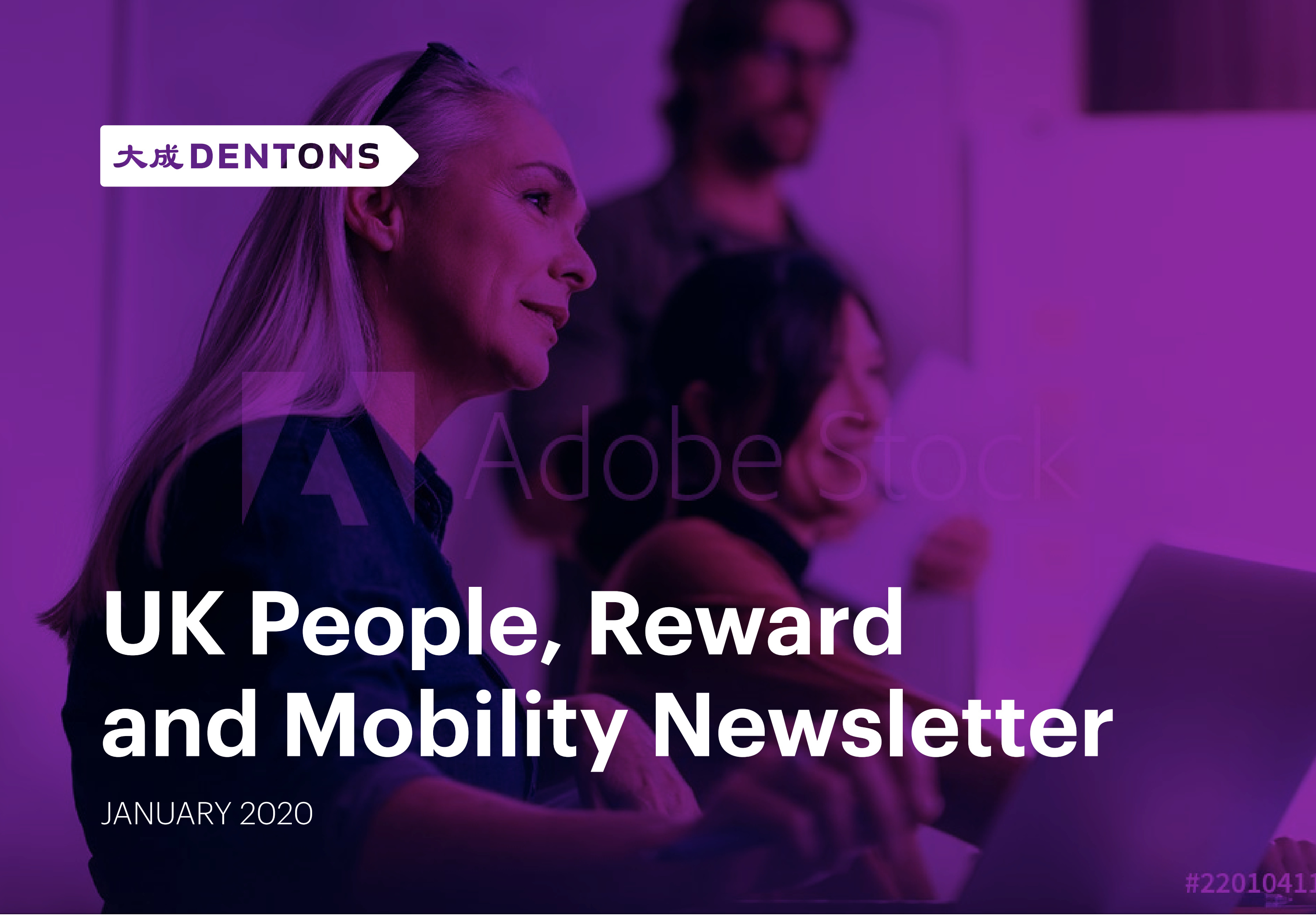

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UK People, Reward and Mobility Newsletter

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In this issue we look at some of the key employment law developments that have taken place over the past year, and also look ahead to what 2021 may have in store in terms of key employment decisions being handed down from the Supreme Court. We also take a look at restrictive covenants and the perennial issue of striking the balance between an effective restrictive covenant and one that is not unnecessarily onerous. Plus the Reward team has put the spot light on liability for outstanding pension contributions on a TUPE transfer.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub.

Here's what you might have missed in 2020

Supreme Court: no vicarious liability where employee pursues own personal vendetta

In the case of *W.M. Morrisons v. Various Claimants*, the Supreme Court overturned a previous Court of Appeal judgment and ruled that the supermarket giant, Morrisons, should not be held vicariously liable for the actions of an employee who leaked the personal data of almost 100,000 employees.

A disgruntled employee had been asked to perform an auditing task on the company database. He then decided to upload the personal data of the employees, including names and bank details, onto a file-sharing website before informing the press of the breach himself. Morrisons immediately took steps to rectify this when they discovered the leak. However, this did not stop a class action from more than 5,000 affected employees. The Court of Appeal initially found that, even though the employee who leaked the data was not acting in the course of his employment, Morrisons could still be held to be vicariously liable for the breach. The Supreme Court overruled this finding on appeal. It concluded that employers should not be liable for an employee's wrongful act where that act was not in pursuit of furthering the employer's business or was an effort deliberately to harm the employer as part of a vendetta.

The Supreme Court provided much needed clarity on the limitations of vicarious liability where the wrongful actions are those of rogue employees.

Good news for employers as the threshold for the "cost-plus" approach lowered

The Court of Appeal case of *Heskett v. Secretary of State for Justice* (Heskett) dealt with indirect discrimination and considered the extent to which a pay policy introduced by an employer to comply with the government's public sector pay freeze (and so reduce its staff costs) could justify an action which was potentially indirectly discriminatory.

Case law has established that employers cannot justify a discriminatory policy if it is solely to save costs. However, a "cost-plus" argument may be able to succeed, if the employer can satisfy the court that cost is one of a number of factors.

In *Heskett*, the claimant, a probation officer, brought an action after his employer sought to introduce a new pay progression policy. This had, in turn, been introduced as a result of the Treasury introduction of a policy limiting public sector pay increases. Under the new policy, the claimant would progress one pay point per year, as opposed to three pay points under the old policy. The claimant alleged that this practice indirectly discriminated against those who were under the age of 50, as older employers stood to earn significantly more than those in his position and age. The employer's justification for the new system was that the business needed to "balance its books" and to live within its means, and that the policy was temporary. The employment tribunal had found that the policy was potentially discriminatory but that it was a proportionate (short-term) means of achieving a legitimate aim and so justified. The EAT upheld the decision.

The claimant appealed to the Court of Appeal. He argued that the employer's argument of absence of means was essentially the same as trying to justify discrimination on cost alone.

The Court of Appeal disagreed. It found that an employer's need to reduce costs (in this case, staff costs) in order to live within its means (or "balance the books") could amount to a legitimate aim. There was a distinction between a situation where avoiding a discriminatory impact just cost more and where the steps to avoid that impact were unaffordable. However, even where the aim is legitimate, an employer still has to show that the measures are a proportionate way of achieving that aim. In this case, although the claimant had argued that the employer had not established that the policy was temporary, the Court of Appeal rejected this but made clear that the temporary nature of the policy was a relevant factor in its decision on proportionality.

The case is a helpful reaffirmation of the cost-plus approach. It is useful for employers to know that the need to "balance the books" can be considered a legitimate aim. However, the primary position remains that "cost alone" will not justify a discriminatory measure and, even where an employer can establish a legitimate aim, it needs also to establish that the measure is a proportionate means of achieving it.

Will an employer using an interview process for selection of suitable alternative employment in redundancy situations be considered unfair dismissal?

In the case of *Gwynedd Council v. Barratt & Other*, Gwynedd Council decided to implement a reorganisation of the schools in the local area and closed a number of primary schools, which included the schools where both of the claimants worked. However, alternative employment opportunities were offered in a new school being created. Instead of creating a scoring matrix to determine those who might be suitable for these positions, the Council decided to use an interview process. Both the claimants were interviewed and both were unsuccessful, despite the fact that the new positions were essentially the same as the positions they had held in the previous schools. The Council did not consult unsuccessful employees and did not allow for any appeal. The Employment Tribunal found that the redundancy process was unfair, both because of the use of this interview process and the unfairness in the process (no consultation and no appeal). The Employment Appeal Tribunal (EAT) upheld this decision. It drew a distinction between where an alternative position is a new (i.e. different) role, for example where it is more senior and/or has different skill requirements, where a forward-looking selection process (like interviewing) would be reasonable and where, as here, the roles were the same as the claimants' previous roles. The EAT considered that the fact that the claimants were, in reality, reapplying for their own jobs, together with the lack of consultation or appeal, made their dismissal unfair.

This case does not mean that an employer should never interview when considering alternative employment in a redundancy situation. It does mean that employers should look carefully at the differences between the requirements of the old role and the new role to consider whether they are so similar that a scoring matrix should be used or whether an interview is appropriate.

Beneficial contract changes made before TUPE transfer not enforceable

It is well established that a transferee cannot make detrimental changes to an employee contract, where the reasons for the change is the transfer itself and that such changes are void. The case of *Ferguson v. Astrea Asset Management Ltd* dealt with the question of whether the same principle would apply to beneficial changes, made before a TUPE transfer. In this instance, four directors, who were also the owners of the transferor, made advantageous changes to their contracts, before the transfer. Once these changes were discovered by the transferee, two were dismissed post-transfer. (The transferee disputed, for other reasons than the beneficial changes, that the remaining two directors transferred.) In an action subsequently brought by all the individuals, the EAT confirmed that TUPE was designed to protect employee rights, not to enhance them. In this case, the changes were clearly made in anticipation of the transfer. Accordingly, in line with the rationale used to protect employees from diminished contracts in the wake of impending transfers, the EAT concluded that the directors' changes were void.

For further insight into any of the cases above or to see even more of the standout matters from 2020, feel free to take a look at our Dentons Blog.

New decision on restrictive covenants

The High Court in *Quilter Private Client Advisers Ltd v. Falconer and another* [2020] EWHC 3294 (QB) has decided that the non-solicitation, non-compete and non-dealing clauses in a financial adviser's employment contract were unenforceable.

Background

Ms Falconer had recently started work as a financial adviser for Quilter. Her employment contract contained a nine-month non-compete clause and a 12-month non-solicitation and non-dealing clause. She was subject to a six-month probationary period, during which either party could terminate her contract on two weeks' notice.

Just before her probationary period ended, Ms Falconer decided to leave Quilter and join a competitor. Quilter brought a breach of contract claim against both Ms Falconer and her new employer.

High Court's decision

The High Court decided that the specific non-compete, non-solicitation and non-dealing clauses in Ms Falconer's contract were an unlawful restraint of trade and therefore void.

Non-compete clause

For nine months after the termination of her employment, the non-compete clause sought to prevent Ms Falconer from working for a competitive business.

The nine-month period applied from the outset of Ms Falconer's employment and did not take into account how long she had worked at the business. The court found it unreasonable that Ms Falconer could have been with the business for a very short period of time, only built up a small book of clients and then left, and yet still be bound by a nine-month restrictive covenant. The court also pointed out that the short, two-week notice period for the first six months of employment indicated that the employer considered Ms Falconer's services were not that important to the business until she had been with them for longer.

The court decided that it would have taken time for Ms Falconer to build relationships with clients. As such, it was unreasonable for her to be restrained for nine months after the end of her employment, when she had been employed for less than six months. The court commented that *"the threat of a departing employee requires less protection if she has had less of an opportunity to build such a relationship with the clients. Having access to client-related documentation does not of itself build a strong client relationship"*.

The court also decided that the scope of the non-compete clause was unreasonable. It sought to prevent Ms Falconer from working in competition with Quilter for prospective clients. The court decided that this went beyond what was necessary to protect Quilter's legitimate business interests. The court noted that it was legitimate to protect their relationship with actual clients, but it was not legitimate to prevent competition.

The court also noted that the head of Quilter only had a six-month non-compete clause in his employment contract, despite having access to much more confidential information.

Non-dealing and non-solicitation clauses

The non-dealing and non-solicitation clauses were for 12 months and prevented Ms Falconer from dealing or soliciting clients of Quilter: (i) with whom she had been materially concerned or had material personal contact in the 12 months before termination; and (ii) who had been clients of Quilter in the 18 months before termination.

This 18-month "backstop" was an issue for the court. The court held that the low standard of "material concern" combined with the length of the 18-month backstop made these restrictive covenants unenforceable. In particular, this was because, when given the opportunity, Quilter could not articulate why the legitimate interest being protected required such a long backstop.

Key takeaway

This case serves as a clear example of the difficulty employers face when striking the balance between an effective restrictive covenant and one that is not unnecessarily onerous. When drafting such clauses, employers should consider the legitimate interest they are trying to protect, and whether the covenant does any more than is really necessary to protect that interest.

Further, employers should not apply a "one-size-fits-all" approach to covenants without considering whether or not it is actually suitable for the employee in question. They should also try to achieve a degree of proportionality between the seniority of their employees and the restrictions applied to them.

Employers might also want to think about providing for shorter and more limited covenants for the initial period of a new recruit's employment, especially where the notice entitlement is reduced.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- What do the new immigration rules mean for businesses? – People Management, by **Marianne Hessey** and **Jessica Pattinson**
- How can employers prepare for the IR35 reforms? – People Management, by **Helena Rozman**
- Employment law in a post-Brexit world – Scottish Grocer, by **Laura Morrison**
- Staff vaccination is not a clear-cut issue – The Scotsman, by **Laura Morrison**

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- IR35 in the private sector – are you ready?
- CJRS: Chancellor extends UK furlough scheme to 30 April 2021
- What does the Brexit trade deal with the EU mean for UK employment law?
- Government consultations on employee rights – are changes on the horizon?

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub – www.ukemploymenthub.com.

Whose liability is it anyway? TUPE and liability for outstanding pension contributions

Background

The general principle under TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)), which sets out the employment protection that must be provided in respect of transferring employees, is that all contractual employment rights will transfer. However, in a pensions context, certain rights and liabilities under occupational pension schemes do not transfer under TUPE on the account of Regulation 10, which carves out most rights under an occupational pension scheme from the normal operation of TUPE. By way of reminder, a group personal pension plan is *not* an occupational pension scheme.

Nonetheless, and with respect to an employer's auto-enrolment obligations (which arise under the Pensions Act 2008), it is in principle accepted that liability for pre-transfer non-compliance with auto-enrolment obligations would transfer on the basis of Regulation 4(2) of TUPE, which provides that most liabilities under statute would transfer under TUPE.[1] This means that any penalties that may be imposed by the Pensions Regulator on the transferor employee for non-compliance with auto-enrolment duties are also likely to transfer to the transferee employer on a TUPE transfer under Regulation 4(2).

The Pensions Regulator has a wide range of powers that it may use against employers who fail to comply with their auto-enrolment obligations, and can direct an employer to pay both employee and employer outstanding contributions, as well as the power to add interest to any unpaid amounts (in addition to any penalties imposed), which could be significant. The Pensions Regulator's most recently published compliance and enforcement bulletin highlights that it takes an active enforcement approach for failure to comply with auto-enrolment obligations, and in the period between July and September 2020, it exercised its powers in relation to such non-compliance on 16,599 occasions.

Key facts

Mr R joined DTC Clear Ltd (DTC) in 2004 and was enrolled in the GPP.

However, from April 2018 onwards, no employer contributions were paid to the GPP in respect of Mr R and no employee contributions (which had been deducted from his salary) were paid over to the GPP. The member raised concerns about the non-payment of contributions and received repeated assurances that it would be resolved.

In February 2019, Mr R's employment transferred to a new employer, Clearcom Analytics Limited (Clearcom) under TUPE. Around the same time, Mr R was signed off work for stress due to the ongoing issues with the outstanding pension contributions (and unpaid salary). Mr R submitted a complaint to the Ombudsman, which was accepted in June 2019. Mr R was made redundant by Clearcom in January 2020.

DTC and Clearcom did not respond to enquiries from the Ombudsman's office.

1 See also *Tucker v Alamo Group (Europe) Limited* (EAT) 24/2/2003: *"it seems to us first, that Regulation [4] applies to rights and obligations derived from statute and regulations, even if not expressly or impliedly incorporated in the contract of employment, provided they exist 'in connection with' the contract of employment or the 'employment relationship…"* at [18]

Pensions Ombudsman's determination
The Ombudsman agreed with the Adjudicator's opinion, and held that:

- by failing to pay the contributions, the respondents were in breach of the Personal Pension Schemes (Payments by Employers) Regulations 2000 (SI 2000/2692), and this amounted to maladministration; and
- Clearcom, as the transferee employer, was responsible for the outstanding contributions as a result of the operation of TUPE.

The Ombudsman directed Clearcom to pay into the GPP sufficient funds to purchase the additional units that the GPP would have purchased for Mr R had all employer and employee contributions been paid on the relevant due dates. As the obligation was to purchase units at the current price it inherently includes an element of interest.

Of particular interest, the Ombudsman also directed Clearcom to pay a relatively high sum of £2,000 to Mr R for stress and inconvenience caused to him (compared to the usual levels of £500 to £800). This relatively high amount turned on the facts that the respondents had been on notice of the problem for around a year and had failed to correct it for that relatively long period of time.

Comment

The finding of maladministration in this case is hardly surprising, given the respondents blatant disregard of its auto-enrolment obligations, exacerbated by their subsequent failure to engage with the Ombudsman's office.

This decision highlights the importance for employers to ensure that contributions are correct and that they act on queries from employees. It also highlights the importance for buyers to carry out detailed due diligence enquiries on the target to ensure that they are aware of all the liabilities they are taking on before the transfer. This is particularly crucial because under TUPE, most of the transferor's liabilities under statute transfer and any acts or omissions of the transferor before the transfer are treated as having been done by the transferee (*regulation 4(2), TUPE*). So in principle, in addition to the transferee employer being responsible for any unpaid pension contributions pre-transfer and any potential adverse determination that can be issued by the Ombudsman, it is likely that any penalties imposed by the Pensions Regulator on the transferor for breach of auto-enrolment obligations under the Pensions Act 2008 would also transfer to the transferee employer.

Key cases for employers in 2021

Equal pay and comparators (Asda v. Brierley)

This case was heard by the Supreme Court in July 2020 and judgment is expected in the early part of 2021. In the Court of Appeal, it was decided that retail store employees, who were predominantly female, could compare themselves to distribution depot employees, who were predominantly male, for the purposes of an equal pay claim. This applied notwithstanding the fundamental differences in their respective roles. The Supreme Court will decide Asda's appeal against that finding.

The Equality Act 2010 requires that men and women should receive equal pay for equal work. To bring an equal pay claim, a claimant (A) must identify a comparator of the opposite sex (B) performing either "like work", "work rated as equivalent" under a job evaluation scheme, or "work of equal value". A and B must be working for the same employer or associated employers, and must be at the same establishment or at a different establishment to which common terms and conditions apply. "Common terms" means broadly similar rather than identical terms.

As the Supreme Court's decision will only relate to whether the depot employees can be considered a comparator for store employees, the decision will not conclude this long-running case. The Asda employees will still need to show that they are in fact performing work of equal value to the comparable employees. The decision will, however, be of interest to employers with staff working exclusively at different sites carrying out different roles. This will not be a barrier to an employment tribunal being prepared to consider that the employees are carrying out work of equal value to the business if the Supreme Court upholds the Court of Appeal's decision.

Trade unions and unlawful inducements (Kostal UK Ltd v. Dunkley)

This appeal to the Supreme Court is due to be heard in May 2021 and concerns inducements relating to collective bargaining under the Trade Union and

Labour Relations (Consolidation) Act 1992. This Act prohibits employers from bypassing unions and making offers directly to members of recognised trade unions where the purpose of the offer is to end or evade collective bargaining.

Kostal UK wrote directly to employees to ask them to accept a pay deal which had been rejected by the union. The employees were also informed that they would lose their Christmas bonus if they did not accept the deal. A few months later, Kostal wrote again, warning employees who refused to sign up that continued failure to do so could result in dismissal.

In the proceedings, Kostal argued that it was not trying to bypass collective bargaining but wanted to ensure that this specific pay deal was concluded and the bonus would be paid in time for Christmas. The Court of Appeal ruled in favour of Kostal, deciding that the Act does not make it unlawful for an employer to make one-off direct offers to members of trade unions if collective bargaining will otherwise continue. In such cases employees are not asked to give up, even temporarily, their right to be represented by their union in the collective bargaining process, and the employer's action does not render the union powerless to oppose the unwelcome change.

If the appeal is successful, Kostal employees could be due substantial compensation, including a mandatory award, and employers' abilities to make one-off direct offers to union members where collective negotiations have broken down may be considerably restricted.

Working Time and overtime holiday pay (Flowers v. East of England Ambulance Service NHS Trust)

This appeal, due to be heard by the Supreme Court in June 2021, concerns whether holiday pay under the Working Time Directive must take account of regular voluntary overtime. Previous cases have confirmed that non-guaranteed overtime must be included, but cases involving voluntary overtime had always settled before reaching the higher courts.

The Court of Appeal decided that holiday pay must include voluntary overtime where it is "broadly regular and predicable" (as compared to exceptional and unforeseeable overtime, which need not be included).

The outcome of the appeal to the Supreme Court will be of great interest to employers who do not currently include voluntary overtime in holiday pay calculations. If the appeal is unsuccessful, such employers may be subject to significant financial liability due to the need to include voluntary overtime in both past and future holiday pay calculations.

Working Time and paid time off (Harpur Trust v. Brazel (UNISON intervening))

This case concerns the entitlement to holiday pay of part-year workers and is due to be heard by the Supreme Court in November 2021.

The case concerned a teacher who was employed on a permanent contract but worked term-time only. Such workers were referred to as part-year workers in the case. Ms Brazel was paid holiday pay equivalent to 12.07% of her earnings. It was argued that the Working Time Regulations 1998 does not state that part-year workers should be treated differently to full-year workers, and they are therefore entitled to a full 5.6 weeks of paid holiday each year. The Court of Appeal agreed, deciding that all workers who are employed for the full year, even if they only work for part of the year, are entitled to 5.6 weeks of paid leave annually.

The Court of Appeal's decision impacted all employers with such part-year employees especially schools, which employ many staff to work only during term-time. It also has a much wider implication, given that agency worker holiday entitlement is calculated in the same way. This led many employers to worry about the possibility of part-year employees launching claims for unlawful deduction of wages claims. The Supreme Court judgment should bring welcome clarity to this complex issue and provide certainty as to whether employers need to change their practices, if they have not already done so.

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