

# Linklaters

Employment & Incentives  
Legal Outlook 2024





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# Introduction

2024 began with a bang as the Retained EU Law (Revocation and Reform) Act 2023 came fully into force, together with reforms to key rights under the Working Time Regulations 1998 and the Equality Act 2010. Industrial action and collective rights will be high on the agenda with minimum service level agreements under the Strikes (Minimum Service Levels) Act 2023 being determined and a new statutory code on the use of fire and rehire entering into force. Workplace culture continues to evolve and in 2024 we expect to see tougher laws on sexual harassment and an acceleration in the impact of AI and automation.

Listed companies will need to continue navigating the plethora of rules and investor, proxy advisor and regulator policies and expectations on executive pay. There are continuing concerns on quantum, windfall gains, use of ESG metrics and transparency, all in the context of the ‘fairness’ agenda which has evolved since the pandemic. Companies are aware that they may face significant levels of dissent for their pay resolutions at 2024 AGMs but need to decide what’s right for the company.

For organisations operating in the financial sector, there are potential pay structure changes to consider with the removal of the bankers’ bonus cap and the relaxation of some pay and disclosure rules for ‘small firms’.

And we expect to see all global companies gearing up to implement the EU’s Pay Transparency Directive which comes into force in 2026.

With the prospect of a general election by the end of the year, 2024 promises to be a year of change on many fronts.



With so much change coming in 2024 including on employment law reform; AI and automation; pay transparency; diversity and inclusion reporting, and a focus on workplace culture, it will be important for businesses to step back and consider all these changes in the round and decide how to respond from a strategic perspective.”

**Alexandra Beidas**, Global Head of Employment & Incentives, London



# All businesses operating in the UK

## The future of work

### Retained EU law

On 1 January 2024, retained EU law ceased to be part of UK law as the Retained EU Law (Revocation and Reform) Act 2023 (**REULA**) came fully into force. The Act brings an end to the principle of the supremacy of EU law in the UK, removes EU principles of interpretation, such as proportionality, and abolishes the application of directly effective EU rights. It also gives the UK courts powers to depart from previously binding retained case law and introduces a referral process, allowing lower courts to obtain fast track consideration by higher courts of questions of departure from retained case law. The changes give rise to considerable uncertainty as to whether EU-derived employment rights will be interpreted in the same way.

### Employment law reform in connection with the Retained EU Law Act 2023

Amendments to the Equality Act 2010 and the Working Time Regulations 1998 also took effect on 1 January 2024. These are designed to preserve EU-derived rights which may otherwise have been lost as a result of the sunset provisions contained in REULA. The amendments include the requirement to calculate holiday pay based on normal pay, the right to carry forward untaken annual leave in certain circumstances, including absence on sick leave or maternity leave, and the right to bring “single source” equal pay claims.

## AI and automation

As the deployment of artificial intelligence across the employment lifecycle gains momentum, so too does awareness of the associated legal risks. The case of *Manjang v Uber* is a stark reminder of how discrimination risks can arise, where facial recognition software was alleged to place people from ethnic minority groups at a disadvantage. The case, which is currently awaiting a hearing date, is likely to be one of a growing number of tribunal claims challenging the use of AI in the workplace.

Change is underway in the EU as it prepares to introduce the first ever legal framework on AI through the AI Act next year. The EU Platform Work Directive will also create a framework of protection for platform workers who are subject to algorithmic management. However, the UK’s approach remains light touch via the use of regulatory guidance. It remains to be seen whether the existing legal framework of the Equality Act 2010, data protection laws and protections under the European Convention on Human Rights will prove sufficient to govern the use of AI and automation in the workplace.



Artificial intelligence is fuelling a new wave of workplace transformation. The pace of change in 2024 must be matched by a renewed focus on both the opportunities and the challenges for employers.”

**Sinead Casey**, Employment Partner, London

## Human rights in the UK

Human rights are increasingly relevant in the development and interpretation of employment law. In 2023, they were a feature in key employment law issues including the Supreme Court’s decision in *Independent Workers Union of Great Britain v Central Arbitration Committee*, on the status of Deliveroo riders, and the judicial review of the ban on the use of agency workers during strike action. They are set to remain topical in 2024, particularly in respect of philosophical belief discrimination cases and concerns about the impact that the Strikes (Minimum Service Levels) Act 2023 will have on the right to freedom of assembly and association.

## New worker rights

New worker and family friendly rights will come into effect in 2024:

- > Carer’s leave – a new unpaid leave entitlement of one week a year from day one for employees to provide or arrange care for a dependant with a long-term care need.
- > Protection from redundancy for pregnant women and new parents – redundancy protection will be extended to cover pregnancy and an 18-month period from childbirth or placement of a child with their adoptive parents.
- > Allocation of tips – workers will be entitled to 100% of any tips, gratuities and service charges earned and employers will have a responsibility to fairly allocate them no later than the end of the month in which they were paid by customers.
- > Predictable terms and conditions for workers – providing they meet certain criteria, workers and agency workers will be able to make two requests a year for a more predictable contract.
- > Flexible working – the existing flexible working regime will be reformed to help more employees balance work and home life from day one of employment.

### Read more

[Law reforming flexible working receives Royal Assent](#)



# All businesses operating in the UK

## Terminating employment

### Statutory Code of Practice on Fire and Rehire

A [draft code](#) on the practice of dismissal and re-engagement was issued for consultation in early 2023. The code sets out a step-by-step process that employers should follow, including considering alternatives to fire and rehire and conducting meaningful consultation with employees.

The consultation closed in April 2023 and the government has now indicated that the final version of the code will be published in Spring 2024. Once introduced, tribunals will be required to take the code into account and will have the power to apply a compensation uplift of 25% where an employer unreasonably fails to follow it.

In the meantime, employers considering conducting a termination and re-engagement exercise should look carefully at the provisions of the draft code when designing their process.

### USDAW v Tesco Stores Ltd

Fire and rehire will also be scrutinised by the courts in 2024 when the Supreme Court considers the injunction application in *USDAW v Tesco Stores Ltd*. The case concerns the use of termination and re-engagement as a means to remove a pay award, which had been characterised by the employer as permanent. While the High Court granted the injunction, on the basis that there was an implied term preventing Tesco from exercising its right to terminate for the purpose of

removing the pay award, this was overturned by the Court of Appeal. The case will be heard by the Supreme Court in January 2024.

### Reform of post-termination non-compete clauses

In May 2023, the government announced the introduction of a statutory cap of three months on non-compete clauses in employment and worker contracts. Guidance was also promised. The proposals followed a consultation on measures to reform non-compete clauses conducted in 2020.

No specific timeframe was announced for either the legislation or the guidance but progress towards implementation may occur in 2024.

## Industrial action and trade unions

### Minimum service levels (MSLs)

Levels of industrial action remain at their highest in decades. The Strikes (Minimum Service Levels) Act 2023 aims to balance the right to strike and the impact on the public by enabling MSLs to be applied within certain sectors. Trade unions served with a work notice, requiring certain workers not to take part in the strike in order to maintain MSLs, will be required to take “reasonable steps” (following the guidance in the new [Code of Practice](#)) to ensure that those workers identified remain on duty during the strike.

The Trades Union Congress (**TUC**) has [reported](#) the government to the International Labour Organization, the UN workers’ rights watchdog, alleging the Act is “undemocratic”. The outcome is awaited.

## Agency workers

The government appears resolute in its aim to lift the prohibition under Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 on supplying agency staff to replace employees on strike. Last year, the High Court quashed legislation repealing the ban because of the government’s failure to consult. In response, the government resurrected its plan to lift the ban by launching a [consultation](#) which closes on 16 January 2024.

## Other developments

After being heard in December 2023, the Supreme Court’s decision in *Secretary of State for Business and Trade v Mercer* on whether employees are protected from action short of dismissal when taking official industrial action is awaited.

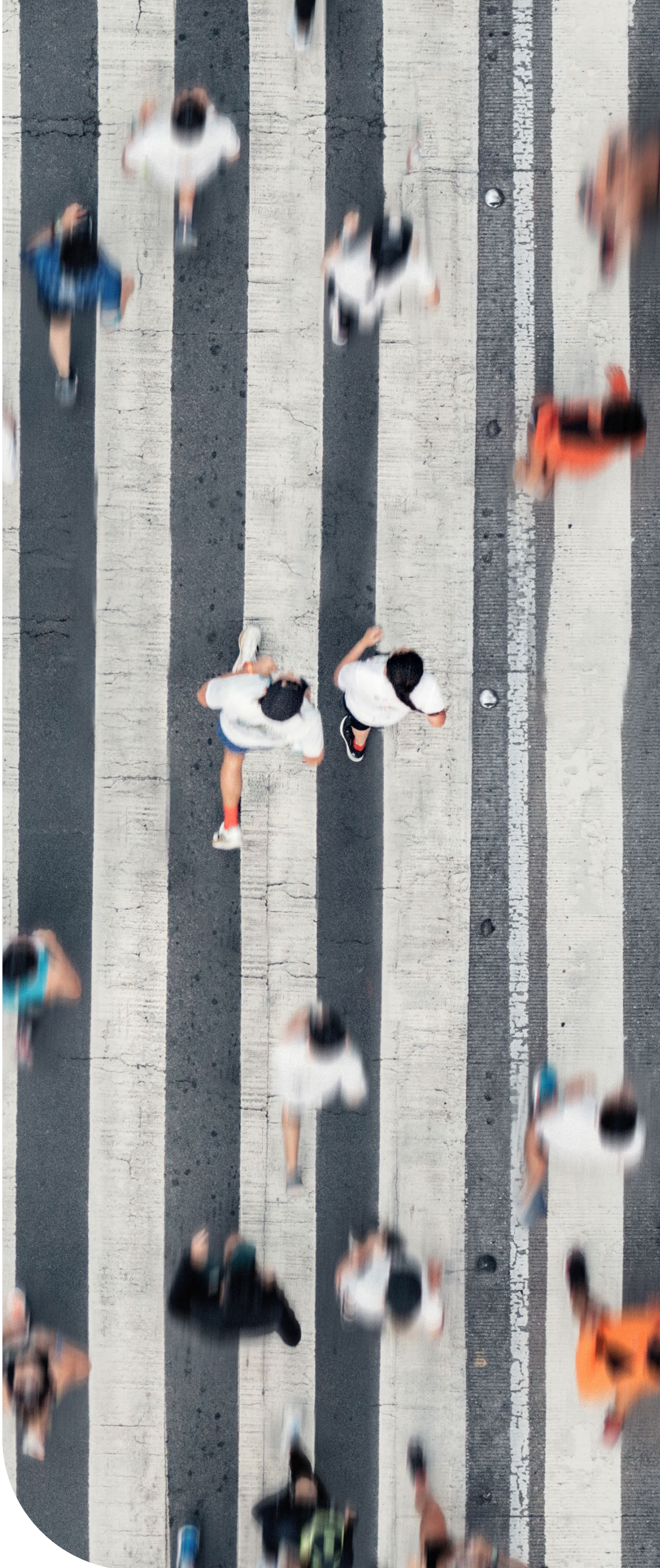
We could be entering a new era of collective bargaining as the main opposition parties outline proposals to strengthen the ability of unions to represent workers.

### Read more

[Post-Brexit reform of employment laws](#)

[Reform of non-compete clauses in employment and worker contracts](#)

[Government publishes draft code of practice on dismissal and re-engagement](#)





# All businesses operating in the UK

## Workplace culture

### EU Pay Transparency Directive

The EU is preparing for a new pay transparency regime which will come into force in 2026. The EU Pay Transparency Directive will introduce gender pay reporting obligations similar to those which exist in the UK. However, the obligations are backed up by a powerful enforcement mechanism which allows workers to seek additional information and imposes a compulsory audit where a pay gap of more than 5% is revealed.

While the UK is not within the scope of the Directive, the new standards it sets are likely to influence practice in the UK, particularly among multi-national employers. Once in force, the Directive will give UK employees ready access to the pay data of comparators working in the EU.

### Non-financial misconduct and new diversity reporting

The long-awaited FCA and PRA consultation papers on D&I in the financial sector set out far-reaching proposals to drive change in the sector.

To address non-financial misconduct, such as bullying, discrimination and sexual harassment, their proposals include amending the scope of the conduct rules to include this type of conduct, and introducing new guidance to reflect that this type of misconduct is potentially relevant to fitness and propriety and the assessment of whether a firm meets the suitability threshold condition for authorisation.

The regulators also propose to introduce reporting of diversity metrics for the board, senior leaders and the employee population. It is intended that mandatory reporting will apply for age, sexual orientation, sex, disability, ethnicity and religion. Firms may voluntarily report gender identity, parental or caring responsibilities and socio-economic background.

### Expression of belief in the workplace

The case of *Higgs v Farmor's School*, heard by the EAT in 2023, underlined the challenges employers can face in navigating employee expressions of belief in the workplace, particularly where those beliefs could be perceived as offensive. Ms Higgs' gender critical views, expressed in Facebook posts, and the actions of the school in dismissing her, needed to be considered, not only under discrimination law but also in the light of the right to freedom of belief and freedom of expression.

The issue will remain under scrutiny in 2024 with EAT judgments expected in the cases of *Bailey v Stonewall Equality Ltd* (a further case concerning gender critical philosophical beliefs) and *McClung v Altrad Babcock Limited* (on whether support for Rangers Football Club could amount to a protected philosophical belief).

### Sexual harassment

Tougher laws on sexual harassment are set to come into force in Autumn 2024, with the introduction of a new duty for employers to take "reasonable steps" to prevent staff from sexual harassment at work which will be supported by a new statutory code of practice.

## Whistleblowing

In March 2023, the government launched a [review](#) of the whistleblowing framework and its effectiveness in protecting whistleblowers. Although the review was wide ranging in its scope (looking at the availability of information, best practice and the extent to which the current framework has facilitated disclosures), proposals made by whistleblowing charities and in Private Members' Bills provide a model for potential legal reforms. The review concluded in Autumn 2023 and the outcome is awaited.



Workplace culture is constantly evolving. New standards on pay transparency in the EU and diversity reporting in financial services will spill over to drive wider change in 2024."

**Nick Marshall**, Employment Partner, London

### Read more

[Diversity Legal Outlook](#)

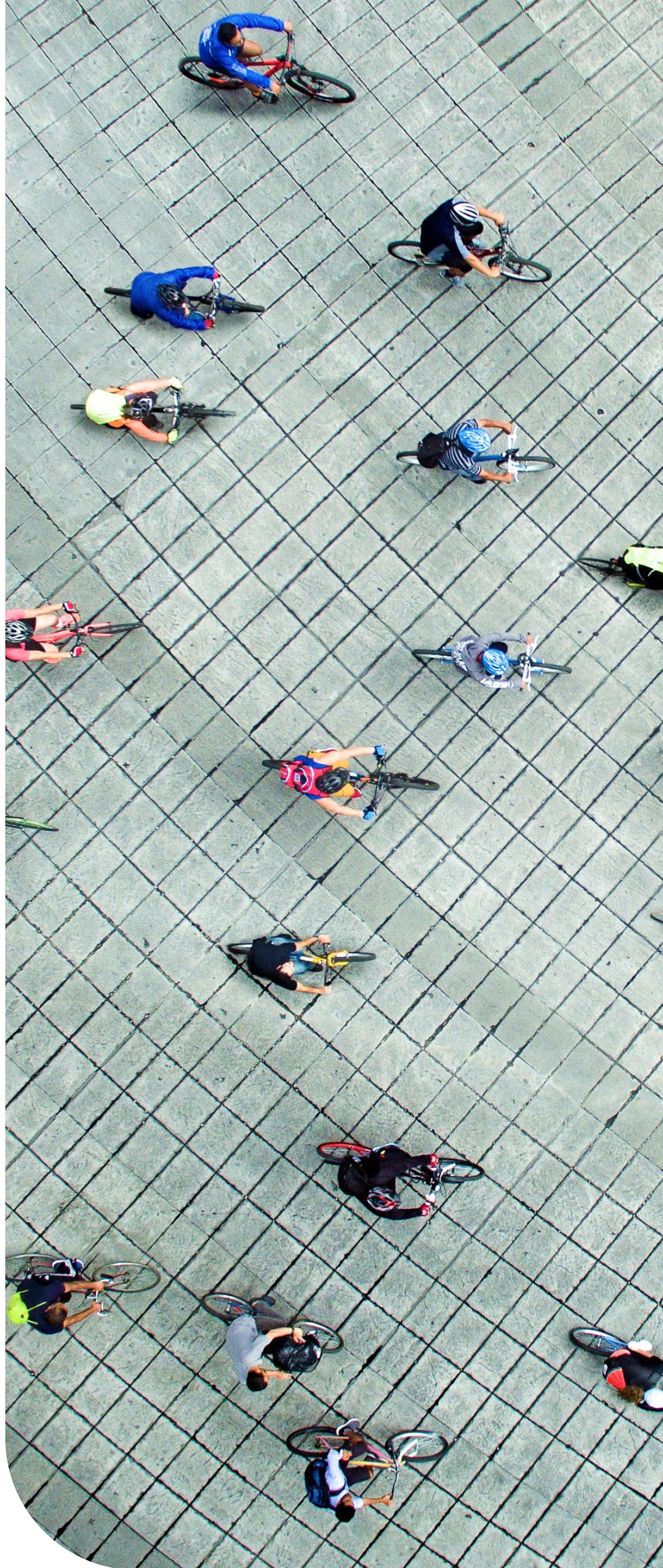
[The EU Pay Transparency Directive](#)

[Financial services regulators in the UK publish consultation papers to boost diversity and inclusion](#)

[Expression of belief in the workplace](#)

[New employer duty to prevent sexual harassment](#)

[UK whistleblowing laws under review](#)







# UK listed companies

## Executive remuneration

2024 is not a ‘triennial approval year’ for the directors’ remuneration regime so fewer companies will present policies to shareholders’ vote than in 2023. These companies, as well as those implementing ongoing policies and preparing remuneration reports for shareholder approval in 2024, will be doing so against a similar legislative and regulatory landscape as in 2022/23.

The 2023 AGM season saw a small drop in shareholder dissent compared to 2022. Up to the end of December, nine FTSE 350 companies received a substantial vote of 20% or more against the remuneration policy. 22 FTSE 350 companies received between 20% and 49.9% vote against their implementation report and two lost the vote. It may well be that the 2024 AGM season will see continuing levels of dissent.

Concerns about windfall gains, quantum, ESG metrics and comprehensive disclosure still persist and 2024 may well see developments in these areas.

## Windfall gains and discretion

Awards vesting in 2023 were mostly granted in 2020 during the fall in share prices resulting from the Covid pandemic (so over a higher number of shares). Proxy advisers and investors generally favour companies reducing award levels at grant to prevent windfall gains. Companies which have done so should refer to this when reporting on the 2023 vesting outcomes of these awards.

Where grant sizes have not been scaled back, investors expect remuneration committees to consider exercising

discretion to reduce vesting levels and prevent windfall gains, so participants do not benefit from being granted significantly more shares. Remuneration reports should explain clearly how the impact of any potential windfall gains was considered and why any or no reduction was appropriate.

In their review of [Corporate Governance Reporting](#) in 2023, the FRC looked in particular at how and whether remuneration committees took into account the potential for windfall gains, and the explanations and rationale given for adjusting, or not adjusting, outcomes. There were many references to windfall gains in reviewed reports (but few downward adjustments), and where adjustments were not made most companies did give a rationale. The FRC would like companies to explain their approach to applying discretion, demonstrating decision-making based on clear criteria to remove the risk of subjective and inconsistent outcomes.

## Quantum and benchmarking

Since the pandemic, the general message has been that directors’ pay should be commensurate with the experience and expectations of employees, suppliers, shareholders and wider society, particularly in view of the cost of living crisis. Remuneration committees are under pressure to guard against unjustifiably high levels (or potential levels) of pay, and to show restraint on overall quantum. However, they are also under pressure to take other factors into account when setting pay policies and packages, such as company sector and size and global operations. Glass Lewis, the only proxy

adviser to have so far issued [updated policy guidelines](#), seem to be open to non-standard benchmarks where appropriate (for example where there are industry-specific pressures on attracting and retaining talent). It may be that investors would be prepared to consider companies deviating from prevailing market practice in their main country of operations. There may be developments in this area in 2024.

## Directors’ remuneration report guide

Our online tool to help companies put together their annual directors’ remuneration report and (where relevant) remuneration policy has been updated to the extent that updated guidance is available. The guide will be further updated in 2024 as and when other proxy advisers and investor bodies publish their guidelines. In the meantime, the rules and requirements which the guide covers continue to apply to 2023 reports and pay considerations for 2024.



# UK listed companies

## ESG metrics

ESG and sustainability are likely to be part of any business strategy. The Corporate Governance Code requires board pay to support strategy and promote long-term sustainable success. When looking at variable pay measures, remuneration committees would therefore be considering ESG metrics relating to operational or strategic objectives that promote long-term value creation. The FRC's review of [Corporate Governance Reporting](#) called incorporating ESG metrics into executive pay “an evolving trend”. The FRC reported that the most common metrics in bonus plans focus on social issues such as diversity and inclusion, employee engagement and culture. Companies also included environmental metrics such as reducing carbon emissions, waste and water/energy intensity, mostly in long term incentive awards. The best reporting is clearly linked to the Task Force on Climate-Related Financial Disclosures (TCFD) and ESG targets.

ESG metrics are likely to be used increasingly in 2024. But investors expect them to be quantifiable with the method of performance measurement clearly explained, suitably stretching, and linked to implementing strategy. They should be credible and achievable, with companies describing the awards' overall objectives and current progress towards their achievement. There is an ongoing concern that metrics should not reward executives for “business as usual” activity or be used to increase overall quantum, particularly where financial metrics have not been met.

Where companies are still considering how to reflect any ESG corporate strategy in variable pay, this should be fully explained, including how the approach will evolve in future years.

## Climate change

In October 2023, the UK's Transition Plan Taskforce published the [TPT Disclosure Framework](#) and accompanying guidance: a ‘gold standard’ for the disclosure of private sector climate transition plans. The intention is that an organisation's plan explains how it will meet climate targets, manage climate-related risks, and contribute to the economy-wide climate transition.

The TPT Framework recommends disclosure of a company's strategic climate ambition, and how this is reflected in its implementation and engagement approaches, its governance and accountability arrangements, and its financial plans. Recommendations include entities disclosing information about how they align *incentive and remuneration structures with the strategic ambition of the transition plan*. This is to include the metrics used and the percentage of total executive remuneration that is linked to transition plan-related metrics.

The Disclosure Framework is voluntary, but the FCA recommends companies start using it now. The FCA is expected to consult in the first half of 2024 on introducing mandatory disclosures on transition plans. These are likely to apply to reporting from 2025 financial years onwards.

## Non-financial reporting

The government is expected to consult on proposals to streamline non-financial reporting in 2024, following its [call for evidence](#) in May 2023. Remuneration did not form part of this call for evidence, but it may be that any subsequent consultation will also include the remuneration regime.

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ESG metrics are likely to be used increasingly in 2024, but care is needed. Investors consider that such metrics should be credible and achievable, not reward ‘business as usual’ activity, nor be used to increase overall quantum, particularly where financial metrics have not been met.”

**Alexandra Beidas**, Global Head of Employment & Incentives, London





# UK listed companies

## Corporate Governance Code changes and regulator scrutiny

During 2023, the FRC consulted on changes to the Code as part of the government’s proposed reforms aimed at “restoring trust in audit and corporate governance”. The proposed changes to the executive pay provisions included enhanced withholding and recovery (malus and clawback) disclosures of minimum trigger events, time periods, whether malus/clawback was applied in the reporting year, and use in the previous five years. There were also measures to improve the quality of reporting with a more direct approach to describing the remuneration committee’s work.

However, the FRC **announced** in November 2023 that it intends to proceed with only a few of the original proposed changes to the Code, and the remuneration proposals were not mentioned. Whether the FRC intends to proceed with them may only become clear when the revised Code is published in January 2024. It is expected to apply from 2025 financial years.

In 2023, the FRC carried out a remuneration reporting pilot on a voluntary basis as a precursor of the proposed extension of its Corporate Reporting Review powers. The intention was to use the pilot’s findings to formulate the FRC’s regulatory approach for when it would have statutory powers over the whole annual report. This pilot scheme indicated the FRC’s intention to scrutinise remuneration reports closely.

As part of its **Annual Review of Corporate Reporting 2022/23**, the FRC also reported back on the pilot, which reviewed the remuneration reports of ten companies against the legislative requirements. The FRC wrote to nine companies raising what they called “appendix points” not requiring substantive changes. These were:

- > *Non-compliance* where companies in the sample did not disclose targets and achieved performance for the annual bonus and LTIP awards. The legislation allows withholding prospective targets on the basis of commercial sensitivity, but the FRC would like more transparency about the structure of future bonuses and awards.
- > *Inconsistency with other annual report and accounts areas*. There were inconsistencies with disclosures of key management personnel pay, alternative performance measures and ESG targets/TCFD disclosures.

The FRC had intended to review a larger number of companies in 2024. But it is now unclear whether this will proceed, in view of the **November FRC announcement** and the question mark over any legislation to extend the regulator’s Corporate Reporting Review powers.

### Read more

[FRC consultation on Corporate Governance Code changes: executive pay proposals](#)

[FRC 2023 review of corporate governance reporting: executive pay](#)

[Glass Lewis 2024 UK Benchmark Policy Guidelines: executive pay provisions](#)

[UK Transition Plan Taskforce publishes final recommendations on credible and robust climate transition plans](#)



# Pay in the financial sector

## Bonus cap

As of 31 October 2023, UK CRD V firms no longer have to apply the bonus cap (which limits MRT variable remuneration to 100% or 200% of fixed pay) and may pay bonuses at a higher level. The FCA / PRA [policy statement](#) confirmed this removal for the 2023 performance year, as well as future years, and that firms should set their own fixed to variable pay ratio.

Firms now need to consider some important issues before changing their pay structures, including:

- > whether to remove the cap for their 2023 or 2024 performance years, in view of existing pay structures and bonus pool accruals;
- > what would be an appropriate ratio of fixed to variable pay (for the firm and staff categories);
- > any necessary shareholder approval or other governance processes, in particular where shareholders approved the cap increase to 200% of salary;
- > the impact of any changes on gender pay gaps; and
- > other implementation complexities, such as contractual and HR considerations, in particular in relation to role-based allowances.

Importantly, the bonus cap will continue to apply to any staff within the EU rules. This could be challenging when applying different pay rules in groups operating across the UK and EU, to staff who may be wholly or partly subject to the EU rules.

Bankers' variable pay in the UK is still subject to onerous pay-out rules (eg deferral and clawback periods). The PRA indicated that it will be looking at the whole remuneration rules structure, but has given no timing. The regulator(s) may be conducting this wider review during 2024. Any resulting relaxations might address competitiveness distortions between banks, asset managers and other investment firms, and between the UK and other jurisdictions.



The ability to reduce fixed costs to be better prepared for downturns was one of the key justifications given for the bonus cap removal. Banks reviewing their reward, recruitment and retention strategies in 2024 face some tricky issues to navigate in implementing changes to pay structures.”

**Bradley Richardson**, Incentives Partner, London

## ‘Small firms’: relaxation of some pay and disclosure rules

Following consultations, the FCA and PRA have introduced new proportionality levels and relaxed some CRD V pay rules for ‘small firms’. Firms in *Proportionality Level 3* will not be required to apply **malus and clawback** rules and (for PRA-regulated small firms only) the **buy-out** rules, for performance years starting *on or after 8 December 2023*. However, they may still apply them voluntarily.

This is part of the regulators’ aim to enhance proportionality for small firms, which are already not required to apply rules on payments in instruments, deferral, or discretionary pension arrangements.

However, all dual-regulated firms within the **same group** must be subject to the same remuneration rules. A more proportionate regime will only apply if all firms in the group, and the group as a whole, meet the conditions set out in the definition of small firms. But it is unclear whether it will still be possible for firms to apply for a waiver/modification to move down a proportionality level.

Also following consultation, the **Pillar 3 remuneration disclosure** requirements have been relaxed for small firms, for performance years *starting on or after 1 January 2024* (so published in 2025). Unlisted small firms will not have to disclose any information on remuneration. Listed ones will only have to disclose limited information: governance, link between pay and performance, main characteristics of the remuneration policy and fixed/variable pay ratios.







## Pay in the financial sector

### ESG factors

Regulators' aims had generally been to ensure that firms properly factor in climate and other environmental risks. The regulatory impact on remuneration has so far been relatively light with a focus on disclosure rather than substantive changes to remuneration policy. But this may change in 2024, not least due to the UK's [TPT Disclosure Framework](#) (see "Climate change") and, further down the line, under the EU's recently-agreed [CSDDD](#) transition-plan-achievement linkage to executive remuneration in larger companies.

In addition, during 2023, the FCA [sought views \(DP23/1\)](#) on how it can move most effectively beyond disclosure-based initiatives. Specifically on remuneration, the FCA warns about using soft targets or metrics that are little more than greenwashing. Firms could also extend (financial and non-financial) performance measures linked to sustainability-related factors to all or part of their wider workforce, if appropriate. The FCA is interested in exploring matters which firms should consider when designing remuneration and incentive plans linked to their sustainability-related objectives. It intends to use feedback, along with its ongoing analysis and supervisory engagement with firms, to consider how best to support the industry, and whether there should be further regulatory measures.

The impact of climate change on the financial system is becoming a strategic priority for financial institutions and regulators, with firms increasingly adopting

climate-related metrics in pay structures. The Financial Stability Board published a report in 2023 on [Climate-related Financial Risk Factors in Compensation Frameworks](#), reviewing these and identifying challenges. The FSB considers that climate-related metrics will need to be continuously adapted to ensure effective alignment of remuneration with prudent risk taking, and that regulators can facilitate this by helping share regulatory and industry practices with each other and with industry.

#### Read more

[Bonus cap removed as of 31 October](#)

[UK CRD V "small firms": relaxation of some pay and disclosure rules](#)

[Consultation on relaxing CRD V pay rules for "small firms"](#)

[FCA consultation on relaxing pay rules for dual-regulated "small firms"](#)

[FCA DP 23/1 "Finance for positive sustainable change" seeks views from across the financial services](#)

[EU: Political agreement reached on the CSDDD](#)



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