

## Two-Year Qualifying Period for Unfair Dismissal in UK Only for New Joiners

The Government plans on 6 April 2012 to increase the qualifying period of service required to have been completed for an employee to be able to claim unfair dismissal from one to two years in order to reduce the burden on business of unfair dismissal claims. It is understood that the Department for Business, Innovation and Skills (BIS) has now confirmed that, subject to Parliamentary approval, the new two year qualifying period for unfair dismissal will not be retrospective — it will only apply to employees whose employment begins on or after 6 April 2012 and those who are already employed before that date will retain the current one year qualifying period. This *DechertOnPoint* explores the potential impact these developments may have upon employers.

### Policy Background

In response to an unattractive economic backdrop and rising unemployment, in its November 2011 press release BIS took the view that the move to a two year qualifying period will encourage growth and give businesses, especially small employers, confidence to hire more staff. It also estimated that the change will save business approximately £5.5m a year, and that this, combined with other proposals in the consultation, should see the number of unfair dismissal claims drop by up to around 2,000 a year. What it had not done, until recently, was to confirm that the regulations that will implement the change will only apply to employees whose employment **begins** on or after 6 April 2012.

### Practical Consequences

Whilst the Government's response to the consultation on this proposal indicated that individual businesses agreed that extending the qualifying period would make them more confident about hiring new workers, it remains to be seen whether this will be the case. Also, it has to be said that it is not clear that this change to

the eligibility threshold for unfair dismissal will make a significant difference to employers' overall exposure to potential employment liabilities. Many employers already make use of probationary periods and will generally have terminated the employment of those individuals who prove not to be suitable well before the current one year qualifying period has expired in any event. For such employers, having the extra year to dismiss may not make a great difference to their business. If employers end up being tempted only to address poor performance towards the end of the qualifying period, the risk is increased of other employment claims arising in the meantime.

One concern which has been expressed about the potential consequences of the increased qualifying period is that individuals who, but for the increased qualifying period, would have been able to claim unfair dismissal, may be more likely try to bring alternative claims, such as whistleblowing or unlawful discrimination, which do not have qualification periods (or indeed compensation caps). Some commentators have expressed the concern that employers will face greater levels of unfounded discrimination and whistleblowing complaints brought by those

unable to claim unfair dismissal due to short service. The Government is, however, unconvinced that there will be widespread substitution of current unfair dismissal claims into other jurisdictions and claims that there is little evidence that, for example, where there are grounds for a discrimination claim, individuals are currently choosing to pursue an unfair dismissal claim instead.

## Potential Challenge

While not directly impacting upon employers at this stage, there is also the possibility of a potential legal challenge to the two year threshold on the basis of indirect discrimination against certain groups.

Between 1985 and 1999, the qualifying period for unfair dismissal was also two years and a legal challenge was mounted on the basis that the two year limit was indirectly discriminatory on the grounds of sex, because women tended to have shorter service periods than men (*R v Secretary of State ex parte Seymour-Smith and Perez* (No.2) [2000] IRLR 263). The challenge ultimately failed as the House of Lords held that, while the limit did result in an unequal impact upon men and women, it was objectively justified.

The Government's own impact assessment of the proposal to increase the unfair dismissal eligibility threshold indicates that there may be some mileage in the argument that the increase in the qualifying period will have a disparate impact on young workers and, to a lesser extent, non-whites and women. It is therefore conceivable that this increase

in the qualifying service requirement could also be subject to a similar challenge.

## Conclusions

It would be ironic if a change to the law intended to improve recruitment were to cause employers to pause their engagement of new staff until April in order to avoid their being entitled to protection from unfair dismissal after one year under the current regime. The fact that new joiners will have to wait longer to acquire unfair dismissal claims does, however, increase the risk of staff resorting to bringing more whistleblowing and discrimination complaints. The proposed change does therefore reinforce the need for employers to consider whether they have adequate training and systems in place to minimise their exposure to such claims.



This update was authored by Charles Wynn-Evans (+44 20 7184 7545; charles.wynn-evans@dechert.com) and Kate Astbury (+ 44 20 7184 7463; kate.astbury@dechert.com).

Visit our website for more information on our [London employment team](#) and [International Employment Practice](#).

Download a copy of our detailed briefing [Employment Law in England and Wales](#).

---

## Practice group contacts

For more information, please contact one of the lawyers listed, or the Dechert lawyer with whom you regularly work. Visit us at [www.dechert.com/employment](http://www.dechert.com/employment).

Sign up to receive our other [DechertOnPoints](#).

### Charles Wynn-Evans

London  
+44 20 7184 7545  
charles.wynn-evans@dechert.com

### Kate Astbury

London  
44 20 7184 7463  
kate.astbury@dechert.com

Dechert internationally is a combination of limited liability partnerships and other entities registered in different jurisdictions. Dechert has more than 800 qualified lawyers and 700 staff members in its offices in Belgium, China, France, Germany, Hong Kong, Ireland, Luxembourg, Russia, the UK, and the US.

Dechert LLP is a limited liability partnership registered in England & Wales (Registered No. OC306029) and is regulated by the Solicitors Regulation Authority. The registered address is 160 Queen Victoria Street, London EC4V 4QQ, UK.

A list of names of the members of Dechert LLP (who are referred to as "partners") is available for inspection at the above address. The partners are solicitors or registered foreign lawyers. The use of the term "partners" should not be construed as indicating that the members of Dechert LLP are carrying on business in partnership for the purpose of the Partnership Act 1890.

Dechert (Paris) LLP is a limited liability partnership registered in England and Wales (Registered No. OC332363), governed by the Solicitors Regulation Authority, and registered with the French Bar pursuant to Directive 98/5/CE. A list of the names of the members of Dechert (Paris) LLP (who are solicitors or registered foreign lawyers) is available for inspection at our Paris office at 32 rue de Monceau, 75008 Paris, France, and at our registered office at 160 Queen Victoria Street, London, EC4V 4QQ, UK.

Dechert in Hong Kong is a Hong Kong partnership regulated by the Law Society of Hong Kong.

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking action. This publication, provided by Dechert LLP as a general informational service, may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Dechert in Ireland is an Irish partnership regulated by the Law Society of Ireland.

© 2012 Dechert LLP. Reproduction of items from this document is permitted provided you clearly acknowledge Dechert LLP as the source.

**EUROPE** Brussels • Dublin • Frankfurt • London • Luxembourg • Moscow • Munich • Paris  
**U.S.** Austin • Boston • Charlotte • Hartford • Los Angeles • New York • Orange County • Philadelphia  
Princeton • San Francisco • Silicon Valley • Washington, D.C. • **ASIA** Beijing • Hong Kong