



Briefing Paper
What to expect in Employment Law in 2023

Emma Ogden
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Last year in summarising the possible changes to Employment Law in 2022, we anticipated the delayed or postponement of employment law changes as a legacy impact of the pandemic. Unfortunately, this predication was correct. 2022 was, a year of uncertainty, both politically and economically. Consequently, limited statutory regulation was introduced.

Looking ahead to 2023, we expect to see several proposed reforms progressed, albeit in many cases through private members' bills. This briefing paper reflects upon 2022 Employment Law changes and outlines potential 2023 changes that universities need to be aware of.

This briefing paper covers:

1. Flexible working requests
2. Statutory Code on Fire and Re-Hire
3. Right to Work and Sponsor Guidance changes
4. Family-related Leave changes
5. Retained EU Law (Revocation and Reform) Bill
6. Changes to Statutory Pay Entitlements
7. The Worker Protection (Amendment of the Equality Act 2010) Bill.

We recommend UK universities to familiarise themselves with new requirements, make relevant changes to policies and processes, communicate these changes, and consider how they will implement and assess their impact effectiveness.

SUMS is a membership-based higher education consultancy, a registered charity and not-for-profit organisation that provides expert consulting to universities across all professional service areas. Here, Emma Ogden, SUMS Consultant, shares insight on what the Employment Law landscape might look like in 2023.

This is provided for information purposes only and is no substitute for, and should not be interpreted as, legal advice.

1. Reflections on 2022

Emerging age-related issues

2022 saw a significant increase in individuals aged over 50 leaving the job market, with a 60% increase in economic inactivity during the pandemic¹. Other than retirement, it is believed that age discrimination might be a contributing factor. Age discrimination claims increased more than thirteen-fold from 2014 to 2021² (from 1,087 to 15,336).

The Women and Equalities Committee called for the government to launch a consultation on introducing a new protected characteristic for menopause, following a report by the Fawcett Society³ which found that 44% of women said their menopause symptoms affected their ability to do their job. Despite this, it is not expected that menopause will be made a protected characteristic under the Equality Act 2010.

Immigration changes

Following Brexit, the number of passenger arrivals and visas granted dropped significantly. However, 2022 saw increased numbers, particularly within the Health and Social Work sector.

New immigration categories were introduced, including:

1. **Graduate visa**⁴ (previously the post-study visa) which allows those on a Tier 4 or student visa to have two years leave in the UK (three years for PhD students).
2. **High Potential Individual (HPI) visa**⁵ allows a two- or three-year unsponsored visa for recent graduates from “top ranked” global universities (most of which are in the US).
3. **UK Expansion Worker (Global Business Mobility) visa**⁶ for new businesses setting up a subsidiary in the UK that require senior staff to set it up. There are stipulations on the company to be able to qualify (e.g., registered with Companies House, be at least three years old and the senior staff member needs at least 12 months service).

Employment Bill

Of the anticipated 2022 changes, the most surprisingly omission from the Queen’s Speech was the Employment Bill. A recommendation from the 2018 Good Work Plan, and part of the Conservatives’ manifesto pledge in 2019; this was the second year in a row that it was removed from the legislative agenda.

The Bill is now likely defunct, meaning the proposals may now be subject to separate legislation. Some MPs have brought forward private members’ bills to bring elements of the bill into force.

Holiday Pay

In July 2022, the Supreme Court handed down its judgement about the holiday entitlement and pay of a music teacher who worked irregular hours during term-time. The ruling found that

¹ Higher Education Statutory Authority (HESA), *Higher Education Staff Statistics: UK, 2020/21, 2022*.

² A copy of the dataset is available [here](#).

³ A copy of the report is available [here](#).

⁴ Further guidance is available [here](#).

⁵ Further guidance is available [here](#).

⁶ Further guidance is available [here](#).

holiday entitlement and pay for “part-year” workers on permanent contracts could not be reduced pro-rata to reflect the actual hours worked during the year.

The judgement specifically applies to workers who work irregular hours or who work part or parts of the year (i.e., those on permanent, zero hour or irregular hours contracts) and are not paid their full 5.6 weeks’ statutory holiday. The previously widely accepted method of calculating holiday pay (to make a payment of 12.07%), is no longer an appropriate mechanism for calculating annual leave. In summary, such workers must now receive:

1. The full statutory minimum 5.6 weeks’ paid holiday entitlement per year.
2. Calculated pay based on averaging a week’s working hours (averaged over the previous 52 weeks worked but counted back up to 104 weeks to identify a full 52-week period).

This judgement will not affect those whose contracts are short term, and their pay will be calculated at the end of the assignment. However, a series of recurrent contracts is likely to fall within the category of permanent work.

2. Flexible Working Requests

Towards the end of 2022, the government announced the right to make flexible working the default, committing to the following changes:

1. Removing the 26-week qualifying period before employees can request flexible working, making it a day-one right
2. Requiring employers to consult with employees, as a means of exploring options, before rejecting a flexible working request
3. Allowing employees to make two flexible working requests in any 12-month period
4. Requiring employers to respond to requests within two months
5. Removing the requirement for employees to set out how the effects of their flexible working request might be dealt with by their employer.

With many institutions now operating hybrid working models, the impact of this change will perhaps be less substantial than it might previously have been, although it will vary by job role. It is recommended that institutions adopt a flexible mindset, supported by appropriate policies, recruitment, and workforce planning processes. Alternative options where a request cannot be considered are required, with the aim of encouraging mutually acceptable solutions. Institutions will need to pay particular care to show that there is objective justification for refusing the request.

3. Statutory Code on Fire and re-Hire

As a response to the excessive use of fire and re-hire during COVID, it is expected that a statutory code on the use of fire and re-hire will be introduced; supported by ACAS. The code positions fire and re-hire as a last resort. It is proposed that if the code is breached, or there is an unreasonable failure to follow it, tribunals may be able to uplift compensation awarded by up to 25%.

4. Right to Work and Sponsor Guidance changes

The temporary measures to conduct remote Right to Work checks ended on 30 September 2022. Checks should now be completed face-to-face.

For those with sponsor licences, it is now possible to manage delayed arrivals without the visa being cancelled if the delay is due to:

1. Travel disruption
2. The employee working their contractual notice period
3. Delays in processing an exit visa
4. Illness, bereavement, or other compelling family circumstances.

If over 28 days, the delay should still be reported (), but the changes provide greater flexibility to manage start dates.

5. Family-related Leave changes

To compensate for the lack of momentum with the Employment Bill, new private members' bills to be brought forward include:

1. **Protection from Redundancy (Pregnancy and Family Leave) Bill** – aims to provide additional protection from less favourable treatment and redundancy if there is an alternative position. The proposal is to extend the priority for protection from notification of pregnancy to 6-months post leave. This would apply for maternity, adoption and/or shared parental leave.
2. **Neonatal Care (Leave and Pay) Bill** – proposes to offer additional leave and statutory pay for up to 12 weeks (on top of current entitlement) for babies needing neonatal care for at least seven days. At least 26 weeks service would be required to qualify. The bill is likely to become law in 2023 and should come into force sometime in 2024 or 2025.
3. **Carer's Leave Bill** - a proposed law which would grant one week's unpaid leave a year to provide or arrange care for dependents.
4. **Fertility Treatment (Employment Rights) Bill** - seeks to give employees the legal right to have time off for appointments related to fertility treatment. If approved, care will need to be taken that any policies adopted, or benefits provided are inclusive and applied consistently to avoid inadvertent discrimination claims.
5. **Miscarriage Leave Bill** - currently, miscarriages that take place before 24 weeks and ectopic pregnancies do not give rise to statutory pay entitlements. This proposal is seeking to make provision for paid leave for people who have experienced miscarriage.

While many institutions have local policies and procedures regarding discretionary time off work, it is recommended that these are reviewed to ensure they define where legislation provides a statutory right.

6. Retained EU Law (Revocation and Reform) Bill

Known as the "sunset law", the proposal is to see the automatic end of retained EU law on 31 December 2023, unless specific legislation is introduced to preserve or retain it. The bill is still going through the parliamentary process: if approved the implications would be significant. As they derive from EU law, legislation such as working time, paid holidays, fixed term, part-time and agency workers may all be affected.

7. Statutory Pay Entitlements

The Department of Work and Pensions have confirmed the new pay rates⁷, which will come into effect on 6 April 2023. The increases which will apply to several statutory benefits, including statutory sick pay, maternity, paternity, shared parental and adoption pay have also been published.

8. The Worker Protection (Amendment of the Equality Act 2010) Bill

The bill, which is yet to clear the committee stage of the House of Commons, is likely to introduce a duty to prevent harassment and reinstate employer liability for third-party harassment. This means that institutions would be required to take “all reasonable steps” to prevent harassment from occurring and could be held liable for harassment committed by visitors to the workplace.

This provision, unlike the preventative duty proposed last year, is not limited to sexual harassment, and covers the other relevant protected characteristics. While uncertainty remains on how to meet this duty, the EHRC has said it will publish a statutory code of practice if the bill becomes law. If approved, it is likely to come into force in 2024.

SUMS Recommendations

We recommend that universities consider, and plan for, possible new legislative and regulatory change by:

1. Focusing upon equality for all staff, including older workers and specifically ensuring comments or ‘banter’ do not fall under the category of discriminatory language.
2. Developing better family friendly and age-related policies (particularly around menopause, carers, and fertility-related guidance) and providing improved guidance, support
3. Ensuring that all staff, leadership, and management teams are familiar with legislative changes and understand the implications and expected benefits
4. Ensuring a proactive response; where consultations are ongoing or proposed, institutions may wish to get ahead by reviewing procedures, ensuring effective, open, and supportive communication channels are in place and engaging with staff.
5. Identifying where practical interventions are needed, as part of a business and workforce planning cycle
6. Considering workforce data and metrics, to provide insight into current performance and possible gaps
7. Planning implementation and impact assessments.

With expertise covering almost all areas involved in Human Resources, policy and employment law, the team at SUMS Consulting would be happy to help in supporting conversations further.

If you wish to discuss further or need any further information, please contact Emma on e.l.ogden@reading.ac.uk

⁷ A copy of the new rates are available [here](#).



Reading Enterprise Centre, University of Reading, Earley Gate,
Whiteknights Rd, Reading RG6 6BU
T: 0118 378 4304 | **E:** sums@reading.co.uk | www.sums.org.uk