

APSCo Update on Legal & Compliance Issues

NEW June 2023

The Retained EU Law (Revocation and Reform) Bill

The [Retained EU Law \(Revocation and Reform\) Bill](#) (REUL Bill) was introduced to Parliament in September 2022. It received Royal Assent on 29 June 2023, becoming the [Retained EU Law \(Revocation and Reform\) Act 2023](#) (REUL(RR)A 2023).

Background

The draft Bill included a sunset clause, which meant that approximately 4,800 EU related laws would automatically expire on 31 December 2023, unless ministers specifically decided to replace or retain them. The laws are wide ranging and include competition rules, workers' rights, environmental protection, and food standards.

After months of debate in the House of Lords, the government changed its approach by dropping plans for the controversial "sunset clause" in the REUL Bill, moving from a default position of revocation to a default position of retention.

There had been widespread concern regarding the potential for the Bill to result in major changes across the UK, including to key areas such as health and safety, environmental protection, employment, and consumer rights. The sunset clause caused particular concern, as in the absence of government ministers taking action before the end of 2023, it would in effect have resulted in a 'bonfire' of retained EU legislation. Business groups considered the Bill was not thought through and risked removing important rights and protections without proper scrutiny, and further could have resulted in uncertainty for businesses and what they needed to comply with.

Schedule of Retained EU Law

The Government has now replaced the overarching sunset clause with a list of the 600 pieces of retained EU law that it intends to revoke by the end of 2023, which can be accessed through the GOV.UK website [here](#).

They consider these 600 pieces of retained EU law to be "*defunct and unnecessary now we have left the EU*". Only the Retained EU law specified in Schedule 1 will be revoked on 31 December 2023. Retained EU law not specified in Schedule 1 will remain on the statute book and will become assimilated law.

Retained EU Law to be Assimilated into UK Law

The remainder of retained EU law, which is not included in the list of 600, will be assimilated into UK law (and from that point referred to as 'assimilated law'). The Bill gives the Government significant power to amend the assimilated law in the future with limited parliamentary scrutiny.

Parliamentary Scrutiny

The House of Lords had suggested the inclusion of a clause requiring additional parliamentary scrutiny, where government ministers sought to make changes to retained EU law or assimilated law concerning environmental

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protections. This would have required the government to obtain expert opinions to confirm that any changes to legislation did not reduce the level of environmental protection and to publish a report to this effect.

However, on 12 June 2023 this clause was removed by the Commons who said it was unnecessary to maintain environmental protections. The House of Lords had also suggested amendments to the Bill to allow for more parliamentary scrutiny of changes made to legislation by ministers, but again, at their latest sitting the House of Commons removed this.

EU Case Law

The Bill abolishes the principle of supremacy of EU law and provides that the UK courts will not be bound by EU case law. This means that even where retained EU legislation is assimilated into UK law, it is possible that the interpretation of the legislation could change.

Employment Law

The Government has been conducting a comprehensive review of all retained EU law to ensure that UK regulations are tailored to the needs of the UK economy and help create the conditions for growth. Below are the key areas of retained EU employment law that form a part of that review process.

As part of the Government's review of retained EU employment law, they have identified several regulations which no longer operate as intended following the UK's exit from the EU.

Holiday Entitlement

Employees currently have two separate holiday leave entitlements as a result of the UK's former membership of the EU:

- A right under the EU Working Time Directive to a minimum of four weeks' annual leave; and
- an additional 1.6 weeks provided under UK law.

Different rules apply to EU and UK holiday entitlement. Workers should receive their normal remuneration for the four weeks' leave required by EU law; it should include certain types of commission, bonuses, and overtime. However, the 1.6 weeks' leave provided by UK law does not have to reflect the worker's normal remuneration and can be paid at basic pay rate. This makes calculating holiday pay more complicated for employers.

The Government proposes to combine the two types of annual leave into one pot of statutory annual leave entitlement of 5.6 weeks, although workers will still not be able to carry the four weeks' EU leave into the next leave year unless they have been unable to take it in certain scenarios such as maternity leave or sickness.

Rolled-up Holiday Pay

The Government is proposing to introduce 'rolled-up' holiday pay as an option for all workers. Rolled-up holiday pay is a system where a worker receives an additional amount or enhancement with every payslip to cover their holiday pay, as opposed to receiving holiday pay only when they take annual leave. This proposal would give employers a choice between using the existing 52-week holiday pay reference period and rolled-up holiday

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pay to calculate holiday pay for their workers with irregular hours. Employers could also choose to use rolled-up holiday pay to calculate and pay the holiday pay of their workers who have regular hours, as it may present benefits to both workers and employers.

Rolled-up holiday pay is currently unlawful following a 2006 ECJ ruling, due to concerns that workers may not be incentivised to take leave as they could earn more holiday pay by staying at work. In practice however, rolled-up holiday is heavily used in the recruitment sector and the gig economy as a simple way to calculate holiday pay for workers on irregular hours or zero-hours contracts.

The benefit of rolled-up holiday pay is the potential simplicity with which it can operate for employers and employees. The calculation of holiday pay by employers can become very straightforward, as an enhancement (for example, 12.07% of a worker's pay) would be calculated and paid to workers with every payslip.

The Government propose that rolled-up holiday pay is paid at 12.07%, as this is the proportion of statutory annual leave in relation to the working weeks of each year (5.6 weeks of statutory annual leave divided by 46.4 working weeks of the year). In other words, statutory annual leave entitlement is 12.07% of hours worked by a worker. Introducing rolled-up holiday pay would ensure that workers with irregular hours receive their holiday pay regularly and up front.

Employers will need to make their workers aware if they choose to start paying rolled-up holiday pay and this payment would have to be clearly marked on a worker's payslip as their holiday pay. When the worker goes on holiday, they would not receive any further pay whilst away as they would have already received their holiday pay whilst working. The Government propose that rolled-up holiday pay should be paid at 12.07% of a worker's pay on each payslip, as 12.07% is the proportion of the year taken up by statutory annual leave. Employers would need to adjust this percentage to account for any contractual leave they offer beyond the statutory annual leave entitlement.

This change will be welcomed by employers in sectors with a large number of casual and irregular hours workers, such as hospitality, as it provides a straightforward solution to calculating and paying holiday pay.

Holiday Accrual in the First Year of Employment

In order to solve the confusion and administrative burden caused by the separate annual leave entitlements, the Government proposes to create one pot of annual leave entitlement for all workers in Great Britain.

The Government proposes to replace regulations 13 and 13A of the Working Time Regulations 1998 with a new regulation to create a new single statutory annual leave entitlement, which will set out the minimum rate that holiday pay should be paid at. Under this proposal, the total statutory annual leave entitlement for workers would not change. Workers would continue to be entitled to 5.6 weeks of paid statutory annual leave.

Workers would accrue their annual leave entitlement at the end of each pay period until the end of their first year of employment.

Maximum Working Hours – Record Keeping

The Working Time Directive (adopted by the UK as the Working Time Regulations (WTR)) provides that a worker's average working time must not exceed 48 hours per week on average over a 17-week reference period. However, workers can agree to opt-out.

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There is no plan to remove the limit on average working hours, but the Government wishes to remove the EU retained case law requirement ([Federación de Servicios de Comisiones Obreras \(CCOO\) v Deutsche Bank SAE](#)) on employers to maintain adequate records showing whether the limits on average working time are being complied with in the case of each worker. The UK Working Time Regulations only require employers to keep adequate records to show that they are complying with the maximum 48-hour week in relation to workers who have not opted.

The Government therefore propose to remove this uncertainty and the potential high cost of implementing a system of recording working hours by legislating to clarify that businesses do not have to keep a record of daily working hours of their workers.

The key provisions in the Working Time Regulations include:

- A maximum average working week of 48 hours for adult workers, measured over a reference period of 17 weeks.
- Workers can 'opt-out' of the 48-hour limit in writing.
- Rest break of 20 mins for a working day of more than 6 hours.
- Annual leave of 5.6 weeks.
- Uninterrupted rest periods of 11 hours each day; and at least 24 hours each week (or 48 hours each fortnight).
- Special protections for young workers and night workers.

The Government will preserve these rights in domestic law and ensure that workers continue to enjoy them.

TUPE

The Transfer of Undertaking (Protection of Employment) Regulations (TUPE) provides protection for employees when a business transfers to new owners or where there is a service transfers to a new provider. In these scenarios an employee's employment automatically transfers to the new owner of the business or service provider on their existing contractual terms and preserving their continuity of employment.

TUPE sets out certain requirements to inform and consult with employees affected by a transfer. Currently, employers are required to consult with employee representatives, or if there are no representatives, to facilitate the appointment of such representatives. Businesses cannot consult employees *directly* about TUPE transfers. The consultation confirms that this requirement will be removed in two situations to allow employers to consult with employees directly: -

- for businesses with fewer than 50 employees irrespective of the size of the transfer.
- and where the transfer affects less than 10 employees irrespective of the size of the business.

Businesses with less than 10 employees are already permitted to consult with employees directly.

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Next Steps

The Government's response to the consultation is likely to be published later this year.

If you have any queries, please contact the legal helpdesk at legalhelpdesk@apsco.org.