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Skadden

UK Employment Flash

Insights into the latest employment news

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UK Government Plans To Limit Duration of Non-Compete Restrictions in Employment Agreements to Three Months

As part of efforts to increase the competitiveness of UK firms in global markets and promote their growth, the UK secretary of state for business and trade announced plans to restrict the duration of non-compete post-termination restrictions in employment agreements.

The current law on restrictive covenants in the UK has been settled for some time. Generally, post-termination non-compete restrictions (like all post-termination restrictions) are only enforceable if they are intended to protect a legitimate business interest (such as the goodwill in the business, its confidential information or the stability of its workforce) and apply no further than is reasonably necessary to protect that interest — and therefore are appropriately limited by, among other things, duration and geographical scope.

In May 2023, the UK secretary of state for business and trade, Kemi Badenoch, announced plans to restrict the duration of non-compete post-termination restrictions as part of a wider package of reforms to address "the red tape that holds back UK firms, reduces their competitiveness in global markets and hampers their growth". In a previous consultation on this issue in 2020, the UK government had considered banning non-compete restrictions altogether in the employment context or requiring employers to pay employees compensation during the period of the restriction. Instead, the government has proposed to limit the scope of non-compete restrictions in employment agreements to three months following the termination of employment. All other post-termination restrictions (such as non-solicit and non-dealing restrictions) are not addressed in the new changes, and confidentiality clauses will also remain subject to the existing rules.

Currently, the proposals are light on detail, but we anticipate the following areas of focus for employers:

- **Shareholder and partnership agreements.** The proposals state that the changes will apply only to employee and worker contracts and will not impact non-compete provisions in shareholder or partnership agreements. The proposals are unclear on the extent to which the new rule will apply in situations where a shareholding or partnership arrangement may be incidental to an employment relationship. As a result, we expect increased focus on including non-compete provisions in equity incentive and shareholder documents, though the efficacy of those provisions will likely depend on the extent to which the grant of equity relates to the individual's employment as opposed to genuine ownership of the business.

- **Longer notice periods and garden leave provisions.** Employers will need to rely more heavily on long notice periods and garden leave provisions to restrict the activities of their departing employees. This will result in increased costs (compared to the current position whereby a company can enforce a non-compete restriction without paying the employee for that time), but is likely to increase certainty regarding the restrictions that will apply when an employee leaves.
- **Confidentiality clauses.** Employers will need to focus more on their confidentiality clauses and other post-termination restrictions (such as non-solicit and non-dealing restrictions). This will become particularly important when an employer is seeking to restrict an employee's activity post-termination of employment.
- **Application of the new rules.** Whether the new rules will apply to all existing non-compete arrangements in employment agreements, or only those in agreements entered into after the legislation comes into force, is unclear. Also there is no indication of whether a global cap of three months will be applied to existing non-compete restrictions or if those that exceed three months will fall away altogether. We suspect the time limit will apply to all non-compete restrictions, regardless of when they have been entered into, but we await clarity on these points.

There is currently no firm timeline for when these changes will come into effect, with the proposals stating that legislation will be passed "when Parliamentary time allows".

UK Government Plans To Simplify TUPE Consultation Requirements

The UK government has issued proposals to streamline the TUPE transfer regime to reduce administrative burden for UK companies by removing the requirement to elect employee representatives for the purpose of TUPE consultations for businesses with fewer than 50 employees and transfers affecting fewer than 10 employees.

In May 2023, the UK government issued proposals to reform certain employment laws, which included proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to "save businesses red tape and improve engagement with workers" by simplifying the TUPE transfer process.

Pursuant to Regulation 13(6) of TUPE, an employer who envisages that it will take measures in relation to an employee affected by a TUPE transfer that are in connection with the TUPE transfer, "shall consult with the appropriate representatives of that employee with a view to seeking agreement to the intended measures". "Appropriate representatives" of the affected employees may be either a trade union or, where there is no recognised trade union, employee representatives that have a mandate for TUPE consultations. If the business does not already have employee representatives with a mandate for TUPE consultations, the election and appointment of new representatives can be a time-consuming process and impact a transaction timeline.

An exemption to the requirement to inform and consult appropriate representatives currently applies where the employer employs fewer than ten employees (Regulation 13A of TUPE) and where there are no existing appropriate representatives and the employer has not invited any of the affected employees to elect employee representatives.

The government's recent proposals would remove the requirement to elect appropriate employee representatives for the purpose of a TUPE consultation for businesses with fewer than 50 employees and transfers affecting fewer than 10 employees. In either of those circumstances, businesses will be allowed to consult directly with the affected employees. If the business has a recognised trade union or employee representatives with a mandate for TUPE transfers already in place, the business would still be required to consult with them.

While the extension of the exemption to the requirement to appoint appropriate representatives is a minor change to the existing TUPE regime, the policy paper recognises more generally that "there are some simplifications that can be made to reduce administrative burden without changing employee rights". How the newly proposed changes will be implemented and whether the government intends to make further proposed changes to the TUPE landscape in the future remain to be seen.

ICO Publishes Guidance for Employers on Responding to Data Subject Access Requests

The ICO has released guidance to clarify key procedures and provide examples of employers' legal obligations and general good practices in relation to DSARs.

In May 2023, the Information Commissioner's Office published new guidance for businesses and employers on responding to Data Subject Access Requests (DSARs). DSARs are requests made by individuals to organisations such as public bodies or employers to access an individuals' personal information. Organisations must respond to a DSAR within one month of receipt of the request (or up to two months for a particularly complex request or if the individual has sent multiple requests), so DSARs can be both time-consuming and costly for organisations. If an organisation fails to respond to a DSAR promptly, the organisation can be subject to fines or reprimand.

According to Elanor McCombe, the Policy Group Manager at the ICO, the purpose of the new guidance is to "support employers in responding to subject access requests in a proper and timely manner, and to ensure that employees are able to access their personal data when desired". **The ICO released the guidelines upon its finding that employers often misunderstand the nature of DSARs or underestimate the importance of responding to such requests.** Notably, from April 2022 to March 2023, the ICO received 15,848 complaints relating to DSARs.

The newly published guidance clarifies key points and includes helpful examples and case studies that distinguish an employer's legal obligations from general good practice:

- **No specified format:** There are no formal requirements for the format of a DSAR, and an employee can make a request verbally or in writing, including by social media. Employees can make a DSAR to any part of the organisation, but employers should maintain a designated person, team and email address to handle DSARs.
- **Clarification of requests:** While employers may request clarification of a DSAR, they should only do so if further specification is genuinely required to respond to the DSAR and the employer possess a large amount of information about the relevant employee.
- **Management information exemption:** Employers could refuse to provide certain information on the basis that it is likely to prejudice the conduct of the business or organisational activity. The guidance gives the example of staff members requesting information to determine whether they are in the selection pool for likely future redundancies. In this type of situation, management may be able to rely on the management information exemption, subject to careful consideration of the request.
- **Manifestly unfounded requests:** Employers may refuse to comply with DSARs if the requesting workers clearly have no intention to exercise their right of access or if a request is malicious in intent. Factors that may indicate malicious intent include making unsubstantiated accusations, targeting specific employees or sending multiple requests as a tactic to cause disruption rather than to exercise the employee's access rights. For example, a request may be manifestly unfounded where an employee, after being made redundant, makes a DSAR but states that he will withdraw it if the employer can agree on an improved financial package.
- **Manifestly excessive requests:** An employer may refuse to comply with a DSAR if it is manifestly excessive, *i.e.*, clearly or obviously unreasonable. To determine whether a request is manifestly excessive, the employer must balance the request against the burden or costs involved in responding to it. A DSAR is not manifestly excessive just because it covers a large amount of data or will require a lot of time and expense to respond.
- **Settlement agreements:** The guidance states that a settlement or nondisclosure agreement cannot override the right to obtain personal information pursuant to a DSAR. To the extent a settlement agreement limits an employee's rights in this regard, those settlement provisions will be unenforceable.

Throughout the guidance, the ICO reiterates that employers must consider each DSAR based on its facts, taking into account all the circumstances of the request. While the ICO is willing to provide guidance to employers on the interpretation of data protection legislation, employers must use the general guidance provided by the ICO to themselves determine what should be included in a DSAR response.

ACAS Publishes New Guidance on Reasonable Adjustments for Mental Health

New guidance explains and troubleshoots employers' responsibilities regarding mental health-related accommodations in the workplace.

ACAS, the UK's Advisory, Conciliation and Arbitration Service, recently published guidance addressing mental health in the workplace. Focus on mental health in the workplace has increased, most likely as a result of reported increases in concerns about mental health (particularly following the COVID-19 pandemic) and from efforts to dispel taboos associated with mental illness. If an employee's mental health amounts to a disability (namely, where an employee has a mental impairment that is likely to affect their normal day-to-day activities for 12 months or more), employers need to be aware of their obligations under the Equality Act 2010. The ACAS guidance addresses a key underlying legal obligation in this context — the duty to make reasonable adjustments to ensure workers with disabilities or health conditions are not substantially disadvantaged. While many employers will be accustomed to this obligation in the context of physical impairments (for example, by supporting access to work and providing equipment to assist employees with physical disabilities), many are less familiar with the nuance of mental health considerations. The ACAS guidance is a welcome document to support employers in considering reasonable adjustments relating to mental health and to advise how to handle the accompanying conversations sensitively.

Disability is defined under the Equality Act 2010 as a mental or physical impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. The ACAS guidance highlights that even where employees do not themselves recognise their mental health condition as a disability, employers should be aware that it might be. Employers must make reasonable adjustments where they know or could reasonably know someone is disabled, where a disabled person is having difficulty with any part of their job, or is absent because of or for a circumstance linked to the disability; **this employer responsibility is not only relevant where adjustments are requested by the individual**.

What makes mental health particularly tricky to navigate as an employer is that many aspects of a condition will be unique to an individual and may not be visible or apparent to others. Mental health conditions can develop either as a result of specific events or gradually over time. Each individual can manifest different signals of a condition, which can also fluctuate, meaning that the difficulties affected employees might experience at work may change over time. ACAS acknowledges that these facts may make identifying employee mental health conditions and making reasonable adjustments challenging for employers. The ACAS guidance provides practical advice and helpful examples of "reasonable adjustments," including:

- Reducing an employee's more stressful responsibilities (for example, phone calls or customer-facing work).
- Agreeing to preferred communication methods (for example, avoiding spontaneous phone calls).
- Relocating an employee's workspace to a quieter area to reduce sensory demands.
- Offering an extended/phased return to work to enable an employee to build up hours gradually (if this is not already company policy).
- Modifying supervision to provide regular check-ins, prioritise work and create structure in the workday.

The guidance also emphasises the need to review any reasonable adjustments on an ongoing basis. In addition to the fact that mental health conditions can fluctuate, individuals suffering from mental illness may not be aware of what would help them at work. Initial reasonable adjustments are just a starting point and should be reassessed with follow-up meetings to discuss if helpful. **A key theme of the ACAS guidance is a recommendation for employers to be flexible in their approach and to respond to changing needs**.

The ACAS guidance is timely and its practical suggestions should give employers some confidence about how to support mental health in the workplace.

Incentives and Remuneration Update

- **The UK government is continuing to focus on improving the efficiency of UK tax-advantaged shares plans in order to increase their adoption and participation rates.**
- **HMRC has confirmed that bonus rates will apply to SAYE savings contracts for the first time in almost a decade — for SAYE invitations from 18 August 2023.**
- **The Financial Reporting Council has published a consultation paper proposing revisions to the UK Corporate Governance Code to expand executive remuneration disclosure requirements for UK-listed companies.**

Tax-Advantaged Share Schemes

In June 2023, the UK tax authority, His Majesty's Revenue and Customs (HMRC), **published an independent research report evaluating the impact of tax-advantageous types of share plans such as Company Share Option Plans (CSOPs), Save-As-You-Earn (SAYE) plans and Share Incentive Plans (SIPs)**. According to the report, 81% of businesses say these schemes help "boost their business," with almost 75% saying the plans have helped them retain and recruit staff. However, companies also reported that the difficulty associated with setting up and administering the schemes acts a barrier to implementation, and smaller companies felt that the schemes were not suitable due to issues relating to valuing private company shares and controlling shareholdings. The UK government is continuing to focus on improving the efficiency of UK tax-advantageous shares plans in order to increase their adoption and use.

As announced in the UK Treasury's Spring Budget 2023, on 5 June 2023, the UK government published a call for evidence on SAYE schemes and SIPs, which are two types of "all-employee" share incentive plans providing for tax-advantageous treatment, provided the relevant HMRC-approved requirements are complied with. The call for evidence (which closes on 25 August 2023) seeks to collate views on the effectiveness of these arrangements, potential barriers to participation and adoption rates, with the aim of improving and simplifying the schemes in the future. SAYE schemes and SIPs have been operated since 1980 and 2000 respectively, and although there have been legislative updates since the plans were first established, there has been for some time a general consensus that these schemes need refreshing (as discussed in our previous client alert "A New Focus on UK Tax-Advantaged Share Schemes"). **The call for evidence is a significant opportunity for stakeholders to suggest where these plans could be made more flexible and how to make them more attractive to a wider range of companies and participants**.

Separately, HMRC recently published a new employee-related securities (ERS) bulletin on SAYE plan bonus rates. Under the SAYE plan, participants are granted an option, and make monthly savings contributions (via a linked savings contract over a three- or five-year savings period), which are then used to pay the exercise price of the option. The SAYE plan legislation includes a bonus rate mechanism whereby participants may be entitled to a tax-free "bonus" at the end of their savings period, which is essentially a form of interest accrued on their savings over that period. The bonus rate is set at the grant date of the option (*i.e.*, at the beginning of the savings contract), and has been 0% since 2014, due to very low UK interest rates set by the Bank of England (also known as the "base rate"). **ERS Bulletin 51[1] confirms that for SAYE invitations made from 18 August 2023 onwards, both the three-year and five-year bonus rates will be calculated using a new automatic mechanism**, by reference to the prevailing base rate (at the grant of the option). HMRC anticipates publishing the initial rates (to apply to savings contracts entered into from 18 August) in early August 2023. **Companies have not had to consider an SAYE bonus rate in almost a decade, so SAYE plan operators will want to check their underlying SAYE rules, and ensure that participants are aware of and take advantage of this development effectively**.

HMRC also recently published updated guidance in its Employee Tax Advantaged Share Scheme User Manual (ETASSUM) to reflect the changes to CSOP and Enterprise Management Incentives (EMI) schemes that came into effect on 6 April 2023. As a reminder (and as highlighted in our November 2022 *UK Employment Flash* client alert):

- Regarding CSOP options:
  - The individual limit on the value of shares that may be subject to a CSOP option was increased from £30,000 to £60,000.
  - The restriction applying to companies with more than one class of ordinary shares in their share capital was removed.
- Regarding EMI options:
  - The requirement for an EMI option agreement to set out details of restrictions applying to the underlying shares was removed.
  - Employees are no longer required to sign a declaration confirming that they meet the working time requirement (although the requirement itself must still be met for an employee to be eligible to receive an EMI option).

Starting on 6 April 2024, the deadline for reporting the grant of an EMI option to HMRC will be extended (from the current deadline of 92 days from grant) to 6 July following the end of the tax year. **This amendment is expected to be included in the draft Finance Bill 2024, which will be published on 18 July 2023, and will bring employer EMI reporting obligations in line with those applicable for other employee share plans**.

Executive Remuneration of UK-Listed Companies

The Financial Reporting Council recently published its consultation paper for proposed revisions to the 2018 UK Corporate Governance Code (the Code). Premium-listed companies on the Main List of the London Stock Exchange are required to comply with the Code, or otherwise explain any noncompliance in their annual reports. The deadline for comments on the revised version of the Code is 13 September 2023, and a revised Code would likely take effect for fiscal years starting on or after 1 January 2025.

A key proposed change from a remuneration perspective is a new "Principle P" that explicitly requires director remuneration outcomes to take account of ESG considerations. This inclusion would reinforce guidance already published by institutional investors, as discussed in our client alert on ESG predictions for 2023. The alignment of a company's remuneration policy with that company's ESG strategy is already well underway in market practice — Willis Towers Watson's latest global study[2] of ESG incentives in executive compensation found that over 75% of companies globally now use ESG metrics when determining executive compensation (ranging from approximately 69% in the U.S. to approximately 90% in Europe and the UK).

The consultation paper also proposes to remove the requirement to explicitly refer back to the principles of "clarity, simplicity, risk, predictability, proportionality and alignment to culture" with respect to executive remuneration in a company's directors' remuneration policy (as required by Provisions 40 and 41 of the existing Code), as this has led to generic, boilerplate disclosures rather than bespoke reporting practices. **The Code revisions would instead require companies to reference their broader approaches to workforce remuneration, culture and related policies and to explain their policies for investing in and rewarding their workforces**.

[1] HMRC's ERS Bulletin 51.

[2] Willis Towers Watson's global study on ESG incentives in executive compensation.

The proposed revised malus and clawback Code provision states (more specifically) the existing requirement to include provisions for recovery of amounts paid. The proposed amendments require the directors' remuneration report to include a description of the company's malus and clawback arrangements, including disclosure regarding whether such provisions have been enforced during the previous five-year reporting period. While malus and clawback provisions are now prevalent in incentive schemes and disclosure of such terms is common, the new proposals require more specific and detailed disclosure than perhaps commonly practiced. **Companies would be required to set out their minimum malus and clawback triggers and minimum clawback period**.

While the 2023 voting season is now drawing to a close, compensation for executives at UK-listed companies remains in the headlines. Following recent comments made by Julia Hoggett, the CEO of the London Stock Exchange,[3] on how executive pay might impact the UK's competitiveness as a listing venue, we published a 12 June 2023 client alert "Are UK-Listed Companies Paying the Price for Executive Talent?" discussing comparative UK and U.S. pay practices. Whether Ms. Hoggett's suggestion that UK companies should be encouraged to compete for talent on a global basis and remunerate their executives more favourably will impact UK investor sentiment on executive compensation going forward remains to be seen. Likewise, how directors' remuneration might feature in the context of the UK Financial Conduct Authority's reforms to the UK-listing regime has yet to be determined.

[3] London Stock Exchange Group, "We Need a Constructive Discussion on the UK's Approach to Executive Compensation".

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