

Employment law update – November 2023

A number of changes to employment laws are currently in the pipeline, so today's update covers those changes as well as offering some tips on what the new legislation might mean for your business. Some of the changes affect both employees and temporary workers / contractors, some affect only one or the other.

1. The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

The government has released [draft legislation](#) to amend the law in a number of areas relating to holiday, Working Time Regulations and TUPE. The new legislation is due to take effect from **1st January 2024**. This update discusses the changes to holiday and holiday pay only, since they are likely to have the most impact on employers and recruitment agencies. These changes affect employees and temporary workers.

(A) **New definitions.**

- **"Irregular hour" worker:** is someone whose hours worked in each pay period (e.g weekly or monthly) of that year is, under the terms of their contract, wholly or mostly variable.
- **"Part year" worker:** is someone who is required to work only part of any year of that contract, and there are periods within that year, of at least a week, which they are not required to work and for which they are not paid.

(B) **Holiday entitlement calculation.** Holiday entitlement will be calculated differently for different types of workers (including employees). The new regulations will effectively overturn the controversial Supreme Court decision in Harpur Trust v Brazel (more information [here](#)).

- "Irregular hours" and "part-year" workers: holiday entitlement (and holiday pay) will be calculated on the basis of 12.07% of hours worked during the worker's pay period (ie weekly or monthly).
- All other workers: holiday entitlement and pay will be continue to be calculated on the basis of 1/12 of the annual entitlement on the first day of each month for the first year, and pro-rata thereafter.

(C) **Rolled-up holiday pay (RHP).** The new regulations allow employers and agencies to pay rolled-up holiday pay for "irregular hours" workers and "part-year" workers **only**. Employers and agencies will calculate the rolled-up holiday pay on the basis of 12.07% of remuneration received in that worker's pay period (ie weekly or monthly). Where RHP is used, payslips must show the holiday pay as a separate line item.

What should you do now:

- (A) **Holiday entitlement.** Most temporary workers supplied by recruitment agencies will fall under the definition of irregular hour workers or part-year workers. Many agencies are still using the 12.07% calculation method for holiday entitlement, so changes to systems and processes may not be needed. However, do be aware that the 12.07% multiplier **needs to reflect the worker’s “pay period”**. If workers are paid weekly, their pay period is weekly. If workers are paid monthly, their pay period is monthly. You may therefore need to make tweaks to your processes to ensure the calculations use the correct reference period (as opposed to calculating holiday based on their hourly or daily rate).
- (B) **Rolled-up holiday pay (RHP).** Firstly, decide whether as a business you will implement the RHP option for your temporary workers (and employees if applicable). If so, you will need to make the necessary changes to your contracts with temporary workers (and employees if applicable) and issue communications to those affected. You should also confirm whether any umbrella companies who supply temporary workers to you are intending to pay RHP or not. If so, any umbrella company workers you engage should also be included in your communications plan. Finally, if and when you do start paying RHP, ensure that the payslips issued to your workers include the RHP as a separate line item.

2. The Workers (Predictable Terms and Conditions) Act

This new legislation received Royal assent in September 2023, so is now officially on the statute books but is not yet in force. It is expected that the law will **take effect in September 2024**. There are additional regulations yet to be enacted, and ACAS is currently consulting on a [Code of Practice](#) with further detail on how the law will work in practice, but this is what we know at the moment.

The new law will provide employees, direct workers and temporary workers who meet the definition of “agency worker” under the Agency Worker Regulations (AWR) with new and additional rights under employment law.

- (A) For **employees and direct workers**, these individuals will have the right to request a more predictable working pattern if:
- they have been engaged or employed by their employer for a certain minimum period (expected to be 26 weeks)
 - there is a lack of predictability in relation to the work they do; and
 - they are requesting a change to their working pattern – days, hours, contract period etc.

The employer must reasonably consider the request and provide a response **within one month**. Furthermore, the onus will be on the employer to **accept the request** unless there is a genuine business reason not to. Genuine business reasons to refuse are listed [here](#) in the Code and include, amongst others: increased costs, negative impact on ability to meet customer demand and insufficient work available. If the employer can’t agree to the request made by the worker / employee, it should consider alternative options.

- (B) **Agency workers** may make a request for a more predictable working pattern to their **agency or the end client**.

Where the agency worker makes the request to the agency, that worker must have had a contract with the agency at some point in the month before the 26 weeks leading up to the day of the request. According to the draft ACAS code, any assignment with a client which is due to last less than 12 months is automatically assumed to lack predictability, giving rise to a right to request a longer assignment duration (in excess of 12 months). Even if the assignment is expected to last longer than 12 months, if the number of working days or hours are not predictable, a worker may still make a request to the agency for a more predictable working pattern for that assignment.

Where a request is made directly to the client, the worker must request a direct contract with the client. It is unclear how this right of any agency worker will affect the agency's ability to charge a transfer fee to the client, but since the agency worker can only make the request on or after 26 weeks (timescale not yet confirmed), which exceeds the period for charging a transfer fee as set out in the Conduct Regulations, it's unlikely in practice to result in significant conflict between the two issues.

The agency and/or client (as appropriate) must reasonably consider the request and, as with employees, the request must be accepted unless there is a genuine business reason to refuse (explained in the section above). The agency's or client's decision must be provided **within one month of the request**.

The right to request a more predictable working pattern is not available to temporary workers who are self-employed.

What should you do now: Begin familiarising yourself with this legislation and the ACAS (draft) code of practice. Ensure that internal teams are aware of the legislation and begin to design processes to deal with these requests, both from agency workers and your own employees, if applicable.

Consider a client education campaign so that clients are aware of the upcoming changes. Since you'll need to liaise with the client on any requests made by agency workers - whether made to you or to the client directly - and the timescale to respond is very short, you will need prompt responses and action from everyone involved.

Ensure you understand what information and evidence you will need to refuse a request made under the legislation. Since the burden is on you to approve such requests unless you have a genuine business reason for refusing, you should make sure you understand what is (and is not) considered a genuine business reason.

Once the ACAS code of practice is finalised and you have decided how you will implement the necessary procedures to deal with requests, ensure those procedures are, once the legislation is live, made available to employees and agency workers as part of their onboarding.

You should consider making changes to contracts with clients to ensure they co-operate with any such requests received by an agency worker. Also be mindful that clients may try to include indemnities in their contracts with their recruitment agencies to offset any liabilities they may be

exposed to under these new laws. As always, be very careful of indemnities in contracts and take advice on any non-standard terms and conditions that a client asks you to sign.

3. Non-compete clauses

The government intends to bring in legislation that will **restrict non-compete clauses in contracts to a maximum period of three months**. This upcoming change in legislation will affect employees and temporary workers (subject to some caveats as explained below).

The new legislation will only apply to non-compete clauses. Non-compete clauses prevent an employee (or temporary worker) from being employed by a competitor or from starting a competitor company for a certain period after the end of their current employment contract.

Non-solicitation and non-dealing clauses will not be affected; instead the existing common law rules around reasonableness and protection of interest etc will continue to affect the validity and enforceability of these types of clauses.

Once the new legislation is in place, companies cannot impose non-compete clauses which last longer than 3 months.

The new legislation is expected to apply to all employees, regardless of seniority. It will also affect direct PAYE and umbrella company workers. The legislation will not affect self-employed contractors (sole traders or limited company contractors), so these individuals can be subject to longer non-compete periods, providing they are reasonable.

As mentioned above, non-dealing clauses are not affected by this legislation, so you can still prevent temporary workers from working directly with your end client after an assignment ends, providing the temporary worker has validly opted-out of the Conduct Regulations.

As yet, a date has not been set for the new legislation and it will likely be a few months before we know more about timing.

What should you do now: For the moment, do nothing. Once a go-live date for the new legislation is confirmed, you will need to:

- make changes to your standard employment contracts - if they have non-compete clauses included - to limit the non-compete period to 3 months or less.
- implement a variation to the employment contracts of your existing employees to align with the new maximum period for non-compete clauses. If contracts are not changed, the entire non-compete clause might be considered unenforceable in the future, instead of the non-compete period being reduced to the statutory maximum. To avoid that risk, we recommend changing the contracts for existing employees.
- make changes to your direct PAYE temporary worker contracts - if they have non-compete clauses included which is uncommon - to limit the non-compete period to 3 months or less.

4. Supplying agency workers during strikes

The government repealed Regulation 7 of the Conduct Regulations in July 2022. Regulation 7 prevented agencies from supplying temporary workers to clients during periods of industrial action and strike. The repeal meant that from July 2022 onwards, agencies were free to supply temporary workers during strike action.

In July 2023, the High Court ruled that the repeal was unlawful, meaning that from 10th August 2023 onwards, Regulation 7 was reinstated. However, the government issued a public [consultation](#) on 16th November 2023 proposing the formal abolishment of Regulation 7 of the Conduct Regulations. Depending on the outcome of the consultation, Regulation 7 could once again be repealed (though this won't happen until 2024 at the earliest). For now though, the status quo remains and **agencies are not able to supply temporary workers to clients during periods of industrial action.**

Feel free to contact me on bernie@labvolution.com if you would like any additional information or support on any of the areas covered in this update.