



Employment

SEPTEMBER 2019

Key areas of employment law are derived from EU legislation and so in theory could fall away automatically, be abolished or be amended. These areas include working time, agency workers, fixed-term employee and part-time worker protection, health and safety, acquired rights under TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006), collective redundancy consultation, works councils, discrimination and certain family-related rights. However, in the short term at least, very little is likely to change whether or not there is a deal on Brexit.

EU-derived employment legislation

Some employment legislation giving effect to EU rights predates or gold-plates the relevant EU Directive (eg some forms of discrimination, family rights, TUPE), making it particularly unlikely that these would be repealed. Perhaps the most likely targets for abolition or amendment in the longer term would be the [Working Time Regulations](#) and the [Agency Workers Regulations](#), which have both been heavily criticised as imposing unnecessary burdens on business. (Interestingly, the [Government's Good Work Plan](#) published on 17 December 2018 announced changes to the Agency Worker Regulations, but only to improve agency worker rights by abolishing the 'Swedish derogation', whereby agency workers can be paid less than if directly hired provided they have a contract of employment with the agency and are paid between assignments - with effect from April 2020. The Government also proposed changes to working time rules, but again this was only a

minor reform to the benefit of employees: holiday pay for those on variable pay will be calculated using a 12 month reference period rather than 12 weeks.)

Amendments might also be made to TUPE to make it easier for employers to harmonise terms of employment and the Government might consider placing caps on compensation for discrimination claims at some point in the future.

Theresa May announced on 2 October 2016 that existing workers' rights would be guaranteed during her premiership. Indeed, Theresa May offered a Workers Rights Bill to ensure that UK workers enjoy rights that are no less favourable than EU rights, in an attempt to secure support for her Withdrawal Bill. Boris Johnson's approach to worker rights is yet to be clarified, but any changes would be in the longer term. The [Government's technical note on workplace rights in the event of a no deal Brexit](#) has been republished following

The section is part of our Brexit Legal Guide.

No deal

- If the [Withdrawal Agreement](#) endorsed by the EU Council on 25 November 2018 or the [Political Declaration](#), or some version of both, are not approved by 31 October 2019 and there is no change to the exit date, the UK will cease to be a member state on that date without any transitional period
- The body of EU law in force at that time will be imported into UK law (with necessary amendments) under the [European Union \(Withdrawal\) Act 2018](#) and UK legislation made to implement EU law will be retained, with suitable amendments - this is called 'retained EU law'
- A lot of the secondary legislation to adjust retained EU law for the post-Brexit world has already been made, see the accompanying section: [The UK's new legal order post-Brexit](#)

Mr Johnson's election, confirming that there will be no changes to workplace rights on exit, save in relation to employer insolvency for UK employees working in the EU and membership of European Works Councils.

The [European Union \(Withdrawal\) Act 2018](#), together with secondary legislation made under it, provides for EU law (with necessary amendments) to be imported into UK law on exit. Two statutory instruments have now been made, implementing various technical amendments to employment legislation, to apply from 1 November 2019 in the event of a no-deal Brexit. The only substantive changes made by the regulations relate to European Works Councils (EWCs), which cannot continue to function as currently in the event of Brexit (unless the EU agrees to treat the UK as if it were still a member state for these purposes). The regulations provide that no new requests to set up an EWC or information and consultation procedure can be made after exit day; they also attempt to maintain employee rights in relation to existing EWCs to allow them to continue to operate as UK EWCs. However, post-Brexit, multinationals will have to comply with European Works Council legislation in an EU member state and therefore continuing to run a UK EWC in addition is unlikely to be welcomed. Most are likely, instead, to relocate their EWC arrangements from the UK (and may voluntarily choose to permit UK employees to continue to participate).

In the event of a deal on Brexit, the European Union (Withdrawal) Act 2018 would be amended to put it on hold until the end of the transition period. The proposed Withdrawal Agreement endorsed by the EU Council on 25 November 2018 provides that EU law will continue to apply during a transition period through to at least 31 December 2020. Employment law rights derived from EU law would therefore be maintained for this period as a minimum. It is highly likely that employment rights would be maintained after the transition period too, as:

- The backstop arrangements included in the draft [Withdrawal Agreement](#) (applicable in order to avoid a hard border in Ireland should it not be superseded by an agreement on the future UK-EU relationship) also deal with employment rights. The backstop includes level playing field measures to ensure fair competition between the UK and the EU including in relation to labour and social standards. It provides for non-regression of current levels of labour and social protection and “as regards fundamental rights at work, occupational health and safety, fair working conditions and employment standards,

information and consultation rights at company level and restructuring”. In effect this would embed EU law in UK law beyond the transition period until such time as a full agreement on the future relationship is reached.

- The [Political Declaration setting out the Framework for the Future Relationship between the EU and UK](#) (which accompanied the draft Withdrawal Agreement) includes a commitment to work together to safeguard “high standards of ... workers’ rights” and a statement that the future relationship must ensure open and fair competition, including provisions on social and employment standards. The commitments should combine appropriate and relevant European Union and international standards and adequate mechanisms to ensure effective implementation. It also notes that the future relationship should incorporate the UK’s continued commitment to respect the framework of the [European Convention on Human Rights](#). The Conservative government had originally planned to replace the [Human Rights Act 1998](#) (which incorporates the European Convention of Human Rights) with a British Bill of Rights, but this was put on hold at least for the course of the current Parliament in view of Brexit; this reference in the Political Declaration makes a future repeal of the Human Rights Act even less likely.
- The [UK Government’s White Paper](#) detailing its proposal for the future relationship between the UK and the EU (published on 12 July 2018) also proposed that the UK and the EU commit to the non-regression of labour standards and to uphold their obligations deriving from International Labour Organisation commitments.

It is also worth noting that some EU law-derived rights will have been transposed into employment contracts and policies and therefore would continue to apply until varied in any event.

CJEU case law

Under the draft Withdrawal Agreement, EU law would continue to apply throughout the transition period, including rulings of the CJEU handed down during the transition period (or thereafter if commenced before the end of the transition and involving the UK as a party).

After a transition period, or immediately on a no-deal Brexit, there is some uncertainty over the precise extent to which EU law will be preserved. Under the European Union (Withdrawal) Act, in theory at least, the Supreme Court could re-examine and

- Means:
 - Secondary legislation making technical changes to employment law (and substantive changes regarding EWCs) will apply from 1 November 2019
 - EU-derived employment law rights are likely to be substantially maintained. The Government has published a [technical note on workplace rights in the event of no-deal](#)
 - Supreme Court could reverse some case law

Deal/transitional period

- If approved by the UK Parliament, the Withdrawal Agreement, or some version of it, will set out arrangements for the UK’s withdrawal from the EU – when the UK will cease to be a member state
- A transition period will follow the date of the UK’s EU exit up till at least the end of 2020, possibly the end of 2021 or 2022
- During transition, EU law will continue to apply in and to the UK and the UK will continue to trade as part of the Single Market
- The Withdrawal Agreement will be accompanied by the Political Declaration on the future relationship between the UK and the EU. This will comment on the future trading relationship between the EU and the UK
- Whether or not the Withdrawal Agreement or the Political Declaration, or some version of both, are approved by 31 October 2019, the UK will cease to be an EU member state on that date, unless the date for the UK to leave the EU is extended again by agreement between the UK and the EU27

potentially overturn established doctrines, subject to the requirement to continue to give effect to the supremacy of EU law in relation to pre-exit domestic legislation (and in relation to post-exit amendments to pre-exit legislation where this is not inconsistent with the intention of the modification). Much-litigated issues such as holiday pay could be re-opened, making the legal position unpredictable until suitable cases are decided by the UK courts. Given the volume of EU legislation and CJEU case law in the field of employment law, this will be concerning to employers and employees alike.

Practical steps

While Brexit is likely to have very little immediate impact on employment law, more generally employers will need to factor employment law obligations into broader business decisions as a result of Brexit:

- The possible impact of Brexit on business and employment plans may be an issue that should be addressed where there are obligations to inform and consult with employee representatives, eg in the context of a proposed TUPE transfer.
- Employers contemplating restructuring in response to Brexit should ensure they are up to speed on their information and consultation obligations. These arise on a TUPE transfer, which can include offshoring situations. An obligation to inform and consult also arises where there is a proposal to make 20 or more redundancies at one establishment within a period of 90 days or less; consultation must begin at least

30 days before the first dismissal takes effect where 20-99 redundancies are proposed, increasing to at least 45 days for 100 or more proposed redundancies. Tribunals can award compensation of up to 90 days' pay per affected employee for breach.

- If they have not done so already, multinationals with Works Councils under UK legislation (as their central management is based in the UK) should urgently take steps to relocate their EWC arrangements.
- Employment documentation may need updating and multi-jurisdiction benefits packages and employee representation may need to be reviewed for workability. Cross-border transfer of employee data may also need to be reviewed for ongoing compliance with data protection law and whether additional steps may be required to transfer EU data subjects personal data (eg, put model clauses in place, if there is no immediate adequacy decision in favour of the UK as a third country).

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or the Article 50 notice is withdrawn. If there is an approved deal and the UK enters transition as explained above, the legal position during transition will be very similar for businesses as if the UK were still an EU member state

- Means:
 - EU-derived employment law rights will be maintained during transition; thereafter, Parliament could make legislative changes but these are likely to be limited given commitments made to date.
 - Supreme Court could reverse some case law post-transition

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