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Insights

THE ERA'S HIDDEN GAME-CHANGER? HOW FIRE AND REHIRE REFORM WILL BLOCK YOUR ABILITY TO RESTRUCTURE YOUR WORKFORCE

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Summary

For years, fire and rehire has been unpopular but lawful. An employer who wanted to change pay, hours or other terms could dismiss an employee who refused and offer a new contract, provided it was a reasonable decision. From January 2027, that option all but disappears. The Employment Rights Act 2025 makes many fire and rehire dismissals automatically unfair as a day one right, removes the compensation cap, and increases penalties for failing to inform and consult. This makes the financial exposure effectively unlimited.

What is proposed?

The new law splits contract changes into two categories. Changes to pay, pensions, hours, certain shift patterns and holiday entitlement are restricted variations. Dismissing someone for refusing any of these is automatically unfair unless the employer can show the business faced a genuine threat to its survival and had no reasonable alternative. That is a near-impossible threshold. Everything else, including job duties, titles, reporting lines and place of work, falls into unrestricted variations. These are not automatically unfair, but employers must satisfy a new statutory fairness test that is significantly harder than the current one.

There is a further trap. A separate provision makes it automatically unfair to dismiss an employee to replace them with a contractor or agency worker (tune in this time next week for further details on this). Genuine redundancies remain lawful, but relabelling a role to sidestep the rules will not work.

What this means for employers

This raises the bar dramatically. Today, a pay cut can often be justified as a reasonable business decision. Under the new regime, the business must be facing an existential threat, and even then tribunals will scrutinise the process closely. With uncapped compensation and enhanced penalties for failures in the information and consultation process, the cost of getting it wrong is significant. And these provisions do not only catch formal dismissals.

Another important consideration for employers is that constructive dismissals also fall within scope. This means that where an employee resigns in response to pressure to accept new terms, or where they allege that a contractual term has been varied without consent employers face the same unlimited exposure. This is going to be difficult for employers even where they do not intend to dismiss and re-engage, particularly where they want to make an operational change and whether it involves a contractual change is unclear. Common examples are changes to reporting lines and changes to benefits.

Employers also need to watch the line between genuine redundancy and workforce replacement. If the activity has genuinely diminished, a redundancy dismissal remains potentially fair. But if the same work still needs doing and the employer can make savings by using contractors or agency workers instead, that is automatically unfair even if it looks like a textbook redundancy. The test is whether the need for the work has actually reduced, or if the employer is just swapping who does it? Get that wrong and rather than a “fair” redundancy, employers face an automatically unfair dismissal claim.

What to do now

Employers should not wait until January 2027. The window to act is now:

- audit existing contracts to understand what flexibility clauses permit, because inserting new ones after the rules take effect will itself be automatically unfair;
- favour incentives over compulsion: offer something of value in exchange for agreement, rather than imposing change;
- lock down contracts with robust "no oral variation" and "entire agreement" clauses to prevent informal promises hardening into binding terms;
- for regulated firms, build flexibility for regulatory pay changes into contracts now, before January 2027 closes the door.

Fire and rehire will not vanish, but the combination of automatic unfairness, uncapped compensation, and tougher penalties for procedural failures makes it a last resort with potentially significant consequences.

For further information about the Employment Rights Act 2025 and its fire and rehire provisions, please get in touch with your usual BCLP employment contact.

Related capabilities

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