Getting ready for employment law reform in 2021: 10 things employers really need to know

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Employment Law News

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Getting ready for employment law reform in 2021: 10 things employers really need to know

It's been said that death and taxes are the only certainties in life, but employers may wish to add a third – changes to employment law. Both caused by Brexit and the pandemic, and

independent of them, reforms haven't ceased. In this article, we round up the top 10 changes for people with responsibility for HR to watch out for in 2021.

1. **Recruiting EEA nationals is about to get a lot more complicated…**

The new year brings new headaches for employers wishing to recruit EEA nationals. From **1 January 2021**, EEA nationals will lose their automatic right to live and work in the UK. For those based in the UK before this date, the solution is to apply for either Settled Status or Pre-Settled Status before 30 June 2021. Either status will give the individual the right to continue to live and work in the UK. Successful applicants will usually be given a "share code" to provide to their employers to prove their right to work in the UK. Employers will need to establish a system of checking the share codes of affected employees after **30 June 2021**.

From 1 January 2021, EEA nationals wishing to come to the UK to work will need to be sponsored by a UK employer under the new points-based based immigration system. Employers wishing to sponsor workers will need a licence to do so. Employers will need to make sure the sponsor licence is in place in good time (licence applications can take between 3 to 6 weeks to process). Further guidance on the points-based immigration system is available here.

2. **…and so is engaging contractors**

The way in which the off-payroll working rules (known as "IR35") operate in the private sector is set to change on **6 April 2021**. The reforms were due to come into force on 6 April 2020 but were deferred in the light of the coronavirus pandemic

These reforms will see contractors lose the ability to determine their own tax status and place this burden on those who engage them. Large and medium-sized businesses in the

private sector that engage independent contractors via an intermediary (usually a personal service company) will become responsible for assessing whether the IR35 rules apply – this is known as the "status determination". The determination process is notoriously difficult, and you may well need to take legal advice.

Once the status determination has been made, the business must notify various parties of its decision and provide an opportunity to challenge the assessment.

On top of this, where a business contracts directly with the intermediary (i.e. it is the fee payer), it will also become responsible for deducting income tax and NICs and paying employer's NICs.

Those running the payroll will need to be ready to implement these changes from April 2021. You can read more about the IR35 reforms in our detailed note on the new regime here.

3. **Be prepared for new limits on how you draft your employment contracts…**

After jumping the hurdle of recruitment, employers also need to be ready for changes affecting their onboarding arrangements.

Currently, the Government is consulting on two areas which may affect the drafting of employment contracts.

Views are sought on proposals to restrict the use of non-compete restrictions. It's possible that non-compete clauses could be made unenforceable altogether, meaning employers would not be able to include them in employment contracts at all. Alternatively, they may be permissible for a prescribed period of time and only where the employer provides compensation during the term of the clause. Either change would see employers having to amend existing employment contracts and update template documents. You can read our

further thoughts on this consultation and also find out how to feedback your thoughts to the Government here.

The Government is also seeking views on extending the ban on exclusivity clauses in employment contracts to prevent employers from restricting low-paid employees (i.e. those earning below £120 per week) from working for another employer. Currently, the ban only applies to those working under zero-hours contracts. If the ban is extended, affected contracts will need to be amended.

Both consultations close on **26 February 2021** and new laws could be in place later this year.

4…and standby to overhaul your family-friendly policies

And it's not just employment contracts that may need a rewrite in 2021. Employers may need a cold towel at the ready when it comes to overhauling family-friendly policies as there are a raft of changes in the offing.

The Pregnancy and Maternity (Redundancy) Protection Bill 2019-21 is on its passage through Parliament, with the next stage of the Bill taking place on **12 March 2021**. If passed, it will prohibit redundancy during pregnancy and maternity leave and for the six months after the return to work, save in limited circumstances.

The Government has also consulted on several proposals to update family leave rights including reforming the system of parental leave and pay; introducing a new right to neonatal leave and pay; and requiring employers to publish their family leave and flexible working policies. Although still at the proposal stage, it would be wise for employers to make sure that family leave and flexible working policies are kept up to date, particularly as the publication requirement could be introduced fairly swiftly.

There are also plans afoot to introduce a new right for

workers with caring responsibilities to take one week's unpaid leave. This new form of leave would supplement other relevant forms of leave such as parental leave or time off for dependant emergencies.

5. **Wave goodbye to the furlough scheme…**

The furlough scheme is currently set to change on **1 February 2021**, with a likely reduction in the Government's contribution to the wages of furloughed employees. The scheme is then due to close for good on **31 March 2021** and is likely to be replaced with a less generous form of wage support. You can read more about the furlough scheme in our detailed guide here.

Payroll teams dealing with furloughed employees will need to ensure that final claims are made to HMRC in good time. At the same time, employers need to have a strategy in place for what happens next: will furloughed staff be brought back to work or made redundant? If redundancies are needed, will time-consuming collective consultation be triggered? If so, when will that consultation process begin?

6.…and say hello to a flurry of flexible working requests

The roll out of the Covid-19 vaccine in 2021 signals the hope of return to normal life, including in the world of work. But after a year or more of working from home, will staff be prepared to return to commuting five days per week? Some will, but employers should get ready for an influx of flexible working requests from staff who have got used to the benefits of working from home.

This could range from requests to work from home on a flexi-basis or 1 or 2 fixed days per week, through to requests for permanent home working. Employers should consider now whether they are willing to continue with home working and, if not, the grounds for refusing such requests. Rejecting requests will be harder where the employee can demonstrate that they

have worked effectively from home for a long period of time.

It's also worth bearing in mind that the Government intends to put its weight behind flexible working for all jobs. There are plans for a new Employment Bill which would make flexible working the default for all job roles, meaning that jobs should be advertised as open to flexible working. This will represent a big change for employers – a recent survey revealed that 78% of job ads did not mention flexible working at all and, of those that did, the majority offered it only on a temporary basis to cope with the Covid-19 pandemic.

7. **Pay equality issues will be back in the spotlight…**

HR and payroll teams at large employers had a reprieve from crunching their gender pay gap numbers in 2020, after the Government paused publication in the light of the Covid-19 pandemic. As far as we know, reporting is back on the agenda in 2021, with a deadline for private sector employers of **4 April 2021**.

However, there are some unanswered questions about what needs to be reported. It's not yet clear whether businesses will have to report the missing 2019/20 figures at the same time as their 2020/21 figures. It's also not clear whether staff who were on furlough on the snapshot date of 5 April 2020 should be included in the 2020/21 figures. And if they are to be included, is their pay their normal rate of pay or the reduced furlough rate of pay? HR and payroll teams will need to watch out for further guidance from the Government and be ready to adjust their calculations and accompanying narrative.

Businesses outside of the gender pay gap reporting regime will escape these headaches for now – but employers should note that there are plans to reduce the reporting threshold to employers with 100 or more employees. The Equal Pay (Information and Claims) Bill 2019-21 is on its passage through Parliament and aims to reduce the threshold for gender

pay gap reporting and bring in ethnicity pay reporting for employers at the same threshold. The next stage of the Bill is scheduled to take place on **15 January 2021**. Although these changes are unlikely to come into force in 2021, they would involve a great deal of preparatory work for affected businesses and so employers are advised to keep a close eye on this development.

In addition, the Bill seeks to reform equal pay law and, among other things, would introduce a right for employees to know what their colleagues are paid. This could shine a light on pay disparities and trigger equal pay disputes on an individual or group basis. With the Supreme Court's decision in the high-profile Asda equal pay dispute expected any day now, pay inequality issues will be firmly back in the public eye in 2021.

8.….and holiday pay headaches will rumble on

It's hard to believe but holiday pay issues continue to rumble on, many years after the wave of cases which looked at which components of pay must be included in holiday pay. In **June 2021**, the Supreme Court will consider whether voluntary overtime payments should be included in the calculation of holiday pay and whether a "series" of unlawful deductions from holiday pay is only present where the deductions are not more than three months apart. Both decisions could have a big impact for employers' holiday pay liability and employers should monitor the outcome.

And when it comes to holiday requests, don't forget that special rules were introduced to allow staff to roll over any holiday that they were unable to take due to the Covid-19 pandemic. Where this is the case, the unused holiday may be carried forward and taken over the next two leave years. This may mean that some employees have higher than usual holiday entitlements in 2021 and possibly into 2022.

9. **Protection for whistleblowers is on track to be strengthened**

Protection for those blowing the whistle looks likely to be enhanced in 2021. At EU level, a new Directive introduces protection for those reporting certain breaches of EU law. EU Member States have until **17 December 2021** to implement the Directive into national law. It's not yet clear whether the UK will be obliged to introduce such legislation. This will depend on the terms of any post-Brexit relationship agreed between the UK and the EU. However, employers with operations in EU Member States will have to comply with the new rules in those jurisdictions and may wish to take a uniform approach across their business, including in the UK.

The Directive requires employers with 50 or more employees to have internal whistleblowing procedures which offer a range of reporting mechanisms. UK employers are not currently required to have such procedures in place, save in certain regulated sectors. Employers will also be required to provide feedback to whistleblowers about their internal investigation. Employers should be poised to prepare such procedures and roll out relevant training to staff.

There are also efforts underway in the UK to enhance whistleblower protection, with two Private Members' Bill currently on their passage through Parliament. The Public Interest Disclosure (Protection) Bill 2019-21 and the Office of the Whistleblower Bill 2019-21 are both aimed at strengthening protection for whistleblowers. The next stage of the Public Interest Disclosure (Protection) Bill 2019-21 is scheduled to take place on **26 February 2021**.

10. **And finally, when parting ways with employees watch out for new rules affecting terminations**

When parting ways with employees in 2021, employers should take note of the Government's commitment to introduce new laws

as soon as possible to restrict the use of non-disclosure agreements (**NDAs**) in settlement agreements where there has been an allegation of harassment or discrimination. The new rules will mean that:

- NDAs must not prevent someone from making a disclosure to the police, regulated health and care professionals or legal professionals;
- the limitations of an NDA must be made clear to those signing them; and
- new enforcement measures will be introduced for non-compliant clauses.

Employers will need to amend template settlement agreements in due course to comply with these new rules.

You can find out more about these and other developments on the horizon in BDBF's 2021 Employment Law Tracker. If your business needs advice on preparing for any of these changes please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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