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Employment Rights Bill

Transcript prepared for HR & Compliance Centre by Callisto Connect.

Robert Shore: So, this is a sizeable piece of legislation and it promises some significant changes for organisations and their HR departments. So we'll be covering all the major elements in the bill, and a picture should emerge of the changes coming down the track and the ways that organisations can begin to prepare.

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Hello everyone. My name is Robert Shore, and today I am joined by my colleagues at Brightmine, formerly XpertHR, Zeba Sayed, senior legal editor, and Stephen Simpson, acting content manager, employment law and compliance, and we'll be talking about the Employment Rights Bill which was published on 10 October of this year, 2024.

Hello, Zeba.

Zeba Sayed: Hi Robert.

Robert Shore: And hello Stephen.

Stephen Simpson: Hi Robert.

Robert Shore: And thank you both for joining the podcast today. Now, as listeners will know, this is a sizeable piece of legislation and it promises some significant changes for organisations and their HR departments. We recently did a webinar setting out the major proposals, and you can watch this on our website – I'll put a link in the show notes. Lots of questions were generated by that session and it's these that we're going to be addressing today.

So we'll be covering all the major elements in the bill, and a picture should emerge of the changes coming down the track and the ways that organisations can begin to prepare.

So let's begin with timelines. We had lots of questions about the timeline for implementation of the bill. Now, we talked about this in

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the webinar but Stephen, can you recap on the timetable and if we've had any further information since then?

Stephen Simpson: Sure. So the Government has announced that most of the reforms in the Employment Rights Bill won't take effect until 2026 at the earliest. And the Government has also specifically said that reforms to unfair dismissal won't take effect until at least autumn 2026.

We're expecting the bill to receive Royal Assent in the summer of 2025 at the earliest. Even then, there needs to be multiple regulations to support the act before specific provisions take effect and employers have to comply with them.

So the bill has 12 stages to go through Parliament – that's five in the House of Commons, five in the House of Lords, and then two final stages, the twelfth and last of which is for it to receive Royal Assent.

So we're recording this in mid-November 2024, and I can tell you that the bill is now at the third of those stages, what's called the committee stage, where it's being scrutinised line by line by a public bill committee, which does take a long time. In fact, the UK Parliament website states that the committee is expected to report back to the House by 21 January 2025.

We may see more consultations on specific proposals launched in the meantime, but otherwise we're expecting progress to be slow between now and January 2025.

Robert Shore: So let's begin to look at some of the specific proposals now. Let's begin with unfair dismissal. Zeba, will anything replace the removal of the two-year service requirement for an unfair dismissal claim or will it simply be better use of a probationary period?

Zeba Sayed: Arguably, the two-year service requirement is being replaced with a new statutory probation period, which looks set to be around nine months, although the length hasn't yet been confirmed. Now, during this period an employer will be able to dismiss an employee using a more relaxed and less onerous procedure, but only in certain circumstances. So although an employee could still claim unfair dismissal from the first day of their employment, the extent to be able to challenge a dismissal during the probationary period is likely to be more limited for an employee, and the compensation regime is likely to be more limited too.

Robert Shore: A follow-up question to that. The proposal then is for the two-year period to be removed. Will the statutory probationary period be compulsory? After all, not all employers have probationary periods.

Zeba Sayed: If it's implemented, the statutory probationary period will become compulsory in all sectors. We don't have the exact details of what

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that probationary period looks like in practice. All we know is that the Government's preference is for a nine-month probationary period, and if an employer wants to dismiss during this period they will be able to follow a more relaxed procedure.

There's going to be extensive consultation around all of this, so we expect more to be fleshed out in the forthcoming months, and we will obviously update you as more details come to light.

Robert Shore: A HR professional asks here, 'We don't currently have probationary periods in place. What is the best approach for us to take, given the incoming legislation?'

Zeba Sayed: So, even though the Employment Rights Bill is going to change the landscape on probationary periods, we aren't going to see this change earlier than 2026. So if you don't currently operate probationary periods, I think the best approach is to introduce them for any new hires because they do offer numerous benefits and they pose limited risks. In essence, they help set expectations, they are a good way to assess whether an employee is suitable for a role, and they're also a good way to gradually introduce additional contractual entitlements once a probationary period is confirmed.

Now, when statutory probationary periods are implemented, managers will have to start managing more effectively. We won't have the benefit of a two-year period to assess whether someone is a good fit for a role. So while you may not currently have probationary periods in place, you can start equipping your managers with the right tools to be able to manage performance, to be able to set targets and objectives, define the standards for success, and to be able to have those really difficult conversations. So if you start to adopt these practices now, you will be better prepared when the change is eventually implemented.

Robert Shore: Will employers have to change contracts of employment to take into account of the statutory probationary period? And what would a robust probationary period clause look like?

Zeba Sayed: So we will be updating all our template contracts, our probationary period clauses and our probation policy. But how we do that, and what a robust probationary period clause will look like, will depend on what the law specifically prescribes with regards to the statutory probationary period.

And just to note, the Government has confirmed that employers will be able to operate separate contractual probationary periods of any length they choose, as well as choose what non-statutory entitlements an employee can access during that period. But any dismissal beyond the statutory probationary period will be governed

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by existing provisions on dismissal, rather than by the light-touch regime.

Robert Shore: Right. And you say there, obviously Brightmine is going to be providing all sorts of templates as the detail emerges.

Another more detailed question about the implications of this legislation. So someone asks, 'If an agency worker who has been with the employer for a while becomes a permanent employee and signs a contract of employment, will they have the right to a statutory probationary period in the new role?'

Zeba Sayed: So, the statutory probationary period only applies to employees. So that means if an agency worker signs an employment contract, they will then become an employee, which means that the employer would be able to operate a statutory probationary period for that employee during the initial period of employment.

Robert Shore: Let's go onto fire and rehire. Stephen, I think this is your area in particular. Now, we've had a question about the proposal to allow claimants to apply for interim reliefs in fire and rehire cases. And we've been asked to expand on this. So Stephen, can you be expansive?

Stephen Simpson: Okay, sure. So this isn't actually in the bill. So it would have to be dealt with either by amendment to the bill or by separate legislation. So, more details are included in one of the consultations that was published shortly after the bill was released. The consultation on strengthening remedies against abusive rules on collective redundancy and fire and rehire, which opened on 21 October 2024 and closes on 2 December, proposed extending interim relief to employees who bring claims for protective award and collective redundancy consultation cases, and fire and rehire cases.

So just to explain what interim relief is, it's already an option for employment tribunals in some unfair dismissal cases, particularly those involving whistleblowing, and they allow tribunals to order employers to continue to pay the claimant while the claim is being litigated. Interim relief is reserved for cases where the employee can show that they are likely to succeed in their claim, or as the consultation phrases it, they have a pretty good chance of showing that their employer breached their collective redundancy obligations. So I'd say that could provide a powerful disincentive for any unscrupulous employers threatening staff with dismissal unless they agree to sign up to new terms and conditions of employment.

Robert Shore: I will refer listeners to our webinar here because in the webinar, Stephen, you talked about the narrowness of the exceptions where employers will still be able to utilise fire and rehire. So with the

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Employment Rights Bill, does it in effect bring in a ban in all but name?

Stephen Simpson: Well, I'd say it's almost a ban but not quite. And this is where we will ultimately have to wait and see how the tribunals and courts interpret the legislation after it comes into force. I'm afraid case law can take a very long time to filter through – sometimes years – so in addition we're hoping it will be supported in Government guidance, setting out when employers might still be able to use fire and rehire.

Just a reminder that the exception will be where the reason for the variation is to significantly reduce or mitigate the effect of any financial difficulties that already or are likely in the immediate future to affect the business as a going concern. Plus, in all the circumstances the employer could not reasonably have avoided the need to make the variation. So that wording does feel very narrow to me but, as I say, we'll have to wait for any Government guidance and subsequent case law precedents.

Robert Shore: So let's move onto redundancy consultation. Now, we know that the bill proposes to remove the words 'one establishment' from the Trade Union and Labour Relations Act, and this in practical terms means that collective consultation will be triggered where 20 or more redundancies are proposed across the whole business, rather than each individual workplace or site.

When deciding if the threshold for collective redundancy consultation is reached across the whole organisation, does this mean an individual company or does it include a group of companies? Zeba?

Zeba Sayed: So, if you have a group of companies – so Company A, Company B and Company C – and they all fall under one group but the employees across the different individual companies are employed by different employers, so the employees in Company A are employed by one employer, the companies in Company B are employed by a different employer and so forth, you wouldn't have to count up the number of proposed redundancies across the whole group. But if they are all employed by the same group company, then you would.

Robert Shore: When deciding if the threshold for collective redundancy consultation is reached across the whole organisation, do we, asks one concerned listener, only have to include establishments in the UK?

Zeba Sayed: So, in terms of the current position, the legislation doesn't address the territorial scope of collective consultation obligations, which means that we need to look at the case law in this area.

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Now, there was a judgement that was handed down in the Court of Appeal in 2018, which essentially confirms that in the context of a redundancy situation an employee who works outside of Great Britain is not excluded from making a claim for the protective award. Now, the court ruled that if there are workers working across different borders, then employers will need to consider whether the establishment that they work in is based in Great Britain or whether it is closely connected to Great Britain. If it is, then collective consultation will apply.

Given that the bill is proposing to remove the word 'establishment' from the act, we don't really know what this means for cross-border redundancies within the framework of collective consultation. Now, unfortunately the bill doesn't provide any further clarity on this. I think a lot will really depend on the facts, and it's possible that the courts will change their approach by assessing whether the individual employee, rather than the establishment, is based in Great Britain or has a sufficiently strong connection to it. So on this one I think we will have to wait to see how the case law develops in this area.

Robert Shore: Okay, great. Trade unions. Will the requirement to provide a statement to new starters about their right to join a trade union apply to all employers or only employers that have recognised a trade union?

Zeba Sayed: It will apply to all employers. And just to be clear, every worker has the right to join a trade union, regardless of whether the employer recognises the union or not.

Robert Shore: Redundancy protection now. Stephen, a question here. What's the thinking behind the introduction of wider protection against dismissal for pregnant employees and family-related leave returners?

Stephen Simpson: Yes, so just to recap, this relates to the proposal for increased protection against dismissal for pregnant employees and those on or returning from family leave. Currently employees who have informed their employer that they're pregnant, as well as those who are on or have recently returned from maternity leave or adoption leave or periods of shared parental leave, must be offered any suitable alternative vacancy in a redundancy situation.

So the scope of protection is being extended to other types of dismissal. The Government published its impact assessment on this on 21 October, along with impact assessments on a wide range of proposals in the bill. The impact assessment highlights evidence showing that between 7% and 11% of pregnant women and mothers report that they were either dismissed, made compulsorily

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redundant when others in the workplace were not, were treated so poorly they felt they had to leave their job, or felt forced to leave due to effects from working requests being declined or due to health and safety issues. The impact assessment states this is the equivalent of between 42,000 and 54,000 women a year.

It also highlights the gender pay gap widens significantly between entry into the labour market and when a mother's first child arrives. By the time the child is 13, there is a 30% difference in average hourly rates between men and women. The impact assessment says that workers will benefit from extra job security and fair treatment, improving wellbeing and career prospects. Meanwhile, employers will benefit from a more engaged workforce, which could lead to productivity gains. So really, those are the reasons for the Government creating this proposal in the bill.

Robert Shore: Will there be any exemptions to the day one right to statutory sick pay? For example, what if the individual is having elective surgery or the absence is self-inflicted, such as a single day off because of a hangover?

Stephen Simpson: I'd say with this question employers need to remember that statutory sick pay legislation doesn't distinguish between types of incapacity, for example, self-inflicted illness or injury such as a hangover. That isn't treated any differently in the eyes of the law. So if someone rings in sick, employers should generally take their sickness at face value and they should be paid statutory sick pay.

Employers are, of course, entitled to take action under their short-term sickness absence policy for frequent short-term absences, or in extreme cases if there are strong suspicions that an employee's being dishonest about their sickness absence to take disciplinary action under their disciplinary procedure.

The position is slightly different with cosmetic surgery that's purely elective. In those circumstances, employers are entitled to have a policy that requires staff to take annual leave or unpaid leave to have non-medically necessary cosmetic surgery. The main exception to this would be where the employee is incapacitated because they fall ill or are injured as a result of the cosmetic surgery. In these circumstances, the employee would be entitled to statutory sick pay for incapacity related to that type of illness or injury.

Robert Shore: 'While the removal of statutory sick pay waiting days is a positive for genuine cases of incapacity at work, will it encourage employees to game the system?' asks another listener. 'Does this mean that we will have to tighten up our sickness absence monitoring and, if so, how can we do this?'

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Stephen Simpson: Sure. So generally, we've detected some concern that the removal of the three-day waiting period, i.e. the first three waiting days in the period of incapacity for work, will 'make it easier for staff to take sick leave'. According to our pulse survey on HR's initial reaction to the bill, 30% of respondents expected the statutory sick pay proposals to have a big impact on their organisation. There was actually particular concern amongst employers in the manufacturing and production sector. In fact, we found that employers in this sector were far more likely to be concerned about statutory sick pay being payable from day one than those in other sectors.

But I do think that these upcoming changes will be a good opportunity for employers that have concerns to review their sickness absence procedures. If your organisation does have concerns that these measures will result in an increase in sickness absence rates, you should use it as an opportunity to review and tighten up the procedures.

Robert Shore: Another question on SSP. Will agency workers be entitled to statutory sick pay?

Stephen Simpson: So, agency workers who are categorised as employed earners and meet the other qualifying conditions are already eligible for statutory sick pay. However, it's the agency rather than the end-user employer that is normally responsible for paying it. So that won't change.

Robert Shore: Let's talk about zero- and low-hours contracts. Zeba, if we have current employees on zero-hours contracts, how should we handle them?

Zeba Sayed: Some zero-hours workers may think that they're entitled to rights that have not yet come into force. So, it's important to be open and perhaps keep those workers informed about the progress of the law. I think it's really premature to make any changes at this stage in terms of how you handle a zero-hours worker, but as an organisation you could identify individuals who may be entitled to stronger rights and start considering whether the zero-hours model is one that you want to retain in the future.

Robert Shore: A related question here. Will a casual worker, who is on neither zero hours or low hours, have the right to a guaranteed number of hours in the future, as a result of the changes proposed?

Zeba Sayed: Yeah, so just to be clear, there is no legal definition for a casual worker. In practice, the term 'casual worker' is often used interchangeably with a zero-hours worker. What's really important is to look beyond the label and consider the terms of the contract to see how that individual is engaged in practice. If they're engaged under a contract where the employer is under no obligation to

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provide a minimum amount of work then yes, they're likely to be treated as a zero-hours worker and they probably will have the right to guaranteed hours.

Robert Shore: Will it be possible for the guaranteed hours to be modified during peak periods so that guaranteed hours are lowered during non-peak periods?

Zeba Sayed: As far as I can see from the bill, it doesn't provide a specific exception on this basis. However, if you need to adjust the workforce based on peak and non-peak periods to reflect, say, seasonal fluctuations, I think the use of fixed-term contracts may be the most practical way to get around this.

Robert Shore: So, do you think that these changes may lead to employers using fixed-term contracts instead of zero-hours contracts?

Zeba Sayed: Possibly. But as the bill stands at the moment, an employer mustn't propose a fixed-term contract as part of a guaranteed hours offer unless it's reasonable to do so. And the bill then goes on to say that this may be where the worker is only needed for a specific task or the worker is only needed until a particular event occurs, or there is a temporary need for the worker. However, the criteria for determining reasonableness is not defined in the bill.

Also, the bill doesn't explain what is considered to be a temporary need for work. We expect and hope that this detail will be set out in the regulations. So in a nutshell, while employers may decide to use fixed-term contracts instead of zero-hours contracts, there will be limitations in how these can be used in practice.

Robert Shore: What will the position be if someone refuses the working hours offered to them from what they did in the reference period? Do they retain the right to a reduced number of guaranteed hours?

Zeba Sayed: So, a worker can accept or reject an offer of guaranteed hours. There is no provision in the bill on the right to retain a reduced number of guaranteed hours. However, once an offer is made, I suppose both the employer and the employee could mutually agree different hours.

Robert Shore: Another question then, same subject. If a recruitment agency provides agency workers, who's responsibility will it be to provide the guaranteed hours – the recruitment agency or the end-user employers?

Zeba Sayed: As things stand now, the right to guaranteed hours doesn't apply to agency workers. However, the provisions in the bill could be extended to agency workers through regulations. The consultation relating to the application of these measures to agency workers

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opened on 21 October and closes on 2 December. So we will, of course, publish further details on our site as more information comes to light.

Robert Shore: Will annualised contracts be impacted by the changes around zero-hours or low-hours contracts?

Zeba Sayed: Yeah. So the changes only apply to workers engaged on zero-hours contracts and low-hours contracts. However, we don't know at the moment what a low-hours contract worker looks like because this hasn't been defined in the bill. So I suppose again if we look beyond the label, if a worker on an annualised-hours contract meets the definition of a low-hours worker, then they could in theory be impacted.

Robert Shore: Let's move onto another subject, bereavement. Will statutory bereavement leave, as proposed in the bill, be paid or unpaid?

Stephen Simpson: So as far as we understand, the leave will be unpaid. That's what it says in the Government's impact assessment on the introduction of a new wider right to bereavement leave. So that will be a key difference with parental bereavement leave, which currently provides for two weeks' leave paid at the statutory minimum level, although of course some employers will choose to enhance it by offering paid bereavement leave.

Robert Shore: Okay. Let's take a question now on something that's actually not in the bill, is it? Pay gap reporting. And so, for the proposal to introduce mandatory ethnicity and disability pay gap reporting for larger employers, will group companies be able to report as one or will each individual company have to report separately?

Stephen Simpson: Yes, so we're expecting the Equality (Race and Disability) Bill, which hasn't been published at the time of recording, to follow the same approach as gender pay gap reporting. That is, for each company to be required to report as a separate legal entity, provided that they have at least 250 employees. There's no option for employers to comply with that duty by reporting on a group basis or by a parent company reporting on behalf of its subsidiaries.

Of course, there's nothing to stop groups of companies working together to align the format of their reports, but ultimately they do have to report separately.

Robert Shore: So, a question about harassment. Now, as we know, recent changes have come into this and there are further changes proposed under the Employment Rights Bill. The question is, 'Will the Employment Rights Bill change the position on liability for third-party harassment

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to allow standalone claims?' And obviously we need to know what a standalone claim is too. Zeba?

Zeba Sayed: In short, yes. It means that an employee will be able to bring a standalone claim for third-party harassment. So that means it will allow an employee to pursue a claim at the employment tribunal for harassment that they've experienced from individuals who are not directly employed by the employer, so, say, a client or a customer. So quite a significant shift there.

Robert Shore: So, looking back then at these changes that have recently come in. As a result of those sexual harassment changes introduced on 26 October 2024, another HR professional says, we have updated our policies to provide clearer definitions of what counts as sexual harassment, and stressed in the policies how employees can raise concerns about sexual harassment. Is this sufficient?

Zeba Sayed: I think an employer will need to go further than this. The duty is to take reasonable steps to prevent sexual harassment from occurring in the workplace. What's reasonable will depend on things like the size and resources available to the employer. However, the EHRC's guidance does make it clear that an employer will need to conduct a risk assessment to be able to comply with the duty.

But in addition to a risk assessment, other key steps could include things like training, a robust reporting mechanism, regular check-ins with staff, the implementation of workplace champions, and just generally a culture that doesn't tolerate certain attitudes and behaviours.

On that, I just want to point out that we do have a template sexual harassment risk assessment form on our site which you can adapt for your own specific needs.

Robert Shore: That's been downloaded quite a lot. It's proving quite useful, I think. So another question there on that is: how frequently should employers run risk assessments? Is there a requirement to do it annually, for instance?

Zeba Sayed: There's actually no statutory requirement to do a risk assessment at all, but I would recommend that employers should do this annually and wherever there is a big change in the organisation which could affect the work environment.

Robert Shore: Okay, great. Flexible working, another popular area for questions. 'In reality, what reasons can we give to turn down flexible working requests, especially requests around home or hybrid working?' Stephen?

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Stephen Simpson: Sure. So just a reminder that employers are currently able to turn down requests if their reason falls within the wide list of acceptable business reasons. These business reasons are staying, actually. They are, just to remind everyone, the burden of additional costs, the detrimental effect on the ability to meet customer demand, an inability to reorganise work among existing staff or recruit new staff, a detrimental impact on quality or performance, insufficiency of work during the periods the employee proposes to work, and planned structural changes. So really very wide.

But what is changing is that employers will have the additional burden of having to show that any refusal is reasonable. In addition, there will be a specific requirement for the employer to write to the employee if they refuse a request, setting out the reason or reasons for refusing that request and explaining why they considered their decision to be reasonable. So this will add an extra layer of complexity for employers dealing with statutory requests, even though the permissible business reasons for rejection are actually staying the same.

If employers are particularly dealing with requests for homeworking or hybrid working, one thing I'd say there is that you need to look at consistency across your organisation. Say, if you're adopting a different stance for different departments, it needs to be justifiable and those justifications needs to be recorded.

Just to take a very basic example, it might be justifiable to allow total remote working for your accountancy department if a lot of their work is solo working on spreadsheets and accounting software, while your organisation might prefer your sales teams to be in the office several days per week to feed off each other's energy for sales calls. Just a couple of examples, really.

Robert Shore: Now, of course the Employment Rights Bill contains an awful lot of material. At the same time, there's also lots that was expected or that's been discussed that isn't in there. So Stephen, what are the main things that were left out of the Employment Rights Bill that we were expecting to hear about?

Stephen Simpson: Something we originally thought might be included was mandatory ethnicity and disability pay gap reporting, which we've already mentioned. So that's for large employers, i.e. those with 250 or more employees. However, the Government's Next Steps to Make Work Pay policy paper, which sets out things that didn't make the bill, confirms that these proposals will be contained in a separate Equality (Race and Disability) Bill. The policy paper states the Government will be consulting on this in due course, with the draft

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bill to be published during this parliamentary session, which ends in July 2025.

Other things that the Government appears to have kicked down the road include a full review of the parental leave system, and an examination of the benefits of making statutory paid carer's leave. Also, reforms to employment status were left out, with a proposal to merge employees and workers into a single category, which would potentially give more individuals access to a wider range of statutory rights. Given the complexity of that one, I don't think anyone's surprised that that was left out. The Next Steps to Make Work Pay policy paper indicates that the Government does still intend to go ahead with this.

Robert Shore: Well, Stephen, we've also been asked about a couple of specific proposals that were left out, the much-heralded right to disconnect, and the so-called right to move to a four-day working week, which is much in the news still at the moment. What's happening with those?

Stephen Simpson: Well, the widely heralded right to disconnect was not included in the Employment Rights Bill. However, the Government has said that it intends to consult on a non-statutory code of practice. So it looks like that proposal has been significantly watered down, as it won't now be a statutory right to disconnect. Again, that's not surprising, I don't think, as we know in advance of the publication of the bill the Government was faced with concerns from businesses about the impact that the right to disconnect would have on them.

And just in terms of the right to move to a four-day working week, it was in the newspapers over the summer of 2024. I think we could file this as under 'definitely not happening'. So it's Brightmine's understanding that the Government is not planning to implement the proposals put forward by the campaign group to allow workers to receive 100% of their current pay in return for working a four-day, 32-hour week. Employers should, though, bear in mind that there's nothing to stop employees under the current law from making a formal flexible working request to move to compressed hours, in other words, to work an ordinary number of hours but across four days rather than five days.

Robert Shore: As we're recording this, there's quite a lot of activity still around that four-day week question, and we are tracking this in an excellent new feature on the Brightmine website called On Your Radar. So I will direct listeners to that to hear updates on this question.

Beyond that, I think that's all the questions we have time for today. Zeba, Stephen, that's quite an epic effort on your part to prepare answers to all of those questions. Thank you both so much.

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Zeba Sayed: Thanks, Robert.

Stephen Simpson: Thanks, Robert.

Robert Shore: I've put some links both to the webinar, of course, and to other useful resources on the Brightmine website. Those links are in the show notes. And, of course, we will continue to update our coverage on the website as the bill proceeds through Parliament. I think that's all we have time for today, so I will wish you a good day.

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