A magazine from

irwinmitchell solicitors

Summer 2015

Focus on Manufacturing

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>> The rise of
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Get compliant

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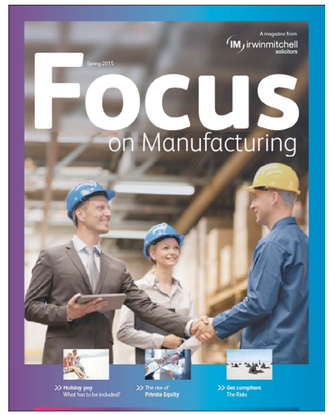

Welcome...

Manufacturing the Future

As the UK competes in an increasingly global economy, the manufacturing sector plays an important role in economic development both within the UK and on the international stage. Whilst manufacturers provide a vital contribution to the UK's GDP, Irwin Mitchell seeks to assist manufacturers in maximising opportunities for advancement and innovation.

Manufacturing is as relevant now as it was in the industrial revolution; in fact, the German government has described the computerisation of the manufacturing industry as a fourth-wave industrial revolution, Industry 4.0.

The manufacturing sector has been developing at an increasing pace since manufacturers started using steam power, followed by electric power and subsequently utilisation of technical developments of the electronics industry. However, in a global economy companies must continue to develop their technology to protect their commercial longevity.

Along with the cultivation of manufacturing technology and techniques, the legal landscape has similarly adapted to the modern world. Irwin Mitchell's Manufacturing Sector Group aims to advise manufacturing businesses on legal issues that may cause a commercial impact and to encourage businesses to consider new opportunities to further their business.

Irwin Mitchell is the largest UK law firm headquartered outside of London, operating out of 10 UK offices. Each office considers itself to be part of its local community and to provide a service tailored to business within the region. With our committed team, experienced in providing a full range of services for business, we are dedicated to helping businesses develop and succeed locally, nationally and internationally.

If you would like to discuss any of the issues raised in Focus on Manufacturing or how Irwin Mitchell could assist your business, please contact Dorrien Peters

Dorrien Peters
Partner, Commercial Litigation

What has to be included in holiday pay?

How much an employee should be paid when they take annual leave is proving to be one of the biggest issues facing employers. In particular, the recent decisions in the cases of Wood and others v Hertel and Fulton v Bear Scotland Ltd and Lock vs British Gas, have generated wide spread publicity on the issue.

Given the range of working patterns which manufacturers operate, they need to consider whether all paid overtime and whether any commissions earned should be included in the calculation of holiday pay.

Non-guaranteed overtime
The Hertel case decided that overtime payments must be included in the calculation of holiday pay when it is regular and forms part of a worker's normal working hours.

Irregular non-guaranteed overtime must also be included in holiday pay, but the average overtime worked over a twelve week period must be calculated.

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Voluntary overtime
Although there are no cases about the inclusion of purely voluntary overtime in the calculation of holiday pay, it is likely that if it is worked regularly (for example, every Christmas, Easter etc) or frequently (eg two hours this week, two hours in two weeks time etc and so on) it should be included.

What about productivity, attendance or performance allowances?
Allowances which are linked to productivity must be included in the holiday pay calculation. However, allowances which are intended to cover occasional costs, such as travel, do not need to be included.

Do these requirements apply to all paid holiday?
These requirements only apply to the first four weeks of holiday taken by a worker, as this is the minimum holiday required by the European Working Time Directive.

How far back can workers bring claims?
Workers can bring claims in the Employment Tribunal under the Working Time Regulations or a claim for a series of unlawful deduction from wages. Either claim must be brought within three months of the underpayment. A worker will not be able to claim a series of underpayments if there are more than three months between the alleged underpayments.

The Deduction from Wages (Limitation) Regulations 2014 will apply to all claims brought after 1 July 2015.

These Regulations:
> Limit all unlawful deductions claims to two years before the date the employment claim is brought

> State that holiday pay is not incorporated as a term of employment contracts so that workers cannot bring a civil claim for breach of contract in respect of underpayment.

What should businesses do now?
Employers can:
> Review contracts of workers working overtime to establish whether regular overtime is worked

> Decide whether to limit holiday pay for overtime to the four week minimum period provided by the European Working Time Directive.

Manufacturers with seasonal fluctuations can:
> Specify when employees can take holiday so that the first four weeks of holiday isn't taken with twelve weeks where overtime has been worked. Employees should, however, take advice about possible discrimination claims

> Set a more appropriate reference period to calculate holiday pay

> Set up a "task force" to deal with holiday pay

> Re-structure the workforce so that it is not so reliant on seasonal overtime. When doing this, employers must be sure to comply with the relevant legislation about making such changes

> Refuse to include voluntary or irregular overtime in holiday pay until the law decides otherwise.

What is holding back **British** manufacturers from trading **internationally?**

Exploring international markets is something that is a natural progression of any company looking to grow their revenue stream and test whether their products can successfully compete overseas.

Over recent years emerging markets have been considered a priority for exporters wishing to find new customers and untapped revenue streams.

As with a lot of things in business however, there are several obstacles in the way of the new exporter. There are first of all the obvious difficulties which may arise in any cross border transaction: language and cultural differences. These, arguably, are as difficult to overcome as matters such as knowing how logistically to transport products overseas, how to enter the target market, on what terms should you trade and what documents are needed to formalise the arrangement.

The role of an agent and distributor
Using agents and distributors is a relatively straightforward approach to these issues. An agent will act on a company's behalf and arrange the sale of the products to the end customer. Distributors will, in effect, become a customer of the company yet there is the added benefit that the distributor already has an established customer base in the target country in which the company is wishing to sell.

So, why are companies not using agents and distributors more?
We have found that many companies are still lacking in confidence when it comes to knowing how to use overseas representatives. Many companies are unsure as to whether to use an agent or a distributor (or both), what their roles are or, quite simply, where they go to find an agent or distributor suited to their company.

There are also concerns such as loss of control over how sales are handled. Does there need to be a formal agreement in place and, if so, what sort of terms need to be included in the agreement?

All of these issues were highlighted in a recent survey conducted at an International Trade Forum (ITF) seminar in which we participated. The results showed that even if people had used agents or distributors in the past, the majority of people did not feel confident that they knew how to appoint the right person as their agent or distributor.

Where to seek help
Organisations such as UK Trade & Investment and ITF can provide companies with specific information on markets and countries which may be receptive to their products.

Irwin Mitchell can assist companies in drafting and negotiating the agreements between the company and agents or distributors.

Irwin Mitchell can also ensure that some of the concerns that companies have, such as losing control of how the sales are handled, are dealt with in the legal agreements.

This can thereby provide companies with further comfort when using agents and distributors to sell their products aboard.

The potential benefits of trading internationally are huge; agents and distributors are great facilitators of this. We are happy to play our part in ensuring that companies feel confident in using agents and distributors.

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The Rise of PRIVATE EQUITY

Manufacturing M&A continues to be boosted by Private Equity

Significant private equity interest in manufacturing has continued to fuel an increase in M&A activity across the sector, according to research by Experian, the global information services company.

The report has revealed that manufacturers in the UK were the target of 199 deals during the first three months of 2015. This represents a 9% increase compared to the same period last year (183) and a 3% rise compared to the final quarter of 2014.

Aside from financial and insurance services, the manufacturing sector contributed to the largest amount of deal activity in the UK. The main industry involved in Q1 2015 M&A transactions in Yorkshire and Humber was manufacturing.

The report highlights more than 30 completed or near completed Yorkshire & Humber deals in the manufacturing space during the first three months of this year. Unsurprisingly, the West Midlands also performed well with 27 manufacturing deals completing in the period - ten more than the same period in 2014.

South East-based manufacturers were the subject of 30% of all M&A activity across England; however this was the lowest proportion in the seven years covered in the report.

Significantly, the report also shows a large increase in manufacturing M&A activity which involved private equity. In the first six months of 2015, 27% of manufacturing deals involving UK firms were PE-backed. This compares to 21.8% during the whole of 2014.

Irwin Mitchell remains one of the most active legal advisors in the M&A market in the UK, appearing in the top 20 for deal advisory work nationally and top three in Yorkshire & Humber.

In supporting our clients on recent transactions, such as the disposal of Midlands-based door manufacturer and distributor JB Kind, the disposal of Rainbow Dust Colours to food manufacturer Real Good Food, and the recent equity investment in hybrid car manufacturer Magnomatics, we at Irwin Mitchell have witnessed first-hand the strong performance of the manufacturing sector in their M&A and investment activity in the UK.

Although there looks to have been a small dip in activity over the last few months pending the outcome of the General Election, we expect the sector to continue to perform well and generate increasing levels of M&A activity and opportunities for private equity funds throughout 2015.

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UPDATE ON

REAL ESTATE

Irwin Mitchell's Real Estate team has broad expertise in advising manufacturers and industrials on a wide range of property-related issues, including acquisitions and disposals, landlord and tenant and environmental and planning.

Irwin Mitchell recently advised White Label Co on the disposal of a 50-acre brownfield site in South Yorkshire which was surplus to the company's requirements. The site had previously been used for heavy industry and was as a result, potentially contaminated under the Environmental Protection Act 1990. There were a number of interested purchasers and Irwin Mitchell was required to move swiftly to secure the interest of the preferred bidder by way of lock-out agreement.

A number of previous environmental reports and surveys were supplied to the purchaser as part of their due diligence process. Given the sensitive nature of the information deduced, our client was advised to enter into a confidentiality agreement with the purchaser that would enable our client to control the flow of information. This process was carefully managed, so as to balance the interests of our client with the need to allow the purchaser to share information appropriately within its own corporate structure and with its professional advisers.

The agreement was also dove-tailed with a licence that would permit the purchaser to undertake their own site investigations. Our client was conscious to keep these investigations tightly managed, bearing in mind the potential for further contamination arising from the drilling and sampling that was required by the purchaser. The site investigation licence was therefore an important document in the context of the wider transaction and many of the principles agreed at that stage would transfer to the sale contract.

A key element of the transaction was the extent to which liability for the risk and cost of potential remediation could be apportioned between the parties and, insofar as possible, the weight of responsibility shifted to the purchaser. The sale contract would document this agreement and it was keenly negotiated as a result. Appropriate warranties and indemnities from the purchaser were agreed and obligations secured by way of parent company guarantees. Throughout this process, the property team worked closely with Irwin Mitchell's environmental and planning law experts to ensure that the agreement provided as much contractual protection for our client as possible, whilst keeping the client appraised of the risk that would remain with them as 'appropriate persons' under the relevant legislation.

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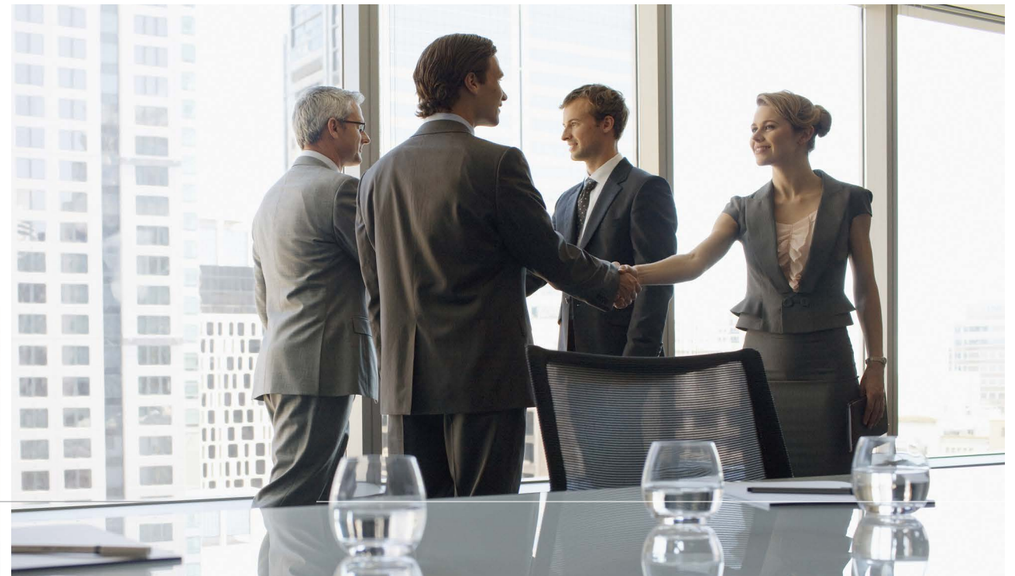

The existential threat from within a business – be it the ill-advised or even unscrupulous actions of its employees – poses possibly the greatest danger to that business' reputation and prosperity.

As well as facing up to the constant challenges posed by competitors, customers and regulators, manufacturing businesses must also be unyielding in policing the actions of their employees. For one client, an international manufacturing firm, concern about an employee's actions became the most urgent consideration when it learned that a senior director had misappropriated the company's products and resold them online for his own profit.

Their situation was made even more precarious as, prior to the directors' dismissal on the grounds of gross misconduct, a major customer had learned of the subterfuge and made clear that they would take their business elsewhere unless the director was removed from his position. This would have devastated the company's order book and so our client's hand was forced in needing to take swift and decisive action to remove the director whose position had become untenable. Our employment law experts were able to assist in implementing the company's disciplinary process and removing the director from his position before engaging our specialist litigation team in respect of the shareholders' dispute which followed.

Initial investigations into the directors' deceit – including CCTV evidence from the company premises - yielded further evidence of various thefts from the company and our team acted rapidly to successfully apply for an injunction which ordered the director to deliver up a number of incriminating items and documents including information he had been seen removing from company computers on a USB stick. A forensic IT specialist was engaged to look into what had been removed and, on the strength of the evidence obtained under the injunction, the director acquiesced.

He entered into a settlement agreement on terms highly favourable to our client which included the buy-back by the company of the director's shares. Having successfully removed the corrupt director from his position, our client was able to secure the subsequent sale of the director's former shareholding to another director, an aspect on which our corporate law specialists advised, and the company is now looking forward to the most successful year in its history and unprecedented growth without the distraction of on-going legal proceedings and without the threat from within posed by the dishonesty of a director.

The importance to the client of a successful outcome could not be overstated. The company's survival hinged on being able to maintain commercial relationships severely strained by the actions of the rogue director and its exposure to embarrassment within the manufacturing sector, on account of the actions of one employee was significant and potentially very damaging.

Our experienced manufacturing sector team was able to employ a broad portfolio of skills and expertise across specialisms including employment, commercial and corporate law as well as dispute resolution and litigation. The various facets of this matter reinforce the importance of engaging, as early as possible, a legal team possessing the necessary expertise across specialisms, some of which may not appear relevant to the initial dispute.

Considering alternatives in Dispute Resolution

Whether bringing legal action against a supplier, or facing a prospective lawsuit from a dissatisfied customer, manufacturers should accept the potential for legal disputes as an on-going business risk.

Whilst a company may be hopeful that a potential dispute will disappear, or be resolved before the commencement of legal action, it would be prudent to consider alternative methods of dispute resolution at an early stage.

Alternative Dispute Resolution
Whilst companies have traditionally turned to the Courts for the judgment of a neutral third party, commercial organisations have increasingly sought to resolve disputes outside the Court using Alternative Dispute Resolution (ADR). Arbitration and mediation have become popular alternatives to litigation.

Companies engaged in commercial disputes may find that ADR to be beneficial due to reduced time, costs and procedural complexity. Further, rather than being heard in open Court, matters can be discussed privately between parties to protect commercial sensitivities.

The Contract
The first step in considering how to resolve commercial disputes should be to look at whether there is a contract between the parties and, if so, whether it specifies the method of dispute resolution that should be used in the event of a disagreement between the parties. For example, a contract may specify that arbitration should be used to provide a binding decision in the event of a dispute, specify the number of arbitrators and how they should be appointed.

Should a company have a strong preference for using ADR over litigation, it may be worth seeking legal advice on including such a clause in the company's contracts with third parties.

The ADR Directive
The UK Government is required to transpose the requirements of the EU ADR Directive into national law by 9 July 2015 and the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 have now been published implementing the majority of the ADR Directive. The Regulations aim to ensure that ADR is available (although not mandatory) for any dispute concerning contractual obligations between a consumer and a business.

The Regulations provide that businesses who sell their goods or services online will also be required to provide information about certified ADR providers on their websites or sale contracts in some circumstances and, in the event of an unresolved dispute, all business may be required to provide information about certified ADR providers.

Significantly, where an ADR process is on-going, the six year limitation period for commencing litigation will be extended by eight weeks. This extension would give parties further opportunity to resolve their dispute prior to the issue of legal proceedings.

Online Dispute Resolution (ODR)
The ODR Regulation will automatically take effect in the UK on 9 January 2016. The ODR Regulation provides for the establishment of an ODR platform, an online service which offers EU consumers and traders a single point of entry for the out-of-court resolution of online disputes. ADR providers for the relevant national jurisdiction will then be linked with disputing parties to progress with ADR.

ODR has the potential to become a useful tool for parties in settling disputes in a cost effective and time efficient manner. However, the success of ODR is dependent on the ADR framework that it is built on and is a technological extension of current ADR options as opposed to constituting a separate method of dispute resolution.

Where manufacturers are not dealing directly with consumers and are predominantly dealing with other businesses, parties may still consider using online mediation platforms in the event that this would ease the dispute resolution process.

The selection of methods available for resolving commercial disputes will be highly dependent on the circumstances of the individual dispute and it is therefore recommended that manufacturers seek legal advice in considering how to approach dispute resolution.

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Don't bury your head in the sand

Get compliant

Perhaps the most innovative approach has been taken in relation to health and safety breaches following the work of the Right Honourable Chris Grayling MP. Before you roll your eyes and say this is all 'health and safety gone mad' please consider this...carefully.

The Health and Safety (Fees) Regulations 2012 introduced the 'Fee For Intervention' (FFI) cost recovery scheme which came into force on 1 October 2012. This has recently been reviewed and is set for further scrutiny in 2015. The regulations place a duty on the Health and Safety Executive (HSE) to recover its costs from duty holders which fall under its gaze including public and limited companies, partnerships of all forms and even Crown and public bodies.

Other bodies which enforce health and safety law such as local authorities and the Maritime and Coastguard Agency are unable to avail themselves of FFI. Whilst the recent review considers that there is a strong case for extending this scope to businesses presently covered by other enforcement regimes in the longer term, at present there remains an uneven playing field.

There is a high degree of uncertainty as a consequence of these limitations in the application of FFI. You therefore need to know if your business is directly regulated by the HSE, what regulations apply to your business and who polices them.

You then have to make sure that you are compliant and take reasonable precautions to eliminate or mitigate risks to health and safety of staff and other people.

How does the scheme work?
HSE Inspectors look at work activities and investigate incidents and complaints. There is a target of around 22,000 inspections per year to be targeted at higher risk sectors and businesses where there is a record of poor health and safety performance. Construction, manufacturing and motor vehicle repair services are the favourite targets for inspections with some 23,472 being carried out over 2013/2014.

Where breaches are insignificant then an Inspector can give verbal advice. However, if the Inspectors visit a business and see a material breach of health and safety law then the business or organisation will receive a written Notification of Contravention (NoC) and will have to pay a fee. For some breaches there is formal enforcement action in the form of a Prohibition Notice, which stops an activity taking place. Improvement Notices require improvements within a certain time. Alternatively, for the more serious breaches, Inspectors can also bring legal proceedings in the Criminal Courts. The HSE are quick to point out that compliant businesses or those where the breach is not material will not have to pay any fees.

What is a material breach?
This is when an Inspector forms the opinion that there is or has been a contravention of health and safety law that requires them to issue written notice of their opinion to the duty holder. This notification may be the notification of a contravention, an improvement or prohibition notice, or a prosecution.

It must contain a) the law that the opinion relates to, b) the reasons for the opinion including which contraventions are considered material ones and c) notice that a fee is payable to the HSE.

What are the costs?
The hourly rate usually applied is £124 per hour and will take in the total amount of time it takes the HSE to identify and conclude its regulatory action, including office based work. If third party involvement is required, such as an expert to give an opinion on specific issues, then the actual fees charged by them would be applied. Similarly, the Health and Safety Laboratory will charge at its own rate if it becomes involved. Costs will therefore fluctuate from case to case, depending on the complexity of the issues and whether there are multiple breaches. As this represents the HSE carrying out its statutory functions, VAT is not charged.

Clearly there is a further tension here. It would be easy for businesses to conclude that the HSE, in face of shrinking budgets was forced into a corner to place the costs of non-compliance from the public to the private purse and that this has become something of a 'cash cow' for the regulator. The review appears to have been conscious of this potential and it has been suggested that there is "no compelling evidence" to suggest this perception exists.

When invoices are issued, businesses can challenge them and they are reviewed. No fees are payable whilst the invoices are in the process of appeal, but the review informs us that relatively few invoices are actually amended.

The cost of health and safety breaches can be significant. FFI is unlimited and if you are prosecuted through the Courts you can also face:

- Significant fines and Court surcharges
- Payment of HSE investigation and prosecution costs
- The potential risk of costly Confiscation Orders where appropriate and in some instances compensation
- In some cases directors can now face custodial sentences.

If you are in any doubt about how FFI might affect you or if indeed you are facing an investigation by the HSE, then please feel free to contact the Regulatory & Criminal Investigations team at Irwin Mitchell.

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