the Word

Woodfines Solicitors' newsletter for business

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What's happening in the 'gig' economy? What employers need to know

Nowadays, the popular concept that work is a nine-to-five job with a single employer is fast becoming out of date; more and more people work on a freelance or short-term contract basis as opposed to having more traditional permanent jobs.

According to the Chartered Institute for Professional Development, roughly 1.3 million people in the UK now work in what's referred to as the gig economy. In a gig economy, instead of a regular wage, workers get paid for the 'gigs' they do, such as delivering services or giving lifts by car.

Proponents of the gig economy claim that people can benefit from flexible hours, as it allows them to control their working patterns and juggle other priorities in their lives. This flexible arrangement benefits employers, as they only pay when the work is available, and don't incur staff costs when the demand isn't there.

In the media, the term gig economy is often linked to reports of employment issues. Uber, Deliveroo, Pimlico Plumbers, and courier firms, City Sprint UK and Hermes, have all hit the headlines for becoming involved in disputes over the employment status of their workers.

Why problems arise in the gig economy

When it comes to employment entitlements, these flexible ways of working are blurring the lines between the different types of employment status, as in 'self-employed', 'worker' and 'employee', and this is where disputes can arise.

Many people with this type of job have been engaged as so-called self-employed 'partners' or 'independent contractors'. The problem is, are they truly self-employed? And can employers who take on 'independent contractors' avoid giving them basic workers' rights such as the national minimum wage, rest breaks or holiday entitlement?

Recent cases

In 2016, Uber faced a case bought by the GMB Union on behalf of its drivers. The drivers claimed that they weren't self-employed 'partners' as Uber maintained, but should instead be classified as workers.

Maria Gallucci, Senior Associate Solicitor

The Employment Tribunal agreed that the drivers were in fact workers and entitled to the basic workers' rights. Uber subsequently won the right to appeal, and the hearing will take place this September.

Deliveroo went one step further and drafted their contracts to prevent any legal challenge to working status from arising in the first place. The clause apparently read that the 'independent contractor' wouldn't challenge their status and if they did, they would pay Deliveroo any costs and expenses incurred in the legal action. Deliveroo subsequently reported to the Work and Pensions Committee of the House of Commons that this would be dropped from contracts on the basis that this type of contractual clause is unlawful. Statutory rights can only be waived through a settlement agreement or through ACAS.

Determining employment status

There are some fundamental principles at stake here. If Deliveroo couriers are in fact workers and not self-employed, they have a right to bring a challenge. Ultimately, employment status is not determined by what an employer wants it to be, even if this is written into a contract and signed by the employee, it's a matter of fact and law.

In deciding the correct status to be applied, the courts will focus on the nature of the employment relationship, and will look behind written agreements to see what the reality of the relationship is. They will consider various factors, including:

- **Mutual obligation** – meaning that the employer has an obligation to provide work, and the employee has an obligation to be available for work
- **Personal service** – the service must be provided by the individual, they cannot send a substitute
- **Control** – the employer controls what, how and when work is done
- **Exclusivity** – the individual cannot work for anyone else without the employer's express permission
- **Facilities and equipment** – the company provides these to enable them to carry out their job
- **Benefits** – they may receive a pension, bonus, private medical insurance, company car or other benefit, and be entitled to holiday pay and company sick pay
- **Integration** – the individual is part of the company. For example, their name appears in the internal telephone directory, they have a company e-mail address, they may perhaps wear a staff uniform, and have a company business card.

HMRC investigations

Another key issue is taxation. HMRC is actively investigating cases where an 'independent contractor' has set up their own limited company and uses it to supply services. HMRC can challenge whether the contractor is truly self-employed if they provide an exclusive, personal service that is controlled and directed by the 'employer', as this can be regarded as 'disguised employment'. This means that HMRC can remove the tax advantages enjoyed by both the contractor and company they provide services to, and this will also apply where services are provided via another intermediary, such as an agency.

If you have any concerns or queries, then please do get in touch.

Data theft – how to safeguard your business

A company's confidential data is often one of its most valuable assets, making it extremely vulnerable to theft and misuse.

Recently, we have all become increasingly aware of the plight of NHS trusts, companies and individuals who have become victims of cyber-attacks in the form of a ransomware encryption of their data. In the case of the NHS, it had a very real effect on patients, operations and care.

Statistics from the recent Cyber Security Breaches Survey 2017, show that nearly 7 in 10 businesses say they have identified a data breach of some sort, with firms holding personal data most likely to be attacked. Those taking part in the survey were very concerned about the protection of customer data from theft, the loss of trade secrets, intellectual property and cash.

A recent UK government review highlighted that data theft results in losses of around £9bn a year. This means that businesses are suffering potentially critical losses because of a failure in their data security, a critical risk area for businesses of all sizes. Any data breach can be catastrophic, and result in a loss of reputation, profits and business competitiveness. By getting their basic defences right, businesses of every size can protect finances, operations and their reputation.

The General Data Protection Regulation (GDPR)

The GDPR, an EU regulation, has similarities with the existing UK Data Protection Act 1998, but it contains some new requirements for those who handle data and are responsible for its protection. The government has confirmed that Brexit will not affect the introduction of the GDPR, which will come into force on 25th May 2018. It requires companies to abide by an 'accountability principle' when collecting data and that it must be processed 'lawfully, fairly and in a transparent manner.' It also requires data to be protected against 'unauthorised or unlawful processing and against accidental loss, destruction or damage using appropriate technical or organisational measures.'

Alice Wooler, Solicitor

The regulation identifies new rights for individuals. These include the right to know what data will be collected, and the way in which it will be stored. Individuals will have the right to block or supress the processing of their personal data.

How businesses can protect themselves from data breaches

While businesses can't always protect themselves against all external threats, many businesses can put in place measures to protect themselves from internal ones. Staff awareness and training can play a key role in reducing accidental data breaches.

The trend towards mobile devices allowing staff to work and access systems and information at any time and in any place, brings with it increasing exposure to theft from laptops, desktops or mobile phones.

When data has been misappropriated, it can sometimes be traced back to an employee who may be looking to move employers, and wants to use sensitive data to secure their new position. This can include sales information, competitor details, specifications and product formulas, and trade secrets.

Some of the measures that companies should consider include:

- Make data management a key business objective that's reviewed regularly. Issue timely reminders to staff handling data about the importance of data protection, encryption and the security of passwords. Include information about the use of data in the staff handbook.
- Make all employees aware that stealing information is a crime, and that can include documents they may have written during their employment, especially if these include details of clients, colleagues or suppliers. Employers should have an investigation plan in place, so that if a breach occurs there is a procedure that can be followed.
- Consider restrictive covenants containing non-compete and non-solicitation clauses for employee contracts. Ensure that employment contracts clearly define what the company's confidential data is, and set out policies on the use of mobile devices and social media. There should also be a data theft policy which includes the steps employees should take if confidential data is lost or stolen.
- Have in place an internal code of data handling to protect client information and help your business remain within the data protection act parameters. Under the GDPR, this will need to include procedures to be used should a theft of data occur, and cover the reporting of information stolen, actions taken to minimise the effect on individuals, whether they have been informed or not, and details of remedial action taken to prevent a re-occurrence.
- Businesses need to consider any additional obligations, such as filing a report to the Information Commissioner, if appropriate to their industry.

If a business suspects that there's been an internal data breach, they should act swiftly to limit potential damage. Monitoring should be put in place immediately and the matter should be discussed with their legal adviser, so that appropriate action can be taken. It may need to be reported to the police.

If confidential data has been stolen by an employee or ex-employee there are a range of legal remedies which can be used to discover not only the extent of the theft, but also assist with the recovery of the information.

If you would like to discuss your data security responsibilities, or would like to know more about your legal position in the event of a data breach, then please do get in touch.

How to make the right premises decisions for your business

Serviced offices – are they right for your business?

Many of the UK's most successful enterprises can trace their inception back to the founder's dining room table or spare bedroom. Sooner or later, however, there comes a point when a business takes off, and proper office space becomes a necessity. For growing businesses, the options available can often include renting accommodation in a serviced office, or leasing their own office space.

The pros and cons of serviced offices

Serviced offices offer an all-inclusive, off-the-shelf package. Rent, rates, service charges, basic IT and office furniture may all be covered in the charge you pay. This means that you and your staff can be up and running from the moment you move in.

If you need flexibility, then you can rent for as long or as short a period as you require. There are added benefits, like being able to hire meeting rooms when you need to, and you're likely to be surrounded by other small and growing businesses who could be in the market for the goods or services you provide.

However, convenience comes at a price. You could find that the costs involved will be considerably higher when compared with similar space taken on a conventional lease basis. You need to factor into your budget additional charges for services like faster broadband, printing and meeting room hire. These can mount up quickly if you are a heavy user. You could also find that the agreement allows the office provider to move you to another part of the building if a new business needs to be accommodated.

If you want your office to reflect the nature and character of your business, leasing your premises can give you greater control over your space, and the freedom to make it your own.

Whichever choice you make at the outset, research shows that businesses typically consider a conventional lease when their headcount reaches around 20 people.

How to avoid unexpected costs at the end of your lease

Growing businesses have a lot of calls on their time, so it can be all too easy to overlook the conditions stipulated in your lease until it's about to end. It's often at that point that we are contacted by tenants in relation to a breach of an obligation relating to the condition of the property.

Understanding from the outset all the charges you could be liable for during the term of a commercial lease can help you save money, and will prevent nasty shocks later.

For instance, you'll need to be clear about your responsibilities for the upkeep of the

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premises. It's also important to ensure that there is specific wording to exclude insured risks from your repair obligations as a tenant. Service charges need to be clearly stated in the lease too. It's possible to agree a capped amount, so that you don't get hit by an unexpected bill if charges rise.

Understanding dilapidations

At the end of your lease term, you can expect to receive a Schedule of Dilapidations, and within 56 days before the end of the lease, a Quantified Demand. A Schedule of Dilapidations is the document prepared by the landlord (or their surveyor) listing outstanding reinstatement, repair, legal compliance and decoration items to the property, suggesting remedial works and, in some cases, estimating the cost of carrying this out. If you don't complete dilapidations before the end of the lease, then your landlord can claim damages.

That's why it can be worthwhile to get a survey done prior to signing the lease. That way, you will have a schedule of condition that records the state of the property when you take it on. It will limit your obligations, as you are not required by law to put the property into a better state of repair than it was at the start of the lease.

Don't lose the right to renew your lease

When entering the final year of their lease, businesses need to be proactive, if not they risk losing the right to renew their agreement. The Landlord and Tenant Act 1954 protects a tenant of business premises and gives them the automatic right of renewal. However, this right can be excluded by the landlord at the outset of the lease. If you are in any doubt, you should get your lease checked.

If you have the automatic right to renew, provided your landlord hasn't already served notice on you, you can make a formal request for a new lease at any time during the last 12 months of your lease. If you do nothing, the landlord could serve you with a formal notice to end the lease on the date shown in the original contract. It will also state if the landlord proposes to offer you a new lease, and if so, on what terms. If both the landlord and tenant do nothing, the lease won't end and will continue until either party serves notice.

However, lease renewal can work to a tenant's advantage. It's a good time to renegotiate terms, and since commercial rents have been falling recently, it can be a smart business move to serve notice and renew your lease at a more advantageous figure.

Taking good advice on commercial property matters can save you time, money and stress, so please do contact us for help on any of these issues.

Reform of the Civil Courts – what this could mean for businesses

As Sir Terence Etherton, Master of the Rolls, signalled in this year's Lord Slynn Memorial Lecture, civil justice is a subject that never rests. Commenting on the current reforms, he said: "It is fair to say that the present reform programme is the most far-reaching that we have had since the 1870s." The £1bn six-year plan, covering both criminal and civil courts is viewed by many as the most comprehensive legal reform initiative currently being undertaken anywhere in the world.

With Brexit negotiations now underway, it is vitally important that the value of English law, and the expert dispute resolution services provided by the English and Welsh courts is widely appreciated. Over the last decades, England has become a prime centre for settling international disputes, and many are keen to see this position maintained post-Brexit demonstrating that the UK is, in Theresa May's words, open for business.

Justice Briggs' Civil Court Structure Review

Driven in part by the pressing need for the UK legal system to adopt a world-class IT framework and to maintain competitiveness in global litigation, the reform of the civil courts looks set to bring real benefits to businesses. The three main areas Justice Briggs focused on are:

a) Using IT to improve the issue, handling, management and resolution of civil cases. Reforms include stepping up the transfer of court processes online to speed up the delivery of justice.

b) Re-allocating aspects of the work currently carried out by judges to court officials under judicial supervision. This will include some routine and non-contentious work, matters that are not actively disputed and routine case management.

c) Flexible deployment of the most appropriate judges to hear cases – making better use of the skills of especially-qualified judges.

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Benefits for business

Currently, as anyone who has had cause to use it will know, the civil court system is often subject to major delays. It can take several weeks, if not months, to get a response to even simple, routine correspondence from the court. This can have a major impact on business owners, causing frustration, a waste of management time, and additional costs. Contrast this with for example, the filing of a Winding Up petition through the Royal Courts of Justice's online portal which can be completed in a matter of hours and that includes online payment of Court fees. Clearly, a move to greater reliance on streamlined IT systems can't come quickly enough.

From June this year, the specialist civil courts within the High Court have been rebranded, creating an umbrella establishment called the Business and Property Courts of England and Wales. This new structure encompasses the Commercial Court (including the Admiralty and Mercantile Courts), the Technology and Construction Court and the courts of the Chancery Division including those dealing with financial services, intellectual property, competition and insolvency. All the courts continue to follow the familiar procedures and practices, but now there can be more flexible deployment of Judges. There will be more access to the court system on a regional basis, with judges sitting in Birmingham, Manchester, Leeds, Bristol and Cardiff, with Newcastle and Liverpool likely to follow. This is hoped to enhance the link between the specialist Business and Property Courts in the regions and in London.

As with all major changes to the judicial system, there will be a period of bedding-in. Bearing this in mind and the increased focus by the courts on pre-action conduct (as evidenced by the new Practice Direction for Debt Recovery Claims which takes effect from October), it's even more important to consider alternative ways of resolving a dispute. This can take the form of an informal round-table meeting of involved parties, a mediation, arbitration or adjudication, all representing a material reduction in costs for businesses looking to resolve disputes in a timely way.

The Pre-Action Protocol for Debt Claims

From 1st October, this Protocol applies to businesses, including sole traders and public bodies, claiming payment of a debt from an individual. It doesn't need to be followed where the debtor is a business unless the debtor is a sole trader. The required steps are more onerous for businesses and includes sending an enhanced letter of claim and allowing a debtor the opportunity to complete a prescribed information sheet and financial statement which must be sent with the letter of claim. The debtor can request extra time to get debt advice before returning the forms. Creditors are to refrain from pursuing court proceeding until 30 days after receipt of the debtor's reply, or 30 days after providing any documents that the debtor may request.

Although only a small percentage of debt claims are defended, clearly the aim of the Protocol is to reduce the number of claims going to court. Its terms mean that businesses will need to factor in additional days into credit control procedures and could incur additional collection costs. Businesses should ensure their credit control measures are as streamlined and efficient as possible and that they have a process in place to ensure unpaid invoices get referred to a solicitor earlier in the credit control process.

If you have questions about the new Protocol, or would like a review of your credit control process, then please do contact us on 01223 411421.