WORK FOUNDATION

A YEAR OF UNCERTAINTY?

THE RETAINED EU LAW BILL 2022 AND UK WORKERS' RIGHTS

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CONTENTS

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We believe everyone should have access to secure, rewarding and high-quality work. By engaging directly with workers, employers, policymakers and leading academics, we deliver rigorous applied research to tackle structural inequalities in the labour market and improve working lives across the UK.

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EXECUTIVE SUMMARY

New legislation is being developed which could significantly re-shape working life in the UK, and could impact the rights and protections of over **8.6 million workers** on part-time, fixed-term or agency worker contracts.

There is growing consensus between unions, policymakers, employers and industry bodies about a need to reform employment law to better reflect the realities of modern ways of working in the 21st century. The Government's commitment in the 2019 Queen's Speech to introduce a new Employment Bill was therefore very welcome. Unfortunately, the legislation has not yet materialised.

Instead we have the EU Retained Law Bill, which will automatically remove all remaining EU legislation from UK statute books by the end of 2023, unless proactive steps are taken to assimilate, amend or replace these laws in the meantime. This includes significant worker protections.

In its current form, it risks circumventing the consultation and engagement needed to enhance workers' rights and bring employment law into the 21st century. Indeed, by explicitly restricting the introduction of new regulations and implicitly encouraging the removal of existing regulations, it could roll back decades of hard-fought progress. This could particularly impact individuals and groups that are more likely to be in insecure work and already face structural inequalities in joining and remaining in the labour market.

The UK's journey out of the EU

On 29 June 2016, the UK voted to leave the European Union. The UK and the EU then negotiated a Withdrawal Agreement, setting out the terms of the UK's departure. This provided for a transition period during which EU legislation continued to apply in the UK. The EU (Withdrawal) Act 2018 preserved some EU-derived legislation – known as 'retained EU law' – in our domestic legal framework.

In January 2022, the Government announced its plans to introduce the Retained EU Law (Revocation and Reform) Bill, which is now progressing through the House of Commons. If passed, it will enable the Government to amend, repeal and replace thousands of retained EU laws, as well as remove much of the EU law concepts embedded within them, without the need for parliamentary scrutiny or a consultation process.

The Bill introduces a default position to remove or 'sunset'* all secondary retained EU laws by 31 December 2023, unless positive action is taken to amend or assimilate them onto the UK statute book. Crucially, it stipulates that any amendments to regulations must always maintain or reduce existing regulation, removing any possibility of reforms that strengthen worker rights and protections as a result of the move to UK-led legislation. Therefore, it is conceivable that the UK wakes up on 1 January 2024 to a very different regulatory landscape.

The Bill could bring significant changes to the UK employment law landscape

The employment regulations in scope for change include those governing working time and entitlement to paid holiday, as well as those that aim to ensure fair treatment for people in insecure work, including agency workers, part-time workers and workers on fixed-term contracts.

* Sunset – set a date on which legislation will expire in the future.

The scale and speed of reform enabled by this Bill will create significant uncertainty for UK businesses and workers, which could in turn impact on business costs, planning and growth, and increase workplace tensions and litigation.

It is likely that the UK's 6.2 million insecure workers will be most immediately impacted by the 'sunsetting' of key EU-derived employment regulations, especially if the net outcome is protections are diluted.

There could also be material impacts for gender equality at work. Women are more likely to be in part-time work, making up 71.8% of part-time workers. And women are nearly twice as likely (1.8 times) as men to be in severely insecure work. While the Bill's equality impact assessment confirms the Government's commitment to upholding high standards in equalities, it does not acknowledge the potential disparate impact of reducing or revoking these regulations.

We need an ambitious Employment Bill to improve working life in the UK

The 2019 Conservative manifesto promised to 'protect and enhance workers' rights as the UK leaves the EU. In the Government's first Queen's Speech in December 2019, they promised an Employment Bill to 'make work fairer'. This Bill is yet to be delivered.

After becoming Leader of the Conservative Party and Prime Minster in October 2022, Rishi Sunak stated the Government's mandate was based on the 2019 Conservative manifesto. Given the commitments above, it is hard to see how the Retained EU Law Bill 2022 is compatible with that mandate, and the Government needs to return to their original pledge by strengthening workers' rights through primary legislation as part of a long-term plan for economic growth that benefits all parts of society.

1. INTRODUCTION

Following the UK's departure from the European Union, speculation has focused on whether employment law and other regulations might change to facilitate a low-regulation, low-tax UK economy envisaged by some of those who campaigned to leave.[1] Announced in September 2022, the Retained EU Law (Revocation and Reform) Bill has intensified this speculation, as a wide range of EU-derived workers' rights are now in scope for reform.[2] The Bill does not set out specific plans for change, but it will enable the Government to amend, repeal and replace retained EU Law with ease.

The UK has a history of going above the minimum standards set by the EU in a variety of areas, including longer annual leave,[3] wider access to flexible working,[4 5] and higher minimum levels of Paternity Pay.[6]

It's also important to remember that a large part of the legal framework that sets out access to essential rights and protections for UK workers is housed in UK legislation, and so is not affected by this Bill. For example, protection from unfair dismissal and the right to a statement of terms and conditions under the Employment Rights Act to prevention from discrimination under the Equality Act 2010, the right to be paid the minimum wage, or employer responsibilities in terms of Health and Safety are all housed in UK legislation and so are not in the scope of this Bill.

However, where EU minimum standards do apply in the UK - for example regarding maximum weekly working hours and agency worker protections - these rights and their enforcement are fundamental for individuals in the most insecure work.

As a result, we are standing at a crossroads. The UK may continue to go beyond EU minimum standards or this Bill, with its comprehensive scope and short timeframes, may drive a concerning change in trajectory. This briefing outlines some of the key aspects of employment law that could be affected by the Bill, and underscores the need for a proactive and an ambitious framework for employment law.

What will the Bill do?

The Bill would allow the Government to completely overhaul a body of UK domestic law known as "retained EU law" (REUL). This was created by the European Union (Withdrawal) Act 2018 to provide legal continuity and certainty beyond the transition period following departure from the Union.[7]

Retained EU Law was never intended to sit on the statute book indefinitely. The wide package of reforms proposed in this Bill would end the supremacy of EU law by 31 December 2023. Supremacy is a principle derived from Court of Justice of the European Union (CJEU) case-law and incorporated into the EU Withdrawal Act 2018. It means that REUL still takes priority over domestic law made before 31 December 2020 when the two conflict, but does not apply to UK law passed after 31 December 2020. This ensured legal continuity at the end of the transition period, but is politically sensitive as domestic laws, including Acts of Parliament, remain subordinate to retained EU law.

At the heart of the Bill is a default position to 'sunset' all secondary retained EU law by 31 December 2023, by which point all remaining retained EU Law will either be repealed, amended or assimilated into UK domestic law. There are immediate concerns about whether this is a feasible timetable given the volume of legislation in scope. And while this position suggests that many retained laws could remain unchanged at the end of the process, this is not guaranteed.

The Bill grants the UK Government wide powers, often described as 'Henry VIII powers' after the power of an absolute monarch, to revoke, restate and wholly re-write all of the affected regulations through Statutory Instruments (SIs) rather than new legislation subject to one

condition: any re-writing must always maintain or reduce regulation, meaning that there is no scope to use this moment to introduce more ambitious rights and protections.[8] In the impact assessment for this Bill, Government makes clear that 'the repeal and replacement powers [are] broadly de-regulatory in nature.'[9]

The Bill includes provision for these powers to be extended up to 2026 for specific pieces of legislation. This may have positive implications for workers, employers, unions and trade bodies, allowing greater opportunity for public consultation. It could also open opportunities for more ambitious reforms to employment law, offering sufficient time for new and more comprehensive primary legislation that extends beyond what would be feasible through the de-regulatory changes allowed through the Bill. However, the potential for extension also introduces uncertainty: where legislation is not restated or repealed, but instead is amended, it is currently unclear whether the Henry VIII powers would allow for unlimited amendments through Statutory Instruments between 2023-2026.

Furthermore, Courts in the UK will be able to decide what consideration they give to EU case law, which includes CJEU judgments. Courts will thus treat REUL and EU law concepts the same as the judgments of other countries with different legal frameworks (i.e., not binding).

2. IMPLICATIONS OF THE BILL

The implications of this Bill are significant and present a number of challenges. If passed without amendments, not only does it create uncertainty for businesses and workers who will have little sense of which elements of EU retained law should persist and which should be scrapped. It is also likely to facilitate the transfer of considerable legislative powers from Parliament to Government Ministers.

The Bill could increase uncertainty for employers and workers. As highlighted by a range of experts and organisations, the scale and speed of reform enabled by this Bill will introduce significant uncertainty to the UK statute book.[10] [11] [12] [13] The greater the extent of reform or revocation of law, the greater the uncertainty will be. This uncertainty will be a challenge both before the sunset, regarding what may change and when, and after the sunset, as new case law develops.

The Government has not indicated how it will ensure that all pieces of retained EU legislation have been identified in the Retained EU Law Dashboard.[14] Legal experts including Professor Catherine Barnard from the University of Cambridge have made the case that there is a serious risk that some retained EU laws are missing from the dashboard, and thus could be accidentally 'sunsetted' without anyone realising it.[15] Recent reports that researchers at the National Archives have uncovered an additional 1,400 pieces of retained EU legislation that would fall within scope of the Bill[16].

Employment Tribunal proceedings already take two or more years to complete as a result of extensive backlogs which have grown worse through the pandemic. If these changes are delivered in this way, it will take many years for the first cases in the new landscape even to reach a first instance appeal and then further time for a significant body of case law to emerge so as to restore employment law to its current level of predictability.[17]

Figure 1: Which worker rights are at risk?

Many key rights have been embedded in legislation and case law originating in the EU. Some examples of these rights that could be lost or diluted include:

- Equal Pay
- Holiday pay
- Agency worker rights
- Data protection rights
- Protection of terms and conditions for workers where a business transfers from one entity to another
- Collective consultation with worker representatives when redundancies are proposed
- Protection of pregnant workers, and rights to maternity and parental leave
- Protection of part-time and fixed-term workers
- Rights relating to working time, including rights to daily and weekly rest, maximum weekly working time, paid annual leave and measures to protect night workers
- Health and safety protections, including provision of Personal Protective Equipment (PPE), noise control and the requirement to conduct risk assessments
- Protection of workers' rights on the insolvency of their employer
- Rights to a written statement of terms and conditions.

Employers will no longer have certainty about:

- the future of many of their employment obligations
- associated future costs of employing their workforce
- whether they may be faced with having to find time and resource to write new, or re-write existing, workplace policies and employment contracts where those reference statutory rights affected by the Bill
- The likely outcome of litigation as old case law may be put in doubt.

Such challenges could impact on business costs, planning and growth.

Workers will lack certainty as to:

- which of their statutory employment rights and protections may disappear or remain, and in what form
- how courts and tribunals may change the interpretation of those rights.

At a time of high levels of industrial action and strikes across many industries, this could lead to further increased workplace tensions and litigation.

A process lacking proper scrutiny and consultation

This Bill will transfer considerable legislative powers from Parliament to Government, potentially limiting scope for consultation or scrutiny. Ministers will be able to change retained EU law via Statutory Instruments, which typically receive little scrutiny and cannot be amended. For example, the House of Commons last rejected an SI in 1979.[18] As a result of this Bill, Parliament could see thousands of SIs being tabled before the end of next year, so there is a huge risk of poorly scrutinised legislation being passed in a very short timeframe.

The Department for Business, Energy and Industrial Strategy said that the Bill is 'an opportunity to move away from outdated EU laws to establish our own rules that are better suited to the UK.'[19] Currently, we lack a vehicle to meaningfully do this. Furthermore, the Government has not yet explained which aspects of EU law will become UK law, or outlined an approach to making these decisions and consulting on them.

Ministers, civil servants and devolved administrations, do not have the time or resources to give sufficient scrutiny to each piece of legislation that falls within the scope of the Bill. Since 2018, of the 2,417 laws identified by Government as being officially in scope, only 196 pieces of Retained EU Law have been repealed and 182 amended. This gives an indication of how much time it takes to reform the law to achieve post-Brexit policy goals. If the additional legislation identified by the National Archives also falls in to scope, this process may take much longer than initially anticipated.[20]

Figure 2: Retained EU Law identified by Government as 'in scope'

Total REUL	Unchanged	Amended	Repealed	Replaced
2,417	2,006	182	196	33

3. WHO IS IMPACTED?

Sunsetting regulations could remove essential protections for insecure workers

Employment laws protect both employers and workers, by bringing clarity about working relationships to everyone involved. Over the years they have evolved to reflect changing working practices and the values we hold as a society. While some divergence from the EU is therefore to be expected, and can be positive, it is important to understand who could be impacted negatively by the sunsetting or amendment of key EU-derived employment regulations, particularly in a scenario where extending regulatory requirements is not possible.

Insecure workers

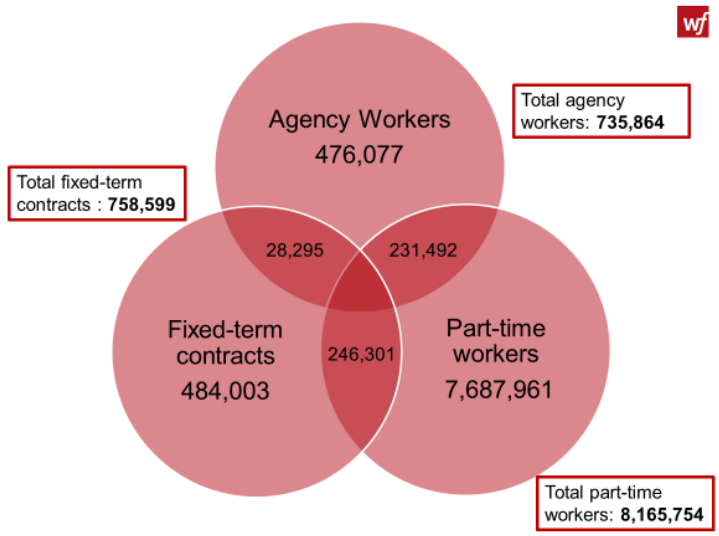
Any changes that remove or reduce existing rights and protections would likely have the greatest impact for the UK's 6.2 million insecure workers[21] who rely on these rights, and their proper enforcement, every day.

Previous Work Foundation analysis found that workers at the start of their careers are two-and-a-half times more likely to be in severely insecure work than those in the middle of their working lives. Women are also more likely to be in severely insecure work compared to men (25% versus 15%). Individuals from ethnic minorities are more likely to be in severely insecure work than white workers (24% versus 19%). Considering gender and ethnicity together, while the insecurity gap is widest between white men and ethnic minority men, we can see that ethnic minority women (26%) are most likely to be in severely insecure work among all worker groups. This underlines the dual penalty faced by ethnic minority women. Disabled workers are also more likely to experience severely insecure work (25% versus 19% of non-disabled workers).[22]

While the current legislative framework is flawed, without these minimum standards workers in these roles could face acute risks. Instead of rushing the sunsetting of these regulations, we need to allow scope to reform and build on them.

Our analysis has identified three key groups of workers as being at risk, some of whom are already in insecure work, while others could be made insecure as a result of changes emanating from this new law. This is due to the fact that their terms and conditions for employment are substantially governed by regulations deriving from EU law.

Figure 3: Three key groups of workers at risk



Part-time workers

There are currently 8.2 million part-time workers in the UK. 72% of these part-time workers are women, compared with just 40% of full-time workers.[23]

These workers are currently protected from being treated less favourably than a full-time 'comparator' by retained EU law. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 states that individuals in part-time work should not be any worse off than an equivalent full-time worker for:

- Pay and leave, including for holiday, sickness absence, maternity, paternity, adoption and Shared Parental Leave
- Pension opportunities and benefits
- Training and career development
- Promotions, career breaks and job transfers
- Redundancy selection and pay.[24]

The TUC estimated that around 400,000 UK employees benefitted from equal treatment rights for part-time workers (around three quarters of whom were women in the UK) as a result of these regulations.[25]

During 2020/21, this regulation was the reason for 2,766 UK employment tribunals, compared with just 319 in the previous year.[26] This represents an increase of 767%. It is clear that these regulations in their current form play an important role in enforcing rights for part-time workers.

Workers on fixed-term contracts

There are currently three quarters of a million workers on fixed-term contracts in the UK, nearly a quarter of a million of which work part-time. 56% of workers on fixed-term contracts are women.[27]

These workers are similarly protected from less favourable treatment by retained EU law. The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 establish protections for fixed-term workers and give the worker the right to be treated no less favourably than a comparable permanent employee, unless the employer can justify the different treatment. Under this law, workers on fixed-term contracts can require that the fixed-term contract is converted into a permanent one in certain circumstances and are entitled to be informed of available permanent vacancies by their employer.[28]

According to the TUC, the Fixed-Term Employee Regulations led to significant improvements in pay and conditions and better access to occupational pensions for many temporary staff in the UK, particularly in the education sector. They gained increased job security, with improved access to permanent employment.[29] These regulations also abolished the use of the redundancy waiver so that fixed-term employees would be entitled to a redundancy payment after two years.[30]

These regulations have been used successfully in a range of employment tribunals in order to enforce the rights of fixed-term workers.

Figure 4: Case Study of Ball v Aberdeen

In the case of Ball v Aberdeen, it was found that Dr Andrew Ball, a research fellow in the department of Zoology at the University of Aberdeen, must be recognised as a permanent employee. Dr Ball was continuously employed at the university under three successive contracts which began in April 1999. Each contract had been linked to external short-term funding. In finding for Dr Ball, the tribunal rejected the university's case that short-term funding could automatically provide a justification for employment on a fixed-term, and found that the university had failed to carry out any assessment as to whether Dr Ball could have been offered a permanent contract in 2002, when his third contract was offered.[31]

The tribunal also found that employment on fixed-term contracts gave rise to genuine disadvantage to the employee, particularly around the uncertainty of future employment, damage to career progression and professional development.[32]

Agency workers

There are nearly three quarters of a million agency workers in the UK. A third of these agency workers (nearly a quarter of a million) work part-time and over 28,000 are on a fixed-term contract, so a significant proportion of these agency workers also rely on part-time and fixed-term worker regulations.[33]

In addition, the (admittedly limited) protections in place for agency workers are currently housed in retained EU law. The Agency Workers Regulations 2010, while adopting a narrow definition of "pay" and requiring a 12-week qualifying period, give an agency worker a right to the same "basic working and employment conditions" as apply to comparable direct employees. Any or all of these could be lost under this Bill.[34]

Analysis from the TUC suggests that the Agency Workers Regulations resulted in some agency workers receiving a pay rise and improved holiday entitlements in 2011. A previous exemption to the right to equal pay for some workers employed by an agency in the UK meant that a significant proportion of agency workers continued to face pay discrimination, with some being paid up to £135 a week less than directly employed staff doing the same job.[35] This exemption was abolished by the UK Government in April 2020, following recommendations from the Taylor Review of Modern Working Practices, but it is currently unclear whether the Agency Worker Regulations 2019 serve the purpose of assimilating the 2010 regulations into the UK statute books.[36]

Women

Women are over-represented among part-time and fixed-term workers. And working women are nearly twice as likely (1.8 times) as men to be in severely insecure work. The situation worsens for mothers, disabled women, and women from Black, Pakistani and Bangladeshi backgrounds.[37]

Therefore, any changes to employment regulations in the UK are likely to impact women significantly. In advice to the TUC, Employment Tribunal Judge Michael Ford KC stated that: "It is difficult to overstate the significance of EU law in protecting against sex discrimination."[38]

While the Bill's equality impact assessment confirms the Government's commitment to upholding high equalities standards, it does not expressly acknowledge the potential disparate impact of revoking these regulations for different groups of people.[39]

The Equality Act is an important piece of UK legislation which protects workers from discrimination, including during the recruitment process and at work, and ensures that individuals are treated fairly. Although it is not derived from EU law, cases have so far been determined on the basis of EU decision-making. As an Act of Parliament, the Equality Act remains on the statute book under the terms of this Bill, but courts will no longer have to interpret those provisions in a way that fits EU jurisprudence, so, for example, the way equal pay cases are determined may change.

In June 2021, thousands of Tesco shop floor workers – who are mostly women – won a legal argument in their fight for equal pay. Their legal claim was based on the contention that the pay settlement was £3 less per hour than their peers working at distribution centres, who were predominantly men. The Court of Justice of the European Union (CJEU) ruled that the 'single source' test applies to businesses in the UK. This means a worker can compare their role with somebody working in a different establishment if a 'single source' has the power to correct the difference in pay.[40] Results in similar future cases heard in UK Courts may not follow this precedence under the terms of this new Bill.

Furthermore, while certain parental rights are contained in the Employment Rights Act 1996, the Maternity and Parental Leave etc. Regulations 1999 (MAPLE) are EU-derived and also play a crucial role.[41] The potential loss of MAPLE regulations could create legal uncertainty in respect to the interpretation and application of ordinary and additional maternity leave rights, the right to be given first refusal of any suitable alternative job which is available during a redundancy process whilst on maternity, adoption or shared parental leave; and the right to return to the same job after maternity or parental leave, where this is reasonably practicable. It is essential UK Government confirms that these protections will be integrated fully in to UK law.

A more ambitious approach on gender and work in the UK should include making flexible work the default, instead of just a right to request it, and extending statutory paternity leave and pay beyond the current two-week allowance.

4. CONCLUSIONS AND RECOMMENDATIONS

The 2019 Conservative manifesto promised to 'protect and enhance workers' rights as the UK leaves the EU, making the UK the best place in the world to work.'[42] As the EU Retained Law Bill requires that any amended or replacement regulations 'do not increase the regulatory burden for employers', it is difficult to see any scope for reforms to improve rights and protections in the legislation as currently planned. But a reduction of working standards is incompatible with the Conservatives' stated policy goals to support working people and families.

Employer and industry bodies have recognised the importance of a clear legal framework for employment within the UK, and many are raising concerns that the Bill may disrupt those established foundations, introducing an unmanageable degree of uncertainty for employers already struggling with recruitment shortages and spiralling operating costs.

Make UK, the manufacturing industry body, has said the Bill 'risks adding further significant challenges and uncertainty in the business environment at an already unpredictable time for UK employers'.[43] Similarly, the Confederation of British Industry (CBI) has put forward a call to 'reduce the uncertainty of the Retained EU Law Bill' at the centre of their Reimagining Regulation campaign.[44]

And while the Federation of Small Businesses have emphasised the need for simpler employment law, with clear, one-page explanations provided by Government outlining key obligations[45] this Bill is a blunt tool to try and deliver that aim – while it allows for the removal or amendment of some EU derived legislation, it will do little to clarify the most complex areas of employment law. Launching an Employment White Paper would offer employers and industry bodies the opportunity to highlight opportunities for simplification and consolidation.

The UK should continue building on its history of going beyond EU minimum standards, and raise the floor of working standards to protect people currently falling through gaps in protections and support.

This Bill is not the vehicle to achieve that.

It does not allow for sufficient parliamentary scrutiny, and offers no room to strengthen or improve working rights and protections. The proper way to do this is via an Employment White Paper consultation which introduces new proposals to clarify employment status, improve sick pay and truly embed inclusive, family-friendly flexible work.

Recommendations

1. **Instead of an assumption in favour of sunsetting, the Government should amend this Bill to ensure an assumption in favour of assimilation to deliver certainty and avoid any gaps in legislation.**

2. **The Government should launch an Employment White Paper consultation to set out Government's proposals for enhancing workers' rights.**

   This should integrate proposals where consensus has already been reached but action has slowed through the pandemic – for example clarifying employment status, as raised in the Taylor Review and the Good Work Plan. This should also reflect shifts in working practices that we have seen though the pandemic and making flexible working a default right to have, rather than a right to request.

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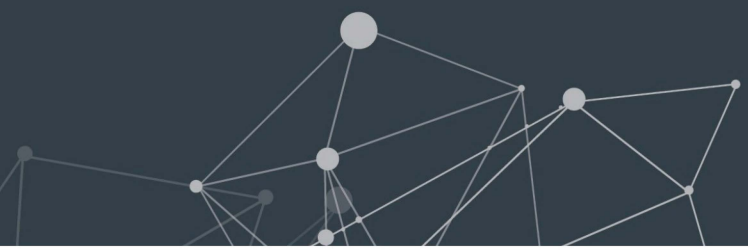

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