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Labour's New Employment Rights Bill – Key Changes (UK)

October 2024

It's here! The Labour government has issued its Employment Rights Bill, heralded as "the biggest upgrade to rights at work for a generation".

Described as a "pro-worker, pro-business plan", most of the employment reforms outlined in this new Bill will not come as a surprise. They largely mirror previous announcements by Labour, but there are a few "biggies" in here. Furthermore, the way in which the government proposes to implement some of the changes will inevitably make things more complicated for employers.

Alongside the Bill, the government has published a "Next Steps to Make Work Pay" document, outlining its vision and long-term plans, as well as further discussion on some of the key changes contained in the Bill. Subject to consultations, future potential changes include a new "right to switch off" through a statutory Code of Practice; a new Equality (Race and Disparity) Bill that will make it mandatory for large employers to report their ethnicity and disability pay gap; a move towards a new single status of worker; potential changes to the parental and carer's leave system; and a Call for Evidence on possible changes to the TUPE Regulations.

According to the Next Steps document, most of the changes in the new Bill will not come into force until 2026 at the earliest (with the proposed reforms of unfair dismissal not being introduced before that Autumn), so there is at least a decent period within which businesses can prepare for them. Employers will also have the ability to share their views on the various reforms outlined in the Bill as part of the consultation exercise, though that will not start until 2025 apparently. In theory, there is therefore still scope for some of the proposals to change, although any significant changes seem unlikely in light of Labour's stance to date and the fact the government has already held various "roundtables" with businesses and trade unions and so will say that it has already taken a wide range of views into account. We must hope that consultation will at least take some of the rough edges off the drafting – the new provisions on guaranteed hours contracts, for example, run to just one section but over 10 pages of migraine-inducing detail.

As the new Employment Rights Bill is not an easy read (it takes the form of a (very!) long list of changes to existing legislation), we set out in the tables on pages 2 – 5 an "At a Glance" summary of the key proposals, how they compare to the current position, together with an indication of the likely implications for employers. Click on the icon on the left-hand side of the table for more details, with further information to follow once we have fully digested all 158 pages of the new Bill.

Webinar - Labour's New Employment Rights Bill: What UK Employers Need to Know

We will also be holding a webinar on Thursday 17 October 2024 during which we will discuss the government's proposed employment law reforms and what these changes would mean for business. Further details (including the registration link) can be found here.

Employment Rights

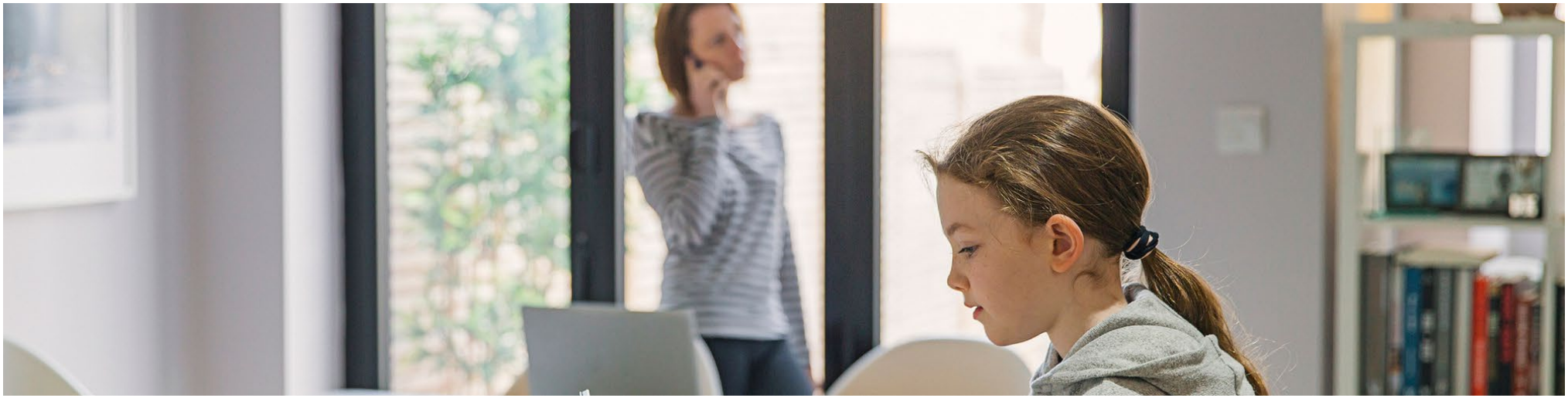
Topic	Current position	Proposals for change	Potential implications for employers
Unfair dismissal	As a general rule, employees must have at least two years' service to bring an unfair dismissal claim (exceptions apply)	Two-year qualifying period will be removed Greater scope to dismiss during "initial" period of employment (likely to be nine months), with a modified test for unfair dismissal	A requirement to have robust processes in place when assessing, managing and dismissing new hires to minimise risk of claims Upskilling managers on handling recruitment and dismissals
Dismissal and re-engagement (or "Fire and Rehire")	No statutory prohibition on dismissal and re-engagement New statutory Code of Practice sets out the steps that employers should follow where the parties are unable to agree to changes to terms and conditions and the employer goes down the dismissal and re-engagement route	A change to the law on unfair dismissal so that such dismissals will be treated as automatically unfair unless the employer can demonstrate financial difficulties such that the need to make the change in contractual terms was therefore unavoidable	Greater caution when seeking to change terms and conditions in this manner – would only be possible in limited circumstances
Collective redundancy consultation	Obligation to consult collectively if an employer is proposing to make 20 or more employees redundant "at one establishment" within a 90-day period	Removal of the words "at one establishment" so the collective consultation obligations will apply regardless of whether the redundancies are taking place at one establishment or not	Multi-site employers will be significantly affected Collective consultation will be triggered more frequently Requirement for multi-site employers to have centralised systems in place to identify proposed redundancies and when the new duty is triggered. Likely removal of site autonomy to make redundancies.
Zero hours workers	No current statutory right to guaranteed hours	Right to guaranteed hours if eligible workers regularly work hours over a reference period (expected to be 12 weeks) Further provisions to follow in relation to agency workers	Review your current arrangements to assess potential impact - how many workers will be affected? A requirement to have processes in place when engaging and managing such workers, including being able to identify when offers of guaranteed hours will be triggered
"One-sided flexibility" for zero hours workers and certain other workers	No current statutory protection for cancelled shifts, etc.	New obligations on employers to give notice of shifts, as well as reasonable notice of, and payments for, cancelled or delayed shifts	Review your current arrangements to assess potential impact - how many workers will be affected? Requirement for stricter processes to ensure compliance with obligations
Statutory Sick Pay	Three-day waiting period Lower Earnings Limit (currently £123 per week) to be eligible	No three-day waiting period No Lower Earnings Limit	Ensure payment systems reflect new provisions Potentially greater financial costs, but note no obligation to pay normal salary for that waiting period
Tips and gratuities	Affected employers must have a tipping policy in place	Obligation to consult with workers when developing or revising their tipping policies	Awareness of and compliance with new consultation obligations

Trade Union Rights

Topic	Current position	Proposals for change	Potential implications for employers
Trade union rights	High ballot thresholds for industrial action, e.g. at least 50% of trade union members who are entitled to vote in the ballot must do so Detailed information requirements, e.g. on the voting paper Detailed notice requirements High statutory recognition thresholds	Repeal of many of the provisions in the Trade Union Act 2016, which will mean: • Lower ballot thresholds for industrial action • Simpler information requirements • Shorter notice requirements Repeal of the Minimum Service Levels (Strikes) Act Various new rights and protections for trade unions Obligation on employers to inform their workers of their right to join a trade union	New rights and protections for trade unions Trade unions will have greater freedom to organise, represent and negotiate on behalf of workers Greater importance of having good working relationship with trade unions

Family-Friendly Rights

Topic	Current position	Proposals for change	Potential implications for employers
Flexible working	Employees have the right to request flexible working from day one Employers may reject requests for one of the eight business grounds for refusal	Employers may only refuse requests if they consider that one of the existing eight business grounds for refusal apply and it is reasonable for them to refuse the application on that basis	Greater burden on employers to justify rejection of requests
Dismissal during pregnancy	Employees have additional protection from redundancy during pregnancy, when on maternity leave and a period after maternity leave Similar protection for adopters and those taking shared parental leave	Additional protection from dismissal (i.e. not just in redundancy situations) whilst pregnant, on maternity and for a period after returning to work Additional protection for those returning from other types of leave including adoption leave and shared parental leave	Ensure managers are aware of new rights and risks of dismissal
Statutory Paternity Leave	To be eligible, employees must have completed 26 weeks' continuous service	A "Day One" right, i.e. no qualifying period The Bill will also remove the restriction that prohibits employees from taking statutory paternity leave if they have already taken shared parental leave	More employees eligible for statutory paternity leave
Statutory Parental Leave	To be eligible, employees must have completed a year of continuous service	A "Day One" right, i.e. no qualifying period	More employees eligible for statutory parental leave
Statutory Bereavement Leave	Parental bereavement leave is currently available to eligible employees who lose a child under 18 years old or have a still birth after 24 weeks of pregnancy	Extended to other employees who have experienced a bereavement (to be defined in regulations)	More employees eligible for statutory bereavement leave



Equality at Work

Topic	Current position	Proposals for change	Potential implications for employers
Protection from sexual harassment	The new mandatory duty to take reasonable steps to prevent sexual harassment in the workplace comes into force on 26 October 2024 No express statutory provisions dealing with harassment by third parties	The new mandatory duty will be amended to require employers to take "all" reasonable steps to prevent sexual harassment in the workplace Re-introduction of a new statutory obligation to take all reasonable steps to prevent harassment (whether related to sex or any other protected characteristic) of employees by third parties Workers who report sexual harassment will qualify for whistleblowing protection	A further review of current steps to prevent sexual harassment to ensure compliance with wider obligations Review of interactions between staff and third parties to assess level of risk
Equality action plans and gender pay gap reporting	Organisations with 250 or more employees are required to publish specific gender pay gap data annually No statutory obligation to publish an action plan	New statutory obligation to produce equality plans related to gender equality (including gender pay gap and menopause) Affected employers will also be required to publish details of those organisations which they receive outsourced work from	Further compliance obligations

Miscellaneous

Topic	Current position	Proposals for change	Potential implications for employers
Enforcement	Various bodies currently have enforcement powers	New Fair Work Agency will bring together existing enforcement bodies, including new right to enforce holiday pay	

Employment Rights	• **Unfair dismissal**: As promised, the Bill will repeal the requirement to have at least two years' continuous service to bring an unfair dismissal claim. Instead, there will be a "modified" test for unfair dismissal if the employee is dismissed during the "initial period of employment" for conduct, capability, illegality or "some other substantial reason relating to the employee" (i.e. this would not include redundancy dismissals). The length of such period will be set out in Regulations, but the government has indicated that its preference would be nine months. According to the Next Steps document, the government is inclined to suggest that the "lighter-touch" obligations on employers during the statutory probation period will consist simply of "holding a meeting with the employee to explain the concerns about their performance", but presumably there will have to be more to it than this. • The government acknowledges that businesses have concerns about the impact such a change will have on hiring decisions and the potential rise in legal liability – and also that the current tribunal system is not capable of dealing with a significant increase in cases – but it does not seem to have any plans to address these concerns other than making it clear to employees "where bringing claims might be unsuccessful"! In the Next Steps document, it also says that it intends to consult on what a compensation regime for successful claims during the initial period of employment might look like, with scope to reduce the full compensatory damages currently available. The reforms to unfair dismissal will not come into effect any sooner than Autumn 2026, and until then the current qualifying period will continue to apply. • What is the rationale for these particular changes? Labour has said that extending protections to workers from day one will encourage more workers to switch jobs, which is associated with higher wages and productivity growth, though it does not sit at all comfortably with the virtues of increasing staff retention and reducing recruitment costs as trumpeted in the press release for the Bill. On the flip side, as a number of articles in the press have recently suggested, it may also prompt employers to be more cautious when it comes to recruiting new staff if they think it is going to cost them more to dismiss them and therefore actually inhibit movement in the labour market. A number of commentators have also suggested that it will lead to an increase in self-employment or consultancy arrangements to try and sidestep these provisions. Having said that, Labour has previously said it will introduce provisions to avoid this – although we don't know what they might look like, and doubt that the government does either. Furthermore, as is the case now, tribunals will always look at the reality of the working relationship, not simply the name given to it. • If more individuals gain unfair dismissal rights, employers will need to ensure that (a) they place more focus on who they are recruiting in the first place – as it will be more difficult to dismiss them if things don't work out; (b) their dismissal policies and procedures (e.g. misconduct, absence management, sickness, etc.) are robust so as to minimise the scope for any dismissals being challenged as unfair; (c) they make use of the new statutory probationary period – we will have to wait and see exactly what form this will take; and (d) managers are aware of the new rights and trained on how to carry out dismissals fairly and above all, promptly. • **Dismissal and re-engagement**: The government will seek to place restrictions on the ability of employers to make changes to terms and conditions via the dismissal and re-engagement route. The Bill provides that if an employee is dismissed for refusing to agree to a change to their terms and conditions of employment in these circumstances that dismissal will be automatically unfair unless the employer can show that "the reason for the variation was to eliminate, prevent or significantly reduce, or significantly mitigate the effect of, any financial difficulties which at the time of the dismissal were affecting, or were likely in the immediate future to affect, the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business" and "in all the circumstances the employer could not reasonably have avoided the need to make the variation". No qualifying period of service will be required to bring such a claim. This is a hugely significant change in the law and will place very strict limitations on the ability of employers to change terms and conditions of employment in this manner. It is also fundamentally inconsistent with the claimed growth agenda, since it requires employers to be in significant financial difficulties before they can take the steps necessary to avoid their getting into those dire straits in the first place. The Next Steps document states that the government will also consult on lifting the statutory cap on protective awards if an employer is found to have not followed the collective redundancy process, as well as the scope for interim relief for workers in such situations.

- **Collective redundancy consultation**: In another significant change, the government is going ahead with its proposal to extend the circumstances in which employers will be obliged to carry out collective consultation. The Bill removes the words "at one establishment" from s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992, which means that we will be taken back to the position following the EAT's decision about the Woolworths collapse in 2013, in which it held that collective consultation obligations will be triggered when 20 or more employees across a whole organisation are proposed for redundancy, rather than 20 or more employees at one particular site or location. This change will make things very difficult both legally and practically for multi-site employers. Employers should ensure they engage with the consultation exercise to make the government aware of the potential implications of such a change.
- **Zero hours workers**: Contrary to the government's press release, it is not banning zero hours contracts – but it is intending to put in place provisions that seek to guarantee such workers a certain number of hours of work based on what they usually work. The Bill contains what can only be described as ridiculously convoluted wording setting out the circumstances in which employers will be required to make a "guaranteed hours offer" to any zero hours workers and those on low hours based on the number of hours they have worked during the reference period (12 weeks according to the Next Steps document). There are even more complicated provisions dealing with what happens if the worker's contract is terminated during the reference period, the offer is withdrawn, the worker subsequently regularly works more hours, Jupiter is in the ascendancy, etc. Qualifying workers will be able to accept or reject the offer. These provisions alone seem guaranteed to dissuade employers from using zero hours contracts (which is possibly the government's intention!). Part of the reason for the complexity seems to be that the government is trying to anticipate all the different ways in which employers may seek to sidestep these obligations and legislate accordingly. The government is also going to consult on how these arrangements should be applied to agency workers.
- It depends on which survey you read, but around one million people are currently engaged on zero hours contracts in the UK, with younger people more likely to be engaged on them as well as a higher proportion of ethnic minority workers. They are also clearly more prevalent in certain sectors than others (e.g. hospitality, entertainment, care sector), so some businesses will be harder hit by reforms in this area.
- **"One-sided flexibility"**: The Bill also introduces new obligations on employers to give reasonable notice of shifts that they require the worker to work (including notice of how many hours are to be worked, times, days, etc.) in the case of zero hours workers and certain other workers to be specified in regulations, as well as reasonable notice of cancellation of or changes to a shift. Further details on the form and manner in which such notices must be given, etc. are to be set out in regulations to follow. Workers will also have the right to be paid for certain shifts that are cancelled, moved or curtailed at short notice. These protections may be extended to agency workers.
- These changes will clearly increase the administrative burden on companies (requirement to give reasonable notice, keeping records for these purposes etc.) and likely also their financial costs (e.g. if they are required to compensate workers for cancelled shifts). They will also lose flexibility, e.g. from being able to offer work at short notice to individuals to reflect changes in demand, etc. On the flip side, greater income security, predictability, etc., could mean that employers will benefit from a more engaged workforce and improved worker relationships.
- **Statutory Sick Pay (SSP)**: As expected, the Bill removes the current three-day waiting period for employees to be eligible for SSP and removes the Lower Earnings Limit. This means that all eligible employees, regardless of earnings, will be entitled to SSP. It also makes provision for a lower rate of SSP (being a certain percentage of an employee's normal weekly earnings) for those employees earning below the current flat rate of SSP. Sensible employers will not take that as requiring them to pay company sick pay over that period.
- **Tips and gratuities**: The Bill will introduce a new obligation on employers to consult "before producing the first version of a written policy" on the allocation of tips. Consultation must take place either with trade union representatives, elected employee representatives or the workers themselves. Furthermore, employers will have to prepare a summary of the views expressed in the consultation available in anonymised form to all workers of the employer at the place of business. What is unclear is what this means for those employers that already have a tipping policy in place! Presumably this will be clarified. They will also be obliged to carry out a review of any such written policy at least once every three years.

Trade union rights	• As anticipated, the new Bill contains a significant number of provisions concerning trade unions and industrial action. We will be publishing a more detailed briefing on these proposals in due course. For these purposes, the key changes include: a new obligation on employers to give workers a written statement about their right to join a trade union; repeal of the Strikes (Minimum Service Levels) Act 2023; new rights of trade unions to access workplaces; changes to the conditions for trade union recognition; time off for union equality representatives; changes to industrial action balloting requirements, etc. • Currently an estimated 6.4 million people are members of trade unions in the UK. This is half of its peak in the late 1970s, when there were 12 million members of trade unions. There is significant regional variation – with more trade union members in the Northwest, Northeast and Wales compared to London, for example. Furthermore, trade union members are overwhelmingly likely to be over 35 – very few young people are members of trade unions. • This would be a good time for those employers with a unionised workforce to review their current dealings with any trade unions in their workplace. If your current working relationship is not as effective or smooth as it could be, now would be an opportunity (as the government itself is claiming to do!) to create a new partnership with your trade unions. They will clearly feel emboldened with a pro-union Labour government in power. This is the same week in which Acas publishes reports suggesting that the relationship between trade unions and employers has become increasingly polarised.
Family-friendly rights	• **Flexible working**: The Bill will amend employers' duties in relation to flexible working requests to provide expressly that they may only refuse such requests if they consider that one of the existing eight business grounds for refusal apply and it is reasonable for them to refuse the application on that basis. So it introduces a new "reasonableness" test, although query how much practical difference this will make. Employers will also be required to explain why they consider it reasonable to refuse the application on that basis. Although the government refers to the changes in the Bill as making flexible working the "default" position, this is not strictly correct - workers will still be required to make requests and employers will still be able to reject such requests provided at least one of the eight business grounds for refusing requests applies and the employer can explain why that is the case. • **Dismissal during pregnancy**: The Bill provides for the government to introduce regulations granting women greater protection against dismissal during or after a protected period of pregnancy, i.e. not only in redundancy situations. Employees will also be granted greater protection against dismissal if they take other forms of statutory family leave, e.g. adoption or shared parental leave. • **Statutory Paternity Leave**: Employees will no longer need at least six months' continuous employment to be eligible to take statutory paternity leave. The government is also removing the quirk in the legislation which said that employees were not eligible to take paternity leave if they had already taken a period of shared parental leave. • **Statutory Parental Leave**: Employees will no longer need at least one year's continuous employment to be eligible to take unpaid parental leave. • **Statutory Bereavement Leave**: Statutory parental bereavement leave is being replaced by "bereavement leave", which will give statutory bereavement leave to other employees (to be set out in regulations) who have suffered a bereavement, i.e. not just parents. • **Further potential changes**: In its "Next Steps" document, the government states that it is considering what more it can do in relation to the current family-friendly provisions. It has committed to review the current system, including the recently introduced rights for carers to take unpaid leave, and will consider whether there is a need to make further changes.

Equality at work	• **Sexual harassment**: The government will change the forthcoming new mandatory duty on employers from taking "reasonable steps" to prevent sexual harassment in the workplace to "all reasonable steps", which will place a materially more onerous obligation on employers. No doubt the Equality and Human Rights Commission (EHRC) will be thrilled to hear that it will need to update its Technical Guidance again, having only just updated it to reflect the new duty coming into force later this month. Having said that, we understand the EHRC was supportive of previous attempts to widen this obligation in this manner. Interestingly, the government has said it will introduce new regulations setting out the steps that will be regarded as "reasonable" for these purposes, to include carrying out risk assessments, publishing policies as well as taking steps relating to the reporting and handling of sexual harassment complaints. Nonetheless, it is impossible to disregard the scope for entirely well-meaning employers committed to taking steps to prevent harassment because there is just one tiny measure they could have taken but did not. "All" is an extremely unforgiving and inflexible standard, and we can be sure that the promised regulations will not be comprehensive of what may need to be done. • **Harassment by third parties**: The Bill also reintroduces protection to prevent harassment at work by third parties. This will cover all protected characteristics covered by harassment, i.e. not just sexual harassment. An employer will be liable where an employee is harassed in the course of their employment, and it is shown that it failed to take all reasonable steps to prevent the third party from harassing them. • **Whistleblowing disclosures relating to sexual harassment**: The Bill will also amend the whistleblowing provisions in the Employment Rights Act 1996 to provide that a report that sexual harassment has occurred, is occurring or is likely to occur, will also amount to a protected disclosure for whistleblowing purposes. This adds little to the protections already provided by the rules against victimisation. • **Equality Action Plans**: The Bill gives the government the power to introduce new regulations obliging large employers (250+ employees) to develop and publish "equality action plans" showing the steps they are taking in relation to their employees with regard to certain matters related to gender equality (including addressing the gender pay gap as well as supporting employees going through the menopause). • **Gender pay gap reporting**: The Bill also gives the government the power to introduce new obligations on employers to publish details of the service providers they contract with for outsourced services. • **Future plans**: According to the Next Steps document, the government will also at some point implement a regulatory and enforcement unit for equal pay and make changes to the Equality Act 2010 to "ensure that outsourcing of services can no longer be used by employers to avoid paying equal pay". This is something that certainly some trade unions have previously called for. It is unclear how this would work in practice – whether the government would seek to insert provisions into the Equality Act 2010 along the lines of the associated employer provisions, which currently mean that a female employee at one associated employer can compare herself with a male employee at another associated employer where there is a single "controlling mind" making the pay decisions. Or whether it will seek to place obligations on employers to include contractual provisions in outsourcing contracts to ensure that outsourced workers receive comparable pay and benefits to direct employees.
Miscellaneous	• **Enforcement**: The Bill contains detailed provisions concerning the enforcement of labour market legislation by the government, including scope for the creation of a new labour market enforcement body (which will take the form of the new Fair Work Agency that will bring together different government enforcement bodies and have new enforcement powers, including in relation to holiday pay). • This was a proposal originally floated as part of the Taylor Review of Modern Working Practices and something that the previous Conservative government had committed to introducing, before putting the proposals on hold. Obviously, compliant employers would notionally have nothing to fear from this, but companies could still face the administrative and financial burden of having to defend any complaints raised with such a body, even if they are without merit. On a more positive note, a Single Enforcement Body (provided it is properly funded) could help bring greater consistency across all areas of enforcement. We know that employers would also welcome greater resources to support them in complying with their obligations, though it would not be uncharitable to suggest that this should start with comprehensive legislation a test which some of the Bill currently fails. • The Bill also introduces new protections for transferring workers in outsourcing contracts.

Key Takeaways for Employers

- Engage loudly and comprehensively with any consultation exercises. The government places weight on the number of responses from interested parties on any given point so if you think any of this is ill-founded, speak now!
- Individuals will have greater rights
- Greater rights and protections for trade unions
- Increased costs and administrative burdens for businesses
- More regulation and greater emphasis on enforcement of rights, including increased risk of claims, though no obvious improvements to the Employment Tribunals' resources for hearing them.

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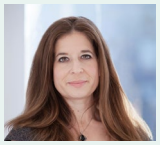

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