INTERNATIONAL LABOUR LAW NETWORK **NEWSLETTER**

ILLN.EU

INTERNATIONAL LABOUR LAW NETWORK

Q3 | 2024

New Members of ILLN Welcome on board!

Dear Reader,

We are pleased to send you the first legal newsletter from our International Labour Law Network (ILLN). ILLN was established in June 2023 with the aim of **providing high quality assistance in labour and employment law** in the countries in which our members are based.

We currently cover 11 countries:

- Belgium,
- France,
- Germany,
- Grand Duchy of Luxembourg,
- Italy,
- Poland,
- Spain,
- Sweden,
- Switzerland,
- The Netherlands,
- The United Kingdom.

In that regard, we are pleased to announce that ILLN has recently been joined by the firms Wojewódka i Wspólnicy in Poland, Elvinger Hoss in the Grand Duchy of Luxembourg, Cirio in Sweden and Walder Wyss in Switzerland.

We hope you will enjoy reading this newsletter, and please do not hesitate to contact the authors if you have any questions about their articles.

NEW RULES ON EMPLOYEE'S LIABILITY TO COME INTO FORCE

Intro and example

On 1 January 2025, new rules on the extra-contractual liability of so-called "auxiliary persons" will come into force under the Belgian law.

The auxiliary persons are employees, contractors, sub-contractors, directors and independent service providers of a company that perform activities in name and on behalf of that company.

These rules, which relate to their liability towards third parties for faults committed in the context of an agreement between their principal and that third party, will have a considerable impact on their liability and the clauses to be provided in employment contracts and commercial contracts.

Current regime

At present, an auxiliary person benefits from the so-called quasi-immunity in relation to the third party (co-contractor).

In practice, the third party (co-contractor) will only be able to claim damages from the auxiliary if:

1. The fault committed also constitutes a criminal offence or;
2. If the fault committed has caused damage other than that resulting from the faulty performance of the agreement.

These are rare circumstances.

Furthermore, workers employed under an employment agreement benefit from additional protection. Article 18 of the Act of 3 July 1978 relating to employment agreements provides

AN EXAMPLE

- Company X (the principal) commits itself to installing machinery for company Y (the client / co-contractor). The installation works are carried out by an employee of company X, who commits a fault during the installation, as a result of which company Y suffers a loss.
- Company Y can claim damages from company X on the basis of contractual liability, as there is a contract between them under which the works were carried out.
- The question arises whether company Y will also be able to claim damages from the employee who committed the fault, on the basis of extra-contractual liability (given that there is no contract between company Y and the workers).

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that an employee may only be held liable for faults committed during the performance of the employment agreement in case of **(1)** fraud, **(2)** serious shortcoming, or **(3)** regular minor shortcoming.

This specific protection applies both in relation to the employer as principal (contractual civil liability) and in relation to third parties (extra-contractual liability).

In practice, in the example, company Y (co-contractor) will therefore only be able to bring an action against company X (principal) on the basis of contractual liability (except in the three very specific cases mentioned above, which can be difficult to prove).

Subject to the limitations under the aforementioned article 18, the employer could try to seek recourse from his employee.

Future regime

The new rules are set out in Article 6.3 of the new Civil Code (to be read in conjunction with the article 5.89 of the new Civil Code), and they change the rules on quasi-immunity, allowing co-contractors to lodge liability claims against employees (auxiliary persons) of a principal, on an extra-contractual basis.

The question is to what extent.

The new principles can be outlined as follows:

The injured party/co-contractor (company Y) has a choice: it can seek compensation for its loss:

- Against company X, on the basis of contractual liability;
- Against company X, on the basis of extra-contractual liability;
- Against the auxiliary persons, on the basis of extra-contractual liability.

The novelty is therefore the abolition of the quasi-immunity of the auxiliary persons.

If the injured party (company Y – co-contractor) invokes the liability or extra-contractual liability of the principal (company X), that principal will be able to invoke a certain number of defences, as follows:

- The contractual clauses in the agreement between company X and company Y (e.g. a liability waiver clause);
- Legislation concerning specific contracts (certain specific contracts are governed by specific liability rules);
- Limitation rules (an action must be brought within a certain period).

If the injured party (company Y – co-contractor) invokes the liability of the auxiliary persons, the law provides that the auxiliary person may invoke the same defences as those that may be invoked by company X (the principal).

Thus:

- The auxiliary person may invoke, against the injured party, the clauses of the contract between company X and company Y (such as liability waiver clauses), even if it is not a party to that contract (which implies the auxiliary person would have knowledge of that contract to which he is no party), as well as the defences from any particular laws applicable to such contracts;
- The auxiliary person may also invoke against the injured party the defences that he himself may invoke against his principal (company X), i.e. the clauses of the contract between him and company X, such as liability waiver clauses.

- If the auxiliary person is an employee engaged under an employment agreement, he will be able to invoke, against the injured party, the rules on restriction of liability set out in Article 18 of the Act of 3 July 1978.

On the other hand, these defences cannot be invoked by the auxiliary person if the action seeks to obtain compensation for damage resulting from:

- An infringement to physical or mental integrity or;
- A fault committed with the intention of causing damage.

On the basis of the above principles, in practice, an employee of company X can therefore only be held liable if company Y proves the existence of:

- Either damage resulting from fraud, serious shortcoming, regular minor shortcoming and provided that the employee cannot invoke liability waiver clauses;
- Damage resulting from physical or mental harm or a fault committed with the intention of causing damage.

In other words, the abolition of the quasi-immunity of the employee does not mean that he or she will no longer have any protection, since the regime of article 18 of the Act of 3 July 1978 remains applicable, and the employee has a legal right to invoke defences.

The law allows the parties to limit or exclude, in the contract, the extra-contractual liability of the auxiliary person, among others in order to protect employees.

In such case, the co-contractor of the employer will not be able to invoke the extra-contractual liability of the employee, except in case the damage results from an injury to physical or mental integrity or from a fault committed with the intention of causing damage.

Such clauses may therefore be useful to attract employees to a position where the risk of professional shortcomings (and therefore the risk of liability claims) is significant.

Finally, it should be noted that, unlike employees, other auxiliary persons (self-employed workers, company directors) do not enjoy the protection of Article 18. For these persons, it is all the more important to provide terms limiting/excluding their non-contractual liability.

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HOW TO SETTLE A CASE OUT OF COURT WITH AN EMPLOYEE IN FRANCE?

The advantages to settle a case out of court are twofold: the employer saves legal costs and the risk of reputational damage, since court proceedings are open to the public.

The main way to settle a dispute out of court is to enter into a settlement agreement with the employee.

Can a settlement agreement be used to terminate the contract?

Under French law, a settlement agreement is not a method to bring an employment relationship to an end. It is only a way to obtain from the employee a waiver of claims or disputes.

The termination of the employment contract must be dealt with separately through dismissal or termination by mutual consent.

When can a settlement agreement be used?

The use of the settlement agreement is twofold:

- a settlement agreement is usually concluded after employment has ended (after a dismissal or a termination by mutual consent).

In this respect, in order to be valid and cover claims related the termination of the employment contract, the settlement agreement must be concluded **after the termination date.** Thus, in case of dismissal, you must make sure that the settlement agreement is not concluded before

What is a settlement agreement?

In consideration of a financial payment (settlement indemnity), it is possible to have the employee waive any claim in relation to the conclusion, performance, or termination of the employment contract.

To make sure the settlement agreement is valid and binding, the amount of the financial payment must not be piddling.

FRANCE

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the dismissal letter has been sent by registered mail with acknowledgment of receipt and received by the employee.

- Settlement agreements can also be used to reach an agreed and final conclusion to a workplace dispute or issue which does not lead to terminate the employment relationship.

For instance, a settlement agreement may be used to resolve a dispute over holiday pay, variable remuneration, discrimination or harassment.

In such a case, a settlement agreement cannot cover the termination of the contract but can only cover the conclusions and performance of the contract.

What is covered by a settlement agreement?

The Supreme Court considers that when the wording of the waiver of claims is sufficiently broad, the employee is prevented from raising any claim related to the employment contract.

As a result, an employee who declares in the settlement agreement that he or she no longer has anything to claim from the employer "on any grounds whatsoever and for any reason whatsoever, either in respect of the performance or termination of the employment contract" can no longer claim payment of back pay and compensation in lieu of notice (Cass. soc. November 5, 2014, no. 13-18. 984), payment of compensation for paid holidays (Cass. soc. November 12, 2020, n°19-12.488), to supplementary pension rights (Cass. soc. May 30, 2018, n°16-25.426), or request payment of the financial consideration for the non-competition clause not waived by the employer at the time of dismissal (Cass. soc. February 17, 2021, n°19-20.635).

In a case where the settlement agreement only covered the performance of the employment contract, the Supreme Court recently ruled that the employee could bring a claim arising during the employment subsequent to the conclusion of the settlement agreement. The claim was related to the payment of meal allowances (Cass. Soc. October 16, 2024, no 23-17.377). The Supreme Court had already ruled in a similar way regarding a claim related to a union discrimination (Cass. soc. October 16, 2019, n°18-18.287).

What clauses can be inserted in a settlement agreement?

The settlement agreement can also provide for specific clauses such as confidentiality clauses or non-disparagement clauses.

To ensure settlement agreements are legally enforceable, it is advisable to be assisted by a lawyer. Do not hesitate to contact us. We will guide you through the negotiation process and help you draft a settlement agreement that is tailored to your needs.

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DIFFERENCE BETWEEN THE TRANSFER OF A GOING CONCERN, AND A CHANGE OF CONTRACTORS WITHIN A PROCUREMENT CONTRACT

In this respect, the Employment Tribunal of Bologna has recently ruled that, according to Article 29 of Legislative Decree no. 276 of 2003, a *change* of procurement contract does not only involve the transfer of employees from the former contractor to the new one, but also some substantial changes, such as the change of the premises where the business activity is carried out, assets or the administration.

The Italian law, implementing the Transfer of Undertakings Directive 2001/23/EC, provides that in the event of a transfer of a business or a going concern, the employees of the transferor have the right to continue their employment with the transferee.

Pursuant to Article 2112 of the Italian Civil Code, a transfer of a business or a going concern is any operation involving a change in the ownership of an organised economic activity existing before the transfer, and which maintains its identity in the transfer.

Within the change of procurement contract, the new contractor is obliged to employ the employees who are dismissed by the former contractor at the termination of the contract. This obligation is set forth in several national industry collective bargaining agreements, for instance those applied by logistics or cleaning companies. This obligation is also set forth in public tenders.

If the hiring of the employees of the former contractor were sufficient to qualify the operation as a transfer of a business or going concern, a transfer of a business or going concern would always be applicable, but this is not the case.

If these assets are transferred from the former contractor without any substantial changes, there is no change of procurement contract, but rather a transfer of a business or a going concern, with the application of Article 2112 of the Italian Civil Code.

ITALY

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NEED TO REVIEW THE EMPLOYMENT CONTRACT TEMPLATES

The Law of 24 July 2024 aimed at transposing the EU Directive No 2019/1152 on transparent and predictable working conditions came into force on 4 August 2024 and introduced additional obligations on employers to provide employees with more complete and transparent information on the essential aspects of their employment.

In particular, employment contracts (whether open-ended or with a fixed term, for full or part-time employment) as well as posting agreements or apprenticeship agreements shall specify certain additional working conditions, for instance relating to remuneration packages, daily or weekly working hours including overtime entitlements, the social security authority collecting social contributions with the applicable coverage as well as the applicable pension scheme, exclusivity commitments, termination rules and procedures, etc.

For contracts already executed on 4 August 2024, there is no legal requirement to be further amended or reviewed unless requested by the employees.

The Law also regulates the transmission of employment contracts by electronic means if the employee has access to it and if it can be recorded and printed. The employer must keep proof of the transmission or receipt.

Special procedures are also foreseen by the Law for the transition to more secure and predictable forms of employment, by converting fixed term employment contracts into open-ended employment contracts or part-time employment into full-time employment subject to certain conditions. The Law also covers professional training, which under certain circumstances may be provided free of charge to the employee during working time.

Failure to observe certain provisions of the Law may be sanctioned by a fine of up to EUR 5,000 per concerned employee and doubled in case of repeat offence.

It may therefore be time to review internal templates and processes in order to comply with the new legal provisions.

LUXEMBOURG

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COLLECTIVE LABOUR AGREEMENTS

Insurance sector

On 4 June 2024, the ACA and the trade unions (ALEBA, LCGB-SESF and OGBL) have agreed on the terms of the collective bargaining agreement for the Luxembourg insurance sector applicable from 1st January 2024 to 31 December 2026. Such agreement has been declared of a general obligation for the entire market by Grand-Ducal Regulation of 24 July 2024 and is therefore generally binding.

WHAT IS NEW IN LUXEMBOURG?

Banking sector

The ABBL and the trade unions (ALEBA, LCGB-SESF and OGBL) have agreed on the terms of the collective bargaining agreement applicable to the Luxembourg banking sector for the period 2024-2026. A Grand-Ducal Regulation is expected soon to declare such agreement of a general obligation for the entire market, hence generally binding.

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NOTICE PERIOD FOR TERMINATION OF EMPLOYMENT CONTRACTS IN POLAND

For employees employed under the provisions of the Polish Labor Code, an employment contract may, among other things, be terminated unilaterally by the employer with a notice period. This way of terminating the employment relationship is the normal, standard way of parting ways. However, when making a statement to the employee aimed at terminating the employment contract, the employer must indicate the reason for this termination. In other words, the employer must announce for what reasons the employer sees no further possibility of working with the person in question. This reason for termination of the employment contract is important because if the employee appeals to the labor court against the employer's statement received, it will be verified by the labor court. Therefore, the correct formulation of the reason in question by the employer is an extremely important issue. The reason must be specific, real and verifiable.

At the same time, both in the case of fixed-term employment contracts, as well as employment contracts concluded for an indefinite period, the institution of a notice period for termination of employment applies. This means that the employer's statement of termination of the employment contract has the effect of terminating the employment contract only after the expiration of this notice period. As a rule, in Polish law, the length of the notice period of an employment contract depends on the length of service of a given employee with that employer.

Notice Period in Poland

In the case of employment contracts for a fixed period and for an indefinite period, the notice period is:

- **2 weeks** if the employee has been employed for up to 6 months,
- **1 month** if the employee's length of service with the employer is up to 3 years
- **3 months** if the employee has more than 3 years of seniority.

The notice period is calculated in full weeks or months.

POLAND

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NEW LEGISLATION IN SWEDEN

New rules in the Temporary Agency Work Act

On 1 October 2024, the new rules in the Temporary Agency Work Act were applied for the first time. The rules mean that a user company that has hired an agency worker to work at one and the same operating unit for a total of more than 24 months during a 36-month period, is obligated to offer the temporary worker permanent employment or pay compensation equivalent to two months' salary. User companies breaching this obligation may be liable to pay damages to the agency worker.

The rules were introduced on 1 October 2022, but were applied for the first time on 1 October 2024, as it was only then that the first 24-months' qualification period was reached.

The rules mainly apply to temporary agency workers, but their application to consultants is uncertain, especially for so-called resource consultants. The rules have already had a major impact on staffing and consulting companies' businesses, but also for companies that regularly hire temporary agency workers. The full effects of the new rules are yet to be seen.

Implementation of the Pay Transparency Directive in Sweden

The EU Pay Transparency Directive was adopted in May 2023 and shall be implemented in national legislation in the member states by 7 June 2026. The aim of the directive is to strengthen the application of the principle of equal pay for work of equal value between men and women. This will be

New Legislation

- New rules in the Temporary Agency Work Act
- Implementation of the Pay Transparency Directive in Sweden

SWEDEN

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achieved, inter alia, by increasing the transparency of pay, setting minimum requirements for rules around the prohibition of pay discrimination and improving mechanisms to ensure compliance. The Government Official Report on how the Pay Transparency Directive should be implemented in Sweden was published on 29 May 2024 and has, thereafter, been out for consultation. Now, it remains for the Government to take a position on the official report and consultation responses and finalize a Bill for the parliament to decide on.

CASE LAW FROM THE SWEDISH LABOUR COURT

Labour Court case; AD 2024 No. 75

This is the first case from the Swedish Labour Court after the new requirement "just reason" for termination was introduced in the Swedish Employment Protection Act and the Main Collective Agreement. The employer side won.

The case concerned a telemarketer who was dismissed on the ground that he did not make as many calls as required in his employment contract. He had been warned that his employment was at risk if he did not comply with the obligation in his employment agreement and he had subsequently had more than reasonable time to consider the situation and improve his performance.

The Labour Court found that the employee, an experienced telemarketer, had breached his employment contract by not making the agreed number of calls per working day (at least 250 calls), which was an express requirement of the contract. Despite repeated reminders and written warnings from the employer, the employee continued to fail to comply with the requirement, with a decrease in call activity following the warnings. The Union claimed that the requirement for calls was unjustified and that the lists of potential customers were of poor quality, but the Labour Court rejected those arguments. Since it had not been established that the employee was unable to make the number of calls and since the employer's right to instruct how the work should be performed (Sw. arbetsledningsrätten) applied, the court found that there were just reasons for the dismissal. The action was, therefore, dismissed.

Labour Court case; AD 2024 No. 72

In this case, the Labour Court tried whether an employer had violated the prohibition against disadvantage in the Parental Leave Act.

The background to the case was that a company had carried out a major reorganization and offered employees relocation to new positions with fewer working hours (Sw. sysselsättningsgrad). According to the applicable collective bargaining agreement (CBA), an employee in such a situation is entitled to a certain period of adjustment to the new conditions (transition period). Two of the affected employees were on parental leave when they were given the relocation offers. The question for the court to assess was whether the company had violated the prohibition against disadvantage in the Parental Leave Act by allowing the transition period, for the two employees on parental leave, to run during their parental leave.

According to the CBA, the transition period begins when the employee accepts a relocation offer, and this also applies to employees on parental leave. There is no exception for employees on

parental leave that would postpone the transition period. During the transition period, employees will retain the same financial conditions as before, which means that both those on parental leave and those on non-parental leave will be treated equally.

The Labour Court found that the concerned employees had received their transition periods with unchanged financial conditions, even slightly longer periods than their non-parental leave colleagues, and, therefore, concluded that the company had not disadvantaged the employees by allowing their transition periods, under the CBA, to run during their parental leave. The action was therefore dismissed.

Labour Court case; AD 2024 No. 66

In this case, the Labour Court tried whether a jobseeker had been subject to discrimination on the basis of disability.

The case concerned a person who applied for a position as an assistant nurse in a neonatal ward within Region Stockholm and was called for an interview. When she contacted the Region on the day of the interview and told them that she was in a wheelchair, the Region cancelled the interview on the grounds that it would not be possible to work in the neonatal ward as a wheelchair user. The question for the court to assess was whether the Region, by cancelling the interview, had subjected the jobseeker to discrimination on the basis of disability.

The Region explained that it had previous experience that it was not possible to adapt the workplace for a wheelchair-bound assistant nurse and, therefore, made the assessment that the employee could not work there. The court took into consideration that the Region had assessed accessibility measures and concluded that no reasonable measures could be taken. The court, therefore, concluded that the Region had not discriminated against the employee, neither through direct discrimination nor lack of accessibility. The action was therefore dismissed.

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THE ELECTRONIC TRAVEL AUTHORISATION (ETA) SCHEME – A UK TOURIST TAX? NO!

In 2023 the UK Government announced the launch of the Electronic Travel Authorisation ('ETA') scheme in an attempt to strengthen UK border, help with passenger experience and firm up border control. The ETA is a pre-travel security clearance scheme and not, as had been mis-reported, a tourist tax or a visa scheme for Europeans.

The scheme, similar to the USA's ESTA programme, is gradually being rolled out and will apply to:

- those visiting the UK who do not need to obtain a a visitor visa prior to travel
- Are visiting for a stay of less than six months and
- those who do not have or otherwise need any other immigration permission to enter.

For clarity this will apply to EEA nationals and all those who can already use the E-Gates on arrival into the UK.

The ETA is a digital process – no physical certification is provided and applications will typically be processed within 3 working days so time should allowed to apply before travelling.

Everyone travelling needs to get an individual ETA, including babies and children.

The ETA will last for 2 years (or in-line with a traveller's passport validity – whichever is the shorter) and can be used to make multiple visits to the UK but does not guarantee entry to the UK, as it is permission to travel, not to enter.

Those transiting through the UK only will also still require an ETA clearance prior to travel.

The ETA program, once fully rolled out by early 2025, will apply to anyone wishing to travel to the UK who:

- Is not a British or Irish national;
- Does not have an alternative visa permission to live, work or study in the UK; and
- Who does not have a UK visa.

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Who can apply?

At present the ETA scheme has already been rolled out to nationals of Qatar, Bahrain, Jordan, Kuwait, Oman, Saudia Arabia and United Arab Emirates. From 27th November 2024, ETA applications can be made for the following nationalities (who will be arriving in the UK on or after 8 January 2025):

- Antigua and Barbuda
- Argentina
- Australia
- The Bahamas
- Barbados
- Belize
- Botswana
- Brazil
- Brunei
- Canada
- Chile
- Colombia
- Costa Rica
- Grenada
- Guatemala
- Guyana
- Hong Kong Special Administrative Region (including British national overseas)
- Israel
- Japan
- Kiribati
- Macao Special Administrative Region
- Malaysia
- Maldives
- Marshall Islands
- Mauritius
- Mexico
- Federated States of Micronesia
- Nauru
- New Zealand
- Nicaragua
- Palau
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Samoa
- Seychelles
- Singapore
- Solomon Islands
- South Korea
- St Kitts and Nevis
- St Lucia
- St Vincent and the Grenadines
- Taiwan (if you have a passport issued by Taiwan that includes in it the number of the identification card issued by the competent authority in Taiwan)
- Tonga
- Trinidad and Tobago
- Tuvalu
- United States
- Urugua

From 5th March 2025 the following European nationalities can also apply (where they will enter the UK on or after 2 April 2025):

- Andorra
- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czechia
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Iceland
- Italy
- Latvia
- Liechtenstein
- Lithuania
- Luxembourg
- Malta
- Monaco
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- San Marino
- Slovakia
- Slovenia
- Spain
- Sweden
- Switzerland
- Vatican City

As a result of the ETA scheme being rolled out, it will no longer be as simple and quick as booking flight tickets for Non-Visa Nationals to come to the UK, particularly for those who may have any criminal convictions or an adverse immigration history which will inevitably be scrutinised when they are applying for an ETA to come to the UK.

Additionally, it is important to continue to ensure that the purpose of the visit of the individual coming to the UK is permitted under the Visitor Visa rules in Appendix V of the Immigration Rules and does not require work visa permission instead to facilitate the purpose of the visit.

Please contact our Immigration team if you have any queries regarding the activities members of your workforce will be carrying out as a visitor and whether they require an ETA for travel to the UK so that you can ensure the correct visa permission is applied for.

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BUSINESS TRAVEL TO THE UK AND EXPANSION OF PERMITTED ACTIVITIES AS A VISITOR

Following on from the topic of the Electronic Authorisation Scheme being rolled out for those travelling to the UK as a visitor, the UKVI (UK Visas and Immigration) on 31st January 2024 favourably broadened the range of permitted activities for visitors to the UK, making it easier for visitors to carry out business activities in the UK without requiring a work visa.

The most notable changes are that:

1. Visitors can now work remotely whilst in the UK as long as this is not the primary purpose of their visit; and
2. The 'Permitted Paid Engagement' visitor route has now been merged into the 'Standard Visitor' route, thus enabling visitors to undertake permitted paid engagements (PPE) without the need to apply for a specific visa in order to do so. It is however important to note that any PPE's being carried out in the UK must be arranged before travelling to the UK and must be completed within 30 days of entry, irrespective of a Visitor Visa being valid for a 6 month period.

FIt is advised to approach these changes with caution, as this has only been reflected in the Immigration rules for now and not the UKVI guidance which contains further detailed information on how these changes apply in practice.

If in doubt about whether the activity you or your employee wishes to carry out in the UK as a visitor is permitted, please do contact us and our Immigration Team will be able to advise you.

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