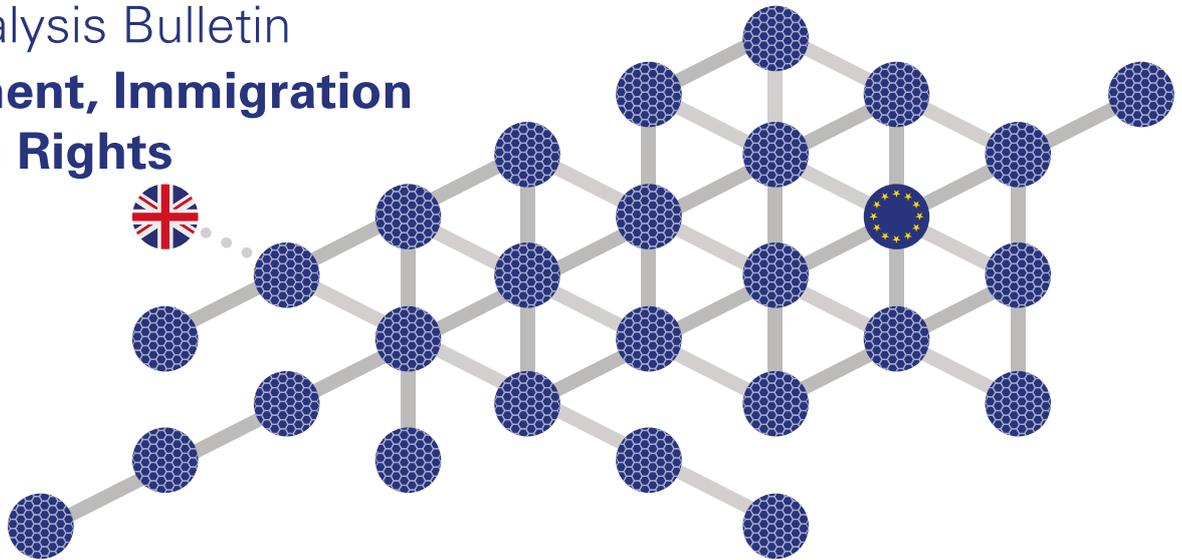


Brexit Analysis Bulletin

Employment, Immigration & Human Rights



In the referendum held on Thursday 23 June 2016, people of the UK voted in favour of leaving the European Union. The discussions around the leave process are now ongoing and it will take at least two years, if not longer, for the UK to formally leave the EU. In the meantime, we remain a member of the EU and subject to its rules.

Potential options for a new relationship with the EU include: a combination of free trade agreements with individual EU member states; bilateral deals or a customs union with the EU; or membership of the European Economic Area (EEA) and/or the European Free Trade Association (EFTA). It remains possible that a further Scottish Independence referendum could be held in the future, potentially leading to a significant difference in the legal landscape North and South of the border.

In this update we focus on the employment, immigration and human rights implications of the UK exiting the EU.

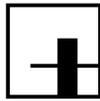
EUROPEAN EMPLOYMENT LAWS

The following EU directives underpin key aspects of UK employment law and apply to all members of the EEA:

- Acquired Rights Directive which protects employees during business transfers and is embodied in UK law by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).
- Working Time Directive which regulates hours of work, rest breaks, holiday entitlement and notably holiday pay is reflected in UK law under the Working

Time Regulations 1998 (WTR).

- European Collective Redundancies Directive which governs collective consultations and is enshrined in the UK's Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).
- Equal Treatment Directive which protects against discrimination and is primarily reflected in the terms of the Equality Act 2010.
- Pregnant Workers Directive and the Parental Leave Directive which are enshrined into UK law by various acts and regulations providing family leave rights including maternity, paternity, adoption, shared parental and parental leave and pay.
- Part-time Workers Directive which ensures that part-time workers are not treated less favourably than their full-time colleagues is reflected in the UK's Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
- Posted Workers Directive which requires co-ordination between EU member states on key rules that would apply when workers are posted from one



undertaking within the EU to another: in general the UK believes that the requirements of this directive are reflected in UK law and no specific acts or legislation were brought in to enforce it.

- European Works Councils Directive which requires certain European businesses to establish a European Works Council is implemented into UK law by the Transnational Information and Consultation of Employees Regulations 1999.
- Temporary Agency Workers Directive which provides basic employment protections to agency workers and is dealt with in the UK by the Agency Workers Regulations 2010.

There are a number of ways that EU law is implemented into UK law. In some cases, the UK uses primary legislation to bring in EU law, for example, the Equality Act. Brexit will have no immediate impact on primary legislation unless the Government decides it wants to make a change.

However, often European law is enforced by UK Government ministers introducing secondary legislation under the European Communities Act 1972, for example, TUPE or the WTR. As a result of Brexit it is likely that the European Communities Act will be repealed. That could leave the status of regulations made under its framework unclear and at risk of being automatically repealed. In reality, it is likely that the Government will take steps to maintain the status quo (at least in the short term) until a more considered decision can be made on what to keep and what to change.

It is unclear what relationship the UK will have with the EU post-Brexit. It may be that as part of any new relationship with Europe, the UK agrees to continue to be bound by various employment regulations. For example, membership of the EEA would require the UK to accept similar European laws to those which currently apply to regulate employment in the UK.

Gold plating

In many areas the UK already 'gold plates' EU directives by giving employees greater rights than the minimum required by EU law. As such, exiting the EU is unlikely to result in the rolling back of as many regulatory burdens as some might have expected.

Holidays

For example, the Working Time Directive gives workers a right to a minimum of 4 weeks' holiday per year. In the UK, the entitlement is increased to 5.6 weeks per year in the WTR. Brexit is unlikely to change the total number of holidays that employees enjoy. What may change following Brexit is the way that holiday pay is calculated

in the UK to reverse recent EU decisions requiring commission and overtime to be included in holiday pay.

Maternity and family leave

Similarly, the EU only requires the UK to offer a minimum of 14 weeks' maternity leave and 18 weeks' parental leave. The UK exceeds this by offering 52 weeks' of maternity leave, 39 of which are paid. The UK also offers 2 weeks of paid paternity leave, 18 weeks of unpaid parental leave, adoption leave which mirrors the maternity leave scheme, and the new shared parental leave regime allowing parents to transfer maternity leave entitlement between them. Brexit is unlikely to lead to any reduction in the total amount of family leave available to individuals. However, it would give the UK greater freedom on how to structure any future rights to parental leave and pay.

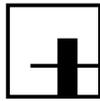
TUPE

TUPE is another example of gold plating. Since 2006, TUPE has arguably offered more extensive protection to UK employees than is required by the European Acquired Rights Directive, because it specifically applies to service provision change situations. The Government consulted on whether to remove this gold plating in 2014. However, the response from business was that the specific service provision change rules should remain, as they provided greater certainty. This is an example of gold plating being used because of a desire to create certainty, rather than a desire to enhance basic rights. Brexit will change the legal landscape so that there would be no requirement to have any form of TUPE protection. In such circumstances, the UK Government may decide to retain the existing TUPE law as businesses are accustomed to its application and have contracted on the assumption that it will continue to apply. However, the UK Government would be free to change the way TUPE works or to remove it entirely without risk of interference from any European Court, unless the UK agrees to a new relationship with Europe which includes the continued requirement to comply with various employment protections.

Potential areas of change

It is likely to be some time before we know what changes, if any, to expect to domestic employment law as a result of Brexit. This will largely depend on any new relationship that the UK has with Europe, and the political views of government at the time. However, there are some areas where European law has guided UK employment law in a way that the UK government may not have done, and as such these could be areas where we may be more likely to see legal change post Brexit if the UK government has the freedom to do so:

- Rules on collective consultation for the purpose of redundancies and TUPE may be watered down.
- Uncapped compensation for discrimination claims and



potentially high levels of liability for equal pay claims could be curtailed. The UK may seek to introduce upper limits on compensation for discrimination claims (something they are currently prevented from doing by EU law).

- Limitations on some forms of discrimination protection could be introduced, such as greater flexibility to treat people differently on grounds of age, and more freedom to offer different benefits to men and women on family leave without this being classed as sex discrimination.
- Unfair dismissal protection from day one for those dismissed on grounds of political opinion may be removed.
- Specific protection for agency workers, which the UK resisted when it was brought into EU law, may be removed or watered down and we may see the Agency Workers Regulations being repealed or amended.

Employment contracts and policies

Even if statutory employment rights were to change following a Brexit, employers may still find that their employees have a contractual right to receive the more beneficial terms. In order to reduce existing employee rights, employers may need to go through a process to agree a change in contractual terms or policy documents.

Court and tribunal decisions

One obvious change to the court and tribunal system is that it would no longer be competent for decisions to be referred to the Court of Justice of the European Union (CJEU). A Brexit may also affect how UK courts and tribunals make decisions. At the moment, they need to interpret UK law in line with EU law as far as possible. The most high profile example of this at present is around how to calculate holiday pay: EU law requires a more generous interpretation than the WTR which has resulted in the UK courts reading in additional words to ensure that the UK statutory position complies with the European directive and so employees have become entitled to receive commission and overtime payments in their holiday pay. Prior to that, uncertainty over the EU law position was at the heart of the Woolworths collective redundancy case which led to the 'at one establishment' collective consultation trigger test in TULRCA being in, out, and in again, as the case made its way through the UK and EU courts.

Brexit could result in uncertainty over the status of existing judgments. At present, lower courts are bound to follow decisions of higher courts. However, if it could be asserted that the rationale behind a particular decision was influenced by EU law (which would no longer apply in the event of Brexit) this could result in lower courts

disregarding certain aspects of decisions, meaning tribunal rulings could go in surprising new directions. There would undoubtedly be a period of uncertainty while the legal system adjusted to the change in standing of the existing swathe of case law.

IMMIGRATION AND THE FREE MOVEMENT OF WORKERS

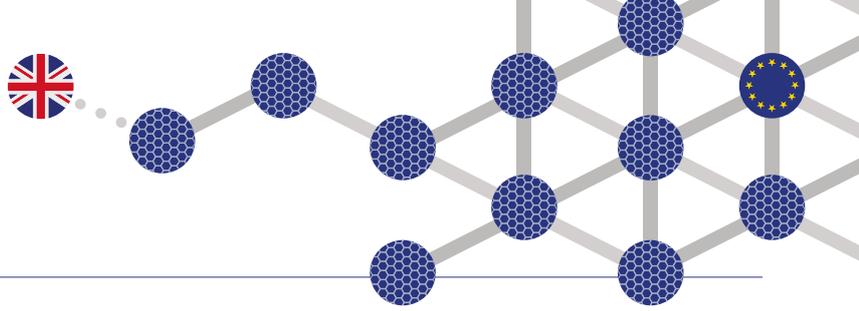
The free movement of workers between member states is a central pillar of the EU. If we were to cease to have any relationship with the EU, the UK would regain control of its borders and the current immigration system may need to be overhauled. EU nationals could potentially face the same visa restrictions as those from outside the EU. However, the extent of change would be dependent on the nature of any new relationship with Europe. If the UK were to join the EEA/EFTA, this would guarantee workers the right to free movement throughout the EU and other EEA nations so would not curb immigration. Alternatively, if the UK were to follow the Swiss model and enter into bilateral agreements with the EU, amendments to the current immigration system would still be needed.

HUMAN RIGHTS

The Charter of Fundamental Rights of the European Union entered into force in December 2009 and sets out a series of individual rights and freedoms. The Charter is addressed to the EU institutions and EU member state authorities when they are implementing EU law. A key example of when the Charter applies is when EU member states adopt national legislation to implement an EU directive, or when the member states directly apply an EU regulation. Brexit will most likely mean that the Charter will no longer be binding in the UK and it is likely that more information on this point will become available as the new relationship with Europe is discussed.

However, the better known international instrument on human rights in the UK is the European Convention on Human Rights. The Human Rights Act 1998 incorporates the rights in the European Convention on Human Rights into UK law. The European Convention on Human Rights is governed by the Council of Europe, which is a separate institution from the EU institutions. As such, after a Brexit, the European Convention on Human Rights would still be incorporated into UK law and would continue to operate in the current manner.

Human rights law in the UK may change in light of the current UK Government's proposal to replace the Human Rights Act with a British Bill of Rights. The UK Government has confirmed that it intends to consult on the proposed British Bill of Rights in 2016, but no consultation paper has been published as yet.



A NEW RELATIONSHIP WITH EUROPE

If there was a Brexit followed by an agreement to join the EEA, the UK would remain bound by many of the regulations and decisions that it was seeking to avoid by exiting the EU, but with less influence over the legislative process. In addition, the EFTA Court, which would have jurisdiction in these matters for EEA nations, is bound to follow decisions of the CJEU. Switzerland, with over 100 bilateral agreements with Europe, operates TUPE, collective redundancy and working time, and its courts treat CJEU decisions as persuasive. It would be open

to the UK to seek to enter into a similar arrangement. Alternatively, the UK may enter into an entirely new relationship with Europe.

The current referendum result has not resulted in any legal change. However, over time the impact of Brexit on UK employment rights and working practices could range from no change to a significant re-writing of employment law and practice. The extent of any change will be dependent on the nature of the UK's new relationship with Europe and/or membership of the EEA/EFTA.

SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS

JOINING THE DOTS OF THE EU REFERENDUM

What next?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

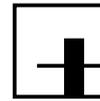
For further information in the first instance, please contact:



Katie Russell
Partner
T +44 (0)131 473 5266
M +44(0)787 269 9897
E katie.russell@shepwedd.co.uk

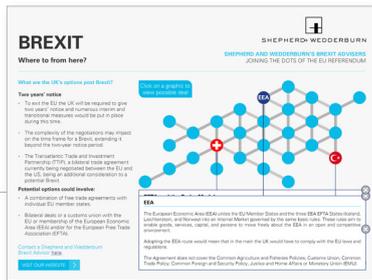


Neil Maclean
Partner
T +44 (0) 0131 473 5181
M +44(0) 07825413316
E neil.maclean@shepwedd.co.uk



Bookmark our Brexit Advisers page for a comprehensive collection of Brexit updates and guidance

Click here to view our 'Where to from here' Brexit infographic.



Click here to read our 'What now' Brexit bulletin.

