



# Education Matters: Employment Law Update

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# Today's Webinar

## 01 New Legislative Rules and Proposals

- Online Safety Bill
- Consultation on Holiday Pay
- New bills covering protection from harassment and flexible working
- Proposals to extend redundancy protection for women during pregnancy
- Introduction of new laws to protect carers
- Publication of new ACAS guidance on managing stress at work
- New ICO guidance on data subject access requests

## 02 Key Case Law Decisions

- Recent cases
- What to look out for in 2023



# Online Safety Bill

# Online Safety Bill

## What is it?

- New set of laws to protect children (under 18) and adults online
- Still in draft stages
- Will make social media companies more responsible for user's safety on their platforms
- Prohibit social media platforms from hosting illegal or harmful content

# Online Safety Bill

The Bill proposes to:

- (i) remove illegal content quickly or prevent it from appearing in the first place
- (ii) prevent children from accessing harmful and age inappropriate content
- (iii) enforce age limits and age-checking measures
- (iv) ensure that the risks and dangers posed to children on the largest platforms are more transparent, including by publishing risk assessments
- (v) provide parents and children with clear and accessible ways to report problems.

# Online Safety Bill

- New offences introduced – false communications, making content that promotes self-harm illegal
- Harmful content will also be regulated under the Bill
- Harm is defined as “physical or psychological harm”
- What constitutes content that is harmful to children and harmful to adults will be defined in regulations

# Online Safety Bill

- Social Media companies will have to enforce age limits and age-checking measures
- Companies will need to say what technologies they are using to enforce age limits
- Impact for Schools?





# Consultation on holiday pay

# Holiday Pay Consultation

## What is it?

- Consultation launched in January 2023

[Calculating holiday entitlement for part-year and irregular hours workers - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/calculating-holiday-entitlement-for-part-year-and-irregular-hours-workers)

- Closed 9 March 2023
- Recognises that holiday pay and entitlement legislation has “become complex” and that there is a risk the legislation may not be “achieving its original intention”.

# Holiday Pay Consultation

## What are the proposals?

- Introduce a 52-week holiday entitlement (rather than pay) reference period including those weeks in which workers perform no work. This would be a fixed (not rolling) reference period
- Move away from the calendar week method established in *Harpur*
- Allow employer to use a 12.07% calculation method
- During the first year of employment, holiday entitlement to be calculated at the end of each month based on actual hours worked

# Holiday Pay Consultation

## What next?

- Consultation has closed and awaiting government response
- Further consultation published in May 2023 which included proposals to allow rolled up holiday pay
- How do the two consultations work together?

A row of white dominoes is shown falling in a line from left to right. The dominoes are white with black pips. The background is a light blue gradient. A dark blue arrow-shaped graphic points from the left towards the right, partially overlapping the dominoes.

# The Harassment Bill

# Worker Protection (Amendment of Equality Act 2010) Bill

## Background

- Current law prohibits employers from harassing their staff and employers may be vicariously liable for harassment carried out by their employees
- In *Unite the Union v Nailard* it was held that the Equality Act does not cover liability for third-party harassment
- A 2018 Select Committee workplace sexual harassment inquiry criticised gaps in protection and enforcement measures and consultation launched

# Worker Protection (Amendment of Equality Act 2010) Bill

## What does it do?

- Two new (reinstated to some degree) requirements:
- New Section 40 EQ 2010:
  - An employer (A) will be treated as harassing a person (B) if:
    - B is harassed by third parties (includes clients and customers) during the course of their employment
    - The employer fails to take all reasonable steps to prevent third party harassment
- A third party will be defined as a person other than either the employer, or an employee of employer.

# Worker Protection (Amendment of Equality Act 2010) Bill

## What does it do?

- New Section 40A:
  - An employer (A) must take all reasonable steps to prevent "sexual harassment" of its employees in the course of their employment.
  - For these purposes "sexual harassment" means harassment of the kind described in section 26(2) of the EqA 2010 (unwanted conduct of a sexual nature).



# Worker Protection (Amendment of Equality Act 2010) Bill

## What does it do?

- A breach of the employer's duty to take all reasonable steps (or a breach of section 111 or 112 of the EqA 2010 which relate to a breach of that duty) will be enforceable in two ways:
  - by the EHRC as an unlawful act under its existing enforcement powers in Part 1 of the Equality Act 2006; and
  - by an employment tribunal where it has first found a breach of section 40 which involved, to any extent, sexual harassment.
- 25% uplift on damages awards
- New Statutory Code of Practice on Prevention of Sexual Harassment to come with the new Act.

# Worker Protection (Amendment of Equality Act 2010) Bill

## Protection of free speech?

- In the following circumstances, A will not be treated as having failed to take all reasonable steps to prevent the harassment solely because A did not seek to prevent the expression of opinion:
  - a third party harasses B in the course of B's employment;
  - the harassment falls within section 26(1) (unwanted conduct related to a relevant protected characteristic) and not within section 26(2) or (3) (Sexual harassment and Rejection of or submission to conduct of a sexual nature);

# Worker Protection (Amendment of Equality Act 2010) Bill

- the conduct constituting the harassment involves a conversation in which B is not a participant, or a speech which is not aimed specifically at B;
- the conversation or speech involves the expression of an opinion on a political, moral, religious or social matter;
- the opinion expressed is not indecent or grossly offensive; and
- the expression of the opinion does not have the purpose of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

# Worker Protection (Amendment of Equality Act 2010) Bill

## What stage is it at?

Not imminent.

House of Commons 1<sup>st</sup> Reading – 15<sup>th</sup> June 2022

House of Commons 2<sup>nd</sup> Reading – 21<sup>st</sup> October 2022

House of Commons Committee Stage – 23<sup>rd</sup> November 2022

House of Commons Report Stage – 3<sup>rd</sup> February 2023

House of Lords 1<sup>st</sup> Reading – 6<sup>th</sup> February 2023

House of Lords 2<sup>nd</sup> Reading – 24 March 2023

House of Lords Report Stage – TBC

House of Lords 3<sup>rd</sup> Reading – TBC

Consideration of Amendments – TBC

Royal Assent – TBC



# Worker Protection (Amendment of Equality Act 2010) Bill

## Issues

- Unclear what will amount to reasonable steps in each case.
- Unclear how this will interact with the current reasonable steps defence within the Equality Act for acts of harassment.
- Unclear how far “third parties” will be applied and whether what is reasonable will vary dependent on how remote the connection becomes.
- Fuller details are awaited.



# The Flexible Working Bill

# Employment Relations (Flexible Working) Bill

## Background

- Under current law (ERA 1996) employees with at least 26 weeks' continuous service have the right to request "flexible working".
- Employers must consider these requests in line with a statutory Code of Practice
- Employers are obliged to respond to these requests within 3 months
- One request in 12 months

# Employment Relations (Flexible Working) Bill

## Background

- In 2021, a Government consultation sought feedback on proposals to reform the right to request flexible working
- A response to the consultation was given in December 2022 in which Government committed to measures identical to those in the current Bill along with making flexible working a day 1 right



# Employment Relations (Flexible Working) Bill

## What does it do?

- Day 1 Right
- Removes the requirement for employees to explain their application's effects on the employer
- Allows employees to make 2 flexible working requests per 12 months
- Requires employers to consult with the employee before being allowed to refuse an application
- Reduces the deadline for an employer decision on flexible working requests from 3 months to 2 months
- New duty to discuss alternative options (possibly)

# Employment Relations (Flexible Working) Bill

## What stage is it at?

House of Commons 1<sup>st</sup> Reading – 15<sup>th</sup> June 2022

House of Commons 2<sup>nd</sup> Reading – 28<sup>th</sup> October 2022

House of Commons Committee Stage – 7<sup>th</sup> December 2022

House of Commons Report Stage – 24<sup>th</sup> February 2023

House of Lords 1<sup>st</sup> Reading – 27<sup>th</sup> February 2023

House of Lords 2<sup>nd</sup> Reading – TBC

House of Lords Report Stage – TBC

House of Lords 3<sup>rd</sup> Reading – TBC

Consideration of Amendments – TBC

Royal Assent – TBC



# Employment Relations (Flexible Working) Bill


## Is this an option for schools?

- DFE guidance [Flexible working in schools - GOV.UK](https://www.gov.uk/guidance/flexible-working-in-schools) ([www.gov.uk](https://www.gov.uk))
- Be mindful of assuming working arrangements will not work out without a sound rationale
- Use the trial periods to make evidence based decisions
- DFE guidance encourages a strategic and proactive approach to flexible working

# Employment Relations (Flexible Working) Bill

## What could this look like?

- Late starts or early finishes
- Virtual team meetings
- Shared management responsibilities
- Split classes
- Virtual parents evenings
- Virtual CPD remotely



Increased protections for  
pregnancy, family and  
carers

# Extension to pregnancy and family protections in relation to redundancy

## Protection from Redundancy (Pregnancy and Family Leave) Act 2023

- Received Royal Assent on 24 May 2023
- Will come into force at the end of the period of two months beginning with the day on which the Act was passed.
- Statutory Instruments with the final detail awaited.

# Extension to pregnancy and family protections in relation to redundancy

## Protection from Redundancy (Pregnancy and Family Leave) Act 2023

- Purpose/intention is to extend the period of time protected by special pregnancy/maternity redundancy laws.
- Currently only apply to pregnancy and during maternity leave (but not after or before).
- Act enables (by SI) protection to be in a period to be set “during or after”
- It is anticipated this will be used to extend protection from the date the employee notifies the employer until 18 months after birth
- Offer of suitable alternative employment

# Carer's Leave Act 2023

- Also received Royal Assent on 24 May 2023
- Actual implementation date to be confirmed
- Makes provisions in relation to unpaid leave for employees with caring responsibilities
- At least 1-weeks unpaid leave in any period of 12 months to arrange or provide care for a dependent with a long term care need
- Day 1 Right for employees



# Carer's Leave Act 2023

- A dependent includes spouse, civil partner, child or parent, someone in same household, someone reasonably relying on the employee ('reasonably' is ambiguous and could be interpreted widely)
- Long-term care needs if an illness or injury that requires or likely to require care for more than 3 months, have a disability under Equality Act 2010, or in relation to elder age
- Employees protected from dismissal or detriment for taking carer's leave
- Employees will have a 'day on right' meaning no need for qualifying service
- Current understanding is that a week will mean up to 5 days and that the leave may be flexibly taken e.g. in one block or separate individual blocks

# Carer's Leave Act 2023

- A dependent means if they:
  - are a spouse, civil partner, child or parent of the employee,
  - live in the same household as the employee, otherwise than by reason of being the employee's boarder, employee, lodger or tenant, or
  - reasonably rely on the employee to provide or arrange care

# Carer's Leave Act 2023

- Long term care need means if:
  - they have an illness or injury (whether physical or mental) that requires, or is likely to require, care for more than three months,
  - they have a disability for the purposes of the Equality Act 2010, or
  - they require care for a reason connected with their old age.

# Carer's Leave Act 2023

- Employees protected from dismissal or detriment for taking carer's leave (automatic unfair dismissal)
- Details of rules and evidence etc. to be set out in SI.



# Managing Stress at Work ACAS Guidance

# Managing Stress at Work

## Background

- Stress is defined by the Health and Safety Executive (HSE) as:  
*“the adverse reaction people have to excessive pressures or other types of demand placed on them.”*
- 33% of British workers believe that their organisation is not effective at managing work-related stress.
- 3 out of 5 employees felt stressed due to the rising cost of living.
- Organisations benefit from creating positive work environments which can also help reduce stress.

# Managing Stress at Work

## Background

- Education Support survey in 2022 found that record numbers of teaching and education staff considered leaving the sector in the past academic year due to pressures on mental health and wellbeing
- 59% considered leaving the sector
- 55% of staff actively sought to leave or change their current jobs
- 68% cited volume of workload for main reason to consider leaving
- 47% of staff go into work when unwell
- 78% experienced mental health symptoms due to their work.

# Managing Stress at Work

## Causes

- Too many or conflicting demands.
- Poor working conditions.
- Little control over how and when work is done or decision making.
- Lack of support or encouragement from managers and others at work.
- Bullying and conflict at work, particularly if these are not managed well.
- Not having enough training or skills to do a job.
- Feeling unclear about roles and responsibilities.
- Low trust and not feeling able to speak up about concerns.
- Change within the organisation.
- Personal circumstances



# Managing Stress at Work

## Signs of Stress

- Employees should look after their own health and wellbeing.
- Managers can also look out for any signs and start a conversation
  - Poor concentration
  - Finding it hard to make decisions
  - Being irritable or short tempered
  - Tearfulness
  - Tiredness
  - Low mood
  - Avoiding social events

# Managing Stress at Work

## Relevant Employment Law

- Health and Safety at Work Act 1974
  - This puts a duty of care on employers to protect their employees from the risk of stress at work
- Management of Health and Safety at Work Regulations 1999
  - This requires all employers to make a 'suitable and sufficient assessment' of the risks to the health and safety of their employees are work
- Working Time Regulations 1998
  - This places a duty of care on employers to ensure that employees are not working long hours without regular breaks

# Managing Stress at Work

## Risk Assessments

- By law, employers must carry out a risk assessment to protect their employees from stress at work.
- Risk Assessments should
  - Identify the risks of stress
  - Decide how to remove or reduce the risks
  - Agree what steps to take
  - Specify a review date

# Managing Stress at Work

## Supporting Staff

- Talking to your staff
  - Make time
  - Open mind
  - Open questions
  - Listen
  - Identify the cause
  - Work together
  - Sign post to internal and/external specialists
- Assistance for employers to support their staff can be found on the government website
  - [Support with employee health and disability – GOV.UK \(dwp.gov.uk\)](https://www.gov.uk/government/organisations/dwp/about/dwp-employee-health-and-disability)

# Subject Access Requests (SAR's)



# New ICO Guidance on Data Subject Access Requests (SARs)

## What is it?

- New guidance published by the ICO for employers on how best to respond to SARs
- Reinforces and repeats existing guidance on rights of access
- Contains some useful new examples to support previous ICO guidance.

# New ICO Guidance on Data Subject Access Requests (SARs)

## Key Considerations

- What constitutes a Data Subject Access Request
- What makes a request excessive or manifestly unfounded
- What is a valid reason to refuse a request: the prospect of litigation or tribunal proceedings is not one of them
- The need to balance employment and data rights
- Can you contractually waive data subject access rights
- Email addresses are personal data but the contents of the email might not be
- The role of social media platforms

# New ICO Guidance on Data Subject Access Requests (SARs)

## **Failure to comply**

- Warning
- Reprimand
- Enforcement notice
- Penalty Notice
- Application for a court order
- Compensation





# Recent cases – key decisions

# Holiday Pay and Relevant Agreements

## ***Connor v Chief Constable of the South Yorkshire Police 2023***

- Working Time Regulations - Payment for untaken holiday on leaving employment - Relevant agreement providing to amount to be paid
- EAT ruled an agreement under regulation 14 WTR cannot agree to pay less than the entitlement under the WTR
- It is important to fulfil the health and safety purpose underpinning the Working Time Directive and the WTR, and that the calculation of holiday pay is necessary because it would undermine that purpose if the amount paid could differ from the usual level of pay.
- Thus, any payment for time off that falls below the usual level of pay will not be in accordance with the legislation's purpose.

# References and Defamation

## ***Smith v Surridge and others [2022] EWHC 351***

- Reference for two former teachers provided.
- Included the line: *'However, I would like to inform you that there were some safeguarding issues during their time at Stanborough School. We will fill in the forms you have sent us in detail and send these to you shortly.'*
- Job offers were withdrawn and teachers issued proceedings for libel, misuse of private information and negligent misstatement.

# Disciplinary Processes

## ***Lyfar-Cissé v Western Sussex University Hospitals NHS Foundation Trust and others [2022] EAT 193***

- Not unfair to dismiss an employee after reopening a previously concluded disciplinary matter which resulted in a final written warning
- EAT held that earlier disciplinary outcome can be part of the circumstances to consider whether a dismissal is fair
- Will depend on the circumstances

# Reasonable Adjustments

## ***Hilaire v Luton Borough Council [2022] EAT 166***

- Duty to make reasonable adjustments did not arise when a disabled employee refused to participate in a redundancy process interview for a reason not connected to his disability
- Argued he should have been slotted into a role without interview
- EAT took into account effect of slotting him into new role on other potentially redundant employees

# Unfavourable treatment arising from disability

## *McQueen v General Optical Council [2023] EAT 36*

- Claimant's 'meltdowns' at work did not arise from his disability
- 2 disciplinary processes
- After medical evidence and Claimant's impact statement, assessed it was not a consequence of his disability

# Menopause and disability

## *Rooney v Leicester City Council*

- Case concerning disability and menopause
- EAT overturned ET decision that an employee suffering from significant menopausal symptoms was disabled
- Important case because it will assess how menopausal symptoms fit the disability definition
- EAT's decision to pass the case back to ET already acts as a caution to employers that menopausal symptoms must be taken seriously and could amount to a disability

# Holiday and unlawful deduction of wages

## ***Chief Constable of the Police Service of Northern Ireland and another v Agnew and Others***

- Supreme Court Judgment awaited – Court of Appeal decided gaps of more than three months would not interrupt a “series” of unlawful deductions from holiday pay
- Supreme Court's decision will be binding throughout the UK
- Opening floodgates for historic pay claims?





Questions?