Never has the quote, "... he who lives by the crystal ball soon learns to eat ground glass" (economist, Edgar R Fiedler) been more true. As the infamously complicated Brexit negotiations continue, 2019 will be another year shrouded in Brexit uncertainty.

Reams of draft legislation are being published as a contingency if there is a no-deal Brexit. Will it be needed? Will there be a deal? Will Brexit be delayed or happen at all? In the words of BBC political correspondent Chris Mason, "I haven't got the foggiest idea".

While Brexit does cast a shadow of uncertainty, the Government has repeatedly stated it intends to maintain current UK employment laws so that existing workers' rights are unchanged following exit day even in a no-deal scenario.

Despite Brexit's near monopoly of Parliamentary and legislative draftsmen's time, the Government did find time to publish its 'Good Work Plan' in December. The plans set out are more a tweak of employment laws over the next two years rather than a major reform. Nevertheless, it does offer some real improvements aimed at protecting more vulnerable workers.

In our first podcast of 2019, and accompanying article, our employment experts discuss 2019's hot employment law topics that employers need to have on their radar.
The 2019 employment law hot topics

1. **Family friendly**: Shared parental leave pay; Extended redundancy protection; Bereavement leave; Publishing & advertising policies
2. **Sexual harassment**: Code of practice & consultations; Non-disclosure agreements
3. **Employment status**: New statutory test; Uber heads to the Supreme Court; IR35 tax change
4. **Pay reporting**: Gender pay gap reporting; CEO pay ratios; ethnicity pay reporting
5. **Whistleblowing**: Deemed knowledge
6. **Wages**: Sleep-in shifts; National Minimum Wage (NMW) reform; April's NMW rate increases; Tips & gratuities
7. **Holiday pay calculation**: Atypical workers short-cut; reference period extension
8. **Atypical workers**: Payslips & Particulars of employment; Security of employment; Agency workers
9. **Disciplinary proceedings**: Suspensions; Investigating criminal misconduct
10. **Industrial relations**: Unlawful inducements; Privacy; Employee consultation
11. **Business protection**: Post-termination restrictions; Employee inventor compensation
12. **Tribunal proceedings**: 6 April caps on penalties & awards; Proposed tribunal reform;
Employment Law Legislative Reform 2019: at a glance

1 January

- **Corporate governance**: quoted companies with more than 250 UK employees will be required to include certain CEO pay ratios in the directors' remuneration report and prepare an annual statement of engagement with employees in respect of financial years beginning on or after 1 January 2019.

28 January

- **Right to work checks**: Employers will be able to rely solely on online checks in appropriate cases.

30 March

- **Gender pay gap reporting**: public sector second reports due to be published.

1 April


4 April

- **Gender pay gap reporting**: private and voluntary sector second reports due to be published.

6 April

- **Itemised pay statements**: all 'workers' (not only 'employees') must be given a written itemised pay statement which includes the number of hours paid where paid hourly
- **Apprenticeship levy**: ability to invest up to 25% of levy to support supply chain apprentices.
- **Employment Tribunal penalties**: maximum penalties for aggravated breach increase from £5,000 to £20,000.
- **Employment Tribunal awards**: annual increase expected.

  [Note: termination payments above £30,000 becoming subject to class 1A National
Insurance Contributions (NICs) (employer liability only) has been delayed from 6 April 2019 to 6 April 2020.

- **Statutory pay rates**: Statutory Sick pay increases from £92.05 to £94.25.

7 April

- **Statutory pay rates**: Statutory maternity paternity, adoption and shared parental leave pay rates increase from £145.18 to £148.68.

9 December

- **Financial services**: Senior Managers and Certification Regime extended to all firms authorised by the Financial Services and Markets Act 2009.

The 2019 employment law hot topics

1. Family friendly

Shared parental leave pay

Where employers offer enhanced contractual maternity pay to mothers, can they only offer statutory shared parental leave (ShPL) pay to fathers? Does a failure to match contractual enhancement for fathers taking ShPL amount to direct or indirect sex discrimination?

These questions have been the baby elephant in the room for some time. There is no express obligation on employers in the voluminous ShPL legislation to match enhanced contractual maternity pay. Indeed, Government guidance is that employers are not so obliged. But the question remains whether employers might be obliged to do so under the Equality Act 2010. At what point is maternity leave no longer designed to protect a woman’s biological condition following pregnancy, or the special relationship between mother and baby, and instead becomes akin to childcare?

The Court of Appeal is due to consider these questions on 1 May in two combined appeals, Ali v Capita Customer Management Ltd and Hextall v Chief Constable of Leicestershire Police.

Extended redundancy protection

From 25 January to 5 April 2019 the Government is consulting on extending redundancy
Currently, if a woman's role is made redundant while she is on maternity leave, she is entitled to be offered suitable alternative employment by her employer or associated employer if such a vacancy exists. Essentially, she has priority over other employees whose role is made redundant at the same time.

The Government is proposing to extend the protected period at both ends. It proposes that the period starts, from the point at which a woman notifies her employer that she is pregnant and is also extended by an additional six months after she returns from maternity leave.

The Consultation seeks views particularly as to when the six month extension after 'return from maternity leave' starts to run. How should periods of annual leave, shared parental leave and/or unpaid parental leave immediately following maternity leave be treated?

The Consultation also seeks views on whether the six month extension should also apply for those on adoption, shared parental leave and/or unpaid parental leave.

**Publishing & advertising policies**

Look out for an expected Government consultation on requiring employers with more than 250 staff to publish their parental leave and pay policies on their websites. Also under consideration is the introduction of a duty for employers to consider whether a job can be done flexibly and make that clear when advertising the position. Whether the Government will take the advertising proposal further is yet to be confirmed.

**2. Sexual harassment**

**Code of practice & consultations**

The issue of sexual harassment in the workplace continues to attract headlines and the attention of the House of Commons' Women and Equalities Committee.

On 18 December, the Government responded to the Committee's 2018 inquiry into sexual harassment in the workplace and confirmed it will:

- ask the Equality and Human Rights Commission (EHRC) to develop a Statutory Code of Practice on Sexual Harassment;
- add the **EHRC** to the list of prescribed persons for whistleblowing purposes; and
- consult on introducing a mandatory duty to protect workers from sexual harassment;
how best to tackle third-party harassment; protection of interns and volunteers; possible extension of time limits; and the better regulation of non-disclosure agreements.

When the Statutory Code of Practice will be introduced and the further consultation launched is yet to be confirmed.

Non-disclosure agreements

On 13 November 2018, the Women and Equalities Committee launched a new inquiry into non-disclosure agreements (NDAs) in harassment and discrimination cases. The new inquiry has a wider remit, focusing on the use of NDAs in circumstances where any form of harassment or discrimination has been alleged, for example, pregnancy discrimination or racist treatment.

While we wait the outcome of the latest inquiry this year, it is highly likely to include a recommendation that legislation be introduced to make it explicitly clear that any NDA is void if it purports to restrict the making of protected disclosures under the whistleblowing regime or the reporting of a criminal offence to a law enforcement agency/regulator or cooperating with a criminal investigation or prosecution.

3. Employment status

New statutory test

Like last year and the year before, determining worker status in modern workplaces will continue to be a hot topic in 2019. As announced in the Government’s December 2018 ‘Good Work Plan’:

- The Government accepts the Taylor Review’s recommendation that the differences between the employment status tests that govern entitlement to employment rights and tax liability should be reduced to an absolute minimum. It will make ‘renewed effort’ to align the tests and will bring forward detailed proposals in this regard.
- The Government states it will also legislate to ‘improve the clarity of the employment status tests, reflecting the reality of modern working relationships’.

BEIS & HMRC ran a joint public consultation on Employment Status last year, focusing on possible codification of an employment status test and in particular the options of:

- A ‘precise criteria’ test: a test based on more precise and objective criteria, such as
length of engagement, the percentage of an individual's income that comes from one employer, and where the work is done;
• A 'precise structure' test: a test based on a clear order, hierarchy or weighting of the criteria; or
• A less complex test by reducing the number of factors to consider.

Trying to encapsulate the nuanced factors developed over years of case law into legislation will be no easy feat and aligning the three employment law statuses (employee, worker or self-employed) with the binary tax system (employee or self-employed) complicates matters even further.

Brexit priorities and political volatility permitting, further detail is expected in 2019 which should shed light on if and when a new statutory test may be introduced.

Uber heads to the Supreme Court

While a new statutory employment status test is under consideration, the courts will continue to grapple with the issue.

In December 2018, the Court of Appeal upheld the findings to date that Uber drivers are 'workers' entitled to national minimum wage (NMW), paid annual leave, and whistleblowing protection, but only by a majority. A dissenting judgment in favour of independent contractor status suggests all is still to play for in this long-running case that has become the poster-child for gig economy worker status cases (Uber BV and others v Aslam and others).

In addition to the NMW, paid annual leave, and whistleblowing protection implications in question in the Uber case, it should not be forgotten that establishing 'worker status' may also bring a significant pensions auto-enrolment liability. The stakes are high for brand-based companies who exercise tight control over the people who carry their brand but argue those people are self-employed.

As held by the majority of the Court of Appeal, could much of the contractual documentation be disregarded as it did not reflect the reality of the agreed working relationship? Or, as held by the minority, did the contractual documentation reflect the, albeit unfairly disadvantageous, reality of what the parties agreed?

The Court of Appeal has granted Uber permission to further appeal. The Supreme Court is expected to hear the further appeal possibly late in 2019 with important implications for a number of other 'gig economy' employment status cases pending before the tribunals and
Employment Appeal Tribunal (EAT). Many of the other cases concern couriers/drivers, but also other gig economy workers such as a claim by National Gallery tour guides.

**IR35 tax change**

On the tax front, existing public sector restrictions and rules on IR35 (workers providing services through intermediaries) will be extended to some private sector organisations. Under the controversial change, instead of the contractor having responsibility for determining their employment status for tax purposes, the client or hirer will need to make the call. They could be liable for any missing tax if they get the decision wrong.

Following the May 2018 consultation, the extension of the rule changes to the private sector has been pushed back to April 2020. The Government will carry out a further consultation in 2019 to refine the extension of IR35. Draft legislation is expected to be published in summer 2019 and only apply to large and medium sized enterprises as defined under the Companies Act 2006.

**4. Pay reporting**

**Gender pay gap reporting**

Last year saw the publication of the first mandatory gender pay gap reports. The Government Equalities Office (GEO) summary of the 2017/18 gender pay gap (GPG) data showed that while 57% of employers have more women than men among their lowest paid employees, only 33% have more women than men among their highest paid employees.

The deadline for the 2018/19 GPG reports is fast approaching (30 March for public sector and 4 April for private and voluntary sector employers). On 17 January this year, the Government rejected calls to lower the threshold to include organisations employing 50 or more staff. The Government has also rejected calls for mandatory publishing of narratives and action plans (though voluntary publishing is still encouraged). So same again.

**CEO pay ratios**

Gender pay gap reporting is not the only pay gap information being required of some employers. On 1 January, the majority of The Companies (Miscellaneous Reporting) Regulations 2018 came into force. Quoted companies with more than 250 UK employees
will be required to include certain pay ratios for the relevant financial year in the directors' remuneration report. The pay ratios compare the total annual remuneration of the CEO to UK employees whose pay and benefits are on the 25th, 50th and 75th percentiles.

**Ethnicity pay reporting**

The Government Consultation on Ethnicity Pay Reporting closed on 11 January, regarding the possible introduction of mandatory ethnicity pay reporting along similar lines to gender pay gap. Simply cutting and pasting the methodology used in gender pay gap reporting is unlikely to be suitable as particular issues arise from small statistical groups as well as collection and classification of ethnicities information. We wait the result of the consultation to learn whether the idea will be taken further forward or languish in the 'too difficult pile' later this year.

**5. Whistleblowing**

**Deemed knowledge**

Where an employee is dismissed, it will be automatically unfair if the principal reason for the decision to dismiss was that they made a protected public interest disclosure. But what if the decision-maker is being manipulated by another? In the case of Royal Mail Ltd v Jhuti, the dismissing officer was unwittingly misled by the employee's line manager. In 2017, The Court of Appeal, confirmed that in the context of a whistleblowing unfair dismissal claim, even where manipulation has taken place, it is only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss that is relevant. Unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial unless it can be properly attributed to the employer.

The Supreme Court will now consider the issue of decision-maker manipulation in Jhuti, on 12 and 13 June.

**6. Wages**

**Sleep-in shifts**

In one of the most controversial employment law cases of 2018, Royal Mencap Society v Tomlinson-Blake, the Court of Appeal overturned numerous EAT judgments to rule that the
only time that counts for national minimum wage (NMW) purposes during sleep-in shifts is the time when the worker is required to be awake for the purpose of working (Sleeping on the job take two: National minimum wage and 'sleep-in' shifts).

The surprise Court of Appeal judgment has had a huge impact on the care sector, with the Government suspending its social care compliance scheme, which was set up to allow care-sector employers to volunteer back payments to sleep-in staff who were previously denied the national minimum wage. The Supreme Court is expected to grant permission to appeal in early 2019 to be heard sometime late 2019/early 2020.

NMW reform

On 17 December 2018, the Government launched a consultation, NMW: salaried workers and salary sacrifice, seeking views on whether certain aspects of NMW legislation should be amended to ensure that they do not inadvertently penalise employers. The consultation focuses on the complex rules on "salaried hours work" under which employers can average out pay over a calculation year for NMW purposes and whether they effectively prevent exploitation of workers. The Government is also seeking views on the impact of the NMW rules on salary sacrifice schemes, in particular whether employers are withdrawing schemes from low-paid workers in order to avoid non-compliance with the NMW. The consultation closes on 1 March 2019, with proposed reforms to follow.

April's NMW rate increases

On a business as usual front, 1 April will see the National Minimum Wage annual increases:

- rate for 25+ year olds (the national living wage) from £7.83 to £8.21 per hour
- rate for 21 to 24 year olds from £7.38 to £7.70 per hour
- rate for 18 to 20 year olds from £5.90 to £6.15 per hour
- rate for 16 to 17 year olds from £4.20 to £4.35 per hour
- rate for apprentices from £3.70 to £3.90 per hour.

Tips & gratuities

The Government has announced as part of its December 2018 'Good Work Plan' proposals to legislate 'at the earliest opportunity' to ban employers from making deductions from staff tips, gratuities and service charges. Preventing employers' from
taking an administration fee cut from tips is hardly controversial. What is unclear is whether employers will be prevented from forcing waiting staff to hand over a portion of their tips to kitchen staff (including higher paid chefs and front of house supervisors).

7. **Holiday pay calculation**

**Atypical workers short-cut**

Working out holiday entitlement for term time only workers, casual and zero hour workers can often prove to be an administrative headache. Many employers use a 12.07% of annualised hours shortcut as set out in ACAS guidance. Last year the EAT in [Brazel v The Harpur Trust](https://www.bailii.org/ew/cases/EAT/2019/811.html) held that when calculating holiday pay for variable hour term-time workers, employers must calculate holiday pay on the basis of the average hours worked in the preceding 12 weeks immediately before payment is made as required under the Working Time Regulations 1998. The Court of Appeal will further consider the use of this short-cut on 2 May.

**Reference period extension**

While judicial assistance may or may not be forthcoming about easing holiday pay calculations for some atypical workers, legislative reform may help instead. Though not coming into force until 6 April 2020, the [Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018](https://www.gov.uk/government/publications/employment-rights-employment-particulars-and-paid-annual-leave-amendment-regulations-2018) increases the reference period for calculating holiday pay from 12 to 52 weeks (or the number of complete weeks for which the worker has been employed if fewer than 52). This will allow for consistent holiday pay calculation over the year rather than holiday pay being inflated (if holiday is taken after a busy period) or deflated (if holiday is taken after a quiet period) for workers with variable hours.

8. **Atypical workers**

**Payslips & Particulars of employment**

2019 will see the start of some statutory protections currently limited to those classed as 'employees' extended (and strengthened) to the wider category of 'workers':

- From 6 April 2019, employers are required to give every 'worker' (not only 'employees'
as currently) a written itemised pay statement at or before the time at which any payment of wages or salary is made.

- In addition to the information that must currently be provided to employees, where the amount of wages varies by reference to time worked, the statement should include the number of hours worked in respect of the variable amount of wages or salary. This needs to be as a single aggregate figure, or separate figures for the different types of work or different rates of pay.

- From 6 April 2020, all employers must provide a Statement of Employment Particulars to all 'workers' (currently only employees) to be received on day one of employment commencing (currently within 2 months). Some additional particulars that must be set out are also inserted including more detail on working hours, probationary periods and required training. These changes will only apply to workers whose employment begins on or after 6 April 2020.

**Security of employment**

As announced in the Government's December 2018 'Good Work Plan' it is expected that:

- New regulations will be introduced for all workers on flexible contracts (e.g. zero-hours workers) who have 26 weeks' continuous service to have the right to request 'a more predictable and stable contract'.

- Increased protection for 'employees' who work intermittently by increasing the period required to break continuity of employment for the purpose of accruing employment rights from one to four weeks.

Draft legislation and the time frame for introduction has not yet been published.

**Agency workers**

From 6 April 2020, the Agency Workers Regulations 2010 (AWR) will be amended. The 'Swedish derogation' (which excludes agency workers from the right to the same pay as directly-recruited workers if they have a contract of employment with the agency) will be repealed. Employers should now consider the cost implications in any contract negotiations with employment businesses/agencies.

Also from 6 April 2020, all employment businesses must provide every agency worker with a 'key facts' page (type of contract, minimum rate of pay that can be expected, how they will be paid etc...). The Employment Agency Standards Inspectorate is expected to
be given enforcement powers.

From the courts, on 3 April the Court of Appeal will consider whether the AWR requires a term-by-term comparison of basic terms and conditions (as held by the EAT) or whether a package approach is permissible (Kocur v Angard Staffing Solutions).

9. Disciplinary proceedings

Suspensions

Is suspension of an employee pending investigation into an incident a neutral act or can it amount to a breach of the implied duty of mutual trust and confidence, entitling the employee to claim constructive unfair dismissal? The High Court held the latter where suspension was seen as a default knee-jerk reaction.

The Court of Appeal considered this important question on 29 January in Agoreyo v London Borough of Lambeth, we await the judgment.

Investigating criminal misconduct

An employer investigating alleged misconduct which also amounts to a criminal offence will be facing a difficult situation and will need to proceed carefully. Should disciplinary action be put on hold pending the outcome of criminal proceedings? Can an employee insist disciplinary proceedings be adjourned on the basis that his response to questions could prejudice a pending trial or police interview?

On 19 or 20 February, the Court of Appeal will consider whether the High Court was correct to grant an injunction holding that the employer would be in breach of the implied term of trust and confidence if it refused a request for an adjournment in Gregg v North West Anglia NHS Foundation Trust.

10. Industrial relations

Unlawful inducements

Trade union legislation makes it unlawful for employers to offer incentives to workers to influence their relationship with unions, for example by paying them to refrain from joining a union. On 22 or 23 May, the Court of Appeal will explore the scope of this legislation in
Kostal UK Ltd v Mr D Dunkley and Others. In particular, if acceptance of a direct offer would mean that at least one term of employment will be determined by direct rather than collective agreement, is that sufficient to amount to an unlawful inducement, even if other terms continue to be determined collectively?

Privacy

On 28 November 2018, the Grand Chamber of the European Court of Human Rights in López Ribalda v Spain considered whether an employer's decision to install hidden cameras to monitor suspected workplace theft by a number of supermarket cashiers violated the cashiers' privacy rights under Article 8 of the European Convention on Human Rights. The judgment currently awaited is expected to provide guidance on when the use of covert video surveillance may be considered appropriate.

Employee consultation

On a legislative front, under the Information and Consultation of Employees Regulations 2004 (ICE), employees in organisations with 50 or more employees may be able to compel their employer to put in place (if they have not done so already) an information and consultation agreement, setting out a framework for the exchange of information and views on workplace issues. Under the draft Employment Rights (Miscellaneous Amendments) Regulations 2019 the threshold for triggering the ICE Regulations will decrease from 10% to 2% (15 employee minimum threshold to remain).

11. Business protection

Post-termination restrictions

On 21 and 22 January, the Supreme Court considered in Tillman v Egon Zehnder Ltd whether a restrictive covenant that prevents an ex-employee from being "concerned or interested in" a competitor for six months without an express carve-out for minor shareholdings was too wide and therefore unenforceable in its entirety. In this case, an executive was able to join a competitor free of a six month non-compete clause This was the case even though she did not have nor intend to have a minor shareholding in the competing business, so was not impacted by the failure to provide this carve out.
Employee inventor compensation

On 6 and 7 February, the Supreme Court will consider the long-running case of Shanks v Unilever concerning employee inventor compensation and what constitutes 'an outstanding benefit' to the employer. The Patents Act 1977 provides for employee inventors to be paid additional compensation in the event that their patent/invention is of 'outstanding benefit' to their employer. In assessing whether or not such a benefit is "outstanding", regard should be had of the size and nature of the employer's undertaking. It must also be 'just' in the circumstances that the employee receives compensation and such compensation should be a 'fair share'. But, just how high is the hurdle for employee inventors to show 'outstanding benefit'? So far it is set very high.

12. Tribunal proceedings

6 April caps on penalties & awards

From 6 April 2019

- The maximum financial penalty (payable to the Exchequer) that Employment Tribunals can impose for 'aggravated breach' will increase from £5,000 to £20,000. The minimum penalty remains at £100.
- The annual increase to employment tribunal compensation limits is expected. New limits yet to be announced

Proposed tribunal reform

On 26 September 2018, the Law Commission launched a consultation on employment tribunal reform. The lengthy consultation proposed possible reforms including extending the current three-month time limit for issuing most employment tribunal claims to six months, increasing the employment tribunal's £25,000 limit for contract claims, and allowing tribunals to apportion liability in discrimination claims. The consultation closed on 11 January 2019. We wait to hear if any of these proposals will be taken further.

Tribunal fees?

Despite the abolition of tribunal fees by the Supreme Court in July 2017, the Ministry of Justice announced in November 2018 that a new fee regime "balancing tribunal funding
and access to justice" was "in development".

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