) and Ross Waldram (Trainee Solicitor).

**Tessa Fry** is Head of GSC's Employment Law Group. She has practiced as a solicitor since 1989 and specialises in employment law. Tessa also advises on business immigration.

Tessa has considerable experience in advising companies (including multi-nationals) and individuals on all aspects of employment law from appointment to dismissal. This includes preparation of employment contracts, termination of employment, sickness absences, redundancy procedures, transfer of undertaking regulations, data protection and family friendly policies. She has also handled numerous employment tribunal claims relating to unfair dismissal, race, sex, disability and age discrimination and unlawful deduction of wages.

Tessa has represented clients in various High Court actions for breach of contract including injunctions to enforce restrictive covenants, actions for breach of copyright and confidentiality and claims for non-payment of bonuses.

Tessa has also lectured on new developments in employment law. Recent publications include articles in the London Evening Standard, People Management, Graduate Recruiter and Workplace Law. She was also directly quoted in "Working It Out" by Colin Cottell on Guardian Unlimited (Guardian Unlimited/money/work/working it out).

**David Nathan** qualified as a solicitor in January 2001 and before joining GSC, was a partner at Manuel Swaden, a four-partner firm in West Hampstead, where he specialised in employment, company/commercial and litigation.

David has experience in advising companies (including plcs) and individuals on all aspects of employment law including drafting employment contracts, service agreements, staff handbooks, compromise agreements, disciplinary and grievance procedures, redundancy procedures, unfair dismissal, wrongful dismissal, discrimination claims, employee benefits, employment law aspects of mergers and acquisitions, shareholders agreements and share purchase agreements.

David has also represented clients in employment tribunal and employment appeal tribunal matters.

**Nadia Adil** trained at GSC and qualified as a solicitor in March 2005. Nadia specialises in commercial litigation and employment law. She also advises on business immigration.

Nadia's employment experience includes advising companies and individuals on employment matters, in particular, drafting employment contracts, service agreements, disciplinary and grievance procedures, terms and conditions, maternity rights, employee benefits and compromise agreements. She has also represented clients in employment tribunal claims.

**Ross Waldram** joined GSC as a trainee in October 2007. Ross will be qualifying as a solicitor in October 2009.

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### Disclaimer

This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.