June to September 2011

30/09/2011
National Minimum Wage to rise
Subject: Employment/National Minimum Wage
Source: Department for Business, Innovation and Skills

From Saturday 1 October 2011 the National Minimum Wage (NMW) will rise in accordance with the recommendations set out by the Low Pay Commission last April.
From October 2011:

The adult rate will increase by 15p to £6.08 an hour;
The rate for 18-20 year olds will increase by 6p to £4.98 an hour;
The rate for 16-17 year olds will increase by 4p to £3.68 an hour; and
The rate for apprentices will increase by 10p to £2.60 an hour.

15/09/2011
Employers and interns get clarity on minimum wage
Subject: Employment/Work experience and internships
Source: Department for Business, Innovation and Skills (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=421229&NewsAreaID=2&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+bis-news+%28BIS+News%29

Business Link and DirectGov have published new guidance for businesses who offer work experience, placements and internships. There is in particular advice on the payment of the National Minimum Wage (NMW) for work experience staff and interns. The guidance also includes a new worker checklist for employers and examples of case studies, which aims to make sure that those who are entitled to the NMW receive it.

Entitlement to the NMW depends on whether the work experience person or intern comes within the definition of a “worker” for NMW purposes. This is a broader test than that for an employee working under a contract of employment.

The full version of the guidance can be found here - www.businesslink.gov.uk/nmw.

At launch in 1999, the main rate for NMW was £3.60. It is now set at £5.93 per hour. New NMW rates coming into force on 1 October 2011 are:

* Adult rate increased by 15p to £6.08 an hour
* Rate for 18-20 year olds increased by 6p to £4.98 an hour
* Rate for 16-17 year olds increased by 4p to £3.68 an hour
* Rate for apprentices increased by 10p to £2.60 an hour

08/09/2011
Hughes v The Corps of Commissionaires Management Ltd
Subject: Employment/Working Time Regulations
Source: Source: Court of Appeal [2011] EWCA Civ 1061

http://www.bailii.org/ew/cases/EWCA/Civ/2011/1061.html

This case concerned the interpretation of regulation 24 of the Working Time Regulations 1998 ("WTR") which deals with rest breaks. The appellant, Mr Hughes, was a security guard working for The Corps of Commissionaires, the respondent employer. Mr Hughes was assigned to a site at Croydon owned by Orange, the telecommunications company, where the respondent was providing twenty four hour security coverage. The appellant guarded the site together with two other security officers. It was a single manned site so that on any one day one security guard worked a day shift, another worked a night shift, and the third had a rest day.

Unlike most workers, Mr Hughes was not allowed to take uninterrupted rest breaks. His job duties required him to be continuously available to supervise and monitor access to the Croydon site. He was provided with a kitchen area where breaks could be taken but he had to remain on call during these periods. He was permitted to leave a message on the reception desk where the monitoring and security equipment was placed saying that he was on his break and leaving a contact number. This meant, however, that his break might be interrupted by visitors to the site. If his break was interrupted then he was permitted to start it again. Sometimes, particularly at night, he would in fact have a complete uninterrupted break although he could never be sure in advance that that would be the position.

Regulation 12 entitles an adult worker whose daily working time is more than six hours to a rest break of an uninterrupted period of not less than 20 minutes. There are certain exceptions including where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms. In such a case, under regulation 24, the employer must: (a) wherever possible allow the employee to take an equivalent period of compensatory rest; and (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, the employer must afford him such protection as may be appropriate in order to safeguard the worker's health and safety.

Hughes argued that his right to resume his break if interrupted was not enough to comply with the WTR rest break. The Court of Appeal however disagreed and held that the employers had given Hughes a sufficient right to a break under regulation 24 (a) of the WTR and upheld the decision of the Employment Appeal Tribunal.

06/09/2011
Apprenticeships red tape is slashed
Subject: Employment/Apprentices
Source: Department for Business, Innovation and Skills (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=421064&NewsAreaID=2&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+bis-news+%28BIS+News%29

Skills Minister John Hayes today announced a package of new measures to make it easier for employers to take on large numbers of apprentices.
Following the responding to the recommendations of a review led by the Employer Reference Group, the Confederation of British Industry (CBI) and large companies, including BT and TUI Travel, the Government has announced simplified payment, reporting and assessment requirements for firms that contract directly with the Government to train apprentices. Firms will also receive better guidance to help them manage the recruitment, training and assessment of apprentices more efficiently and cost effectively.

The action plan for cutting red tape includes the pro vision of an online plain-English toolkit for employers that clearly explains the processes employers need to undertake for apprenticeships. Further measures to cut red tape for small and medium sized employers taking on apprentices will be unveiled this autumn as part of the Government's plan for growth.

01/09/2011
Ladder Exchange Initiative 2011
Subject: Health and Safety at Work
Source: Health and Safety Executive
http://www.hse.gov.uk/falls/ladderexchange.htm#?eban=rss-

This initiative provides UK businesses with an easy and simple way to replace broken, damaged or bent ladders and trade them in for safe new ones. Since its launch, Ladder Exchange has resulted in over 8,000 dodgy ladders being removed from use. This year's programme will run for 3 months from 1 September until 30 November.

Ladders may be exchanged at the following partner retail outlets throughout the UK:

A1 Hire & Sales Ltd
A-Plant
Browns Ladders and Ceilings Ltd
Clow Group
Engex in association with CEF
Globe Ladders Ltd
HSS Hire
Ladderstore.com
Ladder & Fencing Industries (Newent) Ltd
Slingsby
Speedy Hire
TB Davies

1/09/2011
Food Standards Agency’s plan to unify food hygiene rating schemes
Subject: Food and Drink
Source: Food Standards Agency

The Food Standards Agency (FSA) anounced its plans to encourage all remaining local authorities in England and Northern Ireland to adopt the Agency's Food Hygiene Rating Scheme (FHRS). The FHRS helps people choose where to eat out or shop for food, by giving them information about the hygiene standards in restaurants, pubs, cafés, takeaways, hotels, and so on. Supermarkets and other food shops are also included in the scheme. The scheme is run by local authorities in England, Wales and Northern Ireland in partnership with the Food Standards Agency.

There are 163 local authorities already up and running with the FHRS, and many others are preparing to launch it. Discussions with local authorities over the past 18 months have revealed the reasons why some are not yet committed to the Agency's scheme. These include concerns about potential costs, particularly for re-visits, the IT system used for displaying the ratings, or simply a desire to remain with well-established local schemes.

In addition to the FHRS, there is another similar scheme currently in operation, known as 'scores on the doors'. Transparency Data publishes hygiene scores for the 125 local authorities who use the Scores on the Doors scheme. The FSA has reached agreement with Transparency Data to acquire the existing Scores on the Doors contracts and software, and to work with the firm to encourage remaining local authorities to transfer to the FHRS. The agreement will enable the Agency to move towards publishing ratings in a single format for thousands more businesses across England, Wales and Northern Ireland.

All local authorities in Wales are now running the FHRS. A different scheme, with similar aims, is being rolled out by local authorities in Scotland.

26 /08/2011
Changes to food business approval process
Subject: Food business and sales
Source: Food Standards Agency

The Food Standards Agency is today contacting relevant groups about important changes to the approvals process for establishments that require approval under European Union food or feed hygiene legislation.

A High Court judgement and Judicial Review established that premises that have changed food business operator (FBO) since January 2006, and those that do so in future, require a new approval in order to operate. More on the judgement and review can be found at the links below.

The ruling applies to all approved establishments, such as slaughterhouses, fish processing establishments and game handling establishments, whether or not the nature of their business has changed.

To allow time for interested parties to adjust to the ruling, the Agency plans to implement changes to its approval process from 31 January 2012. In the meantime, the Agency will be contacting establishments, for which it has responsibility and that have changed FBO since 2006, to make arrangements for new approval applications and, after January 2012, reassessment. The Agency

has also written to other relevant enforcement authorities throughout the UK to advise them of the action it is taking.

The Agency is advising businesses, for which it has responsibility and that have changed food business operator since 2006 without being reapproved, that they may continue to operate until the required approval visit and use their existing approval number after a successful reassessment. Changes to ownership after 31 January 2012 may, however, require a new approval number, unless business activities remain substantially the same.

Businesses that have changed FBO since being approved, and those that do so in the future, should inform their enforcement authority at the earliest opportunity.

25/08/2011
Call for regulation in hairdressing industry
Subject: Hairdressing
http://www.apil.org.uk/public-news.aspx?news-item-id=79

The Association of Personal Injury Lawyers (APIL) has announced that it is calling for legislation via a Private Members' Bill (PMB) to introduce compulsory registration in the hairdressing industry. The Bill is expected in November.

APIL is using as a springboard for its campaign the case reported in the Manchester Evening News on 21 August about the experience of Melanie Kenny, who was injured at a hair salon. Kenny is reported to have agreed publically to support APIL's campaign. Kelly suffered burns and swelling during a colour treatment, and can no longer dye her hair as trichologists have told her it would fall out.

19/08/2011
OFT secures High Court order to stop unfair gym contract terms
Subject: Selling and marketing/consumers/unfair terms in contracts
Source: Office of Fair Trading
http://www.oft.gov.uk/news-and-updates/press/2011/92-11

The OFT is urging gyms to check their contract terms to make sure they are lawful and check whether they need to notify their customers of any changes, after the High Court ordered a gym management company not to use certain unfair terms and business practices.

The OFT's case against Ashbourne Management Services Limited ('Ashbourne') was launched following a large number of complaints to it and to local trading standards services from consumers who had entered into lengthy memberships which they were not able to cancel.

An enforcement order against Ashbourne and its directors has now been granted in the High Court. This sets out what Ashbourne may no longer do or say to consumers, further to a High Court judgment handed down on 27 May 2011.

As part of the Court's requirements under the order, Ashbourne has this week written to over 700 gym clubs it acts for to inform them of the judgment and their responsibilities to comply with it.

The Court had ruled that Ashbourne's minimum contract length terms in some of their standard contracts and a number of other key terms in thousands of gym membership contracts were unfair and therefore unenforceable. The Court also found that a number of Ashbourne's techniques for collecting the arrears of consumers who had stopped making payments were unlawful, including its practice of reporting the arrears to credit reference agencies. The use of these practices has now been prohibited under the order.

Cavendish Elithorn, Senior Director of the OFT Goods and Consumer Group, said:

'We are pleased that the enforcement order has been granted by the High Court, and urge gyms that use similar contracts that they should review their customer contracts for fairness. This judgment and order make clear that businesses cannot hide behind contract terms to engage in intrinsically unfair commercial practices.

'Gym companies should also be aware that trying to enforce illegal contract terms is a breach of the law and in certain circumstances they may have a duty to notify customers where their contract terms have been found to be illegal.

'This case sends a clear signal to traders that the OFT and local trading standards services will not hesitate to take action to protect consumers.

'Any consumer who feels that they have an unfair minimum term and wishes to end their contract should now feel able to challenge the terms with their gym.'

The OFT is unable to provide advice or resolve individual complaints for consumers. General consumer information is available from www.direct.gov.uk/consumer or by calling Consumer Direct on 08454 04 05 06. For further assistance consumers should consider obtaining independent legal advice.

17/082011
Government announces 11 new Enterprise Zones
Subject: Government SME policy
Source: HM Treasury (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=420820&NewsAreaID=2

The location of eleven new Enterprise Zones, designed to boost local growth and create over 30,000 new jobs by 2015, were announced today by the Prime Minister, David Cameron, the Chancellor of the Exchequer, George Osborne, and the Communities Secretary, Eric Pickles.

At Budget the Government announced 11 Enterprise Zones in some of the country’s largest cities, including Manchester, Birmingham, Merseyside and Newcastle, as well as inviting applications for 10 more in other areas. The strength of the applications from Local Enterprise Partnerships was such that Government has agreed to increase this invitation to 11. The location of Zones in the Black Country, Tees Valley and the North East have also been agreed today. This brings the total to 22 Enterprise Zones across the country, helping to create thousands of new jobs by 2015.

11/08/2011
Riot Damage claims
Subject: Insurance
Source: Home Office

Under the Riot (Damages) Act 1886, claims for compensation may be made to the police in England and Wales for payment of compensation by persons whose building or property in it has been injured, destroyed or stolen during a riot. The claim formerly had to be made within fourteen days and had to be made in a particular form. Following representations from the insurance business, the deadline for making claims has been extended to forty-two days and the particular format for claims is no longer required (see the Riot (Damages) Act 1886, Riot Regulations 1921 No. 1536, the Riot (Damages) (Amendment) Regulations 2011(2011 No. 2002) and the Riot (Damages) (Amendment No. 2) Regulations 2011(2011 No. 2009).

HMRC help for customers affected by civil disorder: HM Revenue & Customs (HMRC) has today announced a single helpline number – 0845 366 1207 – to help businesses and individuals adversely affected by the recent civil disorder. The dedicated Civil Disorder helpline is available to provide comprehensive advice and deal sympathetically with problems currently faced by businesses and individuals

Legaleze comment: The first London riots took place on 6 August 2011 so any claim under the Riot (Damages) Act on that day must be made by **17 September 2011**. However any claim under a commercial insurance policy should be made **immediately** to avoid any prejudice to the claim.

09/08/2011
Credit card data security breach
Subject: Data protection

Cosmetics retailer Lush breached the Data Protection Act after the security of its website was compromised for a four month period, the Information Commissioner's Office (ICO) said today. The breach, which occurred between October 2010 and January 2011, meant that hackers were able to access the payment details of 5,000 customers who had previously shopped on the company's website.

As a result of the breach, the ICO has required Lush to sign an undertaking to ensure that future customer credit card data will be processed in accordance with the Payment Card Industry Data Security Standard. The ICO is taking this opportunity to warn online retailers that if they do not adopt this standard, or provide equivalent protection when processing customers' credit card details, they risk enforcement action from the ICO.

Lush discovered the security lapse in January 2011 after receiving complaints from 95 customers who had been the victim of card fraud. After making enquiries, Lush found out that their website had been subject to a hacking incident which had allowed hackers to access their customers' payment details. On uncovering the incident, the security of Lush's website was immediately restored.

The ICO's investigation found that, although the company had measures in place to keep customers' payment details secure, they were not sufficient to prevent a determined attack on their website. The retailer's methods of recording suspicious activity on their website were also insufficient, which delayed the time it took them to identify the security breach.

Mark Constantine, Managing Director of Lush Cosmetics Ltd, has signed an undertaking committing the retailer to taking necessary steps, including that the company only stores the minimum amount of payment data necessary to receive payments, and that this information will not be kept for longer than is necessary. All future payments will also be managed by an external provider compliant with the Payment Card Industry Data Security Standard and the retailer will also make sure that appropriate technical and organisational measures are employed and maintained.

The ICO has produced guidance on the security measures that businesses should have in place when storing personal information electronically
http://www.ico.gov.uk/for_organisations/data_protection/security_measures.aspx

03/08/2011
Government accepts recommendations in Hargreaves report
Subject: Intellectual property
Source: Department for Business, Innovation and Skills

The Government today announced its acceptance of the recommendations made in an independent review which estimate a potential benefit to the UK economy of up to £7.9 billion. The recommendations were made in May 2011 by Professor Ian Hargreaves in his report, - 'Digital Opportunity: A review of intellectual property and growth'. Modernising intellectual property law is a key action from the Government's Plan for Growth, published in March alongside the Budget, which will help create the right conditions for businesses to invest, grow and create jobs.

Among the recommendations that have been accepted are:

* The UK should have a Digital Copyright Exchange; a digital market place where licences in copyright content can be readily bought and sold. The review predicted that a Digital Copyright Exchange could add up as much as £2 billion a year to the UK economy by 2020. A feasibility study will now begin to establish how such an exchange will look and work. The Government will announce arrangements for how this work will be driven forward later in the year.

* Copyright exceptions covering limited private copying should be introduced to realise growth opportunities. Thousands of people copy legitimately purchased content, such as a CD to a computer or portable device such as an IPod, assuming it is legal. This move will bring copyright law into line with the real world, and with consumers' reasonable expectations.

* Copyright exceptions to allow parody should also be introduced to benefit UK production companies and make it legal for performing artists, such as comedians, to parody someone else's work without seeking permission from the copyright holder. It would enable UK production companies to create programmes that could play to their creative strengths, and create a range of content for broadcasters.

* The introduction of an exception to copyright for search and analysis techniques known as ‘text and data mining’. Currently research scientists such as medical researchers are being hampered from working on data because it is illegal under copyright law to do this without permission of copyright owners. The Wellcome Trust has said that 87 per cent of the material housed in the UK’s main medical research database is unavailable for legal text and data mining, that is despite the fact that the technology exists to carry out this analytical work.

* Establishing licensing and clearance procedures for orphan works (material with unknown copyright owners). This would open up a range of works that are currently locked away in libraries and museums and unavailable for consumer or research purposes.
That evidence should drive future policy – The Government has strengthened the Intellectual * Property Office’s economics team and has begun a programme of research to highlight growth opportunities. One report has already shown that investments made by businesses in products and services that are protected by intellectual property rights (IPRs) are worth £65 billion a year.

The Department for Culture Media and Sport (DCMS) has also laid out the next steps for implementing the mass notification system in the Digital Economy Act. This involves letters being sent to internet account holders when their internet connection has been identified as linked to unlawfully shared copyright material.

The letters aim to educate people about copyright and point them toward legitimate content. They also seek to inform subscribers their internet connection may have been used by others to unlawfully share copyright material. For example parents may be unaware their children are using their internet connection to unlawfully share copyright material.

The Government has decided to introduce a £20 fee for subscribers wishing to appeal detected instances of unlawful sharing of copyright material they have been notified about. The fee will be refunded if the appeal is successful.

A report by Ofcom, which is published today, identifies a risk of the system being overwhelmed by vexatious appeals from people determined to disrupt the system. Government expects that a £20 fee should deter appeals without deterring genuine appeals.

Ofcom was also asked to consider whether the site-blocking provisions in the Digital Economy Act would work in practice. The Act contains reserve powers to allow courts to order that websites dedicated to copyright infringement are blocked. The regulator concluded the provisions as they stand would not be effective and so the Government will not bring forward the Act’s site-blocking provisions at this time.

The Government's response to Professor Hargreaves’ independent review is available here: http://www.bis.gov.uk/news/topstories/2011/Aug/reforming-ip

An example of where an exception to copyright for search and analysis techniques known as “text and data mining” is an issue is in the research for malaria cures. A Thai based research unit wants to make 1,000 journals available offering potential insights into treating malaria today.
Researchers would like to text mine them – copy the articles in order to run software seeking patterns that would assist their work. However, because many of the authors are unknown it is

impossible to establish who owns the copyright to them. The papers remain unavailable to researchers. This appears out of proportion to any benefit the authors of the articles would be likely to want if they could be found.

The Hargreaves report said that the introduction of exceptions to parody could have a positive impact on economic growth in the UK. He also suggests there will be a wider social and cultural benefit in terms of freedom of expression. Comedy is big business and video parody is becoming ever more popular. An example of homemade parody - Newport State of Mind (based upon Empire State of Mind) achieved great success on YouTube in 2010 but resulted in action by the rights holders to have it removed under UK copyright law.

The full Government response, along with the IP International Approach and IP Crime Strategy are available on the IPO website www.ipo.gov.uk/ipresponse

'Digital Opportunity: A review of intellectual property and growth' is available on the review website www.ipo.gov.uk/ipreview

The Government has published a policy statement on the next steps of the Digital Economy Act at LINK to supplement the information in the Government response to the Hargreaves Review. Ofcom's reports on the Digital Economy Act provisions on site-blocking and the appeals process can be found http://www.culture.gov.uk/publications/

02/08/2011
Toys (Safety) Regulations 2011 (2011 No. 1881)
Subject: Product Safety/Toys
Source: Department for Business, Innovation and Skills

These regulations come into force on 19th August 2011 and apply to toys placed on the market on or after that date. These Regulations implement Directive 2009/48/EC of the European Parliament and of the Council of 18th June 2009 on the safety of toys (OJ No L 170, 30.06.2009, p1). The Directive sets harmonised safety requirements for toys and minimum requirements for market surveillance, in order to ensure a high level of safety of toys with a view to ensuring the health and safety of children whilst guaranteeing the functioning of the internal market.

The Directive repeals and replaces Council Directive 88/378/EEC of 3rd May 1988 on the approximation of the laws of the Member States concerning the safety of toys (OJ No L 187, 16.7.88,p1) (as amended), which was implemented in the United Kingdom by the Toys (Safety) Regulations 1995 (S.I. 1995/204) (as amended). These Regulations revoke and replace S.I. 1995/204, subject to the continuing application of S.I. 1995/204 to toys placed on the market before these Regulations come into force (regulation 2).

01/08/2011
First ExEFG export loan granted to Norton Motorcycles
Subject: Finance and funding
Source: Department for Business, Innovation and Skills

Norton Motorcycles (UK) Ltd has received the first loan made under the Exports Enterprise Finance Guarantee Scheme (ExEFG). Santander will lending £625,000 to Norton under the scheme to finance the company's plans to increase production to 1,000 motorcycles a year. It will also benefit Norton's supply chain, of which 80 per cent is British.

ExEFG was launched on 28 April 2011 based on the successful Enterprise Finance Guarantee Scheme (EFG). ExEFG can enable accredited lenders to provide export finance facilities of between £25,001 and £1 million for terms of up to 2 years to viable SMEs with up to £25 million turnover. The scheme will be reviewed in the New Year. Barclays, HSBC, Lloyds & Bank of Scotland, Royal Bank of Scotland and NatWest and Santander have agreed to participate in the ExEFG scheme initially. Further lenders are expected to join in due course.

29/07/2011
Office of Fair Trading v Purely Creative Ltd and others
Subject: Selling and marketing/ Consumer Protection from Unfair Trading Regulations 2008
Source: English Court of Appeal [2011] EWCA Civ 920

Note: Legaleze prepared and is solely responsible for the following summary

The Court of Appeal has referred to the European Court of Justice certain questions arising in this case. The defendants Purely Creative appealed and the OFT cross-appealed the High Court judgment [see Legaleze news report 2/02/2011 in this case]. The questions are:

(i) whether the banned practice set out in para 31 of Annex 1 to Directive 2005/29/EC prohibited traders from informing consumers that they had won a prize or equivalent benefit when in fact the consumer was invited to incur any cost, including a de minimis cost, in relation to claiming the prize or equivalent benefit;
(ii) if the trader offered the consumer a variety of possible methods of claiming the prize or equivalent benefit, whether para 31 of Annex 1 was breached if taking any action in relation to any of the methods of claiming was subject to the consumer incurring a cost, including a de minimis cost;
(iii) whether para 31 of Annex 1 was not breached where the method of claiming involved the consumer in incurring de minimis costs only, how was the national court to judge whether such costs were de minimis? In particular, whether such costs should be wholly necessary: (a) in order for the promoter to identify the consumer as the winner of the prize, and/or (b) for the consumer to take possession of the prize, and/or (c) for the consumer to enjoy the experience described as the prize;
(iv) whether the use of the words 'false impression' in para 31 imposed some requirement additional to the requirement that the consumer paid money or incured a cost in relation to

claiming the prize, in order for the national court to find that the provisions of para 31 had been contravened; and
(v) if so, how was the national court to determine whether such a 'false impression' had been created. In particular, whether the national court was required to consider the relative value of the prize as compared with the cost of claiming it in deciding whether a 'false impression' had been created? If so, should that 'relative value' be assessed by reference to: (a) the unit cost to the promoter in acquiring the prize; (b) to the unit cost to the promoter in providing the prize to the consumer; (c) to the value that the consumer might attribute to the prize by reference to an assessment of the 'market value' of an equivalent item for purchase (see [14], [18] of the judgment).

28/07/2011
Red Tape Challenge sets retailers free from regulations
Subject: Law, Lawmakers and Lawyers
Source: Department for Business, Innovation and Skills (National)

The Government has announced plans to scrap or simplify more than 160 regulations in the retail sector which are unnecessarily burdensome, overly bureaucratic or completely redundant have been announced today by Business Secretary Vince Cable.
The proposals are the first results from the Red Tape Challenge.

257 regulations have been under consideration. The proposals would:
* replace or simplify more than 12 pieces of overlapping, costly and confusing consumer rights law, with a single new piece of legislation;
* remove a number of burdens specifically identified by retailers including consolidating and simplifying the procedures for age verification or identification for the selling of age-restricted goods;
* simplify the ineffective and burdensome poisons licensing system for low risk products such as fly spray and toilet cleaner;
* remove the requirement on retailers to notify TV Licensing about TV sales; and removing and simplifying a range of rules on transport products such as tyres and catalytic converters;
promote greater personal freedom and responsibility by getting rid of symbolic cases of heavy handed intervention, such as
* cease requiring a shop selling liqueur chocolates to have an alcohol licence;
* lowering the age for buying harmless Christmas crackers.

Legaleze comment: there has been criticism that despite the fanfare made by the Government of the Red Tape Challenge, some really burdensome regulation will not be avoided. In particular, this applies to EU legislation in the employment field which the Government is powerless to avoid. Included in such legislation is the Agency Workers Directive, which will take effect this autumn, and will give agency and temporary workers full employment rights after just 12 weeks in a job. In the UK, it is reported that eight million temp workers are employed. The Directive could have a crippling impact on labour market flexibility. It has been estimated that the measure will cost the country £40 billion over the next decade.

[See Law, Lawmakers and Lawyers]

27/07/2011
Autoclenz Limited (Appellant) v Belcher and others (Respondents)
Subject: Employment/Self-employment
Source: UK Supreme Court [2011] UKSC 41

http://www.bailii.org/ew/cases/EWCA/Civ/2011/890.html

Autoclenz provides car-cleaning services to motor retailers and auctioneers. It has contracts with British Car Auctions ("BCA") for cleaning vehicles at a number of different places. The respondents ("the claimants") are 20 individual valeters who at the relevant time provided car-cleaning services at BCA's Measham site in Derbyshire. The claimants claimed that they were workers within the meaning of the National Minimum Wage Regulations 1999 ("NMWR") (SI 1999/584) and of the Working Time Regulations 1998 ("WTR") (SI 1998/1833) and that, as workers, they were entitled to be paid in accordance with the NMWR and to receive statutory paid leave under the WTR. Their case is that they were paid neither.

The legal issue was whether the claimants were workers within regulation 2(1) of the NWMR, which adopted the definition in section 54(3) of the National Minimum Wage Act 1998, and in regulation 2(1) of the WTR. The definition of worker is in materially identical terms in both sets of regulations as follows:
"... 'worker' … means an individual who has entered into or works under …
(a) a contract of employment; or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

Proceedings were issued in the Employment Tribunal ("ET") by the claimants on 19 November 2007. The question whether the claimants were workers as so defined was determined by the ET as a preliminary issue. In a judgment sent to the parties on 1 March 2008 the ET (Employment Judge Foxwell) held that the claimants were workers within the definition on the basis that they were employed under contracts of employment within limb (a) of the definition and that they were in any event working pursuant to contracts within limb (b).

Autoclenz appealed to the Employment Appeal Tribunal ("EAT"), which heard the appeal on 4 June 2008. The EAT (Judge Peter Clark) held that they were not within (a) but that they were within (b). Both sides appealed to the Court of Appeal. The Court of Appeal (Sedley, Smith and Aikens LJJ) restored the judgment of the ET, holding that the claimants were within both (a) and (b).

Autoclenz appealed to the Supreme Court. The court upheld the Court of Appeal decision.

Legaleze comment: this case shows that in disputes about written terms of contracts relating to work or services carried out by individuals, the courts will look closely at the true intentions of the parties and how they operated the contract in practice, rather than accepting only the written terms. In this case Autoclenz went to great lengths to ensure that the valeters were engaged on a

self-employed basis and not as employees. It seems that HM Customs & Excise accepted this. The terms of the contract specified this; there was no obligation on Autoclenz to offer work or on the valeters to accept work; the valeters were allowed to sub-contract their work to other subject to certain conditions. The following pointers led the court to this conclusion:

* They were not businessmen in business on their own account. They had no control over the way in which they did their work and no real control over the hours that they worked
* They had no real economic interest in the way in which the work was organised
* They were subject to the direction and control of the respondent's employees on site
* They worked in teams and not as individuals
* They had no say in the terms upon which they performedwork
* The invoices which they submit are prepared by the respondent; deductions applied to the invoices and the amounts charged in respect of insurance and materials were fixed by Autoclenz
* The claimants were required to wear company overalls and some of these are supplied free; they were also provided with some training by Autoclenz (the court stated that neither of these factorswas determinative in the case).
* The court found that notwithstanding the substitution clause in the contract, the clause did not reflect what was actually agreed between the parties, which was that the claimants would show up each day to do work and that the respondent would offer work provided that it was there for them to do
* The clause stating there was no obligation on it to offer work or on the claimants to accept worklause was wholly inconsistent with the practice described in Autoclenz's site manager's witness statement where he referred to a requirement for valeters to notify him in advance if they were unavailable for work. This indicated that there was an obligation to attend for work unless a prior arrangement had been made.

27/07/2011
The Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others
Subject: Intellectual property/Copyright/Media monitoring
Source: English Court of Appeal [2011] EWCA Civ 890
Case No: A3/2010/2888/CHANF

Note: Legaleze prepared and is solely responsible for the following summary

Newspaper Licensing Agency Ltd (NLA) (the first claimant) acted as the licensing and IP manager for newspaper publishers (second to seventh claimants). The first two defendants (Meltwater)were a group of companies carrying on the business of media monitoring organisation (MMO) called Meltwater News. The third defendant was Public Relations Consultants Association Ltd (PRCA), an association representing the interests of UK public relations consultants.

PRCA members were subscribers to the Meltwater news monitoring service, Meltwater News. Meltwater News monitored media websites, including those of the claimant publishers, using "spider" computer software which read website content ("scraping"). Using this software, Meltwater News could "scrape" for news content which met key words specified by customers of the service.

NLA licensed the use of its members' websites under a web database licence (WDL) scheme for MMOs like Meltwater News. It also had another licensing system which allowed the use of NLA members' websites by offering a web end user licence (WEUL) to end-users of MMO services, e.g. public relations consultants. The WDL terms obliged MMO customers to obtain a WEUL. Meltwater News contended that it did not require a WDL in order lawfully to carry on its business. In addition it maintained that the terms of the WDL were unreasonable.

The PRCA intervened in the case on behalf of its members. One of its arguments was that because Meltwater already had a license to send copy to its subscribers, PRCA members did not require a WEUL in order to use Meltwater News. Thus both Meltwater News and PRCA were contending before the Tribunal, inter alia, that no infringement of copyright was committed by either Meltwater News or an end-user not holding a WDL or WEUL respectively.

The High Court judge held that PRCA members required a licence from NLA or the publishers to receive and/or use the Meltwater News service. The judge also made a declaration to the effect that the end-user was bound to obtain a licence having regard to the terms and conditions imposed by the publishers on the use of their websites.

The PRCA appealed the High Court decision. The Court of Appeal upheld the High Court's decision for the same reasons and dismissed the appeal. The only point found in favour of the PRCA was that the declaration made by the judge went further than was justified by her findings. The Court of Appeal disagreed that every recipient and/or user of Meltwater News would inevitably infringe the copyright and therefore always would require a licence or consent from the publisher. There might be some cases in which neither the headline nor the "scrappings" constituted a copyright work or substantial part of a copyright work. A licence would not be required in such a case but there could not be many of them. On that basis the declaration would be modified.

Comment: OUT-LAW.COM comments that the Court of Appeal's decision about this news clippings service has the potential to derail much of the basis of online publishing. People who look at newspaper web pages at work as part of their job could be infringing copyright, it seemed to suggest. Every minute of every working day thousands, possibly even millions, of people in the UK could be breaking the law, under this ruling. This is because most uses are covered by newspapers' terms and conditions which typically say that use is permitted for **personal and non-commercial** use. This is a very undesirable result; watch this space for the appeal to the Supreme Court.

22/07/2011
Higher Apprenticeships to help business build the skills for growth
Subject: Apprenticeships
Source: Department for Business, Innovation and Skills (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=420541&NewsAreaID=2

The Prime Minister took the opportunity of a visit to Jaguar Land Rover to announce a £25 million fund that will support up to 10,000 Advanced and Higher Apprenticeships. The Higher Apprenticeships Fund will support the expansion of apprenticeships up to degree equivalent in

companies, particularly SMEs, where there is unmet demand for the higher level skills that are necessary to create additional jobs and growth.

Industry representatives are invited to bid to the fund, which will be delivered via the National Apprenticeship Service, from today. The new apprenticeships will commence from October 2011.

The £25 million for the Higher Apprenticeships Fund is part of a package of additional investment in apprenticeships totalling £180 million, announced in this year's Budget. The Government is committed to funding some 360,000 apprenticeships this financial year alone.

The Higher Apprenticeship Fund prospectus is available at www.apprenticeships.org.uk/highers

21/07/2011
Manufacturers asked to take up the Red Tape Challenge
Subject: Law, Lawmakers and Lawyers
Source: Department for Business, Innovation and Skills (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=420502&NewsAreaID=2

The Government has announced the latest phase of the campaign to reduce the burdens on British businesses. Manufacturing businesses are being asked to play their part in cutting bureaucracy and red tape in the Red Tape Challenge.

This phase will focus on 140 different regulations that manufacturers and producers have to deal with every day. The Challenge asks whether the regulations are good and should be retained or if they are burdensome or redundant and should be scrapped. The campaign also asks for suggestions on how regulations can be improved or simplified to reduce the burden that they place on businesses but maintain protections for employees, consumers and the public.

19/07/2011
Automatic pension enrolment draft regulations consultation
Subject: Employment/pensions
Source: Department for Work and Pensions
http://www.dwp.gov.uk/newsroom/press-releases/2011/jul-2011/dwp085-11.shtml

The Department for Work and Pensions (DWP) has published draft regulations to "cement" workplace pension saving reforms were published today. The regulations will underpin automatic enrolment which will require employers to enrol workers into a pension scheme and contribute into it, from 2012.

The DWP claims that the regulations have been drafted to include changes to make it easier for employers to understand and operate their new duties. Following the independent Making Automatic Enrolment Work Review, the consultation includes regulations and guidance on the certification of money purchase schemes and certain hybrid schemes and some of the details around how the optional waiting period works.

The changes are set out in the draft regulations published alongside the consultation document. This consultation is available at:
http://www.dwp.gov.uk/consultations/2011/workplace-pension-reform-2011.shtml

The consultation period will run for twelve weeks, ending on 11 October. It is proposed that these regulations will come into force in early 2012.

18/07/2011
Official online directory of qualified driving instructors
Subject: Driving Instructors
Source: Driving Standards Agency (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=420441&NewsAreaID=2

A free online service making it easy for learner drivers to find qualified instructors in their area has been launched today by the Driving Standards Agency (DSA). It is the only official online directory of qualified, approved driving instructors. Over 30,000 qualified instructors signed up to the service.

Learners will also be able to see if an instructor has signed up to the voluntary code of practice and if they are committed to continuing their professional development. The voluntary code of practice sets out the professional standards and business ethics expected of those working in the industry.

Find your nearest driving instructors is at www.direct.gov.uk/finddrivinginstructor

14/07/2011
HMRC offers firms online Olympics advice
Subject: Government SME policy
Source: HM Revenue & Customs (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=420399&NewsAreaID=2

Small and medium-sized companies hoping to win Olympics contracts are invited to take advantage of an HMRC online advice seminar this month. The HM Revenue and Customs (HMRC) online webinar will run on 27 July at 6pm, and can be downloaded free from the internet thereafter.

It is estimated that the Olympic and Paralympic Games will involve more than 50,000 contracts, worth about £6bn. The sectors affected range from construction, engineering and manufacturing to creative, merchandising and retail, and contracts will be available at or near the 34 Games venues around the country.

The seminar will cover issues such as talking to a bank about financing, ensuring that the right systems are in place to comply with procurement policies and how firms go about making a bid for an Olympic contract. It will also explain how customers can get support and guidance on any tax obligations and entitlements.

To register in advance for the webinar, go to
www.mihmentoring.com/webinars/upcoming-webinars/item/hmrc-pitching-for-the-olympics

For further HMRC Olympics and Paralympics Games information:
http://www.hmrc.gov.uk/2012games/index.htm

07/07/2011
The Prospectus Regulations 2011 (2011 No. 1668)
Subject: Finance and Funding
Source: Treasury
These regulations amend two provisions of the Financial Services and Markets Act 2000: increases the number of persons to whom an offer may be directed before it ceases to be an exempt offer from 100 to 150 persons; increases from 2.5 to 5 million euros the limit for the total consideration of the offer in the European Union below which it is not unlawful to offer Transferable securities to the public without an approved prospectus first having been made available to the public. The regulations come into force on 31 July 2011.

These Regulations implement in part Directive 2010/73/EU (OJ No L 327, 11.12.2010, p.1) of the European Parliament and of the Council. That Directive amends Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (the Prospectus Directive) and Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the Transparency Directive.

06/07/2011
Government consults on proposals to encourage small business investment
Subject: Finance and Funding. Tax
Source: HM Treasury (National)
http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=420271&NewsAreaID=2

The Government has announced a consultation on proposals to encourage investment in small and start-up businesses with high growth potential, through the reform and simplification of the Enterprise Investment Scheme (EIS) and Venture Capital Trusts (VCTs). It is also seeking views on new proposals to support seed investment through the tax system.

The announcement states that the smallest companies, entrepreneurs and start-ups can find it particularly difficult to attract equity finance because the small size of the investment required can deter investors who prefer to invest larger sums in big companies. The Government therefore announced at Budget 2011 that it would consult on ways of encouraging seed investment through tax reliefs.

The reforms being consulted upon follow changes to the EIS and VCTs, which were announced at Budget 2011, subject to State aid approval by the European Commission.

Proposals for a new stand-alone scheme designed to target seed investment by ‘business angels’* are set out in the consultation published today. The scheme will be called the Business Angel

Seed Investment Scheme (BASIS). The consultation period runs to 28 September 2011. The consultation document can be found at :
http://www.hm-treasury.gov.uk/consult_tax_advantaged_venture_capital_schemes.htm

Legaleze comment: targeting a tax relief for investors in the smallest companies sounds like a good idea. The possibility of including debt investment in the relief as well as equity is of interest. However we would urge the Government not to make the relief too restrictive. Why limit it to so-called “Business Angels” who will have to fit within a definition, such as having experience of at least four previous “seed-stage” investments. The rules on financial promotions should also be looked at in this context.

04/07/2011
Better Regulation of ‘Use By’ Date Labelled Foods
Subject: Food manufacture and sale
http://www.lbro.org.uk/docs/date-coding-report.pdf

The Business Reference Panel has submitted a report to the Local Better Regulation office (LBRO) on “Better Regulation of ‘Use By’ Date Labelled Foods”. Salient points (our selection) in the report include:
* The EU Food Labelling Directive 2000/13 EC Article 10 provides for a ‘use by’ date to be applied “in the case of foodstuffs which, from the microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health.”
* The UK Food Labelling Regulations 1996, using almost identical wording to require a ‘use by’ date in Regulation 2, make it a criminal offence to sell, or offer to sell, food after its ‘use by’ date has expired. However, it is noteworthy that the EU Food Labelling Directive does not require EU Member States to impose such a prohibition.
* The regulatory regime of ‘use by’ dates is focused on tackling food safety risks via food labelling. The report contends that the UK offences of selling or offering to sell beyond the ‘use by’ date under the Food Labelling Regulations are unnecessary when the Food Safety Act 1990 (as amended by the General Food Regulations 2004) also makes it an offence to sell (or offer for sale) food which does not comply with food safety requirements or is not ‘of the nature, substance or quality demanded’ by the consumer.
* Furthermore many EU member states do not classify the ‘sale’ of expired use-by date foods as labelling offences – trusting consumers to manage their risk by facilitating mandatory duration date labelling.
* Deterioration in quality often precedes deterioration in safety, for example with various meat products or dips like hummus or coleslaw. Therefore, for some foods, expiry of the date label does not mean that the food immediately becomes unsafe. Where the food is of a type that supports rapid growth of pathogens, the durability vis-a-vis quality and safety dates are more likely to converge. The issue is further compounded by ‘use by’ being applied to foods for which it may be inappropriate e.g. many yogurts.
* Business compliance and enforcement: Retailers and wholesalers invest heavily in compliance checks to ensure that products past the ‘use by’ label are not offered for sale. It is estimated that these checks cost in the region of £110 million per annum. This excludes the cost of food which has to be thrown away. The checking of date labels is complicated by the lack of uniformity of size, font and location on pack which extend the time it takes to complete checks. It is clear, given that a large retailer can sell in the order of 50,000 individual products with ‘use by’ dates in one store,

100 per cent compliance is unlikely to ever be achieved. If there were fewer products with a ‘use by’ date then this challenge would be less, and enforcement activities could be better targeted.
* Whilst the regulations relating to ‘use by’ dates are restricted to microbiological safety, the setting of ‘use by’ dates is subject to considerations of quality as well as safety. Evidence was presented to the group that the enforcement of ‘use by’ dates is disproportionate where there was no microbiological evidence of a food safety risk. Enforcement escalations are sometimes justified on the presumption of a safety breach with no evidence having been adduced that the food was indeed unsafe. Due to the practicalities of setting ‘use by’ dates, the presumption of a safety breach in respect of certain foodstuffs may be flawed, and may therefore provide an unwarranted ‘public interest’ justification to formal enforcement, in such cases.
* The group has concluded that the apparently black and white nature of the law in the UK and the food producers’ wish to safeguard their reputation for supplying food of high quality are driving the UK food industry to take a highly risk averse approach in this regulatory area. This results in large numbers of products with ‘use by’ dates, which retailers and the supply chain must check, and an enforcement approach that, for the larger businesses, often focuses on a relatively minor percentage of non-compliance which poses little or no microbiological safety risk.
* The recommendations below are intended to improve the system of ‘best before’ and ‘use by’ durability labelling. However the review group would ultimately like to see a change to the legislation, specifically removal of the criminal offence, and urges that this report is used to inform the debates happening currently at EU level on this point.
* Recommendations
Use and determination of ‘use by’ dates
1) Industry ensures that the ‘use by’ date is only used and set where food, is from a microbiological point of view, highly perishable and in consequence likely after a short period to constitute an immediate danger to human health.
2) The Government and the Industry jointly develop product-specific guidance to complement the revised DEFRA guidance on the application of durability dates to food.3
3) The Government provides training and guidance to enforcement officers based on the DEFRA and sectoral guides to ensure they are competent to advise on and challenge choice of date marks to be applied.
Updating the regulatory regime
4) The Government removes the current offence for selling items past their ‘use by’ date and ensures that the position is not replicated in any future EU regulation.4
5) Enforcement authorities prosecute only where genuine safety risks exist from products being sold past their ‘use by’ date and ensure their officers are adequately trained to assess those risks.
6) Enforcement authorities talk to primary authorities at an early stage where non-compliance is suspected.
7) Primary authorities review businesses date control processes and their implementation.
consumers
8) The Government and Industry educate consumers on the importance of the ‘use by’ date and food practices within the home.6
5 This could form the basis of a nationally co-ordinated inspection strategy to be set out through an inspection plan.
6 The continual change in food risks means there is an ongoing need to keep consumers informed of the risks posed by food.

Legaleze comment: the UK regulations could be seen as another example of UK administrators unnecessarily “gold-plating” an EU regulation. The issues raised in the report also show how

complicated it is to change the law where the EU is involved. Lobbying by the UK and industry representatives at an early stage in the EU legislative process is important.

01/07/2011
Bribery Act comes into force
Subject: Bribery Act 2010
Source: Ministry of Justice
http://www.justice.gov.uk/news/press-releases/moj/bribery-act-comes-into-force.htm

The Ministry of Justice (MoJ) announced the coming into force of the Bribery Act 2010. According to the MoJ, Britain will play its full part in the international clampdown on corruption as the Bribery Act comes into force today. The Act will allow the country to tackle this serious obstacle to trade and development without placing additional burdens on business and legitimate enterprise. The Bribery Act will:
•Introduce a corporate offence of failure to prevent bribery by persons working on behalf of a business. A business can avoid conviction if it can show that it has adequate procedures in place to prevent bribery.
•Make it a criminal offence to give, promise or offer a bribe and to request, agree to receive or accept a bribe either at home or abroad. The Act also covers bribery of a foreign public official.
•Increase the maximum penalty for bribery from seven to 10 years imprisonment, with an unlimited fine.

Comment: see our section on the Bribery Act 2010.

27/06/2011
OFT publishes competition law guidance as survey shows business awareness rising
Source: Office of Fair Trading
http://www.oft.gov.uk/news-and-updates/press/2011/75-11

The OFT today launched new guidance, and a film including a dramatised dawn raid, to help businesses comply with competition law. This coincides with the publication of research showing business awareness of competition law has grown but has further to go.

Businesses' knowledge of competition law has doubled in the last four years, following a period of high profile competition law enforcement across a range of major sectors - 65 per cent of larger businesses surveyed said they were aware of such enforcement by the OFT.

A competition law compliance culture can help businesses avoid the risks of infringing the law: fines of up to 10 per cent of worldwide turnover, director disqualification orders and imprisonment for up to five years for individuals involved in cartels.

The OFT has worked with business groups to develop the new guidance. The first document, How Your Business Can Achieve Compliance, is aimed at businesses and their advisors, and sets out the OFT's recommended risk-based, four-step approach to creating a culture of competition law compliance.

Reflecting the crucial role directors play in compliance the second document, Company Directors and Competition Law, explains the level of competition law understanding expected from directors. It outlines steps they should take to prevent, detect and stop infringements of competition law.

The independent survey of over 2,000 businesses, carried out for the OFT, found 25 per cent felt they knew 'a lot' or 'a fair amount' about competition law, which is double the number (12 per cent) in a similar survey in 2006. For larger businesses this number was higher at 45 per cent, with only 13 per cent of executives from these larger firms saying they knew 'nothing' about competition law.

The survey found that smaller businesses were less able to identify practices that breach competition law.

The two guidance documents - *How Your Business Can Achieve Compliance* and *Company Directors and Competition Law* - along with the Quick Guide and the film can be accessed from the Competition law compliance project page:
http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/

Legaleze comment: SME owners and managers may be less aware of competition law rules than larger businesses, or under the impression that the rules are not really an issue for SMEs by definition, due to their relatively small size. Such an impression is only partially true; see our article on Competition regulation.