DOYLE CLAYTON
Workplace Lawyers

Looking ahead to 2023

Important workplace changes to look out for & how employers can prepare

Employment: Expiry of EU-derived laws

Under the Retained EU Law (Revocation and Reform) Bill, which is progressing through Parliament, the Government could allow many EU-derived laws set out in secondary legislation to expire on 31 December 2023. This could have a significant impact on employment law.

Under the Bill's sunset provisions, EU-derived laws set out in secondary legislation will expire on 31 December 2023, unless the Government decides to preserve them so that they remain part of UK law. The Government could also decide to postpone their expiry, but to a date no later than 23 June 2026. It also has the option to restate legislation, replace it or revoke it (without replacing it). Any replacement legislation it introduces must not increase the regulatory burden.

Many of the UK's most significant EU-derived employment rights and protections are contained in secondary legislation. This means they will be affected by the Bill's sunset provisions and could be allowed to expire at the end of 2023. Obvious examples include the Working Time Regulations 1998, the Agency Workers Regulations 2010, the Part-Time Workers Regulations 2000, the Fixed-Term Employees Regulations 2002 and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (with the exception of the service provision change provisions which go beyond EU law requirements).

Primary legislation implementing EU law (for example the Equality Act 2010) is not caught by these provisions. However, EU-derived laws contained in Acts of Parliament, but which were put there by secondary legislation, are caught. This would cover some of the collective redundancy consultation requirements in the Trade Union and Labour Relations (Consolidation) Act 1992.

The Government does not necessarily have carte blanche when deciding which laws should be allowed to expire, due to the UK's obligations in the UK-EU trade and co-operation agreement. These prevent the UK from reducing employment protections where doing so could affect trade or investment between the EU and UK. This is intended to ensure that UK employers are not able to take advantage of lower and cheaper employment standards to undercut their EU counterparts.

Employment: Expiry of EU-derived laws (cont.)

Under other provisions of the Bill:

- Directly effective EU rights and obligations derived from EU Treaties and Directives will cease to be recognised, enforced or followed in domestic law after 31 December 2023. However, the Bill includes powers enabling their effect to be reproduced if the Government chooses to do so.
- The supremacy of EU law will end on 31 December 2023, meaning UK law will take priority. In addition, general principles of EU law will no longer be part of domestic law, unless the Government exercises its power to restate legislation to produce an equivalent effect.
- After the end of 2023, any EU retained law will be known as "assimilated law".
- It will be made easier for courts and tribunals to depart from retained EU case law.

Action Points

Employers will need to keep a close eye on Government decisions about which legislation it will allow to expire (at the end of 2023 or at a later date) and which it will choose to restate or replace. These decisions could result in significant changes to employment law and employers will face a period of uncertainty while the Government decides on its approach.

Employment: Fire and rehire practices

Changing terms and conditions of employment

In the wake of the P&O redundancies in March 2022, the Government announced that it would be issuing a statutory code of practice addressing fire and rehire practices used by employers to bring about changes to terms and conditions of employment. This practice is often used by employers where they have not been able to obtain an employee's agreement to contractual changes. It involves terminating the employment contract and offering the employee continued employment on the revised terms. As the practice involves terminating employment contracts, there is potential for employees to bring unfair dismissal claims. In addition, where an employer is proposing to dismiss 20 or more employees, they will also have collective consultation obligations. The new code of practice will detail how businesses must hold fair, transparent and meaningful consultations on proposed changes to employment terms and will include practical steps that employers should follow. The code of practice was expected to be published in the summer of 2022 and in November 2022 it was promised "in the near future".

Employment tribunals and courts will be required to take the code of practice into account when considering relevant cases, including unfair dismissal claims. Where the code applies and the employer unreasonably fails to follow it, tribunals and courts will have the power to apply an uplift to an employee's compensation of up to 25%.

Action Points

Employers should keep an eye out for the new code of practice. If they need to make changes to terms and conditions of employment via a "fire and rehire" route, they will need to ensure the code is built into their processes. Otherwise, any dismissal could be unfair and compensation could be increased by up to 25%.

Employment: Industrial action

Attempts to limit the impact of industrial action

2022 saw the beginning of a period of industrial unrest, with rail and bus workers, postal workers, nurses, ambulance workers, baggage handlers and Border force staff amongst those taking industrial action. In July 2022, in a bid to reduce the impact of strikes, the Government legislated to repeal the ban on recruitment businesses supplying agency workers to replace striking employees. It also increased the limits on the maximum damages award which may be made against a trade union where industrial action is found to be unlawful. In a further bid to limit the impact of industrial action, the Government introduced the Transport Strikes (Minimum Service Levels) Bill which will require minimum service levels to be put in place for transport services when strikes are taking place. The Bill had its first reading in the House of Commons on 20 October 2022 and could come into force in 2023.

The Prime Minister has set up a Government strike response unit to respond to strikes across the public sector. The unit will seek to prepare contingency plans to cope with and oversee the Government's approach to industrial disputes. The Prime Minister also indicated that the Government is considering "new tough laws" to protect people from strike disruption. We could therefore see further changes to industrial action laws over the course of 2023.

In the meantime, unions have been given permission to apply for judicial review of the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 which repealed the ban on recruitment businesses supplying agency workers to replace striking employees. The application is due to be heard in late March 2023.

Action Points

Employers facing industrial action should consider whether using agency workers to replace striking workers is an option for their business. In this regard they will need to be careful about how they handle relations with striking employees, while keeping in mind their responsibilities to agency workers who could face some hostility. They will also need to watch out for the outcome of the judicial review challenge as this could affect their ability to use agency workers going forwards.

Employers with unionised workforces will also want to monitor any changes to industrial action laws which could make it more difficult for employees go on strike or take other industrial action.

Employment: Harassment law changes

The Government is backing the Worker Protection (Amendment of Equality Act 2010) Bill, a Private Members' Bill, which will introduce a new statutory duty on employers to prevent sexual harassment. The Bill will also reinstate an employer's liability for harassment by third parties.

Duty on employers to prevent sexual harassment

The duty requires an employer to take all reasonable steps to prevent sexual harassment of their employees in the course of their employment. Breach of the duty will be an unlawful act enforceable by the Equality and Human Rights Commission (EHRC).

The EHRC intends to produce a statutory code of practice to help employers comply with the new duty. This will draw on its existing guidance on sexual harassment and harassment at work. The code of practice will set out the steps that employers should take to prevent and respond to sexual harassment to comply with the new duty. The EHRC will also establish a way for employees and employee representatives to notify it of breaches.

Although employees will not be able to bring standalone claims for breach of the duty, they will be able to obtain increased compensation in a sexual harassment employment tribunal claim. If an employee is successful in a claim for sexual harassment and the employment tribunal rules that the employer is in breach of the duty, it will have the power to award an uplift in compensation of up to 25%.

Third party harassment

Under the Bill's provisions, an employer will be liable if a third party harasses an employee in the course of their employment and the employer has failed to take all reasonable steps to prevent them from doing so. This provision is not limited to sexual harassment and so covers the other relevant protected characteristics as well. These are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

Previously the Equality Act 2010 made employers liable for instances of third party harassment if there were two or more incidents. Those provisions were repealed in 2013. The provisions in the Bill contain no requirement for there to be two or more incidents before an employer can be held liable. There will therefore be greater scope for employers to be held liable for harassment of their employees by third parties.

Employment: Harassment law changes (cont.)

Timescale

The Bill is currently progressing though Parliament, with the Report stage scheduled for 3 February 2023. The Bill will come into force one year after it is passed and so will not come into force until 2024.

Action Points

Although the changes will not be in force before 2024, preventing sexual harassment of employees at work should be a key priority for employers. Employers will already be familiar with the concept of taking reasonable steps to prevent harassment, as they will not be held liable for harassment committed by a worker in the course of their employment if they can show that they took all reasonable steps to prevent it.

Now is a good time for employers to check their policies, processes and practices against the existing EHRC guidance to ensure they reflect best practice. As the new code of practice will draw on this guidance, acting now will also help ensure employers are well-prepared for when the new duty comes into force.

Employment: Flexible working changes

In December 2022, the Government responded to its flexible working consultation and announced that employees will have the right to request flexible working from the first day of their employment, rather than having to wait 26 weeks.

The Government also confirmed that:

- Employees will be allowed to make two flexible working requests in any 12-month period (instead of one). However, the right will remain a right to request flexible working, not a right to have it.
- Employers will have to respond to a flexible working request within two months (instead of three).
- Employers will be required to consult with employees, to explore the available options, before rejecting a request.
- The current requirement for employees to set out how their employer might deal with the effects of their flexible working request will be removed.
- There will be no change to the eight business reasons an employer can rely on for refusing a flexible working request.

The Government also intends to develop enhanced guidance to raise awareness and understanding of how to make and administer temporary requests for flexible working, as consultation responses indicated a lack of awareness of the right to request a time-limited change.

The Government also recognises that people often need ad hoc or informal flexibility to manage elements of their lives, such as attending appointments or managing fluctuations in their health. It will issue a call for evidence 'in due course' to better understand how informal or ad hoc flexible working might work in practice, so this is something to look out for in 2023.

Timescale

Precise timescales are unclear. Making the right to request flexible working available from the first day of employment will be done through secondary legislation 'when parliamentary time allows' and in theory this could happen quite quicky, parliamentary time allowing. The other changes require primary legislation. However, the Government is supporting a Private Members' Bill, the Employment Relations (Flexible Working) Bill, which already includes these changes. The Bill's Report stage is scheduled for 24 February 2023. Based on these timescales, these changes could come into force in 2023.

Action Points

Employers may wish to update their flexible working policies now so that they are ready for use when the changes come into force. Closer to the time, they will need to train managers so they understand the changes, in particular the need to deal with requests more quickly and to consult and explore alternatives before rejecting a request.

Employment: New family friendly rights

The Government is backing a number of Private Members' Bills which will see the introduction of new rights to carer's leave and to neonatal care leave, as well as additional redundancy protections for pregnant women and new parents.

Carer's leave

The Carer's Leave Bill requires the Government to make regulations giving employees the right to take one week's unpaid carer's leave each year. The leave will enable employees to provide or arrange care for a dependant with a long-term care need. The right will only be given to employees and no qualifying period of employment will be required.

An employee's dependants covered by the new right are their spouse, civil partner, child or parent, someone who lives in the same household as them (other than a lodger or tenant) and someone who reasonably relies on them for care. A dependant will qualify as having a long-term care need if they have an illness or injury that requires or is likely to require care for more than three months, if they are disabled for the purposes of the Equality Act 2010, or if they require care due to old age.

According to the Government, employees will be able to take the leave flexibly to suit their caring responsibilities and will not need to provide evidence of how the leave is used or who it will be used for.

Employees taking carer's leave will be protected from dismissal and detriment as a result of taking time off. They will also be able to bring an employment tribunal claim if their employer unreasonably postpones their leave or prevents or attempts to prevent them from taking it.

Timescale

The Bill's Explanatory Memorandum indicates that if the Bill is passed in 2023, the right to carer's leave will come into force in 2024.

Employment: New family friendly rights (cont.)

Neonatal care leave

Under the Neonatal Care (Leave and Pay) Bill, the Government must make regulations giving parents the right to take leave if their baby receives neonatal care. The right will only be given to employees and will be available from the first day of employment. Employees with 26 weeks' continuous employment may also be entitled to statutory neonatal care pay, subject to meeting the minimum earnings tests applicable to other types of family leave.

The Bill provides that the period of leave must be a minimum of one week. However, the Government indicated in its consultation response that employees will be entitled to a week's leave for every week their baby is in neonatal care, capped at a maximum of 12 weeks. It is therefore likely that the regulations introduced by the Government will provide for a maximum of 12 weeks' leave.

Much of the detail is left to be dealt with in the regulations, including rights in relation to retaining existing terms and conditions of employment while on leave, the right to return to work and additional redundancy protections during and following leave. However, we can expect these to match the rights and obligations of employees taking other types of family leave.

Employees who exercise the right to take neonatal care leave will be protected from dismissal and detrimental treatment as a result of taking leave.

Timescale

The Bill's Explanatory Memorandum indicates that HMRC and commercial payroll providers usually require around 18 months' lead-in time to implement changes needed to administer new statutory payments. Therefore, it is likely that the new rights will not be implemented until at least 18 months after the Bill is passed, meaning that they will not be in place until 2024 at the earliest.

Employment: New family friendly rights (cont.)

Redundancy protection

The Redundancy (Pregnancy and Family Leave) Bill will give pregnant women and new parents additional protection against being made redundant.

Currently women on maternity leave and parents on adoption and shared parental leave have additional protection against being made redundant. Before being made redundant, they have the right to be offered any suitable available vacancy with their employer or an associated employer.

The Bill gives the Secretary of State the power to extend this redundancy protection to pregnant women and new parents for a period after they return from maternity, adoption and shared parental leave. The Government has indicated that employees will be protected for 18 months following their return, longer than the six months it mentioned in its 2019 consultation response. As a result, women will be protected throughout their pregnancy and maternity leave and until 18 months after they return to work. Parents taking adoption or shared parental leave will be protected while on leave and until 18 months after they return.

Timescale

It is unclear when these new protections will be in force. The Bill's Report stage is scheduled for 3 February 2023.

Action Points

Employers do not need to do anything for now but should monitor developments during 2023 and prepare for changes once timescales and details become clearer.

Employment: Increased employment costs

Minimum Wage increases

The Government announced Minimum Wage increases of between 9.7% and 10.9% to take effect from 1 April 2023.

The National Living Wage, paid to those aged 23 and over, will increase to £10.42 an hour (up from £9.50). This is the largest increase to the National Living Wage since it was introduced in 2016. The Government accepted the Low Pay Commission's recommendations which aim to ensure that the National Living Wage reaches the Government's target of two-thirds of median earnings by 2024.

The Government also confirmed increases in the National Minimum Wage as follows:

- The rate for 21 and 22-year-olds will go up by £1 to £10.18 per hour, narrowing the gap with the National Living Wage. The Government intends that this age group will receive the full National Living Wage by 2024.
- The rate for 18 to 20-year-olds will increase to £7.49 (from £6.83), with the apprentice rate and the rate for 16 and 17-year-olds going up to £5.28 (from £4.81).

The accommodation offset, an allowable deduction from wages for accommodation, will increase to £9.10 per day, up from £8.70.

Statutory payments and compensation

In April 2023, we will see increases to statutory maternity, paternity, adoption, shared parental and parental bereavement pay to £172.48 per week (up from £156.66). Statutory sick pay will also rise in April to £109.40 per week (up from £99.35).

Also in April, we will see increases to statutory redundancy payments, the maximum compensatory award for unfair dismissal and injury to feelings awards for discrimination. Details have not been announced yet and are usually announced in February.

Action Points

Employers should identify staff who are earning around National Living Wage and National Minimum Wage levels and check that they will still be meeting their minimum wage obligations when minimum wage levels increase on 1 April 2022.

Employment: Key judgments expected in 2023

We can expect to see the following judgments handed by the courts and tribunals:

- The Supreme Court's decision in ***Agnew v Chief Constable of Northern Ireland,*** an important decision affecting unlawful deductions claims where a worker's claim is based on a series of deductions (including, but not limited to, holiday pay claims). The Supreme Court hearing took place between 14 and 16 December 2022 and considered whether the Northern Irish Court of Appeal was correct when it ruled that a series of unlawful deductions is not broken by a gap of more than three months between deductions, or by a lawful (correct) payment. The Northern Irish Court of Appeal disagreed with the Scottish Employment Appeal Tribunal's decision in ***Bear Scotland Limited v Fulton and another*** in this regard. Courts and Tribunals in England, Wales and Scotland will be bound by the Supreme Court's decision which could affect how far back in time an unlawful deductions claim can go. However, legislation that applies in England, Scotland and Wales prevents claims going back more than two years from the date of the employment tribunal claim.

- The Court of Appeal's decision in ***Fentem v Outform EMEA Ltd*** which will consider whether the Employment Appeal Tribunal was correct when it ruled that an employer had not dismissed an employee when it relied on a contractual payment in lieu of notice provision to bring forward his termination date after he resigned with notice. The case is due to be heard on 31 Jan 2023 or 1 Feb 2023.

- The High Court's decision on whether the **Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022** are lawful. The Regulations repealed the ban on recruitment businesses supplying agency workers to replace striking employees. The case is due to be heard in late March 2023.

- The Employment Appeal Tribunal's decision in ***Mhindurwa v Lovingangels Care Limited*** on whether an employment tribunal was correct to rule that it was unfair to dismiss an employee on grounds of redundancy without first considering whether to put her on furlough. The case is due to be heard on 20 April 2023.

The Supreme Court will also hear an appeal in ***Angard Staffing Solutions Ltd v Kocur and others*** on whether the courts below were correct that Regulation 13 of the Agency Workers Regulations 2010 does not provide agency workers with a right to apply for and be considered for vacancies at the hirer and instead merely provides a right to be informed of vacancies. However, the case is listed to be heard on 7 December 2023 and so judgment is not expected until 2024.

Data protection: Draft employment practices guidance

The Information Commissioners Office (ICO) has published updated draft guidance documents addressing monitoring at work and handling information about workers' health.

Monitoring guidance: This guidance makes it clear that a balance must be struck between the employer's interests and the rights and freedoms of workers. Employers must identify the specific lawful bases for monitoring before starting any monitoring activity. Full and accurate information should be provided to workers in privacy notices, and employers should carry out a data protection impact assessment before starting any monitoring activities. The guidance is subject to public consultation until 11 January 2023.

Health guidance: This guidance emphasises that due to the high level of sensitivity of health data, employers must be transparent about their processing and provide clear information about what health data is being collected and why. Access to health data must be restricted on a "need to know" basis. The updated guidance includes sections on occupational health schemes, genetic data and health monitoring. The guidance is subject to public consultation until 26 January 2023.

Action Points

Look out for final versions of the guidance, review your data practices and check they comply with the guidance.

Data protection: Data transfers between the EU and US

New US privacy shield

The US President has signed an Executive Order outlining the steps required to implement the United States' commitments under the EU-US data privacy framework. This follows the *Schrems II ruling* in July 2020 which invalidated the EU-US Privacy Shield as a safeguard for transferring data between the EU and US. Under the Executive Order, the US commits to enhancing safeguards and to introducing a new mechanism to provide redress for affected individuals. Privacy principles (with which organisations transferring personal data to the US will need to comply) will be updated.

Standard contractual clauses do not address all data transfers that fall within the scope of the GDPR, such as directly collecting information from data subjects in the EU and transferring that data to the US. This is why a new US privacy shield is needed.

The Executive Order should end the uncertainty created by *Schrems II.* On 13 December 2022, the European Commission issued a draft adequacy decision for data flows between the US and EU, which is likely to lead to an adequacy decision being granted. The UK must now independently choose whether to grant its own adequacy decision for UK-US data transfers, but it is likely that it will do so as the UK has a similar data protection regime under the UK GDPR.

Data protection: New Standard Contractual Clauses

In the absence of an adequacy decision for the intended destination of exported personal data, many organisations use Standard Contractual Clauses (**"SCCs"**) to transfer personal data between the EU and other countries. New SCCs were introduced in June 2021 (the **"New SCCs")** which must be used for transfers of personal data from the EU to third countries from 27 September 2021, for contracts entered into on or after that date. Until 27 December 2022, there was a transition period allowing contracts signed before 27 September 2021 using the SCCs available prior to June 2021 (the **"Old SCCs")** to remain valid. However, from 27 December 2022, the New SCCs must be adopted for all future and ongoing data transfer arrangements from the EU to third countries.

How to update SCCs

When adopting the New SCCs, organisations must check their processing meets the requirements of the New SCCs, which are more comprehensive than the Old SCCs.

The *Schrems II* decision heightened the importance of transfer risk assessments. Organisations must review the laws and practices of the importing country that could result in personal data being disclosed to public authorities. This assessment requires the contracting parties to "*warrant that they have no reason to believe that the laws and practices in the third country of destination applicable to the processing of the personal data by the data importer, including any requirements to disclose personal data or measures authorising access by public authorities, prevent the data importer from fulfilling its obligations under these Clauses.*" The parties must expressly declare this and document their transfer risk assessment and make it available to the data protection authorities on request.

How do the New SCCs affect data transfers from the UK?

The deadlines above specifically apply to data transfers from the EU. However, data transfers from the UK relying on SCCs are still impacted, although organisations have more time to prepare.

The New SCCs are not valid in the UK without the UK Addendum. This is included alongside the New SCCs to satisfy the UK's requirements for transferring personal data from the UK to third countries.

Alternatively, companies can use an International Data Transfer Agreement (**"IDTA"**). This is a stand-alone agreement that can be used when personal data is transferred from the UK to third countries.

The UK GDPR requires existing and ongoing data transfers agreements to third countries to be switched to the new arrangements (the New SCCs + UK Addendum or the IDTA) by **21 March 2024.**

Data protection: New Standard Contractual Clauses (cont.)

Action Points

If your organisation operates both in the UK and the EU, it is subject to both the EU GDPR and the UK GDPR. If you rely on SCCs for the transfer of personal data, you will need to take action in respect of both the EU and UK GDPR. Different timescales apply to each:

- If you transfer personal data **from the EU to third countries**, you had to update your current SCC arrangements by **27 December 2022.**
- If you transfer personal data **from the UK to third countries,** you should begin to review your arrangements. You should ensure you use either the **UK Addendum + New SCCs or IDTAs** and that you have these in place by **21 March 2024** at the latest.

Although there is still time to update practices for transfers outside the UK, steps should be taken now to account for any changes in data transfer or security methods needed and when negotiating any new contracts, especially if any other organisation in the group is relying on the Old SCCs.

Data protection: Other changes

Data Protection and Digital Information Bill

The Data Protection and Digital Information Bill seeks to amend the rules which already apply to automated decision-making under Article 22 of the UK GDPR. The UK Government has also published a policy paper setting out a proposed framework for regulating the use of artificial intelligence (AI) in the UK. The emphasis is now more on promoting innovation within a stripped-down regulatory environment.

New e-Privacy Regulation?

The EC published its work programme for 2023 under the heading "A Europe fit for the Digital Age", proposing a series of proposed laws including a new e-Privacy Regulation. The possibility of a new e-Privacy Regulation was first proposed in 2017 so it remains to be seen if 2023 will be its year. This will cover changes to cookie legislation and direct marketing rules. In order to maintain the UK's adequacy ruling, the UK Government is expected to update the Privacy and Electronic Regulations to take account of the changes brought about by the new e-Privacy Regulation.

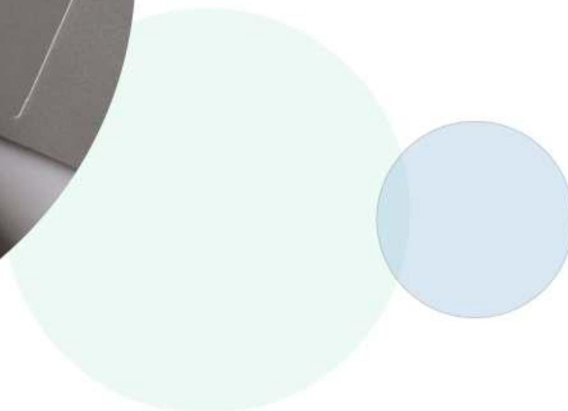
Business Immigration: 'Digital by default'

The UK Visas & Immigration (UKVI) department of the Home Office will continue to expand its use of eVisas and online profiles, as part of its aim to have a fully digital only immigration system by 2025. An eVisa is a digital visa provided by the Home Office as evidence of a person's immigration status (permission to enter or stay in the UK).

This follows Right to Work requirements which introduced an online only checking option for some immigration categories from 01 October 2022. The Home Office's vision is that not only will applicants continue to use online forms and upload supporting evidence, but all biometrics will be given via Apps and individuals will prove their status at the border and to third parties by using a digital record, rather than a physical document (such as a physical Biometric Residence Permit (BRP)).

Action Points

Employers should ensure they are correctly conducting Right to Work checks, in particular the online checks, following significant changes to the process during 2022. A short webinar is available on our website and we can provide tailored training in-house for our clients.



Business Immigration: ETA Scheme roll out

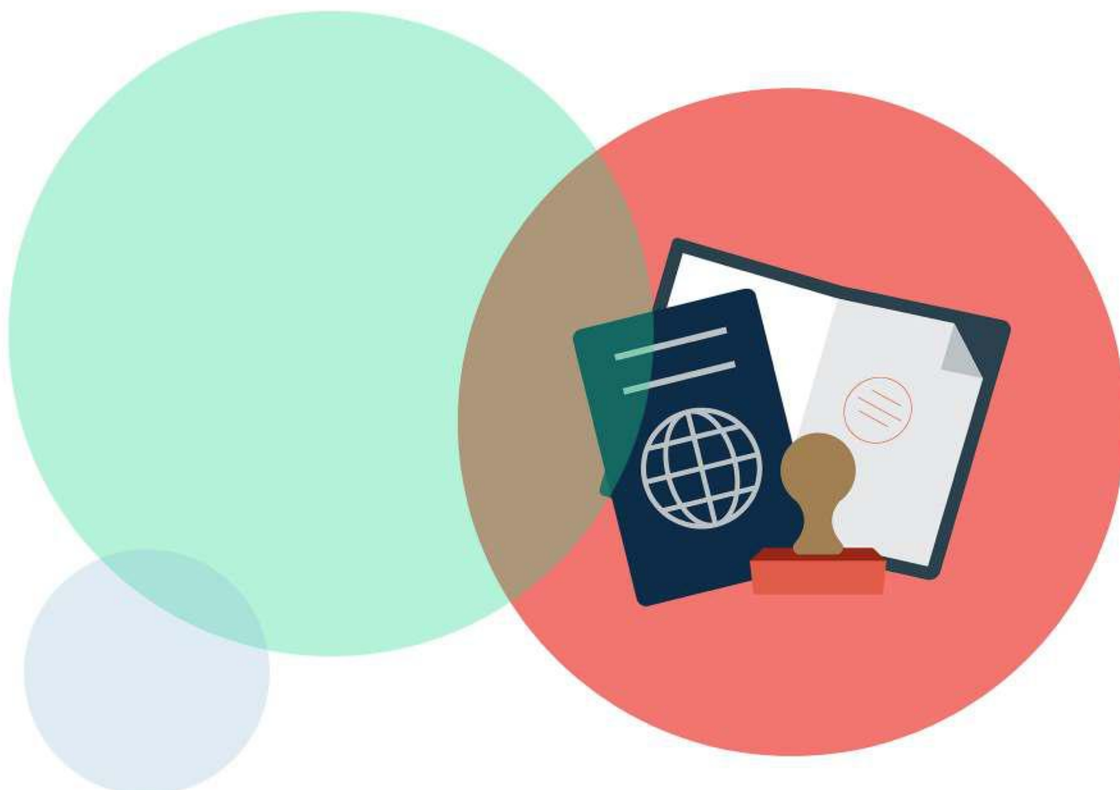
New Electronic Travel Authorisation Scheme

Those coming to the UK as Visitors will need to factor in additional time and costs when planning business trips to the UK, with the rolling out of the new **UKVI's Electronic Travel Authorisation (ETA) scheme**. The scheme is similar to the USA and Australian e-visitor visa progammes. With the gradual roll out of the scheme expected to start in early 2023, those who have previously been able to travel to the UK without applying for a visit visa in advance will be required to apply for permission prior to travelling, via an online application. Details of the costs and processing times are expected to be announced shortly.

Action Points

Employers will need to keep an eye on updates from the Home Office for when the Electronic Travel Authorisation scheme will go live, and which employees/workers will be affected e.g. overseas employees/workers who plan to travel to visit the UK office.

Companies with operations in the EU/EEA should continue to factor in restrictions on their employees'/workers' activities while moving between offices and visiting clients, as a result of Brexit. We can provide guidance on the permitted business activities for visitors to the UK and highlight the restrictions on UK employees visiting the EU/EEA.



Business Immigration: Other considerations

Ukraine Extension Scheme deadline

Employers employing Ukrainian nationals may wish to highlight to their employees that the deadline to switch from any other type of UK visa to the Ukraine Extension Scheme is likely to be 16 May 2023. The Extension Scheme allows those in the UK on, for example, work or study visas, to switch, for free, on to a three year visa allowing them to continue living in the UK. This visa route does not lead to Settlement (permanent residence) in the UK, so those considering applying under it should make sure this route is most appropriate for their circumstances, before switching.

Applications continue to be accepted under the Ukraine Family Scheme and Homes for Ukraine Scheme for those who were living in Ukraine on or immediately before 1 January 2022, and their immediate family members.

UK-Switzerland Services Mobility Agreement extended

The professional services industry has welcomed a three-year extension of the UK and Switzerland's Services Mobility Agreement until December 2025. The agreement allows UK professionals to work in Switzerland without a work permit for up to 90 days per year. In return, Swiss professionals will be able to deliver contracts in the UK in key skilled sectors through the International Agreement visa (formerly under the Tier 5 Category). The two countries are expected to use the additional time to negotiate a longer-term agreement, focusing on professional services mobility and trade.

Change to Immigration Skills Charge fee

From January 2023, employers who are bringing EU national staff over to the UK from their linked EU office under the Global Business Mobility: Senior or Specialist route for no more than three years, will not have to pay the Immigration Skills Charge (ISC), which can be up to £1,000 per employee, per year of their visa. Please note, this concession applies only to nationals of an EU country including Latvian non-citizens, but it does not apply if the worker is a national of Iceland, Norway, Liechtenstein or Switzerland. Also, the overseas EU entity must be linked by common ownership or control to the UK sponsoring entity and be named on the UK entity's sponsor licence.

Action Points

Sponsors who wish to take advantage of the Immigration Skills Charge exemption from January 2023 should ensure that they add any EU overseas entities linked by common ownership or control to their UK sponsor licence as a matter of priority.

Pensions: Finance Bill 2023

Changes to tax relief for low earners

Following the significant expansion of the Pensions Regulator's powers introduced by the Pension Schemes Act 2021, 2022/23 sees a quieter legislative period on pensions matters. However, HMRC has included a few noteworthy pension provisions in the draft Finance Bill 2023 which will come into force in April 2024. Of particular significance are changes relating to the treatment of pensions tax relief for low earning pensions savers in schemes which operate net pay arrangements.

Under a net pay arrangement, pension contributions are deducted as a gross amount from gross salary before income tax is calculated. By contrast, under a "relief at source" arrangement, pension contributions are deducted as a net amount from net pay after income tax has been deducted.

A number of pensions industry professionals have noted a discrepancy in relation to tax relief for lower paid workers whose pension schemes obtain tax relief via net pay arrangements. The particular issue in hand here relates to the fact that if an individual has earnings lower than the HMRC personal allowance (£12,570 for FY 2022/23) and they pay pension contributions by way of relief at source schemes, they receive basic rate tax relief via a direct payment from HMRC into their pension scheme. This is despite the fact that their own pension contributions are not tax relievable because their earnings are below the personal allowance threshold. If, on the other hand, a worker with earnings lower than the personal allowance contributes to a net pay scheme, they do not obtain any tax relief. This is because their contributions are made out of "pre-tax" income (albeit anyone with earnings less than the personal allowance will not be paying income tax) and HMRC does not operate a mechanism to pay basic rate tax relief into their scheme.

To address this inequality between savers in the same income bracket, the Finance Bill will, with effect from April 2024, introduce a system for HMRC to make top-up payments directly to low earners in a pension scheme using a net pay arrangement. This top-up payment will be an amount equal to the income tax relief which they have not received on their contribution (albeit their net pay will not be subject to income tax as their earnings are less than the personal allowance).

Action Points

From an administration perspective, this process will be undertaken by HMRC. However, employers operating net pay schemes should ensure that this change is communicated to their staff in the course of 2023 so they are fully aware of the additional relief they will earn in 2024.

Tax position for high earners

As well as low earners, some high earners will, from April 2023, have to pay more tax as the threshold for payment of the 45% additional rate of income tax will be lowered from £150,000 a year to £125,140, bringing around 660,000 more people into the 45% tax bracket. In practice, this also means that someone with earnings of £150,000 or more will pay around £1,250 per annum more in income tax than they do at present.

One potential way in which businesses might be able to offset some of this cost for employees (if they do not do so already) is through introducing a salary sacrifice mechanism to pay pension contributions. Under a salary sacrifice arrangement, an employee and their employer enter into an agreement whereby the employee agrees to give up or “sacrifice” part of their salary in exchange for an equivalent benefit funded by their employer.

HMRC allows salary sacrifice schemes to fund a number of different benefits including childcare vouchers and cycle to work schemes, and, in a pensions context, employer funded contributions to a company pension scheme. In a pensions salary sacrifice arrangement, an employee agrees to a reduction to their gross salary equivalent to the rate of pension contributions they pay to their scheme, with the employer, in turn, paying the equivalent amount to the scheme as an employer contribution. Importantly, as the salary sacrifice scheme has the effect of reducing gross pay, the employee will pay reduced rates of income tax and NICs on the revised, lower salary and the employer will also make a saving on their employer NICs payable.

Although not in itself significantly turning the dial on an individual’s liability to income tax, salary sacrifice is a simple but straightforward way of helping someone reduce their income tax and NIC burden and in doing so potentially mitigating the forthcoming increase to the income tax band for high earners.

Financial Services and Markets Bill

The Financial Services and Markets Bill (FSM Bill) was introduced to Parliament on 20 July 2022 and sets out key changes to financial services in the UK including:

- Revisions to retained EU law and revocation of retained EU law relating to financial services, including rules implementing the AIFMD, MiFIR and UCITS Directive in the UK.
- A new HM Treasury power to require the regulators to review a rule that is not working as intended.
- Increased cooperation between the Financial Conduct Authority (FCA) and the Financial Ombudsman Service (FOS).
- A new secondary objective of competitiveness and growth for the FCA and the Prudential Regulation Authority.
- A new insolvency regime for insurers.

At the date of publication the Bill was at the second reading stage in the House of Lords.

Consumer Duty

The FCA has introduced a new Consumer Principle that will require firms to act to deliver good outcomes for retail customers. This includes:

- Cross-cutting rules requiring firms to act in good faith, avoid causing foreseeable harm, and enable and support customers to pursue their financial objectives.
- Four Outcomes rules requiring firms to ensure that consumers receive communications they can understand, the support they need, and that products and services meet their needs and offer fair value.

The Duty will apply to new and existing products from 31 July 2023 and to closed books from 31 July 2024.

Action Points

Firms should already be in the process of implementing their approach through Board approved Consumer Duty implementation plans, which were required by 31 October 2022.
Firms should have agreed a Duty "Champion" on the Board who should ideally be an independent NED. The Champion, together with the Chair and CEO, will be responsible for ensuring that the Duty is discussed by the Board on a regular basis and that an annual compliance report is provided to the Board.
Firms should now be in the process of reviewing their strategies, governance, leadership and people policies to ensure they foster good outcomes for retail customers.

The Edinburgh Reforms

On 9 December 2022, the Chancellor of the Exchequer announced a set of reforms intended to drive growth and competitiveness in the financial services sector.

Included within the Government's planned steps, which build on the FSM Bill, are:

- Reforming the Ring-Fencing Regime for Banks.
- Publishing the plan for repealing and reforming EU laws using powers within the FSM Bill.
- Commencing a review into reforming the Senior Managers & Certification Regime in Q1 2023.
- Publishing an updated Green Finance Strategy in early 2023.
- Consulting on a UK retail central bank digital currency alongside the Bank of England.
- Consulting on Consumer Credit Act Reform.
- Committing to work with the FCA to examine the boundary between regulated financial advice and financial guidance.

Bankers' bonus cap

On 19 December 2022, the PRA and FCA issued a joint consultation on proposals to remove the cap on bankers' bonuses. Bonuses are currently capped at 100% of fixed pay, or 200% with shareholder approval.

The regulators explained in the consultation that the cap does not limit total remuneration but instead limits the proportion of remuneration that can be adjusted by risk and performance measures. The PRA and FCA consider the bonus cap can place upward pressure on salaries and allowances that may not be linked to longer-term performance and cannot be reduced or clawed back in the event of later failure and/or previous misconduct coming to light.

The removal of the cap on variable remuneration would increase the proportion of compensation that can be subject to incentive setting tools (including deferral, payments in instruments and risk adjustment). Removing the cap should therefore strengthen the effectiveness of the remuneration regime. The regulators believe that, over time, these changes should also help to remove unintended consequences of the bonus cap, particularly growth in the proportion of the fixed component of total remuneration, which reduces firms' ability to adjust costs to absorb losses in a downturn.

The consultation remains open until 31 March 2023 and the changes are likely to take effect for the 2024/2025 performance year.

Action Points

If you are affected by these proposals, consider whether you wish to respond to the consultation. Any comments or enquiries should be addressed to CP15__22@bankofengland.co.uk.

Our Experts: Contact us for help

Employment: (London):
Peter De Maria (Senior Partner)
Email: pdemaria@doyleclayton.co.uk
Tel: 020 7778 7221

Employment: (Reading):
Tina Wisener (Head of Reading Office)
Email: twisener@doyleclayton.co.uk
Tel: 0118 951 6760

Business Immigration: Anita de Atouguia (Head of Immigration)
Email: adeatouguia@doyleclayton.co.uk
Tel: 020 7778 7233

Pensions: Andrew Campbell (Head of Pensions)
Email: acampbell@doyleclayton.co.uk
Tel: 020 7778 7235

Regulatory: Charles Herbert (Head of Regulatory & Financial Services Disputes)
Email: cherbert@doyleclayton.co.uk
Tel: 020 7778 7231

Data Protection: Piers Leigh-Pollitt (Data Privacy Specialist)
Email: pleigh-pollitt@doyleclayton.co.uk
Tel: 0118 951 6761

If you need help with a workplace law issue, contact us and we will be happy to help you

Tel: +44 (0)20 7329 9090
Email: info@doyleclayton.co.uk

DOYLE CLAYTON

Workplace Lawyers