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DIRECTORS AND THE COMPANIES ACT 2006

spring 2008



New duties were imposed on company directors at the end of last year. Now, early in 2008 will be a good time to assess compliance within your company. The Companies Act 2006 imposed seven duties on directors and four of them are now in force. The four new duties are that: -

- the director must act within the powers granted to him or her by the company
- he or she must exercise independent judgment
- the director must use reasonable skill, care and diligence and
- must promote the success of their company.

The other three duties that come into force in October 2008:

- are to avoid conflicts of interest
- to declare interests in transactions with which the company is involved

- a duty not to accept benefits from third parties.

Many of these duties already exist as developed in case law over the years, but this is the first time they have been written down in a statute

The duty to promote the success of the company extends the existing law. The director has to "act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole". This includes considering the interests of the employees, what consequences a decision will have long term, fostering good relationships with suppliers, customers and others, impact of the business on the community and environment plus maintaining the company's high reputation.

If a director does not pay heed to these issues, then later he or she could be sued by shareholders suing in the company's name.

Now could be a good time to revise or draw up directors' employment or service contracts and internal manual/advice to directors. For more information on directors' duties and the Companies Act 2006 in general, please contact us.

EMPLOYMENT LAW

A new year is also a good time to consider whether a business is fully compliant with employment law requirements. Many small businesses still do not provide written terms or an employment contract, even though this is required by law.

- The Working Time (Amendment) Regulations 2007 now provide that all employees are entitled to 24 days holiday a year including bank holidays for full time, 5 day a week workers. Many workers already have 20 days plus bank holidays so are over the

new threshold but some may not be, and for those this will be a big change. You may need to revise contracts or staff handbook to reflect these changes.

- The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2007, extend the right to request flexible working to private foster carers and relatives of private foster carers.
- There are three levels of minimum wage, and the rates from 1st October 2007 are:
 - 1) £5.52 per hour for workers aged 22 years and older,
 - 2) development rate of £4.60 per hour for workers aged 18-21 inclusive and
 - 3)

£3.40 per hour for all workers under the age of 18, who are no longer of compulsory school age.

- The new Equality Act 2006 is in force and this has the effect that the Commission for Equality and Human Rights (CEHR) replaces the previous equality bodies including the EOC. However, plans to extend the period of maternity leave and permit father to take 6 months paternity leave have been put on hold until at least 2010.

FOR FURTHER INFORMATION ON ANY ASPECTS OF EMPLOYMENT LAW, PLEASE CONTACT US.

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LPAs AND ADVANCE DIRECTIVES

One of the changes introduced by the Mental Capacity Act 2005 is that from 1 October 2007 the Enduring Power of Attorney (EPA) has been replaced with a revised type of power called a Lasting Power of Attorney (LPA).

However, EPAs made prior to 1 October will continue to be valid.

An LPA allows a donor to nominate one or more attorneys to make decisions should they lose the mental capacity to do so themselves. Unlike the EPA, an LPA will need to be registered with the Court of Protection before it may be used by the attorney(s).

A person can make two types of LPA, one dealing with financial matters (as do EPAs) and one concerning personal welfare.

A Personal Welfare LPA can be used to set up an 'advance directive' regarding giving or refusing medical treatment in circumstances where the donor has lost the capacity to make such decisions themselves. The Personal Welfare LPA is legally binding if it is valid and applicable to the treatment proposed. This new power has caused anxiety for some

people, who worry that making a Personal Welfare LPA might allow a relative to 'pull the plug' when they themselves might not wish that to happen.

No matter what the Personal Welfare LPA states, the final decision regarding any treatment given will rest with the responsible clinician. The Personal Welfare LPA cannot compel treatment to be given which is contrary to medical advice.

There are considerable legal safeguards built into advance directives, which in any event will only apply when the person creating the directive no longer has mental capacity. Where there is genuine disagreement about the existence, validity or applicability of an advance directive, those providing care or treatment will be able to apply for a ruling from the Court of Protection.

IF YOU NEED ADVICE ON HOW TO DEAL WITH YOUR AFFAIRS, OR THOSE OF A FAMILY MEMBER, IN THE EVENT THAT MENTAL CAPACITY IS LOST, PLEASE CONTACT US.

WATCH WHAT YOU SAY!



The Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007 are now in force.

They set out when a foreign company can be brought to justice in the UK over blog postings that encourage terrorism.

They follow the Terrorism Act 2006 which, amongst other things, gives those hosting web sites and ISPs 2 days to take down material encouraging terrorism from the time they are made aware of it.

If you need any advice on this area, or want some guidance on what to write in employment handbooks or staff policies about blogging and members of staff, please contact us for further information.

DE-REGULATION AND PRIVATE COMPANIES

In addition to changes relating to directors' duties mentioned on the front page, the Companies Act 2006 provisions relating to private companies and administration are now in force.

These include:

- no requirement to have a company secretary although companies may choose to continue to have one.
- Private companies (as long as not subsidiaries of public companies) may give financial assistance for the acquisition of their own shares.
- A simpler method for private companies to reduce their capital without court approval.
- A majority vote to pass a written ordinary resolution and a 75 per cent majority for a written special resolution.
- Private companies are no longer required to hold an AGM, although they may choose to do so. In addition, larger companies need to include in their

annual accounts an expanded business review each year which will set out:

- main trends and matters likely to affect its future business;
- information about the environment, the employees of the company, and social and community issues; and
- information about people with whom company has contractual or other arrangements essential to its business (this has become known as the supply chain provision), unless seriously prejudicial to that person or contrary to the public interest.

Some companies are choosing to revise their articles of association where they were incorporated under the old Companies Act to take advantage of some new provisions and a review now may be wise.

CALL US FOR ANY ADVICE NEEDED ON THE COMPANIES ACT 2006.

COPYRIGHT AND PRIVACY – PROTECTING YOUR IMAGE



DO YOU USE PICTURES OF MEMBERS OF STAFF ON THE COMPANY WEB SITE OR BROCHURES? IF SO, IN MANY CASES, CONSENT SHOULD BE OBTAINED FIRST FROM THE INDIVIDUAL TO ENSURE COMPLIANCE WITH THE DATA PROTECTION ACT 1998.

Although the photographer (or his or her employer if they are a direct employee) of a person owns the copyright in the image (unless the parties have agreed otherwise), that does not mean it can be freely used. In a recent case, *Murray v Express Newspapers*, the Court had to look at this issue.

The Court held that where someone is engaged in ordinary activities in public, such as walking down the street, then there is, under English law, no right nor expectation of privacy and so their photographs can be taken, even if they are famous people.

The case concerned a photograph taken of the child of J K Rowling in a public street in Edinburgh, without her knowledge or consent. It was

published in the *Sunday Express Magazine*. The judge held that the Human Rights Act 1998 in English law, did not recognise any right of confidentiality or privacy in relation to a person's appearance in a public place. Although the right to respect a person's private and family life was protected under article 8 of the European Convention on Human Rights, this did not apply to photographs taken in the street. That right was balanced by article 10 which set out the right to freedom of expression, enjoyed by the press and media.

In another case (*Campbell v MGN Ltd*), the court identified the test to be applied under article 8 - whether the person had a reasonable expectation of privacy.

Since the *Campbell* case, the European Court of Human Rights in another case, held that individuals will have some privacy protection when on private holidays and sporting activities. However, the English court said walking in the street was not the same and there was no protection.

The claim for compensation under the Data Protection Act 1998 was therefore dismissed on the ground that the photograph did not amount to unlawful or unfair use of personal data relating to the claimant. Permission to appeal was granted and the defendant was awarded £40,000 interim costs against the claimant pending the outcome.

IF YOU WANT ANY HELP ON COPYRIGHT ISSUES OR QUESTIONS RELATING TO THE DATA PROTECTION ACT, PLEASE CONTACT US FOR FURTHER INFORMATION.

CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

On 6th April 2008, the new laws on corporate manslaughter come into force. They create a new offence of corporate manslaughter which would allow organisations to be prosecuted for management failures that lead to the deaths of employees and others.

The 2007 Act changes the basis on which companies are liable for prosecution for manslaughter. Gross failures in the management of health and safety, causing death, will be liable to prosecution as corporate manslaughter from April 2008. An organisation is guilty of the offence if the way in which its activities are managed, or organised, causes a death and amounts to a gross breach of a relevant duty of care to the deceased. A substantial part of the breach must have been in the way activities were managed by senior management.

Until April 2008, organisations could only be convicted of manslaughter if a 'directing mind' at the top of the company (like a director) was also personally liable. This however, is not how most companies reach decisions so the law has been changed.

The new offence allows an organisation's liability to be assessed on a wider basis. The Act applies to:

- public bodies incorporated by statute such as local authorities, NHS bodies and a wide range of non-departmental public bodies;
- organisations incorporated by Royal Charter
- limited liability partnerships
- all other partnerships, trade unions and employer's associations, if the organisation concerned is an employer
- Crown bodies such as Government departments & police forces.
- The position of individuals

The offence is concerned with the corporate liability of the organisation itself and does not apply to individual directors, senior managers or other individuals. Nor is it possible to convict an individual of assisting or encouraging the offence (section 18).

However, individuals can already be prosecuted for gross negligence manslaughter/culpable homicide and for health and safety offences. The Act does not change this and prosecutions against individuals will continue to be taken where there is sufficient evidence and it is in the public interest to do so, the Government says.

PLEASE CONTACT US FOR FURTHER INFORMATION.

COMPENSATION FOR INJURIES



If you have been injured in an accident, or through exposure to dangerous substances at work, contact us for information on whether you might make a successful compensation claim. Usually, where the employer is at fault, compensation is possible.

However, in one recent case, *Johnston v NEI* the House of Lords, rejected claims relating to asbestos on complex legal grounds.

The employees had 'pleural plaques' on their lungs which caused no symptoms, but did cause individuals considerable anxiety and some suffered depression as a result. The plaques indicate asbestos is in the lungs that may develop later and cause injury, but until that occurred and was proven, there was no claim.

This decision should not deter employees who are injured at work however from seeking compensation in appropriate cases.

Contact our specialist personal injury lawyers if you want advice in this area, or if you are an employer worried about employees' claims.

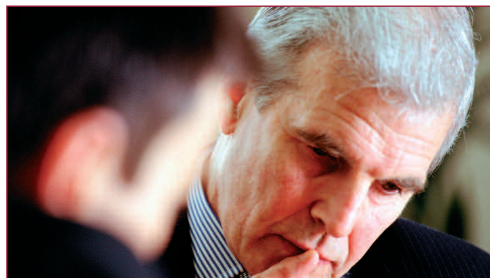
AGE DISCRIMINATION

Unlike other forms of discrimination legislation, age discrimination is allowed where it is justified, as a proportionate means of achieving certain aims.

In one recent case in the UK, a partner in a City solicitor's firm (*Freshfields*) who claimed £4.5m for age discrimination lost his claim. The pension scheme changes imposed on him when he left the partnership in a shake-up, were found to be discriminatory but they were justified.

In a separate case, the European Court of Justice (ECJ) has looked at whether a country's laws requiring employees to retire (if the employer chooses) at a fixed age are discriminatory and found that Spain's 65 year retirement age was lawful. This was because the discrimination was an acceptable means of achieving the social aim of promoting full employment and access to the job market.

The aim which the ECJ accepted as legitimate was the social policy objective of creating employment. This is not the same as the aims the



British Government has used to justify the UK's current 65 default age - the employer's need to plan its workforce and the impact on pensions and other benefit schemes of abolishing retirement ages.

The ECJ may have a different view on the UK's position and *Hey Day (Age Concern)* is bringing a UK test case on this.

Meanwhile, it is open to any employer to let staff continue to work after age 65 if they choose to do so in any event, rather than forcing them out because they reach an arbitrary birthday.

IF YOU WANT ADVICE ON AGE DISCRIMINATION LAW, PLEASE CONTACT US FOR INFORMATION.

trade marks

Many of our local clients use innovative names for their businesses and products. Some protect these by registered trade marks.

Now new rules for trade marks have come into force. The new rules provide that the UK Intellectual Property Office (IPO) will do less checking. It will still examine trade mark applications to see if the mark is distinctive and suitable for registration as now, but they will no longer check if someone else has the same or similar name. This means unless trade mark owners are watching out for new registrations by competitors and others they may find someone registers their name as a mark.

However, companies can oppose an application for registration of their own name or a similar name - but only if they notice it is going through.

This makes the UK system like that applying in the other 26 EU states which are part of the Community Trade Mark system.

Many UK trade mark owners also apply for Community Trade Marks which provide one mark protecting them in 27 EU states. Under the CTM system 25% of marks which are applied for are opposed but only 5% currently in the UK. It is likely that oppositions will rise in the UK under this new system too.

However the IPO will notify applicants if it notices an overlap with an existing marks. There is also a system where existing owners can pay to use notification services.

Contact us if you have any trade mark or similar issues or internet domain name disputes.