Loss Prevention Insights

Recent Developments in UK Employment Law: What Firms Need to Know

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I. INTRODUCTION

As anticipated in the Labour Party's election manifesto earlier this year and the 2024 King's speech, the UK Government has launched its Employment Rights Bill (the Bill). It had its first reading in Parliament on 10 October 2024.

The Bill plans a radical shake-up of UK employment rights, with the Government describing the legislation as 'pro-worker and pro-business'. It appears, however, that the former substantially outweighs the latter.

Many of the Bill's provisions will require the Government to issue public consultation papers, which may lead to changes in what is currently proposed, and in some cases additional regulations will be needed. The new law will likely take effect in stages, with most of the changes only coming into force in 2026 or later. In particular, the Government has stated that the amendments to unfair dismissal law will not take effect before autumn 2026.

In this article we highlight some of the key changes we think are likely to be most relevant for employers. Our comments are based on the Government's current plans, but it is highly likely that there will be changes before the Bill becomes law.

II. DISMISSAL

A. DAY-ONE RIGHTS FOR UNFAIR DISMISSAL

Undoubtably the biggest shake-up for most employers will be the removal of the two-year qualifying period for an employee to become eligible to bring an unfair dismissal claim. It will mean that an employer will need, from day one of the employee's employment, to have a fair reason for termination and to follow some sort of process.

Regulations yet to be published will introduce a 'light-touch' process during a statutory probationary period at the start of an employee's employment. The Government has yet to finalize the required process, though their initial suggestion is that it should consist of no more than a meeting with the employee at which the performance concerns are explained (and at which the employee would have a right to be accompanied by a colleague or trade union representative). As regards the duration of the probationary period, the initial suggestion is for a probationary period of nine months, and that the light-touch approach would still apply where the dismissal takes effect within three months after the end of that probationary period. As such, if the statutory probationary period is set at nine months, an employee could be dismissed under the light-touch approach during the first year of their employment.

However, the probationary period and light-touch process will not apply to redundancy dismissals. Therefore, when carrying out a redundancy exercise, employers will need to follow the same procedure for new joiners as they currently would for employees who have two years' service.

This is a substantial change to unfair dismissal law, and a concern for many employers. It seems inevitable that the number of employment tribunal claims will increase, and there will likely be much satellite litigation, as the tribunals and employers grapple with how to comply with the (yet to be determined) light-touch probationary process. For the time being, employers would be well-advised to ensure that their contracts of employment for new joiners include probationary periods.

B. DISMISSAL AND RE-ENGAGEMENT (OR 'FIRE AND RE-HIRE')

The Bill will significantly reduce the occasions when fire and re-hire can be used.

At present, to avoid a claim of unfair dismissal when dismissing an employee and offering to re-hire them on changed terms, an employer (broadly speaking) can do so provided they carry out a fair process and demonstrate sound business reasons for the change. The Bill will make this much harder. For example, the Bill will eliminate employers' ability to use fire and re-hire to harmonise employment terms across a business. It is not uncommon for one group of employees to have different terms to another group at the same employer, possibly following an acquisition, internal restructure, or other historic reasons. In these circumstances, an employer may well, for good reason, want to move all employees onto the same terms. Under the current law, while the employer will invariably attempt first to make the changes with the employees' agreements, where that is not possible, they can ultimately force through the change by terminating the refusing employees' contracts and offering to replace them with the new terms.

Under the proposed changes in the Bill, however, this will be much more difficult. If an employee is dismissed because they do not agree to vary their contract of employment, this will be automatically deemed unfair, unless the change is needed to allow the business to continue operating as a going concern and cannot reasonably be avoided. Even if this test is satisfied, it would still be for an employment tribunal to decide whether the dismissal was fair in all the circumstances. In order to prevail, the employer will likely need to submit detailed evidence of a perilous financial position. In turn, employment tribunals will be required to assess the commercial viability of businesses, something they have not previously been called on to do.

III. HARASSMENT

On 26 October 2024, the UK Equality Act was amended to introduce a new positive duty to prevent sexual harassment, requiring employers to take 'reasonable steps' to prevent sexual harassment of their workers. If found to be in breach, employers face a potential uplift of up to 25% in any discrimination compensation awarded against them and a potential investigation by the Equality and Human Rights Commission (the EHRC), which could result in enforcement action.

The Government plans to enhance harassment protection further through the Bill in the following ways:

- by extending the positive duty to prevent sexual harassment to one that requires 'all' reasonable steps to be taken, leaving greater scope for arguments that more could have been done;

- by introducing employer liability for harassment by third parties. This will apply not only to sexual harassment, but also to harassment on grounds of age, disability, gender reassignment, race, religion or belief, sex, and sexual orientation; and

- by providing that a worker who reports that sexual harassment has occurred, is occurring, or is likely to occur will be making a 'protected disclosure' for whistleblowing purposes. While a sexual harassment complaint may already be categorised as a protected disclosure, legislating specifically to identify it as such is intended to avoid any ambiguity or dispute and to raise awareness of whistleblowing protection for speaking up about this type of behaviour.

Accordingly, employers should review their harassment, whistleblowing, and anti-discrimination policies, to check that they are up to date and ready to cater for the changes still to come. Consideration must also be given to what other 'reasonable' steps can be taken to prevent sexual harassment. Currently, the 'reasonable' steps required are not prescribed in the legislation, although the EHRC has published guidance. For the new expanded duty, the Bill will provide for further regulations to be issued that will specify steps to be taken. This may include carrying out risk assessments, providing anti-harassment training, publishing action plans and sexual harassment policies, and encouraging the reporting of sexual harassment and taking effective action when an allegation of harassment has been made. Organisations may also wish to appoint a senior person to actively monitor harassment issues and drive through appropriate actions when needed.

IV. OTHER NOTABLE CHANGES

A. TIME LIMITS FOR BRINGING EMPLOYMENT TRIBUNAL CLAIMS

The Government plans to double the time limits for employees to bring most types of employment tribunal claims, from three to six months. As with the proposed changes to unfair dismissal, this will inevitably result in an increase in the number of claims being brought, and further uncertainty for employers.

B. FLEXIBLE WORKING

The Bill will limit an employer's ability to reject requests for flexible working.

Employers will still be able to reject a request by identifying at least one of eight stated business reasons, namely:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods you propose to work; or
- planned structural changes.

The Bill will however introduce a further requirement: to show that it is 'reasonable' to refuse the request on that ground. The penalty will remain at up to eight weeks' pay, subject to a cap (currently set at £5,600 until 5 April 2025).

Employers will likely need to carry out a more detailed investigation and gather more evidence than is currently the case if rejecting a flexible working request. Managers who may be asked to decide flexible working requests should be trained in how to deal with them, bearing in mind that those requests where the requestor is from a protected group will carry the additional protections of UK discrimination law.

C. FAMILY-FRIENDLY LEAVE

The qualifying period for parental leave and paternity leave will be removed so that these become 'day-one' rights. Currently, employees need 26 weeks' continuous employment to qualify for these rights. Bereavement leave, which currently only applies to parents who have lost a child, will be broadened to cover other relationships (not currently defined).

The Government also plans to extend dismissal protection for up to six months following the end of maternity leave. Protection will similarly be extended to other types of leave, such as adoption leave and shared parental leave for a period of time after the employee returns to work.

When these changes take effect, staff handbooks will need to be updated, and managers trained, so that they are aware of the new requirements.

D. GENDER EQUALITY ACTION PLANS

The Bill will require organisations with 250 or more employees to publish a gender equality action plan every 12 months. The plan should show the steps that the employer is taking to advance equality and opportunity between male and female employees, including how it is addressing any gender pay gap. It should also explain how the employer is supporting employees going through menopause. Regulations will set out what details the action plan must cover, and what penalties will be imposed for any failures.

Many employers already publish an action plan alongside their gender pay gap data, but for those who do not, it is worth preparing now for when the new requirement takes effect.

E. STATUTORY SICK PAY

The Government intends to remove both the four-day waiting period for statutory sick pay, so that it is payable from the first day of employment and the lower earnings limit (currently £123 per week). When this change takes effect, employers will need to consider changing most staff handbooks and template employment contracts for new joiners and updating their sickness absence processes.

F. ZERO-HOURS CONTRACTS

The Bill will introduce new requirements for employers of workers on contracts with no guaranteed hours, and those with a 'low' number of guaranteed hours (not currently defined) who regularly work more than these hours over a reference period (not currently defined, but the Government has suggested 12 weeks). Such workers will have a right to be offered a guaranteed hours contract reflecting the days and

times, or working patterns, that they have regularly worked. This offer must be made at the end of each reference period, and the terms of the guaranteed hours contract must, on the whole, be no less favourable than the worker's previous terms.

This change will increase the administrative burden on employers who engage workers on zero- or low-hours contracts. A worker can however choose to reject the offer and remain on their existing contract.

G. COLLECTIVE REDUNDANCY

Currently, the obligation to carry out collective redundancy consultation (with employee representatives such as trade unions) is only triggered if the employer proposes to dismiss 20 or more employees at a particular location, but numbers are not aggregated across multiple sites. The Bill will change this so that employers will be required to consult collectively if they are proposing to dismiss 20 or more employees in total (within a 90-day window), across all of their sites within the United Kingdom.

H. ADDITIONAL DEVELOPMENTS

Other changes, which you may see mentioned when the Bill is being discussed, include the following:

- A new enforcement body, called the 'Fair Work Agency', will be created to bring together the enforcement of national minimum wage, statutory sick pay, and holiday pay. It will include representation from trade unions and businesses.

- For shift workers, there will be new rights to receive reasonable notice of a shift that they are requested or required to work, and any changes to or cancellation of a shift. They will also be entitled to compensation if a shift is cancelled with unreasonable notice.

- The existing restrictions on trade union activities will be lessened, the thresholds for industrial action ballots will be reduced, and the process for statutory recognition of a trade union will be simplified.

V. CONCLUSION

The Government is making the most ambitious change to employment law in decades. On a wide range of HR issues, employers face new challenges and new risks. As details are fleshed out, employers should keep an eye out on the Bill's progress and how this will impact their business. The good news is that, at present, there is plenty of time.

LOSS PREVENTION SUGGESTIONS

- Update handbooks and review processes and procedures, including regarding 'fire and re-hire' practices, flexible working, parental and paternity leave, and collective redundancy.
- Review employment contracts. Particularly, ensure that the contracts include probationary periods for new joiners and comply with the Bill regarding sick pay, and review the use of zero-hours contracts.
- Prepare to publish a gender equality action plan, if you are a 'large' employer and not already doing so.
- Provide training to managers and employees in supervisory roles regarding compliance with the Bill and new firm handbooks, processes, and procedures.
- Provide training to all personnel regarding anti-discrimination and harassment principles.
- Monitor the progress of the Bill during 2025 and any further changes that may yet arise.