



RETAINED EU EMPLOYMENT LAW REFORMS

USDAW RESPONSE TO DEPARTMENT FOR BUSINESS AND TRADE CONSULTATION

JULY 2023

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About Us

Usdaw is the UK's fifth largest union, representing around 350,000 members across the UK. Most of our members work in the retail sector but we also have a substantial membership in the distribution, food manufacturing, pharmaceutical and home shopping sectors.

Usdaw holds national agreements with four of the UK's biggest food retailers - the Co-op, Morrisons, Tesco and Sainsbury's, and we are also the recognised trade union for Asda stores in Northern Ireland. In the non-food sector we negotiate pay with Argos, Next Distribution, Ocado and Poundland nationally, as well as Primark in Northern Ireland. We also hold a range of agreements covering food manufacturing and distribution sites at national and local level.

Summary

We welcome the opportunity to respond to this Department of Business and Trade consultation. Usdaw has consistently opposed the Retained EU Law Bill, on the basis of its potential to see a downgrading of workers' rights, by giving ministers the power to use statutory instruments to that effect. Whilst many of the changes that were reportedly being considered appear to have been shelved, any downgrading of workers' rights is unacceptable. This is especially the case in the context of a cost of living crisis and an already weak employment rights framework in this country which leaves working people vulnerable to short-term economic headwinds. The proposed changes run contrary to the Government's commitment to 'protect and enhance workers' rights' and risk regulatory non-compliance, workers feeling unable to use their annual leave entitlement and the disempowerment of workers.

Working Time Regulations

1. **Do you agree or disagree that the Government should legislate to clarify that employers do not have to record daily working hours of their workers?** Please explain your answer, including consideration of the costs and benefits that may affect employers and/or workers.
 - Strongly agree
 - Agree
 - Neither agree nor disagree
 - Disagree
 - **Strongly disagree**
 - Don't know

2. **How important is record keeping under the Working Time Regulations to either enforcing rights (for workers) or for preventing or defending disputes (for employers)?** Please explain your answer.

- **Very important**
- Important
- Neither important nor unimportant
- Unimportant
- Don't know

Usdaw strongly disagrees that the Government should legislate to clarify that employers do not have to record daily working hours of their workforce and believes that record keeping under the Working Time Regulations is very important in enforcing rights for workers.

Employers not being required to keep adequate records of daily working hours of their workers will leave more workers vulnerable to exploitation and significantly damage enforcement of current entitlements, to the point where regulations may effectively become unenforceable. Such regulations, that are critical to the safety and wellbeing of workers, include:

- A ceiling of 48 hours work for the average working week, except for those workers who have opted out. This is particularly the case for HGV drivers who, due to the safety critical nature of their role, cannot opt-out of the 48 hour maximum working week.
- A ceiling of an average of 8 hours night work in every 24 hours.
- A rest period of 11 hours between working days.
- A maximum 40 hour working week for workers aged under 18.

Usdaw already has concerns about working time in the retail sector. HMRC has previously found significant examples of retailers breaching National Minimum Wage requirements as a result of employees being required to attend work before the official commencement of their shift. These requirements included things such as personal searches and team briefings, which should clearly be recorded as working time. Usdaw is concerned that not requiring employers to accurately record working time could result in the re-emergence of such issues.

Furthermore, workers are finding it increasingly difficult to monitor how their own working time is recorded. Since the introduction of online payslips, many Usdaw members report to the Union that, due to a lack of digital literacy, they can no longer access their pay information. It must be clear that, while employers may find it easier to provide payslips digitally, they are still required to keep accurate information for those employees who can no longer easily access their payslips.

In addition, structural changes in the retail sector have resulted in a loss of frontline high street roles and the growth of hidden retail roles as shopping moves online. These new roles typically have a lack of trade union oversight meaning that there is a significant risk of increasing numbers of workers not receiving their statutory entitlements.

The Government's proposed changes would signal to employers that accurate record-keeping is no longer important, which may then have a knock-on impact on

enforcement in other areas, for instance around the minimum wage. We have repeatedly expressed concerns around the resourcing of labour market enforcement in this country in our various written submissions in recent years to the Low Pay Commission and to calls for evidence on Labour Market Enforcement. The limited resources available to HMRC and the complex set of challenges it faces have been identified by the Low Pay Commission itself in its Non Compliance and Enforcement reports.

Taken together, these proposed changes, structural trends and changes in the retail sector and an existing lack of resources for pro-active enforcement would leave retail workers at significantly increased risk of exploitation and, with a legal system with major issues of its own, significantly less able to enforce their rights or seek redress.

Holiday Pay and Entitlement Reform

9. **Would you agree that creating a single statutory leave entitlement would make it easier to calculate holiday pay and reduce administrative burden on businesses?** Please explain your answer.

- Strongly agree
- Agree
- Neither agree nor disagree
- **Disagree**
- Strongly disagree
- Don't know

12. **What rate do you think holiday pay should be paid at?** Please explain briefly in your answer what you think should be included as part of the holiday pay rate you have selected.

- 5.6 weeks of statutory annual leave at basic pay
- **5.6 weeks of statutory annual leave at normal pay**
- Don't know
- Other (please explain)

Where we have collective agreements in place with employers, holiday pay is paid consistently across the 5.6 weeks and this appears to be standard practice. We are strongly against bringing all statutory holiday pay in line with the basic pay allocated to the UK-derived 1.6 weeks of holiday. Such a proposal would have the potential to see the widespread downgrading of holiday pay to basic pay, whereas currently holiday pay is generally paid at normal pay, in part as a result of the enhanced EU-derived 4 weeks. Usdaw has significant experience of members being employed on short-hours contracts, where they will have a contractual guarantee of around 8 hours per week yet regularly work at least 30 hours per week, classed as additional hours with no overtime premium. Prior to the introduction of holiday leave paid at normal pay, many members simply could not afford to take holiday leave. We have examples of members in some employers not taking a day off for over four years as a result of the financial detriment associated with taking annual leave. This was clearly unacceptable.

As mentioned above, for the purposes of simplicity, the employers we deal with now pay all annual leave at normal pay. This ensures that workers are not financially disadvantaged as a result of taking leave and protects workers from suffering burnout.

If all holiday pay was able to be paid at the level of basic pay, this would have a significantly negative financial impact on workers and leave many workers, particularly those on short-hours contracts, unable to afford annual leave. Usdaw is clear the Government must not reduce all statutory leave entitlement to basic pay.

13. Would you agree that it would be easier to calculate annual leave entitlement for workers in their first year of employment if they accrue their annual leave entitlement at the end of each pay period? Please explain your answer.

- Strongly agree
- Agree
- Neither agree nor disagree
- **Disagree**
- Strongly disagree
- Don't know

We disagree with this proposal, as if workers in the first year of employment accrue annual leave at the end of the pay period, they would not be able to take their last bit of holiday before the leave year and they may not be able to carry this holiday over.

14. Are there any unintended consequences of removing the Working Time (Coronavirus) (Amendment) Regulations 2020 that allow workers to carry over up to 4 weeks of leave due to the effects of COVID? If yes, please explain your answer.

- **Yes**
- No
- Don't know

Yes, we believe that removing the Working Time (Coronavirus) (Amendment) Regulations 2020 at a time when many people are still experiencing the impact of Coronavirus, in particular long-Covid, risks workers being unable to use their leave entitlement. Studies suggest more than two million people may be living with long-Covid and the longer-term consequences of Covid-19 are still poorly understood. In addition, the Government should consider making this right permanent, to give workers more flexibility around how they take their leave.

15. Do you think that rolled-up holiday pay should be introduced? Please explain your answer.

- Yes, rolled-up holiday pay should be introduced as an option for employers in relation to all workers
- **No, rolled-up holiday pay should not be introduced**
- Don't know
- Other (please explain)

Udaw strongly disagrees with the proposal to introduce rolled-up holiday pay. Annual leave is clearly separate to working time, this clear distinction needs to be retained. The Government's proposals have two clear risks. Primarily, employers are likely to treat, wherever possible, the hourly rate including overtime payment, as the consolidated rate, for example when advertising roles or comparing pay rates with comparators. This will lead to a driving down of total pay for workers, particularly those who are currently slightly above the National Minimum/Living Wage.

Secondly, the proposal will mean that workers do not receive payment during the time when they are off work, with an expectation that low paid workers will be able to budget for such a scenario. The truth is that this is unlikely to be possible. One reason why it is unlikely to be possible is that, as noted above, the proposal will lead to a reduction in overall pay. Secondly, under Universal Credit, we have seen an expectation that workers on four weekly pay cycles will be able to budget for a scenario where they do not receive a Universal Credit payment for one month as a result of having 13 pay days per year, yet the Universal Credit system only having 12 set reference periods. Many of these workers experience significant financial difficulty every time their Universal Credit payment is stopped, resulting in them getting into debt and struggling with the repayments. Prior to any action on this proposal, Usdaw believes that the Government should seriously engage with workers around the likely, although not necessarily intended consequence, the proposal could have on workers' ability to take their annual leave.

Furthermore, changes to holiday pay calculations, with the increase in the reference period to 52 weeks, were only recently introduced. Our experiences suggest employers and employees have now learned about, and understood this change, and employers have put systems and processes in place on this basis to ensure the correct calculation of holiday pay. To change the calculation of holiday pay again so soon risks significant confusion about what workers are being paid for and when, and means employers may not be able to correctly calculate the rolled-up rate and the 52 week reference period using their current systems.

Udaw considers that any move to allow a system of rolled-up holiday pay is likely to be interpreted as the Government's first attempt to weaken employment legislation in light of Brexit.

Transfer of Undertakings (Protection of Employment) Regulations 2006

7. Do you agree that the Government should allow all small businesses (fewer than 50 employees) to consult directly with their employees on TUPE transfers, if there are no employee representatives in place, rather than arranging elections for new employee representatives? Please explain your answer.

- Yes
- **No**

18. Do you agree that the Government should allow businesses of any size involved with small transfers of employees (where fewer than 10 employees are transferring) to consult directly with their employees on the transfer, if there are no employee representatives in place, rather than arranging elections for new employee representatives? Please explain your answer.

- Yes
- **No**

19. What impact would changing the TUPE consultation requirements (as outlined above) have on businesses and employees? Please explain your answer.

We have extensive experience of TUPE transfers, on both a large and small scale, in large and small employers. Sometimes, the transfers we see are single stores transferring between retailers in different regions, with very small numbers of staff impacted and local consultations. For example, a handful of OneStop stores and Co-op stores have transferred to Tesco over the past couple of years.

In light of our experience of these consultations, we strongly disagree with the proposals. Transfers are a challenging and worrying time for workers and it is important that these workers have a collective voice, as well as an individual voice and that consultation requirements are not watered down, even if only a small number of workers are involved, in a large or small company. In fact, it is where smaller numbers of employees are involved, particularly in smaller businesses, that the consultation requirements are perhaps less likely to be followed.

The impact of these proposals would be to further shift the balance of power in the workplace towards employers and would represent a green light for unscrupulous companies to not apply the regulations appropriately, leaving workers more vulnerable.

20. What is your experience of the TUPE regulations? Beyond the proposals above, how, if at all, do you think they could be improved? Please explain your answer.

In our experience, the current arrangements work well and employers have a good understanding of the TUPE regulations. The Government should not use this as an opportunity to further water down TUPE regulations and protections, to the detriment of the workers effected.

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