

# UK Employment: Top Five Hot Topics in 2023

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Employment

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2023 will likely see employment lawyers and HR professionals (in the UK and further afield) grappling with a number of key employment-related legal and policy developments. In this alert we highlight some of the most important ones.

## 1. Brexit: The Employment Law Fallout

When the UK left the European Union on 31 December 2020, a “snapshot” of existing EU law was retained to prevent a legal vacuum. To accelerate the UK’s decoupling from the EU, the government introduced the Brexit Freedoms Bill in September 2022. The Bill provides that many EU-derived laws will be revoked (“sunset”) by default on 31 December 2023 (although there is an option to extend this deadline for specific laws until June 2026).

Since many of the laws that protect workers are derived from the EU, this could have a huge impact on some of the UK’s employment laws. The government may elect to revise key laws or, in theory, remove them in their entirety. These include the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), the Maternity & Paternity Leave Regulations 1999 and the Working Time Regulations 1998 (which dictate maximum weekly working hours among many others). It is currently unclear what approach the government will take – we will be keeping a close eye on developments.

## 2. Flexible and Hybrid Working

Employers will need to consider new rules surrounding the right to request flexible work. In its [response](#) to its “Making Flexible Working the Default” consultation, which closed in December 2021, the UK government has said it will pass secondary legislation to give employees the right to request flexible working from their first day of employment (rather than requiring them to meet a 26 week service criteria).

In addition, the Employment Relations (Flexible Working) Bill, which is expected to become law sometime this year, proposes to allow employees to make one flexible working request every six months (as opposed to once a year). Employers currently have three months to provide employees with their response – the Bill would reduce this to two months, and impose a new duty on employees to discuss alternatives to the request (if rejected).

In a post-pandemic world, many employers are making policy decisions about working practices and flexible or hybrid working arrangements. Particularly when it comes to assessing risks of remote working arrangements, there are a number of key considerations to be borne in mind,

including tax implications, immigration requirements, potential indirect discrimination risk and health and safety obligations. (For more on this, see our recent [alert](#).)

### **3. Diversity and Inclusion Initiatives: Tensions with Existing Laws and Standards**

Employers face calls from a range of stakeholders - governments and regulators, shareholders, civil society and workers themselves - to strengthen efforts to foster diverse workplaces. While the UK government no longer appears to be pursuing mandatory ethnicity pay gap reporting requirements, it is expected to publish guidance on voluntary reporting, for example. Outside of the UK, U.S. shareholder activism is driving audits of workplace racial equality measures by a number of companies.

As this pressure mounts, lawyers and human resources professionals are required to navigate some interesting tensions, including, for example, putting in place actions to promote diversity without falling foul of the fairly narrow scope of “positive discrimination” permitted by the Employment Act 2010. The UK government is also grappling with these tensions. On January 24, 2023, for example, the government [rejected](#) proposals from the Women and Equalities Committee (in July 2022 [report](#)) to consult on making menopause a “protected characteristic” under the Equality Act 2010 (rather than women having to present themselves as suffering from a disability in order to make an effective discrimination claim). This was [reportedly](#) due to a fear this could discriminate against men.

### **4. Workforce as a Key Component of the “ESG” Movement**

Compliance with national and international standards surrounding treatment of a company’s direct workforce and workers within the supply chain is central to a number of rapidly evolving legal and enforcement trends. In many jurisdictions, we are seeing a range of laws relating to prohibition of forced labour and other labour rights, including import bans and due diligence laws. As companies bolster compliance efforts to meet evolving requirements and best practice, in-house employment and human resource departments, both within the UK and further afield, are likely to be called on to assist in implementing workplace policies and procedures.

Further, new reporting laws, including the EU’s recently approved Corporate Sustainability Reporting Directive (“CSRD”) are going to require subject companies to report on a number of “social” standards, including the treatment of workers both in a company’s direct workforce and within the supply chain (see our recent [post](#)). For companies subject to the requirements (which will include certain, large UK companies with a significant EU presence), it is likely that employment law and HR experts will be asked to advise on the social aspects of these reports.

### **5. A Myriad of Other Legislation, Consultations and Guidance to Watch**

- a. *Consultation on holiday calculation:* On 12 January, 2023, the government opened a [consultation](#) on calculating holiday entitlement for part-year and irregular hours workers. The consultation is in response to last year’s Supreme Court judgment in *Harper Trust v Brazel*, the consequence of which was to entitle part-year workers to a larger annual paid holiday entitlement than part-time workers who work the same total number of hours across the year. It proposes introducing a holiday entitlement reference period to ensure that holiday entitlement and pay is directly proportionate to time spent working. The consultation will remain open until 9 March, 2023.

- b. *Sexual harassment:* A new law will require employers to go further to protect their employees from instances of sexual harassment. The Worker Protection (Amendment of Equality Act 2010) Bill proposes to re-instate potential liability (which was repealed in 2013) for employers in instances where their employees are sexually harassed by third parties. In addition, the Bill will subject employers to a positive duty to take all reasonable steps to prevent sexual harassment of their employees in the course of their employment. Employees need not always bring these claims themselves: if there is a suspected breach of this duty, the Equality and Human Rights Commission may undertake strategic litigation, investigation and enforcement activity regardless of whether an individual has submitted a legal claim to the employment tribunal. Tribunals will be allowed to uplift employees' compensation by up to 25 percent in cases where it is shown that the employer failed to uphold this duty. The Bill is currently at the report stage in the House of Commons, to be discussed in Parliament on 3 February, 2023.
- c. *Data privacy guidance:* The Information Commissioner's Office ("ICO") recently published draft guidance on two key employee data issues. Consultations are closing in January and we can expect finalised guidance to be published in the coming months.
  - i. *Employee monitoring:* The draft guidance suggests that employers should, among other things, consult with employees where monitoring is being introduced (unless there are good reasons for not doing so); conduct impact assessments relating to the carrying out of that monitoring (even where there is no strict requirement to do so); and asks that employers expect the bar for privacy to be higher when monitoring employees' home working (as opposed to working in the office).
  - ii. *Health information:* The draft guidance aims to provide practical guidance about handling the health information of workers in accordance with data protection legislation. Its advice covers topics such as handling sickness and injury records, obtaining information from medical examinations and guidance as to when sharing health information may be permissible. This guidance should be particularly useful for employers given that health information is among the most sensitive personal information they will process for workers.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Employment practice:

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