SUMMER 2014

Health and Social Care

NEWS AND ADVICE FOR HEALTHCARE PROFESSIONALS FROM BIRKETT LONG

Out with the old...

The Care Act has received Royal Assent and with its introduction come big changes for care providers.

The Care Act 2014 (the Act) is split into three parts, each dealing with a different aspect of care, carers and the law. The first part deals with a wide range of issues and is intended to bring together existing care and support legislation into a new, modern set of laws and builds the system around people's wellbeing, needs and goals. Part one of the Act gives all individuals the right to ask the local authority to arrange their care for them, irrespective of who is funding the care package. It also deals with the cost of care and is intended to set out a clear approach to charging.

The second part of the Act takes forward the measures within the Government's five-point plan in response to the report by Robert Francis QC.

This part of the Act sets out Ofsted-style ratings for hospitals and care homes and also makes it a criminal offence for health and care providers to supply or publish false or misleading information.

The third part of the Act establishes Health Education England and the Health Research Authority as statutory non-departmental public bodies. This is intended to give them the impartiality and stability they need to carry out their roles in improving education and training for healthcare professionals, and protecting the interests of people in health and social care research.

There is no 'one size fits all' fix for care providers to prepare for the coming changes. However, the Department of Health has provided some guidance and will be issuing more in the near future. The Act is intended to bring change to care law and practices so care providers will need to educate themselves on the implications that the Act will inevitably have on them, their staff, their users and their families.

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On side with the employer?

New legislation and the care sector

Changes to employment legislation over the last couple of years have certainly favoured employers, including in particular the requirement (in most cases) of two years' service to bring a claim of unfair dismissal, the introduction of fees for claimants to lodge a claim and tighter tribunal rules.

Early figures confirm this with a massive 79% drop in claims reported in the period 1 October – 31 December 2013, compared with the previous year.

Health and social care providers have no doubt benefited from these changes, and will continue to do so given that many of their staff are lowly paid and for whom, therefore, the relative cost of enforcing legal rights is particularly high, often disproportionately so to the amount claimed.

That said, further legislative changes have been introduced, most recently on 6 April 2014 and, as always, there is much to get to grips with for all employers. The most noteworthy changes are the introduction of ACAS conciliation before a claimant can lodge a tribunal claim, the repeal of the statutory discrimination questionnaire and, perhaps for employers to note particularly carefully, the introduction of financial penalties for employers found to have breached employment law, where the Tribunal considers that the breach had "one or more aggravating features". The penalty will be 50% of any award made, but with a cap of £5,000, which is halved if paid within 21 days.

In terms of case law, the issue of Sunday or flexible working is something that arises frequently for health and social care providers, given the nature of what they do and the need for continuity of service 24/7.

The case of Mba v The Mayor and Burgesses of the London Borough of Merton at the end of 2013 involved a full time care worker at a home which provides residential breaks for children with serious disabilities. Full time staff were contractually required to work on two or three weekends over a three week period. After two years of allowing M to not work Sunday shifts due to her Christian beliefs, her employer then required her to work in accordance with her contract, which M refused to do. She was therefore issued with a final written warning, whereupon she resigned and claimed indirect discrimination on the ground of religion or belief.

The headache

of a hold over lease

It is in the best interests of both landlord and tenant to ensure that a new lease is in place to take effect from the date of termination of the old lease. This will avoid problems which can arise where the tenant remains in occupation after that date without a formal lease, a situation known as "holding over".

In hold over cases it is a question of fact as to the type of tenancy which has been created. It could be either a periodic tenancy or a tenancy at will and, ultimately, it may be a matter which has to be decided by the courts.

In a recent case the court held that the tenant's notice to terminate the tenancy was incorrect, as a periodic tenancy had arisen and the tenant became liable for a further 13 months' rent, at a rate of £170,209 per annum, plus insurance and service charges. It would have been advisable for the tenant to have entered into an express tenancy at will, which would have avoided the additional cost.

For more advice contact David Temperton on 01206 217310 or email david.temperton@birkettlong.co.uk.

Given that M was put at a disadvantage by the requirement to work on Sundays, as a practising Christian, her employer had to show that the requirement to do so was 'objectively justified'. This it managed to do given its need for the following: an appropriate gender balance and seniority mix on each shift, a cost effective service in the face of budgetary constraints, fair treatment of all staff and continuity of care for severely disabled children. The tribunal considered that these factors outweighed the discriminatory impact on M of the requirement to work on Sundays. It was also relevant that the employer had no viable alternative but to impose Sunday working on its entire staff and that M had originally entered into a contract of employment which required her to work on Sundays.

So, one for the employer, but justification of such indirect discrimination cases remains a high evidential burden for any employer to satisfy.

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Meet the team

Tim Ogle

Tim is a partner and a member of Birkett Long's health and social care team. He takes a particular interest in the myriad of employment law issues in this sector, advising particularly employers from both public and privately owned organisations. Tim also has experience in resolving health and social care workplace disputes through mediation as well as litigation.

In addition, Tim regularly advises health and social care clients on the transfer, sale or purchase of care homes and domiciliary care agencies.

Tim is a member of the Employment Lawyers Association.

"Tim Ogle is a very effective adviser with a good grasp of the commercial nature of decision taking. *Legal 500 Directory*"

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Tips
and reminders

Corporate accountability for health and social care providers

In the Minister for Care and Support, Norman Lamb's report, published in March 2014, recording the response to the consultation on strengthening corporate accountability in health and social care, the Minister confirmed the intention to introduce new regulations to amend the Care Quality Commission's (CQC) registration requirements set out in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010.

The proposed regulations will introduce "fundamental standards", which are intended to set in law a clear baseline below which care must never fall, and will allow the CQC to take enforcement action against providers that do not meet the standards. The regulations also contain a "fit and proper person requirement" (FPPR) and, following the consultation, the intention is for that requirement to be extended to board level appointment or its equivalent, which means the CQC will be able to bar registration of a provider if a director is deemed unfit under the requirements, until a suitable director is in post.

The fundamental standards cover:

- person-centered care
- dignity and respect
- need for consent
- safe and appropriate care and treatment
- safeguarding service users from abuse
- meeting nutritional needs
- cleanliness
- safety and suitability of premises and equipment
- receiving and acting on complaints
- staffing and employment of fit and proper persons

A breach of the regulations will be an offence and the CQC will be able to prosecute immediately for certain breaches. It will only be able to bring proceedings on others where it has notified of the alleged failure and the registered person has failed to rectify the breach within a specified period. Prosecution will result in a fine. Following adjustment of the draft regulations from the consultation and Parliamentary approval, the intention is for the regulations to become part of the existing secondary legislation that sets requirements for registration with the CQC. Therefore FPPR for directors of registered providers will be introduced along with the fundamental standards and associated offences from October 2014.

Our health and social care team will be monitoring the progress of this legislation and will keep you updated with developments.

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Forthcoming events

Employment breakfasts

Keep up to date with employment law at our bi-monthly breakfasts held at all three offices.

For more information on any of our events please visit www.birkettlong.co.uk/events or email seminars@birkettlong.co.uk

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