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Employment Law Update

28 November 2023

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Key Legislation Updates

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Upcoming Legislation

Legislation	Status	Date Anticipated
Employment Relations (Flexible Working) Act 2023	**Act passed 20 July 2023**	**July 2024**

Employees will no longer have to explain what effect their requested change may have on the employer and how any such effect might be dealt with.

Employees will be entitled to make two requests (instead of one) in any 12-month period.

Employers will not be able to refuse a request unless the employee has been consulted.

Employers will have to make a decision in two months (reduced from three months), subject to agreeing a longer decision period.

Upcoming Legislation

Legislation	Status	Date Anticipated
Workers (Predictable Terms and Conditions) Act 2023	**Act passed 18 September 2023**	**September 2024**

Will give workers and agency workers **the right to request** more predictable terms and conditions of work where there is a lack of predictability to their work pattern.

It will be possible to make two applications in a 12-month period and applications may be rejected on statutory grounds.

A minimum service requirement to access the right, expected to be 26 weeks, will be specified in regulations.

Sounds similar to Flexible Working – key will be in the detail which we do not yet have.

Upcoming Legislation

Legislation	Status	Date Anticipated
Draft Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023	**Draft before parliament 4 September 2023**	**Probably 30 December!**

Reverses the earlier Retained EU law (Revocation and Reform) Act 2023.

Removes the sunset provisions which would have seen all EU derived employment laws removed unless expressly retained, as well as granting sweeping amendment powers to the government.

The draft revocation act of the current revocation act will reverse the revocation provisions retaining all current employment laws unless expressly revoked.

Upcoming Legislation

Legislation	Status	Date Anticipated
Worker Protection (Amendment of Equality Act 2010) Bill 2022-23	**Consideration of Lords Amendments due 20 October 2023**	**Unclear – 1 year after the bill becomes an act.**

Introduces a duty on employers to take reasonable steps (previously all reasonable steps) to prevent sexual harassment of their employees.

Gives employment tribunals the power to uplift sexual harassment compensation by up to 25% where an employer is found to have breached the new duty to prevent sexual harassment.

Intended to include new requirements to prevent third party harassment but this is now in doubt.

Upcoming Legislation

Legislation	Status	Date Anticipated
Carer's Leave Act 2023	**The Act was passed on 24 May 2023**	**Not before April 2024**
The Act will introduce a new entitlement of **one week's unpaid leave** per year for employees who are providing or arranging care for a dependant with a long-term care need.		
Neonatal Care (Leave and Pay) Act 2023	**The Act was passed on 24 May 2023**	**Awaiting 7 statutory instruments to implement – anticipated around April 2025**
The Act makes provision for a right to statutory neonatal care leave (expected to be capped at 12 weeks) and pay (expected to be at the statutory prescribed rate or, if lower, 90% of the employee's average weekly earnings) for employees with a parental or other personal relationship with children receiving neonatal care.		

Upcoming Legislation

Legislation	Status	Date Anticipated
Protection from Redundancy (Pregnancy and Family Leave) Act 2023	**The Act was passed on 24 May 2023**	**Awaiting implementing regulations "in due course"**
The Act provides a power for regulations to be made to extend **the right to be offered suitable alternative vacancies in a redundancy situation** so that it will apply during pregnancy and for a period after pregnancy or maternity, adoption or shared parental leave (expected to be a period of six months after returning to work).		
Employment (Allocation of Tips) Act 2023	**The Act was passed on 2 May 2023**	**Anticipated May 2024**
Under the Act employers will have a duty to ensure that all qualifying tips are "allocated fairly" to workers (including agency workers), and make payment in full no later than the end of the month in which the qualifying tip was paid by the customer. Alternatively, if it is fair to do so, the employer may pay the tips over to an "independent tronc operator" who will allocate them to workers.		

Workers (Predictable Terms and Conditions) Act 2023

- The Predictable Terms Act will amend the Employment Rights Act 1996 to give workers and agency workers the right to request a predictable work pattern where:
    - There is a lack of predictability as regards any part of their work pattern (fixed term contracts of 12 months or less are presumed to lack predictability)
    - The change relates to their work pattern
    - Their purpose in applying for the change is to get a more predictable work pattern.

  Two applications can be made in 12 months but may be rejected on statutory grounds. A minimum service requirement to access the right, expected to be 26 weeks, will be specified in regulations.

ACAS consultation on the draft Code of Practice – Handling Requests for Predictable Working Pattern

- ACAS issued a consultation on a new statutory Code of Practice on handling requests for a predictable working Pattern following Workers (Predictable Terms and Conditions) Act 2023.

- Code outlines procedure for dealing with requests for a predictable working patterns. The procedure includes holding a meeting to discuss the request, informing employee of outcome in writing, in a reasonable timeframe and reasons should be provided and, employee should be able to appeal.

- Draft code is in two sections, dealing with requests made by workers to employers in one section and in the other, those made by agency workers to agencies or hirers.

Worker Protection (Amendment of Equality Act 2010) Act 2023

Background

- Previous law prohibited 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?

- Originally introduced two new (reinstated to some degree) requirements:
- The draft bill from the Commons introduced 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.
- The House of Lords struck out this clause in their amendments.

Worker Protection (Amendment of Equality Act 2010) Bill

What does it do?

- New Section 40A:
    - An employer (A) must take 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?

- It gives employment tribunals the power to uplift sexual harassment compensation by up to 25% where an employer is found to have breached the new duty to prevent sexual harassment.
- The Act received Royal Assent on 26 October 2023 and comes into force one year after this.

Employment Relations (Flexible Working) Act 2023

Background

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

Employment Relations (Flexible Working) Act 2023

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 Act along with making flexible working a day 1 right.

Employment Relations (Flexible Working) Act 2023

What does it do?

- 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
- The Bill received Royal Assent on 20 July 2023.

ACAS consultation on the draft Code of Practice – Handling Flexible Working Requests

- ACAS issued a consultation on an updated statutory Code of Practice on handling flexible working requests, anticipating changes which will be implemented when the Employment Relations (Flexible Working) Act 2023 comes into force.

- The draft Code is more detailed than the previous version. Contains foreword setting out benefits of flexible working and emphasises employers should keep their mind open when dealing with requests – rejecting shouldn't be the default position. It covers principles of 'good practice' which are expanded on in the code e.g. transparency in the decision-making process.

- The Code covers the eight business reasons for rejecting a request, as specified in section 80G(1)(b) of the ERA 1996. However, it states that employers must not reject a request without first consulting the employee and discusses what consultation would involve for these purposes.

ACAS Guidance on Reasonable Adjustments for Mental Health

- ACAS published new guidance for employers on making reasonable adjustments for mental health in the workplace.

- Advice covers a range of aspects for employers when making or considering making reasonable adjustments for mental health.

- ACAS highlights that only a legal requirement to make reasonable adjustments if they know (or could reasonably be expected to know) an employee is disabled, however should make reasonable adjustments even if no disability – positive workplace and help employees stay well, will reduce absence and create a healthy workplace.

- Reasonable adjustments for mental health may include changes to the physical working environment, changes to working arrangements, doing something differently, adapting how policies are applied or providing equipment, services or support.

ICO Guidance – Subject Access Requests

- On 24th May 2023 the ICO published guidance on subject access requests for employers.
- Individuals have the right to access their own personal data that organisations maty hold (UK GDPR and Data Protection Act 2018). If organisations fail to respond to SARs promptly or appropriately, they can be subject to fines or a reprimand from the ICO.
- ICO received over 15,848 complaints relating to SARs from April 2022 to March 2023.

ICO Guidance – Subject Access Requests

- SARs are not subject to any formalities in the way they are asked. ICO recommends you have a designated person, team and e-mail address for deal with SARs.

- You can seek further clarification of the request (the time limit for responding being paused whilst clarification is provided). However, clarification should only be sought if

a) it is genuinely needed to respond to the SAR;

b) you process a large amount of information about the worker.

- Certain types of information may be withheld i.e. information relating to someone else, whistleblowing reports and information which is subject to legal professional privilege. Exemptions must be applied on a case-by-case basis and you should be able to justify your reasons as to why.

ICO Guidance – Subject Access Requests

- The right still applies where an employee is going through a tribunal or grievance process.
- Personal data covers all information recorded over an organisation's channels such as social media platforms and CCTV footage.
- Regarding CCTV you should ensure your system allows personal information to be easily located and extracted in response to a SAR and that you redact of information relating to third parties where necessary. If CCTV system is not advanced – will need to comply with SARs but obtain consent from others or disclose if it is otherwise reasonable to do so without their consent.

Strikes (Minimum Service Levels) Act 2023

- This act has superseded the Transport Strikes (Minimum Service Levels) Bill 2022 – 2023.
- This act allows the Secretary of State to make Minimum Service Levels (MSLs) via regulations for strikes in ‘relevant services’ including health.
- Where a strike is called in a service to which MSLs apply, the employer may, after consulting the union, give the union a ‘work notice’, identifying the workers that are required to work and what they are required to do to ensure MSLs are met during the strike.

Strikes (Minimum Service Levels) Act 2023

- The Government has published a response to the consultation on a statutory Code of Practice on the reasonable steps for a trade union to take to comply with MSL obligations.

- Draft code sets out 4 steps for unions to take to facilitate MSLs:

1. Identification of members
2. Encouraging individual members to comply with a work notice
3. Picketing – try to persuade members who are identified in a work notice not to cross the picket line when they are required by the work notice to work
4. Assurance – unions should not undermine any of the steps that they take.

Government has also published separate guidance on the issuing of work notices in relation to minimum service levels.

Strikes (Minimum Service Levels) Act 2023

MSL Regulations will come into force on the later of the following:

- The time immediately after the coming into effect of the statutory Code of Practice on the reasonable steps a trade union should take to ensure that all members of the union who are identified in a work notice comply with the notice.

- The day after the day on which the regulations are made.

Currently there are draft regulations for border security, passenger rail and ambulance services.

Strikes (Minimum Service Levels) Act 2023

- The Government has also launched a consultation to consider introducing MSL Regulations that would cover urgent, emergency and time critical hospital-based health services (could cover hospital staff).
- This consultation ran from 19 September – 14 November 2023.
- The feedback is currently being analysed and the outcome is yet to be published.

Disability Discrimination

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Disability Discrimination

The definition of disability is set out in s.6 EA 2010, you are disabled if:

- You have a physical or mental impairment.
- Your impairment has a substantial and long-term adverse effect on your ability to do normal day-to-day activities.

Disability Discrimination – Direct Discrimination

Direct disability discrimination:

- This is where, because of disability, a person (A) treats another (B) less favourably than A treats or would treat others (section 1 (1)*, EqA 2010*).
- It is not direct discrimination for an employer to treat a disabled person more favourably than it treats or would treat a non-disabled person (*section 13(3) EqA 2010*).
- Direct disability discrimination cannot be objectively justified.
- An employee must show they have been treated less favourably than a comparator (real or hypothetical) whose circumstances are not materially different to theirs (section 23 (1) EqA 2010).

Disability Discrimination – discrimination arising from disability

This occurs where:

- A treats B unfavourably because of something arising in consequence of B's disability.
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Basildon & Thurrock NHS Foundation Trust v Weerasinghe, established two stage test:

- Did the claimant's disability cause, have the consequence of, or result in, "something"?
- Did the employer treat the claimant unfavourably because of that "something"?

Disability Discrimination – discrimination arising from disability

- Employer must have known (or should have known) about the claimant's disability.

- There is no comparator required.

The meaning of 'unfavourable treatment'?

- *Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65* - requires tribunals to answer two simple questions of fact:

- What was the relevant treatment?
- Was it unfavourable to the claimant?

Disability Discrimination – Indirect Discrimination

This occurs where (s6 and 19, EqA 2010):

- A applies to B a provision, criterion or practice (PCP).
- B has a disability.
- A applies (or would apply) that PCP to persons who do not have B's disability.
- The PCP puts (or would put) those with B's disability at a particular disadvantage when compared to other persons.
- The PCP puts (or would put) B at that disadvantage.
- A cannot justify the PCP by showing it to be a proportionate means of achieving a legitimate aim.

Disability Discrimination – Reasonable Adjustments

- Duty on employers to make reasonable adjustments in certain circumstances.

- The duty can arise where a disabled person is placed at a substantial disadvantage by:
  - An employer's provision, criterion or practice (PCP)
  - A physical feature of the employer's premises
  - An employer's failure to provide an auxiliary aid

- Employer is not obliged to make reasonable adjustments unless it knows or ought reasonably to know that the person is disabled and likely to be placed at a substantial disadvantage because of their disability.

- EHCR Employment Statutory Cose of Practice – non exhaustive list of potential adjustments.

Disability Discrimination – Harassment

This occurs where both:

- A engages in unwanted conduct related to disability
- The conduct has the purpose or effect or violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(S26 (1), EqA 2010)

Disability Discrimination – Victimisation

This occurs where:

- person A subjects another person B to a detriment because B has done, intends to do, or is suspected of doing or intending to do, any of the following protected acts:
- Bringing proceedings under the EqA 2010.
- Giving evidence or information in connection with proceedings under the EqA 2010, regardless of who brought those proceedings.
- Doing any other thing for the purposes of or in connection with the EqA 2010.
- Alleging that the discriminator or any other person has contravened the EqA 2010.

(Section 27(2), EqA 2010.)

Key Discrimination Cases 2023

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Unfavourable treatment arising from disability

McQueen v General Optical Council [2023] EAT 36

- EAT held that a 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

Reasonable Adjustments - Time Limits

Fernandes v Department for Work and Pensions

- Failure to make reasonable adjustments for an employee with back pain. Prior to maternity leave she had special chair. Upon return she was not provided with this, requested an ergonomic assessment.
- She went off sick for work-related anxiety/depression. Returned to work for 12 days before further sick leave. Ergonomic assessment was not completed in that time. Issued claims including failure to make reasonable adjustments.
- ET held she was out of time for this claim.
- EAT allowed appeal and issued guidance. Tribunal should consider when the reasonable employee would conclude that the duty to make reasonable adjustments was not going to be complied with – at this point clock would start to run.

Reasonable Adjustments - Menopause

Lynskey v Direct Line Insurance Services Ltd

- Employee worked at Direct Line 2016 - May 2022 when she resigned.
- She began struggling with poor performance because of menopause symptoms. She was moved from one role to one that was a 'better fit'.
- She was subject to a disciplinary/warnings – her condition was not fully considered.
- After a period of ill health her sick pay was cut off with her line manager not exercising discretion in relation to continuing her sick pay - her number of absences wasn't good for business.
- ET upheld her claims of disability discrimination and failure to make reasonable adjustments.

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

Reasonable Adjustments – job application

Aecom Limited v Mallon [2023] EAT 104

- Mr Mallon in this case informed Aecom he was dyspraxic and could not do the online application and requested for this to be done orally in emails. He could not create an account (username and password) as needed, although he did not specify this to employer.

- EAT upheld decision that an employer's requirement for job applicants to create an online profile and complete an online application put an applicant with dyspraxia at a substantial disadvantage.

- Employer should make reasonable adjustments.

Disability Discrimination

Morris v Lauren Richards Ltd [2023] EAT 19

- EAT held that when determining that an individual was not disabled under the Equality Act 2010 an Employment Tribunal had erred in law by focussing on the likely impact of terminating employment on the individual's anxiety when assessing whether the effect of the anxiety would likely last for at least 12 months.

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

Key NHS Cases

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Mid and South Essex NHS Foundation Trust v Catriona Stevenson & Ors [2023] EAT 115

- Appeal on whether the ET had erred in concluding the C's refusal of alternative "suitable employment" in a redundancy process was not unreasonable.

- EAT held that positions were suitable but the C's refusal to accept these positions was not unreasonable as their perception that they would lack autonomy in these roles was not groundless.

Hope v British Medical Association

- BMA dismissed Mr Hope for repeatedly brining ‘frivolous and vexatious’ grievances which he subsequently refuse to progress to formal grievances despite management instruction to. Was this dismissal unfair?
- EAT and ET held that the BMA had acted reasonably in his dismissal.
- Confirm employers can dismiss an employee for bringing grievances in bad faith, but each case is fact specific.

Mrs Gemma Dobson v Cumbria Partnership Nhs Foundation Trust

- C was dismissed after saying she was unable to comply with new flexible working arrangements due to childcare responsibilities.
- She claimed for indirect sex discrimination and unfair dismissal.
- It was held that the PCP of flexible working arrangements was a proportionate means of achieving a legitimate aim. Claim for indirect sex discrimination was dismissed.
- Unfair dismissal claim failed. Tribunal held Claimant could not compromise whatsoever and decision to dismiss was reasonable.

Fleming v East of England Ambulance Service NHS Trust

- Mr Fleming had issues with line manager. Also had anxiety and depression, suffered a heart attack following altercation with line manager and ultimately workplace issues with manager resulted in Post Traumatic Embitterment Disorder. He was never deemed well enough to return to work and was dismissed.

- ET ruled that Mr Fleming was unfairly dismissed and discriminated against as a result of his disability.

- The ET found the possibility of external mediation had not been explored, Trust's policies were looked at in isolation, and the Trust failed to take a holistic view towards Mr Fleming's workplace difficulties. The ET found that Trust had 9 Occupational Health reports and their recommendations were not sufficiently dealt with.

Ms L Fairhall v University Hospital of North Tees and Hartlepool Foundation Trust

- Whistleblowing case. Ms Fairhall, who was employed as a nurse, was dismissed after making 13 complaints about her employer.

- Complaints related to new policy which meant nurses were responsible for an extra 1,000 patients per month. Concern centred around nurses being overworked and stretched. ET found incidents relating to nurse absence due to stress and anxiety began to increase.

- She was dismissed for 'gross misconduct' after telling superiors she was to begin the whistleblowing process following a patient death she thought was preventable.

- Succeeded in claims for automatic unfair dismissal. ET said allegations against her were too vague without specific evidence.

Edward v Tavistock and Portman NHS Foundation Trust

- Claimant successfully claimed victimisation.
- Query over mitigation and reduction in a claimant's award for loss of earnings (50% reduction).
- Case highlights that the burden is on the respondent to show a claimant has not taken reasonable steps to mitigate loss. If this can't be proved on a balance of probability the ET won't find the claimant has failed to mitigate.

Ms A Cox v NHS Commissioning Board

- It was held her employer had treated her unfavourably due to her race and because she was willing to speak up (whistleblowing).
- Several incidents such as purposely arranging team days for when she was away, not informing her of recruitment processes, and sharing confidential information (health information) with other employees.
- NHS after the case issued an apology to her.

Holiday Pay Key Case

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Chief Constable of the Police Service of Northern Ireland and another v Agnew [2023] UKSC 33

- This case considered whether employees can claim for historic underpayments of holiday pay even if there are gaps of more than three months between the judgement?
- Supreme court said yes employees can.
- SC held that a gap of three months between underpayments of holiday pay does not automatically break the chain of a series of deductions if they are linked.
- So, it is important for employers to be aware that claims for underpayment of annual leave have the potential to become higher value. However, this is limited by the Deduction From Wages (Limitation) Regulations 2014, which means claims can only go back two years.

NHS Pension Scheme

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Proposed Changes to NHS Pension Scheme

The Department of Health and Social care announced a consultation on proposed amendments to the NHS Pension Scheme to be introduced in April 2024. The changes include:

1. Deliver phase 2 of the review of member contributions.

2. A new employer contribution rate to reflect the results of the 2020 scheme valuation

3. permanent removal of abatement for special class status (SCS') members, in line with the Agenda for Change pay deal for 2023 to 2024 which is currently suspended to 31st March 2025.

4. Further miscellaneous amendments.

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1. Member contributions – Phase 2

The changes outlined in the consultation are split into 4 sections:

- implementation of updated member contribution structure as agreed during the phase 1 consultation, with the additional proposed removal of the bottom tier
- futureproofing of the member contribution structure
- real-time re-banding
- changes to the pensionability of overtime up to whole time for members who work part time

1. Member contributions – Phase 2

Pensionable Earnings Thresholds	Contribution Rate (from 1st April 2024)
Up to £13,246	5.2%
£13,347 - £25,146	6.5%
£25,147 – 30,638	8.3%
£30,639 - £45,996	9.8%
£45,997 - £58,972	10.7%
£58,973 and above	12.5%

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2. New Employer Contribution Rate from 1 April 2024

- Employers are currently paying 14.38% of a member's pensionable pay towards the cost of pension rights they build up (NHS England typically contribute 6.3%, so total is 20.6%)

- 2020 actuarial valuation – show an increase in benefit costs, requiring 3.1% increase in contribution rate to 23.7%.

- Increase to be financed by Exchequer / central government.

3. Abatement for Pensions for SCS Members

- Permanent abolishment of pensions for special class workers who return to work.
- This is subject to Parliamentary approval (DHSC intends to amend the 1995 NHS Pension Scheme Rules)

4. Further miscellaneous Amendments

Partial Retirement:

- allow members of the 1995 Section who have breached the maximum service limits to partially retire.

- clarify in the regulations that where a member enters into a salary sacrifice arrangement, this does not constitute an eligible change to their terms of employment for the purposes of taking partial retirement.

Carers Leave:

- Proposal to amend the regulations to insert a provision for members who take unpaid carer's leave. Changes would provide further flexibility for working unpaid carers, allowing them to be absent from work for their caring responsibilities.

Lifetime allowance:

- Abolition of lifetime allowance in regulations to ensure compliance with the Finance Act which has abolished this.

Ensuring Staff Safety

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Health and Safety Executive Guidance

HSE updated its guidance on managing violence and aggression at work in March 2023.

March 2023 – HSE completed a report into the inspections carried out within the NHS from 2018 – 2022. The report identified management failings in four broad areas:

- risk assessment
- Training
- roles and responsibilities
- monitoring and review.

It was found that NHS employers don't often monitor their policies and procedures or review them to make sure they are working in practice and as effective as possible.

Health and Safety Executive Guidance

In certain situations, employees may be able to claim against you for harm, for example, personal injury claims.

You should take steps to prevent harassment of staff by service users and members of the public.

Suggested steps for prevention:

- Training and education on how to deal with violence and harassment at work.
- Regularly review and monitor your violence at work policies and prevention strategies to ensure they are effective.
- Encourage and create a safe atmosphere for staff to report concerns.

Questions?

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