

HR in the East Midlands

July 2016



Exit is a theme within this month's bulletin – we answer your requests for an update on exit pay regulations and provide our employment law expert, Darren Newman's analysis of the implications of Brexit, including its potential impact on the Lock decision. Thank you for your responses to our annual sickness absence benchmarking survey, the results of which are provided in this month's bulletin.

Sickness Absence Benchmarking

Each year, EMC benchmarks sickness absence, looking at the average number of working days' lost per Full-Time Equivalent employee. Thank you for providing us with your data. The results of the survey are provided in the following charts.

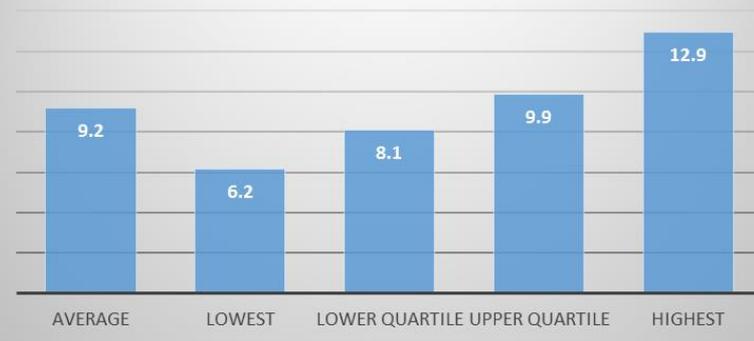
The first chart shows sickness absence for all types of council in the region. The data excludes sickness absence levels in schools in order to provide more comparable information. The chart also provides a comparison of the results from last year, and shows an increase in overall average sickness absence levels.

The second chart benchmarks sickness absence within districts/boroughs.

Sickness Absence - Comparison with Previous Results (All Authority Types)



Avg Days Lost per FTE - Districts & Boroughs 2015-16



Employment Law Developments

Draft Code of Practice on English Language Requirement for Public Sector Workers

The Government has published a further Draft Code of Practice on English language requirements for public sector workers, which is intended to guide employers in the sector on how to comply with the new duty without adding to red tape. The Government's intention is to implement the new duty, which is contained within the Immigration Act 2016 in the Autumn. Although draft, there are unlikely to be any further changes to the code of practice. To access the document [click here](#)

If you have any queries or concerns about fulfilling the Code, please email sam.maher@emcouncils.gov.uk. Sam is compiling any issues Councils in the region may have to inform potential good practice guidance being developed with the Cabinet Office and LGA.

Exit Pay Regulations

No further information is available on when the proposals will be enforced to cap exit pay and to require employees earning £80k+ to repay exit payments if returning to the public sector. October had been the likely timescale, but we are still waiting for any further developments.

Consultation On Legal Duty to Report & Act On Child Abuse & Neglect

This is a new consultation on the potential introduction of a new legal duty in England. The proposals consider the options of either introducing mandatory reporting of child abuse and neglect, or a duty to act in relation to child abuse and neglect. These duties would apply to specified individuals or organisations if they are responsible for caring for children. To access the consultation document, click here [click here](#). The consultation closes on 13th October 2016.

Calculation of Holiday Pay

We are still awaiting the outcome of the latest legal hearing relating to the calculation of holiday pay. The Lock case was heard at the Court of Appeal on 11 July 2016. See Darren's article for more information.

Apprenticeships

You will know from our previous Bulletins of the Government's plans to increase apprenticeships. In April 2017, the intention is to introduce a levy of 0.5% of the employer's wage bill, for those with a wage bill of £3m+. April will also see introduction of a target number of new apprentice starts, set at 2.3% of the headcount of the workforce.

The changes will present opportunities as well as challenges. It is estimated that the annual cost for authorities across the East Midlands region will be £15 million, and that over 3000 new apprenticeships will be needed. Further challenges are likely to be capacity to support apprentices, attracting sufficient numbers of apprentices, and establishing suitable programmes and identifying providers while new national standards for apprenticeships are being developed.

Collaborating on apprenticeships is likely to be a useful approach to addressing some of these challenges and maximising opportunities, and EMC will be providing a co-ordination point for authorities who wish to work together on apprenticeships. EMC will also be working jointly with trades unions as part of the work of the Regional Joint Council. EMC is organising a meeting for authorities in the region with Government and the LGA, to take place in September 2016. Details will be circulated as soon as arrangements are confirmed.

Projects with Local Authorities

This month, we have been providing individual authorities with support on a range of projects and issues, including-

- Outplacement
- Mediation
- Chief Executive Appraisal Facilitation
- Drafting HR policies, including organizational change
- Psychometric testing

If you would like to know how EMC could support an area of work for you, then please contact Sam Maher at sam.maher@emcouncils.gov.uk or Lisa Butterfill at lisa.butterfill@emcouncils.gov.uk.



Events in the East Midlands

Introduction to Coaching for Resilience, 15 September 2016

EMC will be offering coaches in the East Midlands the opportunity to attend a practical workshop designed to help coaches develop their understanding of personal resilience. This event has two specific objectives:

- To support coaches develop their understanding of what personal resilience actually is; its core components and attributes.
- To help coaches learn about a variety of practical and evidence-based techniques that they can integrate into their practice, to help their clients grow their own resilience levels.

Elaine Akester the coach and trainer will also introduce the participants to the Optimal personal resilience model that she co-developed with fellow coach, Julie Hickton. She will share her experience of working with individuals and teams at organisations including Laterooms.com and the NHS, to bring real depth to this important theme in organisations today.

There will be opportunities for participants to engage in practical activities to deepen understanding of coaching for personal resilience.

Coaching Conference, June 2016

Last month, EMC held its annual Coaching Conference, which was a fantastic day and well-received by all that attended. With delegates saying...

“Really enjoyed the whole day, well put together conference. Credit to everyone involved.”

It was one of the best coaching conferences. I enjoyed the fact that the sessions were so proactive and practical.”

The coaching conference will take place again in summer 2017. We're always open to new ideas and suggestions of what to include so feel free to get in touch - kirsty.lowe@emcouncils.gov.uk

East Midlands Local Authority Challenge 2016

With the sun finally shining this summer, the autumn feels a long way off, but at EMC we're already getting excited about the prospect of the change of season and the anticipation of the Local Authority Challenge, which we will bring to the East Midlands for the first time on 24 November.

Already 8 teams have registered from authorities across Derbyshire, Nottinghamshire, Northamptonshire and Leicestershire.

Teams will need to be made up of 6 people. We've had a number of questions about how to determine team members.

At EMC, we see the LA Challenge as a fantastic development opportunity open to all and wouldn't want to specify who should take part, but we like the idea of a mixed team making the most of the opportunity to learn and develop on the day!

To register your team visit [LA Challenge 2016](#)

Contact Details

For further information about any of our work please contact the Local Government Services Team. Either call 01664 502 620 or email:-

Sam.Maher@emcouncils.gov.uk,
Lisa.Butterfill@emcouncils.gov.uk,
Sarah.Short@emcouncils.gov.uk,
Kirsty.Lowe@emcouncils.gov.uk



‘In Deep with Darren’

Darren Newman’s in-depth analysis of a topical HR issue and its implications for local authorities

Brexit

Everyone is writing about the implications of Brexit for their particular subject area – and I’m no exception. The fact that none of us really know what Brexit will mean in practice doesn’t deter us from expressing a view. Nor does the fact that it will be literally years before our predictions are proved to be either right or wrong.

The default position in terms of our leaving the EU is that the process takes two years from the date on which the Government chooses to ‘trigger’ Article 50 of the EU Treaty by formally notifying our European partners that we are leaving. The terms on which we leave will then be negotiated over a two year period. As yet we do not know what our future trading relationship will be with the EU and what restrictions that relationship will place on issues like employment law.

If, for example, we agreed something akin to the arrangement that the EU has with the European Free Trade Association (Norway, Iceland, Lichtenstein and, to an extent, Switzerland) then the price of continued free trade with the EU would almost certainly be compliance with EU employment law. So it is perfectly possible that nothing in employment law terms will change as a result of Brexit – at least not in the short or medium term.

For now at least we continue to be full members of the EU. That means that all EU citizens continue to have the right to live and work here. There is little formal reassurance that employers can give to EU nationals about their future position. While it seems inconceivable that the status of those who are already settled here will be placed under any threat, the

situation is unlikely to be formalised until there is a deal in place – and that could take years. In the meantime recruitment practices should continue unchanged. If an EU national applies for a job, it could be race discrimination to treat their application less favourably because of any uncertainty about their future right to work here.

Over the coming years, politicians are likely to spend their time grappling with the big strategic issues like access to the single market and the free movement of people. It could be that making amendments to employment law – even if the Government is free to do so – will not be a big priority. In theory we could see the repeal of TUPE, the Agency Workers Regulations and the obligation to consult over collective redundancies. We could see a cap on compensation in discrimination claims and a return to redundancy pay exemptions for those on fixed-term contracts. In fact, there are countless ways in which European law has shaped domestic employment law and a no-strings exit from the EU would open up large areas of employment law for future reform. But in reality, such changes would take years to make and require complex redrafting. Any Government is likely to have much bigger fish to fry and I detect no appetite for wholesale employment law reform in the current Government.

A more complicated and immediate consequence of Brexit will be seen in the case law – but even here the impact on local Government may be more muted than in the private sector. Take the case of the right to paid annual leave.

As I write, we are awaiting the decision of the Court of Appeal in *Lock v British Gas* which is about the need for employers to make up any lost commission after an employee has taken annual leave. The key issue is whether the Working Time Regulations can be interpreted in such a way as to comply with the European Court’s interpretation of the Working Time Directive. The Court has held that commission needs to be reflected in holiday pay¹ – but the literal interpretation of the Regulations would say the opposite. Can the UK courts simply pretend that the

¹ LOCK v. BRITISH GAS TRADING LTD - [2014] IRLR 648



Regulations in fact say what the European Court has ruled they should say – or should the courts leave it to Parliament to amend the Regulations to comply with the Directive?

This is such a crucial question that it is more than a little surprising that it hasn't come up in such a pure form before. The fact is, the Courts have been ignoring the literal meaning of the Working Time Regulations for years now. Think of the carrying over of holiday pay for those who are on long-term sick leave – the Regulations say that you simply can't do that, but the European Court ruled otherwise and the courts and Tribunals were happy to 'interpret' the Regulations to achieve the right result. The same is true of the inclusion of regular overtime in holiday pay. The Regulations are entirely clear that overtime should not be included – but in the *Bear Scotland*² case the EAT simply ignored that fact and gave effect to the requirements of the Directive instead.

I think most employment lawyers expect the Court of Appeal in *Lock* to reach the same conclusion and interpret the Regulations in order to achieve the result required by the Directive. If they don't – and instead rule that UK law is sovereign and only Parliament can change it – then that will cause quite a stir. The Government would face the prospect of tens of thousands of employees from across the private sector suing them for the holiday pay that they would have received had the Government implemented the Directive properly. That's why the Government is represented in the *Lock* case and is arguing for the Directive to be given primacy over the Regulations. It doesn't want to be left holding the bill.

In the public sector, however, the Directive will continue to apply – at least for now. The concept of 'vertical direct effect' will kick in. That is the principle that certain rights set out in EU Directives can be enforced directly against a body that is an 'emanation of the state' even if they have not been properly transposed into domestic law. We haven't seen many cases based on that concept in recent years because 'indirect effect' –

interpreting domestic law so that it complies with the requirements of EU law has, as we have seen, been very much in the ascendant. Not all EU rights give rise to vertical direct effect, but the right to paid annual leave certainly does. Whatever happens in *Lock*, EU case law will continue to apply in local government.

If *Lock* is upheld, however, there could be chaos once Brexit actually kicks in. While we have been trying to keep up with the changes to the rights to paid annual leave as a result of decisions from the European Court of Justice, the Regulations have stayed pretty much the same. The Government has never simply accepted that they don't meet the requirements of the Directive and amended them so that they do.

How will the UK courts view their earlier decisions that were reached on the basis that they had to apply EU law? The courts could simply revert to the literal meaning of the Regulations, or they could take into account the fact that the Regulations were intended to implement EU law and interpret them accordingly. Where will that leave the law on annual leave? Will we still have to include overtime? Will those on long-term sick leave still be able to carry their leave over into the next year? The Act which eventually repeals the European Communities Act 1972 may clarify the approach that UK courts need to take – but I wouldn't bet on it. Rather than wholesale reform, the impact of Brexit on employment law may simply be years of confusion.

More information can be found on Twitter:
[@daznewman](https://twitter.com/daznewman)

² BEAR SCOTLAND LTD and others v. FULTON and others; HERTEL (UK) LTD v. WOODS and others; AMEC GROUP LTD v. LAW and others - [2015] IRLR 15



National Developments

Public Health Workforce Strategy

Public Health England recently published their vision for the public health workforce to inform the development of a refreshed national public health workforce strategy. The LGA will be involved in developing the strategy, which will take forward some of the priorities suggested in this [document](#).

Workforce Integration Report

This month saw the launch of a major report by the King's Fund on workforce integration. The report was commissioned by the LGA and NHS Employers to look at supporting integration through new roles and working across boundaries.

In essence the report indicates that significant workforce investment decisions need to be made and developing entirely new roles may not always be the best use of resources – training, optimisation of skills, deeper team working and making proper use of professions can be more effective, and much more evaluation is needed. The report has been well-received and can be accessed [here](#).

Local Government Pension Scheme – Consultation on Fair Deal

The Government has DCLG have commenced a consultation on amendment regulations for the Local Government Pension Scheme (LGPS). It includes the 'Fair Deal' proposals for local government, which would protect individuals' LGPS pension rights where their employment is compulsorily transferred out of the public sector. It also includes a number of technical amendments and outlines plans for the introduction of greater flexibility in how members may take their AVCs. The consultation closes on 20 August 2016. Click here to access the consultation: [consultation document](#)

Local Government Workforce Survey 2014-15

The results of the LGA's Local Government Workforce Survey for 2014-15 are available here. The information is based on responses from 153 councils on a range of aspects such as labour turnover, recruitment and retention, skills gaps and learning and development. It can be accessed [here](#)

Pay Negotiations Updates

Soulbury

The Employers' Side has made an offer to the Officers' Side [click here](#) in response to their pay and conditions claim. We understand that the Officers' Side (NUT, Prospect and AEP) will now consult its members and will aim to respond to this in early September. There will be a meeting of the Soulbury Committee thereafter.

Youth and Community

The Employers' Side made an offer to the Staff Side on 16 June [click here](#). A meeting was held with the Staff Side (Unite, Unison, UCU and NUT) at Joint Secretarial level last Wednesday for further talks. Once a final offer is agreed, the Staff Side will carry out a consultation of members and will aim to respond in early September.

School Teachers

The LGA has published a [circular](#) on school teachers' pay for 2016/17, which is for information and advice and does not constitute a recommendation. It should be read in conjunction with the 2016 School Teachers' Pay and Conditions Document, the final version of which DfE will need to publish by 10th August at the latest and which will come into force on 1st September.

