Employment Rights Bill latest: Government puts forward significant amendments to the Bill

Earlier this month, the Government published responses to various consultations on proposals in the Employment Rights Bill. At the same time, it published a paper setting out numerous amendments to the Employment Rights Bill. In this briefing, we round up the latest developments and what they mean for employers.

Collective redundancy consultation

You can read our detailed briefing on the latest amendments affecting collective redundancies here.

Fire and rehire

The Bill proposed that it would become automatically unfair to dismiss an employee for failing to agree to a change to their terms and conditions of employment, or in order to re-engage them (or someone else) under varied terms and conditions of employment where the role was the same or substantially the same. You can read more about the initial proposals in our briefing here.

Shortly after the Bill was published, the Government consulted on extending the remedy of interim relief to employees who had fire and rehire dismissal claims. You can read more about the consultation in our briefing here. In its response, the Government has declined to extend interim relief to such dismissals. However, the Government has said that it will revise the Statutory Code of Practice on Dismissal and Re-engagement to reflect the new rights in the Bill.

Importantly, where the Code is breached, a Tribunal may uplift compensation by up to 25%.

Zero and low hours workers

The Bill proposed two key changes, which would restrict the use of such zero and low hours contracts and penalise employers who abuse them. First, zero and low hours workers who have worked a certain number of hours regularly over a "reference period" would have a new statutory right to have those hours guaranteed in their contract. At the end of each reference period, the employer must make a guaranteed hours offer to any worker within scope. Second, employers would be required to give zero and low workers (and any other worker who does not have a set working pattern), reasonable notice of shifts, and changes or cancellations of shifts, with a right to compensation where late notice was given. You can read more about the initial proposals in our briefing here.

In light of a concern that the proposals might drive employers to use agency workers to avoid the new rules, the Government opened a consultation considering whether the measures should be applied to agency workers engaged on zero or low hours contracts. In its response, the Government has confirmed that the proposed measures will be extended to agency workers on zero or low hours contracts, although there are some nuances around how it will work in practice. The Bill has been amended to capture the following changes:

- the obligation to offer a guaranteed hours contract must be made by the end user not the agency (save in certain scenarios to be spelt out in secondary legislation);
- the duty to provide reasonable notice of shifts, shift changes and cancellations falls on both the end user and agency; and
- where a guaranteed payment entitlement for short notice cancellation or changes to shifts is triggered, the

payment is to be made by the agency (but it is envisaged that the agency and end user will be able to agree terms allowing the agency to recover a proportion of the payment from the end user to reflect its responsibility for the cancellation or change).

Separately, further amendments to the Bill introduce anti-avoidance measures designed to avoid the duty to make a guaranteed hours offer to a worker. Further, provision is made to allow employers to contract out of the zero and low hours measures in their entirety (for all workers, not just agency workers) by way of a collective agreement with a trade union.

Statutory sick pay (SSP)

The Bill proposed some small tweaks to the SSP regime. First, the "waiting days" were to be removed, meaning that SSP will be payable from the first day of sickness, rather than from the fourth day as is currently the case. Second, the lower earnings limit for SSP – which currently sits at £123 per week – would be removed meaning that employees would become entitled to SSP regardless of income levels. You can read more about the initial proposals in our briefing here.

A consultation was launched to consider what rate of SSP should be paid to employees earning below the lower earnings limit. In its response, the Government has confirmed that the percentage rate will be 80% of normal weekly earnings. This means that employees will be paid SSP at the lower of either the standard SSP rate (currently £116.75 per week) or 80% of their normal weekly earnings. The Bill has been amended accordingly.

Trade unions

The Bill contained a number of provisions aimed at

strengthening trade unions including:

- requiring employers to notify workers of their right to join a trade union in writing when they start employment and at other times;
- enhancing the rights of trade unions to access workplaces for the purpose of meeting, recruiting and organising workers and facilitating collective bargaining;
- simplifying the process for trade union recognition;
- repealing rules which impeded the financing of trade unions; and
- repealing or amending existing laws governing industrial action (for example, in relation to balloting, voting and the giving of notice of industrial action) with the aim of making it easier for trade unions to call such action.

On 21 October 2024, the Government published a consultation on ways to further strengthen the legislative framework underpinning trade unions. In its response, the Government has promised significant further changes in this area and the Bill has been amended accordingly. The areas of change include:

- improving the process and transparency around trade union recognition;
- extending access provisions to cover digital access;
- introducing a fast-track route for achieving an access agreement where certain conditions are met, with penalties in place for non-compliance;
- simplifying the current information requirements on industrial action ballots;
- notice for industrial action to be reduced from 14 to 10 days;

- consultation on delivering e-balloting; and
- extending the expiry of a mandate for industrial action from 6 to 12 months.

Fair Work Agency

The Bill provided that the Secretary of State would assume responsibility for enforcing certain aspects of labour market legislation, by way of a "Fair Work Agency". In terms of addressing non-compliance with the labour market laws within its remit, the Fair Work Agency would have the power to:

- obtain documents or information;
- enter business premises in order to obtain documents or information;
- remove and retain documents or information;
- request that "labour market enforcement undertakings" be provided; and
- apply to Court for a "labour market enforcement order" which prohibits or restricts certain actions or requires certain actions to be taken (and which may last for up to two years).

You can read more about the initial proposals in our briefing here. Now, the Government has proposed several amendments to the Bill which will strengthen the powers of the Fair Work Agency even further. These include:

- a power to enforce a new requirement for employers to maintain adequate records of holiday entitlement and pay for 6 years;
- a power to give notice to an employer to remedy an underpayment of a statutory payment (such as SSP or holiday pay) within 28 days and to pay a penalty of up to 200% of such underpayment (up to a maximum of £20,000

for each individual payment);
- a power to bring a claim in the Employment Tribunal in lieu of a worker (and the Tribunal may still make a financial award in favour of the worker);
- a power to provide or arrange for assistance to someone bringing an employment claim (this may include legal advice and representation); and
- a power to recover any enforcement costs from an employer in breach.

Umbrella companies

The Government has published a response to a consultation commenced back in 2023 concerning the regulation of umbrella companies. In its response, the Government confirms that umbrella companies will be defined as an entity which is in the business of:

- employing a person with a view to them being supplied to a hirer; or
- paying for, receiving or forwarding payment for the services of a person with a view to them being supplied to a hirer.

This change will bring umbrella companies within the scope of the Employment Agencies Act 1973, meaning that workers employed by umbrella companies will gain comparable employment law rights and protections to workers employed directly by an agency.

Further, from April 2026, PAYE/NICs compliance will move from the umbrella company to the agency (or to the end user if there is no agency).

Other key changes to note

- It has been reported that the Government has dropped plans to introduce a right to disconnect. However, as this proposal was not covered in the original draft of the Bill, no changes have been made to the Bill itself.

- There have been reports that the Government will back a proposed non-Government amendment to the Bill which would introduce a right to two weeks' paid parental bereavement leave for those who suffer an early pregnancy loss (i.e. before 24 weeks).

- The amendment paper contains numerous other non-Government amendments which would introduce new rights and protections across a number of areas including family leave, equality law, flexible working, discipline and grievance, health and safety and whistleblowing. At this stage, it is unclear whether any of these will be taken forward.

Next steps

The Bill will continue on its passage through Parliament and will shortly move to be debated in the House of Lords, which will likely lead to further changes to the text of the Bill.

The expectation is that the Bill will pass later this year, although the implementation of many of the changes will be deferred and/or will depend on the introduction of separate regulations.

Although there is still some time before the Bill's reforms will take effect, the sheer volume of changes means employers would be wise to keep track of the Bill and take advice on

implementation in good time.

Employment Rights Bill: Amendment Paper, 4 March 2025

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

The key employment law changes to watch out for in 2025

Employment law never stops and 2025 looks to be no exception. While all eyes are on the Government's flagship Employment Rights Bill, employers should take note of a number of other developments happening this year. In this briefing, we round up the key pieces of legislation, consultations, calls for evidence, reviews and guidance to look out for, and we also highlight some of the most interesting case law decisions expected this year.

New legislation

- **The Employment Rights Bill (the ERB):** the ERB is the key piece of employment law expected to come into force this year and will make wide-ranging changes to employment law. Some of the key changes in the ERB include making unfair dismissal a Day 1 employment right, diluting the threshold at which consultation on collective redundancies is met, clamping down on the use of fire

and rehire practices, introducing employer's liability for third-party harassment of workers, requiring large employers to publish equality action plans, making it harder for employers to reject flexible working requests, expanding family leave rights and increasing the time limit to bring an Employment Tribunal claim from three to six months. You can read our full analysis of the ERB here and catch up with our recent webinar on what the ERB means for employers here. The Bill is currently on its passage through Parliament and is expected to pass into law this year, however, secondary legislation will still be required to bring many of the changes into force.

- **Equality (Race and Disability) Bill:** this Bill will introduce ethnicity and disability pay gap reporting for employers with 250 or more staff, which will be along similar lines to the existing gender pay gap reporting regime. The Bill will also introduce a right for workers to bring equal pay claims on the basis of race or disability, rather than just sex as is currently the case. It will also strengthen the law on equal pay more generally by permitting comparisons with outsourced workers and creating a new regulatory and enforcement unit for equal pay law. A draft Bill is expected to be published in this Parliamentary session for pre-legislative scrutiny and a public consultation on the proposals will begin in due course.

- **Neonatal Care (Leave and Pay) Act 2023:** this Act passed into law in 2023 (under the Conservative Government), with the intention that it would come into force in

April 2025. The Labour Government has since confirmed that it will come into force on 6 April 2025. The Act will provide employees with a Day 1 right to take leave where they are the parent of a baby, aged up to 28 days' old, who needs to spend at least a week in neonatal care. Employees will be able to take up to 12 weeks' leave and this will be on top of any other leave they may be entitled to, such as maternity or paternity leave or annual leave. Employees who have at least 26 weeks' continuous service (and meet a minimum earnings threshold) will also be entitled to receive statutory neonatal pay. Employees will have a right to return to work and will be protected from detriment and dismissal as a result of taking, or seeking to take, the leave. The precise scope and mechanics of the new rights will be set out in seven new sets of regulations, which are yet to be published.

- **Paternity Leave (Bereavement) Act 2024:** this Act passed into law in 2024 (under the Conservative Government), with the intention that it would come into force in April 2025 The Labour Government has confirmed that it intends to pass the regulations needed to bring the Act into force. The Act will remove the usual 26-week minimum service requirement for fathers and partners to take paternity leave where the mother of a child dies shortly after the child's birth (or the adoptive parent or intended parent in a surrogacy arrangement dies). This would make paternity leave a Day 1 employment right in these circumstances (note that under the ERB the plan is to make paternity leave a Day 1 right for all). Separately, regulations may extend the amount of paternity leave available in such circumstances, potentially up to 52 weeks. It is not yet clear how much of this leave would be paid – will it be just the

two weeks' statutory paternity pay as now, or will it mirror statutory maternity and adoption pay and be available for up to 39 weeks? Further, regulations may provide that if the child also dies (or is returned after adoption), the father or partner will be entitled to stay on paternity leave for a period of time. Regulations may also provide enhanced redundancy protection to bereaved employees when they return from paternity leave and allow them to work on "keeping-in-touch" days during their paternity leave. The regulations are yet to be published and it is not known whether the rights will come into force in April 2025, or later in the year.

- **Private Members' Bills 2024-25:** several employment-related Private Members' Bills sponsored by different MPs are currently on their passage through Parliament. Although not impossible, Private Members' Bills are less likely to pass into law. The Bills of most interest are:
    - the **Bullying and Respect at Work Bill**: this Bill would introduce a legal definition of "bullying" and allow employees to bring bullying claims in the Employment Tribunal. It would also introduce a "Respect at Work Code" which would set minimum standards for positive and respectful work environments and give powers to the Equalities and Human Rights Commission to investigate workplaces and take enforcement action. The Bill has its next reading on 20 June 2025.
    - the **Domestic Abuse (Safe Leave) Bill**: this Bill would introduce a right for employees who are victims of domestic abuse to take up to 10 days' paid "safe leave" from work. The Bill has its next reading on 20 June 2025.

- the **Health and Safety at Work Act 1974 (Amendment) Bill**: this Bill would amend the Health and Safety at Work Act 1974 to require employers to take proactive steps to prevent violence and harassment in the workplace, including providing relevant training to staff. The Bill would also require the Health and Safety Executive to publish a framework on violence and harassment in the workplace and publish guidance for employers. The Bill has its next reading on 7 March 2025.
- the **Office of the Whistleblower Bill**: this Bill would establish an independent "Office of the Whistleblower" to protect whistleblowers. It would set, monitor and enforce standards for the management of whistleblowing cases, provide disclosure and advice services, direct whistleblowing investigations and order redress of detriment suffered by whistleblowers. The Bill has its next reading on 25 April 2025.
- the **Public Sector Exit Payments (Limitation) Bill:** this Bill would limit exit payments made by some public sector organisations to employees. The Bill has its next reading on 13 June 2025.

Government consultations, calls for evidence, reviews and guidance

- **Right to disconnect:** the Government has committed to introduce a new statutory Code of Practice which will provide statutory guidance on the ability for workers to disconnect outside normal working hours. However, it does not appear that a statutory right to disconnect will be introduced. We can expect a public consultation on the draft Code before it comes into force.

- **Regulating employee surveillance:** a consultation on workplace surveillance technologies has been promised.

- **Introducing a single worker status:** a consultation on introducing a single worker status has been promised. This consultation will also look at ways to improve protections for the self-employed.

- **Improving TUPE rights and protections:** a call for evidence will be launched to examine a *"wide variety of issues".*

- **Banning unpaid internships:** a call for evidence is expected imminently.

- **Parental leave framework:** a review of all parental leave rights will be undertaken. In particular, we can expect to see the shared parental leave regime come under scrutiny given the low uptake rates. Ahead of that review, the cross party Women and Equalities Select Committee has recently opened a Call for Evidence seeking views on shared parental leave system. This closes on 7 February 2025.

- **Carer's leave**: a review of the carer's leave regime will be undertaken. In particular, consideration will be given to introducing a right to paid leave.

- **Health and safety law and guidance:** a review of the framework will be conducted *"in due course".* Among other things, the review will consider neurodiversity, extreme temperatures and Long Covid.

- **Menopause guidance:** one of the ERB's provisions is to require employers with 250 or more employees to publish equality actions plans covering, amongst other things, the steps being taken to support those going through the menopause. In addition, the Government has said it will publish non-binding guidance for all employers on menopause in the workplace. It is not yet known when this will be published. We expect that the new guidance will be along similar lines to that already published by Acas and the Equality and Human Rights Commission, both of which summarise the legal position briefly, explain how managers should approach conversations about menopause and address possible adjustments that employers can make to support affected staff.

Key cases

Belief and freedom of expression

- **Higgs v Farmor's School:** an employee of a school was dismissed after she made Facebook posts objecting to the Government's consultation on relationship and sex education in primary schools. She claimed she had been

discriminated against because of her religion or belief. An Employment Tribunal held that the dismissal not discriminatory. She was dismissed because of the nature of her Facebook posts which may have created the impression that she was homophobic and transphobic. On appeal, the EAT held that the Facebook posts were, in fact, a manifestation of her beliefs, meaning that the Tribunal should have probed the reason for the dismissal further. Was it because of, or related to, her protected beliefs (which would be unlawful)? Or was it because of the manifestation of her beliefs was objectionable (which could potentially be lawful). If the latter, the Tribunal would then need to assess whether dismissal was a proportionate response to any such objectionable behaviour. The EAT went on to set down some guidelines for conducting such an assessment and remitted the case to the Tribunal. However, this decision was appealed, and the Court of Appeal's decision is awaited. This decision is important as it will set a precedent in future cases concerning the manifestation of protected beliefs at work and when sanctions are lawful.

- **Ngole v Touchstone Leeds:** an employer who provided services to the LGBTQ community withdrew a job offer from a candidate after it was discovered that he had posted negative views about homosexuality on Facebook. After withdrawing the offer, the employer invited him for a second interview to explain his position and offer reassurances, however, they did not go on to reinstate the job offer. The Employment Tribunal held that the withdrawal of the job offer amounted to direct discrimination as it was not a proportionate response. Instead, the employer should have invited him to discuss the matter first and, if not reassured, it could then

have withdrawn the job offer lawfully. The employer appealed to the EAT and its decision is awaited. This is another important decision which will consider the proportionality of an employer's response to what it considers to be an objectionable manifestation of a protected belief.

- **Miller v University of Bristol:** a Professor at a University who held anti-Zionist beliefs was summarily dismissed after complaints were made that he had made anti-Semitic comments in various contexts, including to his students. An Employment Tribunal held the anti-Zionist belief in question qualified as a protected philosophical belief under the Equality Act 2010. The University's own investigation had concluded that his statements were not anti-Semitic, had not incited violence, and had not posed any threat to any person's health or safety. Accordingly, the Tribunal went on to decide that the dismissal was a disproportionate response to the manifestation of his beliefs and a sanction short of dismissal (such as a warning) would have been the appropriate response. The dismissal was held to be directly discriminatory and unfair. The University has appealed to the EAT and the hearing is due to take place later this year.

Whistleblowing protection

- **Sullivan v Isle of Wight Council:** an external job applicant argued that she was entitled to bring a whistleblowing detriment claim against a prospective employer. TheEAT held that she did not qualify as a "worker" for whistleblowing law purposes, nor should the

law be interpreted widely so as to give job applicants protection (as may be done, exceptionally, for other groups such as judicial office holders and, potentially, charity trustees). The job applicant appealed, and the Court of Appeal decision is awaited. This is an important decision in determining who has whistleblowing protection.

- **Wicked Vision Ltd v Rice:** an employee brought a whistleblowing claim against the employer, arguing that it was vicariously liable for a detriment (namely, his dismissal) which had been meted out by a co-worker (namely, the owner of the business). The EAT held he could not do so. He could bring a detriment of dismissal claim against the *co-worker* and he could bring an unfair dismissal claim against the *employer*. However, if the employer was vicariously liable for the detriment of dismissal, this would effectively duplicate the unfair dismissal claim and was not permitted under the legislation. In doing so, the EAT took a narrow interpretation of the leading case on this issue – *Timis and Sage v Osipov* – holding that it was only authority for the point that a detriment of dismissal claim could be brought against a co-worker and not on the question of claims based on vicarious liability. Interestingly, a few months later, in *Treadwell v Barton Turns Developments Ltd*, the EAT reached the opposite view. Appeals have been filed in both cases and the Court of Appeal is due to hear the combined appeal later this year. This will be an important decision is drawing the boundaries of an employer's liability where a whistleblower is dismissed.

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City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

The Employment Rights Bill: a closer look at the remaining provisions of the Bill and at what else is promised

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the final article in our series analysing the Bill, we consider the remaining proposals in the Bill and what else is promised.

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the final article in our series of articles explaining the Bill, we sweep up what else is covered by the Bill and consider what else has been promised by the Labour Government.

What else is covered in the Bill?

In our previous five articles we have discussed the core provisions of interest for most employers across all sectors as follows:

- **Article 1: Family-friendly provisions**.
- **Article 2: Dismissal-related provisions**.
- **Article 3: Equality law provisions**.
- **Article 4: Contract and pay provisions**.
- **Article 5: Enforcement provisions**.

To complete the picture, we have rounded up below the other areas covered by the Bill, some of which are sector-specific.

Area	Bill proposal
Public sector workers	A power to make regulations to protect workers who are outsourced from the public sector.
Ships' crews	Some fine-tuning amendments to the notification rules in certain collective redundancies involving ships' crews. In addition, measures to strengthen seafarers' rights at sea and implement international conventions on seafarers' employment will be added to the Bill by way of an amendment as it progresses through Parliament.
School support staff	Provisions reinstating the "School Support Staff Negotiating Body", a body which will have the power to negotiate on the pay and conditions of affected workers.
Adult social care workers	Provisions introducing a "Fair Pay Agreement" in the adult social care sector and giving the Government the power to establish an "Adult Social Care Negotiating Body", which will have the have the power to negotiate on the pay and conditions of affected workers. A consultation on how the Fair Pay Agreement should work will be launched soon.

Trade unions	Provisions aimed at strengthening trade unions including: • requiring employers to notify workers of their right to join a trade union in writing when they start employment and at other times (you can read more about this **here**); • enhancing the rights of trade unions to access workplaces for the purpose of meeting, recruiting and organising workers and facilitating collective bargaining; • simplifying the process for trade union recognition; • repealing rules which impeded the financing of trade unions; and • repealing or amending existing laws governing industrial action (for example, in relation to balloting, voting and the giving of notice of industrial action) with the aim of making it easier for trade unions to call such action.
Workers involved in trade union activities	Provisions aimed at strengthening protection for workers involved in trade union activities including: • improved access to facilities for trade union representatives taking time off to carry out their duties; • modernising the existing law on blacklisting to protect more people from blacklisting due to their trade union membership or activity; • introducing protection from detriment for having taken part in industrial action; and • removing the cap on the number of weeks for which an employee is protected from dismissal for taking part in industrial action (i.e. the first 12 weeks), meaning they will be protected throughout.

Beyond the Bill: what else is promised?

The Government's appetite for employment law reform does not end with the Bill. The **Next Steps to Make Work Pay** document issued alongside the Bill sets out the plans to take forward the remaining Manifesto commitments on workplace law reform. The table below summarises the position.

Manifesto commitment	Next steps?
Improving the National Minimum Wage	The Government has already widened the remit of the Low Pay Commission (the **LPC**) and the LPC's recommendations for the new rates to apply from April 2025 are expected shortly. You can read more about this **here**.
Extending the time limit for statutory Employment Tribunal claims from three to six months	It is stated that this will be introduced by way an **amendment to the Bill** as it progresses through Parliament.

Strengthening and expanding equal pay and pay reporting laws	A new **Equality (Race and Disability) Bill** will: • introduce ethnicity and disability pay gap reporting for employers with 250 or more staff; • introduce the right to bring equal pay claims on the basis of race or disability; • introduce measures on equal pay, including permitting comparisons with outsourced workers; and • introducing a new regulatory and enforcement unit for equal pay. A draft Bill is expected to be published in this Parliamentary session for "pre-legislative scrutiny" and public consultation on the proposals will begin in due course.
Introducing a "right to switch off"	A new **statutory Code of Practice** will address the right to switch off, rather than endowing workers with a statutory right to do so. We can expect a public consultation on the draft Code before it comes into force.
Regulating employee surveillance	A **consultation** on workplace surveillance technologies has been promised.
Introducing a single worker status	A **consultation** on introducing a single worker status has been promised.
Better rights for the self-employed	This will be addressed as part of the **consultation** on introducing a single worker status.
Reviewing the parental leave framework	A **review** will be undertaken.

Reviewing the right to carer's leave	A **review** will be undertaken.
Reviewing health and safety law and guidance	A **review** will be conducted *"in due course".* Among other things, the review will consider neurodiversity, extreme temperatures and Long Covid.
Improving TUPE rights and protections	A **call for evidence** will be launched to examine a *"wide variety of issues".*
Banning unpaid internships	A **call for evidence** will be launched by the end of 2024.
Permitting collective grievances	The Government will **engage with Acas** about how to facilitate the raising of collective grievances.
Employer guidance on the menopause at work	It is stated that this will be delivered but no further detail is given.

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The Employment Rights Bill: a closer look at the provisions concerning enforcement

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the fifth article in our series analysing the Bill, we consider the proposals concerning

enforcement of employment law.

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the fifth article in our series of articles explaining the Bill, we consider the proposals affecting enforcement of employment law.

Currently, most employment rights need to be enforced by individual workers in the Employment Tribunal system, something which is often challenging for workers with limited resources. A limited number of rights are enforced by the State on behalf of workers, namely, by the Gangmasters and Labour Abuse Authority, the Employment Agency Standards Inspectorate and HMRC's National Minimum Wage Enforcement Team. The Bill provides that the Secretary of State will take over responsibility for enforcing certain aspects of labour market legislation. The Explanatory Notes to the Bill indicate that the Secretary of State will discharge this responsibility by establishing a new body, likely to be called the "Fair Work Agency", which will have responsibility for enforcement of the following areas of law:

- the National Minimum Wage regime;
- the Statutory Sick Pay regime;
- holiday pay rights;
- the regulation of employment agencies and employment businesses;
- the unpaid Employment Tribunal financial penalties scheme for failure to pay sums ordered or settlement sums;
- the licensing regime for businesses operating as "gangmasters" in certain sectors;
- parts 1 and 2 of the Modern Slavery Act 2015; and
- penalties issued by the Fair Work Agency itself.

The Government's hope is that bringing these areas together under one roof will help create a *"strong, recognisable single brand"* so individuals know where to go for help and lead to a more effective use of resources. For now, it appears that enforcement of equality law is remaining with the Equality and Human Rights Commission (the **EHRC**), however, the Bill reserves the right to expand the Fair Work Agency's areas of enforcement in future.

Role of the Fair Work Agency

In terms of addressing non-compliance with the labour market laws within its remit, the Fair Work Agency will have the power to:

- obtain documents or information;
- enter business premises in order to obtain documents or information;
- remove and retain documents or information;
- request that "labour market enforcement undertakings" are provided, which are undertakings to comply with prohibitions, restrictions or requirements stipulated by the Fair Work Agency (and which may last for up to two years); and
- apply to Court for a "labour market enforcement order" which prohibits or restricts certain actions or requires certain actions to be taken (and which may last for up to two years).

Where a person provides false information or documents, obstructs enforcement, fails to comply with a requirement of the Fair Work Agency and/or fails to comply with a labour market enforcement order, they will commit a criminal offence punishable by a fine or imprisonment. Notably, where an offence is committed by a company and it is shown that the

offence was committed with the consent of an officer of the company, or was attributable to any neglect on their part, then that officer will also be guilty of a criminal offence. In this context, "officer" means a director, manager, secretary or other similar officer or person purporting to act in such capacity.

Further, the Bill sets out that the Fair Work Agency must establish an Advisory Board of not fewer than nine members who represent the interests of trade unions and employers, as well as independent experts. In consultation with the Advisory Board, the Fair Work Agency must publish a "Labour Market Enforcement Strategy" every three years addressing the scale and nature of non-compliance with labour market laws and setting out how its enforcement functions will be exercised in future. It must also publish an annual report outlining how its enforcement functions were exercised that year, with an assessment of whether its strategy had an impact on the scale and nature of non-compliance.

What do these changes mean in practice for employers?

- The possibility of State enforcement of labour market laws tends not to be on the radar of most employers. Naturally, the focus is usually placed on the risk of Employment Tribunal claims by individual employees, which carry the risk of compensation awards and bad publicity. Currently, State enforcement is dispersed amongst different bodies, with low levels of knowledge about the remit of those bodies and their enforcement powers. The transition to a single State enforcement body is likely to achieve the desired impact of creating a single, recognisable brand, which, in turn, may increase the reporting of malpractice.

- The Fair Work Agency has teeth. It has strong investigatory and enforcement powers, which could lead to fines and criminal convictions, including, in certain circumstances, for the senior executives working in the offending business. This has the effect of incentivising those individuals to ensure that the business is meeting its legal obligations. A failure to do so could mean they end up with a criminal record. Further, if they work in a regulated sector, this could result in regulatory action against them and potentially jeopardise their ability to practice in their chosen career. Therefore, a lot is at stake.

- The establishment of the Fair Work Agency will take time and its success will, in large part, depend on whether it has sufficient resources to discharge its duties.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. We do not expect the Fair Work Agency to be up and running until 2026 at the earliest. It is worth noting that the Next Steps to Make Work Pay document commits to introducing a separate regulatory and enforcement unit for equal pay. It is not clear whether this unit will sit within the EHRC (which would be its natural home) or be a standalone body.

Stay tuned for our final article in the series, where we will sweep up the outstanding provisions of the Bill not covered in our first five articles and also look ahead to what else is promised.

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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.

The Employment Rights Bill: a closer look at the family-friendly provisions

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the first in a series of articles analysing the Bill, we consider the proposals for family-friendly reform.

Running to more than 150 pages, the Employment Rights Bill (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the first in a series of articles explaining the Bill, we consider all the proposals in the family-friendly sphere.

Flexible working

Currently, employers may refuse flexible working requests where they consider that at least one of eight grounds specified in the Employment Rights Act 1996 (the **ERA**) applies. This includes things like the burden of additional costs, an inability to reorganise work among existing staff or detrimental impact on quality or performance. Importantly, this is a *subjective* test. In other words, as long as an

employer considers that one of the eight grounds applies, and that view is based on correct facts, that is a sound basis upon which to reject a request. Employees are unable to challenge the decision on the basis that they feel the decision was an unreasonable one (albeit they may be able raise other claims such as automatic unfair dismissal or indirect sex discrimination).

The Bill proposes that the law is changed to require an employer's refusal of a request to be based on one of the existing eight grounds and be an *objectively reasonable* one. Further, when refusing a request, the employer must notify the employee of the ground for refusing the request and explain why it considers that it is reasonable to refuse the application on that ground. Where an employer's decision is not reasonable, or where it fails to explain this to the employee, the employee will be able to complain to an Employment Tribunal.

There is one further small change. From 6 April 2024, employers have been required to consult with employees before refusing a request. The Bill provides that, in future, regulations may be issued setting out the precise steps that an employer must take in order to comply with this consultation requirement.

What will these changes mean for employers in practice?

- We think that employers are going to have to go further to be able to justify the ground or grounds for refusal. For example, if a request is refused on the basis of an inability to reorganise work among existing staff or recruit additional staff, and the employer has not consulted with existing staff about the possibility of doing so or attempted to recruit additional staff, it is likely that a refusal on such grounds would be unreasonable. Or where a request was to be refused on the basis of detrimental impact on quality or

performance, again, the question will be: what is the evidence for this view? Unless there is some historical evidence (e.g. if an employee has worked the same or similar pattern in the past and it was unsuccessful), it is likely that an employer would need to allow a trial period of the proposed working pattern for a reasonable period of time in order to assess whether there was, in fact, such a detrimental impact. The end result is that more requests are likely to be accepted.

- Where an employer breaches the rules governing flexible working requests, an employee may complain to an Employment Tribunal. The Tribunal may order the employer to pay compensation of up to eight weeks' pay (currently capped at £700 per week) and require the employer to reconsider the application. Where an employer's refusal is found to have been unreasonable, we can expect Tribunals to more readily order employers to reconsider requests.
- Further, if a refusal is unreasonable, this could assist the employee in other potential claims. For example, if an employer has adopted an unreasonable position this may be sufficient to amount to a repudiatory breach of contract, justifying constructive dismissal. Indeed, in the recent case of Johnson v Bronzeshield Lifting Ltd, a Tribunal held that an employer's failure to take into account relevant information before refusing a flexible working request was a repudiatory breach. This was on the basis that the hours that an employee works has a major impact on their lives, and it also matters how flexible working applications are dealt with – the outcome is not the only thing of importance. It is not a stretch to see that a Tribunal could reach a similar decision where a request has been refused unreasonably.
- It looks like specific rules are on the way governing the form of consultation needed before refusing a request. The existing statutory Acas Code of Practice on requests for flexible working sets out recommendations

on the scope of such consultation. The Code suggests gathering all relevant information, holding a meeting with the employee to discuss the request and considering alternatives if needed. A written record of the meeting should be kept, and a right of appeal is also recommended. A failure to follow the Code does not give rise to a claim but Tribunals will take it into account when considering relevant cases. Therefore, we think it is likely that the Code's provisions on consultation will be elevated into law.

- In due course, employers will need to update policies and practices to reflect the new rules on refusing requests.

Family leave rights

There are three proposed areas of change in the field of family leave rights.

Unpaid parental leave

Currently, employees with one year's service have a right to take up to four weeks' unpaid parental leave per year in respect of children under the age of 18 (up to a maximum of 18 weeks' leave in total).

The Bill proposes to remove the service requirement and make unpaid parental leave a Day 1 employment right.

Paternity leave

Currently, employees with 26 weeks' service ending with the week immediately before the 14th week before the expected week of childbirth (or the week in which an adopter is notified of a match) have a right to take up to two weeks' paternity leave. The same service requirement applies in respect of eligibility for statutory paternity pay.

The Bill proposes to remove the service requirement for paternity leave, making it a Day 1 employment right. However, the Bill is silent on whether the service requirement will be lifted for statutory paternity pay, which suggests that it will remain.

Further, currently, where an employee is entitled to paternity leave and pay and shared parental leave and pay, the paternity leave and pay must be taken *before* the shared parental leave and pay. If the employee takes the shared parental leave and pay first, they lose their entitlement to paternity leave and pay. The Bill proposes to remove this restriction, meaning that employees may take shared parental leave and pay first if they wish and retain their entitlement to paternity leave and pay.

Bereavement leave

Currently, employees have a Day 1 employment right to take two weeks bereavement leave if a child under the age of 18 dies (and those with 26 weeks' service ending with the week before the child died are also entitled to receive statutory parental bereavement pay). Employees taking parental bereavement leave are also protected from detriment and dismissal. However, there is no general right to take bereavement leave outside of this, for example when a spouse, parent or sibling dies. Of course, many employers do permit compassionate leave in such circumstances, but there is no legal requirement to do so.

The Bill proposes amending the parental bereavement leave rules (which are set out in the ERA) to turn "parental bereavement leave" into "bereavement leave", although some special rules will still apply where a child dies. Regulations will specify the relationships which will entitle an employee to take bereavement leave, however, we can expect it to cover most close relationships such as a spouse, civil partner, other life partner, grandchild, parent, sibling or grandparent. The Bill says that the bereavement leave

entitlement must be not less than one week, however, the leave entitlement will stay at two weeks' where a child has died. It appears from the drafting of the Bill that the leave will be unpaid, save that statutory pay will remain available where a child dies.

What will these changes mean for employers in practice?

- The removal of the service requirements for unpaid parental leave and paternity leave will mean that a larger cohort of employees will become eligible to take these forms of leave. The result is that employers will have to manage a higher number of these types absences than is currently the case. In due course, employers will need to adjust relevant policies to reflect the wider scope.
- Many employers already offer paid bereavement leave but the new statutory right will introduce rules around how such leave is managed and provide protections for those taking the leave. Employers will need to revise their bereavement leave policy in due course and will also need to consider whether to enhance the right and offer paid leave.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, the family-friendly provisions will not come in straight away; regulations will be needed to bring them into force. Regulations may also bring different parts of the Bill into force at different times. The Government may also consult on certain aspects of the proposals. Indeed, it has said that in relation to the flexible working reforms it is important to take into account a range of views and it will develop the detail of the approach *"…in consultation and partnership with business, trade unions and third sector bodies".*

It is also worth noting that at the same time as publishing the Bill, the Government published a document entitled Next Steps to Make Work Pay setting out its plans for further workplace reform outside the Bill. It acknowledges that some reforms will take longer to implement, including a full review of the entire parental leave framework and a review of the benefits of introducing paid carer's leave. No specific time frame for these reviews is given.

It also states that the Government will deliver some reforms through means other than legislation, such as taking forward a "right to switch off" through a statutory Code of Practice. This suggests that there will be no statutory right to switch off – rather statutory best practice guidance which may be taken into account by an Employment Tribunal in relevant claims. This appears to be a watering down of the pre-election promise that a *right* to switch off would be introduced. Although not stated, it is likely that there will be a public consultation upon any such Code of Practice before it comes into force. However, as legislation would not be required, this could be introduced relatively quickly.

Stay tuned for our second article in the series, where we will consider the provisions of the Bill affecting dismissals.

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Labour Government scraps law allowing workers the right to request predictable working patterns

Just weeks before it was due to come into force, the Government announced it has no plans to introduce the new right for workers to request predictable working patterns. Read on to find out why and what is coming in its place.

What is the background?

On 18 September 2023 the Workers (Predictable Terms and Conditions) Act 2023 became law. The Act was intended to give workers (and agency workers) a statutory right to request more "predictable" working patterns.

Where eligible, workers would be able to request a more predictable working pattern where their current work pattern lacked certainty in terms of hours, days and/or times worked. "Work pattern" also covered the length of the contract, and a presumption was to be made that a fixed-term contract of under 12 months lacked predictability. However, employers would be able to refuse such requests on a wide range of grounds. You can read our full summary of the proposed right here.

Although the Act had passed into law, its provisions did not come into force straight away. The intention was that it would take effect on 18 September 2024. In readiness, Acas published a draft statutory Code of Practice which provided further guidance on how employers should handle such requests.

What has changed?

Earlier this month, a spokesperson for the Department of Business and Trade confirmed that the Government had “no plans” to bring the Act into force. The Government has its own plans to address insecure working and intends to go further than providing a mere right to request a fixed working pattern. Instead, it plans to legislate to give workers the right to a new contract that reflects the number of hours worked over a period of 12 weeks or more. The spokesperson said the Government did not wish to confuse employers and workers with two different models, hence the scrapping of the right to request.

The planned right to a new contract will be complimented by proposals to:

- ban “exploitative” zero hours contracts altogether; and
- require employers to give workers reasonable notice of changes to working times or shifts, with a right to compensation where late changes are made.

The full detail of these proposals remains to be seen but all are expected to feature in the forthcoming Employment Rights Bill, which Labour had promised to publish within 100 days of taking power (so by 12 October 2024).

What does this mean for employers?

Some employers may have already prepared new policy documents to reflect the right to request a predictable working pattern. It appears these are no longer needed. To the extent that they have been added to Staff Handbooks, they should be withdrawn, and staff notified.

Employers should watch out for the new Employment Rights Bill to understand the proposed scope of the new right to have a fixed working pattern. For those wishing to be as well prepared as possible, it would be sensible to review the

working patterns of staff with variable working hours over the previous three months. This will help you identify the average working week of such workers and the potential scale of the changes you may need to make in future.

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The King's Speech triggers the start of the Labour Government's workplace law reforms

The King's Speech was delivered in Parliament on 17 July 2024, setting out the Labour Government's legislative agenda. The speech promised that two new pieces of employment legislation will be introduced: an Employment Rights Bill and an Equality (Race and Disability) Bill.

Although the draft Bills have not yet been published, the background briefing notes to the King's Speech suggest that they will take forward many of the Labour Government's Manifesto promises on workplace law reform.

The Employment Rights Bill

This Bill will deliver the following manifesto promises:

- **Banning exploitative zero-hour contracts** and ensuring that workers have a right to a contract that reflects the number of hours they regularly work and that all workers get reasonable notice of any changes in shifts with proportionate compensation for any late cancellations or changes.
- **Ending 'Fire and Rehire'** by reforming the law to provide effective remedies and replacing the previous Government's statutory Code of Practice on Dismissal and Re-engagement (which came into force on 18 July 2024).
- **Making parental leave, sick pay and protection from unfair dismissal available from day 1 on the job,** but with employers permitted to operate probationary periods to assess new hires. We discussed the impact of making unfair dismissal a Day 1 right in our briefing here.
- **Strengthening Statutory Sick Pay** by removing the lower earnings limit to make it available to all workers and removing the waiting period.
- **Making flexible working the default from day 1 on the job**, with employers required to accommodate this as far as is reasonable.
- **Strengthening protections for new mothers by making it unlawful to dismiss a woman who has had a baby** for six months after her return to work, except in specific circumstances.
- **Establishing a new Single Enforcement Body**, also known as a "Fair Work Agency", to strengthen enforcement of workplace rights.
- **Establishing a Fair Pay Agreement in the adult social care sector** and, following review, assess how, and to what extent, such agreements could benefit other sectors.
- **Reinstating the School Support Staff Negotiating Body**, to establish national terms and conditions, career progression routes, and fair pay rates.
- **Updating trade union legislation** by removing restrictions on trade union activity – including the

previous Government's approach to minimum service levels – and ensuring industrial relations are based around good faith negotiation and bargaining.
- **Simplifying the process of statutory recognition** and introducing a regulated route to ensure workers and union members have a reasonable right to access a union within workplaces.

The Equality (Race and Disability) Bill

This Bill will deliver the following manifesto promises:

- **Enshrining in law the full right to equal pay for ethnic minorities and disabled people**, making it easier for them to bring unequal pay claims. We discussed the potential impact of these new equal pay rights in our briefing here.
- **Introducing mandatory ethnicity and disability pay reporting for larger employers** (i.e. those with 250+ employees).

What's missing?

Although ambitious in scope, many of Labour's promises for workplace law reform are missing from these two Bills. In some cases, this is because the nature and impact of the proposals needs to be explored in greater depth (e.g. by way of a "call for evidence" and public consultation) before setting them out in legislation. For example, the proposals to introduce a single worker status and a right for workers to disconnect outside their normal working hours.

In contrast, other proposals may be taken forward by way of secondary legislation (i.e. a statutory instrument) and do not need to be included in a new Act of Parliament. For example,

the dual discrimination provisions and public sector socio-economic duty provisions are already contained in the Equality Act 2010 and just need to be enacted. It is possible that other proposals which require relatively minor drafting changes to existing legislation could also be taken forward by way of secondary legislation. For example, the proposals to require employers to publish gender pay gap action plans and to increase the time limits in statutory employment claims from three to six months.

It remains to be seen how, and when, other proposals will be taken forward, including plans to:

- strengthen the new duty to prevent sexual harassment and introduce protection from third party harassment;
- change equal pay law to permit comparisons with outsourced workers and introduce a new enforcement unit;
- regulate the surveillance of employees;
- introduce a right to bereavement leave;
- strengthen the law on whistleblowing and TUPE;
- require employers to publish "menopause action plans"; and
- change the trigger for collective redundancy consultation.

Next steps?

Labour promised to introduce legislation on workplace law reform within 100 days of coming into power, meaning drafts of the two Bills should be published on or before 12 October 2024. We will produce a further update once the draft Bills are available.

In the meantime, if you would like a refresher on Labour's plans for employment law, you can revisit our webinar from last month here.

[The King’s Speech 2024]

[The King’s Speech 2024 – Background Briefing Notes]

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Are you ready for the April employment law changes?

A raft of employment law changes will come into force in April 2024, including simple increases to statutory rates of pay, tweaks to existing employment rights and the introduction of brand new employment rights and practices. Our at-a-glance guide tells you what you need to know.

DATE	AREA	CHANGE
1 April 2024	**National minimum wage**	The national minimum wage hourly rates will increase as follows: • National Living Wage (age 21): £11.44 (up from 10.42). • Age 18 – 20: £8.60 (up from £7.49). • Age 16 – 17 and Apprentices: £6.40 (up from £5.28).

DATE	AREA	CHANGE
Holiday years commencing on or after 1 April 2024	**Holiday accrual and pay** You can read more about these changes here.	The position on accrual of annual leave and holiday pay will change 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. Employers will also have the option of introducing a system of“rolled-up holiday pay” for irregular hours and part-year workers, but not for other types of workers.

DATE	AREA	CHANGE
Notification of pregnancies or return dates on or after 6 April 2024	**Redundancies** You can read more about these changes here.	Pregnant employees who are at risk of redundancy will have priority for any suitable alternative vacancy that is available. Employees returning to work from a period of maternity, adoption or shared parental leave who are at risk of redundancy will have priority for any suitable alternative vacancy that is available. The additional protected period ends 18 months after the date of the child's birth or the day the child is placed with the employee for adoption. Only employees who have taken a period of shared parental leave of at least six consecutive weeks or more will qualify for protection.

DATE	AREA	CHANGE
Expected week of childbirth or adoption placement on or after 6 April 2024	**Paternity leave** You can read more about these changes here.	Eligible employees will have the option of taking their statutory paternity leave as either a single block of either one whole week or two consecutive whole weeks (as is currently the case), 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. The period within which statutory paternity leave must be taken will increase from 56 days to 52 weeks from the birth or adoption placement. The notification requirements have also been relaxed, so that employees will only need give four weeks' notice of a proposed period of leave.

DATE	AREA	CHANGE
6 April 2024	**Flexible working** You can read more about these changes here.	The requirement for an employee to have 26 weeks' continuous service in order to make a flexible working request will be removed, making the right a Day 1 employment right. Later this year (on a date to be confirmed), the following changes will be made 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.

DATE	AREA	CHANGE
6 April 2024	**Carer's leave** You can read more about these changes here.	Employees will have a new 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. 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. In order to qualify for carer's leave, employees must also comply with certain notice requirements.
6 April 2024	**Compensation limits**	The maximum limits on compensation for certain purposes will increase as follows: • Maximum week's pay: £700 (up from £643). • Maximum basic award for unfair dismissal: £21,000 (up from £19,290). • Maximum compensatory award for unfair dismissal: £115,115 (up from £105,707). • Maximum statutory redundancy payment: £21,000 (up from £19,290).

DATE	AREA	CHANGE
6 April 2024	**Statutory Sick Pay**	The rate of statutory sick pay will increase to £116.75 per week (up from £109.40 per week).
7 April 2024	**Statutory pay for family-related leave**	The rate of statutory maternity, paternity, adoption, shared parental and parental bereavement pay will increase to £184.03 per week (up from £172.48 per week).

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New law passed which will shake up flexible working regime

On 20 July 2023, the Employment Relations (Flexible Working) Act 2023 received Royal Assent and became law. The Act introduces reforms to the flexible working regime, which are due to come into force in a year's time. The statutory Acas Code of Practice on flexible working will be updated to reflect the changes to the law.

What is the background to the reforms?

In September 2021, the Government published a consultation setting out its proposals for change to the flexible working framework. In particular, views were sought on whether the right to request flexible working should become a Day 1 employment right (currently, 26 weeks' service is required before a statutory request can be made).

The Government responded to the consultation in December 2022 and confirmed that it would make the right to request flexible working a Day 1 employment right. It is estimated that this will bring a further 2.2 million employees within the scope of the flexible working regime.

Separately, the response confirmed that the Government would support the Employment Relations (Flexible Working) Bill 2022-23, a Private Members' Bill sponsored by the Labour MP, Yasmin Quereshi. The Bill received Royal Assent on 20 July 2023 and became the Employment Relations (Flexible Working) Act 2023.

What changes will be made to the flexible working framework?

The Act will make the following changes to the flexible working framework:

- Employees will no longer be required 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, unless an extension is agreed.

However, the Act does *not* take forward the Government's proposal of making the right to request flexible working a Day 1 employment right. The Government has said that secondary legislation will be introduced separately to implement this.

Are there any other changes employers need to know about?

On 12 July 2023, Acas launched a consultation on proposals to update its statutory Code of Practice on handling flexible working requests. Although the Code is not legally binding, it is taken into account by Employment Tribunals when considering relevant cases. The Code has been updated to reflect changes to ways of working since the Code was first introduced in 2014, and to reflect the new legal reforms. The draft Code encourages employers to approach requests with an open mind and engage in meaningful dialogue. It also:

- Provides clarity on what consultation should involve and recommends that meetings are held both when a request is to be rejected or accepted.

- Extends the categories of individuals who may accompany an employee at meetings to discuss a request (so that it mirrors the position for disciplinary and grievance meetings).

- Provides guidance on the information that employers should set out to help explain their decision.

- Encourages employers to allow for an appeal process where a request is rejected.

- Provides information about the planned new right for workers to be able to request more predictable working patterns (which is separate to the right to request flexible working).

The consultation on the draft Code close 6 September 2023. Acas has said it will also update its non-statutory guidance on flexible working, which complements the Code.

Separately, on 19 July 2023, the Government launched a call for evidence on "non-statutory" flexible working. This covers regular flexible working arrangements that have been agreed outside the statutory regime, as well as ad hoc arrangements which are occasional or temporary in nature. In particular, the Government wishes to understand the extent to which individuals and businesses are using such practices, how and why they are using them, as well as the barriers and the benefits. It also wants to receive examples of best practice and case studies. The Government wishes to develop an evidence base in this area, which it says will inform the Government's future flexible working strategy.

What steps should employers take now?

The Act provides that the changes may come into force on a date or dates specified by the Secretary of State. The Government has said it "expects" the measures to come into force approximately a year after Royal Assent, in order to give employers time to prepare i.e. in July 2024. The intention is that the secondary legislation introducing the Day 1 right to request flexible working will be introduced at the same time.

Therefore, employers have a year to prepare for these changes. We would recommend that you consider taking the following preparatory steps:

- Consider whether you will specify what flexible working options would be suitable for a role in job advertisements and 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 discussing this upfront 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.

- Revise your flexible working policies 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 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 ability to make two requests per year, the shorter time frame for providing responses 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 consultation has been undertaken).

In addition to the above, you may wish to contribute to the consultation on the Acas flexible working code and the call for evidence on non-statutory flexible working.

Employment Relations (Flexible Working) Act 2023

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Government announces plans to

relax paternity leave rules

The Government has announced that it intends to introduce legislation to make it easier for fathers to take paternity leave. It is not yet known when these changes will come into force.

Last month, the Government published its response to a 2019 consultation on reforming parental leave and pay entitlements. In its response, the Government announced plans to make the following changes to the paternity leave framework:

- **Allowing discontinuous blocks of leave:** eligible employees will be able to take the two weeks' statutory paternity leave in two separate blocks of one week of leave (currently, only one week or a single block of two weeks may be taken).

- **Providing a longer window within which to take the leave:** eligible employees will be able to take their statutory paternity leave within 52 weeks of birth or placement for adoption (currently, it must be taken in the first eight weeks after birth or placement for adoption).

- **Simplifying notice requirements:** the notice requirements will be changed to make them more proportionate to the amount of time the father or partner plans to take off work. It is proposed that fathers will need to give 28 days' notice before each period of leave they intend to take, although the notice of entitlement will still need to be given 15 weeks before birth.

At the same time, the Government confirmed that it does not intend to reform either the shared parental leave or unpaid parental leave frameworks.

The Government has said secondary legislation will be needed to effect these changes and will be introduced in due course.

We will provide a further update on these reforms once the draft legislation has been published.

Parental Leave and Pay: Government response, June 2023

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New law offering workplace rights to those with caring responsibilities

The Carer's Leave Bill received Royal Assent on 24 May 2023, becoming the Carer's Leave Act 2023. The Act provides the pathway to new rights and protections at work for employees who have caring responsibilities. In this briefing, we outline where things currently stand and what steps employers should take next.

What is the background?

The charity, Carers UK, estimates that that there is a 50:50

chance of a person in the UK having caring responsibilities before the age of 50 – long before retirement age. Caring responsibilities can take many forms. It may include caring for an elderly relative, but it may cover other scenarios such as caring for a child who has a disability, or a partner injured in an accident. It can extend to caring for those suffering with mental health impairments (such as dementia or depression) as well as physical health impairments.

Carers UK reports that caring is often "invisible" in the workplace, with many not identifying themselves as carers or feeling uncomfortable about raising personal matters at work. The result is that many carers struggle on in silence, attempting to juggle their unpaid carer's role with work. These pressures have led one in ten carers to consider reducing their working hours or giving up work altogether and 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 "as soon as Parliamentary time allowed". However, the legislation did not materialise. Instead, the Government chose to back a Private Members' Bill – the Carer's Leave Bill – which would allow regulations to be made to provide new rights and protections for carers.

What rights and protections will carers be given?

The Carer's Leave Act 2023 provides for the introduction of new rights and protections for carers including:

- a Day 1 right for employees to take at least one week's unpaid carer's leave in any 12-month period to provide care for, or make arrangements to provide care for, a dependant who has a long-term care need. In this context, a "long-term care need" means:
    - an illness or injury (whether physical or mental)

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).
- a right to benefit from the existing terms and conditions of employment that would have applied but for the leave (apart from terms and conditions about remuneration);
- a right to return to work to a job of a kind to be prescribed by the regulations;
- a right to claim compensation from employers who unreasonably postpone, attempt to prevent or prevent the taking of carer's leave; and
- protection from detriment or dismissal as a result of having taken carer's leave.

However, the precise scope and mechanics of the new rights will be set out in separate regulations. For example, the regulations will address:

- how much leave an employee may take (it must be at least one week in any 12-month period);
- when and how leave may be taken (e.g. continuously or discontinuously);
- the amount and form of notice to be given to the employer;
- what records employers will need to keep;
- whether, and in what circumstances, an employer is able to postpone the leave; and
- which activities count as "providing care" or "making arrangements to provide care".

The Government has said that the regulations will be laid in due course, although it is expected that this will not be before April 2024.

What steps should employers take now?

With just under a year before these new rights come into force, employers should devise their approach to carer's leave now. Although employers will need to await the publication of the regulations to understand the finer detail of how the rights will work, employers should consider the following policy issues now:

- 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)?
- 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)?
- If the regulations provide that leave may only be taken continuously, will you take a more flexible approach and allow the employee to take it discontinuously (e.g. a day at a time)?
- Will you relax any notice requirements provided for in the regulations? If so, what would be the minimum notice required? What form must it take (e.g. would verbal notice be sufficient)?

Employers should also remember that employees taking carer's leave will remain entitled to other relevant forms of leave 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.

In addition, where an employee is caring for someone with a disability, they may also have rights under the Equality Act 2010. Although such employees are not entitled to have

reasonable adjustments made for them, they are protected from less favourable treatment because of their association with a disabled person. Further, where an apparently neutral workplace policy or practice disadvantages such an employee, this may amount to indirect disability discrimination by association, unless the employer is able to justify its approach.

Carer's Leave Act 2023

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

New rights and protections at work for parents of babies requiring neonatal care

The Neonatal Care (Leave and Pay) Bill received Royal Assent on 24 May 2023 becoming the Neonatal Care (Leave and Pay) Act 2023. The Act provides the pathway to new rights and protections at work for employees who are parents of babies requiring neonatal care. In this briefing, we outline where things currently stand and what steps employers should take next.

What is the background?

Currently, parents of a baby requiring neonatal care must use existing statutory leave entitlements to allow them to take

time off work while their baby remains in hospital. For mothers, this means using up some of their 52-week maternity leave entitlement (the start of which is triggered on the day of the birth). For fathers, this would usually mean using up their two-week paternity leave entitlement, perhaps in combination with other leave rights such as unpaid parental leave, unpaid dependant emergency leave or annual leave. In some cases, the mother may exchange up to 50 weeks of her maternity leave for shared parental leave to share with the father. Doing this would enable the father to take a longer period of time off work, but would, in turn, reduce the amount of time off work that the mother is able to take.

Over the last ten years there have been calls to create special leave and pay rights for parents of premature babies in receipt of neonatal care. In 2015, two premature baby charities, Bliss and The Smallest Things, submitted a joint petition to Government on the issue. The aim was to create an entitlement to ringfenced rights which did not exhaust other forms of leave.

Back in 2019, the Government consulted on proposals to introduce new workplace rights to neonatal leave and pay. In March 2020, the Government responded to the consultation and committed to introducing such rights. However, the legislation did not materialise. Instead, the Government opted to back a Private Members' Bill – the Neonatal Care (Leave and Pay) Bill.

What rights and protections will affected employees be given?

The Neonatal Care (Leave and Pay) Bill received Royal Assent on 24 May 2023 and became the Neonatal Care (Leave and Pay) Act 2023. The Act provides for the introduction of rights and protections for employees who are parents of babies up to 28 days old who require neonatal care for at least one week without interruption. The rights and protections include:

- a Day 1 right for employees to take leave where they are the parent of a baby who needs to spend at least one week in neonatal care;

- a right for employees with at least 26 weeks' continuous service and whose weekly earnings are at or above the "lower earnings limit" (currently £123 per week) to be paid statutory neonatal pay;

- a right to benefit from the existing terms and conditions of employment that would have applied but for the leave (apart from terms and conditions about remuneration);

- a right to return to work to a job of a kind to be prescribed by the regulations; and

- protection from detriment or dismissal as a result of having taken or sought to take neonatal leave.

However, the precise scope and mechanics of the new rights will be set out in separate regulations. For example, the regulations will address:

- the precise meaning of "neonatal care";

- how much leave an employee may take (this will be set at between one and 12 weeks);

- the period within which the leave may be taken (this

will be at least 68 weeks from the child's birth);

- how leave may be taken (e.g. continuously or discontinuously);
- the rate and duration of statutory neonatal pay;
- the amount and form of notice to be given to the employer;
- the evidence of entitlement to be given to the employer;
- what records the employer will need to keep; and
- what will happen is special cases (e.g. where the parent has more than one child receiving neonatal care, or a child receives neonatal care on two or more separate occasions).

In response to written questions on 22 May 2023, Kevin Hollinrake MP stated that the new neonatal leave and pay entitlements are expected to be delivered in April 2025, with regulations to be laid in due course.

What steps should employers take now?

Although employers will need to await the publication of the regulations to understand the finer detail of how the new rights will work, employers should consider the following policy issues now:

- Who will have “ownership” of ensuring compliance with the new rules in your business (including things like preparing a staff policy and updating related policies, training line managers and managing any record-keeping obligations)?

- Will you enhance the amount of neonatal leave available? If so, to what amount?

- Will you enhance the rate of neonatal pay? If so, to what level and for how long?

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

- If the regulations provide that leave may only be taken continuously, will you take a more flexible approach and allow the employee to take it discontinuously (e.g. a day at a time)?

- Will you relax any notice and evidence requirements provided for in the regulations? If so, what would be the minimum notice required? What form must it take (e.g. would verbal notice be sufficient)?

Neonatal Care (Leave and Pay) Act 2023

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