



## Brexit snapshot

**BREXIT AND EMPLOYMENT LAW ISSUES<sup>1</sup>**

**FEBRUARY 2020**

### Summary

Although a significant proportion of UK employment law is derived from the EU, it is anticipated that the impact of Brexit on UK employment law will be fairly limited (regardless of whether the UK leaves with a deal).

### Will workers' rights be protected post-Brexit?

Whilst the government's version of the Withdrawal Agreement Bill introduced into Parliament in October 2019 contained provisions to safeguard existing EU-derived workers' rights, these provisions were removed from the next version of the bill which has now received royal assent to become the European Union (Withdrawal Agreement) Act 2020.

The government has said that it intends to introduce a new Employment Bill to legislate separately to protect and enhance workers' rights. This creates theoretic uncertainty as we await the details of the Employment Bill, but in reality we do not anticipate any major changes.

### What will happen to key areas of UK employment law?

In summary, the UK's withdrawal from the EU would mean that UK employment rights currently guaranteed by EU law would no longer be guaranteed. Accordingly, whilst a post-Brexit government could seek to amend or repeal any of these rights, we view this as unlikely for the vast majority of rights.

We've set out below some key areas of employment law and the likely impact post-Brexit.

- **Discrimination:** The Equality Act 2010 implements the UK's laws against discrimination and is primary legislation<sup>2</sup> which will remain in force post-Brexit and can only be altered by fresh primary legislation. Whilst, the government could choose to repeal the act, this would be extremely controversial - we do not expect this to happen.
- **Parental leave and pay:** The origin of family friendly rights are mixed, with some rights deriving from the EU and some from the UK. As above, we would not expect that these would be repealed or watered down for policy reasons.

---

<sup>1</sup> For further information on the current position in relation to the negotiation of a Free Trade Agreement between the UK and the EU, refer to our client briefing "[Brexit: where do we go from here?](#)" (February 2020).

<sup>2</sup> Primary legislation is the general term used to describe the main laws passed by the legislative bodies of the UK, including the UK Parliament (source: <https://www.parliament.uk/site-information/glossary/primary-legislation/>).

- **Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”)**: The UK TUPE regulations (which is secondary legislation<sup>3</sup>) go further than required by the relevant EU directive essentially “gold plating” the EU directive. The existing TUPE regulations will continue to be in force post-Brexit. There is some speculation that the government will introduce small changes to make TUPE more business friendly, particularly in respect of the service provision changes.
- **Holidays and working time**: The Working Time Regulations 1998 (secondary legislation implementing the European Working Time Directive) will remain in force post-Brexit. We anticipate this could be a target area which will see some changes going forward. The UK will not be bound by various ECJ decisions on holiday issues and there is commentary suggesting that the weekly cap on working hours will be removed (however, in many instances employees already opt-out of the 48 hour working week in their employment contracts).

### What about the creation of new employment laws?

Subject to the terms of any deal between the UK and EU, the UK will no longer be required to transpose new EU law into domestic law.

The employment law consequences of this would be:

- The UK would not be required to implement new EU laws created in the employment sphere; and
- ECJ decisions interpreting EU Directives that have already been implemented in the UK, would have no automatic binding effect on UK law – although domestic courts may well still refer to them for guidance on points of EU-derived law. (See the “case law” section below for more information.)

### What about EU case law?

Post-Brexit, the Supreme Court is not bound by any retained EU case law. It can depart from existing ECJ decisions (applying the same test as it would apply in deciding whether to depart from its own case law), which is likely to lead to challenges arising from controversial ECJ judgments (such as those relating to holiday pay).

It is also worth noting that the European Union (Withdrawal Agreement) Act 2020 seeks to give the government a power to specify in regulations that certain lower courts and tribunals would not be bound by ECJ cases or domestic case law on EU-derived rights. The impact of this could be that employment tribunals are given more freedom to override ECJ and domestic cases on EU-derived employment rights.

However, a UK court or tribunal may still “have regard to” anything done on or after exit day by the ECJ, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

### If there is “no-deal”<sup>4</sup> what does this mean for UK employment law?

We expect the impact of a “no-deal” Brexit on UK employment law to be fairly limited. The information given above is unlikely to change significantly regardless of whether there is a deal. However, some specific issues of which to be aware in a “no-deal” scenario include the following.

- **European Works Councils “EWCs”**: The government intends to amend relevant regulations (TICE Regulations 1999 SI 1999/3323) concerning EWCs so that no new requests to set up a EWC or Information and Consultation procedure can be made. UK businesses with EWCs, and trade unions that are parties to an EWC agreement should review those agreements because there will no longer be reciprocal EWC arrangements between the UK and EU post-Brexit.
- **National Guarantee Fund**: It is unclear whether, in the event of an insolvency, the national guarantee fund would protect UK or EU employees working for a UK employer in another EU country. This is because there are variations in how each EU country implemented the guarantee and its application. Employers may wish to get clarity on the position.

<sup>3</sup> Secondary legislation is law created by ministers (or other bodies) under powers given to them by an Act of Parliament (primary legislation) (source: <https://www.parliament.uk/site-information/glossary/secondary-legislation/>).

<sup>4</sup> In the event that no free trade agreement is signed by the UK and the EU.

- Professionals: UK lawyers practising in the EU, depending on their particular circumstances, may need to register with the relevant authority in the country in which they are working to seek specific advice in respect of the recognition of their professional qualifications. EEA qualified lawyers practising in the UK, as well as other EEA professionals practising in the UK and UK professionals working in the EU should also review their professional status. This is a complex area which depends upon the countries involved, the specific individual, the profession and their activities and specialist advice should be taken as required.
- Jurisdiction issues: In the event of a “no-deal” Brexit, whilst the current rules on the jurisdiction for enforcing employment contracts will essentially be mirrored for the domestic context, the rules are likely to be impacted in other circumstances (such as where the defendant is not domiciled in a member state or where parallel proceedings are pending in a court in the EU and a court outside the EU).

### What should the current Brexit-related priorities be for employers?

- Consider current staffing to see potential immigration issues that may arise including for individuals with professional qualifications (see [Immigration Brexit Briefing Paper](#) for more detail on immigration issues).
- Check on existing works council agreements and whether they should be retained.
- Review governing law and jurisdiction clauses for those with workforces abroad to understand the current position and seek specialist advice as required;
- Review post-termination restrictions and references to geographical limitation (e.g. if they refer to areas “throughout the EU”).
- Whilst TUPE 2006 is unlikely to be changed imminently, consider whether commercial contracts should include a specific provision for TUPE 2006 being repealed and/or amended during the life of the contract.
- From an employee communications point of view, consider what communications are necessary now and over the course of Brexit.

### Contact us



#### Leanne Raven

Professional Support Lawyer

T: +44 20 7809 2560

M: +44 7827 353 108

E: [leanne.raven@shlegal.com](mailto:leanne.raven@shlegal.com)



#### Anne Pritam

Partner

T: +44 20 7809 2925

M: +44 7946 647 238

E: [anne.pritam@shlegal.com](mailto:anne.pritam@shlegal.com)

© Stephenson Harwood LLP 2020. Any reference to Stephenson Harwood in this document means Stephenson Harwood LLP and/or its affiliated undertakings. The term partner is used to refer to a member of Stephenson Harwood LLP or a partner, employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Stephenson Harwood LLP’s affiliated undertakings.

Full details of Stephenson Harwood LLP and or/its affiliated undertakings can be found at <https://www.shlegal.com/legal-notice>.

Any contact details and information that you provide will be held on a database and may be shared with other Stephenson Harwood offices and associated law firms. For more information in relation to how your personal information is processed please read our privacy policy which can be accessed [here](#).

Information contained in this document is current as at the date of first publication and is for general information only. It is not intended to provide legal advice.