

New rules for Tiers 1 and 2, and other changes to immigration

Stuart Chamberlain, Croner author in employment law, highlights the recent changes to the points-based immigration system.

On 6 April 2010, the Government made significant changes to Tiers 1 and 2 of the UK's Points-Based System of immigration (PBS). The changes, which are summarised below, include new points criteria for both tiers, a simpler route for very highly-skilled workers without Master's degrees, greater flexibility for short-term transfers by multinational companies, and more protection against the use of such transfers to fill long-term vacancies that should go to resident workers.

The Points-based system

The PBS came into operation in February 2006. The following five-tier system for work and study in the UK applies to migrants from outside the European Economic Area (EEA) and Switzerland.

| | |
|---------------|--|
| Tier 1 | Highly-skilled individuals |
| Tier 2 | Skilled workers with a job offer (replaced the Work Permit Scheme) |
| Tier 3 | Low-skilled workers filling specific and temporary labour shortages (this Tier is currently suspended) |
| Tier 4 | Students |
| Tier 5 | Temporary workers and young people covered by the Youth Mobility Scheme |

At the end of 2008, the rules were amended to create new categories for business and special visitors, although these fall outside the PBS.

The 2010 changes

As a result of recommendations from the Migration Advisory Committee (MAC), the Home Office has made the following significant changes to Tier 1 and Tier 2, which took effect from 6 April 2010.

Changes to Tier 1 (Highly-skilled workers)

- Applicants will initially be granted leave for two rather than three years. After two years, migrants will be able to extend their leave for a further three years.
- Individuals with undergraduate degrees (previously only Masters' degrees) will now qualify, subject to meeting appropriate earnings thresholds.
- The points awarded for age, qualifications and previous earnings have been revised.

- Applicants with very high earnings (£150,000 or more) qualify, even if they have no formal qualifications at a high level.

Changes to Tier 2 (Skilled workers with job offers)

- New sub-category for "intra-company transfers" — this Tier 2 category is designed to allow multinational companies to transfer skilled staff to a skilled job in a UK branch of the company for posts that would not otherwise be filled by resident workers.
- The minimum experience required for "established staff" was doubled from 6 to 12 months. In effect, this means that the sub-category is only open to staff who have been employed by the company overseas for at least 12 months before coming to the UK. Applicants will not have to spend a further 12 months working overseas before they can come to the UK.
- The maximum stay for graduate trainees who have been employed by the company overseas for at least 3 months, and who come to the UK as part of their training or career development (but not to fill a long-term post or to displace a resident worker), is 12 months.
- Skills Transfers — this sub-category enables those who have been newly recruited overseas by a multinational company to transfer temporarily to the UK to acquire or impart skills and knowledge relevant to their new role. The skills transfer should be incidental to the applicant's employment overseas and his or her job or role must not be transferring to the UK. It cannot be used to fill job vacancies or displace resident workers. The appointment, which must be for a maximum of six months only, must therefore be additional to the company's UK staffing requirements.

The Government did not accept one of the MAC's recommended changes to Tier 1 — the awarding of points for professional qualifications held in addition to academic qualifications — as it is too complex, confusing and difficult to administer and operate.

Other changes

There were minor changes to other parts of the PBS that also came into force on 6 April 2010: the introduction of the new Highly Trusted Sponsor category; and amending the rules to permit researchers who are part-way through research projects at UK higher education institutions to make an application to extend their leave under the Government Authorised Exchange sub-category of Tier 5.

The Statement of Changes in Immigration Rules, which sets out these changes in more detail, is available on the UK Border Agency's website at www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementofchanges/.

The act of harassment

With recent press reports about employees complaining of bullying and workplace mistreatment, it is not surprising that, according to statistics published by the National Bullying Helpline, one in four people allege they are being bullied at work, and that 80% of managers are aware of occurrences of bullying behaviour.

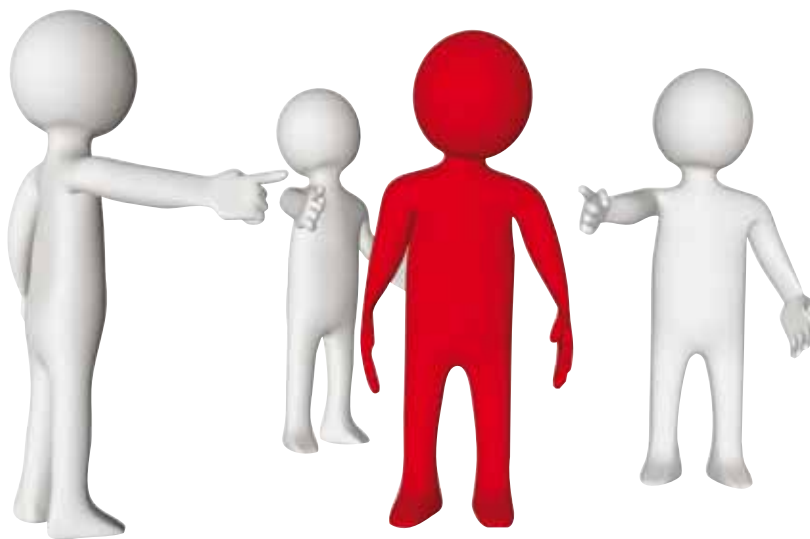
Many employers are mindful of their obligations to protect their employees from bullying or harassment on the grounds of sex, race, disability, age, sexual orientation or religious or philosophical beliefs. However, under the **Protection from Harassment Act 1997**, employers can even be responsible for acts of harassment that do not fall under one of those headings.

The **Protection from Harassment Act 1997** was introduced primarily to prevent "stalking". However, in 2006, in the case of *Majrowski v Guys and St Thomas NHS Trust*, the House of Lords held that under the provisions of this Act, employers could be liable for acts of harassment committed by their employees in the course of their employment. Furthermore, employers could be required to pay compensation to a victim, even if there were no failings on its part.

For a claim to be successful, there must be a course of conduct, meaning at least two incidents which would be considered oppressive and unreasonable.

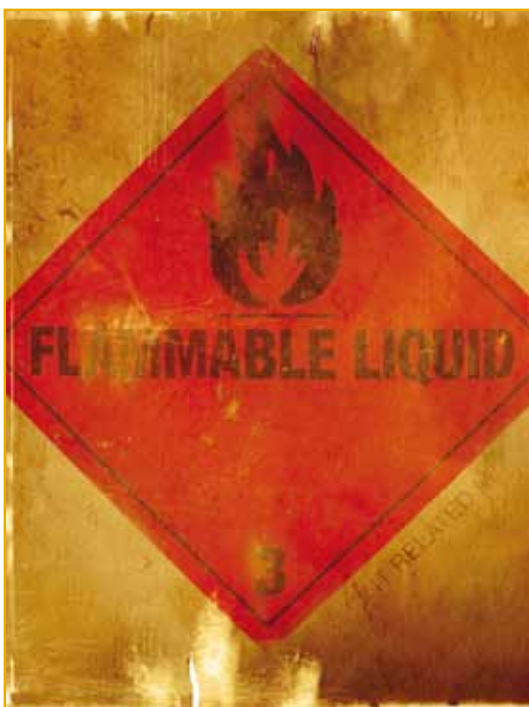
This issue was recently revisited by the Court of Appeal in the case of *Veakins v Kier Islington*. The claimant was an electrician who claimed that she had been bullied, intimidated and embarrassed by her supervisor. There was undisputed medical evidence that the claimant suffered with depression caused by her dealings with her supervisor. The Court of Appeal believed the evidence showed that the supervisor crossed the line and that there were indications of callousness in the supervisor's dealings with the claimant.

The Court of Appeal noted that it has become more difficult for employees to successfully bring a personal injury claim for work-related stress. This has caused more employees to seek redress under this Act. Furthermore, the normal defence of taking reasonable steps to prevent such behaviour will not apply. So how can employers minimise the risk of such a claim?



Clearly, it is important to head off these types of claim before they happen. Employees should be encouraged to report any behaviours that they find unacceptable, either in a formal grievance or in an informal way as soon as possible.

Employers should tackle inappropriate behaviour early on, so as to ensure that all employees are clear about what is and what is not acceptable behaviour, and also the consequences of engaging in unacceptable behaviour. It may also be advisable for employers to ensure that line managers are trained in how to manage employees fairly and effectively.



Recycling firm fined

A Yorkshire hazardous waste recycling company was recently fined £40,000 for failing to safeguard flammable liquid that was used in an arson attack on the business.

The breaches came to light during a joint investigation by the Health and Safety Executive (HSE) and North Yorkshire Police following an arson attack by a former employee in October 2008. The arsonist, who was later convicted for his crime, had ready access to the drums of volatile chemicals, which he ignited to start a blaze.

The company, based at Marston Business Park, Tockwith, pleaded guilty to breaching regulations 6 and 7 of the Dangerous Substances and Explosive Atmospheres Regulations 2002, after illegally processing the chemicals close to unprotected electrical equipment and fork-lift trucks.

HSE inspectors also found a dangerous drum-crushing machine in use at the company, which contravened the Provision and Use of Work Equipment Regulations 1998 (PUWER). Harrogate Magistrates' Court heard that a vital safety guard was missing from the machine, which exposed operators to dangerous internal mechanics, including a hydraulic ram capable of applying two tonnes worth of pressure.

Furthermore, the HSE said employees would have struggled to stop the crusher should an accident have occurred, because the safety stop switch was covered in grime and was almost unrecognisable.

The company pleaded guilty to breaching regulation 11 of PUWER for this failing. The company was fined £40,000 and ordered to pay £6110 in costs for the three breaches in total.

TUPE: the duty to inform and consult

Regulation 13 of the Transfer of Undertakings (Protection of Employment) (“TUPE”) Regulations 2006 places a duty on both the transferor (the “old” employer) and the transferee (the “new” employer) to provide information about the transfer and its implications to representatives of the “affected employees” before the transfer.

Where “measures” in connection with this transfer are envisaged (these could include changes in work practices, relocation or even redundancies), there is an added duty to consult with these representatives.

No need to provide accurate legal advice

In *Royal Mail Group v Communication Workers Union* [2009] EWCA Civ 1045, the Court of Appeal held that an employer had to inform employees’ representatives of its considered view on the legal implications for the employees prior to a transfer of part of its business to another. The employer did not have to warrant the legal accuracy of this opinion.

No obligation to consult after the transfer

The Employment Appeal Tribunal (EAT) ruled in *Amicus v Glasgow City Council* [2009] IRLR 253 that a transferee is not obliged to consult with transferred employees after a transfer about “measures” it proposes taking in relation to them. To suggest that the transferee has a duty to consult after the transfer would be unduly burdensome to transferee employers and potentially unworkable. It would be entirely open-ended: the employers would never be free of the obligation to consult whenever they envisaged measures that could be interpreted as being in connection with the transfer and might affect employees who had been transferred to them, even if the transfer had taken place years before.

The link between the obligations to inform and consult

Recently, the EAT in *Cable Realisations Ltd v GMB Northern* [2009] IRLR 42 examined the link between the obligation to inform and the obligation to consult, and particularly, what happens if no “measures” are envisaged and, therefore, there is no mandatory obligation to consult.

In its judgment, the EAT upheld the employment tribunal’s decision that the duty to inform is a freestanding duty. It arises even where there is no obligation to consult. Indeed, the duty to inform goes further than putting at rest the minds of the affected employees at a time of impending change. The Regulations are designed to allow the representatives of the affected employees to engage in meaningful consultation with the employer on an informed basis. And the EAT suggested that a responsible employer will not necessarily limit consultation to the “measures” being taken; voluntary consultation might still take place. The obligation to inform, therefore, arises not just for compulsory consultation, but also in respect of voluntary consultation.

Who are the “affected employees”?

In *Unison v Somerset County Council and others* [2010] IRLR 207, the EAT held that the “affected employees” whose representatives the employer must inform and consult about a relevant transfer are those who will be or may be transferred, those whose jobs are in jeopardy by reason of the proposed transfer, and those who have internal

job applications pending at the time of transfer. The definition does not extend to everyone in the workforce who might apply in the future for a vacancy in the part transferred. Indeed, it would be “a very surprising conclusion” if every employee of the organisation concerned was potentially “an affected employee”.

Comment

The decision in *Cable* is a reminder to employers, therefore, that even where there is no statutory obligation to consult, the required information should be given to the representatives of the affected employees to enable consultation — even if it is voluntary — to take place.

The EAT in *Unison v Somerset County Council* adopted a common-sense approach to determining which employees were “affected employees” for the purposes of TUPE consultation. A wider interpretation would have had dramatic and arguably unworkable consequences.

A failure to meet these obligations can be extremely expensive for the employers: transferor and transferee can be held jointly and severally liable for this failure and be subject to punitive compensation of up to 13 weeks’ pay (uncapped) per employee. Even where employers raise the “special circumstances” defence — eg fast-moving events and tight deadlines prevented them from meeting their obligations to inform and consult with the representatives — they must still prove that they took all steps that were reasonably practicable to perform the duty.

Top business issues

Every month we bring you the top issues from callers to our telephone advice lines. These were the top issues in March.

| Tax & VAT | Employment | Legal | Health & Safety |
|---|----------------------------|--------------------------------|--------------------------------------|
| 1. Entrepreneurs’ relief and effects of gifting or selling assets for capital gains tax purposes. | 1. Conduct. | 1. General contractual issues. | 1. Risk assessment. |
| 2. HMRC new information powers and entitlement to issue requests for books and records outside of enquiry window. | 2. Absence/sickness. | 2. Company matters. | 2. H&S policy implementation. |
| 3. Pension contribution queries in light of end of tax year and new anti-forestalling legislation. | 3. Disciplinary procedure. | 3. Property and leases. | 3. Accident recording and reporting. |

Event diary

Legislation



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Fax: 01455 897026

All our courses can be designed to meet your specific requirements and are available on an in-house basis.

Event diary — Open Course Schedule 2010

| Health & Safety | | | |
|--|----------|------------|-----------------------------------|
| Course title | Duration | Date | Location |
| Health & Safety in the Workplace Level 2 | 2 days | 2–3 June | Gonville Hotel, Cambridge |
| Health & Safety in the Workplace Level 2 | 2 days | 9–10 June | Copthorne Hotel, Manchester |
| Health & Safety in the Workplace Level 2 | 2 days | 22–23 June | Croner Consulting, Leicestershire |
| Manual Handling Training for the Trainer | 2 days | 29–30 June | Holiday Inn, Swindon |
| Health & Safety in the Workplace Level 2 | 2 days | 21–22 July | Caledonian Hotel, Tyne & Wear |
| COSHH | 1 day | 20 July | Croner Consulting, Leicestershire |
| Health & Safety in the Workplace Level 2 | 2 days | 27–28 July | Mercure London City Bankside |

| Employment | | | |
|----------------------------|----------|---------|--|
| Course title | Duration | Date | Location |
| Role of the Supervisor | 1 day | 18 May | Bedford Lodge Hotel, Newmarket |
| Introduction to Personnel | 1 day | 20 May | Holiday Inn Heathrow Ariel Hotel, Heathrow |
| Managing Investigations | 1 day | 27 May | The Marriott Hotel, Portsmouth |
| Dealing with Discipline | 1 day | 3 June | Mercure London City Bankside |
| Essential Employment Law | 1 day | 10 June | Holiday Inn, Warrington |
| Sensitive Workplace Issues | 1 day | 15 June | Holiday Inn, Leeds Garforth |
| Role of the Supervisor | ½ day | 17 June | The Dunsilly Hotel, Antrim |

IOSH Managing Safely Croner Consulting also offers a 4-day IOSH Managing Safely course. 14–17 June 2010 Croner Consulting at Hinckley. The 4-day course costs £600.00 plus VAT, and fills up quickly, so please book soon to ensure your place! For further details on this IOSH course, please contact Emma Newman on Tel: 01455 897192

Legislation

| Area | Legislation | Details | Date |
|----------------------------|---|---|--|
| Statutory Payments | The Social Security Benefits Up-rating Order 2010 | New rate of £124.88 for Statutory Maternity Pay (SMP), Statutory Adoption Pay (SAP) and Statutory Paternity Pay (SPP) | 4 April 2010 |
| Medical information | Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 | Legislation to change the format and content of medical statements to enable the doctor to say that the patient "may be fit for some work now" to facilitate the patient's return to work. | 6 April 2010 |
| Discrimination | Equality Act 2010 | The aims of the Act are to consolidate existing discrimination law, introduce positive action on recruitment for under-represented groups, make it unlawful to prevent employees from discussing their pay, extend discrimination by association to all aspects of discrimination, enable the Secretary of State to order employers with 250 or more employees to publish information on pay (subject to further consultation and not to come into force before 2013), introduce wider powers for employment tribunals to make recommendations in discrimination claims, create a single equality duty on public sector employers to include duties in relation to gender reassignment, age, sexual orientation and religion or belief, and extend age discrimination law to the provision of goods and services. | The majority of provisions are expected to come into force in October 2010 |
| Training | Apprenticeships, Skills, Children and Learning Act 2009 | The right to request time to train will be phased in. It is available to employees in large businesses with more than 250 employees from April 2010 and will be extended to all employees from April 2011. | April 2010 |
| Additional Paternity Leave | The Additional Paternity Leave Regulations 2010 | Additional Paternity Leave will be available for fathers at 20 weeks after the birth of the child for a maximum of 26 weeks, if the mother returns to work. The remainder of the mother's statutory maternity pay will be paid to the father. | For parents/adopters of babies due/matched on or after 3 April 2011 |

Workplace temperature update

With summer on the way, there will undoubtedly be predictions of a hot summer in the media and with it, some uncertainty among organisations regarding the thermal comfort of workers. Stephen Thomas of the Health and Safety Technical Team discusses a recent official review of upper workplace temperatures and offers some guidance on thermal comfort.

HSE review

The Institution of Occupational Safety and Health (IOSH) recently assisted the Health and Safety Executive (HSE) in the latter's current review of maximum temperatures in relation to workplaces, by sending out a survey on the topic to its members.

The issue of maximum temperatures in workplaces has long been contentious, and many unions have campaigned for increased regulation. For example, the Trades Union Congress (TUC) has repeatedly called for the introduction of an upper limit on workplace temperature, with UK summers being predicted to get gradually hotter and drier over the coming years.

The Approved Code of Practice to the Workplace (Health, Safety and Welfare) Regulations 1992 suggests a minimum temperature of 16°C from the time that work starts on the premises or 13°C if physically demanding work is undertaken. For light sedentary occupations, the recommended winter temperature is 22°C +/- 2°C and the recommended summer temperature is 24.5°C +/- 1.5°C. However, there are no maximum temperature guidelines for when the workplace becomes too hot.

As part of its review on maximum temperatures in workplaces, the HSE wants to identify those sectors where thermal environment is an issue and to scope the full extent of the problems experienced. Specifically, the HSE would like to determine whether problems caused by thermal environments are

specific to certain sectors or whether they affect all areas of industry.

In addition, the safety watchdog is also said to be examining practical effective steps that can be taken to address the issue in workplaces.

In support of the HSE review, IOSH sent its members a survey on the topic of maximum temperatures in workplaces, asking for feedback on illnesses caused by high workplace temperatures, such as fainting, headaches or nausea, as well as on injuries related to hot workplaces.

General guidance on thermal comfort

Every person needs to be provided with a minimum supply of outdoor air for the duration of the work period. This air should be fresh and clean, and uncontaminated by discharges from flues, chimneys or other process outlets.

A minimum of 8 litres per second per person of outdoor air is recommended. Less than this will increase the level of pollutants, in particular carbon dioxide produced from human respiration.

Ventilation should remove and dilute warm, humid air and provide air movement which gives a sense of freshness without causing a draught. It should also maintain oxygen and carbon dioxide levels — if the CO₂ concentration rises above 0.75–1.00% building occupants will become drowsy and lethargic.

In most workplaces, windows will provide sufficient ventilation. However, if process or heating equipment



in the workplace produces dust, fumes or vapours, mechanical ventilation will be needed to remove these.

Humidity can also play a large part in the work environment. The relative humidity is the amount of moisture contained in the air, compared with the amount of moisture that the air is capable of holding. The recommendation for working environments is a relative humidity of 40–60%. Levels outside these parameters can be tolerated but should not be maintained for long periods.

To mitigate any effects of high temperatures and low relative humidity, employers should maintain a clearly labelled, adequate supply of wholesome drinking water, either with an upward drinking jet or suitable cups. This should be located so that it is easily accessible from the work area.



One in four sites failed inspections

The Health and Safety Executive (HSE) has issued a statement expressing its concern that nearly one in four of the construction sites visited by the safety watchdog during its March 2010 inspection blitz failed safety checks.

Inspectors from HSE carried out checks at 2014 construction sites across Great Britain as part of an intensive inspection campaign aimed at reducing death and injury in one of Britain's most dangerous industries. Throughout the unannounced visits, inspectors focused on refurbishment and roofing work to ensure that any work at height was being done safely and that the sites were in good order.

During the campaign, 2414 contractors were inspected. A total of 691 enforcement notices were issued at 470 sites, with inspectors giving orders for work to be stopped immediately in 359

instances for either unsafe work being carried out at height or where sites lacked "good order". The majority of all notices issued related to unsafe work being carried out at height.

Commenting on the results, Philip White, the HSE's Chief Inspector for Construction, said: "While it is encouraging that many small construction firms have got their act together and are giving health and safety the priority it needs, the fact that our inspectors needed to take enforcement action on almost a quarter of sites, and on a similar proportion of contractors, is a matter of serious concern."

During 2008/09, there were 53 deaths in construction and 11,264 injuries. Last year, inspectors visited 1759 sites, 2145 contractors and issued 491 enforcement notices during a similar month-long initiative.



Dunn & Another v AAH Ltd [2010] EWCA Civ 183

Mr Dunn was the Managing Director (MD) and Mr Davidson was the Finance Director (FD) and a board member of AAH Pharmaceuticals Ltd (AAHP).

Their contracts of employment contained specific guidelines that required them to immediately report "cases of essential significance" to the parent company. This would include "information...which may have a significant effect on assets...financial position or the general trading position of the Company".

In 2006, AAHP became suspicious that one of its main clients, who purchased stock using credit letters, had been "diverting stock" (a practice of obtaining stock at a low price for export to Africa but then recycling it in the UK market). AAHP attempted to address these concerns

by redirecting the stock back to its own UK warehouses.

In early April 2007, it became clear that there was significant stock missing. Over the following months, solicitors became involved and both Mr Davidson and Mr Dunn were involved in communications making it clear that there was a "major problem [with this] sensitive matter and a large amount of money [was] involved"; the expected shortfall of stock was estimated to amount to £4 million. The situation continued to develop further, yet neither individual complied with the guidelines in their contract and reported this case to the parent company.

Eventually, on 25 October, Mr Dunn broke the news to a senior official at the parent company. Within two weeks, the company suspended the

two employees and they were later summarily dismissed on the basis that they had failed to comply with the lawful instruction and obligation to report the risk as required under their contracts of employment.

The employment tribunal agreed that both employees had fundamentally breached their contracts of employment and, therefore, satisfied the employment test that the "master should no longer be required to retain the servant in his Employment" (*Neary v Dean of Westminster* (1999)). They concluded that for these employees the need to report was clearly "an important and specific feature...and in these circumstances...there had been a wilful neglect of duty or gross misconduct".

The EAT dismissed an appeal brought by Mr Davidson.

Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to cronerinfo@croner.co.uk.

Q: We have an ongoing disciplinary issue with an employee who was issued a letter requesting attendance at a formal disciplinary hearing. This person already has a final written warning on file, and, upon receipt of this letter, he went to his doctor and was signed off sick with stress and depression.

We decided initially to put the hearing on hold. However, he has just sent in another sick note and has now been off for six weeks.

How should we proceed? Can we move things along, because the absence is not going to affect the fact that we will still have to go through the process when he eventually returns?

A: To begin with, you should remind the employee that this matter will not go away, no matter how long he remains absent, and say that you are concerned about the adverse affect this issue could

be having on him, in that it may be causing him additional stress.

There is nothing to prevent you from going ahead and arranging a time and date for the disciplinary hearing. This is the case even during a period of sickness absence, because the sick note being provided by the employee only prevents him from attending work and his normal work activities, not a disciplinary hearing.

Should he refuse to attend, seek a medical report regarding this employee's fitness to attend a disciplinary hearing, reiterating the effect the issue could be having on his health. It is also worth asking the GP what adjustments, if any, can be made in order for the employee to attend and participate.

Should the doctor confirm that the employee is unfit to attend, and will be for the foreseeable future, you could suggest you would agree to hold the hearing in his absence and offer him the opportunity to send in written submissions or allow him to send a representative to attend the hearing on his behalf. However, unless he would be happy for this to be the case, you are really left with no alternative but to await his return and proceed at that time.

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