EMPLOYMENT LAW UPDATE
January 2023

Employment Law update

There have been a lot of changes in the area of Employment Law recently.

So, we thought it would be helpful to provide some clarification and give you an update on some of the key areas that may impact your business.

If you would like any help understanding the implications for you, or implementing any of the necessary changes, please contact us on 020 3053 8613 or info@thelegaldirector.co.uk.

Retained EU Law (Revocation and Reform) Bill

This is intended to enable the government, via Parliament, to amend more easily, repeal and replace Retained EU law (REUL). The bill includes a Sunset Date - currently this is 31 December 2023, but it may be pushed back to a date prior to 23 June 2026 if a consensus to delay is reached. Any protections that have not been repealed or amended by that date will fall away.

This Bill has huge ramifications, affecting some 2400 UK regulations across 21 Government departments. As far as its effect on employment Law is concerned, it will impact (among others):

- Working Time Regulations 1998
- The Agency Workers Regulations 2010
- The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 200
- The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

It's Impossible yet to give definitive advice, but we would recommend you keep an eye on the Government's REUL dashboard which is updated quarterly and records where EU-derived legislation remains and where legislation has been amended, repealed or replaced.

Employment status

The Government has currently decided not to legislate on employment status but has issued non-statutory guidance on this fast-moving area. This provides helpful advice on the differences between employees, limb (b) workers and those who are self-employed (including a table of rights that attach to each), as well as an explanation of the key factors in determining status.

It also looks at some of the more difficult issues or developments in this area, such as those associated with gig economy workers, zero hours workers, freelancers, interns and employee shareholders. So, if you need a bit of clarity in this area, the guidance is well worth exploring.

IR35

You are probably aware that the mini budget contained the announcement that employers would cease to be responsible for deciding whether the IR35 tax rules apply to contractors working for them through personal service companies.

On 17 October, Jeremy Hunt announced that the proposed change would not take place. So, determining IR35 status remains the end employer's responsibility.

Fire and rehire

A new Statutory Code of Practice is to be published on the practice of 'fire and rehire', with guidance on how to engage in meaningful consultation with employees when seeking to implement changes to employment contracts by way of terminating existing contracts and offering to re-engage on new terms.

The new Code is expected to detail how businesses must hold fair and meaningful consultations on proposed changes to employment terms, and to provide practical steps for employers to follow.

As a statutory Code, tribunals and courts would be required to take it into account when considering relevant cases, including those for unfair dismissal. This is similar to the current statutory ACAS Code of Practice on disciplinary and grievance procedures, and, as such, a Tribunal would be able to apply an uplift of up to 25% to an employee's compensation where their employer unreasonably fails to follow it.

Once the detail on this has been published, we will update you.

Family and carers' rights

The Neonatal Care (Leave and Pay) Act 2022 has not yet come into force – realistically we're looking at 2024.

This Act will allow parents whose babies need hospital neonatal care to take 12 weeks' paid leave in addition to their statutory maternity or paternity leave.

The right will:

- be available from day one of employment
- apply to parents whose babies are admitted to hospital up to the age of 28 days
- apply to babies who need to stay in hospital for seven days continuously or more.

Menopause rights

The government has now outlined its policy on menopause and employment in response to recommendations from a roundtable set up in July 2021. The policy advises:

- not making changes to the Equality Act 2010 (on the basis that protection against discrimination for menopause is already covered by sex, age and disability discrimination provisions)
- setting up a menopause taskforce to ensure the issue is prioritised in public policy on inclusion and diversity at work
- appointing government 'menopause employment champions' and encouraging larger organisations to do the same.

The House of Commons Women and Equalities Committee has since produced a report on 'Menopause and the workplace', recommending that menopause become a protected characteristic, and dual discrimination claims shoud be made possible under the Equality Act.

Menopause discrimination

Though menopause itself is not specifically mentioned in the EQA, there is no reason in principle why the symptoms can't have the relevant disabling effect on a worker to give them protection from discrimination.

There is growing focus on this issue, and an increasing number of cases related to menopause discrimination. Rooney v Leicester City Council saw the first binding decision, with the Employment Appeal Tribunal holding that it was wrong to find that an employee suffering from significant menopausal symptoms was not disabled under the Equality Act 2010 (EQA).

What should you be doing?

With the menopause now in the spotlight, employers would do well to address any potential issues BEFORE they arise.

We recommend:

- Training managers to signpost and support
- Making reasonable adjustments
- Writing a menopause policy

We can help you with all of this if required. We can deliver training and we have a menopause policy that you can tailor to your business's needs. So, do get in touch if you're interested.

Carers' unpaid leave

The Carer's Leave Bill has been backed by government, so will become law.

Currently, parents have a right to 18 weeks of unpaid parental leave for each child up to 18 but there is no statutory right to any other unpaid carer leave.

When the Act comes into force, there will be a new entitlement to take up to one week of unpaid leave each year to provide or arrange care for a dependant with a long-term care need. This is regardless of length of service. Carers won't be required to show how or for whom it will be used.

Regulations won't be released until later but a lenient approach to giving the notice to take this time off is anticipated. There will be protection against detrimental treatment or dismissal connected to taking leave, so managers may need training on responding to employee requests. Again, if you would like our help with this, do get in touch.

It is worth mentioning that, as an employer, you will have some flexibility about how you wish to implement the new right. You can choose, for example, for the week to be divided into days, and can establish the rules around what notice you require. You also have the right to delay the leave should the request interfere with your business needs.

Fit notes

Since April 2022, the requirement for GPs and other doctors to sign a fit note personally as evidence of an employee's sickness absence has gone - these can now be issued digitally.

More recently, nurses, occupational therapists, pharmacists and physiotherapists working in GP practices or in hospitals will be able to issue and sign fit notes. This is intended to free up GP time for consultations and streamline the process for patients, employers and the NHS. There is government guidance on getting the most out of the fit note which you may find useful.

Reporting thresholds

In October, Liz Truss announced that the business threshold for any future reporting regulations had doubled from 250 employees to 500 employees.

This applies to all new regulations under development, as well as those under current and future review. For example, changes could be made to the gender pay and executive pay ratio reporting regulations.

The government will also look at plans to consult in the future on potentially extending the threshold to businesses with 1,000 employees. We know this will impact a lot of our clients and will let you know if the change occurs.

Pay gap reporting

Ethnicity

The government reported on its response to the Commission on Race and Ethnic Disparities in March and said it would provide its measures that translate the Commission's findings into concrete action within the next 12 months.

In the meantime, they have decided that ethnicity pay gap reporting will not be made compulsory. Employers may still voluntarily compile their own ethnicity pay report and the Chartered Institute of Personnel and Development (CIPD) has issued a guide for employers with suggestions on how to do this, as well as compelling reasons why it's important to do so.

Gender

Gender pay gap reporting was resumed after a pause during the pandemic.

Modern slavery

More reporting requirements came in with the new Modern Slavery Bill, aimed at strengthening the protection and support for victims of human trafficking and modern slavery, particularly through increasing the accountability of organisations to their supply chains.

The Bill:

- Strengthens the requirements on companies with an annual turnover of at least £36m to publish more rigorous annual reports.
- Introduces a single reporting deadline and a mandated format, with organisations subjected to civil penalties in cases where they do not comply with the requirements.

For legislation which has previously been described as "toothless", this move could signify a key change to the current modern slavery statement regime.

Immigration

During the pandemic, employers could use digital means to check employee's right to work in the UK. This ended on 30 September 2022.

New digital 'right to work' checks, using ID validation technology became available for employees with valid British or Irish passports from 6 April 2022. Employers can use an 'identity service provider' (IDSP) to carry out this check, although they remain responsible for checking the identity of their employees and retaining the record for the duration of employment plus two years.

As from 1 October, employers will now need to either:

- Carry out a manual check by physically meeting with the employee to check and copying their original documentation.
- Appoint an IDSP to check the passport of the employee on their behalf or carry out the check themselves using ID document validation technology.

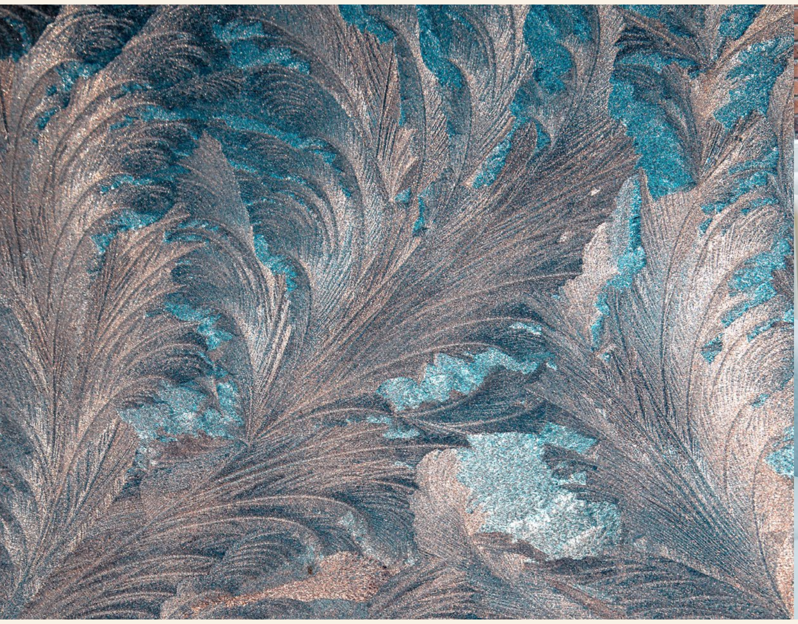
Skilled worker route

'Right to work' visas are available for highly skilled workers (e.g., scientists, engineers, software developers and architects) for scale-up companies. These are companies that:

- Have grown by 20% or more in terms of staffing or annual turnover for at least three years
- Had 10 or more employees at the start of the three years.

As employers, you will need to sponsor the visa for only six months, but the sponsored worker will have two years' leave to remain in the UK during which they can work for any employer without further sponsorship.

Workers using this route will need to be over 18, have an offer of work for six months and be guaranteed a basic salary of at least £33,000.



Tipping

The Employment (Allocation of Tips) Bill, likely to benefit more than two million workers, has passed the Committee stage. Here are the key points:

- Employers may not withhold tips from staff and must distribute tips evenly
- Employers are prohibited from making deductions from tips (including credit card payment processing fees)
- Workers will gain a new right to request information on an employer's tipping record which will help them to bring a tribunal claim under the new rules
- Cases where customers directly pay employees in cash are not covered by the Bill.

A new statutory Code of Practice on how tips should be distributed will be developed. Employers will be required to have a written policy on tipping and keep a written record of their tipping practice in their records. They will also have to give their workers the right to ask questions and demand information about their tipping records. If you are in this position, and would like help developing a tipping policy, get in touch.

The Employment Bill

The Employment Bill will potentially be very wide reaching but is still a work in progress. It will act as a single enforcement agency for employment rights and is likely to include:

- Extended redundancy protection
- The right to request a "predictable and stable contract" after 26 weeks
- Limitations on non-disclosure agreements.

If you would like to get ahead of the game, and improve your policies around these areas, we can review your current documentation and help you implement best practice.

Other government initiatives

Other initiatives in the pipeline include:

- Making flexible working the default
- Introducing a positive duty on employers to prevent sexual harassment
- Extending the ban on exclusivity clauses for low paid workers
- Reforming Human Rights

Holiday pay

The supreme court judgment on Harpur Trust v Brazel clarifies the position on how holiday pay for irregular workers on permanent contracts should be calculated.

It only impacts the calculation for workers on permanent contracts who have irregular working patterns, where their pay corresponds to those working patterns. As such, only workers with no normal working hours and who are paid on an hourly or daily basis will be impacted. It does not impact full-time workers, part-time workers with regular hours or any worker with a fixed salary.

So, what does this mean? Basically, employers can no longer calculate holiday pay for workers with irregular working patterns using the 12.07% method.

For permanent workers with irregular hours, you must calculate holiday pay by looking at the work they have undertaken across a 52-week reference period, discounting the weeks in which they did not receive any pay. You then need to calculate their average week's pay across the 52-week period and multiply it by the 5.6 weeks' annual leave entitlement.

What should you do in response to the change?

We would recommend that you:

- Review your current holiday practices to ensure they comply with the judgment.
- Review and, if necessary, amend contracts of employment and payroll processes. (There is government guidance on calculating holiday pay if you want further help.)

There are ways that you can quantify potential exposure and it is worth spending time undertaking an audit to establish what workers you have on permanent contracts but with irregular hours, who could be impacted by the judgment.

Consider whether to move away from engaging workers on permanent contracts with irregular hours. You may, for example, prefer to engage workers on fixed-term contracts for a specific period to avoid this issue. Alternatively, look at engaging individuals on a self-employed/freelance basis if the work to be undertaken is short and irregular.

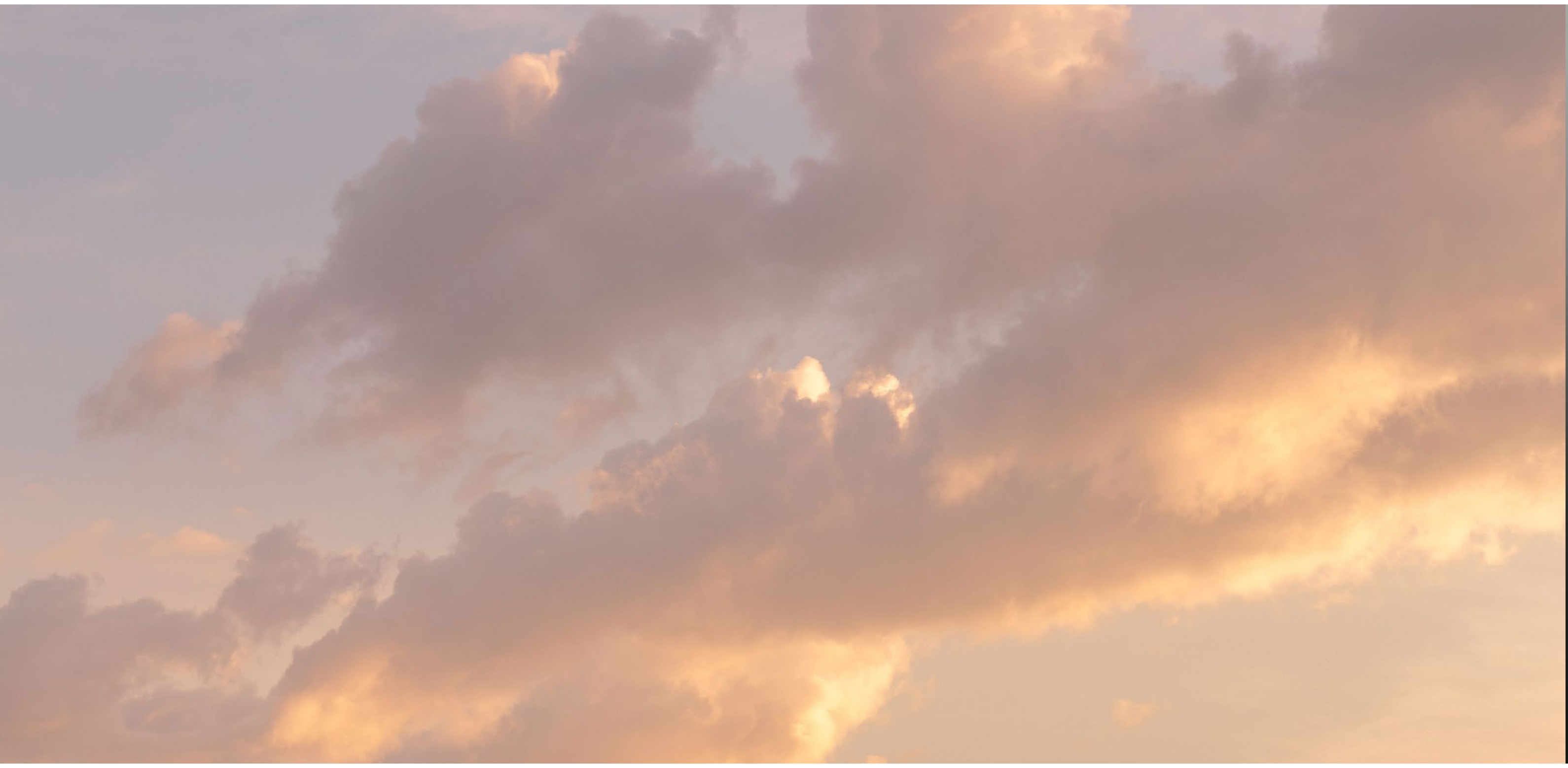
We should point out that an employee's remedy is an unlawful deduction from wages claim and a worker has only three months beginning with the date of the latest deduction to bring such a claim. Where there have been a series or chain of deductions (i.e., regular underpayment of holiday), a claimant can usually only claim up to a maximum of two years from the date of the most recent deduction. Additionally, where there has been a gap of more than three months between deductions, the chain will be broken.

In some circumstances it may be worth paying the higher holiday entitlement in exchange for the flexibility offered through the use of permanent zero hours contracts. If you're unsure what measures are best for your business, please get in touch. We can conduct the audit ourselves and advise you on the most suitable contracts to adopt.

Long Covid – is it a disability?

In the first tribunal case on this point, Burke v Turning Point Scotland, an employee with long Covid symptoms was classed as disabled within the meaning of the EQA 2010. Mr Burke contracted Covid-19 in November 2020 and consequently experienced continuing symptoms including fatigue, joint pain and insomnia.

He was seen by occupational health professionals on two occasions in April and June 2021, and both reports concluded it was unlikely that he was disabled and that he was fit to return to work. He did not return as he was still suffering with symptoms and in August 2021 he was dismissed for his continued absence. Burke claimed for disability discrimination and unfair dismissal.



At a preliminary hearing on the question of disability, the tribunal held that Mr Burke's symptoms had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities and therefore he was disabled.

What does this mean for you?

If you have been put on notice that an employee has a potential disability, to reduce the risk of claims, you should:

- Seek expert medical evidence (GP/ Occupational Health) on the extent of the issue and its effect on the employee's ability to carry out their job
- Put in place any reasonable adjustments to remove or reduce the disadvantage caused by the disability on the employee's normal day-to-day activities.

Note, the onus is on you as the employer to take reasonable steps to ascertain the position, rather than on the employee to volunteer medical information (beyond the duty to submit sick notes).

Here to help

We hope you have found this useful. As we mentioned last month, we can support you with implementing best practice in employment law. We can conduct audits, redraft contracts and policies, and run training on your behalf. So, please do get in touch on **020 3053 8613** or **info@thelegaldirector.co.uk** if you would like our help.

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