

This is all part of implementation of the new points based system for = assessing the eligibility of non-EEA migrants to work in the UK. = The general rule under the system is that non-EEA migrants = require a sponsor unless they are applying under the highly skilled tier known as = "tier 1". Skilled workers generally come under what is known as "tier 2" = and temporary workers come under "tier 5". Migrants from the EEA are, of course, not affected. They = have had freedom of movement within the EEA since 1st January 1994.

In general the conditions for obtaining a sponsorship licence = are that:

- the applicant must be a legitimate organisation working within the law in the United Kingdom;
- there are no reasons to believe that the applicant is a = threat to immigration control; and
- the applicant will meet its continuing sponsorship duties.

The details and the process of applying for and retaining a licence, including inspections and checks by the Home Office, are = complicated - much more so than under the previous "work permit" system. It should be = noted that applicants have to pay a fee (between £300 and £1,000) to the government.

- *For further information click here on [Immigration / work permits / a general note](#) to go to notes on our = website.*

[\(return to top\)](#)

3. [Agency and temporary staff](#)

Two recent developments are of importance for those who use = or supply (or who are) temporary workers. First and most importantly, on 22nd October 2008 after years of negotiation, muddled in particular by the UK using the = "working time 48 hour week opt-out" as a bargaining counter, the European Parliament approved the 2002 draft directive on Temporary Agency = Work (*technically the [EU Directive on "Working conditions for temporary = workers"](#), COM/2002/0701 final, November 2002*). The 2008 = version is understood to be much the same as the 2002 draft although a change = is that Member States have three (rather than two) years to incorporate its = provisions into national law. The precise wording is expected to be = published in the EC Official Journal towards the end of 2008 or in early 2009.

As agreed between the British government, the TUC and the CBI, the = result will be that after 12 weeks' employment temporary workers will have the = same pay and holiday rights as the employer's permanent staff. The = obligation on employers to provide equal treatment for temps will not extend to = providing benefits from occupational social security schemes (eg pension and = sickness benefit schemes) available for permanent staff. The = Recruitment & Employment Confederation is calling "*for the implementation of = these regulations to be pushed back to avoid putting more jobs at risk*". = Second, and quite separately, new rules came into effect in the = UK on 27th October 2008 to ensure that agency workers are treated in the = same way as other staff in regard to entitlement to Statutory Sick Pay. This is a technical correction of an oversight - in 2002 = a rule was abolished under which a fixed-term employee was not eligible for SSP = if the fixed term was for less than three months but the Courts = later held that the wording did not achieve this result if the = individual was an agency worker. The position has now been corrected.

- *For further information click here on [Employment Agencies / EU directive on temps \(2002 draft\)](#) and/or on [Employment Agencies / statutory sick pay](#) to go to notes on our website.*

[\(return to top\)](#)

4. [Incapacity Benefit phase out](#)

Incapacity Benefit and Income Support paid on incapacity grounds are being phased out. From 27th October 2008, any new claimant gets instead a benefit called "Employment and Support Allowance". Those already receiving Incapacity Benefit or Income Support (government figures show that there are some 2.6 million) will continue to receive those benefits for the time being provided they satisfy the entitlement conditions.

The fundamental difference between the old and new systems is the new focus on what work the claimant can do rather than on what he or she can't do.

All applicants, except those severely ill or disabled, will be required to take part in a 13-week assessment. During that 13 week period they will have a "Work capability assessment" carried out at a Medical Examination Centre by a doctor or nurse approved by the Secretary of State (not their own GP). During this assessment period they will receive a basic rate payment (up to £60.50 a week for a single person aged 25+ or £47.95 a week for a single person under 25). After the assessment period, those who qualify will enter either a "Support Group" or a "Work-Related Activity Group". They will then be entitled to Employment and Support Allowance proper.

The Support Group is for those with an illness or disability which makes it impractical for them to work. They will generally receive up to £89.50 a week.

The Work-Related Activity Group is for others. They will be expected to prepare for a return to work as a condition of receiving Employment and Support Allowance. They will generally be required to attend a "work focused interview" every month until they get back into work and will generally receive a weekly payment of £84.50 a week (it can be more - the precise amount is subject to a means test and will also depend on how many National Insurance Contributions the claimant has paid).

The system is "stick and carrot". The stick part means that after the 13 week assessment period, a claimant who fails to attend a "work focused interview" without good reason will forfeit a substantial part of the weekly benefit. The amount forfeited increases if they persist in non-attendance. There is a 14 page "[sanctions guide](#)" on the DWP website for those wanting more information on this important but inevitably complicated aspect.

- For further information click here on [Employment and Support Allowance](#) to go to notes on our website.

[\(return to top\)](#)

5. [Restrictive covenants, garden leave etc](#)

Given the current economic downturn, we looked at various aspects of redundancy law in our September and October newsletters (*please ask if you would like a further copy*). The often difficult question of enforceability of restrictive covenants after employment ends is equally relevant.

Post-termination restrictive covenants limit the freedom of individuals to do the work they want in the way they want. Unsurprisingly therefore the starting point from which a court will begin if asked to enforce such a covenant is to refuse to do so. On the other hand a court will not take kindly to an individual breaking an agreement freely entered into. The result, in practice, is generally a balancing act - the court will generally agree to enforce a post-termination restrictive covenant if in all the circumstances it would be reasonable for it to do so but not otherwise.

There are generally four different types of restrictive covenant, forbidding respectively:

- solicitation of the employer's customers/clients;
- dealing with the employer's customers/clients;
- solicitation of the employer's continuing employees;

- competition.

In considering whether such covenants are reasonable and enforceable = the courts take into account matters such as duration; whether the = restriction covers only persons with whom the employee had direct contact; = geographical area; whether only specified activities are covered; whether the = covenants are individual covenants which can be separated from each other or whether = they stand or fall as a whole; and current business practice generally. The more limited the restriction the more = likely it is to be enforceable.

As one would expect, there is much relevant case law and much scope = for argument by skilful advocates. In a recent high profile case = the UBS finance house won a temporary injunction to prevent former employees = from poaching its clients and staff . They were setting = up a "wealth management" company called Vestra in competition with UBS's = wealth management division. The judge took a dim view of what was going on = saying *"It is in my judgment an unlawful conspiracy dressed up as lawful competition"* and granted a temporary injunction in = favour of UBS.

This was a good example of what is sometimes called a "springboard" = or "head start" injunction - these being catchy names given to = injunctions which an employer can sometimes obtain to prevent an employee or former = employee using confidential information belonging to the employer as a = springboard to launch a new business.

Garden (or gardening) leave is relevant here. An employee who = continues to receive normal salary but is told not to report for duty is = said to be on "garden leave". Typically this happens if the employer needs to = protect himself against competition or poaching of customers/clients/staff by a = senior employee who has given notice or is to be dismissed. Restrictive covenants can be unreliable and difficult to enforce against ex-employees so it may be attractive for the employer to send the = employee home on "garden leave".

However there are risks for the employer. Even if the = employee's contract specifically provides for "garden leave" the employee may, = depending on the circumstances, be able to argue that an attempt to keep = him at home without work amounts to constructive dismissal. He could then = argue that his employment contract had been wrongfully terminated by the = employer and therefore that he was immediately released from all obligations = under the contract. The employer might thus have scored an = unpleasant own goal by sending the employee home on garden leave - the employee, = no longer bound by the contract, could be automatically released = from any post-termination restrictive covenants it might contain.

- *For further information click here on [Restrictive covenants / a general note](#) and/or [Restrictive covenants / garden leave](#) to go to notes on our website.*

[\(return to top\)](#)

6. [Health and Safety \(Offences\) Act 2008](#)

The [Health and Safety \(Offences\) Act 2008](#) increases the maximum penalties for = certain health and safety offences. In particular it increases = the maximum fines which a Magistrates Court can impose (generally from £5,000 to = £20,000) and gives Magistrates Courts power to impose prison sentences in serious = cases.

The Act received Royal Assent on 16th October 2008. It = follows a series of Private Members' Bills over the last few years attempting unsuccessfully to get similar legislation enacted. The = Act works by altering the penalties set out in the [Health and Safety at = Work etc. Act 1974 s.33](#).

The Health and Safety (Offences) Act 2008 comes into force on 16th = January 2009. It does not apply to offences committed before then = even if prosecuted afterwards. It extends to England and Wales, Scotland and = Northern Ireland

- For further information click here on [A= cts of Parliament etc / Health and Safety \(Offences\) Act 2008](#) to go to = notes on our website.

[\(return to top\)](#)

7. Whistleblowing abuse

Whistleblowing is defined in Chambers dictionary as "*Giving = information (usually to the authorities) about illegal and underhand practices*". = The law has given protection to employees who "blow the whistle" since = 1998 when appropriate changes were made to the Employment Rights Act in = response to scandals such as Matrix Churchill, Maxwell, Clapham Rail and the = Zebrugge Ferry disaster. After each of these incidents official enquiries = had established that workers who were aware of dangers had = been too scared to sound the alarm.

Predictably, it seems some individuals deliberately concoct = whistleblowing claims if they have a grudge against their employer, or = more usually their ex-employer. As with discrimination claims, there is = no statutory limit on the compensation if they win and there is = no requirement to complete any particular period of employment as a precondition = of bringing a claim. Both those considerations restrict the value and = availability of an unfair dismissal claim but neither applies to a whistleblowing claim. Further, as a cynic might point out, a white = Anglo Saxon male will generally find it difficult to bring a discrimination = claim and if dismissed may be tempted to look around to see whether any other = claim with uncapped compensation might be available. An argument that the = real reason for his dismissal was that he had "blown the whistle" on some = unacceptable practice by his employer is an obvious candidate. One such case came to light last year after the Nomura banking = firm dismissed a Mr Hussey. He had been their head of German = sales and co-head of structured solutions and was dismissed for performance = related reasons. However Mr Hussey claimed he had = been fired for being a whistle blower and looked for very substantial compensation. He failed to satisfy the employment tribunal = that he had had anything to blow the whistle about and so failed in that claim - = although Nomura did not follow the correct procedures and so was not blame = free.

The possible problem is one of which employment tribunals are = aware. The law is that an employer can defeat a whistleblowing claim if the = employee bringing it was not acting in good faith or did not reasonably believe = in the truth of information disclosed. Employment tribunals will do their = best to prevent improper claims (*another recent example is = Muchesa v Central & Cecil Housing Care Support, EAT on 22nd August 2008*) but nevertheless the moral is that = employers should be on their guard and ready to contest claims which are falsely made.

- For further information click here on [Whistleblowing / a general note](#) to go to notes on our website. =

[\(return to top\)](#)

8. Flexible working

Flexible working was identified in a recent survey as the "perk" = which many employees would rather have than any other (*Accor Services free whitepaper, October 2008*).

Both the Labour government and the Conservative opposition are on record as favouring extension of the legally enforceable right of parents, and some others, who are responsible for looking after children aged under 6 (or under 18 if the child is disabled) to ensure that requests they make for flexible working arrangements are taken seriously by their employers.

This right was enacted in April 2003 and in April 2007 was extended to cover carers of adults. In May 2008 the government indicated that with effect from April 2009 the right is to be further extended to be available to all parents with children under the age of 16. The proposal follows a failed 2007 private member's Bill which would have extended the right to request flexible working to all parents with children under the age of 18.

However, given the economic downturn and in face of pressure from business, the government has recently signalled that it is reconsidering the currently proposed extension, at any rate in relation to its introduction as soon as April 2009. The TUC general secretary Brendan Barber has been quoted as saying this would be "*an astonishingly irrelevant response*" to the problems facing the economy (*see [The Guardian, 20th October 2008](#)*). As at the beginning of November no decision has been announced.

For completeness, it is worth noting a further proposed change to the current "flexible work" rules. The law currently provides that an employer must give written notice to an employee of either agreement or disagreement to a request for flexible working. Few employers are aware that they have a legal obligation to give written notice of *agreement* and the current proposals will remove that obligation. The requirement to give written notice of a *refusal* will, of course, remain.

- For further information click here on [Flexible Working / 2003 rules](#) to go to notes on our website.

[\(return to top\)](#)

9. [New cases statutes and regulations](#)

You can find on our website summaries of all employment law **cases** reported in the most recent editions of the IRLR and ICR Law Reports (the two leading series of law reports covering employment law cases).

You can also find on our website notes on all recent employment law related **Acts of Parliament** and **Bills** currently before Parliament.

- For further information click here on [List of Cases](#) and/or on [Acts of Parliament etc](#) and/or on [Bills before Parliament](#) to go to notes on our website.

[\(return to top\)](#)

10. [and finally the big money](#)

Until quite recently the maximum compensation which an employment tribunal had power to award was very low. It is still restricted in unfair dismissal cases (currently to £63,000). In breach of contract cases the limit is £25,000 and the absolute maximum statutory redundancy payment is currently £9,900. However in discrimination and, as noted above, whistleblowing cases the sky is the limit - there is no statutory maximum on the amount an employment tribunal can award.

Here are three recent examples:

- £600,000 was recently awarded to a Muslim lawyer employed by the Crown Prosecution Service. In September 2001, shortly after the 9/11 attacks on the World Trade Centre in New York, she was at Bradford Magistrates' Court. A security guard joked that she was a risk to security and she joked back that she was a friend of Osama Bin Laden and went on, more seriously, to describe her disgust at the 9/11 attacks and to criticise the USA. Her remarks were overheard by some Asians and by some white men who were in court for public order offences. Apparently this incited them to create some form of disturbance. News of this got back to the CPS which clearly overreacted. They suspended her, started disciplinary proceedings and moved her to another office although the "evidence" on which they acted was no more than a hearsay and unparticularised account by unnamed complainants. Although clearly in the wrong, the CPS refused to apologise. If they had done so, the lady concerned says she would have dropped the matter. In the event she took them to an employment tribunal where she won her claim of unlawful racial discrimination. That decision was upheld by the Court of Appeal which sent the case back to a tribunal to assess compensation. The lady concerned has now been awarded £600,000 ([Aziz v. Crown Prosecution Service \[2007\] ICR = 153](#)).
 - £4.3m claimed and £2.7m awarded. A chartered accountant of Indian origin joined Abbey National in 2001 as a risk analyst. He was dismissed by reason of redundancy in 2006. He took Abbey National to an employment tribunal and won claims of race discrimination, unfair dismissal and breach of contract (the last being in relation to non-payment of a bonus). At the subsequent remedies hearing he asked for compensation of no less than £4.3m, largely on the basis that he would never get such a well paid job again and would suffer 75% loss of earnings until he reached age 65 in 20 or so years time. The tribunal cut that claim down to £2.8m. Not surprisingly Abbey appealed. It lost on the issue of liability but has won on the issue of remedy. The EAT ruled that the original tribunal had applied the wrong principles in assessing compensation and has remitted assessment of compensation back for reconsideration in the light of its guidance ([Chagger v Abbey National PLC & Hopkins EAT, October = 2008](#)).
 - Multi-million-pound compensation claimed. Two French Muslim sisters, twins in their early thirties, are reported to have made more than 200 separate allegations of discrimination against their ex-employer, the French broker Tradition Securities and Futures. The ladies, Samira and Hanan Fariad, had worked for two years in the firm's City of London office but resigned at the end of 2006 in protest after, they allege, Jewish clients were transferred from them to non-Muslim colleagues. The case opened at Central London Employment Tribunal at the end of October and is scheduled to go on for 55 days. A restricted reporting order, which is being contested by the Press, means that at present only few details are available.
- For further information click here on [Discrimination / compensation](#) to go to notes on our website.

[\(return to top\)](#)

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