

UK Employment Law

Where Do We Currently Stand?

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Let's face it, it has been hard to keep up with what is happening on the employment law front recently. Hopefully, our short snapshot below will bring you up to speed with where you need to be and help you with your 2023 priorities.

Exclusivity Clauses

The government has extended the ban on including exclusivity clauses in contracts (both new and existing) beyond zero-hours contracts to cover those earning on or below the Lower Earnings Limit (currently, £123 per week). The aim is to stop employers from being able to restrict employees and workers on low salaries from working for other employers by including an "exclusivity clause" in their contracts. The regulations give employees protection against unfair dismissal (no qualifying period) for breaching an exclusivity term of their contracts. Workers also have protection from suffering a detriment.

Practical advice: Not a significant change, not least because we are unaware of any clients who use such clauses in contracts, but affected employers should be aware that the regulations came into force on 5 December 2022. They should ensure not just that their contracts are compliant, but that HR and line managers are made aware that any attempt to enforce those terms in existing contracts is likely to end in tears.

Fire and Rehire

Back in March 2022, the government said it would be issuing a new statutory code on "fire and rehire" practices to cover the situation where an employer makes changes to terms and conditions by dismissing the employees under their old contracts and offering to re-engage them on new terms and conditions. This practice came under scrutiny during the pandemic, when several large businesses sought to make changes to terms and conditions in this way. The Advisory, Conciliation and Arbitration Service (Acas) issued some guidance that was terribly well-meaning, but did not advance the debate very far.

Very few details were released at the time as to what this code might cover (see our previous [blog](#)). We were told to expect a draft code for consultation over the summer, but it has not yet materialised. In a House of Lords debate in November, it was stated that the intention was to publish it "in the near future." The likelihood of the government actively preventing the practice (as opposed to gently discouraging it) is very small, especially in the headwinds of expected difficult economic times next year.

Flexible Working

It seems a number of government proposals that were expected to form part of a new Employment Bill may, instead, now make their way onto the statute book in the form of Private Members' Bills, which are currently working their way through the Parliamentary process with the government's support.

One of these is the Employment Relations (Flexible Working) Bill, which has been referred to in this week's government [response](#) to its 2021 consultation on flexible working. The Bill will introduce **changes to the existing right to request flexible working**. Under the proposals, employees will have a right to request flexible working from day one (currently, they must have at least 26 weeks' continuous service with their employer) and they will be entitled to apply for flexible working twice in 12 months (as opposed to once). Employers will be under an obligation to consult the employee before rejecting a request, and employees will no longer be required to explain the effects that the changes they applied for would have on the employer and how they might be dealt with.

None of the changes outlined above will make a significant difference to the current regime in terms of the basic structure. They will also not give employees a statutory right to work flexibly, i.e., to be able to insist where/when/how they work, etc. However, they will have an impact (almost entirely negative) on an employer's ability to manage and, where necessary, reject such applications. The dropping of any requirement that the employee has any heed to the practicalities of what is being requested is a particularly retrograde step. Read our [Employment Law Worldview blog](#) for a more in-depth discussion of the proposed changes.

Practical advice: No immediate action is required; monitor progress of the Bill through Parliament. Once we have a better idea of when these changes will come into effect, amendments to policies and procedures will be required.



Holiday Pay

The UK Supreme Court will hear an important holiday pay decision on 14 to 16 December. One of the points that is up for discussion in *Chief Constable of the Police Service of Northern Ireland & Anor v Agnew & Ors* is whether a series of deductions is broken by a gap of three months or more. You may recall that the current case law position in England and Wales is that such a gap prevents there being a “series” of deductions for the purposes of an unlawful deduction from wages claim – a major hurdle for claimants bringing claims for unpaid holiday pay going back over many years. The Court of Appeal in England and Wales cast non-binding doubt on the current position in *Smith v Pimlico Plumbers Limited*, so we will be following the Supreme Court’s decision closely.

ICO Guidance

The Employment Practices Data Protection Code (and accompanying guidance) is intended to assist employers dealing with the impact of data protection laws on the employment relationship. It has not been updated since the Data Protection Act 2018 came into force, and has certainly not been amended to reflect the GDPR. The ICO is now addressing this, and has recently published draft guidance for consultation on [monitoring at work](#) and [information about workers’ health](#). Further guidance on recruitment and employment records is expected and, once approved, aims to provide practical guidance for employers in these areas.

On the topic of data protection, the government has also announced that it plans to replace the UK GDPR with a bespoke British data protection system. It is tempting to assume that this will be far more about flaunting the UK’s independence from the EU and “taking back control of our laws” than making any actual changes of substance at all. The existing regime broadly works, and the government knows it.

IR35

No changes to see here after all!

After a bit of to-ing and fro-ing in recent months, the government has confirmed that it will not be making any changes to the IR35 rules, which means that end-user clients will remain responsible for determining whether the rules should apply, i.e., whether an individual is working like an employee despite providing services to an end-user through an intermediary PSC. Furthermore, the fee-payer will need to deduct employment income taxes (i.e., operate Pay As You Earn and National Insurance contributions) and account for them to HMRC.

Still not come to terms with IR35 in the private sector? Have a look at our blog series starting [here](#).

Menopause and the Workplace

In 2021, the Women and Equalities Committee conducted an inquiry to examine the extent of discrimination faced by menopausal women in the workplace. The Committee published its report, [Menopause and the Workplace](#), on 28 July 2022. The report made several recommendations, including a call for the government to consult on making menopause a protected characteristic under the Equality Act 2010. This now seems highly unlikely given the government’s [response](#) to the independent report, *Menopause and the Workplace: How to enable fulfilling working lives*, published on 18 July 2022, in which it said that it does not intend to make any changes to the Act.

Practical advice: No legislative changes expected at this stage. Menopause is, however, a topical issue, and Acas recently [reported](#) that one in three employers do not feel well equipped to support women going through the menopause. Employers should review what support they currently provide and whether this is sufficient.

National Minimum Wage Increases

In its Autumn Statement, the government confirmed the new rates for the National Minimum Wage/National Living Wage from 1 April 2023. These are as follows:

Wage	Age
£10.42	23 and over (NLW)
£10.18	21 – 22
£7.49	18 – 20
£5.28	16 – 17 and apprentice rate

The government has also confirmed other new statutory rates for 2023 to 2024. Statutory Sick Pay will increase from £99.35 to £109.40 per week in April 2023 and the rate for statutory adoption, maternity, shared parental, parental bereavement and paternity pay will increase from £156.66 to £172.48 per week. Further details can be found [here](#).



Parents and Carers

As set out above, it seems a number of proposals that were originally expected to form part of a new Employment Bill may now make their way onto the statute book in the form of Private Members' Bills, which have been given government support.

The Neonatal Care (Leave and Pay) Bill will create a new statutory right to leave and pay for working parents whose child is receiving or who has received neonatal care. The current version of the Bill proposes that employees with a parental or other qualifying relationship with a child who is receiving or who has received neonatal care will be able to take at least one week's leave to care for the child. The intention seems to be to make this leave 12 weeks, as per the government's previously stated commitment. Eligible employees would be entitled to be paid at the usual statutory rate of pay for family-related leave, provided they meet the usual minimum earnings test and the provisions for qualifying service.

Two other Private Members' Bills that are working their way through the Parliamentary process are the Redundancy (Pregnancy and Family Leave) Bill and the Carer's Leave Bill. The former will afford greater protection to pregnant women and new parents in a redundancy situation by giving them the right to be offered (as opposed to merely having the opportunity to apply for) a suitable available vacancy where one is available. This is the same protection that is currently afforded to women who are at risk of redundancy while on maternity leave. The new protection will extend from when a woman informs her employer that she is pregnant until 18 months after the birth. This new right will also cover employees on adoption leave and shared parental leave.

Under the Carer's Leave Bill, eligible employees with caring responsibilities will be able to take one week's unpaid leave per year to enable them to provide or arrange care. This will be a "day one" right, and employees will be protected from dismissal or detriment for exercising their right to this leave.

Practical advice: At this stage, it is unclear when these proposals will come into force. The position is always less clear when dealing with a Private Member's Bill. Employers should monitor progress of these Bills, as changes to policies and procedures are likely to be required at some point to reflect the changes.



Pay Gap Reporting

On 2 October, the government said it would abolish certain reporting obligations, such as gender pay gap reporting for medium-sized employers (fewer than 500 employees) as part of a "sweeping package of reforms to cut red tape for business and stimulate growth". As this announcement was made when Liz Truss was still Prime Minister, it is unclear whether Rishi Sunak's government will revisit this. Watch this space.

In any event, pay gap reporting remains a topical issue for employers and it is one area where developments in practice are likely to overtake legislative developments. For example, although the government has said it will not introduce a mandatory reporting duty on employers in relation to ethnicity pay gap data, some large employers already publish this information voluntarily, and such an approach has been supported by the Confederation of British Industry, the Chartered Institute of Personnel and Development, the Trades Union Congress and the Equality and Human Rights Commission. For those employers who are keen to (and who wish to be seen to) demonstrate to their employees, customers, investors and other stakeholders that they are committed to tackling inequality, this is one way of showing that commitment.

A response was due from the government in June 2022 in relation to disability pay gap reporting, but to date, nothing has been published.

Restrictive Covenants

In December 2020, the government issued a consultation on proposals to reform post-termination non-competition clauses in employment contracts. The proposals included requiring employers to pay employees compensation for the duration of any post-termination restriction and introducing a limit on the length of such clauses. An additional proposal, seemingly inserted to make the rest of the consultation look sensible by comparison, was to make such clauses unenforceable altogether.

It seems highly unlikely that the government will ban non-compete clauses altogether, but it may require employers to pay the employee some proportion of salary for the duration of the restriction, as is currently the case in several European jurisdictions. It is not clear whether this will apply to all non-competition covenants or, more likely, only those entered into after the implementation date.

Practical advice: No immediate action is required, as no progress has been made by the government in relation to this consultation. A response will presumably be published at some stage.



Sexual Harassment in the Workplace

It seems we are now a step closer to the government introducing a mandatory duty on employers to take proactive steps to prevent sexual harassment in the workplace. Again, the vehicle for introducing the obligation appears to be a Private Member's Bill that is progressing through Parliament and has the support of the government: The Worker Protection (Amendment of Equality Act 2010) Bill.

As previously reported, the government's intention is to impose a new obligation on employers to "take all reasonable steps to prevent sexual harassment" of their employees and workers in the course of their employment. This duty would be enforced by the Equality and Human Rights Commission, but employment tribunals would have the ability to apply an uplift of up to 25% to an award of compensation where harassment occurred and the employer had failed to uphold this duty. The Bill also would reinstate liability on employers for third-party harassment in certain circumstances.

Practical advice: No immediate action is required, but the direction of travel is clear, and employers should consider what changes may be necessary in their workplace and to their policies and procedures to comply with these new obligations.

Linked to this, we may also see the promised changes placing limits on confidentiality provisions in settlement agreements and contracts of employment. The Non-Disclosure Agreements Bill is due to have its second reading on 17 March 2023. There are currently no details for this, but it seems the government is taking forward its proposals to place limits on the content and use of non-disclosure agreements. We will keep you posted.

Single Enforcement Body

The government wants to bring together all the core employment rights for which it currently takes an enforcement role within one body to tackle the full range of non-compliance, from minor National Minimum Wage breaches right up to modern slavery offences. Legislation to create the new agency is still awaited.

Tips

The Employment (Allocation of Tips) Bill aims to create a new legal obligation on employers to allocate tips, gratuities and service charges to workers without deductions. The Bill will require employers to ensure that the distribution of qualifying tips among workers is "fair"; this to be judged in line with a new statutory Code of Practice to be introduced at the same time. Tribunals will be given new powers to order employers to revise the allocation of tips or to make a payment to any workers deemed unfairly treated by that measure. Employers also will be required to have a policy in place setting out how tips are allocated among workers, which will presumably be little more than a re-hash of the Code.

Practical advice: No immediate action is required, but affected employers should review their practices in this area.



Trade Unions

As promised, the government has introduced draft legislation that would impose minimum service levels during transport strikes. The Transport Strikes (Minimum Service Levels) Bill had its first reading in the House of Commons on 20 October.

Various trade unions are currently challenging the changes that were introduced earlier this year to allow the use of agency workers during strike action via the courts. A number of trade unions have issued judicial review proceedings, claiming that the changes are unlawful.

The UK Retained EU Law Bill – What Will This Mean for Employment Law?

And, finally, it would be remiss of us not to mention the government's Retained EU Law (Revocation and Reform) Bill, which could potentially have very significant implications (or perhaps none at all) for employment law, should it be implemented in its current form.

A key aim of the Bill is to give the government the power to amend any "Retained EU law" (i.e., EU law that was retained on the UK statute books after leaving the EU) and any special status it has in the UK legal system. Furthermore, EU law will no longer take priority over domestic law and UK courts will no longer be bound by any retained EU case law, except in limited circumstances.

One of the key provisions in the Bill is a so-called "sunset clause," which will repeal EU-derived subordinate legislation and retained direct EU legislation by the end of 2023 (or 23 June 2006, at the latest), unless the government takes active steps to retain it. From an employment law perspective, this means that regulations such as the Agency Workers Regulations, the Working Time Regulations, the TUPE Regulations, etc. will all fall away at the end of 2023, unless the government makes an active decision to retain them. At this stage, it is not clear which regulations the government has on its hit list. It seems highly unlikely that the government will seek to revoke these regulations in their entirety, but it is possible that it might seek to make changes to them, assuming this will happen at all. There have already been reports that the new Prime Minister, Rishi Sunak, does not intend to press ahead with the proposals, but we will have to wait and see. We will, of course, keep you posted. Overall, there is next to no likelihood that any changes to UK law will be made that would materially weaken any existing worker rights and protections.

This note sets out the position in relation to England and Wales. Not all the changes outlined above will apply elsewhere in the UK.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations, nor should they be considered a substitute for taking legal advice.



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