

LAW & LAND

Agriculture Newsletter | Spring / Summer 2023



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Alex Robinson
Partner and Head of Agriculture

Welcome...

Regardless of which side of the Brexit debate you sat, there is no escaping the fact that, since the decision to leave the EU, farming's profile has never been so high. It is not just the replacement of the BPS with payments and grants based on environmental management that has filled column inches but also the impact of the various trade deals being struck, concerns over food security and self-sufficiency, the eating habits of the British populace and the most recent development, the legalisation of gene-editing. Judging by the comments I hear and read, no one is particularly happy: not the farmers, not the environmentalists, not the consumers, and not the retailers. I suspect that, ultimately, the answer probably lies in the pockets of consumers - we all need to understand that there is a price to pay if we want to continue buying and eating cheaply and, at the moment, it appears to be British farmers footing that bill.

Finding additional income streams is a concern for many of our farming clients and one initiative that might help is one in which we have some experience. From November this year, developers must improve the biodiversity of their new developments by a minimum of 10%. This has the potential to provide farmers with an opportunity to

make marginal or less productive land pay for its keep - but note there are challenges too. Rebecca Mushing explains the benefits - and the pitfalls - on page 7.

Elsewhere, we focus on partnerships, including registering partnerships trusts with HMRC and what happens if a partnership is formed unwittingly, plus a summary of a court case where a previously close family was torn apart over a dispute that stemmed from the partnership agreement being at odds with the partners' wills.

Anyone with telecoms equipment on their land will no doubt groan to hear that legislation that came into force in February is intended to make it easier to install kit in order to enable the country-wide installation of 5G. We give a brief summary of the impact on farmers and landowners on page 8 but do please speak to one of our team if you have any queries on how it affects you.

Finally, our news roundup touches on a variety of topics including stricter penalties for illegal tree felling, gene editing, taxation of ecosystem services plus a reminder of the increase to the National Minimum and Living Wages which came into force on 6 April. As ever, if you have any comments, I'd be delighted to hear from you.

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Dates for your Diary 2023

All the events listed below indicated that they were going ahead at the time of going to print. Please check their websites for the most up to date information.

JUNE

Kenilworth Show
Saturday 3 June
Stoneleigh Park Estate, Stoneleigh Road
kenilworthshow.co.uk

Cereals
13 - 14 June
Thoresby Estate, Newark
cerealsevent.co.uk

Royal Three Counties Show
16 - 18 June
The Showground, Malvern
royalthreecounties.co.uk

JULY

Cotswold Show
1 - 2 July
Cirencester Park, Cirencester
cotswoldshow.co.uk

The Game Fair
28- 30 July
Ragley Hall, Alcester
thegamefair.org

AUGUST

Blakesley Show
Saturday 5 August
Blakesley Heath Farm, Maidford, Northants
theblakesleyshow.co.uk

The Fillongley Show
Saturday 19 August
The Showground, Church Lane, Coventry
fillongleyshow.org.uk

SEPTEMBER

Chatsworth Country Fair
1 - 3 September
Chatsworth House, Derbyshire
chatsworth.org

Moreton-in-Marsh Show
Saturday 2 September
Moreton-in-Marsh, Gloucestershire
moretonshow.co.uk

NOVEMBER

CropTec
29 - 30 November
NAEC Stoneleigh, Warwickshire
croptecshow.com

Rugby Primestock Society Christmas Show & Sale
Monday 27 November
Rugby Farmers' Mart, Stoneleigh Park
rugbyfarmersmart.com

At the time of production, all the events listed above indicated that they were going ahead. Please check their websites for the latest information.



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Farming partnerships: the pitfalls

Family members involved in farming operations may unwittingly create various partnerships over many years. These have significant legal consequences that may only become apparent in a moment of crisis, such as the death of a family member or a family fallout. To avoid protracted disputes and further breakdown of relationships, it is always advisable to ensure that partnership agreements and wills are consistent and correctly reflect the intentions of the parties.

Partnerships are created automatically

Unlike companies, partnerships do not have to be registered. If people carry on business together with a view to a making a profit, a partnership is automatically created even if they do not consciously agree to this. Each time a family member stops being part of a farming business – by choice, or because of death or a dispute – that particular partnership ceases to exist, and a new partnership is created between the remaining family members who continue to run the business. As a result, several different partnerships may be involved in running a farm over decades.

Understand what is, and isn't, partnership property

Understanding that your farm business is a partnership is important as the partners personally share responsibility for the debts and obligations of the farm. Each partner also pays personal tax on his or her share of the partnership profits. Usually, whatever is brought into a partnership or acquired by the business is partnership property, although this does not necessarily apply to the farmland itself. An individual may continue to own the land but allow it to be occupied and used by the farm business. However, if the land is included on the balance sheet of the partnership, it could be deemed that the intention was to transfer ownership from the individual to the partnership. Assessing the correct position may be complicated if children who have joined the farming business have been promised that they will become the owners of the farm. They may assume that even if the land is not a partnership asset it is their inheritance. But, unless the landowner's will properly reflects this understanding, they will not automatically become owners of the land.

Put your partnership agreement in writing

After years of working harmoniously together, a farming family may be thrown into crisis if promises or expectations are not met after a sudden falling out or on the death of a family member. If disagreements cannot be resolved, there may be no choice but to take the matter to court. A family farming together cannot avoid being a partnership but can avert legal action by ensuring that their business is set up as they intend. The experience of the Williams' family (page 6) is testament to the distress caused by a partnership agreement being at odds with the partners' wills.

A written partnership agreement will avoid disputes and govern what happens if the parties' relationship breaks down. It will also enable a farm business to receive bank loans and allow it to be eligible for various types of tax relief. Keeping existing partnership agreements up to date is essential, as is ensuring that partners' individual wills reflect the partnership agreement. Seeking professional assistance to prepare partnership agreements and wills – before problems arise or surprises come to light – is money well spent.

Parminder Takhar, Senior Associate

This article first appeared on the [Warwickshire Rural Hub](#) legal advice page.



Farming partnerships and trust registration

HMRC introduced [new trust registration rules](#) that came into force in October 2020. Previously, only taxable trusts had to be registered. However, the new legislation has been much more wide ranging, meaning that a trust must be registered, unless it is exempt. The definition of a trust is broad, meaning that “bare trusts” also need to be registered. Bare trusts reflect a situation where someone is registered as the owner of an asset, but they own it on behalf of someone else. This has far reaching consequences, meaning that partnership trusts may need to be registered. Although the deadline for registering trusts was 1 September 2022, HMRC is continuing to issue guidance as professionals and individuals try to establish which trusts need to be registered and which are exempt. Fortunately, recognising that trustees will find the requirements unfamiliar, HMRC has stated that it will not penalise those who fail to register for the first time - unless the trustees deliberately avoided doing so.

Trustees are responsible for registering their trust

Nonetheless, there is an onus on trustees to get to grips with whether or not they need to register their trust, as this is the trustees’ responsibility, rather than HMRC’s or professional advisers’. As a minimum, clients are advised to check whether or not a trust exists – and for most farming families it may well do. As a farming partnership is not a legal entity it cannot hold property, so land and other assets are usually held in trust for the partners who are almost always the beneficial owners. Typically, there may also be other beneficial owners of a trust who are not partners but still stand to inherit (such a child who works on the farm but is not a partner and / or non-farming children). In this situation, where the legal and beneficial owners are not the same, the trust may need to be registered.

This is a complex area of the law: whether or not a trust needs to be registered may depend on whether the partners are relying on legislation from 1890 or have an express agreement in place. To complicate matters further, different parcels of land owned by different beneficiaries will give rise to multiple trusts, all of which may need to be registered individually.

There are some exemptions

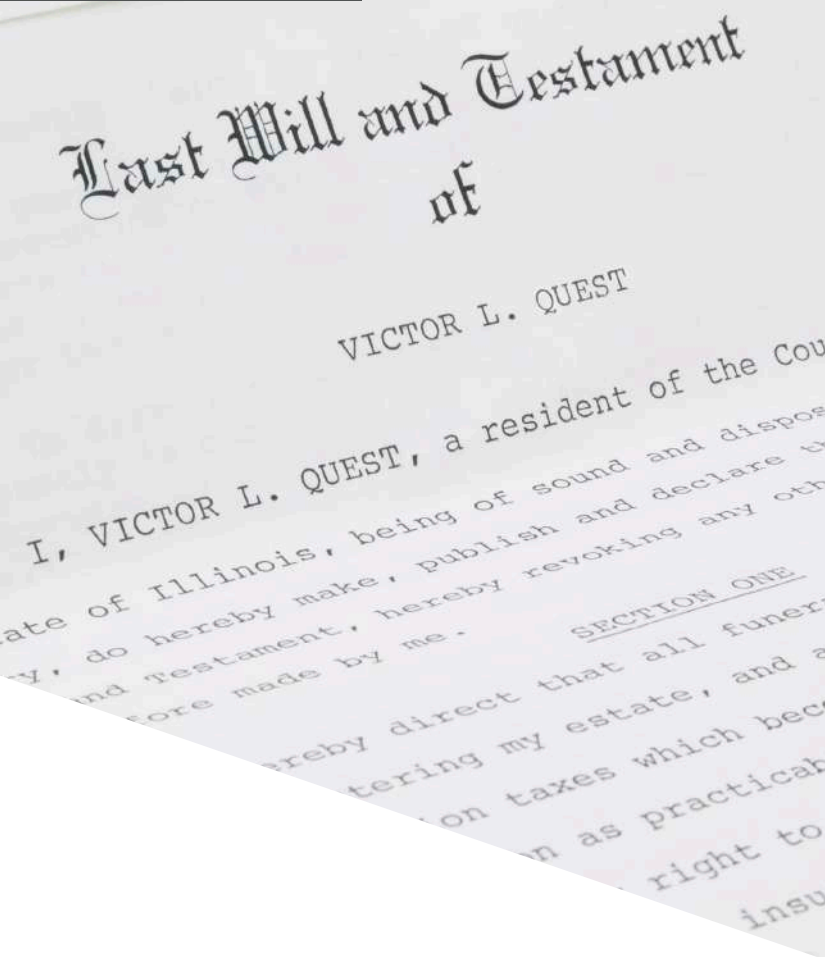
As indicated above, where a written partnership agreement contains a declaration of trust (known as an express trust), the trust may need to be registered. Although this requirement – and associated costs of registration – may lead some to question the merit of a written partnership agreement, we always recommend one for the sake of clarity and to avoid potential, future disputes.

Trusts that do not need to be registered include those where:

- The trustees and the beneficiaries are one and the same and there are no other complications.
- The trust is created by a Court Order.
- Legal title to the land is owned by five people or more and four of the owners are named on the Land Registry entries (the Land Registry will only allow a maximum of four people to appear on the register).

HMRC continue to update their guidance, most recently on 4th April. We strongly advise asking for professional help to ascertain if you need to register a trust – and as soon as possible to avoid incurring potential penalties.

Deborah Beal, Senior Associate



Partnership agreement at odds with will

The ownership of a farm was at the centre of a dispute between three (of four) siblings after the death of their parents, Mr & Mrs Williams. The reasons for the dispute were depressingly familiar – the partnership agreement was at odds with their father’s will, with one brother claiming that assets gifted under the will were actually partnership assets and thus rightfully his. He also employed a backstop argument, that of proprietary estoppel, on the rather flimsy premise that his father had promised him the farm some forty odd years ago.

Desire to be fair failed

The farm in South Wales totalled around 200 acres across two holdings. Previously tenant farmers, the Williams had purchased adjacent holdings, Crythan and the main farm, Cefn Coed, in the 1980s. A partnership agreement was drawn up in 1985 between Mr & Mrs Williams and their second son, Dorian, although the motivation appeared to be primarily financial.

Described in court as a close family, it was clear from Mr & Mrs Williams’ wills that their overriding desire was to be fair to all their children, farming and non-farming alike. Both brothers had worked on the farm; Gerwyn, the elder, had also run a sub-contracting business for a period, whereas Dorian had always been involved full-time. The youngest sibling, Susan, had also worked from time to time on the farm. The eldest daughter was not party to this dispute having married and left home. Mrs Williams pre-deceased her husband and her share in both the farm and the partnership passed to her husband. After his death, his will specified that Dorian had to undertake a number of actions to secure his interest in the farm and a house he was building, and also take his brother into the partnership as tenants in common.

Partnership agreement and wills not aligned

Dorian’s failure to do so meant that default provisions prevailed: Gerwyn and Susan stood to inherit the Cefn Coed farmhouse in equal shares and Gerwyn to inherit his father’s interests in both Cefn Coed and the partnership. Dorian countered that these were all partnership assets as per the 1985 agreement and, as such, were vested in him by dint of him being the only surviving partner. He also claimed those assets on the basis of proprietary estoppel due to promises made to him by his father. His older brother counterclaimed that promises had also been made to him.

In court, the judge determined that neither Crythan nor Cefn Coed were partnership assets, not least as Mr & Mrs Williams’ respective wills gifted their share in the partnership to Gerwyn and their share in Cefn Coed to Dorian. Likewise, Gerwyn’s claim that he became a partner in 2013 by inference rather than an express agreement was also discounted. Furthermore, the evidence suggested that the partnership dissolved on the death of Mr Williams meaning that the assets were to be divided between Dorian and Mr Williams’ estate. Finally, the judge dismissed Dorian’s claim for proprietary estoppel on the basis that his claim failed to meet the underlying principles.

This is another sad example of farming families falling out because of lack of clarity and understanding of the interaction between wills and partnership agreements. It is also a cautionary tale about the drafting of the partnership agreement and the use to which it is put; in this case, the inclusion of Dorian in the agreement was more to do with ‘enhancing the balance sheet value of the partnership’ than any long term plan for the farm.

Biodiversity Net Gain – new income stream for farmers?

We now have more detail on how landowners and farmers can profit from legislation coming into force in November 2023 that requires developers to improve the biodiversity of most new developments (there are some exemptions) by a minimum of 10%. By creating or enhancing biodiverse habitats on their land, farmers have an opportunity to make marginal or less productive land pay through the sale of biodiversity units (BUs) the value of which is calculated using [Natural England's biodiversity metric](#) based on the value of that habitat to the environment. Nonetheless, there are still many challenges to be addressed including the length of the agreements, tax treatment of the land under environmental management, and legal obligations.

BNG will help to exploit natural capital

Although developers are being encouraged to find biodiversity net gain improvements onsite, many will be hard pressed to do so. In theory this should present farmers with the opportunity to profit directly from exploiting their natural capital via the creation or enhancement of biodiverse habitats both on farm as well as aligning more broadly with local nature recovery strategies. There are claims that the sale of BUs to developers will be worth more to landowners than ELMs payments. This may prove correct but until Defra sheds more light on the latter, such a claim remains an unqualified assumption, and there is also the tax position to be considered. Helpfully, Defra has confirmed that a landowner already in receipt of Countryside Stewardship payments (and nutrient credits too) can also sell BUs for additional habitat enhancements to land already part of an agri-environment agreement.

Being paid to enhance the farm's natural capital is an attractive proposition in the current climate of high energy and input costs; likewise, any increase in biodiversity can only have a positive impact on the more productive areas of the farm. Farmers and landowners will need to work with local conservation bodies and planning authorities to establish what sort of habitats are of most benefit to their local area, along with a management and monitoring plan, before committing.

Agreement length and tax uncertainty are risks

But farmers need to tread carefully. As agreements must be for a minimum of 30 years, assessing the practicality of tying land up for this length of time or longer will probably require a crystal ball. All agreements must be legally binding either via a planning obligation (s.106) or a conservation covenant, a private, voluntary agreement created under the Environment Act between a landowner and a 'responsible body' (Secretary of State, local authorities and conservation bodies) in return for payment from the developer. They are binding on successors in title and enforceable on both sides, which may prove to be disadvantageous to future generations.

Landowners can register suitable habitats on Natural England's Biodiversity Gain Site Register for a registration fee (not yet set but likely to be between £100 and £1,000). The government's intention is that these sites should not be taken out of conservation management at the end of the initial 30-year period; instead, it anticipates a new baseline to be taken, and the land re-entered into the BNG market. To encourage this continuing cycle, a range of incentives, including tax incentives,

are being considered. The latter point is important and is currently the subject of a government consultation which is seeking views on how – and if – APR should apply to non-productive land. Without APR, successors inheriting the land may face a large IHT bill.

On the whole, most commentators who have studied what is on offer appear to be broadly in favour of the scheme. There are certainly risks that need to be weighed up, particularly tax and the length of time these agreements must last, but with the current level of development not showing any signs of slowing, BNG should represent a significant income stream that few farmers will be able to ignore. Nonetheless, given our experience of helping to [negotiate an agreement](#) between a developer client and a local landowner, it is critical to seek professional advice to mitigate the known risks, hedge against the unknown, and make sure the deal is as fair as it can be to both parties.

Rebecca Mushing, Associate



Telecommunication operators and Code Rights

Legislation amending the 2017 Electronic Communications Code came into force in February which affects all those landowners on whose land telecoms apparatus is sited. The Product Security and Telecommunications Infrastructure Act 2022 (PSTI Act) was originally introduced in order to make it easier to install the necessary kit to enable country-wide installation of 5G networks. The ambitious aim of the legislation was to balance the often competing interests of all involved parties while concluding agreements for new sites and renewing agreements for existing sites as quickly as possible.

There are several parts to the legislation that will be of particular interest to landowners. First, the Act amends both the 2017 Code and the 1954 Act affecting both rent valuations and compensation payments for existing agreements. Under the PSTI Act, valuations will now be conducted in line with the methodology laid out in the Code, rather than that specified by the 1954 Act which uses the comparable method and is, as such, more generous than the approach adopted by the Code. On the other hand, the compensation will be put on a statutory footing which should prove more palatable and provides more certainty than the approach set out under the 1954 Act wherein the amount of compensation is negotiable.

Second, operators with Code Rights will now be able to share and upgrade apparatus by right, including apparatus that was already installed when the Code came into being. This right is caveated by a requirement that any such upgrading should have 'no material impact' on the landowner and that the necessary notices should be issued. For landowners, this right may mean that they will have to charge less for the extra equipment being installed than under the previous regime.

Finally, if operators encounter resistance when serving notices, they must consider alternative dispute resolution (ADR) providing it is 'reasonably practicable to do so' rather than applying directly to court for a judgment. However, when it comes to landowners choosing not to respond to a request from the operators for Code Rights, the operators have recourse to a court order to settle the matter.

Kylie Cooper, Partner

Farmer prevails in dispute with utility company over damaged land

It would be fair to say that, in a dispute between a farmer and a utility company, the latter is likely to have the upper financial hand and thus pursue a settlement that accords with their own version of events. However, this supposition was overturned in a recent case where a judge found for the farmer who had claimed for damage done to a field that prevented a potato crop from being planted.

This case is a good example how a judge is likely to approach a claim made in good faith, and why it has every chance of prevailing if the claimant is seen as ‘an honest and essentially reliable witness’ even if, as in this case, the documentary evidence is scant. In a nutshell, Mr Kirby, who farmed near Blackpool, claimed for damages against Electricity Northwest because the latter’s contractors, while replacing an electricity cable, had damaged a field he rented to such an extent that he was unable to plant his potato crop.

The defendant maintained that as there was neither documentary evidence that Mr Kirby was planning to plant a crop of potatoes nor a written agreement with a local potato dealer, who Mr Kirby knew well and with whom he had dealt with for many years, to take the harvested crop, there was no intention to cultivate the field. Indeed, the defendant went as far

to claim that Mr Kirby deliberately failed to disclose any documents because had he done so, they would have proved he was in the wrong.

The judge took a pragmatic view: after exploring three plausible explanations for the inconsistencies in Mr Kirby’s evidence and hearing from both Mr Kirby and various witnesses, including Mr Bradley the potato dealer, he decided in Mr Kirby’s favour. He concluded that Mr Kirby’s informal approach to his business affairs did not undermine his case, despite the defendant’s accusation that he was ‘making it up as you go’, noting that he “knows his business extremely well but is not at all good at creating or retaining paper records...”.

Although the importance of documenting agreements and other business arrangements is a drum we lawyers regularly bang, it will bring some comfort to many farmers who do know their business inside out but have neither the time nor inclination to record every element of their operation. In this case, the claimant was seen as honest, reliable, and very experienced and this, on the balance of probabilities, guided the judge to take the side of David in his contest with Goliath.



Spring budget: taxation of ecosystem services

Among a number of uncertainties around the transition to more environmentally sustainable land management is the treatment of such land under inheritance tax legislation. It has not been clear how the government proposes to treat land formerly used to produce food that is switched to enhance the environment. In response, the government has launched a consultation, ending on 9 June 2023, to canvass views on how – and if – APR should apply to non-productive land. Currently, APR can only be applied to land and property that is owned and used for agricultural purposes for at least two years (seven years if tenanted).

Unsurprisingly, the question of whether or not APR applies to land not directly used for agricultural purposes is seen as a major barrier to the adoption of biodiverse habitat-friendly practices, including biodiversity offsetting. The second part of the consultation is concerned with the Rock Review recommendation that 100% APR can only be applied to tenancies of eight years or more. To express your views, visit [Defra's website](#).

Gene-edited crops to be grown commercially

The Genetic Technology (Precision Breeding) Act 2023 became law in March. It allows the growing of gene-edited – or 'precision-bred' – plants and animals in England for food and for experimental purposes. It attracted considerable criticism during debates in both Houses, not least that it gives the Secretary of State powers to create statutory instruments which will not be subject to parliamentary scrutiny. Unlike genetic modification, precision breeding allows for targeted genetic changes which supporters argue is simply a more scientific and quicker method of improving or enhancing particular characteristics usually only achieved through traditional breeding techniques. The government heralded this Act as another tool in the food security box, enabling the breeding of more disease-resistant crops and animals. Opponents point to the more relaxed regulatory regime under which gene-editing will take place, compared with the more rigorous approach of the EU. Under the Act, gene-edited food will not have to be labelled as such, posing an issue for devolved UK nations.



Image courtesy of gettyimages.com



Strict penalties to counter illegal tree felling

The Environment Act 2021 confers additional powers on the Forestry Commission to impose unlimited fines (up from £2,500 or twice the value of the trees felled) on those found to be felling trees without a licence. As well as fines, those falling foul of the legislation also run the risk of a prison sentence in the event of non-compliance with a Forestry Commission enforcement notice. Restocking Notices and Enforcement Notices will be listed on the Land Charges Register which may negatively impact the land's value. Licences are issued for either five or ten years if issued in connection with an approved woodland management scheme. There are exemptions but these rely on tree location, the type of tree work, tree size, other permissions in place, and legal and statutory undertakings.

Anti-poaching law secures first prosecution

In the first prosecution under the Police, Crime, Sentencing and Courts Act 2022, two men were fined and received a three-year ban from keeping dogs following their arrest on an Essex farm in February 2023 for daytime trespass in pursuit of game. In the wake of a worrying increase in incidents of hare coursing and poaching across the country, news that the legislation is already having an effect will be welcomed by farmers and rural communities.

Nature Markets

To promote understanding of nature markets, whereby farmers and landowners can sell units to businesses either wanting (or having) to invest in nature, the government published ['Nature markets: A framework for scaling up private investment in nature recovery and sustainable farming'](#) in March. There are already existing nature markets: voluntary systems such as the UK Woodland Carbon Code and the UK Peatland Code; and those stemming from mandatory (or compliance) requirements such as biodiversity net gain (see page 7 for more detail) and nutrient credits (designed to mitigate developments in sensitive catchments). To encourage engagement, the report notes that land managers 'may sell units for multiple different nature markets (for example biodiversity and carbon) from the same project or piece of land' where the rules allow. Our planning team can advise clients on how to engage with nature markets and provide an alternative income stream.

PDRs for campsites and solar panels

Another recent government consultation sought views on extending permitted development rights (PDRs) in a number of scenarios. The two that are of immediate interest to farmers and landowners are the creation of temporary, recreational campsites for up to 60 days a year (to include certain moveable structures such as toilet and washing facilities); and the siting of solar panels on domestic flat roofs. If PDRs are extended to allow temporary campsites, they would be subject to certain conditions, including protection of local amenities.

Rises to wage and statutory rates 2023/2024

From 1 April 2023:

National Living Wage: £10.42 per hour (from £9.50) aged 23 and over

National Minimum Wage rates:

- £10.18 per hour (from £9.18) for those aged 21 – 22
- £7.49 per hour (from £6.83) for those aged 18 – 20
- £5.28 per hour (from £4.81) for those aged 16 - 17 and apprentices aged 19 and under or in their first year.

Statutory benefit payments increased from 3 April 2023:

- Statutory maternity, paternity, adoption, shared parental, and parental bereavement pay will increase to £172.48 (from £156.66) per week (or 90% of the employee's average weekly earnings, whichever is lower). The gross weekly earnings threshold remains at £123.
- Maternity allowance increases to £172.48 (from £156.66) per week (or 90% of the employee's average weekly earnings, whichever is lower). The gross weekly earnings threshold remains at £30.
- Standard statutory sick pay rises to £109.40 (from £99.35). The gross weekly earnings threshold remains at £123.

Meet the team

Welcome to Neal Patterson

We're delighted to welcome Neal Patterson who joined our agriculture law team earlier this year. Neal specialises in the acquisition and disposal of farms, bare land and estates. He also acts for Landlords and tenants with Farm Business Tenancies and Landlord and Tenant Act 1954 leases for commercial use.

Growing up in rural Northern Ireland, he spent time helping on friends' farms – his first step towards embarking on a career in agriculture law. Following a stint with a national charity looking after their property portfolio, Neal returned to private practice, working first for an NFU Panel firm and then in the Landed Estates and Agriculture team for a national firm. In November 2022, Neal was selected to attend the Worshipful Company of Farmers Advanced Course in Agricultural Business Management at the Royal Agricultural University. He is also a member of the Agricultural Law Association, the Belted Galloway Cattle Society and The Ferguson Society.



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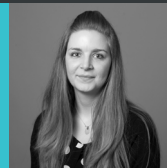
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This newsletter does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.