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# Brexit: Employment

Although much of our employment law derives from the EU, Brexit will have limited implications for employment law in the immediate term. However, there are key questions over workers' rights after the end of the implementation period, and uncertainty about the future status of key ECJ employment decisions.

**Key point – employment law stays the same during the implementation period**

Under the deal negotiated by the Johnson Government there will be an implementation period from exit day until 31 December 2020. During this time, EU employment law will continue to apply and the UK will need to comply with any new ECJ decisions.

This also means that the UK will need to implement the revised Posted Workers Directive, which must be implemented throughout the EU by July 2020. This Directive gives additional rights to workers who are posted from one EU Member State to another. It remains to be seen whether the UK will introduce any new national legislation to transpose this Directive into UK law, or instead decide that posted workers coming to the UK are already sufficiently protected.

The terms of the deal between the UK and the EU allow for the implementation period to be extended to December 2021 or December 2022. However, the Johnson Government has categorically ruled out any such extension, and the EU (Withdrawal Agreement) Act 2020 now says that UK ministers cannot agree to one (although this could be overturned by new legislation at a later date). This means that the UK is not currently planning to transpose the Whistleblowing Directive (which has an implementation deadline of December 2021) or the Work-Life Balance and Transparent and Predictable Working Conditions Directives (both due to be implemented in August 2022).

**Key point - EU citizens' rights are protected by the deal**

The deal between the EU and the UK contains provisions on the rights of EU citizens living in the UK which include protection against discrimination at work. Existing anti-discrimination laws will be largely adequate to reflect these rights, which will need to be observed even if no trade deal is reached with the EU.

**Key point - European Works Councils arrangements will change**

European Works Councils (EWCs) can continue to operate as they did before until the end of the implementation period. After that, however, arrangements will need to change.

**Key actions**

- All multinationals will need to decide what to do about the ongoing involvement of the UK representatives in their EWC after the end of the implementation period.
- Multinationals that are headquartered in the UK, or that have appointed a UK representative agent for their EWC, will need to have proactively designated or assigned a new representative agent based in an EU member state.

**Key point – new legislation allows more flexibility to depart from ECJ decisions after implementation period**

Once the implementation period comes to an end, all existing EU employment legislation as it stands at the end of the implementation period will be converted into UK law, with a few very small adjustments intended to make sure that the legislation is still comprehensible.

New ECJ decisions after the end of the implementation period will not be binding on UK courts or tribunals, although could be taken into account if relevant. However, decisions of the ECJ during the implementation period and before Brexit will be adopted into and retained in UK law, which means that they will remain binding unless and until they are overturned.

The Supreme Court will be able to depart from retained ECJ decisions on the same basis as it can depart from its own decisions (i.e. if it seems right to do so).

Intriguingly, a new provision in the EU (Withdrawal Agreement) Act 2020 suggests that other (lower) courts and tribunals could also be given the authority to depart from retained ECJ case law in the future. The basis on which they may do so is unclear; these issues would need to be dealt with in future regulations. It remains to be seen which courts will be given this power; it seems unlikely that they will include Employment Tribunals, but they may include the Employment Appeal Tribunal.

**Key actions**

- Employers do not need to take any action at the moment, but could expect volatility and uncertainty if the government gives lower courts wide scope to depart from key ECJ decisions, many of which have had a significant impact on UK employment law.

**Key point – scope for divergence on employment law in future**

As explained above, the current arrangements mean that the UK will not be required to implement three new key EU employment Directives (the Whistleblowing Directive, the Work-Life Balance Directive and the Transparent and Predictable Working Conditions Directive). The deadlines for implementing these Directives all fall beyond the end of the implementation period.

The deal negotiated by the Johnson Government allows more scope for divergence on employment rights once the implementation period comes to an end, when compared to the version negotiated by the May Government:

- The original Northern Irish backstop included a commitment not to dismantle employment rights throughout the UK. Although this was only in a protocol, not the main text, it would have operated both as the baseline for a future trade deal with the EU and, critically, as the default arrangement on an indefinite basis in the event of no alternative arrangements (i.e. technological solutions for the Irish border problem)
- The new Northern Ireland protocol does not contain this level-playing field commitment in respect of the UK as a whole. Instead, to protect the Good Friday Agreement, the new protocol commits Northern Ireland to continuing to abide by various EU Equal Treatment Directives (and interpret them in conformity with post-Brexit ECJ decisions) but this commitment does not extend to the rest of the UK.

The revised Political Declaration, which is intended to serve as the starting point for the EU/UK trade talks, says that the UK is committed to maintaining a "high standard" of workers' rights. However, this does not mean full ongoing alignment with EU rights. In fact, the current government has emphasised that it does not intend ongoing regulatory alignment. Equally, the EU has been clear that regulatory alignment is an issue that goes hand in hand with market access. It therefore remains to be seen what trade deal can be negotiated, and how far concessions on either side on the issue of regulatory alignment on workers' rights are necessary to clinch it.

If no trade deal can be negotiated with the EU then the UK will not need to keep pace with any new EU Directives and could potentially start dismantling some EU-derived employment rights. Historically, supporters of leaving the EU have cited scrapping working time legislation, placing caps on discrimination damages and repealing agency workers regulations as among the liberalising measures that could be taken, although none of these featured in the Conservative party's recent election manifesto.

In Northern Ireland, however, under the new Northern Ireland protocol, EU Equality Directives and related case law will remain binding even if no trade deal can be negotiated. This has the potential to result in further divergence between Northern Ireland and the rest of the UK, although there are already a number of differences between Northern Irish employment law and that applicable to Great Britain.

**Key actions**

- Employers should not take any immediate action in relation to the post-implementation-period employment law landscape, but should watch for developments.
- Some companies may be considering relocating some or all of their business into an EU member state after the implementation period, depending on the outcome of trade talks. From an employment law perspective, companies should remember that they may need to consult on the business case for closure before any decision to close a UK business is taken, and that employees should be offered the chance to move with the business if it is relocating.

## For more information


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