

Government announces intention to change the working time regulations, TUPE and non-compete clauses

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On 10 May the Government published a policy paper “Smarter Regulation to Grow the Economy” setting out a number of regulatory reforms intended to grow the economy and cut costs for businesses, following the UK’s departure from the EU. The employment law measures included in the paper include removing reporting requirements from the Working Time Regulations 1998; simplifying the calculation of holiday; introducing a new exception from the application of the TUPE Regulations to smaller businesses; and limiting non-compete clauses to three months.

Working Time Regulations (WTR)

The Government wishes to reduce the administrative burden and complexity of calculating holiday pay. To do this it is proposing to consult on three reforms:

- To allow ‘rolled-up holiday pay’. This practice has been technically unlawful for some years, however, it is still commonly used by employment businesses as these payments can be offset against WTR holiday pay if they are clearly set out;
- Merging the current ‘basic’ (4 weeks) and ‘additional’ (1.6 weeks) leave entitlements under the Regulations into one entitlement to annual leave, while maintaining the same amount of leave entitlement overall (5.6 weeks);
- Removing the requirement on businesses to keep working hours records.

TUPE

Currently, businesses cannot consult employees directly where they do not have employee representatives in place. Instead there is a requirement to elect new employee representatives. There will be a consultation on removing this requirement for businesses with fewer than 50 people and transfers affecting less than 10 employees, allowing businesses to consult directly with the affected employees.

Non-compete clauses

The Government intends to legislate “when parliamentary time allows” to limit the length of non-compete clauses to 3 months. The paper makes it clear that employers will still be able to restrict activities during (paid) notice periods or garden leave - the three month limit will apply only to post-termination covenants. These reforms will also not cut across arrangements on confidentiality, non-solicitation, non-poaching or non-dealing clauses, nor will they affect restrictions on (former) public sector employees under the business appointment rules.

Revocation (or not...) of EU laws

The Government also announced yesterday that it is also making a significant change to the Retained EU Law (Revocation and Reform) Bill. As the Bill is currently drafted, almost all EU law is automatically revoked at the end of 2023, unless a statutory instrument is passed to preserve it.

That approach is being completely reversed, so that EU law will remain binding in the UK unless it is expressly revoked. The Bill will be amended to contain a list of the retained EU laws that the Government intends to revoke on 31 December 2023. This list was published on 11 May - for employment law this will be limited to repealing the Posted Workers Regulations (*The Posted Workers (Enforcement of Employment Rights) Regulations 2016 and The Posted Workers (Agency Workers) Regulations 2020*). All other retained EU laws not on the list (for example protecting part-time and agency workers) will remain valid for now.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Most of these changes will not involve significant practical change to large employers, however, clarification in relation to rolled up holiday pay will be welcome in some sectors. In addition, it will be important to consider the drafting of your

restrictive covenants if you regularly use covenants of 6 month or 12 months duration.

The reversal of the approach regarding revocation of EU laws is also welcome as the previous stance had led to much uncertainty. The impact at this stage on employment law is small, however, we will monitor whether there are likely to be any further changes. The Government made it clear, in its press release, that it will retain the powers that allow it to continue to amend EU laws, so more complex regulation can still be revoked or reformed after proper assessment and consultation.

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