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TEAM Conference Windsor – Friday 16th June – 9.45am
Employment & Recruitment Law Update

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Topics for this Session

An employment & recruitment law update...

- Holiday Pay
- Strike Legislation
- Retained EU Law Repeal Bill

What is in the pipeline...

- Proposed Legislation
- Additional Note – Non-Compete Clauses





Holiday Pay

Holiday Pay: Harpur Trust v Brazel

- Mrs Brazel, a visiting music teacher on a zero-hour contract, brought a claim against Harpur Trust after changes were made to the way her holiday pay was calculated.
- The Supreme Court judgment released on 20th July 2022 ruled that the practice of calculating holiday pay on a pro-rata basis was unlawful.
- They held that employees who are engaged on permanent contracts, despite working irregular hours, should accumulate the full entitlement of 5.6 weeks throughout the year.



The Government Consultation and Recent Development



- The Government subsequently launched a consultation following the Harpur Trust ruling which closed on 9th March 2023, seeking views on their proposals regarding how holiday pay should be calculated.
- It has since made an announcement regarding its intentions to allow the use of “rolled-up” holiday pay, and the use of the 12.07% method to calculate pay.
- As such, it is important that employers are aware of any changes being made to this so that they are able to adjust their methods of calculating holiday pay accordingly.



Holiday Pay: The Potential Changes...

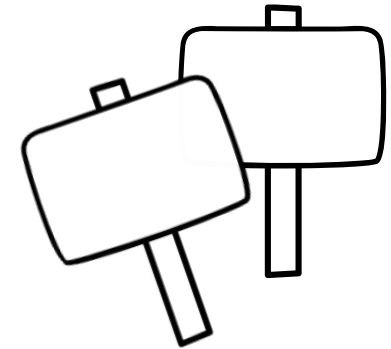
- On 10th May 2023, the Government announced its intention to make important changes to legislation surrounding holidays:
 1. merge the rules around 'normal' and 'additional' leave to create **one holiday entitlement**. Currently employees have two separate entitlements, (1) an entitlement to 4 weeks' leave based on EU law and (2) an entitlement of an extra 1.6 week's leave which is a purely UK entitlement. It is hoped that merging the two together will remove complexity from the perspective of the employer and lessen the current administrative burden.
 2. allow '**rolled up**' **holiday pay**, a practice of not paying holiday pay whilst the worker is on holiday but making an additional payment during the weeks that the worker works to cover pay in respect of holiday periods. This would all workers to receive their holiday pay with every payslip.

Strike Legislation



Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022

- Brought into force on 21st July 2022, allowing businesses to engage agency workers in order to replace striking employees.
- Repealed Regulation 7 of the Employment Agencies and Employment Businesses Regulations 2003 which originally made it a criminal offence for employers to replace striking employees with agency workers.
- This legislation has since been challenged by trade unions due to its detrimental impact on the right to strike.



Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022: Judicial Review

- Permission was granted by the High Court for judicial review proceedings at the end of last year.
- On 3rd and 4th May 2023, the High Court heard a case brought by the Trades Union Congress and 11 other trade unions.
- The case has challenged the Government's revocation on Regulation 7 in the Conduct of Employment Agencies and Employment Businesses Regulations.
- The case has now concluded, so it is expected that we will hear the judgment from the High Court in the coming weeks.



Retained EU Law Repeal Bill

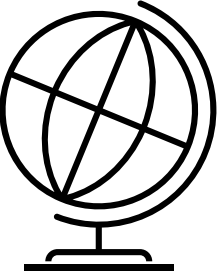


The Retained EU Law Repeal (Revocation and Reform) Bill 2022



- When the Bill was first introduced, it was intended that the supremacy of EU law would be automatically repealed by 31st December 2023 through what was referred to as the 'sunset clause' unless any EU laws had been preserved by other means.
- The Government has since announced that it has made the decision to abandon the 'sunset clause' entirely and reverse it's position.
- As such, EU law will now remain binding within the UK unless it is expressly repealed by Parliament.

The Retained EU Law Repeal (Revocation and Reform) Bill 2022



- The Government has so far announced its intention to expressly repeal the following EU laws which relate to employment law:
 - The Community Drivers' Hours and Working Time (Road Tankers) (Temporary Exception) (Amendment) Regulations 2006
 - The Posted Workers (Enforcement of Employment Rights) Regulations 2016; and
 - The Posted Workers (Agency Workers) Regulations 2020.
- At the moment, it is unlikely that this will give rise to any significant impact.
- Further, the Government has not made any plans to repeal any crucial pieces of EU legislation at present, meaning that they are still set to remain in force after 31st December 2023.

What is in the pipeline?



Proposed Legislation....

- **Employment Relations (Flexible Working) Bill**



A Bill to make provision in relation to the right for employees and other workers to request variations to particular terms and conditions of employment, including working hours, times and locations.

- **The Protection from Redundancy (Pregnancy and Family Leave) Bill**



A Bill to make provision about protection from redundancy during or after pregnancy or after any periods of maternity, adoption or shared parental leave.

- **Worker Protection (Amendment of Equality Act 2010) Bill**



The Bill proposes to impose proactive duty on employers to take all reasonable steps to prevent the sexual assault of employees in their work and will reintroduce protection against harassment by third parties.

- **Strikes (Minimum Service Levels) Bill**



The Bill proposes to make a provision about minimum service levels in connection with the taking by trade unions of strike action relating to certain services.

An additional note...

Restrictive Covenants – Non-Compete Clauses



Restrictive Covenants: The Position of Non-Compete Clauses



- Restrictive covenants are common place within contracts of employment. Their inclusion is designed to protect the employer's business by restricting the activities of an employee generally after employment has ended.
- A non-compete clause is a form of restrictive covenant which seeks to prevent an individual from working for a competitor or setting up a separate business in competition with the employer's business for a specific amount of time and usually within a certain geographical area.
- The use of non-compete clauses has always been controversial and subsequently the UK Government has announced its intention to limit their scope.

Non-Compete Clauses: Potential change & the Government's stance...

- The Government has announced its intention to introduce new legislation to restrict the duration of non-complete restrictive covenants to **three months**.
- From the information currently provided employers would still be able to restrict activities during (paid) garden leave or notice periods – the three month limit will apply only to post-termination covenants.
- The proposed legislation will not impact on non-solicitation clauses (which will continue subject to the clause amounting to “*no more than is reasonably necessary to protect the employer's legitimate business interests*”) or confidentiality clauses.

Change imminent?

- Any change would require primary legislation therefore, although the Government's intention has been made clear, it may be some time before any change to the legal framework is realised.



Umbrella Consultation – Current Update

- On 6 June 2023, the Government issued a summary of responses to the November 2021 call for evidence concerning “umbrella arrangements” in the UK and a new consultation seeking views on proposals to better define umbrella companies, as well as ensuring that they are complying with tax regulations and providing employment rights to workers.

In its consultation, the Government has set out the following three proposals for new legislation:

1. **Mandating Due Diligence:** *A new requirement for recruiters or their clients to conduct due diligence on umbrella companies and penalties imposed if they fail to do so.*
2. **Transfer of Tax Debt:** *Legislation allowing HM Revenue & Customs to collect unpaid tax from another party in the labour supply chain.*
3. **Deeming the Employment Business that supplies the Worker to the end client to be the Employer for Tax Purposes:** *Treat recruiters as the employer for tax purposes and hold them responsible for any irregularities on payroll, even if they used an umbrella company to perform the function.*

The consultation is due to close on 29 August 2023.

Any questions?

Please contact us on 0345 872 6666

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Speaker's Details

Paul Chamberlain

Partner

0161 838 2762

Paul.Chamberlain@jmw.co.uk

