

UK Government Publishes Response to Consultation on Retained EU Employment Law Reforms: What Does This Mean for Employers?

Article By:

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On 8 November 2023, the UK government published its response to the consultation on Retained EU Employment Law. It also published the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023, which will take effect on 1 January 2024.

Quick Hits

- The UK government recently published its response to a consultation that considered reforms to retained EU employment law.
- A draft statutory instrument implementing the reforms, the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023, simplifies the requirements for the recording of working hours and the calculation of annual leave and holiday pay. It also introduces “rolled-up holiday pay” for irregular hours workers and part-year workers.
- The government will proceed with planned reforms to TUPE.

Background

In May 2023, the UK government [issued a policy paper](#), “Smarter Regulation to Grow the Economy,” and launched a consultation seeking views on three areas of proposed reform: (1) recordkeeping requirements under the Working Time Regulations 1998 (WTR); (2) annual leave and holiday pay calculations in the WTR; and (3) consultation requirements under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

The government explained that following the United Kingdom’s departure from the European Union in 2020, “significant quantities of out-of-date, unworkable and unnecessary EU laws still [remained] on [the UK’s] statute book.” The government sought input on reforms that would “amend, remove and replace unsuitable retained EU law with bespoke UK provisions.”

The policy paper also included proposals to limit non-compete clauses to three months, but there has been no confirmation of when the government plans on introducing this statutory cap.

Reforms

Recordkeeping Requirements Under the WTR

Employer obligations with respect to recording working hours in the UK have required clarification following a judgment on the matter issued by the Court of Justice of the European Union (CJEU) in May 2019. The CJEU held that Member States must require employers to set up “objective, reliable and accessible” systems to measure the duration of time worked each day by each worker—an obligation that goes beyond what is required under the WTR. The government [confirmed in its response](#) that the effect of this judgment will not apply in the UK. For that reason, employers are required only to keep “adequate” records in the UK under the WTR (with some industry-specific exceptions).

Holiday Entitlement

The government consulted on its proposal to merge the EU-derived annual leave entitlement of four weeks (paid at a “normal” rate of pay) with the additional UK statutory 1.6-week entitlement (paid at a “basic” rate of pay), into a single entitlement. Given that these two types of leave are paid at different rates, the government confirmed there are no longer plans to implement the single leave entitlement. Instead, a clarification of the definition of “normal” pay will be set out in the regulations.

Irregular Hours Workers and Part-Year Workers

The UK Supreme Court ruling in [Harpur Trust v Brazel](#) prompted reforms on calculating holiday entitlement for irregular hours workers. In *Harpur Trust*, the court held that part-year workers’ holiday entitlement was the same as full-year workers’ (5.6 weeks per year) and their holiday entitlement should be calculated by reference to average earnings over fifty-two weeks, not by reference to the hours a part-year worker worked. In reality, this meant that part-year workers would be entitled to more paid holiday leave than full-year part-time workers who work the same total number of hours, but regularly across the year.

The government has now confirmed it will implement a new calculation method based on a 12.07% formula, with workers accruing holiday entitlement at the rate of 12.07% of the hours worked in a pay period. For irregular hours workers and part-year workers, this reflects the procedure many employers had adopted pre-*Harpur Trust*.

Rolled-Up Holiday Pay

In accordance with the consultation outcome, the draft legislation also introduces “rolled-up holiday pay” for irregular hours and part-year workers only. This is where an employer pays an additional amount on top of a worker’s normal hourly rate of pay when they are working in order to account for the holiday entitlement that the worker would otherwise receive when taking annual leave. This practice had previously been ruled unlawful by the CJEU due to the risk that it could deter workers from taking leave. However, the government considers there to be sufficient safeguards in place to address these concerns with irregular hours workers.

TUPE Amendments

The government will proceed with planned TUPE reforms. Once implemented, these reforms will allow businesses with fewer than fifty employees and businesses of any size undertaking a “small

transfer” (i.e., fewer than ten employees) to consult directly with their employees if there are no existing worker representatives in place. This is expected to save significant time, as currently employers must arrange elections for worker representatives and consult with them during this process, which adds time and complexity to the process.

Next Steps

The government has released a draft [statutory instrument](#) setting out the proposed legislative changes, with an enforcement date of 1 January 2024.

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