

## Proposed changes to employment law

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With growing the UK economy firmly in mind, the Government announced a series of employment law measures set out in the Department for Business and Trade's 'Smarter Regulation to Grow the Economy' policy paper. The paper, published on 10 May 2023, sets out the Government's post-Brexit plans to reform employment law, although it confirms that the vast majority of EU derived laws will be retained.

It is important to note that implementing these changes will require new primary legislation to be adopted. Consultation on the proposed changes runs until 07 July 2023.

### Recording employee working hours

The government intends to remove the WTR (Working Time Regulations 1998) requirements for businesses to keep records of workers daily working hours.

Query whether compliance with the WTR requirements was regularly adhered to by UK companies in this regard, meaning any changes to an employer's requirement to keep such records is in practice unlikely to result in any significant changes to a company's day to day record keeping.

### Holiday pay and calculating holiday pay

Under EU law, workers are required to have 4 weeks annual leave. In the UK, domestic laws provide for a further 1.6 weeks holiday entitlement. The consultation paper proposes to merge the two holiday entitlements into one single entitlement of 5.6 weeks.



The intended effect of this change would be to remove the distinctions between the two holiday entitlements when calculating holiday pay. At present, the 1.6 weeks of UK leave can be paid based on basic pay, while the 4 weeks of EU leave must be paid based on “normal remuneration,” which includes additional payments like overtime and commission. The statutory definition of “normal remuneration” is challenging, and the consultation seeks input from both employers and workers on how holiday pay should be defined.

The rules on carry-over of leave also requires further clarification. The proposal suggests that 1.6 weeks can be carried over by agreement, but it’s unclear if the entire 5.6 weeks can be carried forward without restrictions.

The proposal introduces a new method for calculating holiday entitlement for new employees. They would accrue leave at the end of each pay period until the end of their first year of employment.

The government aims to simplify the process and eliminate confusion caused by current provisions with regards to holiday pay, but there remain areas that require further clarification and consideration.

## ‘Rolled Up’ holiday pay

The recent consultation has confirmed that rolled up holiday pay will be permitted in the UK. Rolled up holiday pay is a system where employers include an employee’s holiday pay in their regular wages instead of paying it separately when they take time off. This practice was previously considered incompatible with the Working Time Directive due to concerns that it discouraged employees from taking holidays. However, some companies, particularly those employing casual workers, have continued to use this method.

The UK Government is now proposing rolled up holiday pay as an option for all workers, including those with regular hours. The aim is to simplify holiday entitlement calculations and benefit both workers and employers. The proposed rate for rolled up holiday pay is 12.07% of pay for hours worked, which aligns with the proportion of statutory annual leave in relation to working weeks.

The consultation emphasises the need to inform workers about the change and to clearly set out rolled up holiday pay on payslips.

## Changes to TUPE

The government is planning to make changes to the consultation requirements under TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006) in order to simplify the process of transferring employees between companies.

The proposed changes include allowing all small businesses (those with fewer than 50 employees) to directly consult with employees if there are no existing employee representatives, without the need for arranging elections for new representatives.

Businesses of any size would be allowed to consult directly with employees when a transfer involves a small number of employees (a transfer of less than ten). These proposed changes aim to streamline the transfer process and make it more efficient for business operations.

## Non-compete clauses

The Government plans to restrict non-compete clauses in employment contracts to a maximum of three months. Non-compete clauses are post-termination restrictions that employers use to prevent employees from working for competitors after leaving their company. In order to be enforceable, these clauses must be reasonable and necessary to protect the employer’s legitimate business interests, such as protecting confidential information and



customer connection.

Other types of post-termination restrictions, such as non-solicitation clauses that prevent employees from poaching clients or staff, paid notice periods, garden leave clauses, and confidentiality clauses, will remain unchanged.

The intended impact of this change is to provide more flexibility for employees by enabling them to join competitors or start their own enterprises, resulting in a wider talent pool and therefore benefiting the overall economy. However, an increase in the use of garden leave clauses, which prevent employees from working for any party during the restraint period, may offset these intended benefits. It is unclear whether the proposed restrictions will apply to non-compete clauses in contracts other than employment contracts, and the impact on existing non-competes longer than three months is also uncertain.

## How we can help

If you have any queries regarding the current legal position, or on any of the proposed changes, please don't hesitate to get in touch with our [employment team](#).

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