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The Employment Rights Bill

Next steps to support the most vulnerable workers

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About this publication

On 10 October 2024, the UK government published the Employment Rights Bill, the foundation in the Labour Party's long-term pledge to deliver a New Deal for Working People. This briefing, the first in a series of publications focused on ending precarious work in the UK, examines where the bill is today and what it will take for the government to level up protections for all workers. This briefing is not exhaustive and is designed to provide an agile response in tandem with the passage of the bill through Parliament.

We welcome feedback at research@workrightscentre.org

About Work Rights Centre

Work Rights Centre is a registered charity dedicated to supporting migrant workers and disadvantaged British residents to access employment justice and improve their social mobility. We do this by providing free and confidential legal advice, and by campaigning to address the systemic causes of labour and social injustice.

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1. Introduction

After much anticipation the Employment Rights Bill, the foundation in the Labour Government's pledge to deliver a New Deal for Working People, had its first reading in the House of Commons on 10 October 2024.

This is a complex, lengthy text. It will take years to shape and implement many of its proposals, and the government has made it clear the bill is but one in a series of steps to reform employment rights. But while this is just the beginning of policymaking, one thing is clear - the bill is likely to increase protections for millions of working people in the UK. The challenge is to ensure that by the end, these protections are also inclusive of the most vulnerable - the millions of people with worker status, the falsely self-employed, the non-unionised, seasonal workers, overseas domestic workers, and the thousands of migrants tied to their employers, who experience fiendishly complex issues. This briefing explains where the bill is today, and what it will take to level up protections for all workers.

2. A raft of new protections

Running at 158 pages,[1] and accompanied by a separate set of Explanatory Notes,[2] the Employment Rights Bill includes a raft of new protections. Among other things, it promises to:

- Give people on zero hours and minimum hours contracts the right to receive an offer of guaranteed hours that reflects their usual work schedule in a 12-week reference period.
- Strengthen Statutory Sick Pay, by removing the lower earnings limit and removing the current need to wait three days before sick pay kicks in.
- Give shift workers the right to receive compensation for shifts cancelled at short notice.
- Protect pregnant workers, making it unlawful to dismiss them within six months of their return to work (except in specific circumstances).
- Give people with employee status day one rights. This includes rights like maternity and redundancy pay and protection from unfair dismissal, that currently require a minimum length of service.
- Make it difficult for employers to fire employees for refusing a less favourable contract. While this does not outright ban "fire and rehire", employers would effectively have to show a judge that firing staff was the last line of defence against financial collapse.[3]
- Introduce a Fair Work Agency, bringing together the complex web of agencies that are currently responsible for enforcing labour rights. This will include enforcement of minimum wage, Statutory Sick Pay, and holiday pay breaches, as well as the Employment Tribunal penalty scheme, labour exploitation and modern slavery.

3. Reforms are likely to take shape for years

It is important to note from the onset that the Employment Rights Bill is the beginning of a lengthy reform process, and the majority of reforms will take effect no earlier than 2026. On the same day the bill was tabled, the government published Next Steps to Make Work Pay,[4] a policy paper that outlines these future delivery plans. This includes plans to flesh out provisions contained in the Employment Rights Bill, but also to implement wider reforms beyond the bill, in a process that will likely take years. This delay and period of consultation are likely designed to ensure that stakeholders are given appropriate time to feed into the development of complex changes, and that employers can prepare ahead of their implementation.

Some of the Employment Rights Bill provisions that will be subjected to separate consultations include:

- how zero hours workers are to be provided with guaranteed hours, beyond the initial 12-week reference period, and how this might apply to low hours workers and agency workers;
- what the percentage replacement rate for those earning below the current flat rate of Statutory Sick Pay should be;
- how much cancellation notice shift workers will need to receive, and the level of compensation for any shifts cancelled or curtailed at short notice;
- the length of the initial statutory probation period, during which businesses will find it easier to dismiss employees. Here the government states a preference for nine months;
- measures to extend the time limit for bringing claims to Employment Tribunals.

In terms of wider reforms beyond the bill, the government promised to:

- use non-legislative routes to remove National Minimum Wage age bands, institute a statutory Code of Practice on the Rights to Switch Off, modernise health and safety guidance, and develop menopause guidance for employers;
- adopt an Equality (Race and Disability) Bill which will include extending pay gap reporting to ethnicity and disability for large employers;
- review the parental and carer's leave systems;
- consult on a simpler framework that differentiates between workers and the genuinely self-employed, including giving the self-employed the right to a written contract.

To say that these proposals are ambitious and that consultation will be fierce would be an understatement. This is in many ways a reflection of what is at stake. Millions of people could be included, or excluded, from better employment protections based on how the government determines eligibility for guaranteed hours. Millions more will be affected by the framework for a single worker status. In many cases, those most at risk of exclusion are also the most vulnerable. What, then, does the government need to get right to ensure the New Deal is a good deal for the most vulnerable workers?

4. Proportionate probationary periods

Currently, employees only acquire protection from unfair dismissal after two years of continuous employment. Though the bill removes the two-year qualifying period, it envisages a probationary period in which employers would find it easier to dismiss people.

The Next Steps to Make Work Pay document confirms that the precise length of the probationary period will ultimately be subject to consultation, but that the government's preference is a period of nine months. The final length of the probationary period will be crucial, and it must not be designed in a way that practically excludes workers from protection. Similarly, the government will need to ensure that unscrupulous employers don't string employees along from one probation to the other. Currently, there is no statutory definition of what constitutes a fair extension of probation (though this may be enshrined in future updates to guidance such as Acas' Code of Practice on disciplinary and grievance procedures).

One group of workers that may miss out on full protections is those employed on fixed-term contracts, who constitute more than 5% of all working age people in the UK, and as much as 12% of black employees.[5] Subjecting people on one-year or two-year contracts to the same probation time as employees on permanent contracts would be disproportionate, adding insecurity to livelihoods which are already insecure, and entrenching precisely the type of racial inequality the government promised to address.[6]

A similar point can be made in respect of tens of thousands of migrant seasonal workers who come to the UK every year to work in horticulture, for a maximum period of six months, before being required to return to their country of origin. The government's current preference for a nine-month probation period would completely exclude them from full protection against unfair dismissal (with some exceptions). The situation for these workers is compounded because of an increase in concerns related to productivity, of which there is no specific regulation, and its use as potentially arbitrary grounds to dismiss workers prematurely.[7] In addition, these workers are generally not unionised and often do not have representation throughout the disciplinary process to challenge unfair dismissals.

RECOMMENDATION. To remedy this, we suggest that any probationary periods for individuals on fixed-term contracts are proportionate to their contract length. Given the well-established vulnerability of migrant seasonal workers to exploitation, the bill should also include a specific carve out for this population of the workforce.

5. Statutory Maternity Pay (SMP) eligibility

Pregnant workers are a beneficiary of the bill as it will now be unlawful to dismiss them within six months of their return to work, except for in specific circumstances. However, as we argued in the past,[8] a legislative gap in the maternity pay rules risks excluding lower-paid pregnant workers.

To qualify for SMP, individuals must meet certain qualifying criteria, including giving notice to the employer within a prescribed time, submitting specified evidence of the pregnancy and due date and, importantly, earning enough (£123 per week on average) over a specific period during the pregnancy (also known as the "relevant period").

However, if a pregnant worker earns less because they have been off sick or working fewer hours due to pregnancy-related illness, they can receive a reduced amount of SMP or none at all. This makes little sense. According to section 18 of the Equality Act 2010, "(2) a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably - (a) because of the pregnancy, or (b) because of illness suffered by her [in that protected period as a result of the pregnancy]". Indeed, the rules have previously been changed to allow for flexibility in other situations - e.g. furloughed workers during Covid were assessed for SMP on the basis of what they would have earned in the "relevant period" before birth, rather than furlough pay. Similarly, the calculation of notice pay is based on a reference period (generally 12 weeks before the notice period starts) that excludes time spent not working/ill. A similar system needs to be instituted for SMP.

Pregnant workers who fail to meet the earnings criteria for SMP could still claim Statutory Maternity Allowance (SMA), but they would do so at a potential disadvantage. Maternity Action have previously identified that SMA receives differential treatment when the Department for Work & Pensions considers Universal Credit awards (it is treated as unearned income, so is deducted from Universal Credit awards, whereas SMP is largely disregarded).[9] A new mum on Universal Credit who qualifies for SMA can therefore be £4,500 worse off than someone in the same circumstances, but receiving SMP, over a nine-month period of maternity leave.[10]

RECOMMENDATION. To resolve this historical injustice, our recommendation is simple - ensure the Employment Rights Bill amends the SMP regulations to allow for flexibility regarding the calculation of normal weekly earnings during the relevant period e.g. by allowing the weeks a pregnant worker was sick/worked fewer hours to be left out or to be substituted with other periods.

6. A single "worker" status

While the bill removing minimum service requirements is a welcome provision for employees who have recently started their roles, the extent to which the day one rights provision (and other parts of the bill) will protect the most vulnerable working people fundamentally depends on whether, and when, the government will introduce a single "worker" status. The Next Steps to Make Work Pay lists single "worker" status as one of ten longer-term delivery of reforms expected from autumn 2024 and onwards.

Currently, UK employment law distinguishes between three employment statuses.

- employees, who enjoy the broadest range of employment protections;
- workers, who enjoy just some employment protections (though special provisions apply to people classed as agency workers); and
- self-employed, who have no statutory protection under employment law, not even the right to National Minimum Wage.

Millions of people classed as workers miss out on rights such as protection from unfair dismissal, redundancy pay, or maternity/paternity leave, which are at present only available to employees.

Another category of people who will fail to benefit from these protections are the falsely self-employed. Here we are referring to people who are pressured into working on a self-employed basis by businesses (or individuals) that are trying to keep their payroll costs down (by evading paying Employer's National Insurance and pension contributions). In practice, these people are hardly independent entrepreneurs selling a service, but workers who are denied the protections inherent in employment law.

RECOMMENDATION. To protect them, a single "worker" status that draws a clearer distinction between workers and those who are genuinely self-employed will be key. The bill does not explicitly tackle this, and the government has promised to issue a consultation intended to create a "simpler framework that differentiates between workers and the genuinely self-employed". Given the stakes, we would urge the government to prioritise this.

7. Guaranteed hours

The bill aims to give people on zero hours and minimum hours contracts the right to receive an offer of guaranteed hours that reflects a 12-week reference period. This is a welcome step to tackling work (and pay) insecurity. In 2024, over 1 million workers in the UK were engaged on zero hours basis – with migrant workers and women over-represented in this category.[11] Previous research has also found that most workers would prefer a contract offering a predictable schedule,[12] and ending the practice could also support staff retention.

To ensure that the bill protects the most vulnerable workers, the government should widen eligibility and implement measures to prevent unscrupulous employers from finding loopholes.

There is a real risk that employers who already rely on a casual workforce of zero hours workers will evade the bill's requirement to offer guaranteed hours by casualising their staff even more. For example, some employers may pressure staff to work on a self-employed basis, a status which is currently excluded from the guaranteed hours protection. While these workers may contest their status at the Employment Tribunal, this takes considerable time and resources, as well as access to employment advice. It is imperative that the government prioritises the creation of a framework for a single worker status to prevent such employer behaviour.

Unscrupulous employers may also subvert the spirit of the bill by engaging more agency workers.[13] Under the current provisions, the bill excludes agency workers from the right to guaranteed hours - though it promises to consider including them through a separate consultation. Ensuring that this consultation concludes before the bill comes into force is key.

Finally, there is a risk that workers are given guaranteed hours, but are strung along on short-term contracts. While the bill specifies that time-limited contracts may only be offered in certain circumstances (if the worker is only required to perform a specific task, if the worker is only needed until the occurrence of an event, or if the employer only has a temporary need for the worker), these can be abused.

RECOMMENDATION. To ensure that the provision on guaranteed hours protects the most vulnerable workers, we recommend that the government streamlines the creation of a single "worker" status, extends guaranteed hours to agency workers, and includes resolution of disputes over contract limitations within the remit of the Fair Work Agency.

8. A Fair Work Agency that workers can trust

The bill's proposal to institute a Fair Work Agency that would act as a single body responsible for the enforcement of labour rights is welcome, and long overdue.[14] The enforcement of employment rights in the UK is currently divided between HMRC's National Minimum Wage team, the Gangmasters and Labour Abuse Authority, the Employment Agencies Inspectorate, and the Health and Safety Executive - distinct agencies with different remits, resources, and approaches to investigation. A separate network of agencies including the Home Office, the police, local councils, as well as third sector organisations, are involved in supporting victims of labour exploitation via the National Referral Mechanism for Modern Slavery. Employment Tribunals, the only institution with jurisdiction over the totality of employment law offences, are separate altogether.[15]

The Fair Work Agency could go a long way to address the well-documented confusion and inconsistency derived from this complex tapestry of agencies.[16] However, a few details are key.

Resourcing and fit with tribunals

The International Labour Organisation recommends that countries have one labour inspector for every 10,000 workers. At present, the UK is at a third of that rate.[17] Good resourcing is required to ensure that workers' reports are investigated in a timely fashion, but also that workers disenchanted with the Agency do not duplicate their and authorities' efforts by bringing the same claims to the Employment Tribunal.

Future consultations should consider how the Agency will complement and support Employment Tribunals, to ensure that workers don't miss out on remedies, and that resources are best spent. But this isn't a zero-sum game. Ultimately, it is important to remember that the tribunal system is a forum for *individual* workers to enforce their rights and this is different to the Fair Work Agency, the state enforcer of rights *generally*. They are separate but complementary and, at a resource level, must both be adequately supported.

The inclusion of migrant workers

Migrants constitute one in five workers in the UK.[18] They are both over-represented in low-paid work, and under-unionised. In 2023, 24% of UK-born workers were unionised, but the figure for foreign-born workers was just 16%.[19] If the Fair Work Agency is to empower all workers to stand up for their rights, it is paramount that it recognises the additional vulnerabilities faced by migrants in the workplace, and takes the steps to build a culture of trust and inclusivity. A first step in this direction would be to allow migrant workers and their representatives to join the Advisory Board which, according to the bill, will advise the Secretary of State on matters related to the labour market enforcement strategy.

A well-informed migrant worker contingent on the Board could help the Secretary of State to identify and adequately respond to the risks particular to migrant workers. As

indicated by a substantial volume of literature, this includes risks inherent in individual vulnerabilities (for instance in levels of English, IT literacy, or lack familiarity with UK rights), in community dynamics (related to trust in authorities, shame of whistleblowing, or fear of implicating others),[20] but also in the immigration system which, at present, disincentivises reporting by linking a person's permission to remain in the UK with their continued employment by the business that sponsors their visa.[21]

Including a Migrant Worker Welfare section into the Agency's annual strategy would help mitigate the risks derived from the current disconnect between the UK's approaches to immigration and labour enforcement. Over the past couple of years, a substantial volume of evidence submitted by charities,[22] journalists,[23] and most notably the Independent Chief Inspector for Borders and Immigration[24] found that a poorly designed work migration system has been responsible for a crisis of labour exploitation and reluctance to report, particularly in the care sector. Equipped with a diverse Board, the Fair Work Agency can be an opportunity to give the government, employers, and workers the coordinated, systemically cohesive vision that has lacked so far.

Secure reporting

A key issue for migrant workers when deciding whether to report a labour market offence will be the extent to which reporting risks their lawful immigration status in the UK (or is perceived as risking it). Data relating to migrants' immigration status has previously been shared with the Home Office,[25] and joint or simultaneous inspections have been conducted with Immigration Enforcement.[26] This has been an issue with the previous labour market enforcement bodies, who have consequently lacked upstream intelligence and reporting from migrant communities and victims of labour exploitation.[27]

The Employment Bill presents a unique opportunity to reset this dynamic. It will already abolish the Gangmasters and Labour Abuse Authority and Office of the Director of Labour Market Enforcement, bringing these bodies within the purview of the Secretary of State until a new Fair Work Agency is created. It is most likely that the new body will sit under the Department of Business and Trade rather than the Home Office - this is important because over the years labour market enforcement in the UK has been unable to disentangle itself from the immigration sphere, with its activities often subject to, or conditional on, separate priorities related to immigration enforcement. This has meant that the enforcement of workers' rights, and measures that would increase the government's ability to understand and tackle the full scale of labour exploitation (such as safe reporting), have been thwarted.

RECOMMENDATION. To address these concerns, Fair Work Agency should:

- be adequately resourced, and designed to support the Employment Tribunal system;
- allow migrant workers or their representatives to join the Advisory Board to the Secretary of State/Fair Work Agency;
- make migrant worker welfare a part of the annual strategy for labour enforcement; and
- include specific provisions to prevent the sharing of workers' immigration status with the Home Office.

The Illegal Working Offence

Another aspect of this entanglement which has not been touched by the current version of the bill is the Illegal Working offence under Section 34 of the Immigration Act 2016, which criminalises work done in breach of one's conditions of stay in the UK. This provision disincentivises irregularised and vulnerable migrants from reporting labour exploitation, despite the fact that many fall into irregularity because of the actions of an exploitative employer (see our previous analysis).[28] As exploitation becomes underreported, this makes the job of enforcing labour standards for all workers harder, and also entrenches the vulnerability of an already precarious cohort of the UK's workforce. Perhaps most damningly, it entrenches the view that immigration control is a more important policy prerogative than the enforcement of employment rights.

Resetting these practices will be an integral part of rebuilding trust with migrant communities, but so too is representation and accountability. Though the bill envisages a new Advisory Board to assist the Secretary of State with his functions relating to labour market enforcement, migrant workers or their representatives are, at present, notably absent from the mandated composition of this new board. This makes little sense when, by the government's own admission,[29] migrant workers have in recent years been at the sharpest end of exploitative practices in the labour market.

9. Enforcement against rogue company officers

The bill recreates the system of labour market enforcement undertakings and orders that appeared in the Immigration Act 2016. This system allows the Secretary of State (or in this case the prospective Fair Work Agency) to give notice to employers and request undertakings that they stop committing the labour market offence(s) in question. Failure to comply with one of these orders without reasonable excuse could result in a range of penalties, including imprisonment of up to two years. Similar offences are created for failing to provide documents and obstruction, while company directors and officers can be held jointly liable for these offences committed by a company if they have consented to them or been negligent (Section 105 of the Bill).

It remains to be seen how effective this system will be. Currently, it appears to be aimed at constraining bad behaviour rather than providing a remedy for affected workers, and much of its effectiveness will depend on how well the new Fair Work Agency is actually resourced.

This is where the Bill still falls short. A key issue for lower paid workers is their practical access to remedy. Currently, even if the employer has behaved unlawfully, workers are all too easily denied remedy. This can happen in a range of scenarios, including illegitimate phoenixing (whereby unscrupulous directors close companies and declare insolvency to avoid paying debts, only to reopen them under a different name), or instances where directors refuse to comply with tribunal orders.

According to the survey of Employment Tribunal Applications, a staggering 37% of claimants did not receive the money owed in 2012 (this figure was 28% in 2017, but the decrease was likely shaped by the introduction of tribunal fees).[30] Our employment legal advisers see echo of this in our client work.[31] Overall, it is simply too easy for rogue company officers to hide behind corporate structures which obfuscate workers' access to remedy.

RECOMMENDATION. The bill must contain provisions to deal with these issues. As a starting point, we suggest that the wording of Section 105 is adapted to ensure that, where workers cannot obtain remedy from their employer (a company), company officers who are found to have connived or consented to the issue, or contributed to it due to neglect, can be held jointly liable for the payment of associated tribunal awards or settlement amounts.

10. Conclusion

As the Employment Rights Bill quickly hurtles towards its second reading in the House of Commons on 21 October, it is important to take stock of exactly where we are. On the one hand, the bill is the "most significant shift in UK employment law in the last 50 years",[32] seeking to level up rights for millions of working people and address the lax regulatory environment. On the other, it has some way to go to include, or even identify the existence, the needs and priorities, of the most vulnerable groups of workers for whom the Bill was surely designed to have the most benefit. Migrant workers tied down through an inflexible work visa system, agency workers, and the falsely self-employed are pressing examples of this.

The reforms and amendments suggested in this briefing would go some way to redressing the injustices faced by the most precarious workers in our economy. We believe they are measured, achievable, and impactful for vast groups of workers, who are traditionally under-represented.

Moving forward, a truly worker-centric approach should also consider the wider ecosystem of forces that drive standards of work down – such as a work-sponsorship system that ties exploited migrant workers to their visa sponsors, or the practical and administrative barriers that workers face when attempting to access their rights. This is a more complicated endeavour than can perhaps be achieved through a single bill, but nonetheless remains crucial to the government's future approach in this area.

If the last few years have taught us anything, it is that no government's legislative programme is truly certain. The path ahead for the successful crafting and implementation of the Employment Rights Bill remains potentially thorny and, for this reason, it is important that the government gets it as "right" as possible the first time around. It is for this reason that we urge the government to heed the voices of organisations like ours, and all those working to advance the rights of vulnerable workers, in its development of the bill over the coming months.

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