



## Brexit: The employment law implications

Since the UK voted to leave the EU on 23 June 2016 there has been plenty of political change in the UK and a great deal of debate about what the UK would realistically look like outside of the EU.

A potential weakening of employment protection rights if the UK were to leave the EU was frequently referred to as part of the “Remain” campaign. However, our view is we are unlikely to see many changes to the UK’s employment laws as a result of Brexit and in any event nothing will change before the UK leaves the EU. The Government intends to invoke Article 50 (the EU exit mechanism which once invoked means the UK must leave the EU within two years unless otherwise agreed by all of the Member States) in March 2017 and therefore it is likely we will remain “as we were” until March 2019.

How the UK’s employment laws will be impacted will largely be determined by the nature of the new relationship the UK’s government negotiates with the EU. The UK is unlikely to agree to continued freedom of movement, but the extent to which it is prepared to comply with much, if not all, of EU employment regulation is currently unclear.

If the terms on which the UK negotiates its exit from the EU allow for more flexibility than is currently expected, the extent of any changes that affect HR will depend upon the appetite of the political party which is in government at the time. The majority of the UK’s employment protection rights are now well embedded in our workplace culture and in our view making significant changes that leave employees feeling more vulnerable would be unpopular and most likely politically undesirable.

### Candidates for change?

#### Immigration

There could be a significant impact on UK businesses that employ EEA nationals and the ability for UK nationals to work and move freely in the EU. We have already considered the implications of Brexit on UK immigration in a [separate briefing](#). Businesses which rely on EEA labour would be well advised to plan ahead for all eventualities.

#### Holiday pay

Brexit may present an opportunity for the UK government to alter the rules around holiday pay, which have been the subject of much litigation and a cause of many headaches for HR teams over the last few years.

A wholesale repeal of the Working Time Regulations 1998 is unlikely as few would argue the UK’s enhanced holiday entitlement and rest breaks are in need of significant reform. It is more likely the government could tackle the long running saga of whether overtime, commission and other payments should be included in the calculation of holiday pay. It might also choose to review how workers accrue holiday while on sick leave. Businesses would welcome a simplification of both.

#### Agency Workers Regulations

These regulations are the most obvious target for complete revocation as they are not yet entrenched in UK employment law in the way other workers’ rights are. The regulations are complex and have been unpopular with businesses since their introduction in 2010 to implement the EU’s Temporary Agency Work Directive 2008.

#### TUPE

Although often seen as complex, we think it unlikely that there would be significant changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). In 2006 the Government introduced the wholly domestic concept of a “service provision change” to apply to contracting out, contracting in and a change of service provider. While TUPE pre-2006 could still apply in those circumstances, the 2006 regulations brought welcome clarification and today TUPE is accepted and understood by businesses and commercial contracts are priced accordingly.

Some aspects of TUPE could be reviewed, however. In particular, the current restriction on harmonising terms and conditions after a transfer is an irritation to businesses and the information and consultation requirements and penalties could be relaxed.

### What will happen to European case law?

Following Brexit the European Court of Justice (ECJ) will no longer have jurisdiction over UK courts and tribunals and its future decisions will not be binding on the UK’s legal system.

The UK courts and tribunals have interpreted EU-derived law in accordance with ECJ decisions and will continue to do so until Brexit becomes a reality. Accordingly, a body of UK case law has built up on a foundation of ECJ decisions.

It is not clear to what extent UK courts and tribunals may be able to disregard previous or future ECJ judgments following Brexit for example. If like Norway, the UK remains a member of the European Economic Area despite leaving the EU (which looks increasingly unlikely, it will instead be subject to the jurisdiction of the court of the European Free Trade Association States which interprets EEA rules and is bound by ECJ ruling. A case of same but different.

**For further information and advice on how Brexit might impact your workforce please speak to Stephanie Dale, Paul Lambdin, Kerry Garcia or Lloyd Davey or your usual Stevens & Bolton LLP contact.**



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