Government confirms wide-ranging changes to the Working Time Regulations and TUPE from 1 January 2024

Earlier this year, the Government published a consultation paper which proposed a number of reforms in the areas of working time, paid holiday rights and rights upon the transfer of a business or an outsourcing (the Consultation). On 8 November 2023, the Government published its response to the Consultation, setting out which reforms will be taken forward (the Response), together with a draft Statutory Instrument intended to bring the changes into effect. In this briefing, we remind you of the Government's proposals and explain what is and is not being taken forward.

1. 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 proposed to legislate to clarify that businesses would no longer have to keep a record of daily

working hours of their workers.

The Government has decided to take this proposal forward. Regulation 9 of the Working Time Regulations (**WTR**) will be amended to clarify that businesses do not have to keep a separate record of the daily working hours of workers provided that they are able to *"demonstrate compliance without doing so."*

2. One vs two pots of annual leave

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 (**Regulation 13 leave**); and
- 1.6 weeks' leave which was granted by the UK Government on top of the minimum WTD requirement (**Regulation 13A leave**).

Different rules about pay apply to Regulation 13 leave and Regulation 13A leave. ECJ caselaw has made it clear that workers must be paid their "normal pay" for Regulation 13 leave. This may include things like commission, allowances

and some types of overtime payment. In contrast, workers are only entitled to be paid basic pay for their Regulation 13A leave (although employers may elect to pay normal pay for Regulation 13A leave if they wish and, indeed, many do).

The Consultation proposed to replace Regulation 13 leave and Regulation 13A leave with a single leave entitlement of 5.6 weeks and sought views on what the applicable rate of pay should be.

The Government has decided not to take this proposal forward and, instead, will retain the two distinct pots of leave and their associated rates of pay. However, the WTR will be amended to spell out which types of payments count when determining pay for Regulation 13 leave. These are:

- payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract;
- payments for 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 (it does not expressly state whether *voluntary* overtime payments should be included, however, if they are "regularly paid" to a worker then we think they will probably count).

This change is designed to reflect the existing rulings of the ECJ on this issue in our domestic legislation for the first time (and necessitated by Brexit). Employers should have already incorporated these types of payments into their calculation of Regulation 13 holiday pay. However, where this has not yet been done, action should be taken to regularise the position now.

3. Accrual of annual leave

On the accrual of leave the Consultation proposed that workers should accrue their annual leave entitlement at the end of each "pay period" until the end of the first year of their employment. The aim was to provide workers with a steady amount of holiday entitlement as they work and to simplify the calculation of holiday entitlement for employers.

The Government has decided to change the position on accrual of leave for "irregular hours workers" and "part-year workers" only (and there will be new legal definitions of both categories of workers). Further, the new position will apply throughout the employment relationship, not just in the first year as originally proposed. There will be nochange to the accrual of leave for other workers, who will continue to accrue their 5.6 weeks' leave at the beginning of the leave year, save for in the first year of employment.

Under the new system, irregular hours and part year workers will accrue annual leave at the end 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. Special rules will apply

if the worker is on sick leave or family leave. Importantly, this new system will nullify the effect of the Supreme Court's decision in Harpur Trust v Brazel, which said that the holiday entitlement of part-year workers could not be pro-rated below 5.6 weeks' per year, no matter how many weeks they had actually worked each year. The new system means that the annual leave entitlement of such workers will be proportionate to the number of hours they have actually worked.

The new accrual system for irregular hours and part-year workers will apply to leave years commencing on or after 1 April 2024 only. Employers will need to decide whether it will allow such workers to book and take more holiday than they have accrued under the new "accrue-as-you-go" system. Where this is to be permitted, employers should ensure that they have a right to make deductions in respect of any holiday taken but not accrued when the employment relationship terminates.

4. Carry-over of annual leave

On the carry-over of unused leave the Consultation proposed 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 noted that those regulations were no longer needed.

The Government has decided to take forward this proposal. This means that from 1 January 2024, workers will not be able to carry over any accrued Covid-related Regulation

13 leave. Workers will have until 31 March 2024 to use up any Covid-related leave that was accrued before 1 January 2024.

On top of this, the Government has decided to amend the WTR to clarify when workers may carry over accrued leave in other circumstances. This change is designed to reflect the existing rulings of the ECJ on this issue in our domestic legislation for the first time (and necessitated by Brexit). The WTR will specify that workers may carry forward their accrued but untaken leave as set out in the table below.

Circumstances?	**What leave can be carried over?**	**For how long may the leave be carried over?**
Worker does not take annual leave (or takes it, but it is not paid) because the employer: 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; ordoes not warn the worker that they will lose their leave if they do not use it by the end of the leave year.	Regulation 13 leave	Until the end of the first full leave year in which the employer is no longer at fault.

Worker unable to take the leave due to absence on sick leave.	Regulation 13 leave	18 months from the end of the holiday year in which the leave arose.
Workers unable to take the leave due to absence on maternity, adoption, shared parental, parental, paternity or parental bereavement leave.	Regulation 13 and 13A leave	12 months from the end of the holiday year in which the leave arose.

5. Introduction of rolled-up holiday pay

"Rolled-up" holiday pay is a system whereby no holiday pay is paid during the weeks that a worker takes their annual leave entitlement, and, instead, their pay is enhanced during periods of work. In other words, the enhanced 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 their annual leave was taken.

The Consultation proposed that rolled-up holiday pay be introduced as an option for all workers. It also proposed that the default enhancement rate be set at 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).

The Government has decided to take this proposal forward but only for irregular hours and part-year workers (and, as above, there will be new legal definitions of both

categories). Rolled-up holiday pay will not be permitted for other types of workers. Where an employer elects to pay rolled-up holiday pay to an eligible worker, it must be:

- calculated at 12.07% of the worker's pay;
- paid at the same time as pay for work done; and
- itemised separately on the payslip.

Special rules will apply if the worker is on sick leave or family leave. Rolled-up holiday pay will be permitted for leave years commencing on or after 1 April 2024 only.

6. 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* where there are no

existing representatives in place.

The Consultation proposed 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 Government has decided to take this proposal forward in the form originally proposed.

What are the next steps?

As above, these reforms are due to come into force on 1 January 2024, save for the changes affecting irregular hours and part-year workers, which will apply to holiday years commencing on or after 1 April 2024. Some of these changes are fiddly and may necessitate to 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. We would recommend that employers conduct an audit of their existing holiday pay arrangements and then identify any necessary and desirable changes to be made. 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

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.