

# Employment Law Update

Spring 2024

## Recent Developments

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- Substantial increases in civil penalties for illegal workers

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- Reintroduction of fees in Employment Tribunals
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## Recent Developments

# Substantial increases in civil penalties for illegal workers

**As part of the government's efforts to reduce illegal migration, substantial increases to illegal working penalties for employers come into force on 13 February 2024.**

- For a first-time breach, penalties will increase from £15,000 to **£45,000** per illegal worker.
- For repeat breaches, the current maximum penalty of £20,000 will triple to **£60,000** per illegal worker.



In order to assist employers, the Home Office has published an updated Code of Practice on preventing illegal working which will also come into effect on 13 February 2024.

The Code of Practice sets out the following:

- Processes on how employers should conduct right-to-work checks.
- Processes on what information and the length of time it must be retained by the employer.
- Requirement for employers to conduct follow-up right-to-work checks for workers whose immigration permission is time-limited.
- Requirement for employers to properly record their right-to-work checks.

A civil penalty can be mitigated if the employer can establish that they have complied with the Code of Practice. This would provide the employer with a defence known as a statutory excuse.

### Comment

*In view of these substantial increases, all employers should ensure they have internal measures and practices in place to comply with the Code of Practice and to carry out right-to-work checks on all employees/workers.*

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# New rights for working families

**New rights aimed at helping working families will apply from 6 April 2024. These include new rights for carers; improved paternity leave; changes to flexible working regulations; and extension of redundancy protection to employees during pregnancy and return from maternity leave.**

## New rights for carers

From 6 April 2024 employees who are carers will have a new statutory right to take up to one week of unpaid leave per year.

The right is a day one employment right meaning there is no minimum service requirement and will apply to all employees who meet the eligibility requirements.

To be eligible for carer's leave, an employee must:

- have a dependant (spouse, civil partner, child or parent who lives in the same household as the employee) with a long-term care need (illness or injury whether physical or mental that requires care for more than three months);
- make a written request to be absent from work to provide or arrange care for that dependant; and
- not have exceeded their entitlement of one week of carer's leave in the relevant 12-month period.



The key procedural requirements under the regulations are:

- Employees must give written notice when requesting to take carer's leave. The notice must state the employee's right to take carer's leave and give at least twice the amount of notice of the requested leave period or three days (whichever is the longest).
- Employers can postpone a request if the operation of the business would be unduly disrupted. The employer must give notice of the postponement before the leave was due to begin and explain why the postponement is necessary.
- Dismissal of an employee for a reason connected with their taking carer's leave will be automatically unfair.

The new carer's leave will not affect the right to time off for dependants. This applies to emergency situations and is also unpaid.

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## Improvements to Paternity leave

New regulations aimed at improving the rules around how and when statutory paternity leave can be taken are due to come into force on 8 March 2024 and will apply in cases where the expected week of childbirth (EWC) is on or after 6 April 2024.

Under the current rules, new fathers and partners must take their paternity leave in the first eight weeks of childbirth and it must be taken as a single block of either one or two weeks.

In addition, they must give notice of their leave dates 15 weeks before the EWC, and to be eligible for statutory paternity leave and pay, employees need six months' continuous service.

The regulations make the following changes:

- Employees will be able to take their two-week paternity leave entitlement as two separate one-week blocks.
- Employees will be able to take paternity leave at any time in the first year after birth or adoption of their child.
- Reduce the notice period to 28 days required from employees to request to take their paternity leave.
- Employers have no right to postpone an employee's statutory paternity leave or request that it is taken at a different time.

No changes are proposed to statutory paternity pay (currently £ 172.48 per week) or the eligibility requirements for paternity leave including 6 months' minimum service.

## Extension of Redundancy protections

From 6 April 2024, the redundancy protection which currently applies to employees on maternity leave will be extended to employees who are pregnant or returning from maternity, adoption or

shared parental leave. The protection gives them priority status for redeployment opportunities in a redundancy situation.

Currently, employees on maternity/adoption leave have some redundancy protection. The protection applies in a redundancy situation and requires an employer to offer a suitable alternative vacancy where one is available with the employer or an associated employer (i.e. a group company).

It is up to the employer to decide whether the vacancy is a suitable alternative and it must be offered on the same terms and conditions of employment.

This protection will now be extended to cover employees during pregnancy and for six months on return from maternity/adoption leave and shared parental leave. It will apply to pregnancies notified to an employer on or after 6 April 2024 and maternity/adoption leave ending on or after 6 April 2024.

For shared parental leave, the new protection applies to employees taking at least six weeks of shared parental leave which begins on or after 6 April 2024.

Taking into account the 12 months maternity/adoption leave period and 6 months following return from maternity/adoption leave, the protected period could be up to 18 months plus the pregnancy period for women taking maternity leave.

### Comment

*Extending the protection will increase the number of employees having priority status, causing potential difficulties for employers managing a redundancy situation. The extended period will also create uncertainty if the new role could not be carried out for 18 months or more, in which case another employee would need to be trained up on a temporary basis.*

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## Changes to the Flexible Working Regulations

The Flexible Working (Amendment) Regulations 2023 will come into force on 6 April 2024. These incorporate various changes to the flexible working regulations to make it easier for employees to request flexible working arrangements and a 'day one' right. However, employers can still refuse the request provided they comply with the process under the regulations.

The amended regulations incorporate the Government's response to the consultation on flexible working in 2022 following changes in working patterns caused by the pandemic.

The key change is removing the requirement for an employee to have completed at least 26 weeks of service before they have the right to request flexible working. This right now applies from the start of employment making it a Day One right.

Other changes are:

- Employees will now be able to make two flexible working requests per 12-month period (an increase from the previous limit of just one request per 12-month period).
- The employee's request must be in writing and the employers must usually make a decision within two months or longer by agreement (down from the previous period of three months).
- There is no longer a need for the employee to set out the impact their request has on the employer's business. The onus will now be on the employer to mitigate the risks.
- The employer must still deal with requests in a 'reasonable manner' which could include holding a meeting with the employee. However, there is now an added duty for the employer to consult with the employee as a means of exploring available options or alternative forms of flexible working before rejecting a request.



The employer can still refuse an application if they have a good business reason for doing so. Examples of good business reasons include extra costs that will damage the business, the work cannot be reorganised among other staff or the effect on quality and performance.

If the employer breaches the regulations or unreasonably refuses a request, the employee's remedy is to bring a claim in the Employment Tribunal for which the compensation is limited to up to 8 weeks' pay at the statutory rate of £643 per week. As compensation is minimal, the regulations do not therefore make much impact in practice provided that the employer follows the correct procedure. The amended regulations do not change the compensation provisions.

### Comment

*Flexible working and particularly, working from home remain an issue for employers and employees. Whilst increasing administrative obligations on employers, the amended regulations still only provide employees with a right to request but not to demand flexible working. There is, of course, nothing to prevent employers and employees from agreeing on flexible arrangements on an informal basis.*

*In view of the day one right, employers which operate on a hybrid basis (i.e. part office part home) should make their arrangements clear at the interview stage. Any request during the first 6 months could interfere with assessment during the probation period.*

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## Future Proposals

# Reintroduction of fees in Employment Tribunals

**The Government is proposing to reintroduce fees for issuing claims in the Employment Tribunal and the Employment Appeal Tribunal.**

There will, however, be a consultation before any decision is made. If fees are implemented, these will become payable for all claims issued on or after 1 November 2024. The proposed fee is £55 per case or appeal payable by the Claimant. By court standards, this is a modest fee.

The Government's previous attempt to introduce fees was overturned by the Supreme Court in 2017 ruling they were unlawful in the case of *R (on the application of Unison) -v- Lord Chancellor*. The level of fees which applied from 2013 was so excessive resulting in a substantial drop in Tribunal claims which, the SC ruled, 'effectively prevents access to justice and is therefore unlawful'. Following the SC decision, fees were abolished and refunds were paid to all claimants who had paid the fees from 2013 to 2017. However, the SC decision did not rule out fees completely provided they were set at a reasonable level.

The Government's current aim of reintroducing fees in 2024 is for users to contribute to costs in the tribunals, incentivise parties to settle their disputes early and to alleviate some of the pressures the tribunals are currently facing.



As the new proposed fee of £55 is low by court standards and there will be an exemption scheme for those unable to afford it, they are unlikely to be subject to any successful legal challenge.

### **Comment**

*Given the modest level and exemption scheme, the fees are likely to be introduced in November. They may make some impact on spurious claims but it is unlikely to make a significant difference. Once introduced the fees will doubtless increase over time..*

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This update was produced by Carolina Nakhle and Tessa Fry of Solomon Taylor & Shaw LLP Employment Team.

*Disclaimer – This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.*

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