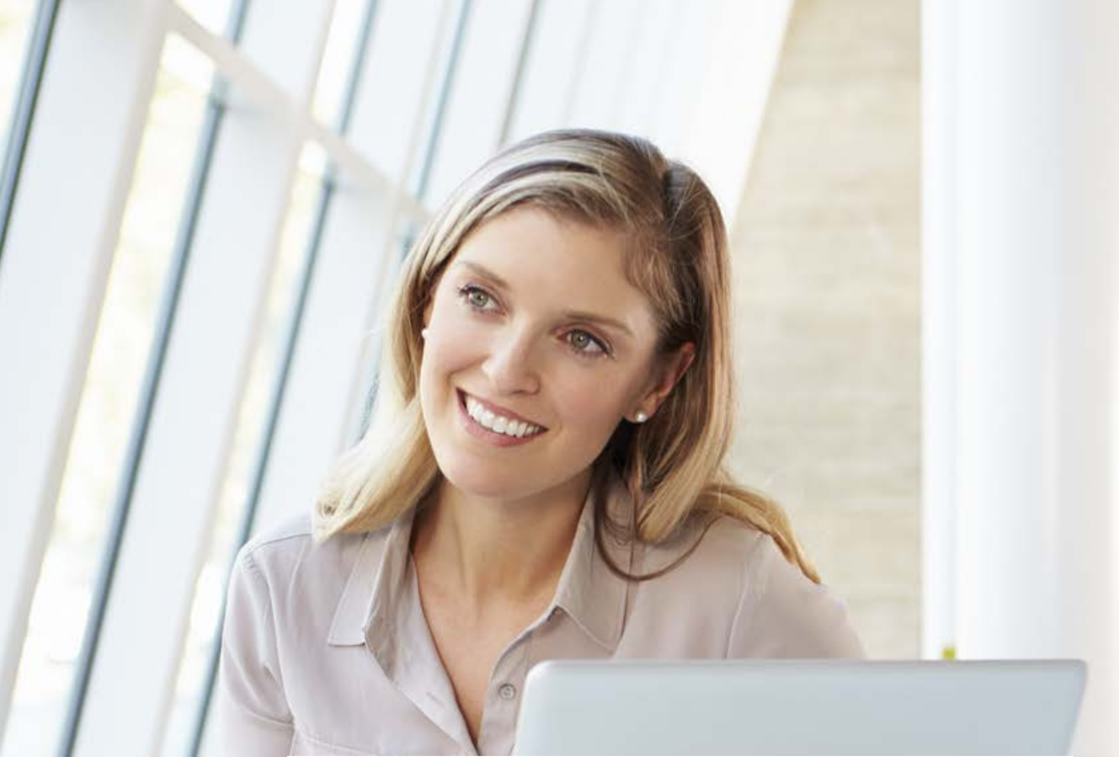

HAYS Recruiting experts in Human Resources

EMPLOYMENT LAW BULLETIN

April 2017

Partnering with:

TRAVERS SMITH

WELCOME

Welcome to the Spring 2017 edition of the Hays Employment Law Bulletin which has been produced with the assistance of the London law firm, Travers Smith LLP. It features comprehensive detail on changes to employment law and legislation.

We understand that keeping abreast of changes in employment law can be challenging so we hope you find this instructive and revealing. Your feedback will be most welcome.

Thank you to Travers Smith LLP for their insight.

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APPRENTICESHIP LEVY ARE YOU READY?

According to a recent survey by City & Guilds, a third of UK businesses are confused or unaware of the financial implications of the new apprenticeship levy. Just one in three businesses surveyed said they were fully aware of the levy and 23 percent said they were unaware of the changes to the apprenticeship system.

From 6 April 2017, all UK employers with an annual pay bill of more than £3 million will be required to pay the apprenticeship levy. The levy is part of a package of reforms which aims to increase the quantity and quality of apprenticeships – the Government hopes to create three million apprenticeships in England by 2020.

The levy will be charged at 0.5 percent of the employer's annual pay bill, on the amount by which the pay bill exceeds £3 million. For group companies, it is the group's total annual pay bill that is relevant, so all entities within the group will be caught where the group's total pay bill is more than £3 million.

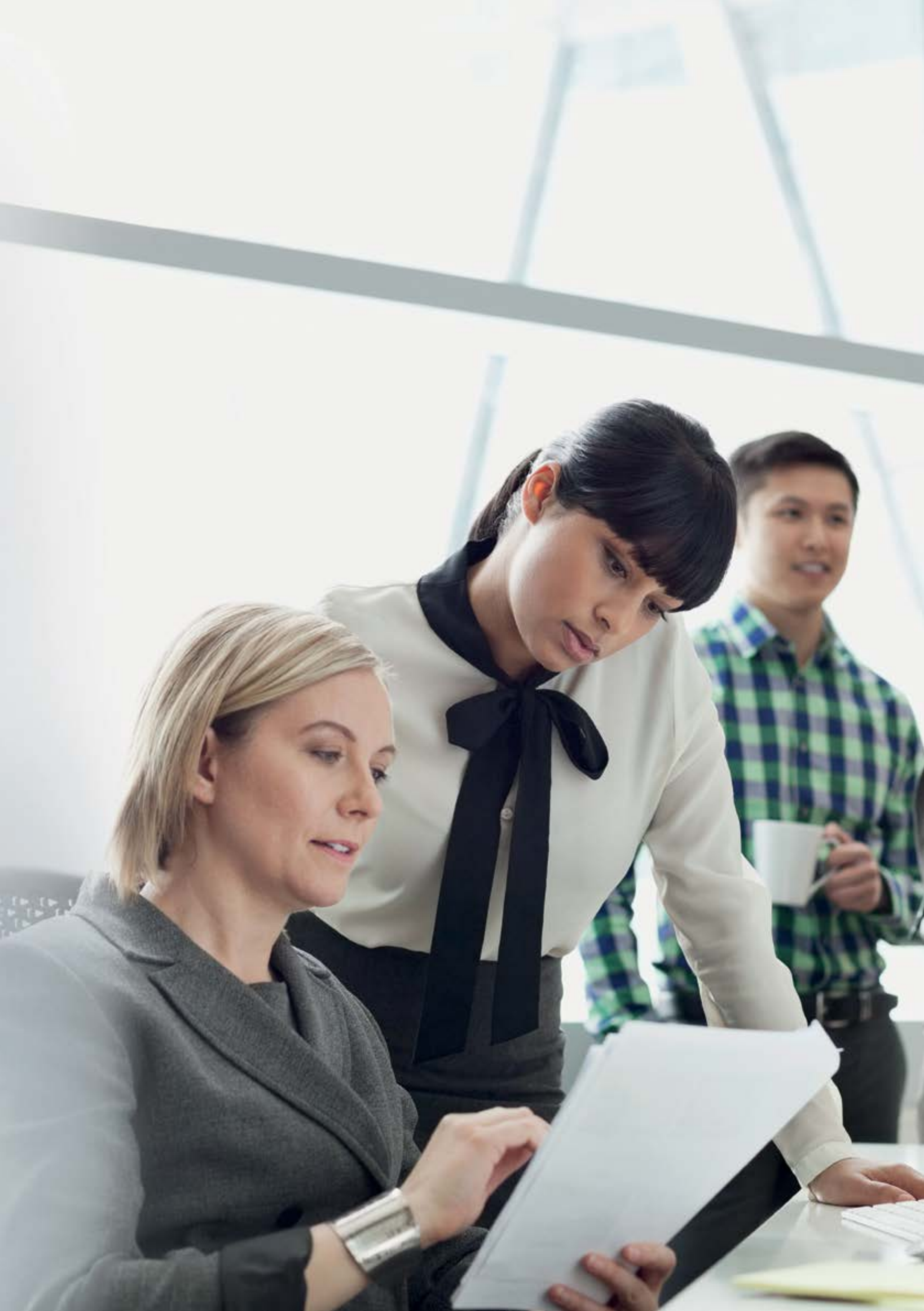
The levy is paid monthly to HMRC through the PAYE process, alongside tax and national insurance contributions. Employers caught by the levy must register for an online digital apprenticeship service account.

Monthly levy funds paid through the PAYE process will go into the employer's digital apprenticeship service account and will be available for the employer to use on training and assessment for approved apprenticeships.

In the light of the levy, many employers are considering how to convert existing training programmes into apprenticeships to make the most of the funds. To qualify for funding, the apprenticeship must last at least 12 months and involve at least 20 percent of "off the job" training. The apprentice must also work towards an approved "apprenticeship standard" or "apprenticeship framework", which are published by the Skills Funding Agency and set out the requirements for apprentices in a given role.

Employers should be aware that apprentices are employees and have the same rights as other employees – for example they are entitled to national minimum wage, paid holiday and unfair dismissal protection after two years' service.

Hays, in conjunction with Travers Smith and Learndirect, recently ran a webinar on the new apprenticeship levy and its implications for employers. Please visit **hays.co.uk/informed** if you would like to access the webinar.



EMPLOYMENT STATUS DO YOU KNOW YOUR WORKERS?

Employment status and worker rights have made headlines over the past few months, following a recent spate of claims from workers challenging their employment status.

In February 2017, Gary Smith, a plumber from Pimlico Plumbers, became the latest worker to successfully challenge the "self-employed" label after winning a claim that he is a "worker" rather than a "self-employed contractor". The decision follows the recent rulings in relation to two Uber drivers and a CitySprint cycle courier – all of whom have been found to be "workers" rather than self-employed. The rulings mean these workers are entitled to basic worker rights like national minimum wage and paid holiday.

Although the rulings do not represent new law, they shine a spotlight on employment status issues, particularly for businesses in the 'gig economy' that engage self-employed contractors and present them to the public as working for the company.

It is an issue that is set to remain in the spotlight. The Government has launched a review to assess whether employment law needs to change to keep pace with modern business models. Among the issues being considered is the impact of new forms of working on employee rights and employment status, particularly in the light of the growing 'gig economy'. Matthew Taylor, Chief Executive of the Royal Society of Arts, has been commissioned to lead the review, which is expected to conclude by summer 2017. HMRC has also set up a specialist Employment Status and Intermediaries team to investigate businesses which engage large numbers of self-employed workers and act on any complaints about false self-employment.

In the light of these developments, employers would be well advised to review the different types of workers they engage – including casuals, zero-hours workers, agency staff, freelancers and contractors – to assess how they are being used and whether their terms are still appropriate. Given the recent trend for challenges from different types of workers, businesses need to be prepared to respond.

OFFICE RELOCATION HOW FAR CAN YOU GO?

The employer in this case had to close its office in Greenford due to workload and office capacity. It asked employees to relocate to Leatherhead, relying on a mobility clause in their contracts which said employees could be required to work at a different location in the UK or overseas on a temporary or permanent basis unless there were "exceptional circumstances". A number of employees with caring responsibilities left under the "exceptional circumstances" carve-out and received a redundancy payment. For those transferring, the employer offered a contribution to travel costs for six months and an earlier finish to help with traffic.

However, two employees refused to relocate. They both lived close to Greenford and complained about the considerable extra travel – an increased commute from 20 minutes to two hours each way for one employee, and from 18 to 47 miles for the other (who also had 25 years' service and was close to retirement). They were both dismissed for failure to follow a reasonable instruction and both claimed unfair dismissal and statutory redundancy pay.

The Employment Appeal Tribunal (EAT) ruled that the dismissals were unfair. The EAT accepted that the reason for dismissal in each case was not redundancy but the failure to comply with the request to relocate. However, the employer's instruction to relocate had not been reasonable because of the greatly increased travel time. The mobility clause did not assist as it was so widely drafted and the steps taken by the employer to alleviate the impact were of no benefit to the two employees.

This case highlights the potential limitations of mobility clauses. While employers can sometimes rely on a contractual mobility clause to avoid making employees redundant, they must do so with caution. The employer should check the clause is tightly drafted and covers the situation, and make it clear in employee communications from the outset that the mobility clause is being invoked. Regardless of how wide the clause appears, employers must always act reasonably when asking staff to relocate, by giving plenty of notice and taking steps to mitigate the impact of the relocation. Employers should also be prepared to take into account the particular circumstances of individual employees on a case by case basis.

Kellogg Brown & Root (UK) Ltd v Fitton and Ewer

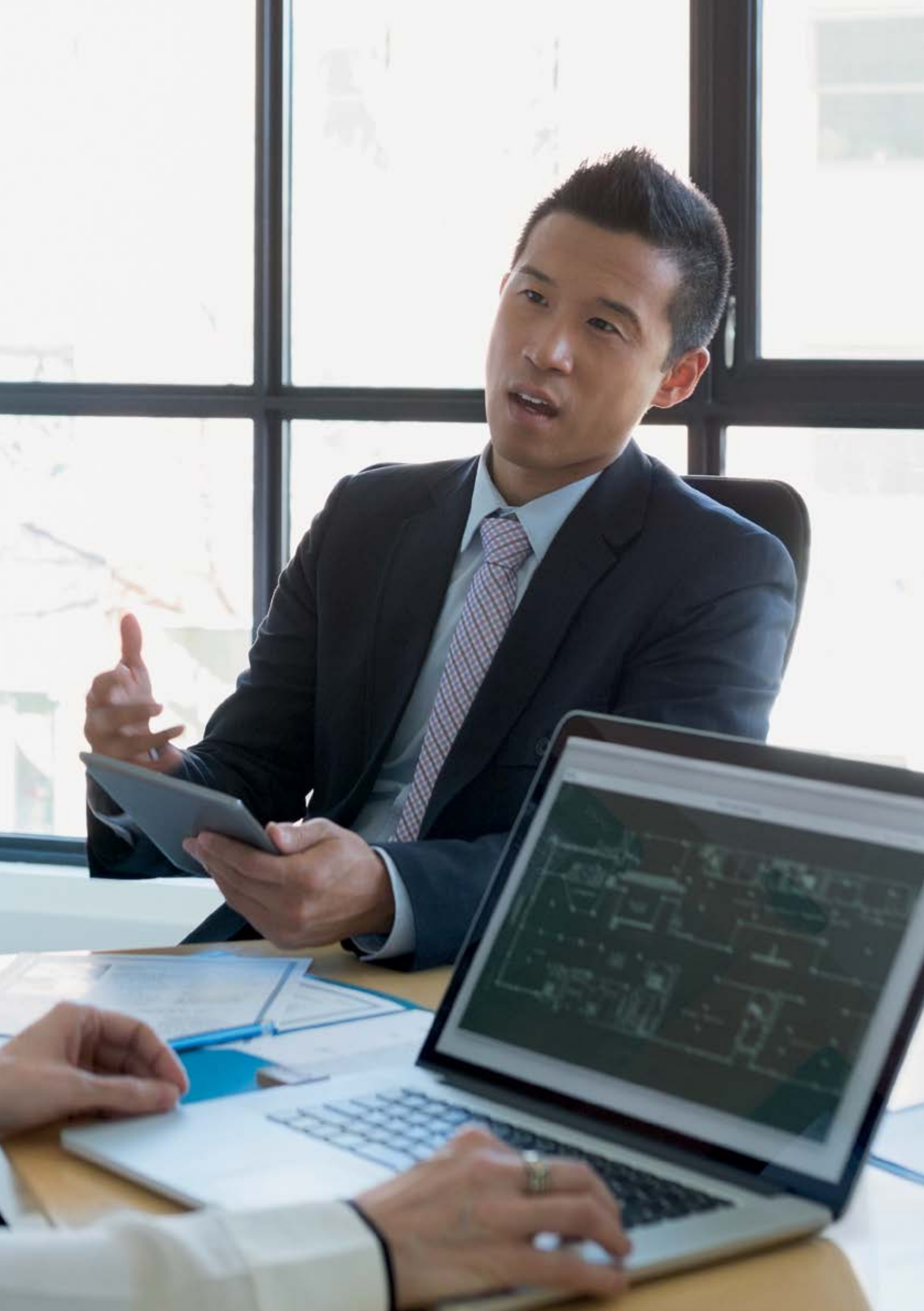
DISMISSAL
WHEN IS ENOUGH ENOUGH?

The employee in this case, who worked for a manufacturer of motorhomes, had a very poor disciplinary record. There were some 18 formal disciplinary issues in almost 13 years' service (in addition to informal discussions). He was dismissed after he was caught using his mobile phone on the shop floor which was "strictly prohibited" in the employee handbook. He had two recent warnings on file for misconduct but both had expired. The dismissing manager said that the phone incident was worthy of a final written warning, taking into account the personal issues the employee had been having at home. However, he decided to dismiss because of the employee's extensive disciplinary history and because he did not think things would improve. The employee brought an unfair dismissal claim, arguing that the prior expired warnings should not have been taken into account.

The employee lost his claim. The Employment Tribunal and the Employment Appeal Tribunal ruled that the dismissal was fair. It was reasonable for the employer to take account of the employee's disciplinary record and base its decision on a prediction that things would not improve in the future. The disciplinary record was extensive and covered the entire period of the employee's employment.

This case is helpful to a point but should be approached with caution. An employer cannot usually rely on expired warnings to "tip the balance" where a later incident of misconduct is not enough on its own to justify dismissal. It will also be rare that an employer will be able to justify dismissal by deciding "enough is enough" based on an employee's prior disciplinary record. Where there is a history of repeated misconduct, it would usually be much safer for the employer to consider extending the life of warnings. Although the Acas Code suggests warnings should normally have a time limit of 12 months, a longer period would be justified where the misconduct is especially serious or there is a pattern of misconduct recurring each time a warning expires.

Stratford v Auto Trail VR Limited



DISMISSAL
HOW CAN YOU TELL?

The employee in this case was employed by an agency and assigned to work for a client. The client had concerns about her performance and gave notice to terminate her engagement. The employee did not get in touch with the agency and a manager only made one failed attempt to get in touch with her. He did not proactively seek out any other assignments for her, as he was required to do under her contract, assuming she would not be interested. The employee brought an unfair dismissal claim against the agency. She argued that by not seeking out alternative work for her, the agency had effectively dismissed her. However, the Employment Tribunal and the Employment Appeal Tribunal ruled that the employee had not been dismissed by the agency. The agency had done nothing to communicate a dismissal to her, so she remained employed and could not claim unfair dismissal.

This case is a reminder that, to be effective, dismissal must be communicated clearly to the employee. While there are some cases where a dismissal has been inferred from conduct (eg where the employer stopped paying the employee or issued the P45), the conduct in those cases left no room for doubt that employment had ended and the employee was aware of it. Wherever possible, employers should ensure that dismissal is communicated expressly to the employee. The dismissal will only be effective once the employee has received that communication, so it is safest to communicate the dismissal in person or over the phone and then confirm this in writing, rather than relying solely on post or email.

Sandle v Adecco UK Ltd

NEW LAW

Strike ballots

On 1 March 2017, new rules concerning strikes and other industrial action came into force under the Trade Union Act 2016. The Act introduces a new turnout threshold for all strike ballots. Previously, there was no minimum number of workers who had to participate in a ballot, provided the majority of those who responded to the ballot voted in favour of the strike. Now, a strike is only valid if at least 50 percent of all eligible union members turn out to vote, and a majority of those who turn out vote in favour of the strike. There is also a new, additional requirement for important public services (eg the health service) that the ballot is only valid if at least 40 percent of all eligible members in total vote in favour of the strike.

Other key changes include:

- an increase in the notice of the strike that the union must give the employer from seven to 14 days, and
- a new time limit of six months for taking strike action after the ballot, after which a new ballot would be needed for further strike action

The changes apply to strike ballots on or after 1 March 2017.

National minimum wage

On 1 April 2017, the rates of the national minimum wage and national living wage increased to:

- £7.50 per hour for workers aged 25 and over (rising from the original national living wage of £7.20 per hour)
- £7.05 per hour for workers aged 21 to 24 (rising from £6.95 per hour)
- £5.60 per hour for workers aged 18-20 (rising from £5.55 per hour), and
- £4.05 per hour for workers aged under 18 years (rising from £4.00 per hour)

The apprenticeship rate, for apprentices under 19 or in the first year of their apprenticeship, also increased from £3.40 to £3.50 per hour.

Maternity pay rates

On 2 April 2017, the lower rate of statutory maternity pay and the rate of statutory paternity, adoption and shared parental pay increased from £139.58 to £140.98 per week (or 90% of the employee's average weekly earnings if lower).

Statutory sick pay

On 2 April 2017, the rate of statutory sick pay increased from £88.45 to £89.35 per week.

Employment Tribunal compensation

The annual increase in Employment Tribunal compensation limits took effect on 6 April 2017. For dismissals taking effect on or after 6 April 2017:

- the maximum compensatory award for unfair dismissal is the lower of £80,541 or a year's pay (previously the limit was the lower of £78,962 or a year's pay) and
- the maximum amount of a week's pay (used for calculating, for example, the unfair dismissal basic award and statutory redundancy pay) increased from £479 to £489 per week

Immigration for licensed sponsors

From 6 April 2017, employers who are licensed sponsors will be required to pay an Immigration Skills Charge for sponsored employees. The charge, which is designed to discourage reliance on migrant workers, will be £1,000 per employee per year on a Tier 2 visa (a reduced rate of £364 per year will apply to small sponsors). The charge will be payable upfront and for the total period covered by the Tier 2 visa. It will be payable for both Tier 2 General and Tier 2 Intra Company Transfer visas but will not apply to extensions where the original visa was granted before 6 April 2017, PhD level roles or for international students switching from student visas to sponsored Tier 2 visas.

Gender pay gap reporting

The new rules in relation to gender pay gap reporting came into force on 6 April 2017. Employers with 250 or more employees will be required to publish on their website annually figures showing the pay gap in their organisation, including:

- the overall mean (average) and median (mid-point in the data) difference between male and female pay across their workforce
- the mean and median difference between bonuses and other incentive payments made to male and female employees across the workforce
- the proportion of male and female employees who received bonuses and other incentive payments in the relevant year
- the proportion of male and female employees in each quartile of pay in the workforce

Employers will have 12 months from the 5 April each year to report on the previous year, so the first reports will have to be published by 4 April 2018.

CONTACT US

Hays Human Resources recruits for HR Directors and their teams on a permanent, contract and temporary basis. With offices across the UK, we are able to give you the benefit of local knowledge and an understanding of the HR market to help you find the right people, when you need them.

We also offer expert advice on salaries and benefits as well as specialist insight into market trends, helping you keep up-to-date with the latest developments in the HR industry.

For more information on our range of services, please call 020 3465 0113 or contact your local Hays office at hays.co.uk/offices

This Employment Law Bulletin has been produced with the assistance of the London law firm, Travers Smith LLP. If you have any queries about the Bulletin, or employment law generally, please contact Travers Smith LLP employment law specialists:

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