NEWS BRIEF

Employment Rights Bill: new obligations for employers

Delivering on its promise to introduce legislation within 100 days of coming into power, the government introduced the Employment Rights Bill to Parliament on 10 October 2024. The Bill represents the biggest change to UK employment law since the 1990s. However, it also rows back on several campaign pledges and postpones the implementation of some of the more complex proposals, such as ethnicity and disability pay gap reporting and the shift toward a two-part framework for employment status (*see Exclusively online article "King's Speech 2024: all change?", www.practicallaw.com/w-043-9124*).

The Bill's provisions are not expected to come into effect before 2026. Many of the requirements also depend on secondary legislation, the outcome of consultation, and the publication of codes of practice (*see box "Planned consultations"*). Nonetheless, it is critical for employers to understand the implications that these changes might have for their businesses in order to begin to prepare now.

Day 1 right to unfair dismissal

Employees currently need two years' continuous service to bring an ordinary unfair dismissal claim. Employers therefore have a degree of flexibility when it comes to terminating an employee's employment within the first two years. The Bill removes this qualifying period, so that the right not to be unfairly dismissed will begin on an employee's first day of employment. However, the government has confirmed that this change will not come into effect any sooner than autumn 2026.

The government plans to consult on a statutory nine-month probationary period. Within this period, a less onerous dismissal process will apply if employers wish to dismiss an employee who is considered unsuitable. Modifications will be made to the existing obligations concerning procedural and substantive fairness, provided that the reason for dismissal falls within categories that will be familiar to UK employers; that is, capability, conduct, statutory restriction and some other substantial reason, but not redundancy. Subsequent regulations will clarify what those modifications will entail and the meaning of the probationary period, which the Bill terms the "initial period of employment". The government has already suggested that this lighter touch process would require a meeting with the employee to explain the performance concerns.

It is likely that many employers will consider strengthening their probationary practices in view of the Bill's enhanced unfair dismissal protections. Employers' ability to dismiss an employee lawfully during a probationary period will likely be curtailed in comparison to present circumstances once the proposed statutory probationary period framework is in force.

Other day 1 rights

The Bill also provides for the following to be provided as day 1 rights:

- Statutory sick pay (SSP), which is currently subject to a three-day waiting period. A consultation on the appropriate level of SSP for some low-earning employees, calculated as a percentage of their average weekly earnings, was published on 21 October 2024 (*www.gov.uk/government/consultations/making-work-pay-strengthening-statutory-sick-pay/making-work-pay-strengthening-statutory-sick-pay*).

- Parental, paternity and bereavement leave entitlements. Eligibility for statutory parental and paternity leave currently requires 26 weeks' service. Bereavement leave will be a new day 1 right and is adapted from the existing parental bereavement leave entitlement, which was already a day 1 right.

Pregnancy discrimination

The Bill strengthens the existing provisions concerning dismissals during pregnancy. The precise obligations will be contained in further regulations, but it is expected that dismissal protection will be extended to six months following the employee's return to work.

Fire and rehire

After considerable scrutiny of the practice of fire and rehire, or dismissal and re-engagement, in recent years, the Bill will make it unfair to dismiss an employee who does not agree to a contract variation, or to enable the organisation to employ another person, or to re-engage the same employee, under a varied contract to carry out substantially the same duties (*see News brief "Fire and rehire: Supreme Court restores injunction for shop workers", www.practicallaw.com/w-044-4884*).

The exception to this will be if an employer can show that the reason for the variation was to eliminate, prevent, significantly reduce, or significantly mitigate the effect of, any financial difficulties which, at the time of the dismissal, were affecting, or were likely in the immediate future to affect, the employer's ability to carry on the business, and in all the circumstances the employer could not reasonably have avoided the need to make the variation.

The Bill provides for various matters that need to be considered in determining the fairness of the dismissal, such as whether the employer carried out any consultation with the employee about varying the employee's contract.

Flexible working

The Bill modifies the current statutory flexible working framework with the intention of ensuring that more requests are agreed to (*see News brief "New rights for employees: flexibility is the new watchword", www.practicallaw.com/w-043-1308*). Under the Bill, an employer's reliance on any of the existing lawful grounds to refuse a flexible working request must now be reasonable. The employer will also have to state the ground or grounds for refusing the application and why it considers that it is reasonable to refuse the application on that ground or those grounds.

While the changes require employers to consider flexible working requests more carefully, the lawful grounds on which a request can be refused remain the same

Planned consultations

Following the introduction of the Employment Rights Bill, the government has also set out its vision for implementing its wider plan to make work pay (*https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf*). Potential further reforms that could be implemented outside of the Bill include the following:

- A consultation is expected in due course regarding the Equality (Race and Disability) Bill, which would extend pay gap reporting to ethnicity and disability for employers with more than 250 staff and introduce other measures concerning equal pay.
- A full review of the UK's parental leave system and carer's leave.
- A consultation will be undertaken on an employment status framework that only differentiates between workers and the genuinely self-employed.
- The government plans to launch a call for evidence to examine reported issues related to the Transfer of Undertakings (Protection of Employment) Regulations.
- A call for evidence on tightening the ban on unpaid internships is expected by the end of 2024.
- A review of health and safety guidance and regulations.
- A consultation with Acas on enabling collective grievances will also be undertaken.

and are wide-ranging. The Bill also states that subsequent regulations may provide for other lawful grounds on which a request can be lawfully rejected. The Bill does not change the penalty for breaching an employee's right to flexible working. As such, whether these modifications ultimately result in making flexible working the default in reality remains to be seen.

Zero-hours contracts

Zero-hours workers will benefit from rights to:

- Guaranteed hours that reflect the hours that they regularly work over a 12-week reference period.
- Reasonable notice of shifts.
- Payment for shifts that are cancelled, moved or curtailed at short notice.

These provisions are intended to address the government's concerns regarding one-sided flexibility. However, zero-hours contracts will not be prohibited as the government has expressly recognised that zero-hours contracts can work well for some, such as students or those with caring responsibilities.

A consultation on the application of the zero-hours contracts measures to agency workers was published on 21 October 2024 (*https://assets.publishing.service.gov.uk/media/67128a779cd657734653d82a/Consultation_application_zero_hours_contracts_measures_agency_workers.pdf*).

Sexual harassment

The Bill will require employers to take all reasonable steps to prevent sexual harassment, rather than just reasonable steps. Regulations will be issued specifying what steps are to be regarded as reasonable. This new obligation therefore supplements the requirements of the new preventative duty to combat sexual harassment that came into force on 26 October 2024 (*see feature article "Preventing sexual harassment: putting the new duty into practice", www.practicallaw.com/w-042-2864; see "Sexual harassment: updated EHRC guidance", Bulletin, Employment, this issue*).

Sexual harassment-related disclosures will now also constitute protected disclosures and therefore would not be covered by a non-disclosure agreement. A dismissal for making a protected disclosure will also be treated as automatically unfair, although the distinction between ordinary and automatic unfair dismissal will be less significant once there is no longer a qualifying period for unfair dismissal protection.

Third-party harassment. The Bill creates a new obligation for employers to prevent harassment of their employees by third parties. An employer will be considered to have permitted a third party to harass its employees where an employee has been subjected to harassment by a third party during the course of their employment and the employer is deemed to have failed to take all reasonable steps to prevent the third party from harassing the employee.

This provision will be particularly important for employers in sectors where employees are frequently in public-facing roles such as in the retail, leisure and hospitality sectors, the transport sector, and industries that regularly engage third-party contractors, such as construction. These types of employers are likely to have to conduct a harassment risk assessment, among other things, in order to establish that they have taken all reasonable steps to prevent third-party harassment.

Organisations will likely need to revisit their harassment-related procedures in order to ensure compliance with the duties to prevent both sexual harassment and third-party harassment.

Collective redundancies

The concept of "at one establishment" will be removed from collective redundancy legislation (*see feature article "Redundancy consultations: a fresh look", www.practicallaw.com/w-038-8891*). The threshold at which burdensome collective redundancy

obligations will be triggered is therefore where 20 or more dismissals are proposed across an entire business, rather than at particular establishments. This means that the relevant obligations will be triggered more often in the future.

Trade union reforms

Workers will have the right to receive a written statement of their right to join a trade union at the same time that they receive their written particulars of employment; that is, on day 1 of employment.

Unions will have new rights relating to their ability to access workplaces in order to meet, represent, recruit or organise workers, and to facilitate collective bargaining, but not to organise industrial action.

Various other trade union-related reforms are made under the Bill, including modifications to the conditions for union recognition, removing restrictions on trade union activity, and measures such as electronic balloting, which are intended to make ballots simpler and more flexible.

Equality action plans

Certain employers may be required to develop and publish equality action plans. These plans would need to show the steps that employers are taking in relation to their employees with regard to prescribed matters concerning gender equality. The prescribed information will be required to be published not more frequently than annually.

A matter is related to gender under the Bill if it relates to advancing equality of opportunity between male and female employees, and the Bill expressly refers to matters addressing the gender pay gap and supporting employees going through menopause as relating to gender equality.

This requirement will apply to larger employers; that is, more than 250 employees.

Enforcement

The Bill establishes the Fair Work Agency (the agency), which will unite the Gangmasters and Labour Abuse Authority, the Employment Agency Standards Inspectorate, and the HM Revenue & Customs team that polices the minimum wage. The Bill provides for powers for the agency to obtain documents or information, to enter business premises to obtain documents, and regarding the retention of documents. Offences are established for individuals and organisations, with potential penalties for contraventions including imprisonment and fines.

If properly resourced, the agency could lead to a much more aggressive and interventionist approach to employment law enforcement than is presently the case, presenting disruption for employers across a wide range of industries. While the government has verbally committed to providing such support, it remains to be seen how the agency will work in practice and whether its unified enforcement powers prove to be a more effective tool in enforcing employees' rights against employers than is currently the case.

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