

# International HR Best Practices Tip of the Month

**April 2008**

## **This Month's Challenge**

UK employers must adjust to new sex discrimination regulations.

## **Best Practice Tip of the Month**

New regulations have expanded the definition of sexual harassment in the UK to conform to EU Equal Treatment Directive standards. In addition, benefits for maternity leave have been increased. Employers with UK operations need to adjust their benefit plans and budgets, and train their management to understand the enhanced discrimination regulations.

## **U.K. Broadens Protection Against Sex Discrimination To Comply With The EU's**

### **Equal Treatment Directive**

In response to a ruling by the High Court of Justice that the United Kingdom's regulations concerning sex discrimination fell short of the standards set forth in the European Union's Equal Treatment Amendment Directive, the UK has issued new regulations that amend the Sex Discrimination Act

of 1975. The Sex Discrimination Act 1975 (Amendment) Regulations 2008 (the "2008 Regulations") enlarge the definition of actionable harassment, create greater rights for women during maternity leave and remove the requirement that women point to a comparator in maternity or pregnancy-related discrimination cases. With the exception of the regulations concerning maternity leave, the 2008 Regulations became effective on April 6, 2008.

### **Scope of Actionable Harassment Expanded**

Prior to the 2008 Amendments, the Sex Discrimination Act prohibited harassment of a woman “on the ground of her sex.” This prohibition required a showing that an individual’s sex was the motivating factor for the harassment. To conform to the EU standard, the 2008 Regulations broaden the scope of prohibited conduct to include within the definition of harassment “unwanted conduct that is related to [the victim’s] sex or that of another person.” This change greatly expands the scope of conduct that constitutes actionable sex harassment. As the explanatory note accompanying the regulations makes clear, the change in the definition of harassment “removes[s] the causal link between harassment and the sex of the person being harassed” thus enabling “a claim to be made by someone who is not subjected to the unwanted conduct himself or herself but the effect of which nonetheless violates his or her dignity or creates an intimidating environment for him or her.”

In addition to the definitional change, the 2008 Regulations now explicitly provide that employers can be found liable for harassment when an employee is harassed by a third party, such as a customer or employee of another employer. The 2008 regulations require workers to be protected from “any unwanted conduct related to their sex which violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.” To successfully state a claim of third-party harassment, an employee must show that: (i) she was subject to harassment by the third party in the course of her employment; (ii) her employer failed to take reasonable steps to prevent the third party from harassing the employee; and (iii) her employer knows that the woman has been subject to harassment in the course of her employment by a third party on at least two other occasions (the harasser need not be the same).

### **Increased Protection For Pregnancy and Maternity**

U.S. employers may be unfamiliar with the manner in which compulsory maternity leave is administered in the UK. Maternity leave is divided into two periods of leave. An employee generally has the right to 26 weeks of Ordinary Maternity Leave (“OML”) and 26 weeks Additional Maternity Leave (“AML”) — making the leave up to one year in total. Provided the employee meets certain notification requirements, an employee can take this leave no matter how long she has been with the company, how many hours she worked or how much she earns.

Currently, OML provides greater protection of various employee benefits during the leave than AML. For leaves starting after October 5, 2008, however, the 2008 Regulations eliminate the differences between the two leaves and allow for claims of discrimination in relation to terms and conditions of employment during OML and AML. This is significant, because with the exception of salary, it means that women will be entitled to benefit from all the terms and conditions of their employment during the entirety of their leave. Such terms may include health insurance, life insurance, a company car, etc.

Finally, the 2008 Regulations amend the definition of discrimination on the grounds of pregnancy or maternity leave to eliminate the requirement of a comparator who is not pregnant or on maternity leave.

The 2008 Regulations will require most employers to revise their training programs regarding sexual harassment and amend their policies or practices with regard to employees on maternity leave. Before October, employers should eliminate any differences between benefits provided during OML and AML and budget for the additional costs.

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