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Labour’s employment law reforms: Employment Rights Bill unveiled

22 October 2024 Claire Rosney

Following on from their manifesto pledge and the King’s Speech, the Government has published its Employment Rights Bill (“the Bill”) within the first 100 days of taking office.

In total the Bill sets out 28 employment law reforms. Most of the measures are set to be brought in through secondary legislation, and a number will go through a consultation process before their eventual implementation. As a result, it would be premature to say for certain how a number of the proposed provisions will work in practice. Alongside the Bill the Government have also published a Next Steps document which provides commentary on the Bill together with details of future reforms. This document confirms that the Government expects to start consulting in 2025, meaning that any substantive reforms are unlikely to take effect before 2026.

Below we give an overview of the Bill’s key provisions and how they may impact employers.

Unfair dismissal

If implemented as drafted the Bill will repeal the current 2-year qualifying period necessary to bring a claim of ordinary unfair dismissal. An employee will have the right to bring an ordinary unfair dismissal claim from day one of their employment provided that they have started work, however the Bill introduces the concept of an 'initial period of employment', during which dismissals (or notice thereof) based on capability, conduct, statutory contravention, or 'some other substantial reason' could see a modification in how S.98(4) of the Employment Rights Act (ERA) (the provision that outlines the criteria for fair dismissal) is applied. The specifics of this modification and the definition of the 'initial period of employment' are to be detailed in subsequent regulations. The Government has indicated that it is currently proposing a nine-month ‘initial period’ and that a ‘lighter-touch process’ would apply. This process would involve inviting the employee to a meeting to explain the concerns about their performance during which the right to be accompanied would apply. The reference to “performance” is interesting given that the reasons for dismissal are broader than just “performance” hence why the further detail will be crucial for employers. Consultation will also be undertaken on the compensation regime that should apply to successful claims for unfair dismissal during the initial period. The Government has indicated that these reforms will take effect no sooner than autumn 2026.

Although further detail is needed, it would be prudent for employers to start to think about their current recruitment practices and how probationary periods are utilised in readiness for the change. Whilst employers could still choose to operate longer probationary periods post the change coming into effect, any dismissals outside of the initial period would not benefit from the new lighter touch process but it would still be possible to have a shorter notice period during the longer probationary period.

Fire and re-hire

The Government plans to make it automatically unfair to dismiss an employee for refusing a contract variation, except in extreme circumstances where the employer faces imminent collapse. Whilst further detail is needed, on the face of it this appears to be a very difficult defence to run. The Bill also outlines considerations for determining the fairness of such dismissals, including the degree of consultation and whether the employer offered the employee anything in return for agreeing to the variation. The Government has committed to consult on lifting the cap on the protective award if an employer is found to not have properly followed the collective redundancy process during fire and rehire exercises, as well as what role interim relief could play in protecting workers in these situations.

These proposals mark a significant shift from the current legal position and will severely curtail the use of fire and rehire in the future.

Collective redundancy rights

The calculation of the proposed number of redundancies for the purpose of establishing whether an employer must consult collectively, will consider the total number across the entire business, rather than treating separate establishments independently.

If introduced as drafted this would be a major change and would mean the obligation to consult at a collective level is triggered far more frequently.

Protection from harassment

Employers will face direct liability if they fail to take all reasonable steps to prevent harassment by third parties. This protection extends to all types of harassment.

In relation to the new preventative duty upon employers to prevent the sexual harassment of their workers the Bill extends the current requirement to take “reasonable steps” to a requirement to take “all reasonable steps”. In addition, a Minister of the Crown will be able to specify steps that are to be regarded as “reasonable” for the purposes of meeting the obligation to take “all reasonable steps” to prevent sexual harassment. The regulations may also require an employer to have regard to specified matters when taking those steps. Sexual harassment will be added to the list of qualifying disclosures in respect of whistleblowing complaints.

The Equality Act 2010 had previously included liability for third-party harassment, based on a three strikes rule. Under the Bill employers could be liable for third-party harassment the first time it occurs, unless they can show they took all reasonable steps to prevent it. Employers may therefore wish to start thinking about where the risks of such harassment occurring applies and what steps can be taken to mitigate against it.

Flexible working

Employers will only be permitted to refuse a request for flexible working if one of the eight specified grounds applies and it is reasonable for the employer to refuse the request on that/those grounds(s). Therefore, the employer will have to explain why it believes that ground applies. The Secretary of State will have the ability to make regulations that set out the steps that an employer must take to comply with the requirement to consult before rejecting a flexible working request. This is an opportunity to align the legislation with the ACAS Code relating to flexible working requests by including a requirement for the employer to explain its refusal in writing.

In practice these proposals shouldn’t represent a significant change as most employers already explain why they believe it’s not reasonable to accommodate the request and confirm so in writing.

Pregnancy, maternity, and family leave protections

The Bill proposes stronger protections for pregnant employees and new mothers, including potential extensions to current protections from dismissal (which at present only apply to redundancy). Although the timescales for new mother protection are not detailed, it is likely it will mirror the existing protection in respect of redundancy, namely six months after a return to work. Amendments are also proposed to allow regulations to be made in respect of dismissals after periods of various statutory family leave (including maternity, adoption and shared parental leave).

Further detail will be provided at the consultation stage; therefore, it would be prudent for employers to await further details before considering how it will affect existing family leave policies.

Day 1 rights

Paternity and Parental Leave are set to become Day One rights. Bereavement leave will be extended to a wider range of relationships beyond children, the detail of which will be set out in regulations. Bereavement Leave will be at least one week and must be taken within 56 days of the person’s death, except in the case of losing a child which will remain at 2 weeks. The existing provisions on parental bereavement pay will be unaffected.

SSP will be payable from the first day of sickness, with the lower earnings threshold removed, although lower earners may receive less than the statutory rate.

Employers wishing to get ahead of the curve may want to think about updating existing policies so that they are compliant with the changes.

Equality action plans

Employers with over 250 employees will be obliged to publish an ‘equality action plan’ showing the steps that they are taking in relation to their employees regarding gender equality, including addressing the gender pay gap and supporting employees going through the menopause. Regulations may specify certain requirements relating to content, frequency of publication and any requirement for senior approvals.

Many employers already have an action plan for closing the gender pay gap and therefore this may not be a significant change. For employers who don’t currently do this, it would be prudent to start thinking about it now ahead of it becoming mandated. Equally, employers may want to get ahead of the proposed change and put a menopause action plan together.

Zero-hour contracts

The Employment Rights Bill seeks to introduce complex changes to zero-hour contracts, including a guaranteed hours provision based on the employee's work pattern in a previous reference period. This applies to minimum hours contracts as well as zero hours and workers may be employed by the employer under one or more worker’s contracts (whether or not continuously).The detail of the specific conditions that will need to be satisfied in order to qualify for this right; the length of the relevant reference period; how, when and in what form the offer must be made; and what information it will need to include, will be set out in secondary legislation. If an employer breaches this obligation the worker will be able to bring an Employment Tribunal claim to recover financial losses, which will be capped. However, the level is yet to be set.

Employers will be prevented from including terms which provide for the contract to terminate pursuant to a limiting event, unless it would be reasonable for it to be a limited term contract, for example where the worker is only needed to perform a specific task and the contract provides for termination once the task has been performed.

The Bill includes new rights in relation to reasonable notification of shifts and changes affecting shifts. Details will be set out in secondary legislation. Workers will be able to complain to an Employment Tribunal about breach and the Tribunal will have the power to make a declaration and may award compensation on a just and equitable basis, having regard to any financial loss sustained (subject to a maximum). There is also a new right to a payment each time a work shift is cancelled, moved or curtailed at short notice. Again, details of what will be considered “short” notice and the amount of the payment period will be set out in regulations.

Corresponding rights not to be subject to a detriment for reasons associated with the exercise of these rights will be created. An employee will be protected against dismissal in relation to the right not to be offered guaranteed hours.

The Next Steps document states that the Government intends to consult on the details and to ensure the Bill’s provisions on zero hours contracts are effectively and appropriately applied to agency workers.

At present, a lot of the crucial details of how these rights will work in practice are unknown as they will be detailed in future regulations. Therefore, it’s extremely difficult to gauge what the impact will be on employers who utilise labour in this way, especially those who rely on seasonal labour to cover short-term peaks.

Trade union reform

Several measures are included in the Bill which are aimed at strengthening trade union rights, including:

- A written statement that the worker has the right to join a trade union.
- "Access to the workplace” agreements.
- A simplified union recognition process.
- Reversing the burden of proof on time off for union duties.
- Simplifying industrial action ballots, including abolishing the current minimum turnout thresholds required for a ballot to be valid. At present, a turnout of 50% of members entitled to vote is needed. In respect of important public services at least 40% of all members entitled to vote must support the strike. Going forwards only a simple of majority of those voting in the ballot will be required, with no requirement for any level of turnout meaning more ballots are likely to be successful.
- Relaxing picketing requirements.

- Protection against detriment for taking part in protected strike action.
- Extending the period of protection against dismissal for participating in protected industrial action so that it applies to the full duration of a lawful and official strike.
- Reversal of the check-off rules in the public sector.
- Repeal of the Strikes Minimum Service Levels legislation.

These changes are likely to be amongst the first to become law. All employers will need to update their new starter documents so that it includes details of the right to join a union. For employers who are unionised consideration will need to be given to how the business will comply with the new rights on access. Equally, employers who are not currently unionised may be approached in respect of recognition so it may be useful to consider what forums you currently have (if any) to engage collectively with staff.

Public sector

If the Bill becomes law as drafted, it will essentially ensure that employees transferring from the public sector maintain their terms and conditions and any employees supplied by the supplier would be treated the same, therefore avoiding a “two-tier” workforce. A Code of Practice will also be introduced to provide guidance in relation to relevant outsourcing contracts. This is obviously relevant to public sector employers and private employers who contract for public services.

Education and Adult Social Care sector

The Bill contains provisions to re-establish the School Support Staff Negotiating Body whose remit will include remuneration, terms and conditions, training, and career progression for school support staff (although the Secretary of State may issue regulations providing that certain payments/matters fall outside of scope).

The Bill allows for regulations to be made to provide for a body to be known as the Adult Social Care Negotiating Body whose remit will include remuneration and terms and conditions applicable to social care workers, and ‘any other specified matters’ relating to their employment.

Other measures

- Tips and Gratuities - employers will be required to consult with workers on tipping policies and review them every three years.
- Labour market enforcement - the Secretary of State will oversee the enforcement of specific labour market legislation, with a focus on areas such as the national minimum wage and statutory sick pay.

Next steps

These reforms represent the most comprehensive overhaul of employment law for decades and are aimed at strengthening worker protections and adapting to the evolving labour market. The Bill has a long way to go before it becomes law, a lot of the detail is unknown, and things could change following the consultations and the Bill’s passage through Parliament. However, whilst no immediate steps may be required, employers should start thinking about which of their policies and practices may be impacted and keep a watching brief for when further details are released.

A copy of the Next Steps document can be found here. The guidance notes to the draft Bill also provide a detailed overview of changes – see here.

If you’d like to discuss how any of the proposed changes may impact your business, please get in touch.

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