

Legal update — March 2017

Employment

Brexit: the implications for employment law?

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Article 50 has now been invoked and the process of negotiating Britain's exit from the EU commenced. What more do we know now about the implications for UK employment law following Brexit?

What we keep and what we lose

The primary purpose of the EU is to integrate member states' economic and political systems and to establish a free market based on the free movement of goods, people, money and services.

In order to achieve this EU members cede part of their sovereignty under the Treaty on the Functioning of the European Union (TFEU), which empowers the EU institutions to adopt laws. These laws take precedence over national law and are binding on national authorities.

The provisions of the TFEU and the Treaty on European Union (the prime sources of EU law) are incorporated into UK law by the European Communities Act 1972. Withdrawal from the EU will affect the legal landscape as much UK legislation enacts EU legislation and decisions would have to be made about what to scrap and what to retain. The Government plans to introduce a "Great Repeal Bill" incorporating all existing EU law into UK law, but with the intention of removing the UK from the jurisdiction of the Court of Justice of the European Union.

Which employment law rights come from the EU?

Although not all employment law rights derive from the EU, a substantial amount of them do, and those that don't have become enhanced over time through EU intervention and case law.

Working Time

The Working Time Directive was implemented in the UK in 1998 by virtue of the Working Time Regulations (the WTR) and introduced maximum hours for the working week, daily and weekly rest periods, rest breaks during the working day and a statutory right to paid annual leave.

Family friendly

Although some family friendly laws are of domestic origin there are some which are derived from the EU. The Pregnant Workers Directive gives women the right to paid time off for ante-natal appointments and places duties on employers to carry out risk assessments and make any necessary adjustments. Under the Parental Leave Directive working parents have the right to take unpaid leave from work to look after a child as well as the right to take time off for urgent family reasons, such as caring for a sick child or dependent.

Equal pay

The Equal Pay Act 1970 was in existence before the UK joined the EU in 1973. However, it did not cover equal pay for work of equal value until enforcement action was taken by the European Commission.



Source: Fotolia

Discrimination law

The Equality Act 2010 is primary legislation which implements the UK's laws against discrimination. However, significant proportions of the Act could be repealed if EU rights in this area were no longer in place as a result of Brexit.

Examples of EU influence on the current discrimination landscape include the EU Framework Equal Treatment Directive which resulted in the introduction of legislation on age, religion or belief and sexual orientation discrimination, the reversal of the burden of proof in discrimination cases following the Burden of Proof Directive, and the requirement that there must be no upper limit for compensation in discrimination cases.

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Transfer of Undertakings

The Transfer of Undertakings (Protection of Employment) Regulations 2006 derive from the Acquired Rights Directive. In theory TUPE could be repealed, though in practice this is unlikely.

Atypical workers

The Part Time Workers Directive, the Fixed Term Workers Directive and the Agency Workers Directive were implemented in the UK by three different sets of regulations. The Directives offer greater protection to these groups of atypical workers. Would a government repeal protections for these workers? It feels unlikely, at least in the near future, in view of the debate around zero hours workers.

Collective redundancy consultation and rights to information and consultation

The Collective Redundancies Directive introduced collective redundancy consultation obligations and was implemented in the UK by the Trade Union and Labour Relations (Consolidation) Act 1992. The Information and Consultation of Employees Regulations 2004 which implement the European Parliament and Council Directive provide a framework for informing and consulting employees. Although these obligations could be reduced following Brexit, unless businesses feel that they are particularly burdensome it is also entirely possible that they will remain in place.

Health and safety

The pre-existing health and safety legislation in the UK has been extended by EU legislation. There have been a number of directives which have been implemented via national regulations which cover the management of specific workplace risks. These could potentially be scrapped under Brexit.

Data protection

The Data Protection Act 1998 (the DPA) implements the Data Protection Directive. It is likely that the DPA will be left alone if the UK exits the EU as UK businesses will still want to operate in the EU and so adequate protections will have to be in place to ensure the safe transfer of personal data.

Freedom of movement

There are currently around 2 million EU nationals working in Britain, as well as large numbers of UK nationals living and working in other EU countries. There is unlikely to be an automatic right to live and work in the EU.

What happens next?

Those employment law rights which derive from EU legislation could potentially be swept away. Despite the plans for the Great Repeal Bill to incorporate all existing EU law (including current case law), the Government also intends to include provisions allowing ministers to

revise it (including Employment law) without further recourse to Parliament. What would the political appetite be to do this in practice though?

The rights under the WTR are now deeply embedded and it's unlikely that they will be removed. However, there are various ECJ (European Court of Justice) decisions on holiday pay, such as the right to accrue holiday while on sick leave and the calculation of holiday pay to include elements such as overtime and commission which the government may wish to avoid. It's possible that there would be a push to limit holiday pay entitlement to basic pay, with limited rights to accrue and carry it over into new holiday years. It's also possible that the maximum weekly hours cap might be removed in view of concerns about the UK's productivity.

It's unlikely that family friendly laws will be affected immediately. The fairly recent rights to shared parental leave and the right to request flexible working are domestic, and rights in the UK to maternity leave and pay are more generous in some respects than some EU counterparts. Similarly it's unlikely that existing discrimination law would be subject to change. It has been suggested that a cap might be imposed on discrimination compensation. It's also possible that the government might legislate for positive discrimination in favour of under-represented groups (this is not allowed under EU law).

How about TUPE? The coalition government was keen to reduce the "unnecessary burdens on business" but when the revised TUPE regulations appeared in 2013 the changes they implemented were less than radical! Admittedly it was not possible for an all-out repeal, but it seems likely that TUPE will stay, though it may be amended to make it more business friendly.

And will there be a mass exodus of EU nationals from the UK?

The status of EU nationals post-Brexit remains uncertain, but for now all EU nationals retain the right to live and work in the UK. The A.50 letter sets out the Government's wish to strike an early agreement about their rights.

This agreement, when it comes, may exist on a permanent basis, or it may be that it will allow individuals time to obtain citizenship of the country where they are living and to return home if they fail to obtain it. The impact on new migrants, however, is harder to predict. The UK could try to negotiate a deal that allows free movement for some groups but the right to impose quotas on others, though there is no guarantee that the EU would agree to this.

Impact on UK legislation

The big question is question is what form the UK's new relationship with the EU will take. Any trade agreements with the EU are likely to demand adherence to EU employment and social protection so, from a practical point of view, it is likely that any watering down of EU legislation will be minimised. Indeed, the A.50 letter acknowledged that UK businesses wanting to trade with the EU will have to comply with EU rules. That does not guarantee, however, that all UK businesses will.

A time-consuming process

Certainly a new trade deal and any legislative changes will take their time to come through. A.50 has a 2 year longstop date and the intention is to finalise a deal within 18 months which can then be rectified across the EU.

Trade deals with other countries have taken up to 12 years to negotiate, and that is with countries who have not voted to leave. It is also likely that any trade deal will be subject to some "social" rights being retained, such as employment rights.

The lengthy process of reviewing all EU-derived employment laws and deciding what should be removed and what should be retained, along with what can be modified and what cannot will then have to take place. This monumental task is bound to take time to complete and will be shaped by the new deal negotiated with the EU and who is in Government in the UK.

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