Department for Business & Trade

Retained EU employment law

CONSULTATION ON REFORMS TO THE WORKING TIME REGULATIONS, HOLIDAY PAY AND THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS.

Consultation response from Lewis Silkin LLP

Lewis Silkin is a leading employment law practice. We have over 180 employment and immigration lawyers, including 34 partners, based in London, Oxford, Manchester, Leeds, Cardiff, Dublin, Belfast and Hong Kong. We have been ranked in the first band of employment practices by the independent legal directories for over 15 years and many of our lawyers are recognised as leading practitioners in employment law.

This response is submitted on behalf of Lewis Silkin, rather than our clients, and is based on our experience in practice of advising predominantly medium to large-sized employers across a variety of sectors, our discussions with clients on these topics and (where indicated) survey responses.

We are happy for you to publish our response.

Our choice of the multiple choice answer options is highlighted in yellow.

Working Time

Question 1: Do you agree or disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers?

[Strongly agree/Agree/Neither agree nor disagree/Disagree/Strongly disagree/Don't know]

The legal position in the UK was left unclear following the ECJ decision in *CCOO v Deutchse Bank C-55/18*. Employers have not, in general, been recording daily working hours in response to this ruling but nevertheless it would be helpful to have clarity.

Question 2: How important is record keeping under the Working Time Regulations to either enforcing rights (for workers) or for preventing or defending disputes for employers?

[Very important/important/ neither important nor unimportant/unimportant/don't know]

Disputes relating to the specific question of time worked are relatively rare; however, of course, appropriate records are helpful with respect to claims relating to minimum wage compliance and other such claims.

Question 3: What is your experience of record keeping under the Working Time Regulations? Beyond the proposal above, how, if at all, do you think they could be improved?

Our experience is that most employers do not keep records of daily working time of all their workers (this is confirmed by our recent poll – see below). Although our recommendation is that the government should legislate to clarify that employers do not have to record daily working hours of their workers, it could also be appropriate to have exceptions for employees who work in higher risk industries such as doctors and nurses.

Question 4: [For employers] Do you keep records to specifically meet the requirements set out in the Working Time Regulations?

[Yes/No/Don't know]

In May 2023 we held a webinar to discuss these consultation proposals, in which we polled our audience (a mix of HR professionals and in-house employment lawyers at medium to large-sized companies across multiple sectors) on this question.

Of the 160 attendees who responded to this question, 78% said that they did not keep records specifically for Working Time Regulations compliance, and 22% said that they did.

Holiday pay and entitlement

Question 9: Would you agree that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on business?

[Strongly agree/Agree/Neither agree nor disagree/Disagree/Strongly disagree /Don't know]

We agree that this is a good idea in principle, subject to the following additional points:

1. Thought should be given to whether holiday allowance should still be expressed in weeks, since this does not reflect the reality of how holiday is taken. Although many workers will take some holiday in whole weeks, it is very common to take holidays in single days (indeed that's the normal position for bank holidays) and not unheard of for holiday to be taken in half days or even hours. There is uncertainty over how to translate 5.6 weeks into days or hours for workers with irregular working patterns (since the legislation is silent on whether/how you should calculate an average working week for this purpose), leading to a lack of clarity. In reality, the vast majority of employment contracts we see provide for holidays in days rather than weeks. We note the government's earlier proposals on calculating holiday entitlement for workers with irregular hours or part-year working patterns but would suggest that the government should go further and reconsider the provision in weeks more generally. A recent example of this causing confusion can be found in the Employment Appeal Tribunal's ruling in *Connor v Chief Constable of the South Yorkshire Police (2023) EAT 42* concerning accrued holiday pay on termination. The EAT insisted on a calculation in weeks when in our experience the vast majority of employers (and employees) calculate this in days (using 1/260 of salary for full-time employees for each day of untaken holiday). If we are to continue with weeks, there must be an agreed system for translating into days or hours for workers with irregular working patterns.
2. The proposals appear to indicate that workers would be able to carry forward *all 5.6 weeks* of the new single statutory holiday allowance in cases where the worker could not take it due to sickness or family leave. If that is the proposal then it would result in a position which is more favourable to employees than the current law:
    a. The current legal position is that workers who have missed holiday due to sickness can only carry forward their four weeks of EU holiday entitlement and must use it up within 18 months (*Plumb v Duncan Print Group Ltd UKEAT/0071/15*). The position is different for holiday missed due to maternity leave, where workers can carry forward *both* their four weeks of EU holiday entitlement *and also* the 1.8 weeks' UK leave (*Merino Gomez C342/01*). If the proposal is to treat both sickness and maternity in the same way, and allow carry forward of 5.6 weeks in both cases, this would result in a more generous position in so far as carry forward in sickness cases is concerned.
    b. We think that, rather than simply enacting any retained EU carry-forward rights, the government should consult about their appropriateness. It might be better to boost maternity and sick pay rather than employees returning with lots of "missed" holiday stored up and rights to carry it over. The government should consult on options. At least, we think that carry over should be time limited and employers should be allowed to make payments in lieu of holiday missed due to maternity or sickness.
    c. Although not covered by the current consultation, we also think that the government should consult about the position when an employee falls sick when on pre-booked holiday. ECJ caselaw (*Anged C78/11*) provides that EU holidays must be converted to sick days in these

situations. This does not apply to UK holidays, so this is another point of distinction between the two types of leave that would need to be addressed if a single pot of leave is created. This is not (necessarily) about carry forward into the next holiday year; it is (mostly) about rescheduling within the current holiday year.

3. Also not covered by the current consultation – but important - is the question of carry-forward of holiday in circumstances when individuals were incorrectly classified as self-employed. EU-based caselaw has found that individuals who were engaged as self-employed but who later establish worker/employment status can bring a claim for unpaid holidays stretching across the whole period of their engagement (*King v Sash Windows C-214/16* and *Smith v Pimlico Plumbers [2022] EWCA Civ 70*). This is at odds with UK government policy that claims should be limited to two years and should be clarified.

Question 12: What rate do you think holiday pay should be paid at?

[5.6 weeks of statutory annual leave at basic pay/5.6 weeks of statutory annual leave at normal pay/ Don't know/Other]

As mentioned above, in May 2023 we held a webinar to discuss these reforms. We polled our audience (a mix of HR professionals and in-house employment lawyers at medium to large-sized companies across multiple sectors) on this question. Of the 175 attendees who answered this question, 63% said all 5.6 weeks should be paid at basic pay only (including shift pay). This answer therefore represents their views.

Our own view is that simplicity is key, not just for employers but also for designers/operators of payroll systems and for employees themselves (because their rights are then easier to check and enforce). A system of basic pay (or rolled up holiday pay at 12.07%) has the advantage of simplicity. Where employers have already come up with systems to factor in overtime or allowances into holiday pay then they are likely to continue to do so. The most important thing, in our view, is that we do not come up with a new system that adds complexity.

Question 13: Would you agree that it would be easier to calculate annual leave entitlement for workers in their first year of employment if they accrue their annual leave entitlement at the end of each pay period?

[Strongly agree/Agree/Neither agree nor disagree/Disagree/Strongly disagree/Don't know.]

We agree with this idea but to fully address the confusion in this area the government needs to think through the position for casual workers with no continuity of employment in between assignments and whose engagement lasts only for the duration of that assignment. For those individuals, assignments may be short (a day or two, for example) and they do not necessarily reach the next payroll date with continuity of employment intact. The answer for this type of worker is rolled-up holiday pay (see further below).

Question 14: Are there any unintended consequences of removing the Working Time (Coronavirus)(Amendment) Regulations 2020 that allow workers to carry over up to 4 weeks of leave due to the effects of COVID?

[Yes/No /Don't know]

Question 15: Do you think that rolled-up holiday pay should be introduced?

[Yes, rolled-up holiday pay should be introduced as an option for employers in relation to all workers/ No, rolled-up holiday pay should not be introduced/Don't know/Other (please explain).]

We very strongly support the introduction of rolled up holiday pay *for some workers*, as the reality of many modern working relationships makes this the only sensible way to deal with holidays.

In our view, the introduction of rolled-up holiday pay needs to come with the facility to avoid having to earmark any particular days as holidays. There are many types of modern worker relationships where the

individual is under no obligation to work on a particular day and there is nothing to distinguish a day of holiday from a day of choosing not to work apart from the holiday pay. For many individuals, the concept of booking time off simply does not reflect the reality of how they are engaged. They simply do not agree to work on days that they wish to have off. This may be true for individuals working through platforms but is also true for a variety of other types of worker including (for example) part-time employment tribunal judges and workers such as the committee chair involved in *NMC v Somerville (2022) EWCA 229*. For such individuals, it should be sufficient to reflect holiday entitlement in an "uplift" to pay.

We are not convinced, however, that it is necessary to introduce rolled-up holiday pay as an option for *all* workers. We also think that there should be safeguards around, for example, making sure that employees do take 5.6 weeks' off each year, otherwise it could be a recipe for poor treatment of employees. It is important to emphasise that rolled-up holiday pay should not be a means of avoiding workers taking proper rest and being properly compensated for it. It should be reserved for situations where it is a sensible method of calculating holiday pay for workers with fluctuating hours and/or where the concept of booking holidays doesn't apply.

TUPE

Question 17: Do you agree that the Government should allow all small businesses (fewer than 50 employees) to consult directly with their employees on TUPE transfers, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

[Yes/No].

The current rules requiring election of representatives where there are no employee representatives in place are not practical where small numbers of employees are involved (which would necessarily be the case where an entire business has fewer than 50 employees). It therefore makes sense to simplify the position and enable such businesses, at their own discretion, either (a) to elect representatives; or (b) to consult directly with affected employees. Consideration could also be given to extending this exemption to cover the scenario where the *relevant part of the business* is a small business employing fewer than 50 employees.

It is worth noting, however, that the majority of businesses already consult employees directly when small transfers are taking place (i.e. they offer the affected employees the opportunity to elect representatives but make it clear that they are happy to consult them directly if they would prefer not to elect representatives). In most cases, the affected employees prefer to be consulted directly.

Therefore, while this change makes sense and should go ahead, we consider that it will have relatively limited impact in practice compared to other potential reforms to TUPE (see below).

Question 18: Do you agree that the Government should allow businesses of any size involved with small transfers of employees (where fewer than 10 employees are transferring) to consult directly with their employees on the transfer, if there are no employee representatives in place, rather than arranging elections for new employee representatives?

[Yes/No]

Yes, for the same reasons set out in our answer to question 17. An exemption based on the numbers transferring rather than on the numbers employed by the business as a whole is particularly helpful in smaller outsourcing scenarios.

Note, however, that the election of representatives will very rarely take place where fewer than 10 employees are affected by a TUPE transfer. The employer will typically offer the employees the opportunity to elect representatives but make it clear that they are happy to consult them directly if they would prefer not to elect representatives). In most cases, the affected employees prefer to be consulted directly.

Therefore, while this change makes sense and should go ahead, we consider that it will have relatively limited impact in practice compared to other potential reforms to TUPE (see below).

Question 19: What impact would changing the TUPE consultation requirements (as outlined above) have on businesses and employees?

As set out above, we consider that the proposed changes will have limited impact.

Question 20: What is your experience of the TUPE regulations? Beyond the proposals above, how, if at all, do you think they could be improved?

Please see our suggestions for reforming TUPE here: Lewis Silkin - Retained EU law bill: our proposals for employment law reform.

Some of these other suggestions would have a greater impact than those currently under consultation so it is disappointing that other proposals are not being taken forward at this stage.

Further, as noted in this consultation, TUPE applies to Northern Ireland (noting that Northern Ireland also has separate regulations relating to service provision changes under the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006). While we appreciate that these proposals do not represent the established policy position of the Northern Ireland Executive or Assembly, guidance or confirmation on how the proposed changes to TUPE are to apply in Northern Ireland would be welcomed.

Final Comments

We acknowledge that the government has not currently identified any areas for reform outside of the three areas being consulted upon above. We also acknowledge that the government suggests preserving most retained EU employment laws. We agree that there is no case for wholesale dismantling of employment law, and we see no evidence of employer support for a bonfire of EU employment rights. There are, however, more opportunities for beneficial reform, as we identify here: Lewis Silkin - Retained EU law bill: our proposals for employment law reform

In particular, we want to highlight the ongoing problems caused by the Transnational Information and Consultation of Employees Regulations 1999. The current concept of running a UK-law version of a European Works Council in parallel to an EU one is ill thought-through and impractical, as the Court of Appeal observed just last month in *EasyJet plc v EasyJet European Works Council* [2023] EWCA Civ 756 (see paras 13 and 23). Given this recent criticism from the Court of Appeal, which comes after the consultation was published, we would hope that the government would reconsider this point.

Lewis Silkin LLP

6 July 2023