

## EMPLOYMENT UPDATES FROM HARBOTTLE & LEWIS LLP

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### **Retained EU employment law**

The Retained EU Law (Revocation and Reform) Act 2023 (the **Act**) came into law in June this year and will have effect from the end of 2023 onwards. Initially the Act was intended to revoke all EU laws not otherwise expressly retained at the end of 2023. Such a provision was ultimately not, however, included in the Act. Instead, in respect of employment law, with the exception of some specific changes to EU derived legislation, all EU law will remain in force, at least for the time being.

The Act will allow parliament to implement changes to employment rights and protections that come from EU law. This is because EU law will cease to have supremacy from 31 December 2023. Up to June 2026, the Act gives government ministers power to reform existing EU-based regulations in force in the UK. The Court of Appeal and Supreme Court will no longer be required to follow the decisions of the European Court of Justice and, in circumstances of general public importance, lower courts and employment tribunals will be able to refer cases to the Court of Appeal and Supreme Court for consideration when they would otherwise have still been bound by earlier EU decisions.

Although the immediate impact of the Act will be limited, it may pave the way for substantial changes to employment legislation in the future. Much may depend on the outcome of the next general election.

### **Changes to holiday entitlements**

One of the changes to employment law that is to be made following the UK's withdrawal from EU law is to the law around holiday. From 1 April 2024, employers may lawfully pay rolled up holiday pay to part year and irregular hours workers and calculate holiday for such workers by reference to hours worked.

It is firmly established in European case law that rolled up holiday pay is not permissible, so this is a key change. Holiday pay is 'rolled up' when, instead of a worker receiving holiday pay for time taken off from work only, they are paid an additional amount each week/month on top of their usual pay in respect of holiday. The rolled up pay calculation has typically been 12.07% of the pay earned by the worker (12.07% referring to the 5.6 week statutory minimum paid holiday entitlement in the UK).

A rolled up holiday approach can be easier to manage where workers have irregular and unpredictable work hours

The current rules will continue to apply to workers with regular hours, who do not work part only of the year.

Irregular hours workers and part year workers will, in respect of holiday years commencing on or after 1 April 2024, accrue holiday at a rate of 12.07% of the hours that they work during each pay period. Employers will be entitled to pay holiday pay as a 12.07% uplift on a worker's remuneration each pay period. Holiday pay must be itemised as such on the worker's pay statement. This greatly simplifies the current rules, which do not clarify how to work out 5.6 weeks' holiday entitlement for irregular hours workers.

*Irregular hours workers* are those whose paid hours of work are wholly or mostly variable in each pay period (i.e. those who do not know from one week/month to the next exactly how many hours they will work and how much they will be paid). Front of house theatre staff will sometimes be irregular hours workers. *Part year workers* are those who are required to work only part of the year, but who remain employed for the whole year and who are not required to work (and are not paid) for periods of at least one week in each year. Such workers are often term time or seasonal workers.

The new rules allow for certainty where, currently, calculating holiday entitlement and holiday pay can be extremely complicated for irregular hours workers and where, in respect of part year workers, the current rules can on occasion yield seemingly non-sensical outcomes. The change to the legislation was brought about as a result of the Supreme Court decision in *Harpur Trust v Brazel*, where, due to the statutory formula for calculating holiday pay, a term time worker's annual holiday pay entitlement was found to far exceed 12.07% of their annual earnings.

It is important to note that workers must still take holiday. Payment cannot be made in lieu of the entitlement to actual time off – other than on termination of the worker's contract. Employers do have the right to direct when leave can and cannot be taken.

Members should ensure they that comply with the requirements of the relevant collective agreements and other contractual arrangements in place with workers, which will not be directly affected by the change to the legislation until such time as the agreements may be varied to reflect the changes.

## **Worker Protection (Amendment of Equality Act 2010) Act 2023**

From October 2024 onwards, employers will be required to take *reasonable steps* to prevent sexual harassment of employees. If an employer breaches this obligation and an employee succeeds with a claim, employment tribunals will be entitled to uplift compensation awarded by up to 25%.

'Reasonable steps' is not defined by the statute. However, the size and resources of the employer will be relevant.

Employers with the resources to do so may wish to consider organising training and implementing anti-harassment policies and procedures now. In a climate where workers have been more willing to bring employment tribunal claims and where, rightfully, individuals are prepared to 'call out' all forms of harassment, it will benefit employers to take the steps that the new Act requires. The risks arising from ignoring or failing to deal with behaviour which may amount to sexual harassment are therefore increased.