

Government changes approach to discarding EU laws and announces plans to reform the Working Time Regulations 1998 and TUPE

The Government has backtracked on its pledge to discard all retained EU laws at the end of year. Instead, around 600 pieces of legislation will be revoked, including some relatively niche employment laws. The rest will remain on the statute books but may be reformed over time. In connection with this, the Government has already announced plans to reform the Working Time Regulations 1998 and the Transfer of Undertakings (Protection of Employment) Regulations 2006.

What is the Retained EU Law Bill?

A large proportion of the UK's legal framework – including its employment law framework – was underpinned by the law of the European Union as follows:

- EU “directives” had to be implemented into UK law, either as an Act of Parliament or a statutory instrument.
- Certain other forms of EU law were directly applicable in the UK without the need for any implementing laws.
- Decisions of the Court of Justice of the European Union were also binding on the UK.

Brexit required changes to be made to this legal framework. Acts of Parliament which implemented EU directives (e.g. the Equality Act 2010) remained in place. However, all the relevant statutory instruments would have automatically fallen away upon Brexit. To avoid legal chaos when Brexit happened, the Government decided to keep these statutory instruments and transfer them into UK law. It also chose to keep directly applicable EU law and decisions of the Court of Justice of the European Union made on or before 31 December 2020. Together, all these laws and decisions became known as “retained EU law”.

In September 2022, the Government decided that the time was right to look again at whether retained EU law should be kept or repealed. The Government published the [Retained EU Law \(Revocation and Reform\) Bill](#) (the Bill), which is aimed at removing the presence and influence of retained EU law within UK law. Initially, the Bill provided that all retained EU law contained in statutory instruments would automatically expire on 31 December 2023 unless a positive decision was made to keep it after this date. This was referred to as the “sunset” provision.

How has the Government changed its approach?

On 10 May 2023 the Government performed a surprise U-turn on the sunset provision. The Government [announced](#) that it would table an amendment to the Bill which would scrap the sunset provision and replace it with a list of around 600 pieces of retained EU law to be revoked on 31 December 2023. Any piece of retained EU law which was not included in that list would stay on the statute books (for now at least – it may be revoked or reformed at a later date).

Why did the Government change its approach? It had become clear that civil servants would simply not have enough time to assess which retained EU laws should be kept, reformed or discarded before the sunset date. If the sunset provision had stayed, the concern was that we would be left with a legal vacuum on 1 January 2024 – including in the field of employment law.

Will any retained EU employment laws be revoked on 31 December 2023?

Yes. The Government's [list of retained EU law to be revoked](#) contains the following employment laws:

- The Posted Workers (Enforcement of Employment Rights) Regulations 2016.
- The Posted Workers (Agency Workers) Regulations 2020.
- The European Cooperative Society (Involvement of Employees) Regulations 2006.

The concepts of a “posted worker” and a “European Cooperative Society” do not apply to the UK as they did when we were members of the EU. The consultation says the revocation of these rules should be regarded as a “*tidying up of the statute book*”.

Will any retained EU employment laws be kept or reformed after 31 December 2023?

Yes. On 12 May 2023, the Government published a [consultation](#)

[paper](#), setting out its plans regarding the future of retained EU employment law. The consultation confirms the Government's intention to keep retained EU employment laws in the following areas without any change:

- Family leave rights (maternity, paternity, adoption and parental leave).
- "Atypical" workers' rights (part-time workers, fixed-term workers and agency workers).
- Information and consultation rights.

However, some reforms are proposed to the Working Time Regulations 1998 (**WTR**) and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) namely:

- Changes to working time record-keeping requirements.
- Changes to annual leave entitlements.
- Introduction of "rolled up" holiday pay.
- Changes to the consultation requirements under TUPE.

You can read our detailed briefing on the proposed changes [here](#).

What are the next steps?

The Bill has completed its passage through the House of Commons and is currently at the report stage in the House of Lords (meaning it has almost completed its passage there). There will then be a consideration of amendments before the Bill passes into law. Assuming that the Bill

passes in its revised format, the employment laws concerning posted workers and European Co-operative Societies will be revoked on 31 December 2023.

The consultation seeking views on the proposed reforms to the WTR and TUPE closes on 7 July 2023. The Government will need to consider the responses and decide what changes, if any, it wishes to make to the law. Its position will be set out in a response paper, which we would expect to be published by the end of 2023. Legislation will then need to be passed, meaning that the reforms to the WTR and TUPE are unlikely to take effect before the latter part of 2024 at the earliest. However, we will continue to monitor this development and keep you updated.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Government consults on reforms to working time rules, holiday pay and TUPE

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The [consultation paper](#) confirms the Government's intention to keep retained EU employment laws in the following areas without any change:

- Family leave rights (maternity, paternity, adoption and parental leave).
- "Atypical" workers' rights (part-time workers, fixed-term workers and agency workers).
- Information and consultation rights.

However, certain reforms are proposed in the areas of working time, paid holiday rights and rights upon the transfer of a business or an outsourcing. The Government says it has identified areas for reform of laws it considers are *"too onerous for business to be used effectively or too complex for workers to know, understand and use"*.

It is seeking views on the following changes.

Changes to working time record-keeping requirements

In 2019, the ECJ [ruled](#) that the Working Time Directive (WTD) required employers to have a system in place to measure the daily working time of all workers. Importantly, that system had to go beyond merely recording overtime hours or drawing upon other sources of information which could be pieced

together to identify daily working hours. The system of recording daily hours had to be objective, reliable and accessible.

The consultation says the Government believes that this requirement is "*disproportionate*" and "*damaging to relationships between employers and their workers*" (although it is not said exactly how it is damaging). The Government wishes to legislate to clarify that businesses do not have to keep a record of daily working hours of their workers.

In fact, the Working Time Regulations 1998 (**WTR**) (which implement the WTD) only require employers to keep adequate records to show whether the weekly working time limits (and night work limits) are being complied with. Currently, there is no requirement in the WTR to record daily or weekly rest breaks, or the actual number of hours worked overall each day. Therefore, the proposal does not involve removing anything from the WTR, rather it would mean adding a new provision stating that such records are not required.

Technically speaking, employers should have complied with the daily working time record-keeping obligation following the ECJ's decision. Yet we suspect that many employers would not even have been *aware* of the ECJ's ruling and, even if they had been, would not have put in place such a system without it being required expressly by the WTR. In conclusion, this reform is unlikely to make much difference in the real world to the way that the majority of employers are managing their working time records.

Creation of a single annual leave entitlement of 5.6 weeks

Currently, the WTR provides that workers are entitled to 5.6 weeks' annual leave per year. However, this holiday entitlement is split into two allocations:

- 4 weeks' leave as required by the WTD (known as "regulation 13 leave"); and
- 1.6 weeks' leave which was granted by the UK Government on top of the minimum WTD requirement (known as "regulation 13A leave").

Different rules about pay apply to regulation 13 leave and regulation 13A leave. Workers should be paid their "normal pay" for regulation 13 leave, which may include things like commission, bonuses, allowances and some types of overtime payment. In contrast, workers are only entitled to be paid basic pay for regulation 13A leave.

The consultation says having these two types of leave causes administrative hassle for employers and confusion for workers. The proposal is to replace regulation 13 leave and regulation 13A leave with a new regulation creating a single statutory annual leave entitlement of 5.6 weeks. Therefore, the amount of leave per year will not increase or decrease, rather this is a "behind the scenes" change to make the management of such leave more straightforward.

In terms of pay for the new single pot of annual leave, the consultation says that the new regulation would set out the

minimum rate of holiday pay. The consultation seeks views on what that rate of pay should be. Ultimately, if the Government decided that only basic pay should be paid for the whole 5.6 weeks this will represent a cut to the holiday pay of workers who are normally in receipt of additional elements of pay such as commission and overtime.

Additional changes are also proposed in relation to the accrual and carry-over of annual leave.

On the accrual of leave the proposal is that workers should accrue their annual leave entitlement at the end of each "pay period" (rather than each month as is currently the case) until the end of the first year of their employment. The aim is to provide workers with a steady amount of holiday entitlement as they work and to simplify the calculation of holiday entitlement for employers.

On the carry-over of unused leave the proposal is to remove the regulations which permitted workers to carry over their regulation 13 leave into the following two annual leave years where it was not reasonably practicable to take it during the coronavirus pandemic. The consultation notes that these regulations are no longer needed. Apart from this change, the rules on carry-over would not change (i.e. 4 weeks' annual leave *could not* be carried over unless the worker was unable to take it in certain scenarios and 1.6 weeks' annual leave *could* be carried over where there was a written agreement between the worker and employer).

Introduction of rolled-up holiday pay

“Rolled-up” holiday pay is a system where no holiday pay is paid when a worker actually takes annual leave, but, instead, an additional amount of pay is added to their pay for periods of work. In other words, the additional pay represents a payment in lieu of holiday pay. In 2006, the ECJ [ruled](#) that the practice of rolled-up holiday pay was unlawful and that workers should be paid holiday pay at the time that the annual leave is taken. The UK Government did not amend the WTR in line with the ECJ’s ruling, however, it updated [non-statutory guidance](#) to provide that rolled-up holiday was not permitted.

The consultation proposes that rolled-up holiday pay be introduced as an option for all workers. Employers could choose between paying holiday pay when the worker takes the annual leave or “rolling up” holiday pay with wages and not paying anything during periods of annual leave. It is said that this system would make life simple for employers as the calculation of holiday pay would be a straightforward enhancement to every pay slip. The consultation proposes that the default enhancement rate is 12.07% of the worker’s pay (which is the result of 5.6 weeks’ annual leave divided by 46.4 working weeks of the year).

This reform will be welcomed by employers of workers who work irregular hours or part-year arrangements as it will simplify the calculation of holiday pay significantly.

Changes to TUPE consultation requirements

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) protect employees’ rights when the business or undertaking for which they work transfers to a new employer, either when the business changes owner or a service

transfers to a new provider. Currently, before such a transfer, the outgoing employer must inform and consult with representatives of the affected employees. These can be existing representatives (e.g. trade union representatives) or ones that are elected just for this purpose. However, outgoing employers with up to nine employees may inform and consult with affected employees *directly* if there are no existing representatives in place.

The consultation proposes that the option of consulting with affected employees directly should be extended to businesses:

- with up to 49 employees; and
- with any number of employees where a transfer of up to nine employees is proposed.

However, this option would only be available where there were no existing representatives. The aim is to help businesses avoid the administrative burden of holding elections for employee representatives. This reform will be welcomed by employers – albeit that consulting with, say, 40 employees may be more challenging than consulting with just three or four representatives.

What are the next steps?

The consultation closes on 7 July 2023. The Government will

need to consider the responses and decide what changes, if any, it wishes to make to the law. Its position will be set out in a response paper, which we would expect to be published by the end of 2023. Legislation will then need to be passed, meaning that the reforms are unlikely to take effect before the latter part of 2024 at the earliest. However, we will continue to monitor this development and keep you updated.

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Polly Rodway presenting at “Maternity & Pregnancy Rights Update – Case Law, Legislation & Future Developments” webinar

On 26 May 2023, BDBF Partner Polly Rodway will be presenting a webinar entitled “Maternity & Pregnancy Rights Update – Case Law, Legislation & Future Developments” in conjunction with MBL Seminars. In this session, Polly will discuss recent maternity and pregnancy discrimination claims, legislative changes and research and campaigns which may influence change in the future.

[Register here.](#)