

DRAPER LANG QUARTERLY



THE MODERN GUNPOWDER PLOT!

PERFECT FOR FIREWORKS NIGHT - EXPLOSIVE
LEGISLATION WITH THE POTENTIAL TO BLOW UP ALL EU
DERIVED EMPLOYMENT LAW...AND THAT IS A LOT!

A forthcoming Parliamentary Bill could effectively rip up hundreds of pieces of employment legislation that we all rely on and refer to day in, day out, without putting anything in its place.

Employment rights covering holiday pay, agency workers, parity of terms for part-time workers, maximum working weeks, health and safety legislation and key TUPE protections **could all disappear overnight on 31 December 2023.**

How? The [Retained EU Law \(Revocation and Reform\) Bill](#) proposes to revoke all employment law which comes from EU law which is not already an Act of Parliament at midnight on 31 December 2023 **UNLESS** it is saved or amended by the Government before that date. The Bill also stops all other EU laws that applied directly to the UK from 1972 onwards from being used after 31 December 2023, **removes the supremacy of EU law in the UK** and grants the UK Government almost unlimited powers to amend all affected Regulations.

WHAT DOES THIS ACTUALLY MEAN?

This is part of putting Brexit into action and restoring the supremacy of UK law. In principle the idea and the logic behind it is clear, but the method massively underestimates the embedded nature of EU law in the UK since 1972, the law that will be lost and the ease with which it can be removed.

The Bill seeks to simply 'delete' legislation that we have all relied and built businesses on for the last 50 years. It also seeks to wipe out a huge volume of settled case law which has interpreted these laws, leaving a vacuum.

The impact of the bill crosses 2,400 pieces of legislation, **around 300 relating to employment law**. The Government can 'save' individual laws through specific legislation, but with over 2,400 pieces of legislation affected, no structured approach and time running out, some things will be missed. If they do elect to 'save' individual pieces of legislation, the Bill allows the Government to make significant changes to it, almost at will.

What this leads to is **uncertainty**. The laws that we have relied on and the principles that interpret these laws are now up in the air. Our courts have relied on decisions built upon settled principles of EU law. The removal of this settled precedent means that employers may no longer be able to predict the effect of workers' rights or employers' obligations.

Welcome to our Autumn update. Here we share some employment news highlights and look at what's coming up to help your business planning.

WHAT IS THE LIKELY OUTCOME?

Right now everything is in a state of flux, so we cannot predict which laws might disappear. However, there are two possible silver linings. The first is that this was introduced under Liz Truss. Might this too be 'u-turned'? If not, then the 31 December 2023 date can be extended until 23 June 2026, the Brexit referendum's 10th anniversary. So there is time for the Government to form a plan regarding the legislation itself. That won't impact the effect of removing legal precedent though, so uncertain times lie ahead. [All we can do at the moment is be aware and watch for updates!](#)

AS ALWAYS [TALK TO OUR TEAM](#) IF YOU WOULD LIKE TO KNOW MORE ABOUT ANYTHING FEATURED IN THIS UPDATE.



Harpur Trust v Brazel: A holiday nightmare!

Every worker is entitled to 5.6 weeks' holiday. Paid at their normal rate. Sounds simple? And it is for full time workers and for part timers who have a regular weekly working pattern.

The problem comes when someone works an irregular pattern. Casual staff or term time workers for example. How do you calculate holiday then? Many employers used a formula of 12.07% hours worked (which reflects 5.6 weeks of a full time working pattern). Indeed ACAS used to recommend it. However the 12.07% method left Mrs Brazel (a visiting school music teacher on a permanent zero hours contract) with less holiday pay than her full time colleagues. She challenged it and, as a result, [the Supreme Court found the 12.07% method to be unlawful.](#)

Employers must move away from 12.07% and average holiday pay based on the last 52 weeks worked. This is not as simple as it sounds as employers have to discount weeks in which no work was done. This may entitle those with irregular hours to higher rates of holiday pay than their full time colleagues. A nightmare for employers! [Contact us](#) if you need help applying this to your business.

Other news

- **PHI cover - a cautionary tale** - an employer's contractual liability was not limited to the terms of the insurance cover. The terms set out in an offer letter which confirmed that benefits would increase by 5% annually was incorporated in the employee's contract. When the employer changed the income protection provider who did not offer this increase, the term stayed in force and the employer was liable for the difference each year. [A lesson to limit contractual liabilities](#) to those payable under the policy in force from time to time and, as we often warn, avoid putting any terms in an offer letter to avoid confusion about whether the offer letter or contract takes precedence.
- **Right to work check changes** - 'Covid adjusted' right to work checks ended on 30 September 2022, so from October onwards you have to either carry out online checks via a digital identity service provider (IDSP), run a Home Office check or carry out an in person check in which you view the original documents. The Government's list of IDSP providers can be found [here](#).

- A doctor who refused to use transgender service users' preferred pronouns did not suffer discrimination by his employer's insistence that he use them - the doctor's 'lack of belief' in 'transgenderism' was protected given his religion but the employer's requirements were necessary and proportionate means of achieving their legitimate aims of ensuring transgender service users were treated with respect, in accordance with their rights under the Equality Act 2010, and to provide a service that promoted equal opportunities.
- **Four day week update** - 88% of the organisations taking part in the UK's four day week working trial are finding it successful and many seem likely to continue four day working after the trial ends. **Productivity has been maintained or improved in over half of the firms taking part.** It seems only 5% of businesses taking part have seen a productivity drop. As the market is more in favour of employees, we wonder how far this trend will spread!
- **Ever lied on your CV? And did you know it was a criminal offence?** Be warned! A former hospice CEO who lied quite spectacularly about his qualifications and work experience by making up degrees and past experience was prosecuted and **had to pay back almost £100k!** This arguably paves the way for employers to take action for CV fraud, though in most cases the best approach will be disciplinary action/dismissal. The sums involved in this case made it worth the fight.

COMING UP

The immediate Employment law agenda is comparatively calm - aside from the looming cliff edge caused by the EU reform bill above!

As hybrid working embeds, now is a good time to ensure that you have work from home policies and that your employment contracts reflect any changes to hybrid working.

As we have said previously, menopause awareness continues to grow in traction and employers may want to consider new policies covering menopause support.

The **EMPLOYMENT BILL** is still moving at a snail's pace. When eventually enacted it will:

- extend the period of maternity related redundancy protection, during which time new and expectant mothers have priority in respect of suitable vacancies. This will run until six months after the end of their maternity leave;

- Make flexible working the default with the right to request it as a day one right (this did get an airing in Parliament in late October so it is slowly moving forward)
- form legislation to require employers to pass on all tips and service charges to workers and, supported by a statutory Code of Practice;
- create a single labour market enforcement agency (to better ensure that vulnerable workers are aware of and can exercise their rights and which supports business compliance)
- establish a right for all workers to request a more predictable and stable contract after 26 weeks' service;
- give unpaid leave for carers;

7-11 November sees International Stress Awareness Week - have you any planned activities in your People agenda?

As always, we'll keep you posted!

Enjoy the autumn colours and, as always, we love to hear from you, so please **get in touch** if you would like to know more about anything featured in this update, or to give us any feedback.

