

Review of legislation 2010

Stuart Chamberlain, Croner author and employment law specialist, looks at developments in employment law during 2010.

The Coalition Government's policy

The main event of the political world in the UK in 2010 was the formation of the Coalition Government after the May General Election. The new Government published its policy on employment law (Programme for Government). It listed: a determination to cut red tape (the "one-in, one-out" policy); a review of employment and workplace laws; the end of "gold-plating" of European Union rules, so that British businesses are not disadvantaged relative to their European competitors; and, unsurprisingly, action against excessive pay and bonuses in the banking world. The effect of the intended cuts in the public sector will also have major implications for employment. As a result, the Government took a number of actions.

- The introduction of a "cap" on immigration from outside the European Economic Area (EEA)
- The Vetting and Barring Scheme was put on hold
- Default Retirement Age (65) to go by April 2011
 - consultation — more on this is expected later
- A review of upcoming legislation, including the Agency Workers Regulations, the extension of the right to request flexible working, the right to apply for time off to train, and the introduction of Additional Paternity Leave.

In fact, many of these reviews had little effect, eg the Agency Workers Regulations are to come into force in 2011 without any changes in their provisions, as is the right to Additional Paternity Leave, which applies to parents (and adoptive parents notified of a match) on or after 3 April 2011 — but it will only be introduced as an "interim measure" to encourage shared parenting. From April 2011, the right to request flexible working is proposed to extend to parents of children under 18 (it is currently available to parents of children under 17, disabled children under 18 and certain carers). The extension of this right to request is to be the subject of a consultation exercise. The Government has also intimated that it may increase the qualifying period of service to claim unfair dismissal from the present one year to two years.

The Equality Act 2010

The most significant (let alone weighty!) piece of legislation to come into force in 2010 was the Equality Act, devised by the Labour Government. The main provisions of the Equality Act 2010 ("The Act") were brought into force by the Coalition Government on 1 October 2010. It harmonises existing anti-discrimination law (previously nine separate statutes and over 100 regulations, including the Equal Pay Act) into a single piece of legislation. The stated

purposes of the Act were “to harmonise discrimination law and to strengthen the law to support progress in equality.” More specifically, in the field of employment, the Act sets out the nine personal characteristics protected by the legislation and provides key changes to the definition of discrimination, especially disability discrimination, and prohibits employers from asking job applicants about their health and whether they have a disability, other than in specified circumstances. The Act bestows new powers on employment tribunals to make recommendations that will benefit the wider workforce, not merely the individual who brings a discrimination claim; and creates a new Single Equality Duty on public authorities to tackle discrimination, promote equality of opportunity and encourage good community relations. The Act is supported by codes of practice produced by the Equality and Human Rights Commission (EHRC), notably those on work and equal pay.

What’s not coming into force?

Not all the provisions of the Act sponsored by Labour’s Harriet Harman will come into force. The Coalition Government has scrapped the socio- economic duty on the public sector, under which public bodies would have had to consider reducing inequalities associated with socio-economic disadvantage when making strategic decisions and gender pay reporting.

Positive action on recruitment and promotion, however, will be implemented. Employers are to be allowed to discriminate positively in favour of women, black and disabled job candidates. From April 2011, employers will be allowed to start to use the measure as part of their recruitment process. In determining whether candidates are equally qualified, employers will not have to judge solely on the basis of qualifications, provided the staff are of equal merit. They will also be able to take into account “general ability, suitability, competence and experience”. Formal guidance will be published in the New Year.

Phasing out the Default Retirement Age

One of the key features of the Coalition’s Programme for Government is a commitment to phase out the Default Retirement Age (DRA). The Government regards this as one of the steps that it is taking to enable and encourage people to work for longer, alongside raising the State Pension Age (SPA) to 66 faster than originally scheduled and ensuring that there is effective support for those out of work to find work. In July 2010, the Government published a consultation document announcing that the DRA would be scrapped on 1 October 2011. According to the proposals, there will be a six months’ transition period from 6 April 2011 to October 2011 whereby only people notified before 6 April and whose retirement date is before 1 October 2011 can be retired compulsorily. Also to be scrapped are the statutory provisions requiring an employer to give notice of mandatory retirement and the procedure that gives employees the right to request to work beyond retirement.

After 1 October 2011, employers will not be able to use the DRA to retire employees compulsorily; if they do wish to rely on a retirement age they will have to justify this objectively — this may prove difficult in some cases. The proposals for the phasing out of the DRA have been the subject of consultation, which closed towards the end of October 2010; the Government will confirm its intentions in due course. Other legislation in 2010.

There were a number of other developments this year worthy of mention, including the introduction of the Fit Note scheme in April 2010, whereby GPs can now indicate whether or not an employee is fit for work and suggest changes that could be made to facilitate a return to work. The success of the scheme remains to be evaluated. A month earlier, new regulations came into force outlawing union blacklisting.

Looking ahead to 2011

The most significant piece of legislation due to come into force in 2011 is the implementation of the European Union's Agency Workers Directive into UK law in October. Originally planned to come into force on October 2011 but "under review" because of different points of view" expressed by the business community and some drafting problems, the Agency Workers Regulations will now come into force on that date and without any change to the provisions. They cover the tripartite relationship between end-user, temporary work agency and the worker and guarantee the right to equal treatment: basic employment and working conditions after 12 weeks in the job (working time, holidays, public holidays and pay) in comparison with directly recruited counterparts. The Bribery Act 2010, which aims to promote anti- bribery practices in business, will become law in the UK in April 2011.