

Hotel and Leisure Lawyers

Wedlake Bell

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hospitality news

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Welcome to the inaugural issue of **hospitality news**, the quarterly newsletter from the Hotel & Leisure Group. This special issue contains a round-up of the latest employment law developments, advice on data protection, risk management of sales promotions, refurbishment in view of the 2012 Olympics and an overview of the changes made to the capital allowances regime in Budget 2007.

We hope you enjoy the newsletter. If you need any further guidance on the issues featured, please feel free to contact one of our specialist lawyers, who will be happy to assist you.

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Are your sales promotions lawful?

Offering people the opportunity to participate in sales promotions is a useful way for your marketing team to retain customer interest in your services and to highlight new products or services. However, how can you ensure that by conducting sales promotions you stay within the parameters of the law?



Unlawful lotteries

You must ensure that any sales promotion does not inadvertently fall within the scope of an unlawful lottery. A word of caution: the promotion or operation of an unlawful lottery is a criminal offence.

An unlawful lottery may exist where prizes are distributed on the basis of chance alone and where an actual contribution is made by customers in return for that chance. For example, if you sell tickets to win a weekend break and the winner is chosen at random, this constitutes an unlawful lottery – even if you call it a competition.

How can you prevent a sales promotion from falling within the scope of an unlawful lottery?

One way around this is to introduce an element of skill into the promotion. Where the distribution of prizes depends to a substantial degree on the exercise of skill, judgment or knowledge, then the promotion will not be a lottery but rather a prize competition. Prize competitions are legal provided that a certain minimum level of skill is exercised, which will ensure that the winning of a prize is not dependent on chance alone.

Another way to prevent the promotion falling within the scope of an unlawful lottery is to ensure that a charge is not imposed for entering the prize draw. A charge in this context could also include stipulating that a customer must purchase goods or services before being permitted to participate. The Committee of Advertising Practice (CAP) has stated that where you propose charging more than the minimum, unavoidable cost of entering into a prize draw, you must also offer a 'no purchase necessary' route to prevent the promotion being an unlawful lottery.

In implementing a promotion, you should ensure that you have followed the guidance contained in the Codes of both CAP and the Advertising Standards Authority (ASA). These Codes can be found on the CAP and ASA websites (www.cap.org.uk and www.asa.org.uk) together with other useful guidance on this topic.

If in doubt, seek legal advice to ensure that your sales promotion does not fall foul of the prohibition on unlawful lotteries.

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Privacy laws: time for a review of your data collection practices?

Customer data is one of your most valuable assets. It enables you to be responsive to your customers' needs and to conduct effective marketing campaigns. But are you complying with current privacy laws?

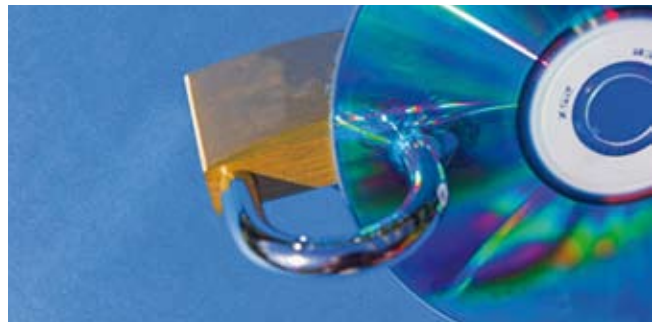
It is not just about registering with the Information Commissioner. Data protection involves an ongoing assessment of how data is being used and by whom.

Marketing emails

One area of confusion involves the use of email for marketing purposes. The general rule is that consent should be obtained prior to sending such emails. The exception to this is where the email address was provided in the course of a booking or a sale and where you gave the individual an opt-out at the time the data was obtained. Further, you can only send marketing emails about your similar goods or services. If you did not bother to give an opt-out at the outset then you should not proceed without consent.

Third parties

You will no doubt use third parties to help run your business – whether it is an advertising agency, a payroll business, beauty therapists or fitness trainers. It is a legal requirement that you have a written agreement with that entity which sets out how they are permitted to process personal data and which confirms the technical and security measures they have in place. If they breach data protection laws, you will be liable for their failures.



Transfers overseas

If you are a multinational group, you may need consent in order to transfer data outside the European Economic Area (EEA). You should in all circumstances tell individuals where the data will be sent and by whom it will be accessed. Consent need not be sought if you need to send the data overseas in order to process a transaction for a customer. If, however, you simply want a sister hotel to benefit from your marketing database then you will most likely need consent if they are outside the EEA. Generally you will also need to tell customers that the country in question may not have data protection laws that are equivalent to those in Europe. This is necessary so that informed consent can be obtained.

These are just some of the areas where leisure businesses need to take care. Failure to comply at the outset when collecting data is a costly mistake since it will reduce the value of the data you have collected and you will not be able to use it as you intended.

It is time to review your registration forms and documentation to make sure your methods and wording are up to date and lawful.

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National Minimum Wage increases

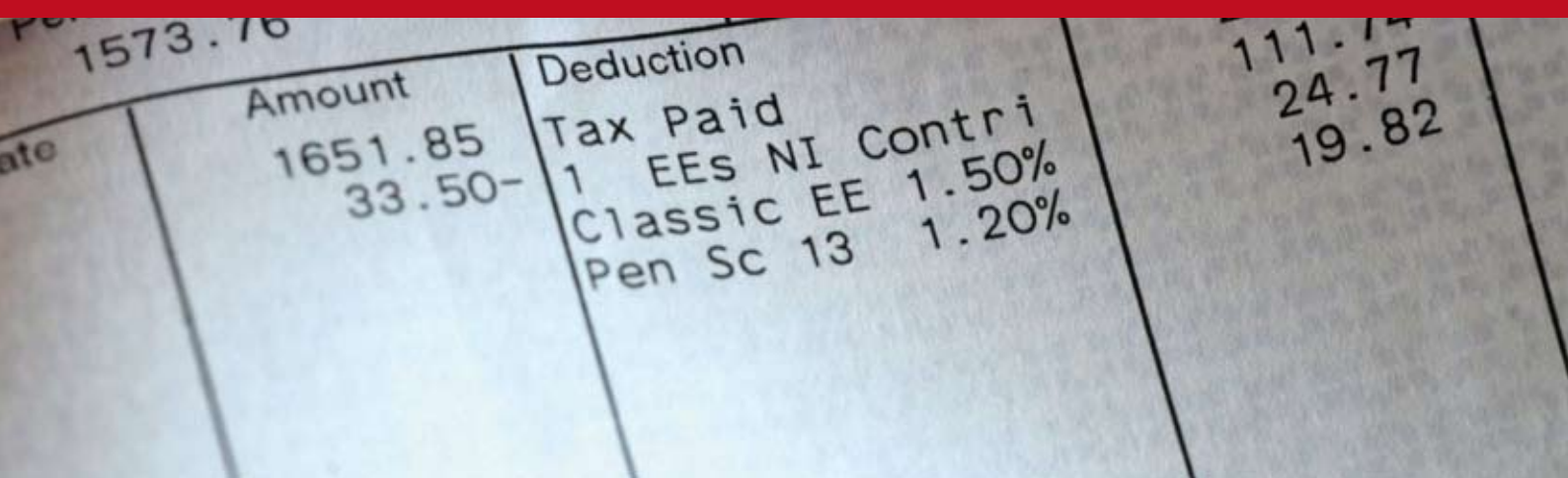
From 1 October 2007 the National Minimum Wage (NMW) will increase again as follows:

- Adult rate (workers aged 22 and over) will increase to £5.52.
- Development rate for 18 – 21-year-olds will increase to £4.60.
- Development rate for 16 – 17-year-olds will increase to £3.40.
- The rate for the accommodation offset will increase to £30.10 per week (£4.30 per day).

Remember that due to a quirk in the age discrimination legislation, you may pay 16 and 17-year-old employees less than those aged over 17, and may pay 18 – 21-year-old employees less than those aged 22 and above. But this exception only applies where you are not paying the younger workers more than the main adult NMW rate. So, for example, you may not pay a 17-year-old £6 per hour and a 23-year-old £7 per hour for doing the same job, but would be allowed to pay the 17-year-old £5 per hour.



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Employing foreign and eastern European workers

More regulatory changes to hiring foreign workers are to be introduced under the Immigration and Nationality Act 2006, which was passed by Parliament earlier this year. Proposals from the Home Office will see employers found to be breaching immigration rules forced to pay the entire cost of deporting illegal workers. The Illegal Working Action Plan will come into force early next year and is part of a bigger government drive to tackle illegal immigration. Although the plan includes a range of measures to make checking a job applicant's right to work simpler, it also promises tougher, intelligence-led enforcement against illegal working.

In the meantime, HR should continue to ensure that pre-recruitment checks are carried out in accordance with requirements laid down by the Asylum and Immigration Act 1996 while taking appropriate measures to avoid race discrimination claims at the recruitment stage.

The best way is to treat all applicants the same way at each stage of the recruitment process. For example, you should not ask people who look or sound foreign for their passports in the first instance, if you ask people who look and sound British simply for a document that includes their National Insurance number. Remember that it is perfectly satisfactory to ask for a document only from the person chosen to fill the vacancy if that is most administratively convenient. To avoid complications, it is good practice to ask job applicants at the outset whether they would be able to produce one of the specified documents if they are successful for the job.

Bear in mind that if you carry out checks only on potential employees because of their appearance or accent, this too may constitute unlawful racial discrimination for which an award of compensation in the Employment Tribunal is unlimited. Remember that the population of the United Kingdom is ethnically diverse and most non-British citizens from the ethnic minorities are entitled to work here. When in doubt, check with your lawyers.

If you are employing workers from Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and Poland (A8 workers), you must ensure that they register with the Home Office under the Worker Registration Scheme within one month of working for you. From 1 January 2007, if you employ an unauthorised worker who is not exempt from authorisation, then you and your employee may commit a criminal offence.

You may continue to employ an unregistered worker while their application is processed. During this period, you must retain your copy of their registration application until you receive notification that the worker has been registered. If you continue to employ an unregistered worker after one month and have not retained a copy of their Home Office application form, or they do not receive a certificate of registration, then you may commit a criminal offence for which the maximum penalty on conviction is £5,000. Similarly, if the Home Office notifies you that your employee's application has been refused and you continue to employ that person, you may also commit an offence.

Finally, if you employ an employee who has limited leave to remain in the UK (eg someone on a student visa, a short work permit), it is good practice to diarise the expiry of their 'work visa' so that you can take appropriate steps to extend or terminate their employment, as appropriate, before their right to work actually expires. This is advisable particularly in relation to employees who have more than one year of continuous service and are protected from unfair dismissal.

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Sexual harassment in the hospitality industry

The High Court has recently held that the UK's discrimination and harassment laws had failed to properly implement the EU Equal Treatment Directive. The Government has announced that it will not appeal against the decision and instead will amend the legislation concerned so that the phrase 'on the ground of sex' under the Sex Discrimination Act 1975 (SDA) will be replaced with 'related to sex', which is what the EU Directive requires. The scope of the SDA will be dramatically extended because it will allow employees who have been harassed by the treatment of others or by the actions of third parties, such as hotel guests or their visitors to claim sexual harassment against their employer.

Take for example a female employee who overhears a comment made by a male colleague to another male colleague, which relates to the man's sex, and which she finds offensive. Such conduct, no matter how offensive, would not fall within the current definition of harassment – the conduct could not be said to be 'on the grounds of' the complainant's sex. However, if the Directive requires the focus to be on 'conduct related to sex', then it is irrelevant whether it relates to the sex of the complainant or another person.

Take another example where the offensive or humiliating environment is caused by the conduct of your guests or visitors. Some of you may remember the 1996 case of *Burton v De Vere Hotels*, generally referred to as 'the Bernard Manning case', where waitresses employed by the hotel had been subjected to racially offensive comments by Bernard Manning, who was a guest speaker at a function hosted by the hotel. The Employment Appeal Tribunal held that the hotel was vicariously liable for this discrimination but that decision was subsequently overruled by a higher court in 2003 based on the current wording of the SDA. It is now questionable if the court's decision will survive going forward.

While your business ethos is for staff to provide the best possible service by satisfying customers' needs, front-line staff may find themselves bearing the brunt of any offensive and sexual behaviour from your guests and customers. When the legislation is amended, HR will have to be more cautious in relation to how your guests or visitors behave towards your staff and how sexual harassment claims are risk-managed.

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Receive
hospitality news
by email

The Hotel and Leisure Group will soon be moving the distribution of its newsletters to email. If you would like to ensure that you continue to receive this publication please let us have your email address by e-mailing cepper@wedlakebell.com.

Gold-medal projects?

The hotel and leisure industry is of course not alone in planning how it can capitalise on the 2012 Olympics. Many of you will be considering refurbishing and upgrading your existing premises or building new ones. You may also want to take this opportunity to remodel or rebrand, or to add to your facilities and move into a different market sector.

Given the current busyness of the construction industry and the labour and materials shortages in many construction sectors (likely to continue and possibly worsen as we approach 2012), early planning and preparation will be key to securing skilled and experienced professionals and value-for-money contractors who can deliver projects on time and minimise disruption to your existing business.



One of the keys to a successful project is to involve everyone in your prospective supply chain as early as possible, particularly in relation to the design and fit-out of your buildings. That way you can take advantage of each party's expertise and experience to meet your objectives and expectations, deliver best value and avoid the pitfalls.

The 'involving everyone early' philosophy should also apply to your lawyers. The procurement of building works and services and their planning and design is very different to procuring other supplies, and yet many attempt to use similar procedures and documentation to do so, which are usually wholly inappropriate to meet the special requirements of a building project. The best method of procurement for you will depend on a range of matters but should take account of your time and budgetary objectives. Important factors for consideration include the requirement for planning and statutory approvals; carrying out the work in phases to keep the business running; possible off-site fabrication, securing materials and fittings in time to meet fast programmes (sometimes the hotel employer obtains these direct but requires the contractor to manage these supplies); and programming to minimise disruption to guests and staff where the premises continue to trade.

We can advise on the most appropriate method of procurement for your project, help you to finalise the contracts before the works start, and ensure, as far as possible, that your project meets your requirements and is delivered on time and on budget.

So start planning now!

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Capital allowances and the hotel sector: bad news in Budget 2007?

The changes made to the capital allowances regime in Budget 2007 were unexpected and dramatic in scope. These changes will have a significant and often adverse impact for many capital-intensive businesses, notably those in the hotel sector:

- Many hotel businesses (ranging from 'new-build' hotel portfolios to bespoke boutique hotels) could find that large tax charges are crystallised because any unrelieved expenditure will no longer qualify for relief from April 2011 because of the abolition of Industrial Building Allowances (IBA).
- The reduction in the main rate of corporation tax from 30% to 28% from April 2008 is unlikely to compensate for the loss of this relief in many cases. In any event, the small companies rate will also increase incrementally (over a three-year period) to 22% from April 2009.
- The changes in the writing-down allowances for plant and machinery will, on an overall basis, mean that tax relief will be given more slowly than is currently the case.
- While welcome, the introduction of the new annual investment allowance is no substitute for the loss of IBA relief (again, particularly for larger businesses that have an existing portfolio of 'new-build' hotels).

The principal changes to the capital allowances regime are as follows:

The abolition of Industrial Building Allowances

- Beginning from April 2008, there will be a phased abolition of the regime over a four-year period. In essence, the phasing-out will be achieved by reducing the rate by one-quarter each year over the four-year period on a straight-line basis.
- The abolition will particularly impact on the hotel business as it means that in addition to a reduction of the writing-down rate over the four-year period, any residue of expenditure will not benefit from the relief from April 2011, and is therefore effectively lost from that date.
- Budget 2007 also saw the immediate withdrawal of balancing adjustments for the IBA regime; in effect this means that all balancing adjustments will be withdrawn in respect of balancing events occurring on

or after 21 March 2007. This is good news for sellers, as it means that they will not incur a balancing charge on the sale of a hotel. The losers are the buyers, as it will no longer be possible for the IBA pool to be 'refreshed' upon a sale.

Changes to the rate of Plant and Machinery Allowances

- As from 1 April 2008, there will be a reduction in the rate of writing-down allowances (WDAs) for plant and machinery from 25% to 20%. This means that while the overall tax relief for qualifying plant and machinery will still apply, the tax relief can only be claimed over a longer time frame.
- It is also proposed that the WDA for 'certain fixtures integral to a building' will be 10% (which presently qualify for relief at 25%) a year.
- From 1 April 2008, there will be an increase in the rate of WDAs for long-life assets from 6% to 10%.

First-year allowances and new Annual Investment Allowance

- The first-year allowance for 50% for small businesses will be extended for another year, while the rate for medium-sized businesses will continue at 40%.
- From 1 April 2008, the first-year allowances will be replaced by a new annual investment allowance; this allowance will be capped at the first £50,000 of expenditure on plant and machinery.

Other measures

- There will also be a 100% allowance available for expenditure incurred on renovating a property that has been vacant for a year or more in a designated disadvantaged area of the UK so that the property is brought back into business use.
- There will be provisions to allow tax credits for losses which have been generated by capital expenditure on designated green technologies.

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Tax structuring & VAT

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