Special treatment in redundancy situations to be extended to pregnant employees and family leave returners from 6 April 2024

The draft Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 were laid before Parliament on 11 December 2023. The Regulations set out the details of how special protection in redundancy situations will be applied to pregnant employees and certain family leave returners. This detailed briefing explains how the new rights will work in practice.

What is the current position?

Currently, employees absent on either maternity, adoption or shared parental leave are afforded special protection in redundancy situations. The law provides that before making a woman who is on maternity leave (or an employee on adoption or shared parental leave) redundant, an employer must offer a suitable alternative vacancy to them, where one is available. In other words, the employee moves to the front of the queue for such roles, ahead of other colleagues and has a right of first refusal of such a role. If an employer fails to comply with its obligations in this respect, the employee may be able to bring an automatic unfair dismissal claim.

In 2019, the Government consulted on extending this protection

to pregnant employees and those who had recently returned to work following a period of maternity, adoption or shared parental leave. To this end, the Government backed a Private Members' Bill – the Protection from Redundancy (Pregnancy and Family Leave) Bill – which aimed to deliver these changes.

What new rights and protections will employees be given?

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 came into force on 24 July 2023. The Act allowed for secondary legislation to be made which would set out the detail of how the new rights would work. The draft Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 were laid before Parliament on 11 December 2023. If passed in their current format, the Regulations will introduce the changes set out below.

Pregnant employees

Pregnant employees who are at risk of redundancy will have priority for any suitable alternative vacancy that is available. This will be known as the "protected period of pregnancy".

The protected period of pregnancy **starts** on the day that the employee informs her employer of her pregnancy (where the notification is made on or after 6 April 2024). In practice, most women notify their employers when they are around 12 weeks' pregnant. However, it should be remembered that if a woman notifies her employer before then (for example, if she has a high-risk pregnancy), her protection will start at that point. The regulations do not stipulate how the notification

should be made and so employers should work on the assumption that an oral notification to an appropriate member of staff would count.

The protected period of pregnancy **ends** on the day that the statutory maternity leave starts (when the existing protection during maternity leave would kick in). However, where a woman suffers a miscarriage before 24 weeks of pregnancy, her additional protected period will end two weeks after the end of the pregnancy. Where a woman suffers a stillbirth after 24 weeks of pregnancy, she would remain entitled to statutory maternity leave (meaning the protection would end of the day that her maternity leave started).

Maternity leave returners

Employees returning to work from a period of maternity leave ending on or after 6 April 2024, and who are at risk of redundancy, will have priority for any suitable alternative vacancy that is available. This will be known as the "additional protected period".

The additional protected period **starts** on the day after the last day of the employee's statutory maternity leave. In practice, this may pre-date the day the employee actually returns to the workplace. For example, it is common for employees to tag a period of holiday or parental leave onto the end of the maternity leave period. It is important for employers to remember that employees who do that are within the additional protected period.

The additional protected period **ends** 18 months after the date

of the child's birth, provided that this has been notified to the employer. Employers may stipulate that such notification is given in writing. If notification of the birth date is *not*given, then the additional protected period will end 18 months after the first day of the expected week of childbirth.

In practice, this means that the additional protected period will differ depending on when the woman starts her maternity leave in relation to the date of the child's birth (or the first day of the expected week of childbirth) and how much maternity leave she takes. For example:

- Jane notified her employer of her pregnancy when she was three months' pregnant. As Jane had a high-risk pregnancy, she started her statutory maternity leave two months before the expected week of childbirth. Her child was born in that week, and she notified her employer of the date. She took her full 12 months' maternity leave entitlement. She returned to work ten months after the birth date. Jane would have an **additional protected period of eight months** (being 18 months after the birth).

- Sarah notified her employer of her pregnancy when she was three months' pregnant. As Sarah wished to maximise the amount of time off with her baby, she started her statutory maternity leave in the expected week of childbirth. Her child was born in that week, and she notified her employer of the date. She took her full 12

months' maternity leave entitlement. She returned to work 12 months after the birth date. Sarah would have an **additional protected period of six months** (being 18 months after the birth). Note that if Sarah had elected to tag one month's annual leave on to the end of her maternity leave, this six-month additional protected period would span the one month's annual leave and a further five months when she was back at work.

- Huda notified her employer of her pregnancy when she was three months' pregnant. Huda started her maternity leave in the expected week of childbirth. Her child was born in that week, and she notified her employer of the date. However, Huda only took three months' maternity leave. She returned to work three months after the birth date. Huda would have an **additional protected period of fifteen months** (being 18 months after the birth).

At first sight this appears anomalous, however, Jane, Sarah and Huda's overall period of protection starting with the notification of pregnancy and ending with the end of the additional protected period would be the same i.e. 24 months in total. How? Jane had a shorter protected period of pregnancy (since she started her maternity leave quite early) and so she benefits from a longer additional protected period after her maternity leave ends. In contrast, Sarah had a longer protected period of pregnancy (since she started her maternity leave at the latest possible point) and so she has a shorter additional protected period after her maternity leave. Huda was similar to Sarah in that she also had a

longer protected period of pregnancy (again, she started her maternity leave at the latest possible point), but because she took such a short period of maternity leave, she benefits from a longer additional protected period after her maternity leave ends.

The key takeaway point is that there is no "one size fits all" in terms of the length of the additional protected period after maternity leave. It will depend on when the birth date (or the first day of the expected week of childbirth) fell during the maternity leave (i.e. earlier or later) **and** how long the maternity leave lasts. Employers will need to take care to calculate the exact period of protection available to each maternity leave returner.

Adoption leave returners

Employees returning from a period of adoption leave ending on or after 6 April 2024, and who are at risk of redundancy, will have priority for any suitable alternative vacancy that is available.

The additional protected period **starts** on the day after the last day of the employee's statutory adoption leave. As above this may pre-date the day the employee actually returns to the workplace if they tag a period of holiday or parental leave onto the end of the adoption leave period.

The additional protected period **ends** 18 months after the day the child is placed with the employee for adoption (or the date they enter Great Britain in the case of overseas adoptions).

As with maternity leave, there is no “one size fits all” in terms of the length of the additional protected period after adoption leave. By way of example:

- Ravi started his adoption leave two weeks before the child was placed with him for adoption. He took eight and half months’ adoption leave and returned to work eight months after the adoption placement date. Ravi would have an additional protected period of 10 months.

- Zoe started her adoption leave on the date the child was placed with her for adoption. She also took eight and a half months’ adoption leave. Zoe would have an additional protected period of nine and a half months.

- Yusuf started his adoption leave on the date the child was placed with him for adoption. He took three months’ adoption leave. Yusuf would have an additional protected period of 15 months.

As these examples show, the length of the additional protected period will depend on when the adoption leave starts in relation to the adoption placement date (which can be no more than two weeks before the placement date) and how long the adoption leave lasts after the placement date. Again,

employers will need to take care to calculate the exact period of protection available to each adoption leave returner.

Shared parental leave returners

Employees who start a period of shared parental leave of at least six consecutive weeks or more on or after 6 April 2024, and who are at risk of redundancy, will have priority for any suitable alternative vacancy that is available.

The additional protected period **starts** on the day after the employee has taken six consecutive weeks of shared parental leave. Note that where the period of shared parental leave is below six consecutive weeks, there is no additional protected period (although the employee will be protected *during* the shared parental leave period, as is currently the case).

The additional protected period **ends** 18 months after the day the child was born or placed with the employee for adoption (or the date they enter Great Britain in the case of overseas adoptions).

Tying the end of the additional protected period to the birth date (or adoption placement date), neutralises any difficulties which might have been caused by employees taking blocks of discontinuous leave. For example:

- Jakub’s baby is born on 1 January 2024.

- Jakub takes his first block of shared parental leave on between 1 February 2024 and 31 March 2024.

- Jakub returns to work between 1 April 2024 and 31 October.

- Jakub takes his second block of shared parental leave between 1 November 2024 and 31 December 2024.

- The additional protected period started on 14 March 2024 (i.e. the day after Joe had completed six consecutive weeks of shared parental leave) and ended on 1 July 2025 (being the day after 18 months from the birth of his baby).

Therefore, the calculation of the additional protected period for shared parental leave returners is relatively straightforward. All the employer needs to know is the birth date (or adoption placement date). However, if the employee has also taken a period of either maternity or adoption leave, then the additional protected period must be calculated according to the maternity or adoption rules discussed above.

Protection from dismissal

Protected employees will have the right to claim automatic unfair dismissal claim where an employer fails to comply with its obligations regarding offering suitable alternative vacancies and the employee is dismissed as a result.

Separately, there is also a risk of discrimination claims being brought against employers who get it wrong.

What steps should employers take now?

Employers should consider the following issues:

- Who will have responsibility for updating any relevant staff-facing procedures and internal guidelines on how to manage a redundancy process?

- Who will deliver training to members of HR and managers who have responsibility for redundancy processes? These groups will need to understand the new rules, know how to apply them and be clear about the consequences of non-compliance.

- To what extent will any imminent redundancy plans be affected by the new rules? The extension of the protection is likely to increase the numbers of employees who have priority status for suitable alternative roles. In particular, employers will need to consider how to approach situations where there is an alternative role which would be suitable for multiple protected employees. It seems likely that a further selection process would be needed to select the best candidate for the available role.

- Who will be responsible for calculating the length of protection available to returners in each case and communicating the same to managers and other stakeholders? Given the potential nuances discussed above, it will be important not to take a broad-brush approach. Doing so risks misidentifying the protected period and exposes employers to automatic unfair dismissal claims.

Protection from Redundancy (Pregnancy and Family Leave) Act 2023

The Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 (draft)

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.

Employees to have new right

to take one week's carer's leave from 6 April 2024

The draft Carer's Leave Regulations 2024 were laid before Parliament on 11 December 2023. The Regulations set out the details of how the new carer's leave regime will operate. This detailed briefing explains how the new rights will work in practice.

What is the current position?

Currently, employees with caring responsibilities have no specific right to take leave in order to discharge their caring duties. They may be able to take other relevant forms of leave where they meet the eligibility requirements, such as unpaid time off for dependant emergencies or unpaid parental leave. Eligible employees may also be able to request temporary or permanent flexible working arrangements.

However, the charity Carer's UK has reported that many affected employees either do not identify themselves as carers, or are uncomfortable about raising personal matters at work. The result is that many carers struggle on in silence. These pressures have led one in ten carers to consider reducing their working hours or giving up work altogether, with over 200,000 people per year end up leaving the workplace.

To help address this issue, in September 2021, the Government confirmed that a Day 1 employment right to carer's leave would

be introduced. The Carer's Leave Act 2023 finally came into force on 24 May 2023. The Act provided the pathway to new rights and protections at work for employees who have caring responsibilities. It allowed for secondary legislation to be made which would set out the detail of how the new rights would work. The Carer's Leave Regulations 2024 were laid before Parliament on 11 December 2023. Together, the Act and the Regulations (if passed in their current form) will introduce the new carer's leave regime on 6 April 2024.

What is the right and who qualifies for it?

Employees will have a Day 1 right to take at least one week's unpaid carer's leave in any 12-month rolling period to provide or arrange care for a "dependant" who has a "long-term care need".

In this context, "dependant" means:

- a spouse, civil partner, child or parent of the employee;
- someone who lives in the same household as the employee (but not someone who is the employee's boarder, lodger, tenant, or employee);
- someone else who reasonably relies on the employee to provide or arrange care.

The dependant must also have a “long-term care need” – this means:

- an illness or injury (whether physical or mental) that requires, or is likely to require, at least three months of care;
- a disability under the Equality Act 2010; or
- care needs relating old age (although “old age” is not defined).

However, neither the Act nor the Regulations define what counts as “providing care” or “arranging care” and so this is left open to interpretation.

In cases where an employer provides a contractual right to carer’s leave, an employee is not entitled to exercise the new statutory right and the contractual right separately. However, they may take advantage of whichever right is more favourable to them in any particular respect.

How should the employee’s carer’s leave entitlement be calculated?

The right is to take one week's leave. This means that full-time employees are entitled to take up to five working days' leave. This should be pro-rated for part-time employees to reflect their working arrangement (e.g. an employee who worked a 60% FTE arrangement would be entitled to three days' leave).

In the event that the employee's working time varies, or they work in some weeks but not others, a "week's leave" must be calculated by dividing the total of the periods that the employee is normally required to work in a 12-month period by 52. Special rules will apply where the employee is in the first year of employment, which mean that this calculation cannot be performed.

How may carer's leave be taken?

Employees may take carer's leave in discontinuous blocks of at least half a working day. The leave can be taken at different times and need not be taken on consecutive days. Alternatively, the leave may be taken as a continuous block of one week's leave. For example:

- Akash's wife was in a bad car accident and sustained damage to her legs. She needs specialist physiotherapy once a week for three months and needs assistance to get to and from the appointments. If Akash works full-time, he could ask to take half a day's leave on up to ten separate occasions, or a full day's leave on up to five separate occasions, in order to assist his wife.

- Jessica’s elderly father needs to move into a care home. Jessica may ask to take a week off for the purpose of visiting different care homes to identify a suitable home for her father and deal with the administration and practical issues associated with the move.

What are the notification requirements?

In order to qualify for carer’s leave, employees must comply with the notice requirements set out in the Regulations.

- Employees are required to give their employer notice of their intention to take carer’s leave. The notice must specify that they are entitled to take carer’s leave. Employers cannot require employees to supply evidence of their entitlement to take carer’s leave and, instead, must rely on the employee’s self-certification.

- The notice must set out the days (or half days) that the employee wishes to take as leave. The notice may relate to all or part of an employee’s overall carer’s leave entitlement (but if it only relates to part of their entitlement, they will need to serve a further notice when they wish to take a further period of leave).

- The amount of notice that must be given to the employer differs depending on the amount of leave requested. For blocks of leave of 1.5 days or under, the employee must give at least three days' notice before the first period of leave specified in the notice. For blocks of leave of two days or more, the employee must give double the number days of leave specified in the notice before the first day of leave (e.g. two weeks' notice must be given in order to take a week's leave, or seven days' notice must be given in order to take 3.5 days' leave). The Regulations provide that an employer may choose to waive the requirement to give notice in this way.

The Regulations do not require the employee's notice to be given in writing. However, there is nothing to prevent employers from asking employees to provide such notices in writing, and it would be sensible to do so to avoid requests getting missed.

Can an employer postpone a period of carer's leave?

An employer may postpone a period of carer's leave where it reasonably considers that the operation of its business would be "unduly disrupted" if the employee took carer's leave on the employee's chosen date/s. In such circumstances, however, the employer must permit the employee to take the requested period of carer's leave at another time. This must be no later than one month from the first day of the leave requested by the employee and the employer is required to consult with the employee about the new start date (although there are no rules on what form this consultation should take).

Where an employer postpones a period of carer's leave, it must provide the employee with written notice of the same, stating the reason for the postponement and setting out the newly agreed dates for the leave. This notice must be given to the employee as soon as reasonably practicable and not later than seven days after the employee's notice was given to the employer or before the first day of leave requested by the employee (whichever is the earlier).

What rights does an employee have during and after a period of carer's leave?

During any period of carer's leave, the employee has the right to benefit from the existing terms and conditions of employment that would have applied but for the leave, save for terms and conditions about wages or salary. In other words, the leave is unpaid.

After any period of carer's leave, the employee has the right to return to the same job they were employed in immediately before the absence. The employee's seniority, pension and similar rights should be the same as they would have been had the employee not been absent. The employee's terms and conditions should be no less favourable than those that would have applied had the employee not been absent.

When can an employee complain to an Employment Tribunal?

An employee will have the right to complain to an Employment Tribunal and seek compensation where the employer has:

- subjected them to a detrimental act or omission because the employee took, sought to take, or made use of the benefits of, carer's leave, or because the employer believed the employee was likely to take carer's leave; and/or

- dismissed them (or selected them for redundancy) and the reason or principal reason for dismissal (or selection for redundancy) was because the employee took, sought to take, or made use of the benefits of, carer's leave, or because the employer believed the employee was likely to take carer's leave. Any such dismissal would be "automatically" unfair and the employee would not need to have two years' service in order to bring the claim. However, compensation would be capped in the usual way.

What steps should employers take now?

With just under three months to go until these new rights come into force, employers should finalise their approach to carer's leave now. You should consider the following issues:

- Who will have "ownership" of ensuring compliance with

the new rules in your business (including things like preparing a staff policy, training line managers and managing any record-keeping obligations)? How will you raise awareness of the new right among staff?

- Will you enhance the amount of carer's leave available? If so, to what amount?

- Will you offer paid leave? If so, how much?

- Will you extend the rights to non-employees on a voluntary basis (albeit that any individuals benefitting from this would not be able to bring relevant claims before an Employment Tribunal as they would fall outside the statutory scheme)?

- Will you relax the notice requirements provided for in the regulations? If so, what would be the minimum notice required?

Carer's Leave Act 2023

The Carer's Leave Regulations 2024

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.

Paternity leave regime to be relaxed from 6 April 2024

The draft Paternity Leave (Amendment) Regulations 2024 were laid before Parliament on 11 January 2024. The Regulations set out the details of how the regime will be reformed to make it easier for fathers to take paternity leave. This briefing explains the key changes and the steps that employers should take now.

In June 2023, the Government published its response to a 2019 consultation on reforming parental leave and pay entitlements and announced plans to make it easier for fathers and partners to take paternity leave. To this end the Paternity Leave (Amendment) Regulations 2024 were laid before Parliament on 11 January 2024.

If passed in their current form, the Regulations will come into force on 8 March 2024 and will have effect in relation to children whose expected week of childbirth begins after 6 April 2024, or whose expected adoption placement date is on or after 6 April 2024.

What is going to change?

Area of change	Current position	New position for births and adoption
How statutory paternity leave may be taken	Paternity leave must be taken as a single block of either one whole week or two consecutive whole weeks. If only one week is taken, there is no ability to take the second week at a later date.	Eligible employees will be able to take their statutory paternity leave as either: a single block of either one whole week or two consecutive whole weeks; or as two separate blocks of one whole week. It remains the case that the leave must be taken as whole weeks and may not be split up into days.
When statutory paternity leave may be taken	Paternity leave must be taken within 56 days' of a child's birth or placement for adoption.	Eligible employees will be able to take their statutory paternity leave within 52 weeks of the birth or placement for adoption. When combined with the ability to take two separate blocks of leave discussed above, this means that employees will have greater flexibility about taking paternity leave. For example, a father may choose to take one week straight after the birth and the second week when the child is 11 months' old, and the mother is returning to work. However, it will remain the case that paternity leave cannot be taken where the employee has already taken a period of shared parental leave. Where an employee wishes to split up their paternity leave, they will need to be careful not to fall foul of this rule.

Notices that should be given to the employer and when they should be given	Currently, an employee who wishes to take paternity leave must give their employer written notice of their entitlement to paternity leave and the period of leave that they wish to take. They must tell the employer: • the date on which they were notified that they had been matched with a child for adoption (if applicable); • the expected week of childbirth or adoption placement date; • whether they wish to take one week or two consecutive weeks' paternity leave; • and the date on which they wish the paternity leave to start. In **birth cases**, this notice must be provided to the employer not later than the 15th week before the expected week of childbirth. In **adoption cases**, this notice must be provided to the employer within seven days of the employee being notified that they have been matched with a child for adoption. Separately, an employer may *elect*to ask an employee wishing to take paternity leave to sign a declaration that they meet the eligibility requirements of the regime and that they are taking paternity leave for the purpose of caring for the child or supporting their partner.	In future, the notice of entitlement and notice of the period/s of leave will be separate. **Notice of entitlement** An employee who wishes to take paternity leave must give their employer written notice of: the date on which they were notified that they had been matched with a child for adoption (if applicable); andthe expected week of childbirth or adoption placement date. At the same time, employees will also be *required* to give a written declaration that they meet the eligibility requirements of the regime. In **birth cases**, this notice and declaration must be provided to the employer not later than the 15th week before the expected week of childbirth. In **adoption cases**, this notice and declaration must be provided to the employer within seven days of the employee being notified that they have been matched with a child for adoption. **Period of leave notice** Before each period of leave, the employee must give their employer notice of the start and end dates of the period of leave. At the same time, employees will also be *required* to declare that they are taking the leave for the purpose of caring for the child or supporting their partner. In **birth cases**, this notice and declaration must be provided to the employer not later than four weeks before each period of leave. In **adoption cases**, this notice and declaration must be provided to the employer within seven days of the employee being notified that they have been matched with a child for adoption. However, in both birth and adoption cases, where a Period of Leave Notice has already been given to the employer, an employee may vary or cancel any dates by giving at least four weeks' notice of the proposed variation or cancellation.

What steps should employers take now?

With just under three months to go until these changes come into force, employers should update their approach to paternity leave now. Employers should:

- Update relevant policies to reflect the new rules on how and when paternity leave may be taken, the shorter deadlines for giving notice of a wish to take leave and the new declaration requirements.

- Update the HR forms used to the support the paternity leave process. The Notice of Entitlement may need to be amended to cover the requirement to declare eligibility (where this is not already covered) and a standalone Period of Leave Notice will also be needed.

- Notify managers that eligible employees will be entitled to take discontinuous blocks of paternity leave within the first year of birth or adoption. However, in practice, the majority of fathers tend to take the two weeks' paternity leave as a single block following the birth (or adoption) and we think this is unlikely to change dramatically.

- Highlight the changes to staff. A new right to carer's leave is also coming into force on 6 April 2024 (you can read about that here) and it would make sense to notify staff about both of these family-friendly changes at the same time.

Separate to these changes, employers should also remember that the rate of statutory paternity pay is expected to increase on or around 8 April 2024 from £172.48 per week to £184.03 per week (or 90% of the employee's average pay if this is less than the statutory rate).

Paternity Leave (Amendment) Regulations 2024

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.

Flexible working requests to become a Day 1 right on 6 April 2024 and further changes to follow soon

The Flexible Working (Amendment) Regulations 2023 have been laid before Parliament and, if passed, will make the right to request flexible working a Day 1 right on 6 April 2024. Further changes will be made to the flexible working framework later this year and a new statutory Acas Code of Practice on flexible working requests has been laid before

Parliament to reflect all of these changes.

Right to request flexible working to become a Day 1 employment right – 6 April 2024

Currently, an employee needs 26 weeks' continuous service in order to make a flexible working request. However, the Flexible Working (Amendment) Regulations 2023 will remove this service requirement, making the right a Day 1 employment right. The Regulations were laid before Parliament on 11 December 2023 and will come into force on 6 April 2024.

This change means that employers would be wise to state which, if any, flexible working options would be suitable for a role in job advertisements. Employers may also wish to identify candidates' preferences in job interviews. Although this will not prevent an employee asking for something different on Day 1 of their employment, the hope is that an upfront discussion will allow a suitable pattern to be identified from the off, rather than having to deal with a request in the first few months of employment.

However, care must be taken to hold any such discussions in a non-discriminatory way, for example, by asking an open question about whether the candidate has a preferred working pattern and not making any adverse comments about the preferred pattern and/or the candidate's reasons for wishing to work in a certain way.

Changes to the flexible working request procedure – expected by end of July 2024

The Employment Relations (Flexible Working) Act 2023 became law on 20 July 2023. The Act will make the following reforms to the flexible working request process:

- Employees will no longer have to explain what effect they think the requested change would have on their employer and how that effect might be dealt with.

- Employees will be permitted to make two flexible working requests per year rather than one.

- Employers will be required to consult with employees before refusing requests.

- Employers will have two months to make a decision on a flexible working request (rather than three months as is currently the case) unless an extension is agreed.

At present, it is not clear exactly when these changes will come into force. The Act states that the changes will come into force on a date or dates specified by the Secretary of State. The Government has said that it expects the measures to come into force approximately a year after Royal Assent, in

order to give employers time to prepare i.e. sometime in July 2024. However, it remains possible that the changes will be introduced on 6 April 2024, to accompany the change to a Day 1 right.

New statutory Acas Code on flexible working

The draft statutory Acas Code of Practice on requests for flexible working (following a public consultation held last year) was laid before Parliament on 11 December 2023 and it is likely to become final within 40 days of that date (i.e. by 20 January 2024). Although the Code is not legally binding, it will be taken into account by Employment Tribunals when considering relevant cases and it may count against an employer where the Code has not been followed.

The Code has been updated to reflect changes to ways of working since the Code was first introduced in 2014, and to reflect the forthcoming legal reforms discussed above. The draft Code:

- Recommends that employers have a clear policy and procedure for handling flexible working requests. It states that this can be helpful in making everyone aware of what is expected.

- Clarifies that while employees may make up to two requests in a 12-month period, they may only have one

"live" request ongoing at any one time. A request will be regarded as live during any appeal process. A request will only be regarded as closed once either a decision is made, the request is withdrawn or the two-month period for deciding the requests ends (without any extension having been agreed).

- Reminds employers that they must consider requests in a reasonable manner and must agree to a request unless there is a genuine business reason not to do so. The reasons for rejecting a request are unchanged. The Code also reminds employers that the legal obligation to make reasonable adjustments for disabled employees is separate to the obligation to consider a flexible working request.

- Recommends that where an employer **accepts** a request, it should confirm the decision in writing and offer the employee the chance for a discussion to clarify any information that may be helpful in implementing the agreed arrangements (and if such a discussion is held then a record should be kept). However, the Code recognises that the employer and employee may agree that a meeting is not necessary in these circumstances.

- Underlines that employers must not **reject** a request without first consulting the employee. The Code provides clarity on what this consultation should involve as follows:

- The employer should invite the employee to a consultation meeting. The employee should be given a reasonable period of time to prepare for the meeting, which should be held without unreasonable delay.

- The employer should allow employees to be accompanied to meetings, even though there is no statutory right to be accompanied. The Code recommends that employers permit an employee to be accompanied by either a colleague, a trade union representative or an official employed by a trade union.

- The meeting should be held privately but may be held in person or remotely via video conferencing or telephone. The meeting should be chaired by someone with sufficient authority to make a decision.

- The meeting should be conducted in a way that allows for a reasonable discussion and consideration of the request. If the request cannot be accepted in full, the employer and employee should discuss suitable alternatives and whether a trial period may be appropriate. A written record of the meeting should be kept.

- The final decision should be confirmed in writing without unreasonable delay and within the two-month period for deciding requests (unless an extension has

been agreed). It should clearly explain the business reasons for rejecting the request, together with any additional information which is reasonable to help explain the decision.

- Encourages employers to allow for an appeal process where a request is rejected, even though there is no statutory right to an appeal. Employers should set out details of any appeal process in their decision letter.

- Reminds employers that they must not subject an employee to any detriment or dismissal in connection with having made a flexible working request or having issued legal proceedings about the same.

Acas has indicated that it will also update its non-statutory guidance on flexible working, which complements the Code.

What steps should employers take now?

In addition to considering whether to address flexible working in job adverts and interviews, we would recommend that employers consider the following preparatory steps:

- Revise your Flexible Working policy to reflect the legal reforms. Although employees are no longer required to explain the potential effect of their request, we would recommend that this is still encouraged on the basis that it may help speed up your consideration of the request.

- Consider what your consultation process will look like. As the draft Code outlines, this should usually include a face-to-face meeting. Where you are tending towards **rejecting** a request, a meeting affords the employee an opportunity to make further submissions and allows time for consideration of alternatives. Where you are tending towards **accepting** a request, a meeting can add value by allowing an opportunity to discuss the request in more detail and think about ways to implement the arrangement successfully.

- Train HR and line managers on how these reforms will impact the handling of flexible working requests. When the Acas Code is finalised, HR and line managers should be asked to read it.

- Consider whether you need to devote further resource to the management of flexible working requests, in light of the fact that employees will be able to make two requests per year, the shorter time frame for providing your response, and that requests may be made from Day 1 of employment.

- Consider whether record-keeping procedures should be strengthened (for example, to record how many requests have been made within a 12-month period and to document what form of consultation has been undertaken).

Employment Relations (Flexible Working) Act 2023

Flexible Working (Amendment) Regulations 2023

Draft Acas Code of Practice on Requests for Flexible Working

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.

New guidance published to accompany holiday entitlement and pay reforms

On 1 January 2024, the Employment Rights (Amendment,

Revocation and Transitional Provision) Regulations 2023 introduced changes to the law governing holiday entitlement and pay. On the same date, the Government published detailed new guidance for employers designed to accompany the reforms. In this briefing, we outline the key points for employers to note.

What changes are being made to holiday entitlements and pay and when?

On 8 November 2023, the Government published its response to a consultation paper which had proposed a number of reforms in the areas of working time and paid holiday rights. In summary, the Government's response confirmed that the following reforms would be taken forward on 1 January 2024 (save as otherwise stated):

1. **Record-keeping requirements**: Regulation 9 of the Working Time Regulations (**WTR**) would be amended to clarify that businesses do not have to keep a separate record of the daily working hours of workers.

2. **One vs two pots of annual leave**: Regulation 13 annual leave (4 weeks) and Regulation 13A annual leave (1.6 weeks) would not be replaced with a single leave entitlement of 5.6 weeks. However, the WTR would be amended to spell out what counts as "pay" for the purposes of Regulation 13 leave.

3. **Accrual of annual leave**: the position on accrual of annual leave will be changed for "irregular hours

workers" and "part-year workers" only. These workers will accrue their annual leave entitlement at the end of each "pay period" at a rate of 12.07% of the number of hours worked in that pay period, up to a maximum of 28 days per year. The new accrual system for irregular hours and part-year workers will apply to leave years commencing on or after 1 April 2024 only.

4. **Introduction of rolled-up holiday pay**: a system of "rolled-up holiday pay" would be permitted for irregular hours and part-year workers, but not for other types of workers. Where an employer elects to pay rolled-up holiday pay, it must be calculated at 12.07% of the worker's pay. Rolled-up holiday pay will be permitted for leave years commencing on or after 1 April 2024 only.

5. **Carry-over of annual leave**: from 1 January 2024, workers will not be able to carry over any accrued Covid-related Regulation 13 leave. On top of this, the WTR would be amended to clarify when workers may carry over accrued leave in other circumstances.

You can read our detailed briefing on these reforms here.

On 1 January 2024, the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 came into force to effect these reforms. On the same day, the Department for Business and Trade published detailed new guidance to accompany the reforms (the Guidance).

What does the new guidance say?

The Guidance is designed to provide further details to support an understanding of the reforms. The Guidance applies only to the minimum statutory leave entitlement (i.e. 5.6 weeks' leave per year), but not to additional contractual holiday over and above this.

Meaning of "irregular hours worker" and "part-year worker"

The new "accrue as you go" system of holiday entitlement and the new system of rolled-up holiday pay will apply to irregular hours workers and part-year workers only. The Regulations provide that a worker will be:

- **an irregular hours worker**, in relation to a leave year, if the number of paid hours that they will work in each pay period during the term of their contract in that year is, under the terms of their contract wholly or mostly variable; and

- **a part year worker**, in relation to a leave year, if, under the terms of their contract, they are required to work only part of that year and there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid.

Section 2 of the Guidance offers examples of workers who would fall into these categories. The example is given of an irregular hours worker is a hospitality worker who worked a different number of hours each week. In contrast, a worker who worked a rotating two-week shift pattern of 15 hours in the first week and 20 hours in the second week would not qualify as an irregular hours workers as their working hours are fixed and not variable.

The example given of a part year worker is a seasonal worker in the farming industry who only works and get paid during the Spring and Summer months. In contrast, a worker who is paid a flat salary over 12 months but has periods of time that last more than one week when he is not working would not qualify as a part year worker as he would be paid throughout the year. Typically, this would mean that term-time only workers in the educational sector would notqualify as part year workers as their salary tends to be paid in equal instalments across the year, including periods when they are not working.

Calculating holiday entitlement for irregular hours and part-year workers

Section 3 of the Guidance sets out that for leave years beginning on 1 April 2024, irregular hours and part year workers will accrue statutory holiday entitlement at the rate of 12.07% of actual hours worked in a pay period. An example is given of how to calculate the statutory leave entitlement as follows:

- **Scenario:** A worker works 68 hours in the month of June.
- **Step 1:** Divide the hours worked in a pay period by 100: 68 / 100 = 0.68.
- **Step 2:** Multiple the answer to Step 1 by 12.07: 0.68 x 12.07 = 8.2076.
- **Step 3:** Round up or down to the nearest hour: 8.2706 rounds down to 8.
- **Answer:** A worker who worked 68 hours in June accrued 8 hours of statutory annual leave that month.

This calculation method works for workers entitled to statutory holiday only. However, the Guidance goes on to explain how employers may calculate the entitlement for workers with an additional contractual leave entitlement.

The Guidance also goes on to explain (with worked examples) how to calculate the statutory leave entitlement for irregular hours and part year workers who:

- leave their role part way through the leave year;
- work a fixed number of hours each week, but a variable

number of hours each day;

- are on maternity or other family-related leave; and/or
- are off sick.

Calculating holiday pay for irregular hours and part year workers

Section 5 of the Guidance explains that for leave years beginning on 1 April 2024, employers may elect to pay irregular hours and part year workers using the system of "rolled up holiday pay". However, this method of paying holiday pay may not be used for workers with regular hours and fixed pay.

Where rolled-up holiday pay is used:

- the employer should check the worker's contract in case payment in this way would amount to a variation of their contract (for which their agreement would usually be needed);
- instead of paying holiday pay when the worker takes their annual leave, an additional payment must be paid at the same time as the worker is paid for work done;

- the rolled-up holiday pay is calculated as 12.07% of the worker's total pay in a pay period (e.g. weekly, fortnightly, monthly) and must be clearly itemised on the pay slip;

- if the worker carries any annual leave over into a new holiday year, they will have already been paid for the period of leave carried over.

The Guidance goes on to offer some worked examples of how to calculate rolled-up holiday pay.

Alternatively, employers who do not wish to adopt a system of rolled-up holiday pay may continue to pay irregular hours and part years workers in the usual way (i.e. pay holiday pay at the time the holiday is taken). Where this is done, holiday pay for such workers should be calculated by reference to the worker's average pay over a reference period of the last 52 weeks in which they were paid. This may mean that, in some cases, employers will need to look back further than 52 weeks if there are weeks were the worker did not get paid (or where they were absent on family-related leave or sick leave). However, this look back period is capped at 104 weeks. Where the worker has not been paid for 52 out of 104 weeks, the reference period is shortened to that lower number of weeks.

Carrying unused leave forward into a new holiday leave year

Section 4 of the Guidance explains the circumstances in which

all workers are entitled to carry forward any unused annual leave into a new leave year:

- **Family leave:** if a worker is unable to take some or all of the statutory holiday entitlement as a result of taking a period of maternity or other family-related leave, they will be entitled to carry forward up to 5.6 weeks' leave to be used in the following leave year.

- **Sickness:** if a worker working regular hours throughout the year is unable to take some or all of their statutory holiday entitlement as a result of being off sick, they will be entitled to carry forward up to 4 weeks' leave to be used within 18 months of the end of the leave year in which the holiday accrued. However, if the worker is an irregular hours or part year worker then they are able to carry forward up to 5.6 weeks' leave, again, to be used within 18 months of the end of the leave year in which the holiday accrued.

- **Denial of leave:** if a worker does not take annual leave because the employer:

- refuses to pay them;
    - denies the worker's right to paid annual leave (e.g. they maintain that the individual does not have worker status);

- does not give the worker a reasonable opportunity to take leave or encourage them to do so; or
- does not warn the worker that they will lose their leave if they do not use it by the end of the leave year,

then they are entitled to carry forward up to four weeks' leave into the next holiday year.

- **Covid-19:** from 1 January 2024, workers will not be able to carry forward any accrued Covid-related leave. Workers have until 31 March 2024 to use up any Covid-related leave accrued before 1 January 2024.

The rate of holiday pay

Section 5 of the Guidance clarifies the position about rates of pay for statutory annual leave for all workers.

It confirms that for the first four weeks of leave, a worker is entitled to be paid their normal rate of pay and that, from 1 January 2024, the WTR was amended to state that this

includes:

- payments, including commission payments, intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out;
- payments relating to professional or personal status relating to length of service, seniority or professional qualifications; and/or
- other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.

In contrast, a worker is only entitled to be paid their basic rate of pay for the remaining 1.6 weeks of leave (although it is noted that, in practice, many employers will also pay normal pay for this portion of leave). The Guidance recommends that where an employer wishes to pay different rates of pay for the two portions of leave, this should be explained clearly in the worker's contract or the staff handbook.

Comment

Where you have irregular hours and/or part year workers, you will need to become familiar with the calculations for the new

“accrue as you go” system of accruing annual leave. Further, if you intend to introduce a system of rolled-up holiday, your payroll team will need to become familiar with the new method of calculating holiday pay, and be clear about when it should be paid and the related pay slip requirements.

Some of these changes are involved and may necessitate changes to employment contracts and Staff Handbooks, for example, clarifying when leave may be carried over and for how long, or introducing rolled-up holiday pay. It is always a good idea to seek legal advice before making major changes to holiday arrangements.

Retained EU Law – Government Response, 8 November 2023

The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Guidance – Holiday Pay and Entitlement Reforms from 1 January 2024

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.