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## Employment Newsletter Spring 2020

In this edition, we consider the issue of employee wellbeing, particularly in the context of the current coronavirus pandemic.

We also remind employers of other important employment law developments, which it might be easy to overlook given the current challenges faced in relation to the coronavirus state of emergency.

This includes:

- Employee wellbeing
- Written particulars of employment
- Holiday pay
- Abolishment of the “Swedish Derogation”
- Parental bereavement act
- Statutory payment increases
- Termination awards exceeding £30,000
- IR35



## Employee Wellbeing.

### Employer Duty of Care

At a time of unprecedented risk to health for many workers, particularly vulnerable workers, employers must have at the forefront of their mind the health, safety and wellbeing of their employees.

It is essential that employers consider very carefully which employees should be required to attend work and, where employees are required to attend work, what measures must be put in place to ensure their health, safety and wellbeing. There is detailed information on our dedicated [coronavirus web page](#) about these issues.

### Home Working

A key feature of the Government's advice is that, where possible, employees should work from home. For many businesses home working arrangements were established as an emergency measure and it is now clear that these arrangements will need to persist for several weeks.

In accordance with Health and Safety legislation, employers remain responsible for an employee's welfare, health and safety even when the employee is working at home. Employers who require employees to work from home for the foreseeable future should consider how they can satisfy the requirement to carry out risk assessments and identify any hazards in relation to employees, including in relation to, potentially makeshift, workspaces.

In addition to carrying out risk assessments, employers must also consider their obligations to:

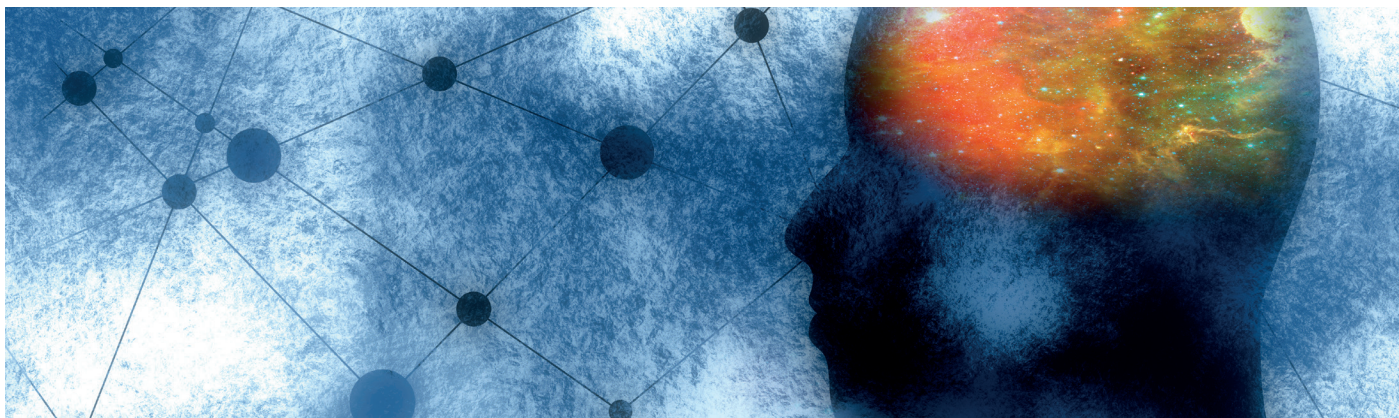
- provide equipment to employees to carry out work that is suitable for purpose, in good working order and inspected regularly;
- ensure there is sufficient lighting in the employee's home working space;
- provide first-aid provisions; and
- establish procedures for employees to report any accidents that occur whilst homeworking.



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## Mental Health.

Irrespective of whether an employee is working at a place of work or at home, employers are often able to more easily recognise when an employee has a physical condition or impairment. However, mental conditions or impairments (the ones we cannot usually see) can sometimes be missed and much less understood.

Prior to the coronavirus pandemic, numbers of employees suffering from stress, anxiety and depression had been on the rise, with 11 million working days lost per year due to these issues. New figures suggest isolation, lockdown and working from home is increasing employees' anxiety, naturally. Further, mental health issues are likely to be even less noticeable or more well-hidden where an employee works at home.

Accordingly, employers will need to be proactive to ensure that the duty of care owed to employees is properly and thoughtfully discharged. Now, more than ever, it is important for employers to make enquiries and encourage employees to be vocal when suffering from any form of mental health issues. Where necessary, employees should be encouraged to use employee assistance programmes or seek advice from medical professionals, their line managers or human resource contacts.

Employers are encouraged to provide employees with guidance on how to manage any stress caused by working from home, how to exercise from home and to provide a way to connect with support contacts to discuss any problems or concerns that employees may have. Many employers use an intranet or other platforms to share tips and tricks relating to working from home and managing stress and wellbeing.

An employee's mental health condition also amount to a disability, within the meaning of the Equality Act 2010, if they have suffered, or are likely to suffer from, the condition for more than twelve months and the illness has an adverse, substantial impact on their ability to carry out day to day tasks. Employers have a legal duty to ensure employees with disabilities do not suffer any direct or indirect discrimination because of a disability.

An employer's failure to support a disabled employee may lead to a failure to make reasonable adjustments and a discrimination claim. A decision to dismiss or discipline an employee because of a disability may lead to a direct discrimination claim. Discrimination claims can be raised irrespective of length of service.

If an employer does discriminate against a disabled employee, an employee may also choose to resign leading to a potential claim of constructive unfair dismissal. In such a scenario, the employee would argue the employer's lack of support or unfair treatment, related to their disability, amounted to the employer's fundamental breach of the employee's contract of employment.



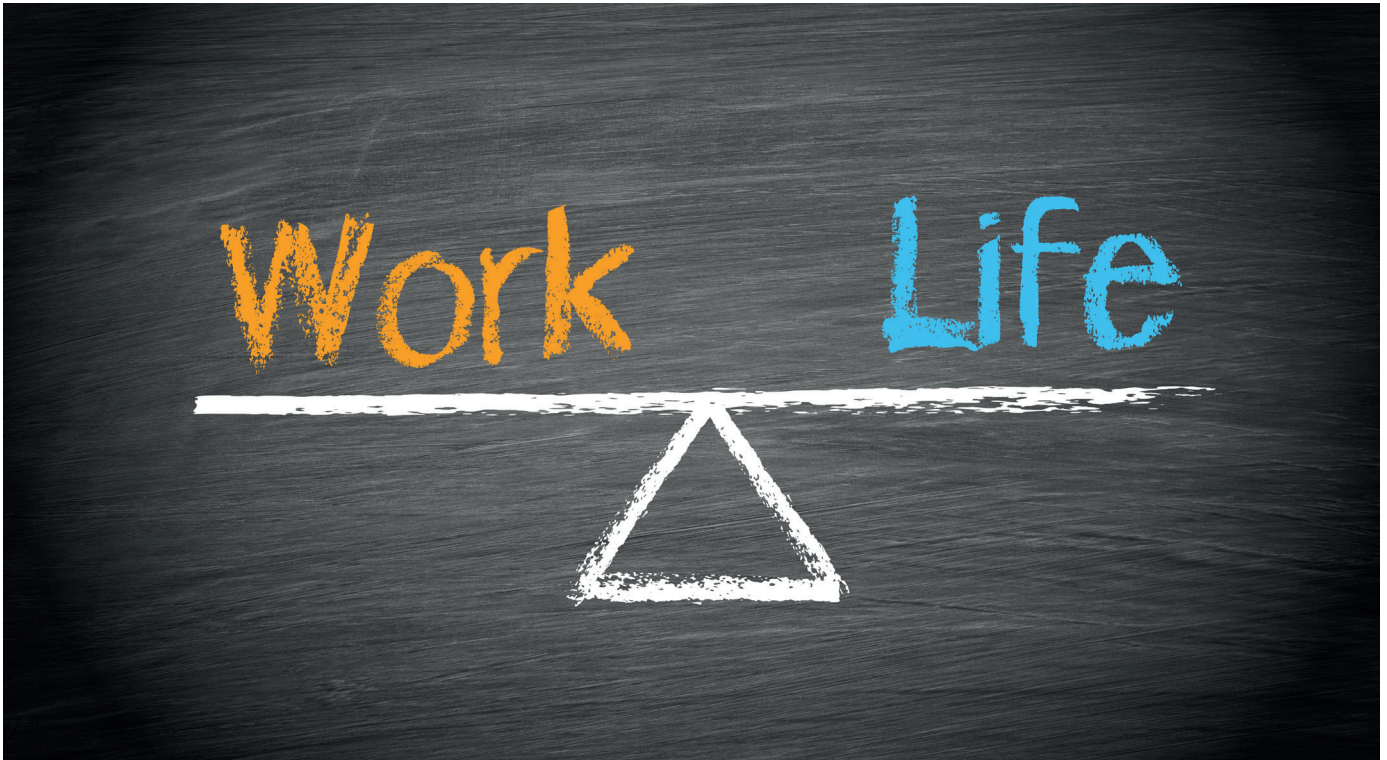
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## Work Life Balance.

With every hour (other than exercise and essential, infrequent, food shopping) spent indoors, it is easy to lose track of when the working day begins and ends.

Many employees are working harder and sometimes longer, to help businesses survive these uncertain times and it is therefore crucial for employers to recognise and encourage employees to turn off the computer monitors at the end of the day and leave the emails to the following morning or until Monday.

Whilst employers adapt to operating virtual offices, they must not forget that the Working Time Regulations 1998 still apply. Employees are entitled to a 20-minute break after working six hours or more, an 11 hour break between each shift and an uninterrupted break of 24 hours over a seven-day period (or 48 hours over a 14 day period).

Additionally, the Working Time Regulations 1998 provide employees with a minimum of 5.6 weeks' annual leave per year. In these uncertain times, some employers may find themselves needing 'all hands-on deck' whilst others may have a large percentage of the workforce furloughed, accruing annual leave but not wishing to take it.

Employers are entitled to refuse employees' requests for annual leave (or, conversely, compel employees to use annual leave) and with effect from 26th March 2020, employees are entitled to carry over four weeks' statutory annual leave, that could not be taken due to the pandemic, to be taken in the following two holiday years. However, employers should not forget the overriding duty of care to employees and that the purpose of annual leave is to ensure health and safety.



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## Leadership & Communication.

Given reported increased levels of general anxiety and the sudden switch from a busy workplace to a place of isolation, communication and strong, positive, leadership is more important than ever.

Leaders should ensure there are easy and reliable methods of communication. Managers should check in on their teams but not be overbearing and should be understanding of difficulties relating to homeworking providing assistance where possible.

An overly distant approach may leave an employee feeling unsupported and unguided. An overbearing approach runs the risk of undermining trust or amounting to bullying and harassment, particularly where current circumstances may mean that employees are working in unfamiliar ways and around personal commitments such as childcare.

In either case the employer must be mindful of the implied term of trust and confidence underpinning the employment relationship.

In addition to the communication between manager and employee, it is good practice to encourage and assist employees in interacting with colleagues. This may be achieved by virtual 'coffee breaks' or other social events during, or outside of, working time. Providing employees with the ability to maintain a regular working arrangement will help to alleviate anxiety and stress.



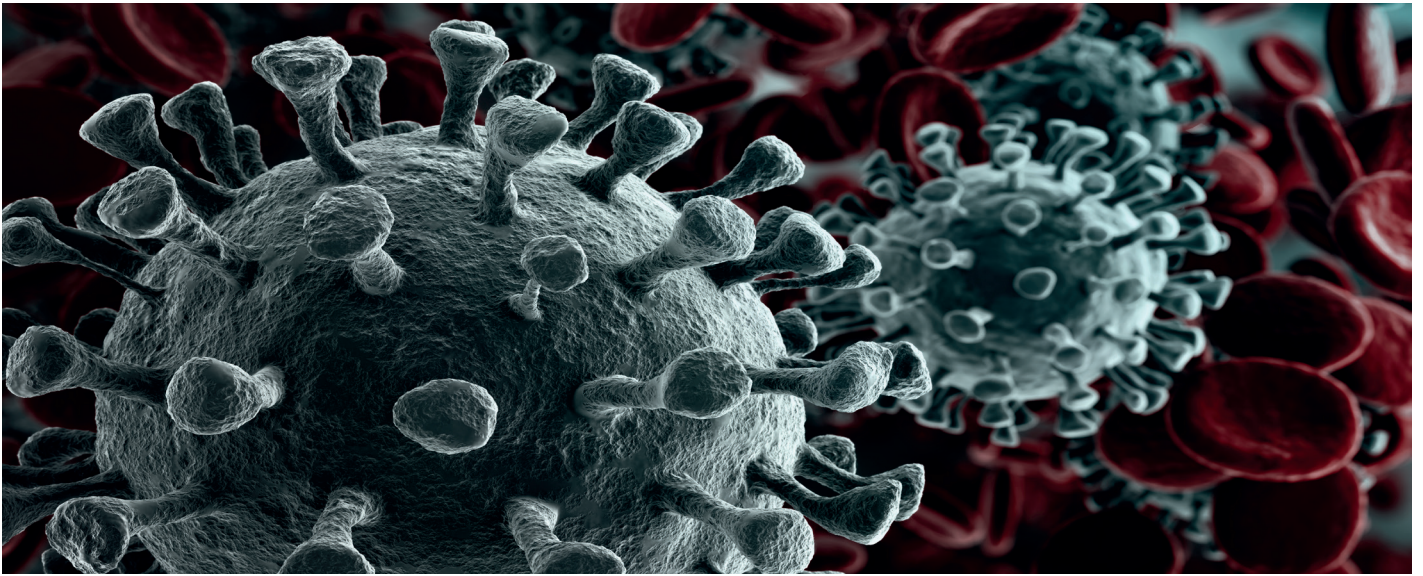
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## Important Changes.

The Government has reacted to the coronavirus crisis with emergency changes to statutory sick pay, absence certification and the carryover of annual leave. For further details see our dedicated [coronavirus webpage](#).

In addition, and despite the huge upheaval of recent weeks, it remains important for employers to react to the following changes which were planned prior to the national emergency and which, despite it, were implemented on 6th April 2020:

## Written Particulars of Employment.

Section 1 of the Employment Rights Act 1996, sets out the basic required written information that an employer must provide to an employee on the employee's employment commencing. From 6th April 2020, employees and workers must be provided with the written particulars of employment, with the majority of written particulars being provided in a single document, on or before the commencement date. Previously, employers had 8 weeks to issue the written statement and it was only necessary for employees (and not workers) to receive it.

In addition to the written information which was required prior to April 6th 2020, the written statement must now also include the following details:

- working days and hours and whether working hours or days are variable (and if so, details as to how they may vary);
- any other paid leave;
- any remuneration or benefits (in addition to pay);
- any probationary period, including any conditions and its duration; and
- any training provided by the employer (either at its cost or not).

The above rules apply to all new workers and employees commencing roles from 6th April 2020 onwards. Where, after 6th April 2020, there is a change to any employment particulars that are required to be given under the new rules, an employer must provide current employees with a written statement containing details of the change. An employer is also under an obligation to provide a revised written statement to any current employee (i.e. those engaged prior to 6th April 2020) who requests it, within one month of the request.



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## Holiday Pay.

The reference period used for determining an average week's pay (for the purpose of calculating holiday pay) has increased from 12 weeks to 52 weeks with effect from 6th April 2020.

An employer must include in the calculation compulsory and voluntary overtime, commission, shift allowances, performance bonuses and call out pay where this is regularly earned.

Where an employee has worked for fewer than 52 weeks, the employer should look back at the actual number of weeks for which the worker has been employed and should disregard any weeks in which the worker did not work or receive pay.

In light of the current pandemic, the Government has implemented the Working Time (Coronavirus) (Amendment) Regulations 2020. These regulations relax the ability of employees to carry over annual leave that could not be taken because of the pandemic.

**Please see our blog in relation to this change here.**



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## Abolishment of the “Swedish Derogation”.

The Agency Worker Regulations 2010 require that workers who are provided by an agency to an end-user, the hirer, must be afforded the same employment rights (such as pay, working time, annual leave and terms) ordinarily included in contracts of employment for employees directly employed by the hirer, after 12 continuous weeks working for the hirer.

However, the so-called Swedish Derogation allowed agencies to avoid this parity between agency workers and the hirer’s employees where the agency worker is given a contract where the agency worker is paid a basic wage on a weekly or monthly basis regardless of whether the worker is carrying out work for a hirer.

With effect from 6th April 2020, all agency workers now have a right to same basic terms and basic working and employment conditions as the hirer’s employees, after 12 weeks.

Agencies must also provide agency workers with a written statement by 30th April 2020 to confirm that the Swedish Derogation no longer applies.



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## Parental Bereavement Act.

With effect from 6th April 2020, the Government has also introduced new statutory rights to parental bereavement leave and pay.

These statutory rights are afforded to parents, partners of parents, adoptive parents and intended parents who have suffered a death of their child under the age of 18, or a stillbirth following 24 weeks of pregnancy.

Employees are entitled to take a period of leave of either one week or two weeks, depending on which they prefer or require, from the first day of their employment and can take this leave within 56 weeks of the death or stillbirth.

If an employee is dismissed or unfairly treated for taking this leave, the employee would be entitled to bring an automatic unfair dismissal claim or detriment claim in the Employment Tribunal.

In addition to parental bereavement leave, employees who have worked for their employer for six months at the time of the child's death or the stillbirth are entitled to parental bereavement pay at a rate in line with statutory maternity pay (currently £151.20) or 90% of their weekly wage if less than £151.20, as long as they earn a minimum of £120 per week.



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## Statutory Payment Increases.

The Government has increased the national minimum wage as follows:

- |                             |       |
|-----------------------------|-------|
| • workers aged 25 and over: | £8.72 |
| • workers aged 21 to 24:    | £8.20 |
| • workers aged 18 to 20:    | £6.45 |
| • workers aged under 18:    | £4.55 |
| • apprentices:              | £4.15 |

The following payments have also been increased:

- |   |         |
|---|---------|
| • a statutory week's pay (for the purposes of calculating statutory redundancy pay and unfair dismissal basic awards) | £538    |
| • statutory maternity, paternity, adoption, shared parental weekly pay  | £151.20 |
| • statutory sick pay, per week  | £95.85  |
| • maximum unfair dismissal basic award/maximum statutory redundancy payment   | £16,140 |
| • maximum ordinary unfair dismissal compensatory award  | £88,519 |
| • guarantee payment per day   | £30     |

## Termination Awards Exceeding £30,000.

If a termination award within the meaning of s403 ITEPA 2003 (such as a settlement payment or enhanced redundancy payment) is paid to an employee that exceeds £30,000, any amount of money over and above £30,000 is now subject to Class 1A Employer National Insurance Contributions in addition to income tax.



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## IR35.

Finally, the Government has postponed the implementation of the revised IR35 scheme until April 2021 in view of its complexity and businesses' need to focus on their response to the coronavirus crisis.

### Further Information and Guidance.

For more information on matters discussed in this newsletter or any other employment law issues please contact our specialist employment team or call 0161 941 4000.

If you require coronavirus related employment law guidance, please visit our website <https://www.myerson.co.uk/coronavirus-updates>.

You can also view our [CJRS Q&A Webinar here](#) or to find out more contact our specialist employment team today.



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If you would like to know more, please contact Charlotte Gilbert on 0161 941 4000 or email [charlotte.gilbert@myerson.co.uk](mailto:charlotte.gilbert@myerson.co.uk) for more information.

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