

“Smarter Regulation” – proposed employment changes ahead

12 May 2023  Sarah Hooton

The Department for Business and Trade has published its report [Smarter Regulation to Grow the Economy](#), setting out its proposed reforms in three areas: working time, TUPE and post-termination restrictions.

Working time

The report proposes reforms to record keeping in respect of working time. The report states that the Working Time Regulations (WTR) themselves place “disproportionate burdens on business, specifically in relation to recording working hours”. However, the proposals included do not relate to amendments to the WTR but rather to “EU case law”. This would appear to be a reference to the ECJ’s ruling in *Federación de Servicios de Comisiones Obreras v Deutsche Bank SAE* which goes beyond the record-keeping requirements set out in the WTR to oblige employers to record the time worked each day to allow for compliance with daily and weekly rest breaks to be assessed, as well as demonstrating overall weekly working time.

Further, there are separate obligations on employers to keep records in respect of working time for the purposes of compliance with National Minimum Wage requirements. At this stage, therefore, it remains unclear precisely what is potentially in scope for removal.

There are proposals to “reduce the administrative burden and complexity of calculating holiday pay” – reform here will no doubt be welcomed by anyone who has had to complete the current averaging calculations. The report is missing any detail about how this will be achieved – although it does include a proposal to merge the current two “pots” of statutory leave (four weeks under the Working Time Directive, and the additional 1.6 weeks of UK statutory leave) into one pot. There is no suggestion the overall amount of leave will be reduced but this merger would result in changes being required as to what is included within the calculation of holiday pay, and whether leave affected by sickness can be rescheduled as currently different rules apply to the two pots of leave.

Lastly, there are also proposals to allow for rolled-up holiday pay. Given that the recent government consultation on calculating holiday entitlement for part-year and irregular hours workers has just closed, it is likely that a coordinated approach will be required to simplify the administration in calculating leave and pay, without adversely affecting the underlying entitlements.

TUPE

There is, on the face of it, a rather modest change proposed to TUPE as it relates only to the election of representatives in certain limited circumstances. The proposal is to consult on removing the requirement to elect employee representatives “for businesses with fewer than 50 people and transfers affecting less than 10 employees, allowing businesses to consult directly with the affected employees”. This would therefore expand out the current provisions relating to micro-businesses (those with fewer than 10 employees).

On the current phrasing, it is a little unclear whether this is intended to apply only to businesses with fewer than 50 employees who are transferring fewer than 10 employees, or whether it would apply to businesses with fewer than 50 employees (regardless of the numbers transferring) *and* any-size employers who transferring fewer than 10 employees (i.e. small-scale transfers). In either case, it would seem to be a sensible adjustment; it wouldn’t affect consultation with representatives who are already appointed, and nor would it prevent an employer from deciding to proceed with an election process if it so wished or diminish the information and consultation process.

Post-termination restrictions

Reform in this area is limited to non-compete clauses rather than any wider type of post-termination restriction. The inclusion of reform here is a little unusual as the introduction (and conclusion) to the report focusses on the ability to change regulation as a result of Brexit – and this area is not an area regulated by EU law. However, reform of non-compete clauses has been on the cards for some time. There was a previous consultation which closed in February 2021, although the Government's response has not been published, beyond this new report. The previous consultation sought views on whether non-compete clauses should be made unenforceable in their entirety or whether they should be allowed to continue but only where an employer pays mandatory compensation during the term of the clause, similar to the approach taken in France, Germany and Italy. This new report proposes a third option not previously tabled – that legislation be introduced to limit the length of non-compete clauses to 3 months.

There have been no timescales proposed for this and it is unclear whether the effect of the legislation would be to make any non-compete clauses which are currently longer than 3 months entirely void, or simply cap their effect at 3 months. However, it would be sensible for employers to review the existing post-termination restrictions that they have in place – as well as the applicable notice periods and availability of garden leave clauses – to ensure that appropriate protections are in place to protect their legitimate interests.

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