FIRE AND REHIRE:

"Fire and rehire" is a controversial practice that has gained significant attention in recent years. This method involves changing employment terms and conditions through dismissal and re-engagement. Due to growing scrutiny surrounding this practice, a Code of Practice was introduced, encouraging employers to negotiate changes fairly and responsibly and emphasizing that fire and rehire should only be used as a "last resort." However, this Code of Practice does not impose any legal obligations.

The newly elected Labour government believes that the existing measures to prevent unfair "fire and rehire" practices are insufficient to address workplace bullying. Clause 22 of the Employment Rights Bill establishes a new right for employees to claim automatic unfair dismissal if:

- An employee is dismissed by their employer for not agreeing to changes in their contract or
- If the employer dismisses the employee and replaces them with other employees or re-engages them on varied terms to do the same job before they were dismissed.

However, an employer can defend against a claim by proving two things:

a. The changes they made were necessary to help resolve serious financial issues that affected the company's ability to continue operating normally at the employer's job loss.
b. The employer had no reasonable way to avoid making those changes.

Although the conditions under which fire and rehire practices can legally occur will be more restricted, such actions will remain allowable if the employer can demonstrate an economic justification that poses a significant threat to the company's viability.

The evidentiary standards for dismissals are stringent, and even when they are satisfied, a termination may still be classified as unfair under standard legal principles if adequate consultation has not occurred.

The employer is obligated to substantiate that firing and rehiring were imperative to address or alleviate operational challenges and that the necessity to alter contractual terms was not reasonably preventable.

Even if an employer satisfies each of the statutory criteria for dismissal, an employment tribunal must still evaluate the fairness of the dismissal in the specific context. The tribunal will examine whether the employer engaged in adequate consultation with the employee, relevant trade union representatives, or other employee advocates. Additionally, it will consider whether the employer provided any concessions or benefits to the employee in exchange for consent to any changes in their contractual terms.

What actions can employers take moving forward?

The government's stringent new policy will significantly hinder employers' ability to alter employment terms and conditions without employee consent unilaterally. This shift is expected to enhance the negotiating power of workers and their representatives, granting them greater leverage to secure concessions from businesses aiming to modify contractual agreements

Employers may increasingly leverage salary increases as a tactical bargaining chip in negotiations. In light of potential restrictions on implementing changes to contractual terms unilaterally, businesses may opt to withhold favourable adjustments, such as salary increases or promotions, to incentivise employee consent for other desired measures.

The ramifications associated with the practice of fire and rehire now carry heightened reputational implications. Nevertheless, organisations evaluating modifications to contractual terms that are likely to face resistance from employees should contemplate acting sooner rather than later; they could take advantage of the current limited timeframe during which dismissal and re-engagement remain a viable tactic.

Businesses could also use flexibility clauses in employment contracts to mitigate the potential impact of the reforms proposed by the Bill. Flexibility clauses grant employers unilateral authority to modify contract terms—such as employee benefits or work schedules—thereby bypassing the need for employee consent.

Employers could also undertake a comprehensive review of their standard contract templates, focusing specifically on the drafting of flexibility clauses. It is crucial to ensure these clauses are articulated as broadly and effectively as possible to mitigate potential compliance issues and maintain operational adaptability.

However, it is crucial for organisations to recognise the substantial body of case law that restricts the application and enforceability of flexibility clauses, particularly when alterations result in detriment to employees. It remains to be seen whether the government will introduce anti-avoidance provisions within the Employment Rights Bill or other forthcoming legislation to address this potential loophole regarding the use of flexibility clauses.