Cooley

UK Government Announces Upcoming Changes in
Employment Law

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In this alert, we've highlighted some of the key developments in UK employment law and explain what they may mean for employers.

Limits on noncompetition restrictions

The UK government has announced its intention to limit the duration of noncompete post-termination restrictions in employment contracts to a maximum of three months. Noncompete covenants are designed to provide business protection to an employer by seeking to restrict a former employee from undertaking employment with a rival competitor for a defined period following the termination of their employment. Noncompetition covenants are common in employment contracts with senior or key employees, and they have been upheld by the courts for durations of up to 12 months. The government's intended statutory cap will impose a limit of three months.

At present, there are no details about when the statutory cap will be introduced or how it will work, but we will keep a close eye on developments.

The government is not proposing to reform an employer's ability to use paid notice periods, gardening leave, or other forms of post-termination restrictions (such as nonsolicitation or non-dealing covenants), so there will remain a range of options for employers to protect their business. Similarly, the statutory cap on noncompetes only will apply in the employment context and not, for example, to shareholder agreements.

Family-friendly rights

Parents and unpaid carers will receive new employment law protections through legislation that has received Royal Assent, as outlined below.

The Carer's Leave Act 2023 will give one week of unpaid leave per year for employees who are caring for a dependant with a long-term care need. It came into force on 24 May 2023, but it requires further regulations setting out how the entitlement will work. The regulations are expected to come into force no earlier than April 2024.

The Protection From Redundancy (Pregnancy and Family Leave) Act 2023 will extend current protection given to employees on maternity leave, shared parental leave or adoption leave. Currently, employees on such types of leave have special protection and the right to be offered a suitable alternative vacancy, if one is available, before being made redundant ahead of other at risk of redundancy. The new law will extend the priority status to pregnant employees, employees who have recently suffered a miscarriage, or employees who have returned from a period of maternity, adoption or shared parental leave. The length of the protection is to be confirmed, but it is expected to be six months following return to work.

The extended protection will come into force on 24 July 2023; however, it will require further regulations setting out how the protection will work. The regulations are expected to come into force no earlier than April 2024.

The Neonatal Care (Leave and Pay) Act 2023 will provide up to 12 weeks of paid neonatal care leave for parents with children in neonatal care. It came into force on 24 May 2023, but it requires further regulations setting out how the entitlement will work. The regulations are expected to come into force no earlier than April 2025.

We recommend that employers update their policies and procedures to reflect these changes once the new

protections come into force.

Flexible working

Under existing law, employees must have accrued a minimum of 26 weeks of service before becoming eligible to submit a statutory flexible working request. Currently, a request only can be made once per year and the employer must notify the employee of the outcome within three months. The UK government has announced its intention to make the right to request flexible working a day one right for employees. Under the proposals, employees also will be able to submit up to two requests each year, and employers must provide a response within two months. What remains unchanged under the proposals is that employers will be able to refuse a flexible working request if they have one of eight statutory business reasons for doing so (and those business reasons will remain unamended from their present form). It is anticipated that the proposals will become law in late 2023.

Proposed reforms to TUPE

The government is consulting on proposals to remove the requirement to elect employee representatives for the purposes of Transfer of Undertakings (Protection of Employment) 2006, or TUPE, consultations for:

- Businesses with fewer than 50 employees.
- Transfers affecting fewer than 10 employees (regardless of the size of the employer).

This proposal would allow businesses which satisfy these criteria to consult directly with affected employees and reduce the complexities surrounding the election of representatives. At present, only micro-employers with fewer than 10 employees can inform and consult affected employees directly in respect of a transfer of a business or service provision change.

Proposed reforms to holiday entitlements

Currently, employees in the UK are entitled to a statutory minimum of 5.6 weeks (28 days) of holiday leave. This is made up of two separate holiday entitlements – four weeks (20 days) of leave derived from European Union law and an additional 1.6 weeks (eight days) derived from UK law. The government is proposing to merge these entitlements to form a simplified single annual leave entitlement. While that might not seem controversial at first glance, it could have a material impact on the calculation of holiday pay and holiday carry-over entitlements.

For example, at present, the 1.6 weeks of holiday derived from UK law can be paid at the basic rate of pay, whereas the four weeks of holiday derived from EU law must be paid at the rate of ‘normal remuneration’, which may include elements of on-call payments, bonus, overtime and commission within the calculation. It is unclear how the government plans to address that differential.

The government also is consulting about changing the method for calculating holiday entitlement during the first year of employment so that new hires would accrue their annual leave entitlement at the end of each pay period during the first year of employment.

It remains to be seen what reforms the government will propose after the consultation, but we will provide an update when there is further clarity.

Proposed reforms to rolled-up holiday pay

Rolled-up holiday pay is the practice of paying workers an additional sum in their basic pay that represents pay due during holiday periods. In other words, basic pay and holiday pay are ‘rolled-up‘ together, meaning that a worker is not paid when they take holiday. Currently, the practice of ‘rolling-up‘ holiday pay is unlawful because it is deemed to deter workers from taking holiday time. However, the UK government is consulting on making rolled-up holiday pay lawful. It is anticipated that the changes will simplify the calculation of holiday pay for casual and temporary workers.

Working time records

Under the Working Time Regulations 1998, employers must maintain adequate records showing compliance with the maximum working time limit rules for employees who have not opted out of the 48-hour limit on the average working week and those completing night work. However, a decision by the Court of Justice of the European Union cast doubt on whether this was sufficient when it held that member states must require employers to have a reliable and accessible system to measure the maximum weekly working time and daily and weekly rest periods. The government is proposing to remove the requirement to maintain a record of daily working hours, which would address the current uncertainty about record-keeping requirements. We do not expect this change to have a material impact on employers' current practices because we suspect that, in practice, few employers keep adequate records at present.

The government's consultation on changes to TUPE, holiday and working time closed on 7 July 2023. We will provide an update when the government has responded to the consultation.

'Reasonable adjustments' on mental health grounds from ACAS

Employers are increasingly aware of the importance of protecting and supporting employees' mental health in the workplace, and the impact this can have on well-being, productivity and retention. Under current legislation, there is a legal duty for employers to make reasonable adjustments where a worker (or job applicant) is considered 'disabled' for the purposes of the Equality Act 2010. An employee will be considered disabled if they have a physical or mental impairment which has a substantial adverse long-term impact on their ability to carry out normal day-to-day activities. Mental health conditions (as well as physical health conditions) may constitute a disability for the purposes of the legislation. The Advisory, Conciliation and Arbitration Service (ACAS), which is an independent public body, has published guidance on best practice for employees and employers with respect to 'reasonable adjustments' on mental health grounds.

Employers should review the full guidance and consider it when handling reasonable adjustments for mental health in the workplace.

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