

The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

Episode 6: Return to office survey results and what to watch out for with the National Minimum Wage rise.

Lucy Lewis

Hello and welcome to our In-House Employment Lawyers Coffee Break, I'm Lucy Lewis.

Sean Dempsey

And I'm Sean Dempsey.

Lucy Lewis

You're joining us for a 10-minute coffee break while we talk through the latest developments and practical takeaways for this month. Today, we're going to be talking about the national minimum wage rise and what that means for businesses, as well as our very own In-House Employment Lawyers survey on return to office.. Sean do you want to start us off with the survey results?

Sean Dempsey

Yes, I will Lucy and thank you very much. So, without further ado, our In-House Employment Lawyer Community asked for this survey, so asked for return to office and whether or not this is something that you are grappling with and whether it's common across the board. And we also looked at whether or not, actually, people are enforcing it, and what issues that might arise. And also, the associated issue of whether or not this has an impact on flexible working requests. So, the survey was completed by about 70 of you, which employed over a quarter of million employees in the UK.

Some of the things we got from the survey were unsurprising, I don't think anybody would be surprised to hear that three-day office week is the norm, and most of you don't have plans to increase those number of days in the office. I think most of us could have predicted that as an outcome.

What's a bit more of a surprise though, is that, most of you are also receiving more remote working requests which, obviously highlights that the more days you ask for, the more remote working requests your managers are going to receive.

Lucy Lewis

Yeah, one of the things that perhaps was less surprising to me, looking at the questions we're being asked, is that we're seeing mental health conditions and neurodivergence increasingly being cited as the reasons why employees are making these requests.

And it's tricky for employers, because you're having to work out how to deal with requests that straddle being both a flexible working request but also a request for reasonable adjustments. And, you know as everybody knows, there's a pinch around occupational health and when we look at some of those time constraints, getting good occupational health advice, within two months, to meet the new ACAS Code requirement is really tricky.

Sean Dempsey

Yes, and I think that's right, I think it's getting trickier to get good occupational health advice!

But where it has perhaps been more surprising in the results of the survey, is that some of you are on the cusp of actually taking enforcement action against employees who aren't complying with office attendance

requirements. What makes that even more interesting, is that most of you aren't using incentives like linking base pay increases or bonuses to office attendance. We all remember we had this in the early COVID days, I certainly remember free lunches, free coffees. But our survey suggests a move away from incentives and more attention being paid to enforcement, which raises some questions about how easy it is to enforce office attendance from a legal perspective.

Lucy Lewis

Yeah, I think it's really interesting, isn't it, when you get into the enforcement debate, it brings up those arguments for employees about custom and practice, so people saying, well, I've been working from home since the pandemic it's worked brilliantly for me. I do think it's difficult for most employees to be able to evidence a variation of an existing express contractual term, so a place of work provision, just by a pattern of behaviour and passage of time though.

Sean Dempsey

And I think there's a strong argument on that front. that if your comms from management over the last few years can be said to have created a contractually binding commitment to changing place of work. So, it might be a question of whether your comms have been carefully worded with the type of language we usually see in policies like, this is not part of your contract employment etc, or whether you have been more definitive as to how much of an issue this might be for you.

Of course, it's always possible for employees to argue constructive dismissal if significant changes like place of work are not handled carefully.

Legally, of course, it's much easier to incentivise office attendance by linking base pay increases and bonuses to attendance than it is to go down a kind of formal disciplinary enforcement approach. It'll be interesting to see if more businesses begin to adopt this approach over time.

The other area I want to talk about is monitoring. I think this has already begun to become a much bigger issue for companies, and our survey shows that half of you are already tracking office attendance, or considering doing so. It obviously goes hand in hand with enforcement, particularly because you can't even begin to think about enforcement until you've collected and analysed the data.

Lucy Lewis

Yeah, and of course probably everybody does have the data that they need to track office attendance already. You know, you'll have data like gate entries, VPN, desk booking, etc, etc. But I think the really crucial question is whether employees have been told that that data is going to be used for different purposes than the ones that they're probably expecting it to be used for.

Sean Dempsey

Yeah, it's definitely sensible to ensure that you are transparent about the fact that you're collecting the data as well as what it'll be used for and that that collection is proportionate. And before you start relying on it, you will need to be alive to any potential accuracy issues. So, that's all I was going to say about the return to office survey now, Lucy. If you're listening, and you haven't had a copy of the results of the survey, please do get in touch with me and I can forward on those results.

Lucy Lewis

Thanks, Sean. So, moving on to our next topic. So as usual, 1st of April sees the annual rises for statutory rates and limits, but the one that's particularly significant this year, is the leap in National Living and National Minimum Wage. And if we take just one of those categories, the National Living Wage, which is now going to apply for everybody over 21, that's gone up nearly 10% from £10.42 to £11.44.

Sean Dempsey

This is a big change, isn't it, and a big cost for businesses. But I think the tricky question for our In-House Employment Lawyers Community are not going to be what to do with those whose hourly rates sit at those minimum levels, as that's relatively simple. It's more going to be around those whose pay sit above the national minimum wage, as now the buffer which protects employers from inadvertent breaches of the national minimum wage have shrunk.

Lucy Lewis

Yeah, that is exactly right, that for me is the really big point. And I'm sure our listeners know, it's a pretty complex area of law.

At a very basic level, workers are entitled to be paid no less than the national minimum wage in respect of each pay reference period, but understanding what hours and what deductions go into those calculations really isn't always easy.

And in February, HMRC named and shamed over 500 employers for national minimum wage breaches, and about a third of those came from pay deductions, so that might be things like food or meals and parking permits, travel costs.

But a common and potentially quite tricky one is uniform costs. Now, most employers in my experience, have a pretty good understanding that, you know, your classic branded uniform must be factored into minimum wage calculations if you're going to ask employees to pay for it.

But there's much more of a blind spot around something that's a bit more generic, so say, for example, my requirement is you need to wear black trousers or black shoes. But if that's something that's required for work, it would reduce pay for national minimum wage purposes. And that means that if you have those generic policies, you do need to make sure you have really good policies ensuring that purchases are visible to employers, setting out reasonable parameters about where those things should be acquired from and what kind of cost they can be acquired at.

Sean Dempsey

Another cause of breach is unpaid working time. So, some of these causes are fairly predictable, working time has been rounded down or trial shifts that weren't paid for. But causing a potential problem in the age of hybrid working is mandatory training time. E-learning modules are not the ideal way to spend your evening at home, but actually, that's when a lot of workers might do their mandatory courses on stuff like diversity or health and safety, on their own device outside normal working hours. So again, it's about visibility, you need to be asking HR and IT teams whether that technology used can capture the time spent doing the training and if not, should it only be done during working hours.

Lucy Lewis

Totally agree with that, Sean. I think it's really important not to leave these things to chance.

The last category of common breaches - and thanks Sean for leaving this one to me because it's particularly tricky! February's HMRC report indicated that 6% of breaches arose from people having an incorrect work type.

So, under the National Minimum Wage Regulations, there are 4 types of work, and how the national minimum wage is calculated depends totally on which of those categories your workers fall into. And employers are most likely to trip up on who exactly is a salaried hours worker for these purposes.

Sean Dempsey

Salaried worker, now unfortunately, most people do trip up thinking that that is an obvious concept when it's not.

Lucy Lewis

Because actually, the definition of salaried hours worker is only likely to catch a pretty small proportion of those people that receive a salary. And that's because, to meet the National Minimum Wage definition, the employer needs to be able to calculate exactly the number of hours that the employee is required to do for that salary.

And so, if you've got a contract (and lots of people do) with one of those classic contractual provisions that says, you may be required to work additional hours outside your normal hours to fulfil your duty, we've already taken that into account when determining your salary, that is pretty fatal for being a salaried hours worker for minimum wage purposes. And in that situation, the work is much more likely to be considered an unmeasured time worker.

So, why does that matter? Well, if you're a salaried hours worker, hours can be averaged across the year to determine national minimum wage compliance. So, that means if you have a workforce where you'll have quieter periods, those quieter periods can compensate for busier periods later in the year.

But if you do 'unmeasured work', that's assessed by looking at each pay reference period - generally a month for most people - and that really has caught employers out in recent years, because if you have real periods of peak activity, it's possible that the hours in those months put your employees below minimum wage. And that means you really need to know what the danger zones are.

If it's not unusual for normal hours to exceed those set out in the contract, how many additional hours can be worked before you fall below national minimum wage? Now some people think that can be addressed through TOIL, time off in lieu, and it potentially can be, as an alternative to overtime. But, if you're an unmeasured time worker, TOIL is only going to help if it's taken in the same month as the additional hours worked or potentially the month after. My view and advice would be that for those lower paid salary salaried employees, with this big increase in national minimum wage, it is worth looking at pay audits.

Sean Dempsey

Thanks Lucy, yes, the prospect of a 200% penalty is definitely a good incentive to kickstart an audit. I can see that this will also give rise to some challenging structural questions for employers as this big national minimum wage rise will have narrow pay differentials. A difficult choice between a very costly pay rise for a wider group or disgruntled managers.

So, that's all we have time for today. Thank you very much for joining us and the next In-House Employment Lawyers coffee break will be on the agenda again in May. If you'd like to be part of our In-House Employment Layers Community, please get in touch with us. We'd love to know what you thought of today's episode, so please leave us a review wherever you get your podcasts. Thank you!