

Retail Briefing  
Summer 2011  
Clarke Willmott



## \*Retail Round-Up

It can be hard to keep up with the legislative and regulatory changes facing the retail sector so here is our round-up of some of the key issues.

### The Agency Workers Regulations 2010

The Agency Workers Regulations 2010 come into force on 1 October 2011. The purpose of the Regulations is to provide the majority of agency workers with very similar rights to those of employees.

This means that any worker, who may have an employment contract with an agency, but is actually working for a retail business, will be entitled to have comparable terms and conditions as direct employees of the retailer. In particular, they should be entitled to the same pay and rights in relation to rest periods, rest breaks, annual leave, sick pay, pension allowances, bonuses, maternity/paternity or adoption leave, redundancy and expenses.

For more information about the Agency Workers Regulations 2010 please contact Kate Gardner on 0845 209 1420.

### Employment law review

The government has announced new areas of employment law that it will consider reforming as part of its review of red tape, including:

- Collective redundancy consultation periods
- Transfer of Undertakings (Protection of Employment) Regulations (TUPE)
- Compensation for discrimination awarded by employment tribunals
- Simplification of paperwork

The Government will start reviewing these areas this year. It wants to ensure that the regulations are fit for purpose and says that legislation will not necessarily be the route to implement any change if there is a case for reform.

### Consumer Rights Directive

The European Parliament has published the text of the new Consumer Rights Directive (CRD), which it approved on 23 June 2011.

The CRD includes an EU-wide right for consumers to change their minds about on-line purchases within two weeks of receiving the goods and new requirements that on-line traders must give buyers precise information about the total price, the goods ordered and the trader's contact details.

Formal approval by the Council of Ministers is expected to take place in July. Member States will then have two years to implement the new rules.

### Enterprise Zones

In the 2011 Budget the Chancellor announced plans to establish 21 Enterprise Zones across England, designed to encourage investment and create new businesses in under-utilised parts of the country.

Eleven local enterprise partnerships were named in the Budget as the 'first wave' of zones, with the remaining ten zones to be awarded in the summer following a competitive bidding process.

Local authorities were invited to tender for Enterprise Zone status, submitting proposals that deliver the best opportunities for growth and new jobs, while offering value for money. The deadline for submissions was 30 June 2011, 29 proposals were received and successful bids are expected to be announced at the end of July.

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Welcome  
to the Summer edition of our  
Retail Briefing

As Mary Portas embarks upon her government-backed review to halt the "decline of the High Street" we bring you the Summer edition of Retail Line.



In this edition we cover issues relating to food safety, immigration, competition law, changes to rules relating to cookies for on-line retailers and stopping intellectual property infringements at the border.

This month we lead with a round-up. The change of government a year ago - set upon reducing red tape - has brought with it a host of reviews, regulations and directives which are set to change both the retail and legal landscapes. We look at these and other initiatives with the aim of keeping you up to date with some of the most talked about issues.

I started this introduction with a reference to Mary Portas. When asked "how can small shops survive?" she responded "I've always summed it up in three words: service, specialism and connectivity...". I would use the same words to describe the Retail Sector at Clarke Willmott. If you want a service which understands your market and tailors its solutions accordingly, look no further...

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# \*Retail Round-Up *Continued*

## Groceries Code Adjudicator

In May the Department for Business Innovation and Skills (BIS) published a draft Bill to establish the Groceries Code Adjudicator. The GCA will act as arbitrator in disputes between retailers and their direct suppliers and initiate investigations about potential breaches of the Code. The BIS Committee began its pre-legislative scrutiny of the Bill on 14 June 2011 and will consider:

- The need for the Groceries Code Adjudicator
- Compliance with the Groceries Code to date
- Enforcement powers, penalties, appeals, and funding
- Coverage of indirect suppliers
- Powers to investigate anonymous reports

The Government aims to introduce a final Bill ahead of Easter 2012, although Consumer Minister Ed Davey said it could be brought forward "if parliamentary time allows".



## End of the cheque?

The Payments Council has announced that it has cancelled its target for possible closure of the cheque clearing system in 2018 and confirms that following consultation with more than 600 stakeholder groups, cheques will continue for as long as customers need them.

## The Bribery Act 2010

The Bribery Act 2010 came into force on 1 July 2011 and introduces changes to UK anti-corruption law which could have significant impact on a company's business.

The sobering message for UK retailers is that the bribery need not take place in the UK, nor is there any requirement that the organisation in question encouraged or was even aware of it.

There are criminal penalties for breaching the Act, with potential personal liability for Directors and senior managers, but an organisation has a defence if it can prove that it had "adequate procedures" in place to prevent bribery.

Retail businesses should conduct a thorough review of their operations, including their supply chains, business expenses policy and staff training to identify what measures might be put in place to guard against criminal liability for the actions of employees and third parties along the chain.

For more information about risk assessment or putting together a suitable anti-corruption policy for your organisation, please contact Jane Oakland on 0845 209 1160.

Clarke Willmott's specialist retail team keeps abreast of these and other issues so that we can help you to pre-empt the challenges facing your business.

For more information, please contact:



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## \*Food Safety: an inspector calls

Last month the Food Standards Agency celebrated the 150<sup>th</sup> local authority to have rolled out its Food Hygiene Rating Scheme since its launch last November.

As if to drive home the message behind the new Scheme, further instances of E.coli have been reported and a high profile restaurateur narrowly escaped conviction for breaches of hygiene regulations.

### Points make prizes

The new national Scheme applies to restaurants, cafés, takeaways, hotels and all food retailers (including supermarkets) and aims to replace existing local schemes, such as "scores on the door", with standardized ratings and increased public awareness.

Following an unannounced visit by local authority officers, businesses are given a certificate and window sticker rating from 0 to 5, reflecting compliance with food hygiene regulations. Businesses are not obliged to display the sticker, but having a positive hygiene rating on show is clearly a good advertisement and the FSA is campaigning to raise public awareness; so we might in time anticipate consumers avoiding those establishments not displaying one. Where an inspection for a new business is pending, a window sticker informing the public of this fact is also available.

### Not just window dressing

There is serious potential for criminal liability arising from a premises inspection, whether from the conduct of staff during the inspection itself or breaches in respect of food safety.

Breach of food hygiene regulations carries unlimited fines and up to two years' imprisonment. The regulations apply to all food business operators and set out hygiene requirements for all aspects of the business, which are assessed at an inspection.

Also assessed are the operator's "food safety management procedures" and records, which any business handling food (outside primary production) is required to implement by law. Businesses must conduct a full risk assessment of the whole process, from deliveries

to serving customers, to identify potential hygiene hazards and take appropriate measures to control and monitor risks at "critical control points" in the process.



### Preparing for the unexpected (inspection)

Businesses should ensure they have in place up-to-date documented food safety procedures - and in the wake of the E.coli outbreak, businesses handling raw and ready-to-eat food are being advised to review and update their procedures appropriately. Failure to have adequate recorded procedures is an offence. Inspectors can demand to see evidence of these procedures and any failure carries the risk of potential imprisonment.

Staff should be trained to be aware of the true extent of an inspector's powers, as officers will often want to speak to staff and request assistance during an inspection. Training should ensure that staff do not obstruct officers - which is an offence - or provide potentially incriminating information in circumstances where continued questioning should cease and only continue formally under caution. The advice at that point? Always call your lawyer.

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## \*Regulatory Practice

Clarke Willmott's regulatory team offers a full range of services to retail businesses, ranging from advice and training on compliance, to representation of companies and staff under investigation by the authorities or facing enforcement action including:

- Advising on risk assessment and the implementation of procedures to comply with regulations
- Statutory requests by the regulator for information and formal interviews under caution
- Licensing applications and revocation hearings
- Advice on responding to or appealing Improvement and Prohibition notices
- Defending prosecution in the Magistrates and Crown Courts

We have recently advised clients on toy safety, food temperature controls, soft drink product labelling, customs seizure of a consignment of household furniture involving alleged cigarette smuggling by a haulier, fire risk assessment and an inquest following a fatality at work.

We have expertise and can offer assistance in the following areas:

- Health and Safety, fire risk and asbestos
- Corporate Manslaughter
- Unfair and misleading trading
- Distance Selling
- Age restricted sales
- Advertising and pricing
- Labelling and packaging
- Product and food safety and recall
- Weights and Measures
- Waste management and disposal
- Odour and noise nuisance
- Imports of goods and business immigration
- Financial crime and anti-corruption compliance

# \*Business Immigration: how to avoid employing illegal immigrants

Following recent changes to immigration legislation retail employers need to take steps to ensure that their employees are entitled to work in the UK before employing them.

Immigration regulations apply across all levels of seniority, from executive staff to those working on the shop floor or warehouse. In the retail sector, the high turnover of junior staff members and the large numbers of agency staff present the biggest risk for unwittingly employing a migrant illegally.

An employer who inadvertently employs illegal immigrants could face significant civil penalties, including fines of up to £10,000 for each illegal worker. Employers who knowingly or deliberately use illegal migrant workers face severe criminal sanctions and could be punished with a maximum custodial sentence of two years and/or an unlimited fine.

## Mandatory checks

In view of the draconian penalties, it is important for you to be fully aware of the standards expected of an employer and the steps you should take to avoid breaking the law.

You should be careful not to rely on a bare assurance from a prospective employee that they are a British or EEA national. If they are not a UK or EEA national then you must satisfy yourself that they have permission to work. In order to protect your position, you should ask all prospective employees to confirm their nationality with an approved document, prescribed by the UK Border Agency.

The approved document must be an original and you must satisfy yourself that it is valid, refers to the prospective employee and confirms that they are entitled to work in the UK. You must retain a copy of the approved document.

Where you have undertaken these checks before the employment begins, you will be able to establish the statutory excuse and will not have to pay a civil penalty, even if it transpires that the employee was working illegally. It is important to note that the provision of a National Insurance number alone is not sufficient for the purposes of establishing an excuse. These checks should be done for all prospective employees and any current employees who have not had their documents checked and copied in the past.

## Agency workers

Whether the employment agency or you are responsible for conducting the document checks depends on the nature of the relationship with the potential employee. If you use an employment agency to find new staff, but then employ those staff under a contract of service, you will be responsible for the checks. If, however, you obtain your workers from an employment agency, and from all the facts it is apparent that they are not your employees (but the agency's) you will not have to carry out the checks. This predominantly covers agencies that provide temporary staff. In contrast, where the agency introduces a worker to you for direct employment (i.e. permanent recruitment) it will be your responsibility to do the checks.



## Employment law rights

Immigration law does not operate in isolation and employers should be alive to a prospective employee's employment law rights.

Employers should be cautious not to operate any checks in a discriminatory way. Checks should be applied consistently to all workers, regardless of their distinguishing characteristics and not on a case by case basis.

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# \*Stopping Infringements at the Border

Intellectual property, such as an established and respected trading name or clever and innovative product design, is a key asset for many retailers.

Intellectual property is what attracts custom to one retailer over another in a competitive High Street and is the foundation of market success. With this in mind it is essential that retailers ensure they have in place the right mechanisms for protecting themselves from third parties who would seek to misappropriate this key asset. One key mechanism is what is commonly referred to as a "Customs Notice".

A Customs Notice is a procedure whereby a rights holder (such as the owner of a trade mark) can register their rights with Customs authorities in part or all of the EU such that when goods suspected of infringing those rights come to the attention of a Customs authority they are detained at the border pending further investigation into the nature of the goods.

## What can be covered?

The types of goods that can be covered by a Customs Notice include those infringing a trade mark, copyright, design right or a patent.

## What information do I need to provide?

- a sufficiently detailed description of the goods to enable Customs to recognise them;
- the name and contact details of a technical expert appointed by you to verify whether intercepted goods are infringing or not;
- for registered trade marks or design rights – proof of registration with the relevant office;
- for copyright or unregistered design rights – evidence of authorship or status as holder of the right(s);
- for patents – proof that the patent has been granted and is in force; and
- for non-UK only applications you must also list the Member State(s) in which you require action to be taken, as well as contact details for the right holder in each Member State concerned.

If you are authorised to use the right(s) in question (such as being a licensee of right) you will need to provide proof of your authority to use the right.

To enable Customs to target and intercept infringing goods, you should also provide details, no matter how trivial, of any other intelligence you may have about the trade in infringing goods.

## Is there a fee for submitting a notice?

There is no longer any official fee for the service provided by Customs, but when you submit an application the rights holder is required to complete an undertaking to pay all costs and liabilities incurred under the relevant EC Regulation. These may include storage and other handling charges, legal costs and compensation for any loss suffered if you or the Courts confirm that the goods are not infringing or the action is discontinued; and costs incurred in the destruction of the goods.

In practice such charges are rarely called upon.



## What is the procedure upon Customs becoming aware of suspected infringing goods?

Customs will detain those goods which are suspected of infringing the notified intellectual property right(s).

Both the applicant under the Customs Notice (i.e. the rights holder or their representative) and the declarant will be informed of the detention. The applicant will be informed of the actual or estimated quantity and the nature of the goods together with photographs or a sample of the same.

The applicant then ordinarily has only ten working days from the notification of the detention in which to seek the abandonment of the infringing goods or initiate court proceedings against the importer, failing which, the suspect goods will be released from detention. This ten day period can be extended by up to a further ten working days.

Goods will be destroyed if the applicant obtains a judgment and the court makes an order for destruction of the goods, or if the declarant agrees to the destruction of the goods. Additionally the goods will be deemed to have been "abandoned", and therefore can be destroyed, if the declarant fails to respond to the request from the applicant for the destruction of the goods (this is the most common outcome).

There have been recent discussions about extending the Customs Notice procedure to cover parallel imports, although, as yet such an extension has not been introduced and neither has any clarification been provided as to how this procedure would operate in practice.

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# \*That's the Way the Cookies Crumble...

On 26 May 2011 a new law came into force which affects all businesses involved in e-commerce and, in particular, owners of websites using "cookies".

Cookies are the text files downloaded onto your PC from the website you have been browsing, designed to help you navigate the website and make online retail an easy experience.

Under the new rules, if your retail website uses cookies (and many do), **you must obtain consent from visitors to the site before anything is downloaded** (previously you only needed to refer to the use of the cookies and offer visitors an "opt out"). The only exception to this new consent requirement is when something is "strictly necessary" for the service requested by the user, for example, to ensure that when a user clicks "add to basket" your site remembers what was selected.

Exactly how businesses go about obtaining the necessary consent is not, at present, clear. The regulations have been introduced on short notice, giving businesses little opportunity to consider how to implement the necessary change. The Information Commissioner's Office has produced guidance on the ways in which businesses might meet the requirement for consent and businesses were given a year's grace to "get their house in order", but failure to act before May 2012 could mean a fine of up to £500,000.



## What do you need to do to make sure your website is legal?

Now is the time to audit your website and consider whether the cookies you use are still necessary, looking at what they do for the website and whether they are intrusive.

You should also consider how you will obtain consent. Possible options include pop-ups, terms and conditions, settings led consent (when the user selects settings) or feature led consent (when the user chooses a particular feature).

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# \*Competition Law: time to read the instructions

As well as the chilly economic climate, the property industry has many novelties with which to grapple. One of them is the belated arrival of certain aspects of competition law, in particular the Chapter 1 Prohibition. Until 6th April 2011, many businesses could ignore it, at least when doing property deals.

In brief summary, the Chapter 1 Prohibition prohibits agreements that have "as their object or effect the prevention, restriction or distortion of competition". Clauses in property sale contracts, transfers and leases etc. are caught by it. Surprisingly to most people, the Prohibition now applies not only to agreements made on or after 6th April 2011, but to any existing agreement, however long ago it was made.

The OFT has published guidelines to help those starting to tackle this issue. They state that "only a minority of restrictions" in property agreements will offend the Prohibition; which looks good until one remembers that 49% is, technically, a minority. More significantly, the guidelines clearly signal that the OFT's enforcement priorities put agreements between competitors aimed at sharing or carving up markets at the top of the list.

The guidelines give nine examples designed to illustrate how the OFT views the impact of the Prohibition on common property restrictions, including five that deal with retail scenarios.

Assessing risk in this area is complicated by the fact that a clause that complies with the Prohibition when entered into may, if the surrounding circumstances afterwards change, start to contravene it. The sanctions for contravention, including fines of up to 10% of turnover and the risk that the entire agreement (not just the offending restriction) may be legally void; mean that those involved in retail property cannot afford to ignore the issue.

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