



In-house lawyer regulatory tracker for 2020

August 2020

This Practice Note, by Susanna Heley of [RadcliffesLeBrasseur](#), highlights key legal and regulatory changes that affect or will affect in-house lawyers in 2020. While some are set in stone, others are more speculative at this stage or subject to the Parliamentary timetable. It was last updated on 24 June 2020.

The ongoing uncertainty arising from the coronavirus (COVID-19) pandemic and the speed at which the situation is moving will have a lasting impact on all areas of law, regulation and policy development. Inevitably some of the anticipated developments in this tracker will be affected and new issues may arise, particularly regarding the availability and extent of business support. We are monitoring the impact of the coronavirus closely and reporting changes via our news updating service. To help you find and access relevant news, practical guidance and Q&As from across Lexis[®]PSL Practice Areas all in one place (subject to subscription), Lexis[®]PSL has also launched a coronavirus (COVID-19) toolkit. In addition to coronavirus-specific content, the toolkit also highlights additional guidance and support materials of general relevance. See: [Coronavirus \(COVID-19\) toolkit](#).

Employment & HR

Category	Details	Expected or actual date
Coronavirus job retention scheme (CJRS)	<p>The government introduced the coronavirus job retention scheme (CJRS) in March 2020. Employees whose jobs would have been redundant due to lockdown may instead be furloughed and paid through the CJRS. This effectively meant that the government was paying 80% of furloughed employees' wages, capped at 80%. The last date for furloughing employees for the first time was 10 June. Furloughed employees may start being reintroduced to work and still claim some support from 1 July 2020.</p> <p>Indications are that the scheme was widely taken up but may have been abused. Enforcement action is likely and those companies using the scheme may be subject to scrutiny from HMRC. Enforcement measures are due to be included in the Finance Bill—see Practice Notes: Taxation of coronavirus (COVID-19) government support payments and Coronavirus Job Retention Scheme—guidance tracker.</p> <p>For more information on the CJRS changes from 1 July, see Practice Note: Coronavirus Job Retention Scheme (revised version from 1 July 2020).</p>	The CJRS will reduce gradually from 1 July 2020.

Category	Details	Expected or actual date
Employee protection legislation	<p>The government announced its intention to introduce a new Employment Bill to enhance employee rights as the UK leaves the EU. The main elements of the Bill are:</p> <ul style="list-style-type: none"> –creating a new, single enforcement body –ensuring tips left for workers go to them in full –introducing a new right for all workers to request a more predictable contract –extending redundancy protections to prevent pregnancy and maternity discrimination –allowing parents to take extended leave for neonatal care –introducing an entitlement to one week’s leave for unpaid carers, and –subject to consultation, make flexible working the default unless employers have a good reason not to <p>See: LNB News 19/12/2019 23.</p>	<p>Announced in the Queen’s Speech in December 2019. Draft bill is not yet published.</p>
Live-in workers’ entitlement to national minimum wage	<p><i>Shannon v Rampersad t/a Clifton House Residential Home</i> (joined with <i>Royal Mencap Society v Tomlinson-Blake</i> in Court of Appeal) [2018] All ER (D) 50 (Aug) concerns the question as to whether home workers required to remain at home for their shift and workers who sleep in are entitled to payment at national minimum wage for time not spent performing some specific activity.</p> <p>The Court of Appeal held that only time spent working had to be taken into account, overturning the High Court at first instance. Appealed to the Supreme Court.</p> <p>This case could have wider implications for sectors requiring employees to be physically present at a specific location as part of their employment.</p> <p>See: Case tracker—Employment.</p>	<p>Hearing 12–13 February 2020. Supreme Court judgment awaited.</p>
Age discrimination—justifying pay policy	<p>In <i>Heskett v Secretary of State for Justice</i> [2019] All ER (D) 12 (Jul) the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) held that a policy of reducing the rate at which probation officers progressed up an incremental salary scale was prima facie discriminatory in favouring employees over the age of 50 as against younger employees but that the policy was, in all the circumstances, justified.</p> <p>See: Case tracker—Employment.</p>	<p>Hearing in May 2020. Awaiting reserved judgment.</p>

Category	Details	Expected or actual date
Off payroll working in the private sector (IR35)	<p>The IR35 rules are designed to ensure that individuals who provide services through an intermediary (usually a personal services company) but would have otherwise been an employee pay the same PAYE and NICs as direct employees. The responsibility for this rests with the intermediary, but the government believes that this is not an effective control and that only 10% of those who should comply with IR35 rules do so.</p> <p>The government's position is to move to similar rules that already apply in the public sector where the public-sector employer is responsible for determining whether IR35 applies and for paying tax and NICs if it does. The draft legislation was expected to be in force by April 2020 to apply to certain medium-sized and large private sector businesses (as amended by the incoming Finance Act). The reforms have however been delayed by at least one year due to the coronavirus pandemic.</p> <p>HMRC has produced guidance on preparing for the changes.</p> <p>See: IR35—key difficulties and HMRC's approach, IR35—off-payroll workers, LNB News 07/02/2020 83 and LNB News 12/02/2020 8.</p>	<p>Delayed until at least April 2021.</p>
Equal pay	<p><i>Asda Stores v Brierly</i> UKSC 2019/0039</p> <p>The Supreme Court will consider the appropriate comparators in equal pay claims in which female claimants in retail stores seek to use male comparators working largely in distribution centres.</p> <p>See: Case tracker—Employment.</p>	<p>Supreme Court hearing 13/14 July 2020.</p>
Individual rights arising from trade union membership	<p><i>Kostal UK v Dunkley</i> A2/2018/0108, [2019] EWCA Civ 1009, UKSC 2019/0153</p> <p>Case about whether an employer's attempt to bypass a recognised trade union by negotiating directly with individual employees regarding changes to terms and conditions amounted to unlawful inducement contrary to section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992.</p> <p>The EAT held that the ET had not erred in finding that it did—see report of 15 December 2017.</p> <p>The Court of Appeal allowed the employer's appeal, held that it did not amount to unlawful inducement and dismissed the claim—see report of 14 June 2019.</p> <p>The Court of Appeal handed down judgment on 13 June 2019. Appealed to Supreme Court.</p> <p>Relevant to employers who recognise trade unions.</p> <p>See: Case tracker—Employment.</p>	<p>Application for permission to appeal lodged on 11 July 2019.</p> <p>Supreme Court.</p> <p>Permission granted on 11 February 2020.</p>

Category	Details	Expected or actual date
Non-disclosure agreements (NDAs)	<p>Following political interest in the alleged misuse of non disclosure agreements to prevent reporting of harassment and criminal conduct, DBEIS announced its intention to:</p> <ul style="list-style-type: none"> —introduce legislation to regulate use of NDAs, and —consult on a potential requirement that all employers should be entitled to a basic reference <p>The Women and Equality Select Committee urged the government to treat this issue as a priority on 29 October 2019.</p> <p>See DBEIS: Crack down on misuse of NDAs in the workplace.</p>	<p>Announcement 21 July 2019 following consultation issued in March.</p> <p>Timetable to implementation has not been fixed.</p>
Vicarious liability for sexual assault	<p><i>Barclays Bank v Various Claimants</i> UKSC 2018/0164</p> <p>Case about whether an employer is vicariously liable for the actions of an independent contractor doctor who allegedly committed sexual assaults on employees during medical examinations requested by the employer.</p> <p>The High Court held that the employer was liable for any such assaults that were proved—see report of 9 August 2017.</p> <p>That decision was upheld by the Court of Appeal—see report of 24 July 2018. Appealed to Supreme Court.</p> <p>The Supreme Court allowed the appeal and confirmed that the doctor should be regarded as an independent contractor so that there was no vicarious liability. See News Analysis: Supreme Court—employer not liable for doctor's sexual assault of job applicants (Barclays Bank v Various Claimants).</p>	<p>Hearing 28 November 2019.</p> <p>Supreme Court judgment 1 April 2020.</p>

Data & privacy

Category	Details	Expected or actual date
ePrivacy	<p>The Draft Regulation on privacy and electronic communications is intended to replace the current ePrivacy Directive (Directive 2002/58/EC) and align electronic privacy requirements with the General Data Protection Regulation, Regulation (EU) 2016/679 (the GDPR).</p> <p>For any organisation other than technology communication providers, the main areas to watch will be the implications on direct marketing and cookies.</p> <p>After years of negotiations in the Council of the EU, the draft regulation was rejected at the end of November 2019 by the Committee of Permanent Representatives (the body responsible for preparing the Council’s business).</p> <p>While some progress had been made on keys areas, Member States failed to overcome differences on how the proposal fits with the GDPR, how to handle cookie walls (pop-up windows that block access to websites until a user gives consent to advertising cookies) and whether an exception should be granted to allow tech companies to scan billions of images for child sexual abuse.</p> <p>The coronavirus outbreak has caused work on the legislation to be postponed indefinitely. Shortly before it was postponed, a slimmed-down compromise proposal was presented representing a significant change from previous versions. See the text of 6 March 2020 and also see News Analysis: Telecoms and big tech face revised, slimmed-down EU draft ePrivacy regulation.</p> <p>On 29 May 2020 Croatia issued a progress report in which it admits that it has been unable to break the negotiating deadlock that has existed since the last set of major proposals were issued on 21 February 2020. Those proposals, have received ‘rather mixed’ reactions according to the report.</p> <p>See: ePrivacy Regulation—timeline.</p>	Not known—currently postponed indefinitely

Category	Details	Expected or actual date
Data transfer	<p>The European Court of Justice delivered judgment in the 'Schrems II' case on 16 July 2020. This case concerns the lawfulness of data transfers outside of the EU based on standard contractual clauses (SCCs) and, in particular, affects mechanisms for transferring data to the US.</p> <p>In its judgment, the Court of Justice invalidated the EU-US Privacy Shield mechanism and specified that any use of SCCs must offer an adequate level of protection of personal data in practice (based on a case by case assessment of the circumstances of the transfer).</p> <p>See News Analysis: Privacy Shield invalidated and use of appropriate safeguards (including Standard Contractual Clauses) require case by case assessments (Facebook Ireland and Schrems).</p>	<p>European Court of Justice judgment 16 July 2020</p>
Data protection	<p><i>Various Claimants v WM Morrisons Supermarket plc</i> [2020] All ER (D) 02 (Apr)</p> <p>The Supreme Court held that the Court of Appeal had misunderstood the principles governing vicarious liability when deciding that Morrisons was vicariously liable for the acts of an employee (S) who unlawfully disclosed personal data concerning other employees.</p> <p>The Supreme Court held that the employee's wrongful conduct had not been so closely connected with acts which he had been authorised to do that, for the purposes of the employer's liability to third parties, it could fairly and properly be regarded as done by him while acting in the ordinary course of his employment.</p> <p>It was clear that S had not been engaged in furthering his employer's business when he had committed the wrongdoing in question. On the contrary, he had been pursuing a personal vendetta, seeking vengeance for disciplinary proceedings some months earlier.</p>	<p>Supreme Court judgment 1 April 2020</p>
GDPR update	<p>The European Commission has published an evaluation report on the operation of the GDPR. The report finds the GDPR is largely effective in meeting its aims and is suitable for the digital age but there is still more work to be done.</p> <p>There are no proposals for immediate reform as the effects of the GDPR are still bedding in.</p> <p>See: LNB News 24/06/2020 97.</p>	<p>24 June 2020</p>

Category	Details	Expected or actual date
Whether loss of control of personal data amounts to damage	<p><i>Lloyd v Google LLC</i> [2019] EWCA Civ 1599</p> <p>The Supreme Court has given permission to appeal in the <i>Lloyd v Google LLC</i> case in which Mr Lloyd is seeking to bring a representative action against Google for placing cookies on users' devices without the users' consent.</p> <p>The issue on appeal centres on whether Mr Lloyd should be given permission to serve out of the jurisdiction on Google LLC. To obtain permission, Mr Lloyd needs to show an arguable case and demonstrate that loss of control of personal data may constitute 'damage' for that purpose.</p>	Permission granted 11 March 2020

Intellectual property

Category	Details	Expected or actual date
Copyright	<p>The EU Directive on Copyright in the Digital Single Market (Directive (EU) 2019/790) intended to harmonise copyright laws to create an effective single digital market was approved in April 2019. The government confirmed in January 2020 that there are no plans to implement the directive following Brexit. Any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.</p>	The directive must be implemented in Europe by 7 July 2021 but will not be implemented in the UK.

Corporate governance

Category	Details	Expected or actual date
Corporate Insolvency and Governance Act 2020	<p>The Corporate Insolvency and Governance Act 2020 (CIGA 2020) was first introduced as a Bill in the House of Commons on 20 May 2020 and came into force on 26 June 2020. Under the Act, companies in financial difficulty may, in certain circumstances, obtain a moratorium and protection from creditors.</p> <p>The Act makes significant changes to insolvency law. Permanent measures include moratoria and restructuring process and the circumstances in which supply contracts may be terminated due to relevant insolvency events.</p> <p>The impact of other measures is intended to be temporary to relieve the immediate impact of the coronavirus pandemic. These affect the winding up process and liability for wrongful trading. See News Analysis: Corporate Insolvency and Governance Act 2020.</p>	In force from 26 June 2020
Taxation—personal liability	<p>Section 98 of the Finance Bill introduces potential joint and several liability for directors in respect of tax due from a company in certain circumstances.</p> <p>Schedule 13 sets out three broad circumstances where such liability may arise:</p> <ul style="list-style-type: none"> —tax avoidance and tax evasion cases (paragraph 2(1)) —repeated insolvency and non-payment cases (paragraph 3(1)), or —cases involving a penalty for facilitating avoidance or evasion (paragraph 5(1)) 	Imminent
Dividends	<p>The Supreme Court will consider whether payment of a lawful dividend may amount to a transaction defrauding creditors contrary to section 423 of the Insolvency Act 1986 (IA 1986). In BTI 2014 LLC v Sequana SA [2019] EWCA Civ 112, the Court of Appeal clarified when remedial relief under IA 1986, s 423 may be granted and when directors' duties to have regard to the interests of creditors (the creditors' interests duty) may apply.</p> <p>See News Analysis: Challenging lawful dividend payment as a transaction defrauding creditors and for breach of directors' duties (BTI 2014 LLC v Sequana SA and others; BAT Industries plc v Sequana SA).</p>	Hearing 25 March 2020. Judgment awaited

Category	Details	Expected or actual date
Extended time for filing	<p>The CIGA 2020 provides for temporary extensions of the period for companies to file their accounts and reports as a result of the coronavirus pandemic.</p> <p>The Financial Conduct Authority (FCA) has similarly announced extensions of time for reports due to it.</p> <p>See Practice Note: Coronavirus (COVID-19)—impact on annual accounts and reports.</p>	

Commercial & competition

Category	Details	Expected or actual date
Loyalty penalty	<p>The CMA issued a 12-month progress update on tackling the loyalty penalty on 21 January 2020 noting that further action from the FCA and Ofcom is awaited in the interests of consumers.</p> <p>Ofcom issued new regulations in February 2020 requiring end of contract notifications to be provided. Potential FCA action endorsed by the CMA may include requiring insurers to automatically move consumers to cheaper equivalent deals.</p>	<p>Further report from the FCA awaited.</p> <p>The FCA announced on 18 March 2020 that some of its work was delayed due to coronavirus, but this would give it more time to consider its response to the issue of the loyalty penalty.</p>

Miscellaneous

Category	Details	Expected or actual date
Brexit	<p>The UK has left the EU on the basis of the Withdrawal Agreement as implemented in the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020. However, we are now in an implementation period running until 31 December 2020 during which time the UK will generally continue to abide by EU rules.</p> <p>See: Brexit risk management guide and Brexit toolkit—Commercial.</p> <p>Draft bills have been published including the Immigration and Social Security Co-ordination (EU Withdrawal) bill which addresses the end of freedom of movement within the EU.</p> <p>Consultations as to regulatory reform of financial services have also been published. To track the progress of legislation being introduced as part of the UK's withdrawal from the EU, see our: Brexit legislation tracker.</p>	<p>The UK's exit took place at 11 pm on 31 January 2020 (exit day).</p> <p>The implementation period runs until 31 December 2020 during which time the UK will generally continue to abide by EU rules.</p>
Overseas property register	<p>Proposed register of ownership and control of foreign companies that purchase property in the UK.</p> <p>The draft Registration of Overseas Entities Bill was considered by a select committee in May 2019. The select committee reported and generally endorsed the proposal with some recommended improvements to minimise possible avoidance.</p> <p>The government responded in July 2019. It stated that the types of overseas entity that will be exempt will be set out in secondary legislation, which will also set out any evidence that might be required to be presented to the land registries to demonstrate that an overseas entity is or was exempt (eg a conveyancer's certificate). It confirmed it intends to publish, and consult on, draft regulations to ensure that the proposals are workable and will have no unintended consequences.</p> <p>This moves the UK one step closer to a 'world-first' public register of overseas entities owning UK property.</p> <p>Relevant to overseas businesses that purchase property in the UK.</p> <p>See subtopic: Risk & Compliance forecast.</p>	<p>The new register is expected to become operational in 2021.</p> <p>Following the general election in December 2019, the draft Registration of Overseas Entities Bill has not yet been republished but it was included within the Queen's Speech.</p> <p>While there is no indication that the proposal is being abandoned, it is likely to have been delayed by the coronavirus pandemic.</p>

Category	Details	Expected or actual date
Business interruption insurance	The FCA is seeking declarations as to the extent of business interruption insurance coverage in an effort to secure clarity amidst the coronavirus pandemic. It has selected a range of policies as a test case and expects to arrange a 5-10 day hearing in July 2020 to obtain urgent legal clarity on this issue. See News Analysis: FCA finalised guidance on the coronavirus (COVID-19) business interruption insurance test case .	Intended hearing July 2020.

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