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SUNSET CLAUSE OF RETAINED EU LAW BILL IS DITCHED BUT GOVERNMENT PUSHES AHEAD WITH EMPLOYMENT LAW CHANGES

The Government has dropped the most controversial aspect of the Retained EU Law (Revocation and Reform) Bill meaning that there will be no wholesale revocation of EU derived law (which includes large swathes of UK employment law) at the end of this year.

However, we are beginning to see some minor but consequential changes to employment law as the Government attempts to simplify what it sees as burdensome regulatory requirements on businesses.

Retained EU (Revocation and Reform) Bill

Dubbed the "Brexit Freedoms Bill", the Retained EU Law Bill will give Government ministers significant powers to change or revoke what is thought to be nearly 4,000 pieces of "Retained EU Law", including some of our key employment regulations.

Retained EU law was created by the EU Withdrawal Act 2018 which preserved EU-derived law that applied to the UK as at the end of the Brexit transition period on 31 December 2020.

Under the Bill, Government ministers will have three options to deal with Retained EU Law:

Restate: this would preserve the EU law as a UK law.

Revoke: this wipes the law from the UK statute book without an equivalent law being put in its place.

Replace: this replaces the EU law with a UK version, but crucially, the UK version cannot create additional regulatory burdens.

Retained EU Law that is restated or replaced will become known as Assimilated Law.

When the Bill was first introduced, a sunset clause provided that any retained EU Law not restated or replaced by 31st December 2023 would automatically lapse. There was widespread concern that this would result in uncertainty and leave gaps in the statute book.

The Government has decided to remove this clause altogether and instead include a list of specific legislation that will be revoked on 31 December 2023. The published list of laws that will be revoked is not exciting, as it is largely made up of regulations which are defunct or not relevant to the UK in any event.

However, separately, the Government has published a policy paper and launched a consultation on proposed changes to employment law with a view to reducing regulatory burdens on employers in the post-Brexit era.

Holiday and holiday pay

Holiday entitlement

As a result of the UK's former membership of the EU, a worker's annual leave entitlement consists of two parts:

- A right under the EU Working Time Directive to a minimum of four weeks' annual leave; and
- A domestic right to an additional 1.6 weeks' annual leave (to represent the usual number of public holidays in England and Wales, although there is no requirement for holiday to be taken on those days).

The Government proposes to combine the two types of annual leave into one pot of statutory entitlement.

The Government will also consult on setting a "minimum rate of holiday pay" to address what they consider to be an "unhelpful divide" between the two types of leave. European Court of Justice caselaw has developed a principle that

holiday pay should include an element of commission, overtime or bonuses. However, this caselaw only applies to the first four weeks of statutory leave and different rules apply to the additional 1.6 weeks of leave. A standardised calculation method across the new single entitlement will help employers get what can currently be a tricky calculation right.

Rolled-up holiday pay

The Government has also proposed that employers will once again be permitted to pay "rolled-up" holiday pay. It had previously been a wide-spread practice for casual, zero hours and irregular hours workers to receive an additional amount on top of their regular pay to account for their paid holiday entitlement. Employers would add an additional 12.07% to a worker's pay packet (because 5.6 is 12.07% of 46.4, which is the number of working weeks in the year).

However, this practice was ruled unlawful by the European Court of Justice, as it defeated the objective of holiday entitlement, as workers would be deterred from taking their holiday as they would in effect not receive any pay whilst they were off.

This change will be welcomed by employers in sectors with a large number of casual and irregular hours workers, such as hospitality, as it provides a straightforward solution to calculating and paying holiday pay.

Maximum working hours - record keeping

The Working Time Directive (adopted by the UK as the Working Time Regulations (WTR)) provides that a worker's average working time must not exceed 48 hours per week on average over a 17-week reference period. However, workers can agree to opt-out.

There is no plan to remove the limit on average working hours, but the Government wishes to remove the requirement on employers to maintain adequate records showing whether the limits on average working time are being complied with in the case of each worker.

The Government considers that this will "save businesses £1billion per year". However, the level of employer compliance with this record keeping requirement is likely to be low in any event and therefore the practical impact of this change may be limited.

If employers do not maintain records of average weekly working time and a worker brings an Employment Tribunal claim alleging breach by the employer of the maximum weekly working time limit, it will be difficult for an employer to successfully defend such a claim without any documentary evidence to rely on, particularly if the employee has kept its own records of their weekly working time, or as part of the disclosure process requests records of time spent logged onto their work computer or records from security logs of hours spent at the work venue etc.

TUPE

Minor changes to the Transfer of Undertaking (Protection of Employment) Regulations (TUPE) also aim to reduce regulatory burdens on business.

TUPE provides protection for employees when a business transfers to new owners (other than by way of a pure share sale) or where there is a "service provision change" for example, when a business contracts out a service for the first time or the contractor supplying a service changes. In these scenarios an employee's employment automatically transfers to the new owner of the business or contractor on their existing contractual terms, and preserving their continuity of employment.

TUPE sets out certain requirements to inform and consult with employees affected by a transfer. Currently, employers are required to consult with employee representatives, or if there are no representatives in existence, to facilitate the appointment of such representatives.

The Government is considering removing the requirement to consult with employee representatives to instead allow employers to consult with employees directly for businesses with fewer than 50 employees and where the transfer affects less than 10 employees.

This is a fairly minor and limited change only applying to businesses with between 10-49 employees. Businesses with less than 10 employees are already permitted to consult with employees directly.

Whilst the changes discussed here are on their own relatively small (the most substantial being the re-introduction of rolled-up holiday pay), we are beginning to see the direction of travel for post-Brexit employment law and further proposals for de-regulation are likely to follow.

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