

# UK Employment Flash

Insights into the latest employment news

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

---

**Helena J. Derbyshire**

Of Counsel / London  
44.20.7519.7086  
helena.derbyshire@skadden.com

**Damian R. Babic**

Associate / London  
44.20.7519.7253  
damian.babic@skadden.com

**Eleanor F. Williams**

Associate / London  
44.20.7519.7162  
eleanor.williams@skadden.com

---

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

40 Bank Street, Canary Wharf  
London, E14 5DS, UK  
44.20.7519.7000

## UK Employment Law: Legislation and Conversations for 2023

In spite of the political turmoil in the UK in 2022, the government did pick up a number of legislative priorities after the hiatus caused by the COVID-19 pandemic. As a result, we anticipate a number of developments in employment law in the year ahead. In this article, we summarise important proposals to look out for in 2023, split into two key categories:

**Legislative developments:** bills that we anticipate will move through the legislative process and potentially change the law within the next year. Employers may want to get ahead of the game by understanding the potential impact and how they may need to respond.

**Continuing conversations:** items that are likely to be important topics for employers throughout 2023 as a result of current affairs. These are also the kind of topics that could lead to legislative developments next year.

### Legislative Developments

There are a number of legislative changes we can anticipate in 2023, including several bills that are already passing through Parliament and intended to enhance employee rights. All of the following bills are currently at the reporting stage of the legislative process. This is the final opportunity for members of Parliament to propose amendments before voting on the final draft bill, which would then be passed to the House of Lords.

### Sexual Harassment

The **Worker Protection (Amendment of Equality Act 2010) Bill** seeks to increase protections against sexual harassment for workers. If implemented, employers would have a specific legal obligation to take all reasonable steps to eliminate sexual harassment in the workplace. Previously there was no positive obligation on employers, although they do have to show they had taken all reasonable steps to prevent harassment in order to successfully defend a claim.

Although employees cannot bring a standalone claim for a breach of this duty, if harassment does occur, they could be entitled to an uplift in compensation of up to 25% if an employer is in breach of the preventative duty. The bill also extends potential liability of employers for the harassment of employees by third parties (for example, clients), even where the employer has no direct control over the third party.

If such legislation is brought in, employers should review their current policies to determine whether they are adequate to ensure that the employer has taken all reasonable steps to eliminate sexual harassment, including by any third party.

# UK Employment Law: Legislation and Conversations for 2023

---

## Flexible Work

The **Employee Relations (Flexible Working) Bill** aims to amend the Employment Rights Act 1996 (ERA) to:

- (a) make the right to request flexible working (for example on reduced or flexible hours, job sharing or working from home) available from the first day of employment, rather than after 26 weeks, as now;
- (b) allow employees to make up to two requests for flexible working in any 12-month period (rather than one); and
- (c) ban employers from rejecting a request without prior consultation with the employee. This will entail a discussion of alternative arrangements if the employee's request cannot be accommodated.

The bill does not give a right to flexible work, since the ERA allows employers to reject a request if it is not reasonable according to criteria listed in the ERA, and there is no change proposed to these criteria. However, the requirement that employers consult with employees and discuss alternative options before rejecting any request is particularly noteworthy as it seems to suggest an increased focus on fair process, similar to the expectation that employers follow a fair dismissal or redundancy process, for example. Employers may need to be more proactive in considering what flexible work can be accommodated as a result of this change.

## Allocation of Tips

It is increasingly common practice in the UK for employers to collect tips with a lack of transparency as to their allocation to the employee(s) for whom they were intended. The **Employment (Allocation of Tips) Bill** aims to outlaw the withholding of tips by employers and introduce a new statutory Code of Practice on their distribution.

The new law would require all employers to have a written tips policy as well as records of how such tips were allocated, and to keep such records for three years. Workers will have the right to request information about an employer's tipping record and the ability to bring claims for failure to comply with the legislation, including if tips have not been *fairly* allocated by the end of each month. Compensation for any such breach could lead to tribunals granting up to £5,000 for each worker's financial losses. The new legislation would apply to both employees and agency workers.

If implemented, the bill will certainly place a greater documentary burden in the immediate future on employers in industries with tipping practices. Time will tell whether the introduction of the proposed law would also prompt employers to change tipping practices themselves out of fear either that their historic practices will be deemed unfair or that the increased transparency will lead to employee backlash.

## Family-related Rights

There are three further bills moving through Parliament that focus on enhancements to family-related rights:

1. Currently, an employee on maternity leave who is at risk of redundancy has the statutory right to be offered any suitable alternative roles available before any other employee in a redundancy consultation process. The **Protection from Redundancy (Pregnancy and Family Leave) Bill** aims to extend this protection to those who have notified their employer of pregnancy or their intention to take adoption or shared parental leave and to those who are taking or have returned from maternity, adoption or shared parental leave within the past 18 months.
2. The **Neonatal Care (Leave and Pay) Bill** would entitle parents to up to 12 weeks' paid leave if their child receives specialist neonatal care in hospital. The right to such leave would only be available to those who have been employed for at least 26 weeks but is in addition to other statutory family leave rights, including maternity and paternity leave.
3. The **Carer's Leave Bill** aims to introduce the right for carers to take a week's unpaid leave in any 12-month period to care for a dependant with a long-term care need. This right would be available from the first day of employment with the aim that such leave could be taken flexibly throughout the year.

## Continuing Conversations

Current affairs frequently influence areas of discussion that may be important to employers and this year is no different. The following are some key topics that we anticipate will be debated in 2023, even if we cannot yet confidently predict any legislative changes in these areas.

## Industrial Action

It was impossible to avoid news of strikes through late 2022, and the beginning of 2023 appears to be no different. We saw several efforts by the government throughout 2022 to limit the damage caused by strikes, including quadrupling unions' potential liability for calling unlawful strikes to £1 million. The government also legislated to repeal the ban on agencies supplying workers to fill in for striking staff.

Industrial action is likely to remain a hot topic throughout 2023. In particular, the Conservative government's promise in its manifesto to maintain a minimum level of transport services during industrial action could make its way into legislation in 2023. The Transport Strikes (Minimum Service Levels) Bill is due to be debated in its second reading in 2023. The bill seeks to remove trade unions' immunity from liability if they fail to ensure that the staff needed to provide this minimum service level do not participate in strike action.

# UK Employment Law: Legislation and Conversations for 2023

---

## Fire-and-rehire Practices

The government has been under pressure since the COVID-19 pandemic to assess the practice of ‘fire and rehire’, whereby employers change terms and conditions of employment by dismissing employees and then re-engaging them on new terms. Following several high-profile redundancy exercises in 2022, the government announced a new Code of Practice that would include guidance for employers on how to carry out fair, transparent and meaningful consultations with employees regarding proposed changes to terms and conditions of employment. It was also stated that Employment Tribunals would be required to take the new Code of Practice into account where relevant, meaning an uplift of 25% could be added to compensation where employers have failed to follow it.

It was stated during a Parliamentary debate in the House of Lords on 15 June 2022 that the draft Code of Practice would be published for consultation in summer 2022. However, there have been no further updates and the timeframe for the draft remains unclear. Regardless of whether we see the draft Code of Practice in 2023 or not, given the likelihood that the current economic climate will cause many organisations to review contractual terms and that we will see more high-profile redundancy exercises in 2023, the conversation around how employers consult with employees is unlikely to go away.

## Brexit

As currently drafted, the Retained EU Law (Revocation and Reform) Bill provides that retained EU law will expire on 31 December 2023 unless explicitly retained. Although the Regulatory Policy Committee found that the bill is not fit for purpose, it does continue to pass through Parliament and it is unclear whether it will be made law in 2023. The implications of the bill would be significant for employment law.

As currently drafted, unless expressly legislated otherwise, many key pieces of legislation, including the Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Working Time Regulations 1998 would be affected.

The key takeaway at the moment is not that that English employment law could be turned completely on its head, but that there is significant uncertainty as to how meaningful any legislative reforms could be. At this stage we cannot even be certain whether 2023 is the year when such reforms are discussed or whether the Retained EU Law (Revocation and Reform) Bill is extended and such decisions are pushed back, potentially as far as 2026.

## Four-day Work Week

A six-month trial commenced on 6 June 2022 under which 3,300 employees across 70 companies worked 80% of their normal hours for the same pay, to test claims that productivity would remain at the same rate. Since the experiment, 100 UK companies have decided to permanently implement a four-day working week at 80% of normal hours. Reported benefits include lower sickness levels and greater staff retention.

Given the current climate and the many reductions in headcount, it seems unlikely that other employers will see this as a key priority in 2023. However, the full results of the trial are expected to be published early this year. Those will undoubtedly be interesting to employers and employees alike and could be the catalyst for continuing interest in flexible working throughout 2023.