Employment Rights Bill Update

November 2024

fladgate

Unfair Dismissal

What are the proposed changes?

- Remove the two-year unfair dismissal qualifying period.
- Implement a new statutory probationary period, likely to be set at nine months, subject to consultation.

Impact

- Employees will have unfair dismissal rights from day one of employment.
- There will be a new initial qualifying period (expected to be 9 months), and the secretary of state will have the power to set out 'certain steps' which are expected to lighter touch procedures which the employer must follow to dismiss fairly during this period.
- The government intends to consult on the compensation regime for successful claims during the probation period. Employees are unlikely to be eligible to receive the full compensatory damages currently available if dismissed during this period.

Matters for Employers to consider

- Timing: the reforms to unfair dismissal will not take effect any sooner than Autumn 2026 and the current qualifying period will continue in place until then.
- In the meantime, employers should start to consider the policies and procedures in place for the management of performance and process for dismissal during the probationary period. The government has indicated that a fair dismissal will consist of holding a meeting with the employee to explain concerns about their performance (at which the employee could choose to be accompanied by a trade union representative or a colleague). Having clear procedures in place will enable employers to show the steps followed in the case of a dismissal.

Unfair Dismissal Continued

Impact

- The reforms impose greater legal liability on the employer, which could impact hiring decisions.
- There will likely be a rise in claims and no SIFT stage could see unwelcome additional work for the tribunals. The government has confirmed they intend to tackle this issue by signposting and supporting employees to ensure they have proper recourse if they are unfairly dismissed but also make clear where bringing claims might be unsuccessful.
- As there is currently no requirement to follow a fair process for dismissal during the probationary period, employers can often experience 'messy' litigation and face claims of unfair dismissal for whistleblowing or discrimination. The introduction of the bill may help to protect employers to that extent and simplify claims.

Matters for Employers to consider

- To avoid potential claims of unfair dismissal, employers may want to undertake a review or update of the following:
  - Recruitment procedures
  - Management of induction periods
  - Employee handbooks (clear policies)
  - Contracts of employment (to reflect the new qualifying period)
  - Probation and performance management processes
  - Training for managers on handling dismissals appropriately

Flexible Working

What are the proposed changes?

- Strengthen the April 2024 legislation giving right to request flexible working from day one of employment.
- Introduce "reasonableness" requirement for any refusal by an employer.

Impact

- Currently, under the ACAS code, employers must deal with flexible working requests in a 'reasonable manner' and must agree to the request unless there is a genuine business reason not to.
- The 8 business reasons will remain the same but there will be a shift from reasonableness focused on process, to one placing greater responsibility on the employer to show the grounds for refusal were reasonable, they will have to:

  a) state the ground or grounds for refusing the application, and
  b) explain why it considers that it is reasonable to refuse the application on that ground or those grounds.

Matters for Employers to consider

- Employers will need to update policies and processes for responding to requests.
- Consider flexible working throughout the recruitment process.
- Think about how flexible working may suit the company and how to implement it.
- Provide training and support for line managers to enable effective management of flexible working teams and navigate new requirements related to employee requests.
- The government hopes there will be a positive impact on family-friendly conditions, productivity, and retention.

Sick Pay

What are the proposed changes?

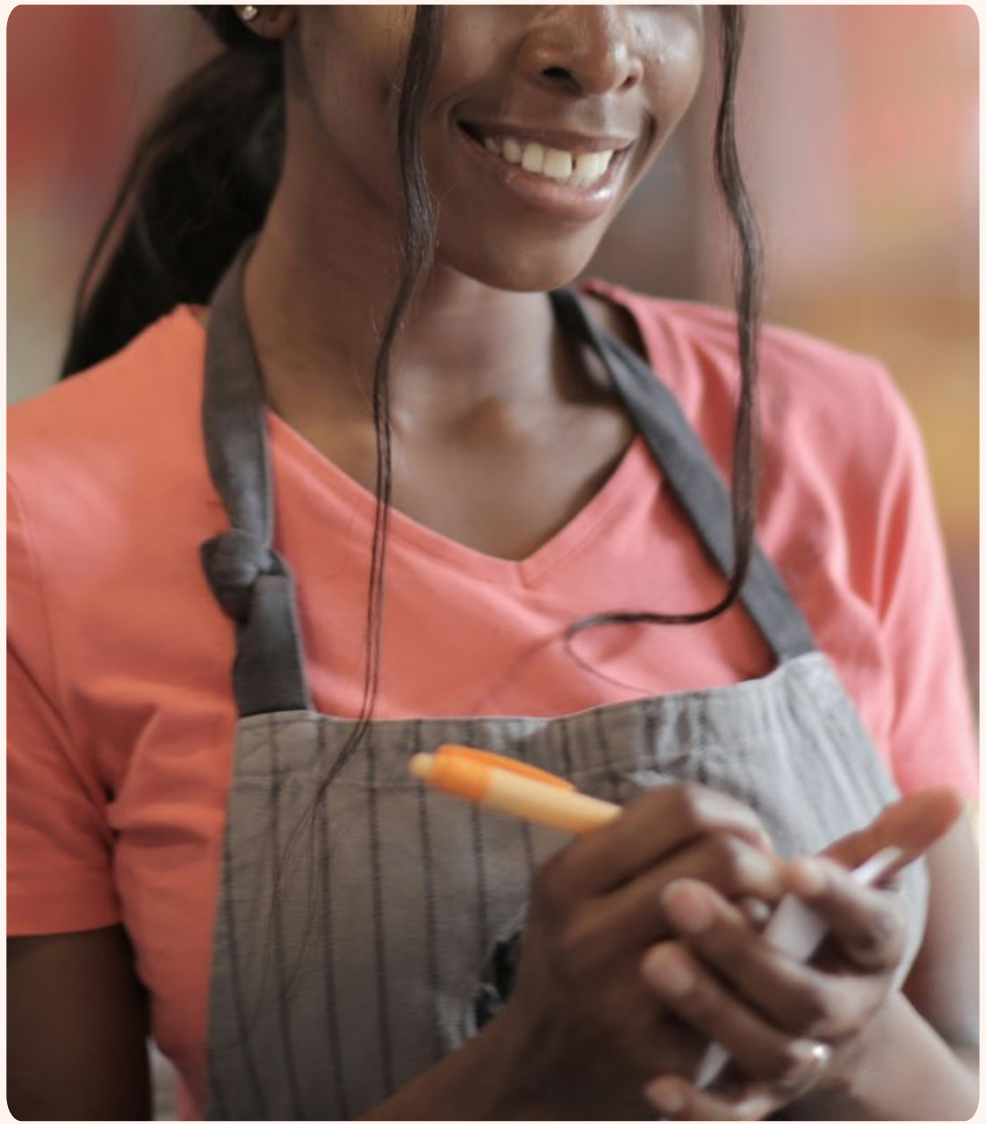
- Removal of waiting period for Statutory Sick Pay.
- Removal of lower earnings limit.

Impact

- Employees will have a right to statutory sick pay from day one of illness (rather than day four) and from day one of employment.
- There will no longer be a requirement to earn an average of £123 a week to be eligible to receive statutory sick pay.
- The pay will be calculated as the lower of £116.75 or a prescribed percentage (to be decided) of weekly earnings.
- Could potentially increase absenteeism if the disincentive of no pay for the first three days of sickness is removed. Alternatively, could have the opposite effect and improve absenteeism and productivity if employees are able to take fewer sick days without having to reach the four-day threshold.

Matters for Employers to consider

- Employers should consider how to manage sickness absences from the start of employment.
- Review and updates to consider include:
  - Systems for absence reporting
  - Rehabilitation and return to work plans
  - Communications to managers and existing employees about the changes
  - Absence policies
  - Contracts of employment
  - Communications with external providers if payroll is outsourced



Tips and Gratuities

What are the proposed changes?

- Introduce a duty to consult with employees before producing a tips policy.
- Requirement to review policy every three years.

Impact

- The Employment (Allocation of Tips) Act and the statutory Code of Practice on fair and transparent distribution of tips came into force recently at the beginning of October. The changes implemented by the Act require employers to pass all tips, gratuities, and service charges on to workers, without deductions, thereby increasing fairness for employees.
- The new Bill takes the changes a step further by placing an obligation on employers to consult with representatives or workers before implementing a tips and gratuities policy, review the policy at least every three years, and to summaries views expressed in a consultation.
- The requirements could be onerous on smaller employers.

Matters for Employers to consider

- A clear policy should be drafted in relation to tips and gratuities.
- Employers will need to consider how to implement systems to regularly review their policy and think about which aspects of the policy are likely to require adjustments from time to time.
- A procedure will also need to be put in place to detail how the consultation will take place and how the consultation views can be implemented into the written policy.

New enforcement body: Fair Work Agency

What are the proposed changes?

- Introduce the Fair Work Agency to bring together existing enforcement functions.

Impact

- The Agency will bring together existing enforcement functions, including:
  - minimum wage and statutory sick pay enforcement
  - the employment tribunal penalty scheme:
  - labour exploitation and modern slavery
  - introduce the enforcement of holiday pay policy
- The aim is to create a strong, recognisable single brand so individuals know where to go for help and encourage a more effective use of resources.
- The body is intended to strike a balance between upholding workers' rights and providing better support for employers who want to comply with the law.
- There will be tough action against employers who deliberately flout rules.

Matters for Employers to consider

- Current rules enforced through Employment Tribunals so employers could expect to see more claims as the body will make it easier and faster for workers to enforce their rights.
- Employers will need to think about updating their policies to align with the Agency's standards but should receive more support in doing this.
- Consider training management to understand fair work principles and how to comply with new regulations.
- Be aware of the consequences of non-compliance.
- Think about how to promote fair working practices and how this can be advertised when attracting and retaining talent.

Fire & Rehire

What are the proposed changes?

- End fire & rehire.

Impact

- The Bill closes the fire and rehire loopholes, such that it will be automatically unfair to have dismissed an employee for refusal to accept a variation to their contract.
- Businesses can, however, restructure to remain viable, preserve their workforce and the company when there is genuinely **no alternative**.
- The government will consult on lifting the cap of the protective award altogether if an employer is found not to have followed the collective redundancy process properly as well as looking at the role interim relief might play in protecting workers in these situations.
- Employers could see more unfair dismissal claims due to the extended time limit for bringing a claim.

Matters for Employers to consider

- Employers should be wary of using fire and rehire and ensure that a proper consultation is followed with workplace agreement for any changes.
- The code of practice on Dismissal and Reengagement remains in place until further notice.
- Consider variation clauses in contracts of employment and drafting provisions which enable flexibility.
- Consider in which situations there is ‘genuinely no alternative’, this will be a high bar and a desire to improve efficiency will not be enough.

Collective Consultation

What are the proposed changes?

- Remove the 'one establishment' requirement for collective consultation.

Impact

- Collective consultation will be required for 20 or more redundancies made within 90 days across all company locations (not including group companies).

Matters for Employers to consider

- Employers will need to allocate more time and resources to monitoring redundancies and the consultation process.
- May want to consider implementing a system to keep track of redundancies.
- Think about the timing of redundancies across locations as the consultation process could be more easily triggered e.g. for proposed redundancies of 2-3 people at one location which will place high administrative and cost burdens on the employer.

Protection from Harassment

What are the proposed changes?

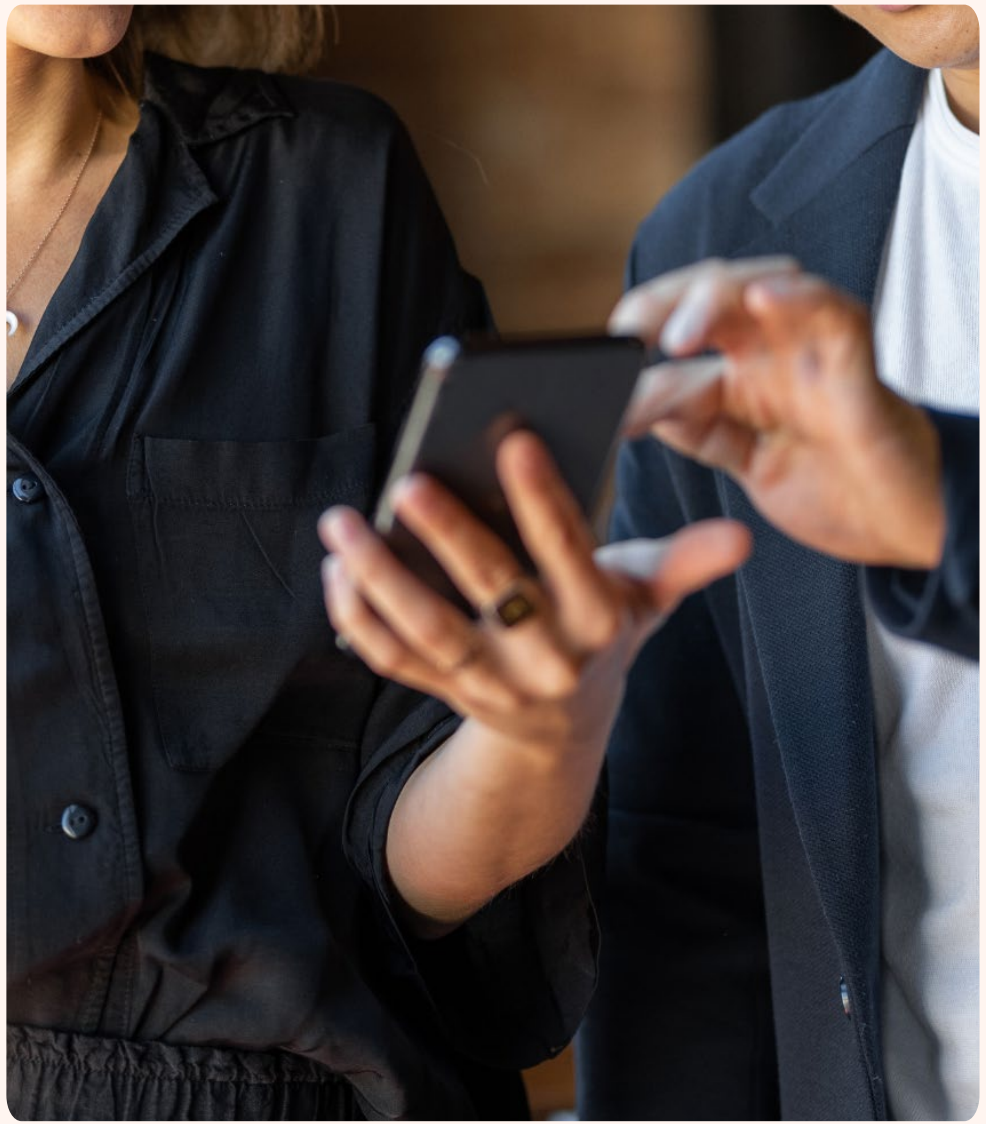
- Introduce new provision requiring employers to not permit harassment from a third party.

Impact

- Employers will be liable for third party harassment of any kind, including sexual harassment which is currently excluded, unless all reasonable steps have been taken to prevent it.
- Disclosures relating to sexual harassment will be protected under whistleblowing.

Matters for Employers to consider

- Employers should consider the reasonable steps proposed by the Bill in relation to sexual harassment which include:
  - carrying out assessments of a specified description
  - publishing plans or policies of a specified description
  - steps relating to the reporting of sexual harassment
  - steps relating to the handling of complaints
- Anti-bullying and harassment policies should be reviewed.



Protection from Harassment Continued

Impact

- Following the President's Club sexual harassment issues along with a slew of other high-profile incidents, the Worker Protection (Amendment of Equality Act 2010) Act 2023, introduced a 'half-way' protection against third party sexual harassment by placing a duty on the employer to take reasonable steps to prevent sexual harassment of employees in the course of their employment.
- However, a contravention under the Act is enforceable only by the Equality and Human Rights Commission (EHRC). Employees will now have a direct course of action against the employer, incentivising employers to comply with their duty.

Matters for Employers to consider

- Anti-bullying and harassment policies should be reviewed.
- Guidance and training should be updated.
- Manager training should be implemented.
- Communications to employees with updates should be considered.
- Policies and contracts with third parties should consider the new requirements.

Equality Pay Gap Reporting

What are the proposed changes?

- Enforce publication of action plans to address inequalities and include outsourced individuals in reporting.
- Under the Equality (Race and Disability) Bill:
  - Make ethnicity and disability pay gap reporting compulsory for employers with at least 250 employees.
  - Introduce right to make equal pay claims to black, Asian and minority ethnic and disabled workers.

Impact

- The Bill introduces a power to make regulations requiring employers to publish an Equality Action Plan no more than annually.

Matters for Employers to consider

- Employers may want to start thinking about the actions they are taking to improve equality and reduce pay gaps. Therefore, developing an action plan now will enable employers to be prepared for the introduction of the legislation.

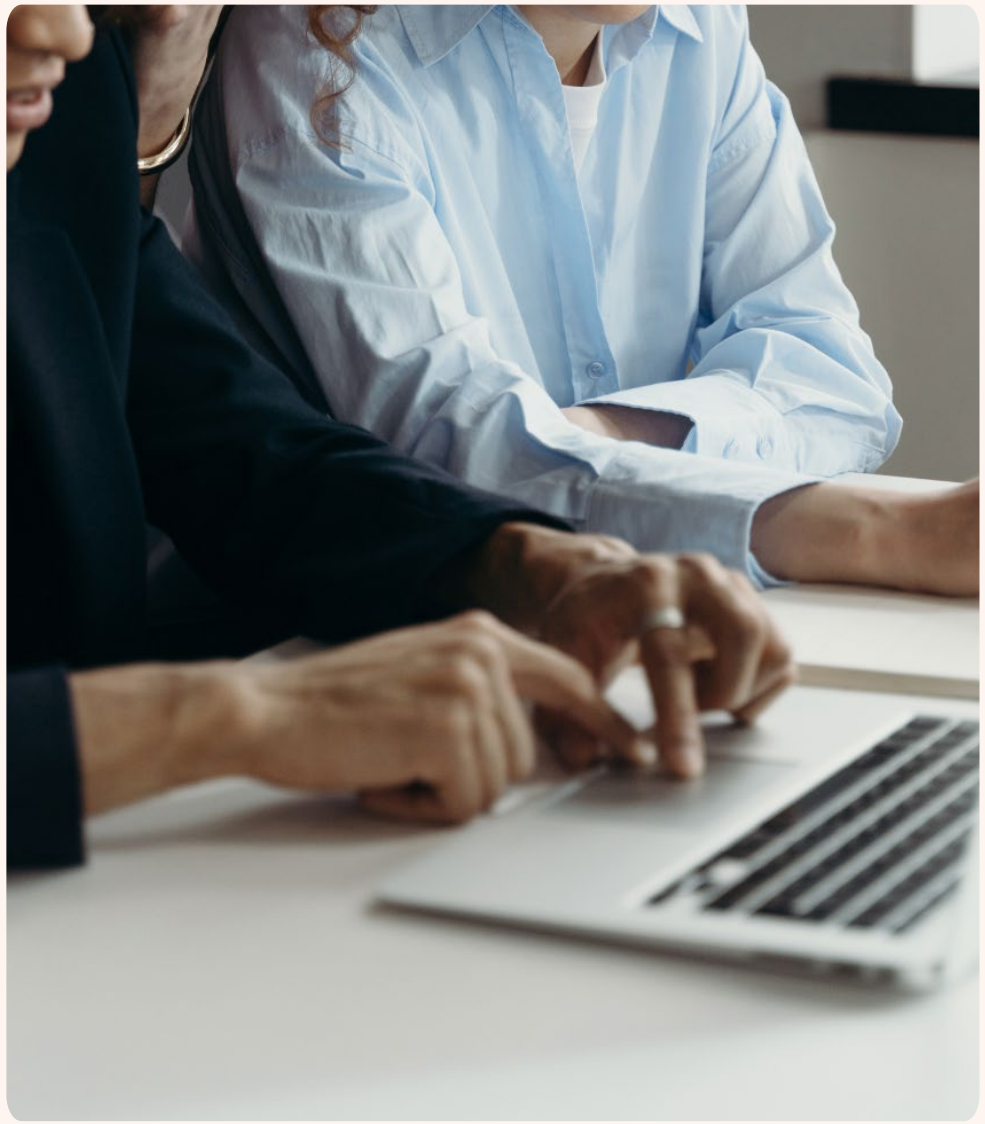
Area of Law: Equality Pay Gap Reporting Continued

Impact

- Equality Action Plans will need to show steps that the employers are taking in relation to their employees with regard to prescribed matters related to gender equality and publish prescribed information relating to the plan.
- Matters related to gender equality will include addressing the gender pay gap and supporting employees going through the menopause.
- The requirement will shift from simply reporting on the gap to explain what they are doing about the gap.
- Next steps states Under the Equality (Race and Disability) Bill will be consulted on in the next calendar year.

Matters for Employers to consider

- Consider where the current gaps are – are outsourced staff currently included in pay gap reports, is support provided for employees going through menopause, are there menopause policies in place?
- Consider how pay gaps will be recorded and monitored.



Guaranteed Hours Contracts

What are the proposed changes?

- Ban "exploitative" zero hours contracts.

Impact

- Workers on zero hours contracts or with a 'low' number of guaranteed hours (definition to be confirmed following consultation), will have the right to a contract which reflects the hours regularly worked over a 12-week reference period. This will be a rolling right so if hours increase over time, workers will be entitled to reflect this in their contracts. The government will consult on how to implement this through subsequent review periods.
- The "next steps" document states the aim is to ensure that all jobs provide a baseline level of security and predictability. The inclusion of 'low hours' workers will ensure that employers cannot avoid the measures by moving zero hours workers onto a slightly higher number of guaranteed hours.

Matters for Employers to consider

- Employers currently utilising zero-hours contracts should consider a review of those contracts and the shift patterns for those employees. It may be worth considering how many employees could be entitled to guaranteed hours, and particularly if there are a large number of employees, whether it is viable to retain all of those on a guaranteed hours basis.
- Shift planning tools should be utilised to manage allocation and notice of shifts to minimise the requirement for last minute changes.

Guaranteed Hours Contracts Continued

Impact

- The bill provides an exception to the right where genuinely temporary contracts are required e.g. where the worker is only needed for a specific task, until the occurrence of an event, or for a temporary need of a specific description.
- There will be a requirement to give reasonable notice of shifts.
- Workers will also be entitled to compensation for cancelled or changed shifts.
- Measures will be adapted to apply to agency workers too following a government consultation.

Matters for Employers to consider

- Employers will need to balance the benefit of cancelled shifts with potential costs arising from compensation claims.
- Employers will need to consider the management of employee scheduling. Over scheduling to cover for potential absences or busy periods will become less practical as shifts will no longer be changeable/cancellable at the last minute.

Trade Unions

What are the proposed changes?

- Modernise trade union legislation.
- Remove 'unnecessary' restrictions.

Impact

- There will be a reduction in the amount of information unions are required to provide in an industrial action notice.
- The Strikes (Minimum Service Levels) Act 2023 will be repealed, removing 'ineffective' 'anti-union' legislation.
- Modern and secure electronic balloting will be introduced and there will no longer be a requirement for at least 50% of eligible trade union members to vote before any ballot is valid.
- Employers will also be required to provide employees with a written statement confirming their right to join a trade union.
- All subject to a consultation ending 2 December.

Matters for Employers to consider

- The proposed changes to the bill and the government's next steps document, indicate that there will be increased levels of consultation with trade unions in the development of future legislation.
- Employers should consider that it is likely the unions will have a greater role to play in the workplace and will have increased rights of access which could lead to increased levels of trade union membership amongst the workforce.
- Employee relations should be carefully considered, and thought should be given to potential periods of staff shortages given that there will be increased protection for representatives in requesting time off and could be higher levels of strike action.

Trade Unions Continued

Impact

- Unions can request an 'access to the workplace' agreement from employers to implement a transparent framework and clear rules for union officials to meet, represent, recruit and organise members. Disputes will be handled by the Central Arbitration Committee.
- Union recognition will be made easier as the requirement to show at the application stage that at least 50% of workers in the bargaining unit are likely to support recognition will be removed. The threshold for at least 10% of workers in the bargaining unit to be union members will be reduced to potentially as low as 2%. Only a simple majority of support will be required for recognition in the final ballot.
- Where trade union representatives were denied reasonable time off to undertake their duties, the burden of proof will now be reversed and put on the employer to show the request for time off was unreasonable.
- Workers will be protected from detriment for participating in lawful strike action and the government will consult on what types of detriment should be prohibited.
- The updates are intended to 'repeal legislation that has led to an overly conflictual approach to industrial relations and contributed to the worst disruption in decades.' This change is likely to take effect shortly.

Matters for Employers to consider

- Existing contracts will need to be updated to ensure the rights to join a trade union are reflected and a system for regular reminders of this right will need to be implemented.

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