UK Government Outlines Employment Law Reforms

December 2023

Back in May this year, the government issued a consultation document setting out a number of proposed changes to employment law. After what can only be described as a pretty swift turnaround (certainly relative to the usual amount of time you wait for a response to a legislative consultation), the government has issued its response and, to show it really means business, it has also issued some draft regulations setting out the relevant amendments to existing legislation.

The government is also taking this opportunity to respond to an earlier consultation from January about calculating annual leave entitlement for part-year and irregular hours workers.

The changes will come into force quickly, as most of them will take effect from 1 January 2024.

To save you wading through the 49-page response and some mind-bending draft regulations, we set out below the key changes that employers need to be aware of and action steps to consider before the changes come into force.

Holidays and Holiday Pay

- Contrary to its earlier indications, the government will not be introducing a single annual leave entitlement with a single rate of holiday pay. Instead, it will retain the current two distinct "pots" of annual leave (four weeks under Regulation 13 and 1.6 weeks under Regulation 13A leave) and the two existing rates of holiday pay. This means that workers will continue to be entitled to receive four weeks' leave at their normal rate of remuneration and 1.6 weeks' leave at their basic rate of pay (unless their contract states otherwise), where "week" is the employee's usual working week, not necessarily five full days. This is the pre-Brexit position, the four weeks being required by the Working Time Directive and the extra 1.6 weeks being self-inflicted at a domestic UK level and so not covered by the Directive's provisions relating to normal pay. The distinction was the obvious candidate for the old Brexit red-tape bonfire, so this must be seen as something of a failure of imagination by the legislators.
- In a game attempt to make amends, the government is, however, amending the Working Time Regulations 1998 (WTR) to set out what elements of pay are to be included as "normal" for the purposes of the four weeks' leave entitlement. Those hoping for a definitive list of specific payments that should be included will be disappointed!

  The WTR will now say that the following types of payment should be included when calculating the normal rate of pay: (i) payments, including commission payments, which are "intrinsically linked" to the performance of tasks that a worker is contractually obliged to carry out; (ii) payments for professional or personal status relating to length of service, seniority or professional qualification; and (iii) other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation. So, as per previous case law, results-based commission, certain overtime payments, allowances, etc., will still be caught. The drafting would still seem to leave uncertainty about certain payments such as annual or semi-annual bonuses, although arguably this new wording supports an argument that they are not caught. So, it remains to be seen whether this amendment actually changes anything. No doubt further case law will follow. No doubt also that it will continue to be very fact specific and little assistance to employers struggling with their own payment structures.
- The government has promised updated guidance to support employers in relation to this change. We will have to wait and see if this gives more of a useful steer on what is included, but it seems unlikely.
- **Action point** – This change in the WTR should not require most employers to do anything significantly different provided they have already amended their holiday pay calculations to reflect previous case law on the type of payments that should be taken into account for these purposes. We would, however, recommend they revisit their current approach to ensure it will be compliant with the changes.
- As for those employers that have held off making changes to their holiday pay calculations (e.g. because their staff have not challenged their current salary-only arrangements) they should review what they currently pay and amend accordingly, as the risk of claims will be greater once the position is set out in legislation.
- **Remember** – this change only applies to the four weeks' leave under Regulation 13. For certain individuals, employers can still lawfully pay only basic pay for the additional 1.6 weeks' leave and any enhanced contractual leave over and above this. Having said that, and this was certainly reflected in the responses to the consultation document, many employers choose not to make this distinction in practice, as it just gets too complicated and administratively burdensome. In addition, the sums involved are rarely worth it, hence our raising a weary eyebrow over the preservation of that split in the amended WTR.

Holiday Entitlement for Irregular Hours and Part-year Workers

- For irregular hours workers and part-year workers (both new defined terms in the WTR – see below), the government is introducing a new method to calculate their holiday entitlement. New regulation 15B provides that in each leave year, an irregular hour worker or a part-year worker accrues annual leave on the last day of each pay period (whatever that may be – weekly, fortnightly, monthly) at the rate of 12.07% of the number of hours worked during that pay period, subject to a maximum of 28 days per leave year. This formula should be used throughout the working relationship and not just for the first year of engagement, as originally proposed. There are some detailed new calculations in the WTR to implement these changes, including specific provisions dealing with how annual leave accrues during a period of sick leave or while the worker is on maternity leave, what happens if they take more or less leave than they are entitled, etc.
- A worker will be an '*irregular hours worker*' if the number of paid hours that they work in each pay period during the term of their contract in the leave year is, under the terms of their contract, '*wholly or mostly variable*'. Clearly, these changes are intended to catch genuine casual workers (or those on zero hours contracts) whose hours vary by the very nature of the arrangement. The government says it could also catch agency workers who satisfy this definition.
- A worker will be a "part-year worker" if under the terms of their contract, they are required to work only part of that year and there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid.
- This change is intended to address the issues caused by the Supreme Court's decision in *Harpur Trust v. Brazel*, in which it held that part-year workers were entitled to 5.6 weeks' leave per year, irrespective of the hours they worked.
- **Action point** – If you engage irregular hours workers or part-year workers, you should review the basis on which you currently calculate their holiday entitlement and make any necessary changes to reflect the new statutory position. Note that these new provisions will apply in respect of any leave years beginning on or after 1 April 2024.

Rolled-up Holiday Pay (RHP)

- The government has abandoned its proposal to introduce RHP for all workers (acknowledging that there seems little benefit of this for full-time or full-year workers) and it will instead only be introducing RHP for irregular hours workers and part-year workers. When it comes to calculating RHP, new Regulation 16A provides that holiday pay may be paid by way of a 12.07% uplift to a worker's remuneration for work done. Such payments must be spelt out in any itemised pay statements for the period to which the statement relates.
- **Action point** – Consider whether you wish to introduce RHP for these categories of worker and whether your payroll systems will be able to handle such calculations. This change does not mean that such workers are not entitled to take holiday during the leave year, simply that they do not get holiday pay when they take such leave. Any employer that introduces RHP should ensure it has systems in place to ensure its workers are taking holiday and that staff are fully informed and consulted about the proposed arrangements.

Record Keeping Obligations

- As the WTR currently stand, Regulation 9 provides that employers must keep "adequate" records showing whether weekly working time limits, night work limits, health assessment, etc., are being complied with. It does not expressly require employers to keep detailed records of all hours worked and there is very little guidance about what "adequate" records are.
- In 2019, there was an ECJ case on recording working hours in which the ECJ held that EU member states must ensure that employers have "objective, reliable and accessible" systems in place to enable them to measure the daily working time of their workers. Questions were raised at the time about whether the WTR were compatible with European legislative requirements, and it was suggested that the government would need to amend the WTR to reflect the ECJ's decision. However, the government now intends to do the opposite and confirm that the ECJ's decision does not change employers record-keeping requirements as set out in Regulation 9.
- To achieve this, the government will amend Regulation 9 so it now says that employers must keep "adequate" records to show whether weekly working time limits, night work limits, etc., are being complied with (no change here). Such records "may be created, maintained and kept in such manner and format as the employer reasonably thinks fit" (new bit – greater flexibility – great). It then goes on to say that an employer need not record each worker's daily working hours to comply with these obligations IF (our emphasis) the employer is able to demonstrate compliance without doing so (other new bit).
- We are not convinced this new wording makes the situation as clear for employers as the government had intended, but businesses should not spend any time worrying about the intricacies of the wording if they are comfortable that they were compliant with the record-keeping requirements of the WTR prior to the ECJ's decision. Furthermore, the responses to the government's consultation suggest that many employers already have systems in place that allow them to record the daily working hours of workers in any event.
- The Health and Safety Executive will apparently be producing updated guidance on this point. Previous guidance issued by it suggested that employers were not obliged to keep detailed records of workers' working hours or create records specifically for the purposes of showing compliance with the WTR, but none of this alters the basic issue that the burden of demonstrating compliance with the WTR rests squarely on the employer, and that there will be no ability to rely on this extra flexibility if the effect of using it is that you can no longer do that.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

- As the law currently stands, only micro-businesses (those with fewer than 10 employees) may inform and consult affected employees directly if there are no existing appropriate representatives in place, e.g. if there is no recognised trade union or employee representatives.
- The government has confirmed it will be going ahead with its proposal to extend the flexibility for employers to consult directly with employees, where there are no existing appropriate representatives in place to small businesses (those with fewer than 50 employees) undertaking a transfer of any size and to businesses of any size undertaking a small transfer (fewer than 10 employees).
- This is a minor change, and it is probably fair to say that it reflects what a lot of businesses do in practice anyway. It is important to flag that the government is not saying that employers do not have to consult with employees on TUPE transfers, or that they can side-step existing representatives, just that in the circumstances outlined above they can consult with employees directly rather than require them to elect representatives for that purpose.
- These changes will apply to transfers that take place on or after 1 July 2024.

Restatement of EU law

- The Retained EU Law (Revocation and Reform) Act 2023 will, amongst other things, remove the interpretive effects of EU law on the UK statute book, i.e. any legislation derived from the EU will no longer have to be considered in light of EU case law, etc. These draft regulations therefore restate the following three principles derived from EU case law to ensure these employment rights are maintained and that the law has the same effect in practice going forward as it did prior to these special EU law features being removed.
  - The right to carry over annual leave into the following leave year where an employee has been unable to take it due to being on maternity/adoption/shared parental leave – this is the case for the full 5.6 weeks' annual leave entitlement.

    Action point – Employers should be doing this already, but they should review their internal processes to confirm compliance.
  - The right to carry over annual leave where an employee has been unable to take it due to sickness – by contrast with holiday deferred due to family-related leave, this applies only to the four weeks' leave under Regulation 13. The worker will be entitled to carry forward such leave, provided it is then taken within 18 months from the end of the leave year in which the leave entitlement originally arose.

    Action point – Again, this is a practice that has been adopted by most employers already, but they should review their internal processes to ensure it is in line with these provisions, in particular how long employees are able to carry over leave for.
  - The right to carry over annual leave into the following leave year where the employer has failed to (i) recognise a worker's right to annual leave or to payment for that leave (e.g. they got their status wrong and incorrectly treated them as self-employed); (ii) give a worker a reasonable opportunity to take the leave or encourage them to do so; or (iii) inform the worker that any leave not taken by the end of the leave year, which cannot be carried forward, will be lost. Again, this protection only applies to the four weeks' leave under Regulation 13.

    Action point – Employers should ensure that going forward, they are cautioning their workers about losing their leave at the end of the leave year (to the extent it cannot be carried forward) to minimise the scope for arguments that their leave has carried over to the following leave year.
- In a separate but similar development, the government is also making some changes to the Equality Act 2010 via the Equality Act 2010 (Amendment) Regulations 2023 to ensure that certain protections as they have been interpreted by EU case law continue once the interpretive effects of EU law on the UK's statute book are removed at the end of 2023, including the right to claim indirect discrimination by association, the "single source" test for establishing an equal pay comparison, etc.

Other Miscellaneous Changes

The government is removing the Working Time (Coronavirus) (Amendment) Regulations 2020, which allowed workers to carry over up to four weeks of leave due to the effects of COVID-19. From 1 January 2024, workers will no longer be able to accrue COVID-19 carryover leave. To the extent they still have leave to take, such workers must use all leave accrued prior to 1 January 2024 on or before 31 March 2024.

The changes outlined above will apply in England, Scotland and Wales.

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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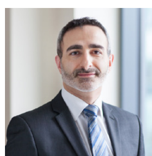

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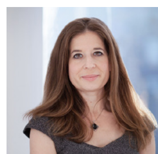

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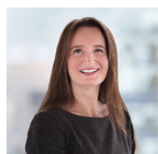

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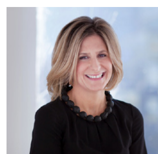

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