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Insights

THE EMPLOYMENT RIGHTS BILL 2024 - POINTS OF INTEREST

UK HR TWO MINUTE WEEKLY

Oct 17, 2024

SUMMARY

This week we cover certain selected areas of the Employment Rights Bill, published on 10 October 2024. It is Labour's flagship employment legislation.

The Bill is a sprawling piece of legislation, with long explanatory notes and a "Next Steps" document, which covers areas that may not be in the Bill, but which are desirable to bring into force. This can sometimes prove difficult and different parts of important principles/provisions can appear in both the Bill and the Next Steps document.

The Bill also makes many changes to existing legislation, particularly the Employment Rights Act 1996, so it can be difficult to follow through overall. Of the 6 parts of the Bill, it is probably parts 1 and 2 that are most relevant to private sector employers and individual employment rights. Parts 3-6 deal with more general matters such as social care, enforcement bodies and trade union legislation.

It is worth noting that nothing in the Bill will become law until October 2026.

These are some selected highlights.

CLAUSE 19

Provisions in schedule 2 removes the qualifying period for unfair dismissal rights. A few points:

- This will be introduced gradually. The transition from two years to no qualifying period will take place over two years (until October 2026) and the qualifying period might be reduced in stages, probably moving down to one year in 2025.

- A new s108A provides that an employee cannot claim unfair dismissal unless they have started work. So if an employee is dismissed before they cross the office threshold on the morning of their first day, the employer is presumably safe. This deals with ambiguities about the start date.
- The usual exceptions for 'automatic' unfair dismissal where the reason for dismissal is things like union membership, whistleblowing or asserting a statutory right etc remain.
- The exception/provision for a probationary period is tricky. The Bill doesn't use the word probation, it refers to an 'initial period of employment' (IPE). It creates a Regulation making powers that allow the Secretary of State to provide for **a different standard of reasonableness** to apply to dismissals that take place during the IPE. This includes situations where the employer gives notice during the period which expires during the IPE or up to a certain period after the IPE has ended. The duration of the IPE or any extensions is not set out in the Bill – that is something for the Secretary of State to specify in Regulations.
- The Government has indicated in its "Next Steps" document that it currently favours a 9 month IPE, but in practice 6 months is more common – many employers however do allow for three month extensions to probation so 9 in all months is not a figure simply plucked from the air. If 9 months remains, then the IPE + 3 months gives a one year period/exception.
- However, even if the dismissal does take place during the IPE, it will still be possible for the employee to claim unfair dismissal. The employer will have to show that the reason for dismissal is related to capability/qualifications, conduct, contravention of a duty, or for "some other substantial reason" and it will be permitted to use a "light touch" as compared to a normal unfair dismissal procedure. If the dismissal is because of redundancy, it seems that the employer will not be able to use this 'lighter touch' approach.. We will only know the full picture once the Regulations are introduced but a reasonable guess is that a dismissal is possible during the IPE + a certain number of months for a legitimate reason, but with a truncated procedure.

CLAUSE 16

Amends the Equality Act 2010 (EqA) to (re)introduce the right of individuals to bring claims under the EqA for harassment by third parties. It is important to note that, unlike the preventative duty introduced on 26 October, the new provisions relate to third party harassment for **all protected characteristics** and not just sexual harassment. Although this is not due to be implemented for two years, it bring claims under the EqA into line with the new preventative duty under s40 of the EqA due to come into force on 26 October.

CLAUSE 15

Amends the EqA and again impacts on the preventative duty by changing the employer's obligation to comply by taking "reasonable steps" to taking "**all** reasonable steps". Again, this is not due to be implemented for some time, but the preventative duty is already quite onerous and this change will only make it more so.

CLAUSE 18

Adds sexual harassment to the list of whistleblowing protected disclosures in s43B of the ERA. This is significant as the requirement to show that there has been a failure to comply with a legal obligation can be ignored (or added to) to the new item on the list which is that "*that sexual harassment has occurred, is occurring or is likely to occur*". The requirements for reasonable belief and public interest remain, but this puts sexual harassment squarely in the centre of whistleblowing and opens up interim relief and an automatic unfair dismissal as remedies. The normal whistleblowing tests of public interests and the holding of a reasonable belief will still apply.

CLAUSE 23

Extends the scope of the duty regarding collective redundancies. It removes the "single establishment" limitation. When this comes into force, where there is a proposal to make 20 or more employees redundant, this will now trigger the consultation duty without needing to demonstrate they are employed at a single establishment. The effect of this is to allow the aggregation of redundancies across establishments.

There are many other areas covered, including zero-hours contracts, fire and rehire, family-friendly policies, flexible working and a great deal of trade union/collective law.

We will be covering some of this in more detail in the coming weeks.

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