



money laundering



Local businesses are not always as careful as they should be about payments in cash. Money laundering legislation is very strict indeed and if you accept large cash payments for goods sold in your business, you may be at risk of breaking the law.

Some car dealers for example, now prohibit customers from purchasing top of the range cars costing £40,000 in used notes in order to avoid falling foul of the legislation. Any reader who has opened a bank account recently will know that it is not as simple as previously. ID is now required. The same goes for instructing an accountant or solicitor. You may be obliged to show your original passport and a recent original utility bill, the certificate of incorporation of a limited company and other documents. Solicitors and other advisers may need to make a report to a body

called NCIS if they have suspicions about a client's involvement in money laundering activities. A court of appeal decision *Bowmen v Fels* looked at how this requirement works when solicitors have a duty of confidentiality to their client, as it was causing problems in practice. In October the Law Society issued guidance on the impact of the case. For clients, the important issue is to be aware that in certain circumstances their professional advisers may have a duty to notify NCIS of matters such as illegal tax evasion which has come to their attention, although in some cases following this recent case, the solicitor can maintain client confidentiality.

Taking on employees is not without risks either. Tightening of immigration legislation means that employers need to check an employee has a right to live and work in the UK. Ask to see passports and check details given as some prospective employees lie about their nationality or status.

Please contact us if you need information on what identification you will require.

tax evasion and pensions

Tax avoidance has always been lawful. Everyone is entitled to arrange their affairs to pay less tax.

For example, it is not an offence to invest in an ISA or for a husband and wife both to go out to work part time so they have two personal allowances rather than one. Nor for an elderly person to give assets away in the hope they survive for seven years and avoid inheritance tax. But when does lawful avoidance drift into evasion? The current Government has a concerted campaign to stop tax "loopholes" and render unlawful some schemes which may have previously been lawful.

The rules change from time to time as well. Many couples have set up businesses on the advice of their accountants by way of limited companies paying themselves dividends. In a recent case the courts held that HM Customs & Revenue was entitled to apply the law so that where one of the couple does not work in the business, that scheme no longer saves tax. The IR35 tax rules for contractors with few clients also had a similar effect.

In addition, there are rules under which new tax avoidance schemes must be notified to the Revenue.

Pensions 'A' Day in April 2006, changes the pensions system in the UK in many ways. All individuals should now be considering whether they should be putting more money into their pension now or later.



Secondly if they have a very large pension fund already, they must decide whether they should be registering it so it does not incur the new tax charge that may be imposed on pension funds.

Although the new rules, for example, allow residential properties at home and abroad, fine wines and even expensive cars and pensions to be placed in a self invested pension, if the tax payer derives any benefit from those assets such as by staying in a Spanish villa without paying a full rent or even viewing the oil paintings, then tax reliefs can be lost. So do take advice.

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using staff from agencies



Many local businesses particularly in busy holiday periods use staff from agencies. The Court of Appeal has held that an agency worker was not employed by the employment agency that supplied him with work but by the company for whom he did the work.

In *Bunce v Potsworth Ltd (t/a Skyblue)* the Court of Appeal considered whether Mr Bunce was an employee and therefore able to bring a claim for unfair dismissal. Mr Bunce had brought his claim against the employment agency (Skyblue) that provided him with work on a regular basis, mainly for a rail company but also for other companies.

In the Court of Appeal, Mr Bunce argued that he was an employee of the agency because he had an overall “umbrella” agreement with them. He also said that each time he was sent on an assignment, a further

contract between him and the agency existed. Although the Court of Appeal did not accept Mr Bunce’s arguments worked in his case, the Court did say that such contractual arrangements could exist. However, this was not the main point. Even if there was such a contract, it may not be an employment contract.

When looking at this issue, the Court emphasised that day-to-day control over what the worker does and how they do it is the key factor. The Court said it was clear that the end-user had such power and control. This is a worrying point for clients of employment agencies. This is the same test the tax authorities have always used – control. With your employees you tell them where and when to work and they cannot send an alternative person in to do the work. A self employed plumber, for example and by contrast, fixes when he works and could send a deputy to do the work instead.

We can advise you on how to protect yourself. You could include an indemnity in your written contract with the employment agency for example, that they will pay all employment costs etc, arising from any decision that that person is later deemed to be your employee.

public sector contracts

Many local businesses supply schools, hospitals, the local authority and other public bodies with their goods or services. Large value public contracts are subject to very strict rules. The “public procurement” rules are set for a big shake up next year when new EU directives in this area are made part of English law. The changes to public procurement rules should make things easier for businesses. Only large value contracts fall within the rules but even so there are quite a large number of local contracts at that level put out to tender each year.

The European Commission has just published a document which helps to explain the new rules and the British Government is consulting on the UK regulations which will bring the new directives into force here. The new directives will make electronic public procurement much easier too, which should save costs. The objective is to enable any business with a PC and an internet connection to bid for public contracts electronically anywhere in the EU. That means a local business here could be bidding for a contract up for grabs in Latvia or any of the other 25 EU member states. The new EU document covers all stages of the contract award procedure that can be computerised, as well as the new instruments and purchase techniques.

competition law and licensing: Microsoft to change Windows in the EU

Most readers will remember Microsoft’s big fine for infringement of the EU competition rules – Article 82 of the Treaty of Rome for bundling software together.

Microsoft says it will adopt all of the main changes demanded by EU antitrust regulators for its stripped-down version of Windows sold without the Media Player programme. Changes to the Windows programme will include deleting references to Media Player from product documentation, boxes and help files. Alterations also include creating a software package that allows consumers to put back the programmes and settings that were removed from the Media Player-less version, which EU regulators demanded Microsoft to offer consumers.

However discussions between Microsoft and the EU were continuing at the date of writing as Microsoft is unhappy to disclose patented information which the ruling also required. It is rare that the competition authorities have required those who own intellectual property rights to grant a license of those rights to a third party.

However the case is not without precedent. A Mr Magill before the European Court of Justice was able to force the BBC and ITV to license him with copyright in lists of TV programmes so that he could bring out a combined TV guide in the days before such guides were available by using Article 82 of the Treaty of Rome.

If in your business you require a license of another business’ intellectual property it may be worth taking legal advice on whether you can use the EU or UK competition rules to require that a licence be granted to you, if the owner of the rights is in a dominant market position.



Clean Neighbourhoods and Environment Act 2005

Worried by anti-social behaviour, vandalism and crime and disorder in your local area? The Clean Neighbourhoods and Environment Act 2005 may help.

The Act gives powers to local authorities, the police, fire services and others to take anti-social behaviour affecting the local environment into account in setting their crime and disorder reduction strategies. So offences such as fly tipping and nuisance vehicles are relevant.

There is also a new gating order restricting public rights over minor highways - for example if that area is being used by local thugs it could be blocked off. Where a local business or residents are bothered by anti-social behaviour it will now be possible to block off or gate access points to the highway such as by using metal gates.

There are new powers to remove abandoned cars from the streets right away without notice. It is also illegal under Section 3 of the Act to leave a car in a public place with a notice inside saying it is for sale. Nor can you mend cars for pay on a public highway.

Litterbugs are also caught. It is an offence to drop litter anywhere in open land including private land, rivers, ponds and lakes so, for example, landowners who must allow ramblers their "right to roam" over their land could prosecute if those exercising those rights drop litter.

Anyone operating stalls, street vending and the like can be required to clear up after them. It is also now made entirely clear that chewing gum and cigarette ends are litter.

Other useful measures include rights for local authorities to restrict free leaflets/flyers being distributed which can end up as litter so if your business uses that means of marketing then you should take legal advice.

There are many other provisions too such as Part 5 - waste. Illegal disposal of waste can lead to a fine of up to £50,000 or 5 years in jail for persistent fly tippers. You can be stopped en route to your illegal tipping and questioned. All in all, it is an interesting new Act.

Direct sellers consumer code of practice

The Office of Fair Trading has approved a consumer code of practice from the Direct Selling Association (DSA).

Direct selling is defined by the DSA as the sale and supply of goods and services through independent direct sales people. This is often face to face contact such as at people's homes or work places. It is different from mail order, direct mail, TV home shopping or internet sales - none of which involve contact with a sales person. People can be more easily misled or conned by a direct salesman in their home.

The new code gives:

- a 14-day cooling-off period during which consumers can cancel the contract (the statutory minimum provides a seven-day cooling-off

period for unsolicited visits only);

- a consumer guide to shopping at home;
- guidance and training to direct sellers to ensure that they act with integrity and do not use misleading, deceptive or unfair practices;
- a free independent arbitration scheme; and
- regular compliance audits and consumer satisfaction surveys with a disciplinary committee to deal with members who do not comply with the code.

DSA members (comprising companies involved in about 70% of all direct sales in the home) will now be able to display the OFT 'Approved code' logo on marketing material. The Code does not cover sale of financial products and services. DSA members will not therefore be able to market such products or services under the OFT Approved logo, except for routine credit arrangements related to the sale of goods. If you need advice on any aspect of direct selling, please do get in touch.

licensed premises

In some areas of the country only one in five of those who sell alcohol have applied for the new style licences for which application was required to be made by 6th August 2005. If you have not applied you should urgently seek advice on what to do.

Existing liquor, public entertainment, theatre, cinema and late night refreshment licences all disappeared and were replaced by a single system. There are now two main types of licence:

- a premises licence and
- a personal licence.

Local councils have become the Licensing Authorities and the courts now no longer administer liquor licensing. The new rules also abolish fixed licensing hours.

The new licensing rules come into force on 24 November 2005. The Licensing Act 2003 contains the law and local businesses have therefore had lots of notice. Anyone not licensed on time will be acting unlawfully and could be prosecuted. Maximum fines for those trading without an appropriate licence are £20,000 and/or imprisonment.

Even if your existing licence does not need updating you must apply. Existing licences expire on 24th November. Managers and senior staff have to hold a Personal Licence too. Some chains of pubs are having to send managers of every branch around the country on courses.

The implications of the legislation are huge and yet many businesses seem completely unaware of them.

legal update

keeping records

How long should you retain documents in your workplace? Storage is expensive and yet sometimes documents are needed many years after they are prepared.

In the US, some businesses have been criticised by the courts for not keeping documents long enough when court action arises later and it has been found no effort was made to preserve documents subsequently needed in the litigation. In the UK, businesses grapple with setting up document retention policies.

Too strict a policy may see documents destroyed too early and then it is found that they are needed later or else they are retained for too long. The Data Protection Act 1998 will be breached if documents are retained for longer than necessary. Indeed there is an employment Code of Practice under the Act which addresses this issue. The following issues are necessary to consider - periods of retention depend on the kind of record:

- Keep accident records for three years
- Retain accounting records for three years or

six years if you are a public limited company

- Keep income tax records normally for at least three years
- Maternity records should be kept for three years
- Pensions records should usually be retained for six years
- Records relating to hazardous materials must be kept for at least 40 years, sometimes 75 years
- Under the Data Protection Act 1998 employment records in general should not be kept for longer than necessary
- Recruitment records should usually be kept only for as long as a claim relating to them might be brought (e.g. unfair dismissal – three months after dismissal)
- Vetting of potential employees records to be destroyed after six months
- Records from monitoring employees' email and web access not to be kept for longer than six months.

If you need any guidance on document retention and relevant legislation, please contact us for advice.

distance selling

Do you sell goods by mail order, telesales or from a web site? This is what is known as "distance selling" – selling goods or indeed services where the consumer does not come to your shop.

To give consumers a chance to look at the goods or test the services before they are finally committed, the Distance Selling Regulations (which were recently amended), give consumers the right to reject the goods within 7 working days after the date of delivery. For services contracts the period is 7 days from the contract date. However, if your terms and conditions such as those appearing on your web site do not tell consumers about their right to cancel, then the cancellation period is extended by an additional 3 months - a very nasty trap for the unwary seller. Is it time you had your terms checked to ensure compliance with

the latest changes? The Office of Fair Trading regularly undertakes trawls of web sites to ensure compliance.

The regulations also require that certain information be given to consumers such as the name of the seller, VAT number, full details of the price and delivery charges and set out rules for the return of products and refunds of the price. It is important that companies are aware of these rules. Recently the Office of Fair Trading and Department of Trade and Industry have launched a consultation on joint draft guidance that will update and inform those trading over the internet and other traders of their duties under the Distance Selling Regulations.

If you trade by way of telephone, mail order or internet web site it may be worth taking legal advice on whether you are trading lawfully.

unfair terms bill

One of the most commonly argued clauses in many negotiated IT contracts is exclusion and limitation of liability. A typical result is a supplier excluding all liability for consequential loss, loss of profit, revenue and goodwill and accepting liability for direct loss up to the value of the contract, or 125% of the contract value or whatever is agreed. Liability for death and personal injury and fraudulent misrepresentation must not, as a matter of law, be excluded otherwise the entire clause can be invalid. The Law Commission has published a draft Bill which proposes some changes in this area although it has not yet been adopted. It is proposed that businesses with nine or fewer staff would have a right to challenge most terms as unfair, where they were indeed unfair, although not clauses as to price or about intellectual property rights. In addition, the legislation currently in the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999 would be merged.

Check whether your contracts comply with current law on a regular basis. Make sure they:

- Do not exclude liability for death or personal injury caused by your negligence
- Do not exclude liability for fraudulent misrepresentation
- Provide some guarantee of performance – a total exclusion will be void
- Only limit liability to the extent that is reasonable in all the circumstances.

It is also wise to check they list carefully what losses are or are not included, as general terms such as "consequential loss" are not always as broad as those writing contracts believe.