



Retained EU Law (Revocation and Reform) Bill

In brief

We [previously reported](#) on the Retained EU Law (Revocation and Reform) Bill (the “Bill”) and the uncertainty it brought for UK employers. Some recent developments from the UK government have given further clarity on what reforms are envisaged for UK employment law post-Brexit.

On 10 May 2023, the UK government:

- [announced](#) that the sunset provisions as drafted in the Bill will be abandoned (instead certain listed regulations will be revoked); and
- published a [policy paper](#) on *Smarter regulation to grow the economy* (the “Policy Paper”) - setting out in brief some proposals to reform employment law, including:
 - reforms to holiday pay, the Working Time Regulations (“WTR”) and the Transfer of Undertakings (Protection of Employment) Regulations (“TUPE”); and
 - limiting the duration of post-termination non-competes to three months.

The UK government then published a [consultation](#) on “Retained EU Employment Law” (the “Consultation”) providing further detail on these proposals. The Consultation does not include the plans in respect of the non-competes, which are instead covered by a recent [response](#) to a previous consultation on non-compete clauses.

In this article, we explain these latest developments and what impacts they might have for UK employers.*

Detail

It was originally proposed that all retained EU laws (approximately 4,000 identified at the time) would be revoked at the end of 2023, unless restated or replaced, as part of a controversial “sunset clause” in the Bill. Since then, the [Retained EU Law Dashboard](#) has been updated and the number of retained EU laws identified has increased. Many (including GQ|Littler) predicted that it would be a huge task for civil servants and ministers to review all these laws (or indeed identify them) by the deadline and were concerned that workers’ rights might disappear overnight.

It is not wholly unsurprising, therefore, that the UK government [announced](#) recently that it was pursuing a “new approach” replacing



the current sunset provisions in the Bill with a defined **schedule** of just under 600 retained EU laws to be revoked. The UK government also confirmed in its Consultation it is not intending to weaken workers' rights and the vast majority of retained EU employment laws will be preserved in areas where it is "*not either consulting on reforms or revoking legislation that is now irrelevant.*"

It no doubt comes as a relief that all retained EU employment laws will not be flung on the bonfire at the end of this year.

So, what employment laws are being revoked?

So far, the retained EU employment laws to be revoked relate to posted workers, European Cooperative Society regulations and working time for road tanker drivers.

[Read More...](#)

It seems that this is simply to tidy up the statute to remove regulations that no longer make sense post-Brexit.

So, what reforms are proposed?

The reforms set out in the Policy Paper and the Consultation are aimed at de-regulation and removing unnecessary complexity to promote economic growth. The proposals include:

[Read More...](#)

Reforms to remove the complexities around working time records and holiday pay

- **Removing the requirement to keep working hour records:** This is to remove the uncertainty about employers' record keeping obligations following an EU court decision, which held that employers should have systems to record actual working hours to keep track of whether working time limits are being complied with. The Consultation proposes legislating to clarify that businesses do not need to keep a record of daily working hours of their workers, for the purposes of complying with the WTR. Although the removal of legal uncertainty is always welcomed, the impact of this may be overstated, as employers will no doubt still want (and need) to keep track of workers' working time for other purposes (for example, for National Minimum Wage compliance).
- **Merging workers' basic and additional holiday entitlement:** Entitlement to annual leave is currently split into two parts, consisting of four weeks "basic leave" (from EU law) plus 1.6 weeks of "additional leave" (UK only). Different rules apply to each type of leave in respect of how to calculate holiday pay and when leave may be carried over to the following leave year - causing undue headaches for employers. The Consultation proposes the following reforms:
 - Combining the different leave entitlements into one pot of 5.6 weeks' paid leave. Currently, different rules apply in respect of minimum holiday pay. The four weeks basic leave must be paid based on "normal remuneration" (which can include payments such as overtime and commission as set out in various EU court case law) and the 1.6 weeks additional leave can be paid at basic pay. No specific plans are put forward, but the Consultation seeks views as to how holiday pay is currently calculated (i.e. whether employers differentiate between the four weeks and 1.6 weeks leave or simply pay all based on normal remuneration in practice) and how employers and workers think "normal remuneration" should be defined in legislation.
 - Clarifying carry over: The Consultation says that in doing this there will be no change to carry over from current arrangements as workers will be allowed to carry over 1.6 weeks into the following leave year if there is a written agreement. The Consultation also indicates that the entire statutory annual leave entitlement, will not normally be permissible to be carried over except where a worker has been unable to take it in certain scenarios (such as being on long-term sick leave or maternity, paternity, adoption, or parental leave). No further details are provided.
 - Changing the method for calculating leave in a worker's first year of employment. The WTR state that workers should accrue annual leave at the rate of 1/12 of a full year's entitlement at the beginning of each month until the end of their first year of employment. But it is not clear which of the two leave entitlements accrue first and this sits at odds with other rules in the WTR on calculating holiday entitlement when a worker leaves during a leave year. The UK government is proposing to make amendments so that workers would accrue their combined annual leave entitlement at the end of each pay period for the first year of employment to remove some of the complexity of the calculations.
 - Removing the temporary emergency Covid exemption permitting carrying over of leave as it is no longer required.
- **Allowing rolled-up holiday pay:** Currently, rolled up holiday pay (where a worker receives an additional amount or enhancement with every payslip to cover holiday pay) is not permitted as the EU courts saw it as deterring workers from taking their leave. It is proposed that employers could choose (if they wish) to use rolled-up holiday pay to calculate and pay holiday pay. It is also proposed that this can be paid at 12.07% of pay as this is the proportion of the 5.6 weeks statutory annual leave in relation to the 46.4 working weeks of the year, subject to adjustment to account for any additional contractual leave offered above statutory entitlements. If an employer were to



choose this option, then they would need to make their workers aware, and this would have to be clearly indicated as holiday pay on payslips. This is likely to be something that employers (particularly with atypical workers) would welcome following the ruling in Harpur Trust v Brazel, which we [reported](#) on last year.

Limited reforms to TUPE

- **Reducing employers' TUPE consultation obligations:** Under TUPE, employee representatives must be in place before employers can inform and consult on proposed TUPE transfers (save for "micro businesses" with fewer than 10 employees). The UK government is proposing to permit employers to consult directly with employees (provided there are no existing employee representatives in place) for:
 - small businesses with fewer than 50 employees; and
 - businesses where fewer than 10 employees are transferring.

In addition, the consultation asks the open question of whether other aspects of TUPE could be improved.

Changes to the law on non-competes

- **Limiting the length of post-employment non-compete clauses:** The current proposal is to impose a limit of three months to the duration of post-employment non-compete restrictions (i.e. restrictions prohibiting an employee from going to work for a competitor or to start a rival business after they have left employment). The UK government's response to its earlier consultation on non-competes was published shortly after the announcement, and more information on the this can be found in our article [here](#).

What is the future looking like?

All the changes listed are only proposals and timelines are not clear. The proposed changes to the WTR, holiday pay and TUPE are subject to the outcomes of the published consultation (which closes on 7 July 2023), and the non-complete reforms are to be legislated on "when parliamentary time allows".

Read More...

There's also the previous consultation (now closed) on holiday pay for part-year and irregular hours workers, which has gone quiet, and it is unclear how this fits in with these current reforms. There is still some flesh to be put on these bones before we can fully understand the impact of these proposals.

The Bill is also currently being given a hard time in the House of Lords, who agreed several amendments that would see UK Parliament and the devolved legislatures (the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly) exercise greater scrutiny over the laws to be revoked and additional measures to improve Parliamentary oversight on how the UK Government is delivering on its Brexit promises. Both the House of Commons and the House of Lords must agree on the precise wording of the Bill before it can become law. And it is still unclear how much of this will work in practice, including how applicable laws are going to be interpreted following the end of the supremacy of EU law.

It seems that extracting years of entanglement of our employment laws with those from the EU is a trickier job than first envisioned, and it is no surprise therefore that the proposals we are seeing now are in specific areas ripe for reform and at the margins, rather than a wholesale rewrite. Whether further reforms will follow is also unclear, as the Policy Paper implies that this might be the first in a series of de-regulation proposals. Employers will have to watch this space as developments continue to unfold.

*The plans in the Consultation and in respect of the statutory limit to non-compete clauses are stated to currently apply to England, Wales and Scotland only, as employment law is a devolved matter for Northern Ireland. It is unclear if Northern Ireland will follow with similar proposals.