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NEWSLETTER UK

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Issue: November 2020

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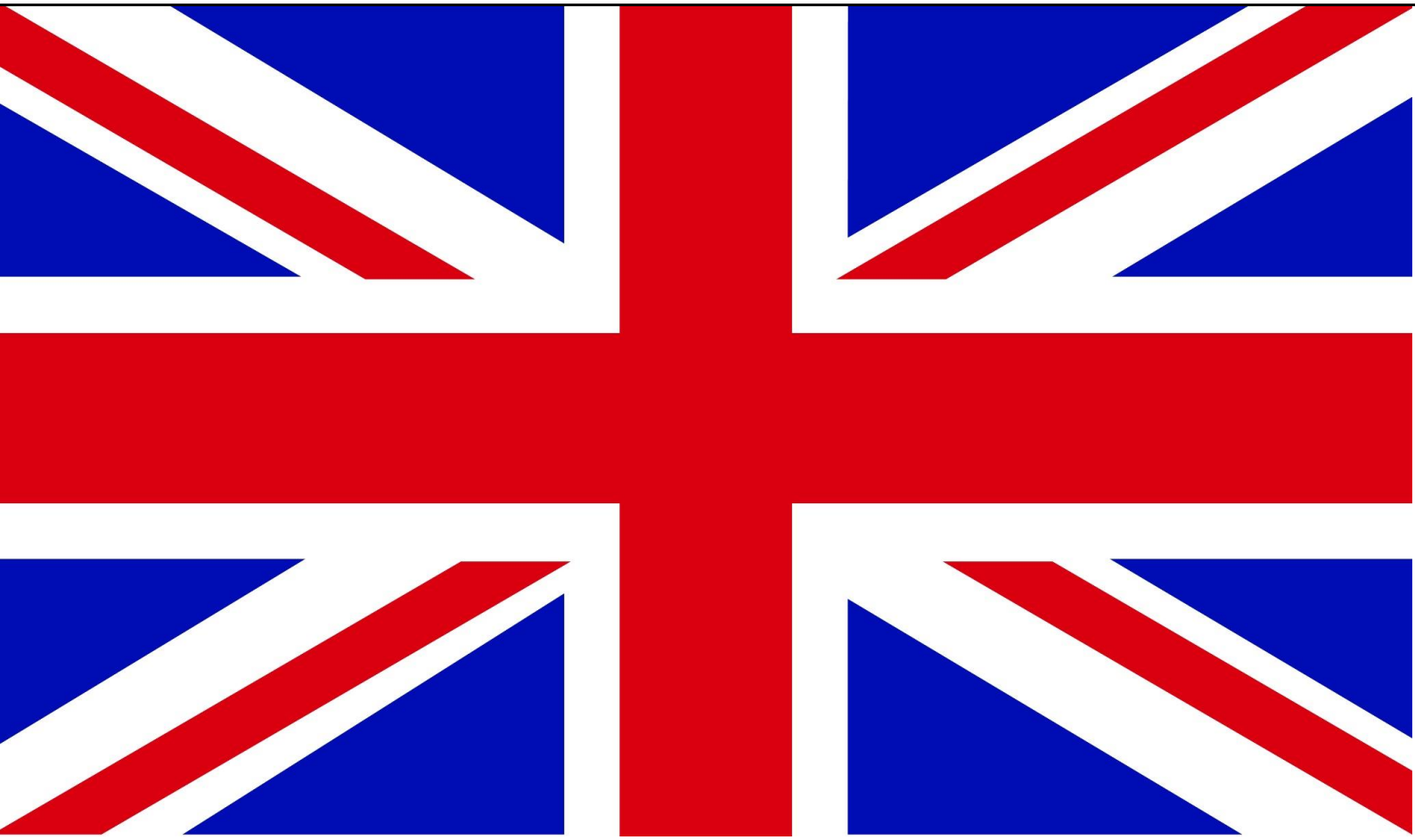

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→ Latest News

Pharmalex Merger with Regulis Consulting Limited

Birmingham, August 2020: Rödl & Partner advised the PharmaLex Group, a renowned consulting and services company, on its merger with Regulis Consulting Limited in the UK.

The merger with Regulis enables PharmaLex to further expand its services in the area of drug registration and safety. While the company operates internationally, it is committed to offering its broad portfolio at a local level. The strengthening of the existing UK team with experts in regulatory affairs, pharmacovigilance and quality assurance represents an important milestone in the company's regional presence. For Regulis, the merger opens up access to an international network of experts.

"The merger of PharmaLex and Regulis offers enormous potential for our complementary customer base and will further contribute to the successful development of our significant operations and business in the UK", said Jon Jeffery, Managing Director of PharmaLex UK.

Kim Wharton, Managing Director of Regulis, commented, “Our services in Regulatory Affairs, Pharmacovigilance and Quality Assurance align perfectly within the PharmaLex portfolio. Becoming part of a larger organisation with an excellent reputation and significant global footprint is an exciting step for Regulis.”

PharmaLex was comprehensively advised on the transaction by a multidisciplinary cross-border M&A team from Rödl & Partner in Germany and the UK. Overall project management was provided by partners Jan Eberhardt and Jochen Reis. The advice focused on a complete legal, financial and tax due diligence as well as the contractual design of the purchase of Regulis shares.

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→ Latest News

Rödl & Partner Legal Limited shortlisted for The Law Society Excellence Awards 2020

We were delighted to be amongst the firms shortlisted for the prestigious Excellence in International Legal Services award at The Law Society’s Excellence Awards 2020. These awards are the highest accolades for law firms in England and Wales.

Law Society of England and Wales president Simon Davis said: “Congratulations to all those who have been shortlisted. There are more than 9,000 firms and 190,000 solicitors in England and Wales, so to be shortlisted for a Law Society Excellence Award is to be recognised as being among the very best of the best.”

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→ Employment Law

Furlough Scheme Extended

Boris Johnson has announced that the Coronavirus Job Retention Scheme (CJRS) will be extended rather than closed as originally planned. The CJRS has been extended for a month which will cover the new lockdown in England, expected to come in on Thursday, 5 November 2020 and to last until Wednesday, 2 December 2020. Employees will receive 80 per cent of their current salary for hours not worked, up to a maximum of £2,500 and employers will be responsible for National insurance and pension contributions.

The CJRS was originally planned to end on 31 October 2020 with the new Job Support Scheme (JSS) set to launch on 1 November 2020. However, over the weekend Boris Johnson announced that the furlough scheme will be extended. To avoid having two schemes running simultaneously, the JSS has now been postponed until the furlough scheme ends. Additional guidance will be set out shortly by the government.

The extended CJRS scheme will remain open until December. The precise end-date has yet to be confirmed. Flexi-furlough will continue to be an option, so employees can work part-time and receive a furlough grant for unworked hours.

The government has widened the furlough scheme so that, to be eligible to be claimed for under this extension, employees must have been on an employer's PAYE payroll before midnight on 30 October 2020. This means a Real Time Information (RTI) submission notifying payment for that employee to HMRC must have been made on or before 30 October 2020.

In addition, the government is to give grants to business premises forced to close in England worth up to £3,000 per month under the Local Restrictions Support Grant scheme.

Further details, including how to claim this extended support, are yet to be released. This is currently a fluid situation with daily updates from the government and may be subject to change.

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→ Employment Law

Redundancy in the UK: Employers' guide to good practice 2020

The coronavirus pandemic has affected the UK economy since it arrived earlier this year and the impact continues to be felt. After a nationwide lockdown was imposed in March to try to halt the spread of the virus, all non-essential retail and hospitality had to close, putting intense pressure on companies to stay afloat.

Redundancy in the UK is a daunting process for employers to get right and many employers struggle with its complexities. Employers need to establish a strong business case and have a fair approach throughout. There are many employment laws to consider during dismissals, so it's essential employers get everything right. If you have to make dismissals, below is a quick overview of the redundancy process.

What is redundancy?

The usual rules around redundancy in the UK have not changed. When dealing with a potential redundancy situation that is subject to the laws of England and Wales, before any employee's position can be determined as redundant, it is necessary to go through a fair selection process with all the "at-risk employees". This obliges the employer to consult with such employees about the redundancy situation, the

selection criteria used, their scores from using the selection criteria, and to consider alternatives to dismissal.

A genuine redundancy situation is either:

- a closure of the business for which the employee was employed; or
- a closure of the place of business where the employee was employed to work; or
- a reduced requirement for employees to carry out work of a particular kind

This process doesn't simply involve ending employees' contracts of employment; it's a bit more complicated than that.

Redundancy law in the UK

Legislation that governs redundancy in the UK is outlined in the Employment Rights Act 1996. As an employer, you do have the right to dismiss employees by way of redundancy; however, you must provide a strong business case to go ahead with it. Employers must justify their reasons for making dismissals as employees have redundancy rights, which include the right to a fair and objective redundancy process. If an employee has been dismissed by reason of redundancy and was not subject to a fair consultation process in advance of being made redundant, they may have a claim against their employer for unfair dismissal.

Consultation process

Employees are entitled to a consultation with their employer if they're at risk of being made redundant. This involves speaking to employees about:

- why they are at risk of redundancy
- any alternatives to redundancy

If you as an employer are making up to 19 redundancies, there are no rules about how you should carry out the consultation. However, if you are making 20 or more redundancies at the same time, then collective redundancy rules will apply which will involve consulting with elected employee representatives as well as the employees themselves. As part of the consultation process, the following points need to be considered:

- SELECTION POOL

Once a genuine redundancy situation has been identified, the next step in a redundancy consultation process is to identify the employees at risk, otherwise known as the appropriate selection pool(s). Prior to choosing who should be made redundant, it is normally the case that there should be a number of different pools which may need to include groups of employees on this list and also be extended to include other employees within the organisation.

A selection pool must contain employees who are doing the same or similar work and whose jobs are interchangeable with each other. This does not mean that a pool of one will never be fair, but an employer seeking to rely upon such a narrow pool must show that it genuinely applied its mind to the issue. The underlying concept is that a wider pool is normally more appropriate and that applying a narrow pool without exceptionally good reasons may render this decision outside the band of reasonable responses and, ultimately, unfair.

- SELECTION CRITERIA

For a redundancy dismissal to be fair, employers must adopt fair and objective selection criteria in order to distinguish between the employees within each pool. If the organisation does not have an agreed redundancy procedure, the employer must adopt fair and objective selection criteria that are most suitable for its business, and should be able to substantiate the criteria adopted. Examples include attendance records, performance and capabilities, skills and qualifications, length of service, disciplinary records and anything else that may be tailored to the new or reduced positions available. Employers should take care to ensure that the selection criteria adopted are consistently applied and do not discriminate.

Employees in the pool for selection are commonly assessed by being marked against the selection criteria, which in some cases may be given a particular weighting.

As part of the consultation process employees should be given information about the selection criteria that the employer is using, and should be given the opportunity to comment on the scores attributed to them.

Once the final scores have been arrived at, the employee with the lowest score in that particular pool would normally be considered redundant.

The final stage involves writing individual redundancy notice letters to each employee set to be made redundant following the conclusion of the consultation process. In these, you should detail the redundancy and notice pay that the employee will receive. Redundancy entitlement is available if the employee has been employed with you for two or more years.

Settlement Agreements

The handling of a redundancy process can be complex and timely, particularly for large scale redundancies, so it is common practice for employers to offer enhanced redundancy payments by way of settlement agreements (where in a financial position to do so) as an incentive to reach a settlement with any affected employees. Where an agreement is reached and the employee signs a settlement agreement accepting the termination of their employment, this then avoids the need to carry out a lengthy consultation process and minimises the risk of future claims in the Employment Tribunal. It can also be carried out in a confidential manner meaning that it does not affect the morale of the wider workforce.

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→ Corporate Law

Legal Due Diligence in the UK

What is Due Diligence?

The common law principle of caveat emptor or 'buyer beware' describes the concept in contract law that places the burden on the buyer to investigate what it is acquiring. This is so because English law does not impose a general duty of good faith on parties to a transaction. Thus, due diligence is the process by which the buyer can gather as much information about the Target business as possible, enabling it to gain a holistic view of the Target business — its strengths & weaknesses, perceived high risk areas, assets of particular importance and ultimately, establish the price it is willing to pay. Under the common law, if the buyer fails to perform the necessary due diligence, it is left without any remedies in the event that the Target business turns out to be different from what the buyer thought it was acquiring.

What does the process involve?

At the beginning of a legal due diligence process in the UK, the buyer's advisers will send the sellers a preliminary request for information often known 'pre-contract enquiries.' This is done via a due diligence request list.

The request list will aim to identify key information about the Target. Default areas of a due diligence investigation include the Target's corporate structure and governance, commercial agreements, employment, involvement in litigation, tax-specific investigation, etc. Further investigation may also be considered depending on the structure of the transaction or the particular industry or sector in which the Target operates. The content of the request list varies on a case by case basis.

To illustrate, where the Target owns factory premises, the due diligence will have to include a focus on environmental factors like concerns of contamination, and an investigation of compliance with health & safety regulations. On the other hand, where the Target creates patented property, the IPR due diligence will be more comprehensive. Particular areas of investigation to consider in commercial contracts during the times of COVID-19 would be force majeure clause, material breaches, termination and frustration of contracts. Areas of investigation in businesses that are affected by Brexit will include a review of immigration & employment related issues of EU citizens, product regulatory standards, references to EU legislation in contracts, etc.

Virtual Data Rooms & Due Diligence

The use of Virtual Data Rooms ('VDRs') is particularly prevalent in storing and accessing the collated information and documentation, particularly in high risk or international transactions. Access, often restricted, is given to the buyer and its advisers in the transaction to view the data. The buyer would expect to see signed counterparts of the documents that the seller uploads on the VDR in lieu of having the opportunity to view original documents. The buyer's advisers will then evaluate the information that the seller has provided, and

create a report, highlighting particular areas of concern and suggesting risk-mitigation measures, where possible.

Once the request list for pre-contract enquiries has been sent to the seller's advisers, they begin to populate the VDR with the relevant information and documents. The information obtained from a due diligence exercise is not, by itself, something that the buyer can rely on if things go wrong. Instead, a due diligence investigation is meant to be precautionary. The terms of material contracts, employment agreements, etc. that are uploaded into a VDR are examined as a part of the due diligence exercise, and form the basis for warranties and indemnities in the purchase agreement.

Disclosures

Disclosures serve as a counter-measure against due diligence and warranties, and are the seller's principal means of limiting its exposure to a potential breach of warranty claim. Disclosure and due diligence are, however, interlinked and the information obtained in the due diligence process will affect the disclosures made by the seller.

Disclosing the entire VDR is commonplace in most transactions. The seller will try to capitalise on the opportunities that the buyer had to perform an extensive due diligence exercise. Accordingly, the seller will attempt to have the complete VDR considered to be a disclosure against all warranties. This is a matter of negotiation that would depend on factors like time available to review the VDR and respective bargaining position. Of course, a buyer will want to reduce the scope of disclosure as much as possible, and it can do this by getting the seller to agree to warrant the contents of the VDR (so that the seller has to think twice about how much information to disclose).

In case of a VDR disclosure, best practice is to download a copy of the VDR (onto a USB or CD ROM) with an index appended to the disclosure letter. It is important to note that if material information is contained in an obscure part of the VDR, the Courts will deem it unlikely to have been 'fairly' disclosed (New Hearts v Cosmopolitan Investments [1997] 2 BCLC 249). It is, thus, of utmost importance to structure the VDR properly, name and number documents in it correctly, and explicitly refer to important sections of the VDR in the disclosure letter. In the UK, a disclosure letter will contain a series of specific disclosures (meaning disclosures against specific warranties), as well as general disclosures (disclosures of certain matters in public domain). Both parties will agree a standard of disclosure. This may extend to documents annexed to the disclosure letter, documents contained in a disclosure bundle, or documents contained in a VDR.

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→ Brexit

Post-Brexit: the UK's new global Points-Based System

On Monday 13 July, the UK government unveiled more details of the new immigration system which will come into force in January 2021, after the transition period between the UK and the EU ends on 31 December 2020, ending the freedom of movement rule with the European Union.

The Policy Statement first published in February 2020 set out how the government will fulfil its commitment to the British public to take back control of its borders by ending free movement and introducing a single, global points-based immigration system, treating EU migrants the same as those from the rest of the world.

Points-Based System

The Points-Based System will cater for the most highly skilled workers, skilled workers, students and a range of other specialist work routes, and gives weight to different factors such as skills and language abilities when awarding visas to allow people to work in the UK.

In the February Policy Statement, the government stated that to get a visa, in addition to passing the relevant UK criminality checks:

- The applicant must have an offer of a job from a licensed sponsor
- The job must be at or above the minimum skill level: RQF3 level or equivalent (A level or equivalent qualification). Workers will not need to hold a formal qualification. It is the skill level of the job they will be doing which is important
- The applicant must speak English to an acceptable standard

Meeting these criteria will get an applicant to 50 points, but they must have 70 points to be eligible for a visa. The most straightforward route to the final 20 points is that the applicant will earn at

least 25,600 £. They can also gain extra points for having additional qualifications (10 points for a relevant PhD; or 20 points for a PhD in science, technology, engineering or maths, (a "STEM" subject)) or an offer of a job in which the UK has a shortage (20 points), even if they don't earn the "base" salary.

The government has now said that people coming to do certain jobs in health or education can still get 20 points if their salary is less than 25,600 £ - so long as they are paid a minimum of 20,480 £ and in line with national pay scales.

Here are two examples of how applicants could earn 70 points in the new system:

A University Researcher (Salary 22,000 £):	
Job offer by approved sponsor	20 points
Job at appropriate skill level	20 points
English language skills at required level	10 points
Salary of 22,000 £	0 points
Relevant PhD in a STEM subject	20 points
Total of 70 points	

A Mechanical Engineer (Salary 26,750 £):	
Job offer by approved sponsor	20 points
Job at appropriate skill level	20 points
English language skills at required level	10 points
Salary of 26,750 £ (below 33,400 £ 'going rate' for profession)	0 points
Job in a shortage occupation	20 points
Total of 70 points	

As in the existing Points-Based System, a sponsorship requirement will apply to the highly skilled and skilled worker route, to the Health and Care Visa and to the student route, as well as to some specialised worker routes. The government's stance is that sponsorship maintains a relationship between a recognised UK employer or educational institution and a migrant to ensure that those who come on the work and student routes are genuinely intending to work or study.

The government will suspend the current cap on Tier 2 (General) visas (the current route for skilled workers), which will result in there being no limit on the numbers of skilled workers who can come to the UK.

Further, in contrast to the existing system, the "resident labour market test" will be abolished, so there will be no need to prove that a job couldn't have been offered to someone already living in the country.

Health and care visa

The Home Office has given details of a fast-track entry system for doctors, nurses and other healthcare professionals, although this excludes most care workers - see The Social Care Sector below. Those eligible for this visa will pay reduced fees and will be supported through the application process, with decisions expected to be given within three weeks.

Applicants via this route will still have to meet the relevant skill level and salary thresholds.

International students

There will be no limit on the number of international students who can come to the UK to study. A new graduate visa will be launched in summer 2021 and will allow students who have completed a degree to stay in the UK for two years, rising to three for those who have done a PhD.

The Social Care sector

The vast majority of vacant positions in the social care sector, however, will not be filled via the new Points-Based System as these workers are not classed as skilled, nor are they eligible for the rebranded NHS and care workers fast track visa.

The final details for the Points-Based System are due to be confirmed later this year via guidance for applicants, Immigration Rules and secondary legislation.

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