

# Employment and Company Law Update Winter 2016

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## EMPLOYMENT LAW

### Current Rates



### Employment Protection Awards

The maximum limits on employment protection awards are increased in April each year. From **6 April 2015** the rates are as follows and apply to all dismissals after this date:

Award	Current Rate (applies to dismissals from 6 April 2015)
Unfair dismissal compensatory award (maximum)	<b>£78,335</b> (maximum – or 12 months pay, whichever is lower)
One week's pay for statutory redundancy pay and basic award	<b>£475</b>
Maximum statutory redundancy payment and basic award	<b>£14,250</b>

Awards for discrimination claims have no maximum limit.

### 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 following the birth. For babies born after 6 April 2015, it is possible for parents to share up to 37 weeks of the mother's maternity pay.

The rates are increased in April each year and are as follows:-

Type of Payment	Current Rate from 6 April 2015	Payment Period
Statutory Maternity Pay and Statutory Adoption Pay (higher rate)	90% of normal weekly earnings <b>£139.58 per week*</b>	First 6 Weeks
Statutory Maternity Pay (basic rate)		Next 33 Weeks
Statutory Paternity Pay	<b>£139.58 per week*</b>	Up to 2 Weeks

\*or 90% of normal earnings, if lower.

### Statutory Sick Pay

Statutory Sick Pay is payable if an employee is incapable of work for 4 or more consecutive days. The entitlement starts from the 4<sup>th</sup> qualifying day up to a maximum of 28 weeks. From 6 April 2015, the SSP rate is **£88.45** per week.

### National Minimum Wage

The National Minimum Wage provides a legally binding minimum hourly rate of pay for most workers over compulsory school age. The rates are reviewed annually and are increased on the 1 October of each year. The

current rates applicable from **1 October 2015** are shown below:

	Hourly Rate from 1 October 2015
<b>Aged 21 and over</b>	<b>£6.70</b>
<b>Aged 18–20</b>	<b>£5.30</b>
<b>Aged 16-17</b>	<b>£3.87</b>
<b>Apprenticeship</b>	<b>£3.30</b>

## RECENT DEVELOPMENTS

### National Living Wage

From **1 April 2016**, employers will be required to pay all workers age 25 and over, the National Living Wage (NLW) of £7.20 per hour.

The NLW is essentially a premium minimum wage rate that excludes those aged 21-24 who are currently entitled to the highest minimum wage rate. This age group may, however, find themselves more employable if employers want to avoid paying the NLW.

The penalties for failing to pay the NMW and, from April, the NLW are high. From 26 May 2015, the penalty was increased to (maximum) £20k *per worker* (previously £20k total). This applies to pay reference periods commencing on or after 26 May 2015.

The NLW should not be confused with the living wage of £8.20/£9.35 (London weighting) per hour which is set by the Living Wage Foundation and has recently been implemented by various supermarkets on a voluntary basis.

### Comment

The penalties for underpayment of the NMW and, from April 2016, the NLW, are high. Employers should ensure that their company payrolls are updated in time for 1 April 2016 to ensure that staff aged 25+ who are currently paid less than the NLW will receive the NLW in April. The changes should also be notified to staff.

Employers should also be aware that dismissing individuals age 25 or over to avoid paying the NLW, could result in unfair dismissal claims (two years service required) and/or an age discrimination claims (no minimum service required). Refusing to recruit individuals aged 25+ to avoid paying the NLW could also result in age discrimination claims.

### Zero Hours Contracts – New Rights for workers

A zero hours' contract (ZHC) allow companies to employ individuals under employment contracts but with no guarantee of work. Such contracts frequently contain an exclusivity clause requiring the individual to work exclusively for the company, even though there is no guarantee of work.

Following critical press coverage, the Government banned exclusivity clauses in ZHC by making them unenforceable from 26 May 2016. However, there was no enforcement provision in the regulations and this has now been addressed.

With effect from **11 January 2016**, any dismissal of a ZHC employee is automatically unfair, if the principal reason is that s/he breached a contractual clause prohibiting him/her from working for another employer. No qualifying period of service is required to bring such an unfair dismissal claim; and it is also unlawful to submit a ZHC worker and/or an employee to any detriment if they work for another employer in breach of a clause prohibiting them from doing so.

### Comment

The new rights for ZHC workers will impact on employers who try to enforce exclusivity clauses, even if the detriment is simply not offering any work if the worker was previously unavailable due to working for another employer. Most ZHC workers will qualify for a waiver of fees in the Employment Tribunal and claims from large numbers of workers could be very costly.

Any employer which is using ZHC workers should ensure they remove any exclusivity clause from the contract and do not penalize ZHC workers who are unavailable for work.

## **Privacy and the workplace**

Barbulescu v. Romania – European Court of Human Rights (ECHR)

*The ECHR has determined that an employer does not infringe an employee's human right to a private life by accessing private messages that he had sent using an online messaging system at work.*

### Facts

B, a Romanian national was employed by a private company as an engineer in charge of sales. At his employer's request, he created a Yahoo Messenger Account to deal with clients' enquiries. On 13 July 2007, the employer informed B that his Yahoo Messenger communications had been monitored from 5-13 July 2007 and that the records showed he had used the internet for personal purposes contrary to internal regulations. When B denied this, he was presented with a transcript of messages he had exchanged with, among others, his fiancée and his brothers, some of which related to personal matters such as his health and sex life. B's employment was terminated on 1 August 2007 for breach of the company's regulations.

B contended that his employer had violated his right to privacy and following the dismissal of his claims by the Romanian Courts, the case was heard by the ECHR (many years later) on the basis that his employer's conduct had infringed his Article 8 Rights (the right to respect for private and family life).

### Decision

The ECHR held that there had been no violation of Article 8 as the company accessed the private information because they reasonably assumed that it was a work related account with client communications rather than a personal one (the personal use of the account having been banned under his employment contract). The ECHR concluded that the Romanian Courts had struck a fair balance between B's right under Article 8 and the interests of the employer to verify that its employees were completing their professional tasks during working hours. Further, B's employer had only used the transcript of B's personal communications to prove the breach, given his denial.

### Comment

Employers should not assume that this case means they can monitor all employees' personal emails used from a work computer or other device. Each case will depend on its own facts. Employers would need to show that any access was reasonable and necessary and there was a clear email/internet usage policy regarding personal communications.

## COMPANY LAW



### An Increase in Corporate Transparency

#### New Rules for Directors and Shareholders

*New rules aimed at increasing transparency around who controls UK companies were implemented in 2015 under the Small Business Enterprise and Employment Act 2015. Other measures are due to come into force at various dates during 2016.*

*The main changes brought in by the Act are:*

- Abolition of Bearer Shares;
- New register of persons with 'significant control';
- Abolition of corporate directors.

#### Abolition of Bearer Shares

A bearer share is a share in a company that is owned by a shareholder whose identity does not need to be disclosed. The company does not keep a register of shareholders of bearer shares. This clearly creates transparency issues as it is not clear who are the actual owners of the company.

Since **26 May 2015**, UK companies have been prohibited from issuing bearer shares. Companies have until **26 February 2016** to agree with holders of existing bearer shares that those shares are to be converted into registerable shares, details of which are available for public inspection. By **26 May 2016**, companies must apply to court for the cancellation of any remaining bearer shares (or potentially leave the company and each of its officers, open to a fine).

#### Information on Beneficial Ownership

From **April 2016**, a company will be obliged to keep a register of those persons with 'significant control' over the company which is to be available for public inspection. From **July 2016**, a company will be obliged to provide this information to Companies House on an annual basis and it will be public record.

There will be an obligation on the company to ensure that the register of person with 'significant control' is kept up to date.

'Significant control' means someone who either holds more than 25% of the shares in the company or more than 25% of the voting rights in the company or has the right to appoint or remove a majority of the board of directors of a company or has the right to exercise significant influence or control over a company. The 'significant control' can be exercised directly or indirectly i.e. through other people.

The register of persons with 'significant control' will include certain prescribed information regarding the person including their name and address.

A person with 'significant control' will be an individual but can also be another company. So, for example, if company A is owned by company B and company B is owned by individual C, then the register of persons with 'significant control' for company A will identify company B. The register of persons with 'significant control' for company B will identify individual C.

#### Corporate Directors

The use of corporate directors is another way in which individuals try to keep their name from public view. However, from **October 2016**, other than in some specified cases, all directors of companies registered in

England and Wales will need to be natural persons. As corporate directors will no longer be permitted, companies may need to review their list of directors and decide whether to remove or replace any corporate directors.

### Comment

The measures set out in the regulations do go some way towards increasing transparency for UK limited companies. However, it is still possible in certain circumstances for individuals who want to avoid public disclosure on company records to use offshore entities as part of their company structure in jurisdictions where the laws on transparency are less onerous than under UK law.

### **Full birthday no longer public record at Companies House**

Since **October 2015**, other than in certain specific situations, Companies House will not make the day a director was born public record (although the month and the year will still show on the public record). This is less to do with corporate transparency and more to do with combating identity theft. It follows from previous legislation which allows directors to show an address at Companies House that is not their residential address.

**For further information or advice, please contact:**

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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.