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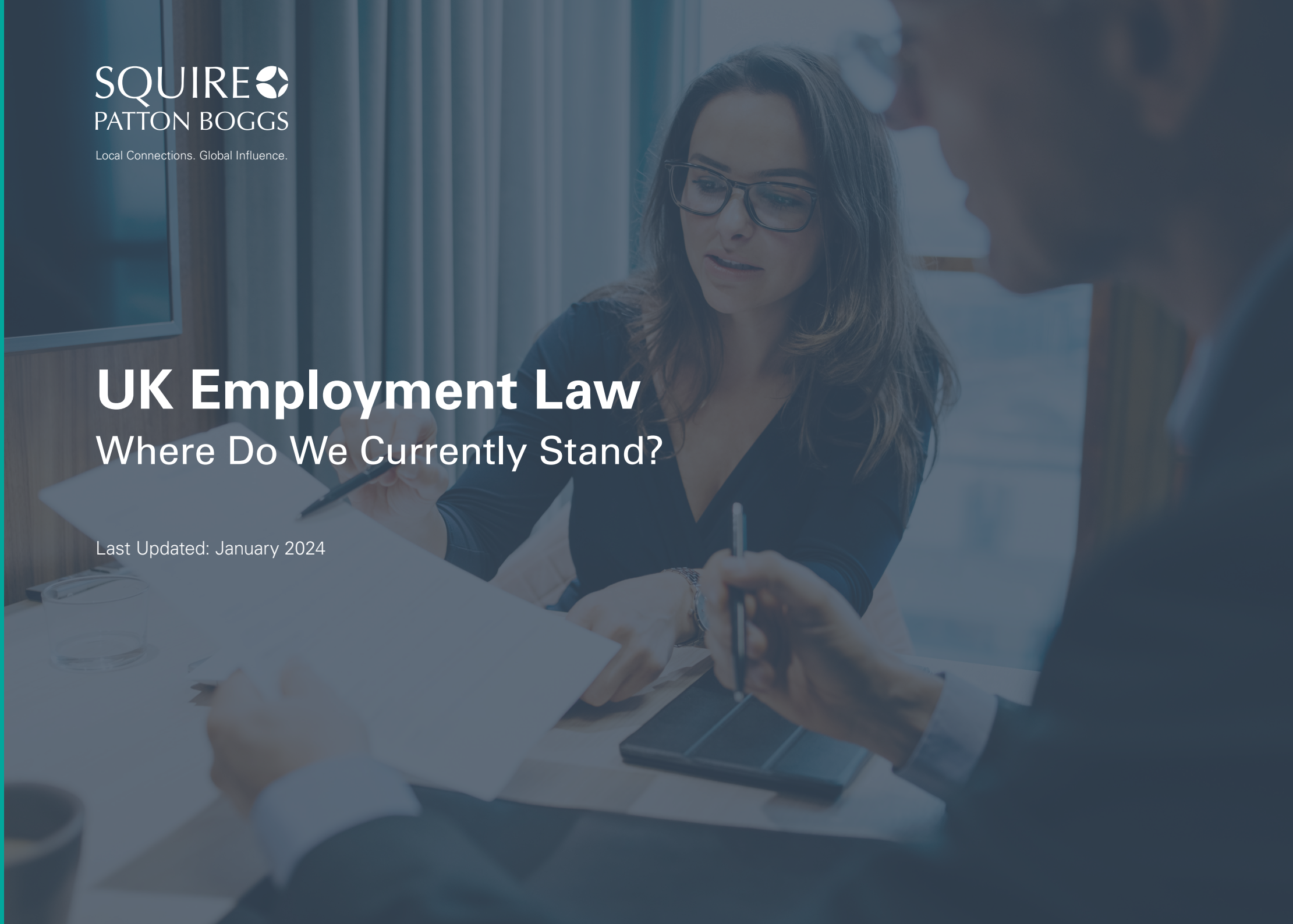

UK Employment Law

Where Do We Currently Stand?

Last Updated: January 2024

We thought we would kick the year off with an updated summary of where we are on the legislative front. Of course, with a General Election due to take place later this year, more changes may be afoot, but based on the current position, we hope our snapshot below will bring you up to speed with where you need to be and help you with your 2024 priorities.

This snapshot sets out the position in England. The position may vary slightly in Scotland, Wales and Northern Ireland.

Employment Law Reforms

Fire and Rehire

Flexible Working

National Minimum Wage Increases

Parents and Carers

Predictable Terms and Conditions

Restrictive Covenants

Sexual Harassment in the Workplace

Tips

Trade Unions

Employment Law Reforms

Including Rolled-up Holiday Pay, Holiday Entitlement for Irregular Hours/Part-year Workers, Minor Changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 and Restatement of EU Law

We set out in our briefing note – UK Government Outlines Employment Law Reforms – the key changes that employers need to be aware of and action steps to consider.

Most of these changes took effect from 1 January 2024.

Since publication of this briefing note, the government has published the final Regulations implementing the changes together with guidance on what the changes mean.

Fire and Rehire

The government has issued a draft Code of Practice on "dismissal and reengagement" to cover the situation where an employer makes changes to terms and conditions by dismissing employees under their old contracts and offers to re-engage them on new terms and conditions. This practice came under particular scrutiny during the pandemic, when several large businesses sought to make changes to terms and conditions in this way. Acas issued some guidance that was terribly well-meaning, but did not advance the debate very far. See our *Employment Law Worldview* blog.

The aim of the Code is to clarify how employers should behave when seeking to change employees' terms and conditions of employment. A court or tribunal will be able to take the Code into account when considering relevant cases, including unfair dismissal. Employment tribunals will have the power to increase an employee's compensation by up to 25% if an employer unreasonably fails to comply with the Code. They could also decrease any award by up to 25% where it is the employee who unreasonably failed to comply.

The consultation document states that the Code will apply where an employer (i) considers that it wants to make changes to its employees' contracts of employment; and (ii) envisages that, if the employees do not agree to those changes, it might dismiss them and either offer them re-employment on those new terms or engage new employees or workers to perform the relevant roles on the new terms.

The Code will apply regardless of the number of employees affected, or potentially affected, by the employer's proposals.

The consultation on the Code closed on 18 April 2023 and we await the government's response – likely to be published in Spring 2024. We were not madly impressed – see our comments in our *Employment Law Worldview* blog .

Practical advice – Any potential rule changes have yet to be implemented, so there is no action required at this stage, per se. However, employers should carefully consider their approach to any dismissal and re-engagement situations in the meantime. This will be of particular relevance for companies seeking investment, as falling foul of this may adversely impact ESG ratings. There have been some recent, well-publicised incidents where the Court of Public Opinion has been swift to judge employers for using this tactic despite its ultimately being entirely lawful.

Flexible Working

The current position is that all employees with 26 weeks' continuous service are able to make one statutory request per year to change their working hours, work pattern or work location.

The Employment Relations (Flexible Working) Act 2023 introduces changes to the existing right to request flexible working. The changes themselves will come into force from 6 April 2024. Acas has also issued an updated version of the statutory Acas Code of Practice on handling flexible working requests. It has been updated to reflect the forthcoming changes to the legislation. A failure to comply with the Code does not in itself expose an employer to the risk of a claim, but the Code may be taken into account by a Tribunal in any proceedings. See our *Employment Law Worldview* blog on the draft Code that was published for consultation.

The key changes are as follows:

- Employees will be entitled to apply for flexible working twice in any 12-month period (rather than the current one request)
- Employers will be under an obligation to consult the employee before rejecting a request, and the decision period within which an employer is required to process the request will be reduced from three to two months
- Employees will no longer be required to explain the effects that the changes they are applying 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 still not give employees a statutory right to work flexibly, i.e. to insist where/when/how they work, etc. However, they will have an impact on an employer's ability to manage and, where necessary, reject such applications.

The government has confirmed that employees will also have a right to request flexible working from day one of their employment.

Practical advice – Policies and procedures will need updating to reflect these changes. Employers should also update managers on the new rights and obligations to maximise compliance with the new provisions.

National Minimum Wage Increases

In its Autumn Statement, the government confirmed the new rates for the National Minimum Wage/National Living Wage (NLW) from 1 April 2024. These are as follows:

Age	21* and over (NLW)	18-20	16-17	Apprentice Rate
Rate from 1 April 2024	£11.44	£8.60	£6.40	£6.40
Increase in pence	£1.02	£1.11	£1.12	£1.12
Percentage increase	9.8%	14.8%	21.2%	21.2%

*The NLW currently applies to workers aged 23 and over, but following recommendations from the Low Pay Commission, the age threshold will be lowered to 21 from April 2024.

Practical advice – Many businesses have been caught out by a seemingly innocuous practice (e.g. staff paying for any uniform in connection with their employment), which has inadvertently dipped their employees under the minimum wage rates. This is ever more likely as the minimum rates increase and the "cushion" that employers thought they had between what they pay and the minimum is eroded.

Our *Employment Law Worldview* blog from last year gives detailed commentary on this and offers six pitfalls to avoid, all of which remain valid. The long and the short of it is that the rules are complex and inadvertent breach is easier than it ought to be. We recommend that any business with staff paid at or near the National Living Wage/National Minimum Wage rates should take some pre-emptive steps to see if this might be an issue when these increases come into force.

Parents and Carers

On 24 May 2023, three government-backed Private Members' Bills that will give new employment protections for parents and unpaid carers received Royal Assent. These are summarised briefly below.

1. Greater Protection From Redundancy for Pregnant Women and Parents

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 gave the government the power to introduce new Regulations to provide additional protection from redundancy during or after pregnancy or after periods of maternity, adoption or shared parental leave.

As the law currently stands, Regulation 10 of the Maternity and Parental Leave etc. Regulations 1999 states that if it is not practicable by reason of redundancy for an employer to continue to employ a woman on maternity leave, the employee is entitled to be offered (not just invited to apply for) a suitable available vacancy with her employer (or an associated employer). This gives women in this position priority over other employees who are at risk of redundancy, even if the other employees are potentially better qualified for the job. This protection only applies while the woman is on maternity leave. Similar protection applies for employees on adoption or shared parental leave.

The current redundancy protection period outlined above is being extended to include pregnancy (starting from when the employee informs their employer that they are pregnant) and for 18 months after childbirth. It will also provide similar enhanced protection for those returning from adoption leave and shared parental leave.

The changes will come into force from 6 April 2024.

Practical advice – Employers will need to make sure their managers are aware of these new rights when conducting redundancy exercises, to ensure they are familiar with the wider range of circumstances in which employees will be eligible to be offered (as opposed to merely invited to apply for) suitable available vacancies. To be clear, however, these new rules will not prevent women on maternity leave, or after it, from being made redundant if no suitable vacancy exists, nor require the employer to create a vacancy, nor to bump anyone else out of a job to make a space for her.

2. Neonatal Care Leave and Pay

The Neonatal Care (Leave and Pay) Act 2023 introduces new rights to leave and pay for employees with responsibility for a child who is receiving, or has received, neonatal care.

This new Act gives the government the power to make new Regulations granting eligible employees the right to neonatal care leave and neonatal care pay in certain circumstances. The Act allows provision to be made for the following:

- **Neonatal Care Leave** – A right for eligible employees to be absent from work for a prescribed period of at least one week in respect of a child who is receiving, or has received, neonatal care.
  - All employees who meet the eligibility criteria will be entitled to this leave, regardless of how long they have worked for the employer.
  - The leave must be taken within 68 weeks of the child's birth, thus giving parents the ability to take the leave in addition to any other statutory leave they may be eligible for, e.g. maternity/paternity/adoption leave, etc. It will be available to employees who have babies who are admitted into neonatal care up to the age of 28 days and who have a continuous stay in hospital of seven full days or more.
  - Although the Act only provides for a minimum period of at least one week at a time, the intention apparently is that the total amount of leave will be capped at 12 weeks, and this will be set out in the Regulations.
- **Neonatal care pay** – A right for eligible employees who meet minimum requirements relating to continuity of employment (at least 26 weeks with their current employer) and earnings to be paid during that leave at the statutory prescribed rate – in line with other family-related statutory payments.
- **Employment protections** – Parents taking neonatal care leave will have the same employment protections as those associated with other forms of family-related leave, e.g. maternity/paternity/adoption leave. This includes protection from dismissal or detriment as a result of having taken or applied for the leave.

The draft Regulations that will set out the full details of the new protections have not yet been published, but apparently the government is targeting April 2025. This is to give HM Revenue & Customs (HMRC) sufficient time to set up the necessary systems for neonatal care pay.

Practical advice – When the new provisions come into force, employers should consider introducing a policy to reflect the new statutory rights, so their staff are aware of them. Employers may also choose to grant additional protection in addition to the statutory rights, which can be reflected in the policy.

3. Carer's Leave

The Carer's Leave Act 2023 gave the government the power to make new Regulations granting eligible employees the right to take at least one week's carer's leave per year. This leave will be unpaid and will be available to employees for the purpose of caring for a dependant with a long-term care need.

There is currently no dedicated statutory leave entitlement for informal carers who have to rely on other forms of leave (e.g. holiday) to take time off work to care.

Key changes include the following:

- **Carer's leave** – An entitlement for employees to be absent from work on unpaid leave to provide or arrange care for a dependant with a long-term care need.
  - It will be a "day one" right.
  - The leave will be available to take in increments of half-days or individual days, up to a week, to be taken over a 12-month period.
  - Employees will not be required to provide evidence in relation to a request for carer's leave.
  - The definition of "dependant" is broadly drawn and includes an employee's spouse, civil partner, child or parent, as well as someone who lives in the same household as the employee (but excluding boarders, tenants, lodgers, etc.) or someone who "reasonably rel[ies] on the employee to provide or arrange care".
  - The definition of long-term care is also similarly broad. In the Act, "a dependant of an employee has a long-term care need if (i) they have an illness or injury (whether physical or mental) that requires, or is likely to require, care for more than three months; (ii) they have a disability for the purposes of the Equality Act 2010; or (iii) they require care for a reason connected with their old age."
- **Employment protections** – Employees taking carer's leave will have the same employment protections associated with other forms of family-related leave, e.g. maternity/paternity/adoption leave, etc. This includes protection from dismissal or detriment as a result of having taken or applied for the leave.

The new rights will come into force from 6 April 2024.

Practical advice – Employers should consider introducing a policy to reflect the new statutory rights, so their staff are aware of them. Employers may also choose to grant additional protection in addition to the statutory rights, which can be reflected in the policy.

4. Changes to Paternity Leave

In addition to the changes outlined above, the government has said it will also make some minor changes to the paternity leave regime. In January 2024, it issued draft Regulations to reflect these changes, which will:

- Allow employed fathers and partners to take the current entitlement of up to two weeks of paternity leave in two separate blocks of one week at any time in the first year, rather than just in the first eight weeks after birth or placement for adoption.
- Change the notice requirements for paternity leave to make these more proportionate to the amount of time the father or partner plans to take off work. This should give parents more flexibility in planning to take the leave they need. Currently, fathers are required to notify their employer of their leave dates 15 weeks before the expected week of childbirth. The proposal is that fathers-to-be/ partners will be required to give their notice of entitlement 15 weeks before birth and give 28 days' notice before the dates that they intend to take each period of leave (and pay, where they qualify).

These changes are going to be coming into force sooner than anticipated - from 8 March 2024 according to the draft Regulations. They will apply to children whose expected week of childbirth begins after 6 April 2024/or who are expected to be placed for adoption on or after this date.

Practical advice – When the new provisions come into force, employers should consider updating their policies to reflect the new statutory rights, so their staff are aware of them. Employers may also choose to grant additional protection in addition to the statutory rights, which can be reflected in the policy.

Predictable Terms and Conditions

The Workers (Predictable Terms and Conditions) Act received Royal Assent on 18 September. The stated intention of the Act is to give workers with unpredictable working patterns the right to make a formal application to change their working patterns to make them more predictable. It reflects the government's previous commitment to introduce legislation to give workers the right to request a more predictable and stable contract.

Acas has also published a draft Code of Practice on handling requests under the new legislation, alongside a consultation requesting views on the draft Code.

Unfortunately, given that neither the Act nor the Code make any attempt to define "predictable" and there is an inevitable (and confusing) overlap with the existing flexible working regime, this may lead to some headaches for employers.

For more information, please see our recent blog series: Part 1, Part 2 and Part 3.

The new rights are likely to come into force next autumn according to a recent press release.

Restrictive Covenants

In December 2020, the government issued a consultation "on measures to reform post-termination non-compete clauses in contracts of employment". The consultation closed on 26 February 2021 and the government published its response in May 2023.

The response states that the government will limit the maximum duration of non-competition covenants in UK contracts of employment and limb (b) worker contracts to three months. See our *Employment Law Worldview* blog for further information on the changes and the likely implications. We also ran a short webinar on the government's proposals and the link to the materials is available here.

In terms of the timing of any new legislation, the government said that it will bring forward legislation to introduce the statutory time limit "when Parliamentary time allows", meaning that these changes are not seen as a priority at this stage.

In terms of the courts' current approach to non-competition restrictions, it is important to remember that all non-compete clauses are presumed to be unenforceable unless they are demonstrated to be reasonable. A non-compete clause will only be reasonable and enforceable if (i) it protects a legitimate business interest of the ex-employer; and (ii) it is no wider than is reasonably necessary to protect that legitimate business interest. Non-competition restrictions are, and always have been, the most difficult type of post-termination restriction to enforce.

Practical advice – There is, of course, a General Election due by no later than January 2025, which may move political focus onto more "vote-winning" endeavours, however misguided, so it remains to be seen whether these reforms will go ahead. Nonetheless, it would be prudent for employers to carry out a pre-emptive audit of the current restrictions/garden leave and off-set provisions applying to key individuals across the business, to form a preliminary view of impact.

Sexual Harassment in the Workplace

The Worker Protection (Amendment of Equality Act 2010) Act 2023 received Royal Assent in October 2023.

This new piece of legislation amends the Equality Act 2010 (EqA) and places a new pre-emptive duty on employers to take "reasonable steps" to prevent sexual harassment of employees in the course of their employment.

A couple of points to flag immediately: the definition of "employee" in the EqA is wider than that used in other pieces of employment legislation and extends to workers and some self-employed individuals, as well as your regular Schedule E employees.

Furthermore, "in the course of their employment" covers activities outside the workplace, such as work drinks or off-site events. Both are points to bear in mind when considering what practical steps employers should be taking to comply with this duty. In terms of the behaviour this change is intended to address, the new provisions use the existing definition of sexual harassment in the EqA, namely unwanted conduct of a sexual nature that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant.

Practical advice – We do not have a specific date yet for this new duty, but the Act states the relevant provisions will come into force one year after it becomes law, so likely to be autumn 2024. For more information on what employers should be doing to prepare for this new duty, please see our update New Duty on Employers to Prevent Sexual Harassment at Work (UK)

Tips

The Employment (Allocation of Tips) Act 2023 received Royal Assent on 2 May 2023. It will come into force on a date to be appointed by the Secretary of State, expected to be 1 July 2024, and will be supported by a statutory Code of Practice, which has recently been issued for consultation.

The Act will insert more than 20 new sections into the ERA 1996 to create a statutory obligation on employers to allocate tips, gratuities and service charges to workers without deductions. Employers will be required to ensure that the total amount of the qualifying tips is allocated "fairly" between workers at the particular place of business and there will be a new statutory code of practice introduced to provide guidance to employers on what amounts to a fair allocation.

The Act will introduce a number of new rights for workers, including the ability to request information about how tips are paid and the right to bring a claim if their employer has failed to comply with the new obligations.

See our *Employment Law Worldview* blog for further details on the proposed changes and what they may mean for employers, especially those in the hospitality sector.

Trade Unions

Earlier this year, the High Court quashed the government's controversial legislation that repealed the prohibition placed upon employment agencies from supplying temporary workers to businesses to backfill labour shortages caused by employees participating in industrial action. (*R (on the application of ASLEF & Ors) v. Secretary of State for Business and Trade* [2023] (see recent *Employment Law Worldview* blog)).

On a related point, in July the Strikes (Minimum Service Levels) Act 2023 came into force. This gives the government the ability to set minimum service levels within key sectors during industrial action, including emergency services, border security, education, passenger rail and the nuclear sector. Where minimum service levels are in force for a specified service, if the relevant trade union gives notice of strike action, employers can issue a work notice ahead of the strike, to specify the workforce required to maintain necessary and safe levels of service.

The minimum service levels will not come into force in the affected sectors until secondary legislation has been passed by Parliament. In December, the regulations in respect of minimum service for border security, passenger rail and NHS ambulance services came into force.

Following a consultation on the steps trade unions must take to comply with a work notice, the government has also issued guidance for employers, unions and workers.

If you have any questions about the changes outlined above, please speak to your usual contact in the Labour & Employment team or one of the following:

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