

APSCo OutSource Board Briefing

Q3 2021

This Board Report aims to provide members' boards, legal and compliance teams with a steer on upcoming legal changes and guidance affecting the professional recruitment sector to enable a proactive response and potentially competitive advantage.

TOPIC	IMPORTANT DATES	ACTIONS
COVID-19	<ul style="list-style-type: none"> Vaccinations will be mandatory in England for those working in care homes from 11 November 2021. England moved in to Step 4 of the roadmap out of lockdown on 19 July and government advice for people to 'work from home where they can' no longer applies. 	<ul style="list-style-type: none"> Use the time period before the new Regulations come in to force to encourage care home workers to get vaccinated and arrange alternative staffing to replace those who refuse. Review our updated guidance on Unlocking the Lockdown.
Right to Work	<ul style="list-style-type: none"> Return to face-to-face and physical document right to work checks deferred until 5 April 2022 (inclusive). Retrospective checks on those who had a COVID-19 adjusted check between 30 March 2020 and 5 April 2022 (inclusive) will not be required. 	<ul style="list-style-type: none"> Members can continue to benefit from the COVID-19 adjusted measures and conduct RTW checks over video calls and using scanned/photo documents until 5 April 2022.
Brexit	<ul style="list-style-type: none"> EUSS transitional measures in place until 31 December 2021. 	<ul style="list-style-type: none"> Home Office employer right to work check guidance sets out measures to take where an EEA citizen has not applied to the EUSS by the 30 June deadline. Review our Right to Work FAQs which go into further detail. Consultations
Consultations	<ul style="list-style-type: none"> ICO Consultation: Views on data protection and employment practices, deadline to submit responses is 21 October 2021. ICO Consultation: Views on how organisations can continue to protect people's personal data when transferred outside of the UK, deadline to submit responses is 7 October 2021. 	<ul style="list-style-type: none"> Contact the APSCo OutSource legal helpdesk to participate in our responses or submit your own responses.

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Off-payroll: Northern Light Solutions Ltd v HMRC [2021]		
<p>Overview: Mr Lee was providing his services as an IT contractor to Nationwide Building Society under his PSC 'Northern Light Solutions Ltd'. He was engaged through a series of similar contracts over a number of years, determining himself as 'outside IR35' under the rules contained in Chapter 8, Part 2 of ITEPA 2003. HMRC challenged his IR35 status and levied a tax bill of £70K against his PSC. The Upper Tribunal upheld the First-tier Tribunal's decision that his hypothetical contracts with the client were that of employment, and therefore should have determined as inside IR35.</p> <p>Impact: One of the key aspects to the case was substitution, which is a key determining factor in the CEST tool. Mr Lee had a contractual right of substitution but had never exercised it in practice. HMRC referred to notes of meetings in which the client confirmed Mr Lee was not able to send another person to complete the work, due to the high level of specialist experience required. Another issue was the degree of control. This case follows very high penalties issued to DWP, Home Office and HMCTS by HMRC for misapplying Off Payroll rules, particularly on substitution.</p> <p>Action: APSCo continue to advise against reliance on right of substitution, particularly if using the CEST tool. If a contractual right of substitution applies when determining IR35 status, attention should be paid to what the working practices are rather than just what is contractually agreed. Substitution should be one factor, not the sole factor. We have several Trusted Partners that can provide Off Payroll support, details of which can be found on our IR35 page.</p>		
Data Protection: Brexit and Model Terms		
<p>Overview: At the end of June, The European Commission adopted two adequacy decisions for the UK one covering GDPR and the other the Law Enforcement Directive. This means that personal data can continue to flow freely from the EEA to the UK where it benefits from an essentially equivalent level of protection to that guaranteed under EU law. For the first time, the adequacy decisions include a 'sunset clause', which means that the decisions will automatically expire four years after their entry into force. After that period, the adequacy findings might be renewed, however, only if the UK continues to ensure an adequate level of data protection. During these four years, the Commission will continue to monitor the legal situation in the UK and could intervene at any point if the UK deviates from the level of protection currently in place. The UK is currently looking to enter into data agreements with many third countries which may cause issues.</p> <p>The EU are introducing new model terms for data transfers out of the EEA to third countries without an adequacy decision, including the USA. For the UK, the ICO have an open consultation which will end on 7 October 2021.</p> <p>Impact: The adequacy decision allows for the continued flow of data out of EEA into the UK, without the need for model terms.</p> <p>Action: There is no need to have separate model terms in place, however you should ensure all your contracts differentiate between UK GDPR and GDPR. International businesses should undertake a review of their data flows and their need to use model terms.</p>		
Extension of Health and Safety detriment protection to workers		
<p>Overview: The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 came into force on 31 May 2021. It extends the rights previously conferred under section 44 of the Employment Rights Act 1996 (ERA), not to be subjected to a detriment in certain health and safety cases to workers. This extension is a result of the decision in R (on the application of IWGB) v Secretary State for Work and Pensions and others where it was held that only providing such protections to employees and not workers was a breach of the EU Health and Safety Framework Directive.</p> <p>Impact: Workers are now protected from detriment on the grounds of health and safety, where they leave work or refuse to come into work due to a reasonable belief that they are in or would be in "serious and imminent danger". Despite the worker being unable to claim for unfair dismissal, they would be able to make a detriment claim if they were sanctioned i.e. by having their contract terminated.</p> <p>Action: Ensure you are obtaining details of health and safety risks from the client and provide them to the worker, as per regulation 18 of the Conduct Regulations. Have a policy and process in place to manage reports of health and safety risks made to you by contractors. Ensure that clients are carrying out health and safety risk assessments, which include contractors to mitigate any potential risks/issues.</p>		