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Client Alert

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Employment Law Developments - What's on the Horizon for Employers?

It is an understatement to say that much has changed in the employment space over the past 18 months. We have seen significant changes in employment legislation in response to the pandemic (most notably the furlough scheme, which recently concluded on 30 September 2021). The pandemic forced flexible working on many employers and employees, with many businesses adopting an increased flexible approach to balancing work and home life in the long-term. Employers also responded to the unique challenges faced by carers during lockdown by putting in place more mechanisms to support working carers. We are now seeing how these experiences will shape legislation in the long-term.

The UK Government has now confirmed that employees with caring responsibilities will be given a new entitlement to one week's unpaid leave per year. Public consultation has also opened on potential changes to the statutory right to request flexible working regime. This month's alert is a brief roundup of these recent developments.

CARERS TO GAIN THE RIGHT OF ONE WEEK OF UNPAID LEAVE

In a consultation response published last month, the UK Government has confirmed its intention to introduce a new statutory right for employees with unpaid caring responsibilities to take up to one week of unpaid leave per year (five working days). This right will apply in England, Wales and Scotland.

This follows a public consultation undertaken last year when the pandemic shone a spotlight on the challenge of juggling caring responsibilities and work.

- **Who will be eligible?** This will be a day one right available to employees who provide care for a dependant with a long-term care need. A 'long-term care need' will be defined as a long-term illness or injury, disability, or issues related to old age. There will be exemptions from the long-term requirement in the case of terminal illness. The definition of 'dependant' will follow the

definition used for the statutory right to time off for dependants. That is, a spouse, civil partner, child, parent, a person who lives in the same household as the employee (other than by reason of them being their employee, tenant, lodger, or boarder) or a person who reasonably relies on the employee for care. This last relationship is a catch-all provision which could potentially capture siblings, other relatives and boyfriends/girlfriends.

- **What can the leave be used for?** The leave can be used broadly to provide care or make arrangements for the provision of care for a dependant (who requires long-term care). Examples given include providing personal support, helping with official or financial matters, or accompanying someone to medical and other appointments.
- **How can the leave be taken?** The week of leave could be taken as one block or as single individual or half days. Employees will need to give notice that is twice the length of time being requested as leave, plus one day. Employers can postpone (but not deny) the request on limited grounds where the business would be unduly disrupted.
- **What evidence will be required?** Employees will be able to self-certify that they meet the legal definition of a carer and will not be required to provide any evidence. A false application can be dealt with as a disciplinary matter in the same way as a false claim for sickness absence.

Those taking carer's leave will be protected from suffering a detriment for having done so. Dismissals for reasons connected to using carer's leave will be automatically unfair.

Legislation will be enacted "when parliamentary time allows", which looks unlikely to be before mid-2022. In the meantime, employers can consider whether or not they will choose to pay employees for any carer's leave taken. Policies will need to be updated, as well record-keeping systems to track the number of days taken.

PROPOSALS FOR FLEXIBLE WORKING REFORM

The Conservative party's 2019 election manifesto promised to encourage flexible working and consult on making it the "default" unless employers have good reasons not to. The Government has opened public consultation seeking views on proposals to reform the Flexible Working Regulations (which currently provide employees with the right to request flexible working arrangements once per year).

The proposals are modest and recognize that there is no "one-size-fits-all" solution. The consultation does not propose a "right to have" flexible working. Rather, it is a reshape of the "right to request" framework. Instead of setting out ways of making flexible working the default, the consultation paper is aimed at creating a framework within which discussions can take place fairly between employers and employees about how best to balance particular work requirements and specific individual needs.

The consultation sets out five proposals for "rebalancing" the current framework, seeking views on:

1. Making the right to request flexible working a day one right (rather than requiring a qualifying period of six months).
2. Whether the eight business reasons employers are allowed to rely on for refusing a flexible working request remain appropriate given the dramatic changes to flexible working arrangements since the right to request framework was first introduced (including extra costs, inability to re-organise work among other staff, and negative impact on ability to meet customer demand, quality or performance).
3. Requiring the employer to consider alternative flexible working arrangements before refusing an employee's specific request. Currently, an employer only has to say that a request to work flexibly cannot be accommodated and give the relevant business reason(s) as to why not. To encourage compromise, the government is exploring how practical it is to ask employers to set out, when rejecting a request, that alternatives have been considered (for example, making

the change temporarily, considering other part-time working patterns or making the changes on some working days only).

4. Whether employees should be allowed to make more than one request per year and whether the current three-month period for responding to a request should be shortened.
5. How to encourage use of requesting temporary arrangements for a defined limited period.

No changes to the penalty regime have been proposed (currently capped at a maximum of £4,352 for failing to deal with a request properly). Remedies for non-compliance will remain relatively weak unless the employee also brings a discrimination claim (for example, indirect discrimination against women with childcare responsibilities or a failure to make reasonable adjustments related to a disability).

The consultation paper confirms that employers will not be required to specify in job adverts whether flexible working is available or publish their flexible working policies, both of which had appeared in previous proposals.

Although the proposed changes are limited, the reality is that employers are already under greater pressure to accommodate post-pandemic flexibility. Flexibility is becoming increasingly important in recruiting and retaining staff.

The impact assessment published with the consultation suggests that April 2023 may be the earliest that any measures come into force. Have your say here before consultation closes on 1 December 2021.

EU WHISTLEBLOWING DIRECTIVE

The EU Whistleblowing Directive is due to be implemented into national laws by Member States by 17 December 2021. The Directive establishes a set of common minimum standards for responding to and investigating whistleblowing reports. However, Member States can implement these minimum standards differently and dictate certain details of domestic whistleblowing laws.

The Directive requires companies with 50 or more employees to operate confidential internal reporting channels (including methods for reporting in writing, orally or in person) and report back to the whistleblower with feedback within set timescales. The minimum threshold does not apply to regulated entities in the financial services sector, which are required to establish reporting channels regardless of their headcount.

Companies with 250 or more employees must establish their internal channels and procedures in compliance with the Directive by 17 December 2021 (or a later deadline of 17 December 2023 for companies with 50 to 249 employees).

As a result of Brexit, the UK is no longer required to implement the Directive, but these deadlines remain relevant for clients with wider EU operations.