Key areas of employment law are derived from EU legislation and so in theory could fall away automatically, be abolished or amended. These areas include working time, agency workers, fixed-term employees 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 at the end of the transition period. At the end of transition, much EU derived law and directly applicable EU law will be preserved as retained EU law, subject to amendment. This section of the Legal Guide reviews how this is likely to develop.

The Withdrawal Agreement approved by the UK and EU Parliaments provides that, although the UK has now ceased to be an EU Member State, EU law will continue to apply until the end of the transition period on 31 December 2020. Employment law rights derived from EU law will be maintained for this period as a minimum. The position following the end of 2020 will depend on the outcome of negotiations.

The European Union (Withdrawal) Act 2018 (the “Withdrawal Act”), together with secondary legislation made under it, provides for EU law (with necessary amendments) to be imported into UK law at the end of the transition period. Two statutory instruments have been made to implement various technical amendments to employment legislation. The only substantive changes made by the regulations relate to European Works Councils (“EWCs”), which cannot continue to function as currently following the end of transition. The regulations provide that no new requests to set up an EWC or information and consultation procedure can be made; they also attempt to maintain employee rights in relation to existing EWCs to allow them to continue to operate as UK EWCs. However, post-transition, 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).
Looking further ahead, the level playing field measures covering labour and social standards contained in Theresa May’s draft Withdrawal Agreement (as part of the backstop arrangements) were deleted from the revised Withdrawal Agreement agreed in October 2019. However, these remain in the Political Declaration setting out the framework for the future relationship between the EU and UK accompanying the Withdrawal Agreement, which 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, encompassing robust commitments to ensure a level playing field” commensurate with the scope and depth of the future relationship. The commitments should combine appropriate and relevant European Union and international standards and adequate mechanisms to ensure effective implementation. The Political Declaration also notes that the future relationship should incorporate the UK’s continued commitment to respect the framework of the European Convention on Human Rights. These goals are reflected in the EU negotiating directives of 25 February 2020 which state that the envisaged partnership should ensure non-regression in relation to “fundamental rights at work; occupational health and safety;… fair working conditions and employment standards; and information and consultation rights at company level and restructuring”. This is reinforced in the draft text agreement issued by the EU negotiating team.

In contrast, Boris Johnson’s written statement setting out the UK Government’s proposed approach to the future UK/EU relationship stated that the Government will not agree to level playing field measures in relation to labour (and other areas) which go beyond those typically included in a comprehensive free trade agreement. He proposed that both the UK and EU should “recognise their respective commitments to maintaining high standards in these areas; confirm that they will uphold their international obligations; and agree to avoid using measures in these areas to distort trade”. This is reflected in the Government’s policy paper of 27 February 2020 which states that the free trade agreement should include “reciprocal commitments not to weaken or reduce the level of protection afforded by labour laws and standards in order to encourage trade or investment” and “should recognise the right of each party to set its labour priorities, and adopt or modify its labour laws”. It should also include commitments to reaffirm existing International Labour Organisation principles and rights.

The European Union (Withdrawal Agreement) Act 2020 (the “Withdrawal Agreement Act”) deleted the provisions of the Withdrawal Act requiring the Government to report on whether employment Bills remove any workers’ retained EU rights and on whether any new EU workers’ rights adopted by the EU will be matched. The removal of these reporting obligations have been seen by some as symbolic, although they lacked any real teeth in any event and the Government stated that their removal was simply to speed the passage of the Bill. The Government has also repeatedly stated that it is committed to maintaining high standards of workers’ rights (although see below concerning the new provision on derogation from retained EU case law).

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.

**EU-derived employment legislation: scope and possible focus of amendment**

Even if the future relationship permits divergence in workers’ rights, the areas of likely reform are limited. 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 1998 and the Agency Workers Regulations 2010, which have both been heavily criticised as imposing unnecessary burdens on business. (Interestingly, the Government has made minor amendments to both the Agency Worker Regulations and Working Time Regulations with effect from April 2020, but to improve the position for workers rather than to reduce rights.)

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.

**CJEU case law**

Under the Withdrawal Agreement, EU law continues 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).

- The non-binding Political Declaration on the future relationship between the UK and the EU accompanies the Withdrawal Agreement – there will now be an intense period of negotiations to seek to finalise the details of the future relationship.
- **Effect:**
  - EU-derived employment law rights continue to apply in the UK until the end of 2020;
  - any attempts post-transition to remove certain regulatory burdens on business which were previously derived from EU legislation may be impacted by any such future relationship/trade deal.

**At the end of transition – will there be elements of no deal?**

- **At the end of the transition period, if the new trading relationship is not in place, there could be a situation similar to no deal at that point. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period. Both sides have set out their respective negotiating positions. The UK and the EU have also released their versions of the draft UK-EU FTA - for further updates, please subscribe to our Brexit blog.**
- However, there will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply and no-deal guidance therefore remains relevant. See the accompanying section: Leaving the EU – The process and preparations.
- The body of EU law in force at the end of 2020 will be imported into UK law (with necessary amendments) under the European Union (Withdrawal) Act 2018 and the
After the transition period, there is some uncertainty over the precise extent to which EU law will be preserved. Under the Withdrawal Act, in theory at least, the Supreme Court could re-examine and 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). It is also noteworthy that the Withdrawal Agreement Act added a new power for ministers to specify (in regulations made before the end of the transition period) that certain lower courts and tribunals would also not be bound by retained EU case law and domestic case law on EU derived rights. There has been speculation that this power could be used to row back on recent case law developments on holiday pay, for example. See also accompanying section: The UK’s new legal order post-Brexit: A new class of UK law.

Given the volume of EU legislation and CJEU case law in the field of employment law, this uncertainty 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 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).
- All this comes at a time when employers are facing unprecedented challenges and economic hardship caused by the COVID-19 pandemic, including temporary shut-downs, furloughing of employees, significant changes to the way of working to ensure health and safety and ultimately restructuring and redundancy. However, the Brexit issues need to remain part of the framework of planning for the next 12 months, as there is, as yet, no indication that the pandemic will result in the extension of the transition period to end 2021 or end 2022.

**UK legislation made to implement EU law will be retained, with suitable amendments – this will be called “retained EU law”.

- A lot of the secondary legislation to make such amendments has already been made, including regulations to make amendments to the Transnational Information and Consultation of Employees Regulations 1999 concerning European Works Councils and minor amendments to the Employment Relations Act 1999, the Work and Families Act 2006 and other employment regulations.
- The Government has published a series of 100+ practical no-deal notes with advice for companies, including one on workplace rights.**

“While Brexit is likely to have very little immediate impact on employment law, employers will need to factor employment law obligations into broader business decisions.”

**CHRISTINE YOUNG**