Reporting Sexual Harassment

#MeToo has been trending over the last few months and it has enabled an unprecedented number of sexual harassment victims to come forward. The high-profile allegations made by the likes of Angelina Jolie and Gwyneth Paltrow against equally high-profile offenders such as Harvey Weinstein and film star Kevin Spacey, have brought the underreported and apparently endemic issue to the forefront of topical issues.

Sexual harassment is a discrimination issue. Harassment (in this context) can be a single act of unwanted treatment that may degrade, humiliate, offend or intimidate another person – male or female. Treatment of this nature is unlawful under The Equality Act 2010, which prohibits discrimination against a person on the grounds of a protected characteristic.

Under this Act employers can be liable for a claim if they did not take reasonable measures to prevent the harassment. This means that employers are required to do what they can to prevent such treatment and if they should become aware of an issue it must be dealt with robustly, with urgency and with sensitivity. Employers also have vicarious liability for harassment that takes place 'in the course of employment' which can include after work drinks (see: Chief Constable of the Lincolnshire Police v Stubbs et al).

Prepare for a complaint by reviewing your Harassment Policy now. If you do not have one use your Grievance Policy instead. If you are caught short, then you should refer to the Acas Code of Conduct.

Once you are aware of an issue, whether the alleged victim(s) want you to take action or not, employers have an immediate duty of care to protect the member of staff and to prevent further harassment or victimisation. Therefore, you will still need to take steps to investigate the claims thoroughly and take an appropriate level of disciplinary action if required.

Current press articles have demonstrated that the present issues concern supporting individuals to overcome worries about reporting harassment.

Below are some tips you can take now as an employer to address this:

- Publish a clear zero tolerance statement and circulate it to all staff.
- Be sure that all your staff know of two senior people that they can confide in.
- Ensure you have a harassment policy that is reader friendly, sets out clear and achievable steps and does not deter people from coming forwards (i.e. explaining possible outcomes for the accused may induce feelings of guilt – put these in the disciplinary policy instead!)

- Adopt an open-door approach to encourage employees to speak with their line managers.
- Raise awareness. Advise your staff about what sexual harassment is (give examples) and what to do if they experience it. Break down the stigma and get them talking about it.
- Run training for both managers and staff on spotting harassment and dealing with it effectively.
- Explore unexpected resignations including any that allude to a workplace issue.
- Look into stress related absences and check if there is anything going on at work.

Further assistance

Watch our webinar recording, entitled 'Sexual Harassment, The Party Season!' and help equip both yourselves and your staff with the awareness and necessary tools to prevent and deal with sexual harassment.

Watch the webinar at:
www.hrsolutions-uk.com/resources/videos-webinars-archive

Looking Ahead in 2018

In 2017, HR Solutions focussed on raising client awareness of GDPR through a series of webinars, news articles and also client letters. There have been other challenges including the effects of the UK Referendum and resulting Brexit negotiations which have caused some concerns throughout our client base, with the impact being seen in relation to their EEA nationals choosing to return to their home countries, as well as presenting them with recruitment challenges.

The resulting fall in the UK Pound has also put a lot of pressure on our clients that import goods and/or services from the rest of the world.

Many of these problems will continue into 2018, and we shall continue to work with our client base to support them in the best way possible. With GDPR only a few months away now, our main focus is to continue to raise awareness of this regulation, as well as provide our client base with the knowledge and tools to be able to plan for this.

Whilst we cannot control the exchange rate, we shall also be preparing some guidance around recruitment, and how to look at different ways to fill skills and candidate shortages.

We shall obviously keep abreast of any future developments and keep you up to date as and when required.

GDPR the Clock is Ticking

GDPR Webinars and Workshops

We have been talking about GDPR for several months now, and in May 2018 the regulation will come into effect. This doesn't leave you very long to be prepared.

We have been trying to support you with various updates throughout 2017, including webinars and seminars, which we shall continue to run in the 2018.

View our upcoming events at:
www.hrsolutions-uk.com/events

GDPR Risk Audit

We have recently launched our GDPR Risk Audit, which can be found on our website at www.hrsolutions-uk.com/risk-audit. If you complete this audit, you will be provided with a report that highlights what further action you need to consider taking to become compliant.

In our workshops we also walk you through the key steps that you need to take, where are at the end of the day you will have a set of tools to be able to take back to your business.

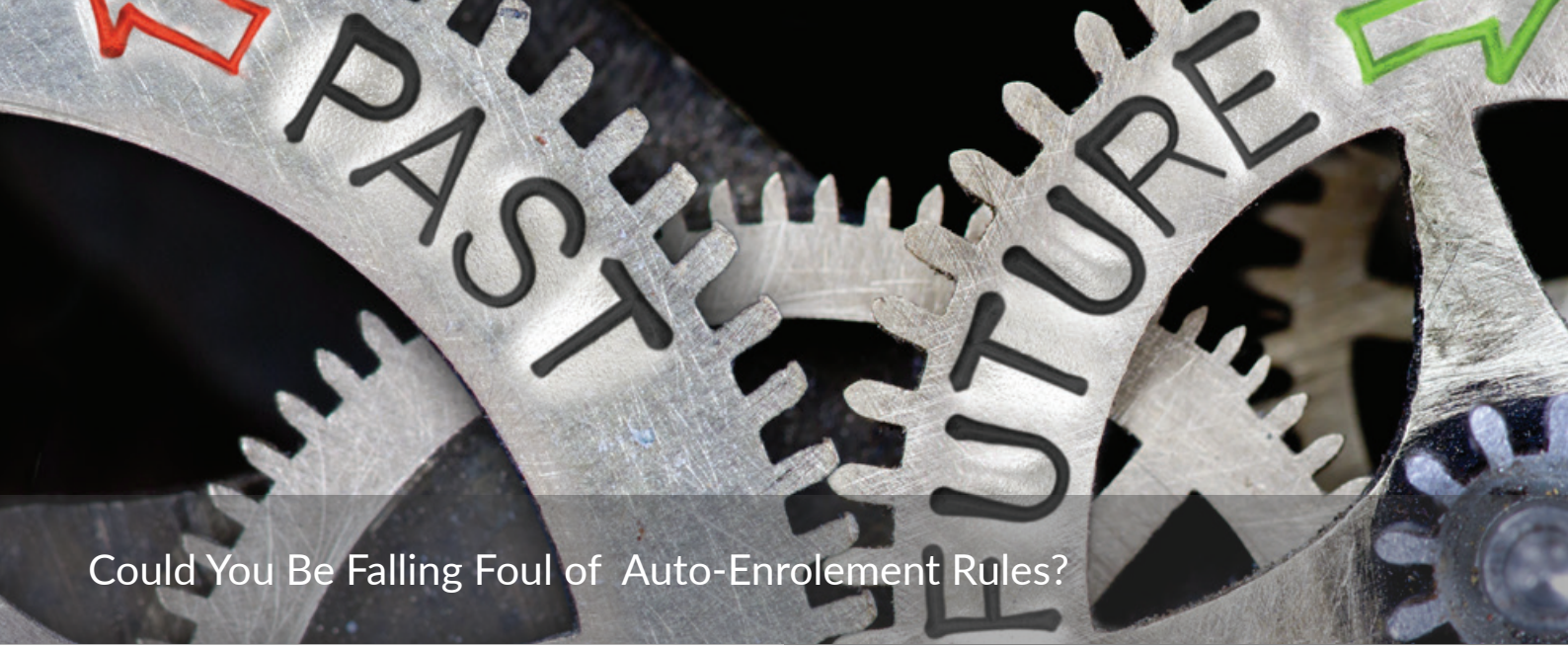
There are many other tools available to you, many of which can be found on the ICO website at: https://ico.org.uk

Acquisition of Milton Keynes Based HR Consultancy

HR Solutions are delighted to announce that we are expanding our business with the acquisition of HR Services (UK) Limited of Milton Keynes. The acquisition coincides with the opening of an office at Midsummer Court in Milton Keynes, which will provide a base for us to meet with and service clients in the area.

As part of the merger which was completed on 1st December 2017, Elaine Pennell, owner of HR Services (UK) Limited, has moved over to HR Solutions and taken on the role of Senior HR Consultant. Elaine's clients have made the move with her to HR Solutions. Elaine started HR Services (UK) ten years ago after working as Head of HR for a global IT organisation.

HR Solutions are incredibly excited both by the acquisition of this great company and to welcome Elaine on board with us. This move is part of a wider growth plan to establish a presence in Milton Keynes and we look forward to meeting with Elaine's clients and getting to know them and their businesses.



Could You Be Falling Foul of Auto-Enrolement Rules?

Despite extensive coverage around pension auto-enrolment, many UK businesses continue to fall foul of their compliance duties and obligations.

In fact, more than 20,000 organisations have already received fines for not properly signing staff up to a workplace pension. By only making minimum contributions, businesses create a high-risk strategy that could expose them to future legal action.

This year, a bus operator became the first UK employer found guilty of failing to auto-enrol staff onto a workplace pension scheme. Stotts Tours from Oldham, admitted to a total of 16 incidences of not organising workplace pension schemes for 36 staff. At a sentencing hearing on 14th December 2017, Stotts Tours were ordered to pay over £30,000 for their failure to set up a pension scheme for their staff. Organisations like Stotts Tours have legal responsibilities to put their staff into appropriate workplace pension schemes and to start pension contributions from June 2015 to April 2017.

Employers failing their responsibilities

It's not just in the UK that employers must take action on their pension provision responsibilities. In the US, employers have had to pay out over $350m (£267m) in legal settlements since 2009.

In June, the Pensions Regulator highlighted several examples of employers failing in their responsibilities relating to:

Zero-hour contracts

A residential care worker agency failed to auto enrol zero-hour contracted staff, wrongly assuming they weren't eligible. The Pension Regulator found that because the agency directly employed all workers and each worker had responsibility for their work, the employer had auto-enrolment responsibilities for them. The agency received a compliance notice and a £400 penalty.

Seasonal or casual workers

A catering business supposed that seasonal staff or casual workers were not eligible for auto enrolment, despite the clear legislation that employers must assess auto-enrolment eligibility on account of age and earnings, regardless of the length of employment and whether the work is seasonal. The employer received a Compliance Notice.

Warning to employers

Despite the comprehensive coverage relating to auto enrolment, there continues to be many misconceptions around worker definitions. It's therefore vital that employers start working on their planning and workforce analysis and seek help where they are unsure.

Over time, the courts may decide that employers should have done more than the bare minimum under the automatic enrolment rules. As they have done with other pension related legislation, courts may decide that employers have an indirect duty to look after their workers.

Top Tips

Regularly review auto-enrolment arrangements

Many employers may believe that once they've selected a pension scheme and enrolled their employees, their obligations are complete; but all employers should regularly review their auto-enrolment arrangements to ensure that it remains fit for purpose. Employers must also ensure that the arrangement offers tax relief to all employees, which includes people earning below the tax threshold.

Under current auto-enrolment legislation, anyone aged between 22 and the state pension age and earning over £10,000 a year can become automatically enrolled on to a workplace pension scheme. The minimum contribution rates for auto-enrolment will increase during April 2018 to 2%, and again in April 2019 to 3%.

Managing Long Term Sickness Absence

When you are managing long term sickness absence at what point do you have to make the decision that the employee is potentially unfit to return? You have to remember that if someone has been off sick for a long time they are deemed to be incapable to do the job. Capability (that includes ill health) is one of the fair reasons for dismissal but you must follow a fair procedure and show that you acted reasonably in treating the absence as a sufficient reason to dismiss. Also, the Acas Code of Practice does not apply in such cases, although particular care needs to be taken with employees who are disabled, or who could be potentially disabled.

Therefore, at what stage do you consider that ending the employment is the right thing to do? You need though to remember that each case of long-term sickness absence is different and each approach in managing it is different.

This is a very delicate area to manage and you can't get it wrong as it could be very detrimental and costly to you if you do.

Firstly, you need to have gone through at least one or more welfare meetings and obtained their consent to obtain a professional medical report or to undertake an occupational health assessment and before any dismissal these must be up-to-date and establish the true medical condition. (You should check the contract of employment to see that the right for these is in it). Also, besides the welfare meeting(s), throughout the length of absence, have you been in touch with the employee, or been to their home to see how they are and obtained how they feel about their absence and their views on it? It's best practice to do this especially in long-term absences because the longer the employee is off work it makes it harder for them to return and could lead to a further decline in their physical and/or mental health.

The information you need to have to consider is:

- The nature and type of the illness
- How long have they been absent (in smaller companies this could be a relatively short period as their absence is likely to have more of an impact)
- If there is any prospect of the employee returning to work in the near future (if ever) and the likelihood of this illness recurring and how that will affect their employment if and when they return
- Does the report specify if the employee is suffering from a disability because if so, you may need to consider making reasonable adjustments* and not discriminate against them because of the disability
- How long you can keep the position open for as there comes a time when it is not reasonable to do this
- Consider what disruption and other costs there have been to the business due their absence
- Consider how you have handled similar situations in the past
- Check to see if there is any insurance scheme in place that covers long term sickness absence as dismissal may not be appropriate depending on the wording in the policy.

*Reasonable adjustments could be to hours of work, the work that they actually do, or if there is something else they could do beside any environmental adjustments. However, you do not have to create a vacancy to accommodate them.

If the employee is claiming stress or anxiety, which could lead to depression, then you need to ascertain if it is going to develop into a disability as stress itself is not a medical condition. If the employee refuses to give consent, then you need to make decisions based on what information and evidence you have at the time the decision is made so that the dismissal can be justified and that it is unreasonable to expect you to wait any longer, although this could be more risky.

Secondly, if it is possible, invite them to a capability meeting to discuss the report and the situation ensuring you follow your appropriate policies for this. This letter could then contain that the outcome of this meeting could be the termination of their employment.

If you establish that the employee is not capable of returning you can then dismiss on the grounds of ill-health. However, the employee could propose a phased return to work that should be seriously considered unless you have professional evidence to say that they are not likely to return in the near future and they have been off a long time and that you feel that it is not appropriate as you cannot keep their job open any longer.

The dismissal needs to be in writing and you may wish to give the employee the opportunity to appeal, although there is no legal requirement to do so.

If they have over 2 years' service they can bring a claim to an employment tribunal if they feel that their dismissal is unfair. Therefore, if the case went to an employment tribunal you would need to justify:

- That the business could not hold the job open any longer
- The temporary cover (if any), disruption to the business and the costs to your business
- The administrative costs of keeping the employee in the business
- The size of your business.

Overall, they will consider the reasonableness and fairness of your decision. This article does not fully go over the full processes involved before you come to the decision to dismiss and the actions you take at the final meeting. Therefore, before embarking upon any such action, it is always best to take advice. We can fully support and advise you on such matters.

Protected Conversations

A 'protected conversation' is not the same as a 'without prejudice' conversation. However, both allow employers to enter into off-the record conversations with a view to agreeing an exit with the employee.

A protected conversation is held when there is no existing dispute. If there is an existing dispute then you hold a 'without prejudice' discussion.

The issues discussed in a protected conversation are meant to enable both parties to have 'off the record' discussions and their very existence cannot be disclosed and cannot be waived. Most of the time they are held as a quicker alternative to going through a formal process of dismissal. However, they do have their limitations and do not cover claims of discrimination, automatic unfair dismissal, unlawful detriment, breach of contract or health and safety matters therefore the conversation is not protected. Therefore, the use of protected conversations is limited to straightforward dismissal and/or unfair dismissal cases.

If a discussion needs to take place in relation to exiting an employee on long-term sickness absence, given the possibility of a subsequent disability discrimination claim, then this is an example where the without prejudice rule has an advantage over protected conversations.

However, if there is improper behaviour during a protected conversation then the protection is lost. Examples of this is are where the employer puts undue pressure on the employee to consider any settlement and Acas recommends you allow 10 days for this. Or it could be where the employee is told to enter into a settlement agreement or be dismissed. The employee could class this as coercion entitling them to claim constructive unfair dismissal. Also, if the employee feels they are being subjected to unwarranted criticism they can still bring a grievance and if the outcome is that the grievance is not upheld then it is likely that the details of the protected conversation will be disclosed.

Having a protected conversation is covered under s.111a of the Employment Rights Act and allows you to have the opportunity to discuss exit packages in a full and frank conversation without fear (providing the conversation is not improper) of comments being reported to a tribunal. Agreement from the employee to enter into the protected conversation is still required. However, as above, if the conversation does not fall within the quite narrow definitions of where to use this it could be admitted as evidence in an employment tribunal claim.

Therefore, employers should not be under the impression that they are covered when entering into a protected conversation and they should be held with extreme caution.

It's always best to follow a script and we can provide support and guidance during either protected or without prejudice discussions.

Employee, Self Empoloyed or Worker - What's the Difference?

Employment status within the gig economy has been a hot topic over the past few years. As most of our readers will be aware, at one end of the spectrum we have employees (with full employment rights); at the other, we have the genuinely self-employed (with no employment rights), and in the middle we have "workers" - who may be self-employed for tax purposes, but who, if contracted to deliver the services personally, are entitled to be paid the appropriate National Minimum Wage rate and to take minimum breaks and paid holiday.

Different outcomes for the Uber and Deliveroo cases

We now have the outcome of two cases – firstly Uber's appeal against a tribunal ruling that found that its drivers were workers, and secondly, the Independent Workers Union of Great Britain (IWGB) v RooFoods Limited t/a Deliveroo – where the drivers were found to be self-employed.

So why the difference?

In the Uber case, the Employment Appeal Tribunal agreed that, when the Uber app was switched on, the drivers were "workers", rather than independent contractors. The drivers had to be "able and willing to accept assignments". Once accepted, they suffered a penalty if they cancelled a trip. Uber determines the fares for the journeys. The tribunal considered that, once logged onto the app, the drivers had little freedom or flexibility in the way they worked and that this indicated a "worker" relationship. It has been reported that Uber intends to appeal and may try to do so directly to the Supreme Court (missing out the Court of Appeal stage) so the case can be heard together with a similar appeal by Pimlico Plumbers, due to be heard early this year.

So the Uber drivers were found to be workers, however, the Deliveroo couriers were not! The latter case, brought by the Independent Workers Union of Great Britain, failed to achieve recognition rights for the Deliveroo couriers. The case was heard by the Central Arbitration Committee (CAC), as the union was aiming for recognition rights for collective bargaining purposes for a bargaining unit covering the area of Camden and Kentish Town, London. The CAC accepted that the union had demonstrated enough support for a collective bargaining unit, but these rights only apply to employees or workers, not to self-employed individuals and the CAC found that the couriers were self-employed. It noted that the key difference in the revised and updated Deliveroo contracts (issued in May 2017) was that the couriers had the genuine right to send a substitute to do the work, provided the substitute used the courier's phone so that the customer could track the delivery. The right to appoint a substitute applied both before and after accepting any particular job, and the couriers did in fact exercise this right. They therefore had more control. The covering letter issued with the contract made it clear that couriers could work for competitors.

Deliveroo had also stopped performance monitoring and no longer required the couriers to wear its branded clothing (this is now optional). The union may decide to take the CAC's decision to judicial review, so this might not be the end of the road, but in the meantime, a group of couriers are now reported to be bringing a claim regarding their employment status in the employment tribunal. This particular group is reported to work shifts and is hourly paid - the argument is that these people are under the control and management of Deliveroo and that they do not carry out their own delivery businesses. So it may well be that the employment tribunal finds this particular group to be workers, and therefore entitled to the NMW and to paid holiday.

For the time being at least the advice remains the same: take a close look not only at your contractual documentation, but at what actually happens in practice. If your people are required to do the work personally, and there is a high level of control over them whilst they are working, then they are more likely to be workers than self-employed contractors. Bear in mind the chances of a claim are now much higher, given the high level of media coverage of this issue and the abolition of fees for employment tribunal claims. And future proposals by the Work and Pensions Committee and the Business Select Committee which include new rules that assume that someone is a "worker by default" may result in far more "self-employed contractors" being treated as workers, or even employees.

What's new with HR Solutions?

HR Solutions is growing. We would like to introduce the new member of our team, congratulate team members on recent promotions and other great news.

Karen's Wedding

Congratulations and best wishes to Karen Lovell and Sam Falconer on their autumn wedding which was held at an old Victorian pump house near the picturesque Cropston Resevoir in Leicestershire. The happy couple got married in September and honeymooned in Barbados.

Alex Butt - Internal Promotion HR Advisor Team Leader

HR Solutions are pleased to announce the internal promotion of Alex from HR Advisor to HR Advisor Team Leader and she is focused on providing case support to our clients and HR Advisors. Alex has a great deal of experience in managing large teams and can pass on her experience to our clients on the challenges involved.

Elaine Pennell Senior HR Consultant

Elaine joined HR Solutions in December 2017 as a Senior HR Consultant, having merged her business, HR Services (UK) Ltd, with HR Solutions. Commercial acumen gained in operational roles has enabled Elaine to excel in change management, acquisition, disposal and TUPE multi-site projects. Her proof of success is evident in that 95% of business growth was through client referrals.

Karen Lovell - Internal Promotion HR Knowledge Manager

Congratulations are due again to Karen Lovell for her recent internal promotion to HR Knowledge Manager. Karen is currently, to great accolade, focused on presenting our hot topic webinars and GDPR interactive workshops. Karen replaces Alison Blackhurst.

SME Awards

Service Excellence Finalist
& Business of the Year Runner Up
Northamptonshire Awards

HR Solutions celebrated being nominated as finalists for two regional SME Business Awards. We were finalists for 'Service Excellence' and we were finalists for 'Business of the Year with Less than 50 Employees' in the SME Northamptonshire Business Awards. We achieved the Runner Up award in the Business of the Year category at the awards ceremony held in October last year.

Business of the Year, Less than 50 Employees Finalist
National Awards

HR Solutions competed against 13 other finalists across the UK for the hotly contested Service Excellence category. The awards ceremony took place on Saturday 1st December at Wembley Stadium in London and whilst we didn't win, we're delighted to have been recognised for offering "outstanding assistance and advice" to our customers and demonstrating a "boldness and imagination that has resulted in exceptional business growth."

Events

GDPR Interactive Workshops
& Hot Topic Webinars

Due to the great feedback received about our GDPR (General Data Protection Regulation) Interactive Workshop held in November last year, we are pleased to have several more upcoming workshops already planned for 2018. Our GDPR half day and full day interactive workshops offer you guidance and tools to help you with GDPR compliance. These workshops are suitable for anyone who has a responsibility for personal data protection. We also have a range of upcoming hot topic free webinars offering guidance on a range of HR topics. Places are limited, so early booking is required to secure your place.

Find out more details about our workshops and webinars and book online at:
www.hrsolutions-uk.com/events

January 2018 Legal Update

Question and Answer

Q An employee who has been on long term sick has sadly died. We just wanted to check what we have to pay them, i.e. holiday pay. Also, what sort of arrangements should we make to allow employees to attend the funeral?

A This employee will need to be paid for any salary or sick pay up to the date of death. As employees on long term sick still accrue holiday entitlement and this person has been unable to take it, the accrued and untaken holiday entitlement not taken will need to be paid too.

Sadly, the contract needs to be ended too, this means writing to the next of kin or Executor informing them of this, the pension details, and any death in service benefits, which are paid up to the termination date. Normally this is included in a nice condolence letter that includes a particular memory or something they worked on successfully and that he/she will be greatly missed.

If you haven't already, you will need to explain this to your employees and if they get very upset and can't work, consider sending them home on paid leave.

Once the funeral date is established arrange to send flowers or a wreath. In regards to allowing employees to attend, normally a member of management would do this with maybe one or two close colleagues. However, if other members of staff would like to go, you can give them time off or ask them to take paid holiday, but you need to review how many can go all at once to ensure the business is still operational.

Q Can you dismiss an employee who has been off sick for a long time?

A When an employee is off sick for a long time they are deemed to be incapable to do the job. Capability is one of the five fair reasons for dismissal but you must follow a fair procedure and show that you acted reasonably in treating the absence as a sufficient reason to dismiss. The Acas Code of Practice does not apply in such cases. However, particular care needs to be taken with employees who are disabled.

As this is quite a complicated area, we have included in this newsletter an article on Managing Long Term Sickness Absence that may give you more guidance on how to manage this, although we recommend that you take advice to ensure that there are no risks associated with any dismissal. We can help you with this.

Webinars

HR Solutions is holding monthly webinars on a range of HR topics and important changes that may affect your business. Please email us at enquiries@hrsolutions-uk.com to register your interest in our webinars and we will be sure to send you an invitation.

Childcare Vouchers

From April 2018 the new scheme that is being introduced may be less favourable than the existing scheme. Therefore, you may wish to encourage your employees to join the existing one before it is too late.

Parental Bereavement Bill

This new bill is likely to be passed in 2018 although will not be implemented until 2020. The key points of this will be that for parental bereavement leave no service is required. As long as employees meet the prescribed care conditions they will be able to take up to 2 weeks unpaid leave within 8 weeks of the death of a child under 18 years of age. This may be in a continuous block or taken as 2 separate blocks.

Advisory fuel rates for company cars

These new rates came into effect from 1 December 2017:

Engine size	Petrol - amount per mile	LPG – amount per mile
1400 cc or less	11p	7p
1401 – 2000 cc	14p	9p
Over 2000 cc	21p	14p

Engine size	Diesel
1600 cc or less	9p
1601 cc – 2000 cc	11p
Over 2000 cc	13p

Hybrid cars are treated as either petrol or diesel cars

The HMRC advisory fuel rates for using own vehicles on company business remain unchanged.

New 'Vento' bands for injury to feelings

When making compensatory awards for injury to feelings in discrimination claims, the employment tribunals use guidance bands known as 'Vento' bands. These have been increased in respect of any claims issued on or after 11 September 2017 as follows:

- Lower band (less serious cases): £800 - £8,400
- Middle band: £8,400 - £25,200
- Upper band (the most serious cases): £25,200 - £42,000
- Exceptional cases: over £42,000

These bands will be reviewed in March 2018.

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