King & Spalding

Client Alert

Global Human Capital and Compliance

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UK Employment - Key Actions for 2024

Although major employment changes in the UK are largely on hold until the general election later in 2024, there are a number of specific changes impacting daily planning and policies, which need to be on Legal and HR's action list.

Notably, there is no date or confirmed plan to progress the announcement to limit non-competes to three months, and it is unclear that this change will in fact take place.

The key changes and date are recapped below. Further details, with specific action points for employers, follow.

New holiday pay rules	1 April 2024
National living wage increases from £10.52 to £11.44 per hour. Full details of the new wage rates are set out here	1 April 2024
New family-friendly legislation, with new leave entitlements and enhanced redundancy protections for new parents	6 April 2024
Changes to the right to request flexible working, effective 6 April	6 April 2024
Simplified consultation on a TUPE transfer for small businesses	1 July 2024
Employers will have a new duty to ensure that 100% of tips are paid to workers without deductions	1 July 2024
New right to request predictable working hours	September 2024 (to be confirmed)
New duty to prevent sexual harassment in the workplace	26 October 2024
Introduction of Employment Tribunal fees	November 2024 (to be confirmed)

Note: the legislative changes outlined in this alert apply to England, Scotland and Wales, but currently not Northern Ireland, where the legislature has been suspended in recent years (but was last week restored).

HOLIDAY PAY – INCREASED RISK FOR PAST LIABILITY BUT CLEARER RULES GOING FORWARD

October 2023 saw a significant Court decision[i] which opened the door for employees to **claim holiday pay going back two years** (or potentially as far back as 1998 in Northern Ireland).[ii] A 2015 Court[iii] had held that employers cut off liability for past claims to the last three months, where the employer either 'fixes' a holiday underpayment on a go-forward basis or the employee has a three-month gap between holidays. But this new ruling allows workers to claim for two years of underpaid holiday pay where there has been a "series of deductions", for example because the employer has taken the same approach to excluding an element of pay such as commission, from holiday pay.

The UK's Working Time Regulations (WTR) have also been revised with effect from January 2024 to reflect the principle from EU and UK case law that **holiday pay for the four weeks of holiday derived from EU law should reflect a worker's "normal pay".** This means that holiday pay must include commission and payments which have been regularly paid to a worker in the prior 52 weeks. However, employers can limit holiday pay to basic salary only for the additional 1.6 weeks which comes from UK legislation (although many employers will want to take the same approach across the board).

Workers also now have an express statutory right to carry over their four weeks' EU statutory leave into the following holiday year where:

- The worker was unable to take that leave due to sickness absence (although this must be taken within 18 months from the end of the holiday year in which it was accrued).
- The worker was unable to use the leave because of taking other statutory leave (i.e. family related leave). This also applies to the 1.6 weeks of domestic leave.
- The employer failed to recognise the worker's right to paid annual leave (i.e. they have been misclassified as a self-employed contractor).
- The employer has failed to encourage or give the worker a reasonable opportunity to take the leave or informed the worker that leave not taken by end of year will be lost.

There are also two simplifications for the WTR that will help employers:

- From 1 January 2024, the WTR are now clear that an employer will not need to record each worker's daily working hours (in line with EU law) provided they can demonstrate compliance with working time limits and rest breaks without doing so.
- The WTR will now permit 'rolled-up' holiday pay for part-year or irregular hours workers, calculated at an accrual rate of 12.07% of hours worked during the relevant pay period. This is a reversal of the Supreme Court's Harpur Trust decision in 2022 which held that the commonly used method of calculating holiday pay for atypical workers at 12.07% annualised hours was incorrect. This change will apply to holiday years which begin on or after 1 April 2024 and will significantly simplify this overly complex area for workers such as seasonal or zero hours staff.

EU EQUALITY PROTECTIONS BUILT INTO UK LAW

Under Brexit reform legislation passed at the end of 2023, the UK courts are no longer required to interpret laws according to the general principles of EU law and have been encouraged to overturn or depart from EU-derived case

law. But certain EU-derived employment laws have now instead been built into the UK Equality Act 2010. This means there is no change in practice for employers, but employers who may have expected UK law to now be simpler than the EU should take care. The protections carried over include automatic discrimination protections for employees who are pregnant, have a pregnancy-related illness or are breastfeeding, the 'single source' test which enables equal pay claimants to compare themselves employees of a different entity where there is an overarching entity responsible for determining terms and conditions of employment, and the legal meaning of 'disability'.

TUPE 'MICRO BUSINESS' EXEMPTION

For TUPE transfers which take place on or after 1 July 2024, employers no longer need to inform and consult with elected representatives where there are fewer than 50 employees overall or fewer than 10 transferring employees. Instead, they can liaise directly with staff, where there are no existing representatives such as recognised Unions.

FAMILY LEAVE RIGHTS – NEW UNPAID LEAVE FOR CARERS, EXTENDED REDUNDANCY PROTECTIONS FOR PREGNANT EMPLOYEES AND NEW PARENTS

From 6 April 2024, employees will be entitled to one week of **unpaid leave** every 12 months to provide or arrange care for a dependant with a long-term care need. This would cover (i) an illness or injury (either physical or mental) that requires, or is likely to require, care for more than three months; (ii) the dependant being disabled, as defined in the Equality Act 2010; or (iii) reasons related to old age. The right will apply from day one of employment and leave can only be postponed by an employer on limited grounds.

In May 2023, new legislation was passed which will extend the existing **right to priority on redeployment in a redundancy** to a broader group. The right currently applies to employees on maternity, adoption or shared parental leave. From 6 April 2024, it will be extended to pregnant employees (from the point at which they tell employers they are pregnant), an employee who has recently suffered a miscarriage and those who have returned from maternity leave, adoption leave or shared parental leave, for a period of 18 months from the expected week of childbirth or the child's actual date of birth if this is notified to the employer before the end of the leave period. The protected period is shorter where a pregnant employee suffers a miscarriage before 24 weeks (in which case the protected period will end two weeks after the end of the pregnancy) and for employees who take less than six weeks' shared parental leave (where the protection will finish at the end of shared parental leave).

A failure to redeploy, where a suitable alternative role exists in the organisation, will create liability for an automatic unfair dismissal and discrimination. Compensation is uncapped and does not require two years' qualifying service as would otherwise be the case for unfair dismissal protection. Employers planning a restructuring in 2024 will need to be aware of this increase in priority numbers and implement record-keeping systems to keep track of protected periods. They may also need to establish their own priority or selection process, where they have several competing employees with legal priority rights.

RIGHT TO REQUEST FLEXIBLE WORKING FROM 'DAY ONE'

From 6 April 2024, the right to request flexible working will be available to employees from their first day of employment (instead of after 26 weeks' service). In addition, the following changes to the flexible working regime are expected to take effect at the same time (but regulations to actually implement these further changes are yet to be published):

- Employees will be able to make two statutory requests in any 12-month period instead of one.
- Employers will have to respond to a request within two months (instead of three months).

- Employers will be required to consult with staff before refusing a request.
- When making a request, employees will no longer be required to set out the effects of their flexible working request or how these might be dealt with.

More detail is in the Code of Practice here.

CASUAL WORKERS - RIGHT TO REQUEST A PREDICTABLE WORKING PATTERN

New legislation is expected to come into force in September 2024 which will give casual workers (including agency staff) a right to request more predictable terms and conditions of work. The right will apply where there is a 'lack of predictability' in relation to any part of the individual's work pattern. This could mean that they are on a zero hours contract, that their hours or days fluctuate, or they are on a fixed term contract of 12 months or less.

The number of applications will be limited to two within any 12-month period, which would include any flexible working requests asking for a change delivering a more predictable working pattern. We expect the right to be subject to 26 weeks' prior service, but this is still to be confirmed.

An employer will only be able to reject the request for a list of specified reasons, such as insufficiency of work during the periods the worker proposes to work, the burden of additional costs or a detrimental impact on the employer's business (in the same way as flexible working requests). Employers will have one month to respond.

NEW DUTY TO PROACTIVELY PREVENT SEXUAL HARASSMENT

From 26 October 2024, employers will have a new duty to take 'reasonable steps' to prevent sexual harassment at work.

Currently, employers are under no proactive duty to prevent sexual harassment, although if an incident occurs, an employer will potentially be vicariously liable unless it can show it took all reasonable steps to prevent it.

Where an employer fails in the duty and sexual harassment takes place, compensation for the harassment itself can be uplifted by up to 25%. Action may also be taken by the Equality and Human Rights Commission (EHRC) (the UK counterpart to the EEOC). To avoid liability, an employer will need to show it took 'reasonable steps'. What this entails will vary according to an employer's size and resources, but as a minimum, employers should be updating anti-harassment policies, ensuring there is a clear procedure in place for reporting and investigating complaints and refreshing previous anti-harassment training to encourage more proactive monitoring and intervention. The EHRC has confirmed that it will update its existing Code of Practice and technical guidance on sexual harassment in the workplace, which employers will need to follow to be in a position to defend a claim. This will be subject to consultation. We will provide further recommendations in a client alert once finalised.

NEW RIGHT TO NEONATAL CARE LEAVE AND PAY IN 2025

From April 2025, employees will be entitled to up to 12 weeks' leave and pay when their baby requires neonatal care. This means that their baby spends seven days or more continuously in hospital receiving medical or palliative care starting before they reach the age of 28 days. This will be a day one right but to qualify for statutory neonatal care pay, employees must also have 26 weeks' continuous service and meet a minimum earnings test, which will mirror existing family leave pay provisions (currently at least £123 per week).

Neonatal care leave must be taken in the first 68 weeks of a baby's birth. The neonatal leave will operate in addition to the current entitlements to family leave. Neonatal care leave will not be payable during another statutory pay week (such as maternity or paternity leave). More details on eligibility are to follow.

IMMIGRATION – STRICTER PENALTIES

From 13 February, the maximum fine for employing staff without the legal right to work in the UK triples from £20,000 to £60,000 per worker (for a repeat offence), or £45,000 for a first offence. The government has issued new guidance on what checks employers should undertake to avoid liability, here.

NEW ACAS STATUTORY CODE OF PRACTICE ON FIRE AND REHIRE PROPOSED

In early 2023, the government publicly consulted on a draft statutory Code of Practice on dismissal and re-engagement, colloquially 'fire and rehire'. This draft proposal was provoked by issues around P&O Ferries summarily dismissing 800 employees without consultation in 2022 when they did not accept reduced contract terms.

The Code reflects best practice, in terms of providing information to employees as to why they are felt to be necessary and only using 'fire and re-hire' as a last resort. The Code would not impose any legal obligations, but tribunals would have regard to it when considering if an employee has been fairly dismissed and could uplift compensation by up to 25%.

Note the rules and penalties are in fact already more onerous where 20 or more employees would be dismissed (which triggers the UK's collective consultation duties). This would not change.

A government response and the final version of the code are anticipated in spring 2024. More significantly, if the UK election later in 2024 results in a Labour government, they have said they will outlaw 'fire and re-hire'.

EMPLOYMENT TRIBUNAL FEES

The UK government recently announced a proposal to introduce fees for claimants to submit claims in the Employment Tribunal, and the Employment Appeal Tribunal, which is currently free for users. Unlike previous fee proposals, which in the end were abandoned after legal challenge, the purpose seems more to contribute to the cost of the Tribunal system than to deter claims – hence the level of fee is set at only £55, which is lower than the previous fee proposals. Given this low level, and the fact the fee is remitted for low earners, we do not expect it to have a major impact for most employers. If confirmed, the change would come into force later in 2024.

2023 THE YEAR OF INDUSTRIAL ACTION – WILL AGENCY WORKERS STEP IN?

2023 saw unprecedent levels of industrial action, not seen in the UK since the 1980s. Throughout the year railway workers, refuse workers, junior doctors, teachers, firefighters, university staff, civil servants, bus drivers and security workers all went on strike. This trend is set to continue in 2024, with further strikes announced across February and March, with more set to come.

To combat the impact of these strikes, the government has proposed a change in law to allow agency workers to cover the work of staff who are on strike. This is currently under public consultation, so we will wait to see if and when the law changes.

ABOUT KING & SPALDING

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[i] UK Supreme Court, *Chief Constable of Police Service of Northern Ireland v Agnew and others*.
[ii] This is because in Great Britain there is a two-year limit on unlawful deduction claims but the regulations including this limitation period were not introduced in Northern Ireland, where claims can be made from 1998 (when the WTR were introduced) or when employees first commenced employment (if later).
[iii] Employment Appeal Tribunal, Bear Scotland Ltd and Others v Mr David Fulton and Others.