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Brexit Law – your business, the EU and the way ahead

Brexit – transition planning for employers

January 2020

The UK's withdrawal from the EU on 31 January 2020 ("**Exit Day**") triggers the start of a transition period (or "implementation period") lasting until 31 December 2020. For employers, it should be business as usual in the short term, from both a compliance and worker mobility perspective. However, planning will need to ramp up in anticipation of legal and regulatory changes taking effect from 2021, and possible "no deal" implications if a comprehensive trade deal is not agreed in time.

We consider the short- and medium-term impact for employers, and key areas in which in-house counsel and HR teams should be preparing for the post-transition period.

What will change for employers in the transition period?

There should be little change, as EU employment law rights and obligations will apply in the same way during 2020. The UK will be treated as a Member State under EU law, although it ceases to be a Member State from Exit Day. EU law, including ECJ rulings, will apply in the UK during the transition period (but see below for the position post-transition) and any changes to it will automatically apply unless provided otherwise. The UK will also continue to participate in reciprocal EU-wide regimes, such as those on financial services passporting, posting of workers, European Works Councils ("**EWCs**"), cross-border data transfers and jurisdiction over employment disputes.

An extension to the transition period could theoretically be agreed, but this looks unlikely to happen, not least because the European Union (Withdrawal Agreement) Act (which implements the UK-EU withdrawal agreement into UK law) prohibits UK Ministers from agreeing to an extension.

Will EU employment law still apply in the UK post-transition?

EU employment law will apply on a limited and different constitutional basis. Existing EU law and EU-derived rights will be converted (or "onshored") into a new body of "retained EU law" at the end of the transition period. These include rights already implemented through domestic legislation (discrimination, TUPE and collective consultation rights among others). While retained law will continue to apply in the UK, EU laws due to be implemented post-transition (for example, the Directives on Whistleblowing, Work-life Balance and Transparent and Predictable Working Conditions) will not apply, unless otherwise agreed.

Numerous sets of regulations are ready to amend UK employment legislation from 2021 in order to onshore EU law. These aim principally to correct deficiencies so the legislation can apply effectively post-Brexit, save in relation to European Works Councils (and employee insolvency protection) where, as explained below, more substantive changes will be made.

UK courts and tribunals must have regard to retained EU case law when deciding any dispute about retained EU law (subject to future regulations which may determine when they can depart from it), though the Supreme Court may depart from retained case law as it can from its own case law. They may also still consider new ECJ rulings that are relevant to matters of retained EU law. This could mean litigation in areas such as holiday pay becoming all the more complex, lengthy and costly given the need to consider, potentially, four bodies of case law – retained EU case law, domestic law (both pre- and post-Brexit) and possibly any relevant new ECJ rulings.

How is worker mobility affected?

During 2020, EU nationals can continue to travel freely to the UK, as can UK nationals to EU Member States. Ongoing worker mobility rights will be a key issue in political negotiations and, subject to concessions being agreed, tighter local restrictions will apply from 2021. A new points-based immigration system will be introduced in the UK. Special arrangements will continue to apply between the UK and the Republic of Ireland.

EU nationals who have been legally resident in the UK for five years as at 31 December 2020 can apply for indefinite leave to remain ("settled status"), while those who have been resident for a shorter period at that date can apply for limited leave to remain ("pre-settled status") until they have accrued the necessary five years' residence. There is a cut-off date of 30 June 2021 for applications. Reciprocal rights apply for UK nationals looking to settle in other Member States.

Many employers have been signposting what staff should do to secure their immigration status or citizenship rights, and providing them with support. The transition phase is a window of opportunity for other key staff to move freely around the EU and, if appropriate, to be encouraged to apply for pre-settled status in a Member State before tougher restrictions kick in. The impact of future mobility restrictions on expatriate and secondment arrangements which extend into 2021 should also be monitored. If problematic, these could be terminated early, or pending arrangements could be delayed.

How will data protection compliance change?

The EU General Data Protection Regulation ("**GDPR**") and Data Protection Act 2018 ("**DPA**") will apply as normal until the end of 2020, at which point the GDPR will be converted into UK law. From 2021, the UK will become a "third country" so that GDPR restrictions will apply to personal data being transferred into the UK unless the European Commission makes an adequacy decision in relation to the UK before then. The political declaration on the framework for a future UK-EU relationship (the "**Political Declaration**") states that the Commission will endeavour to do so by the end of 2020 "if the applicable conditions are met". It remains to be seen if this can be achieved. The UK will recognise all EEA countries and Gibraltar as "adequate", and respect all existing EU adequacy decisions, thereby permitting data transfers to these countries to continue (although it intends to keep this under review).

Employers should plan to implement appropriate safeguards for inbound personal data transfers from the EEA to the UK, in case no adequacy decision or other agreed model for the exchange of data is adopted by 2021. In most circumstances, this would involve relying on the EU's standard contractual clauses or, for occasional transfers, a derogation such as contractual performance. Privacy notices will also need to be updated to reflect any change in approach. For discussion of other Brexit-related data protection issues, please see our Digital Hub Blog.

Do employment contracts need to be amended?

Contractual provisions that refer to the "EU" or "EEA", for example restrictive covenants, confidentiality or IP obligations with geographical restraints linked to the EU or EEA, should be amended to expressly include the UK if this is intended. References to "EU law" should similarly be clarified to ensure that they cover retained law applicable in the UK (and as amended from time to time). These drafting changes will mitigate against the risks of contractual uncertainty, and of such provisions being unenforceable post-Brexit.

Will this affect a choice of governing law?

Current rules on governing law (under the Rome I Regulation) will apply until the end of 2020. From 2021, onshoring regulations provide for substantively the same governing law regime to continue applying in the UK. This means that a chosen governing law for an employment contract will still be respected by the UK courts from 2021, subject to any mandatory rights which prevail over it.

The jurisdiction regime (under the Recast Brussels Regulation) will also continue to apply in 2020 but cross-border jurisdiction questions – whether the UK courts have jurisdiction if a UK employer is sued by an employee working in another Member State – will become more complex from 2021. The Recast Regulation will be revoked for proceedings commenced post-transition, and UK common law rules will apply. However, as UK employers (who will be "third country" employers) can still be sued in a Member State under the EU regime, conflicts could arise between the two sets of rules, and exclusive jurisdiction clauses are likely to remain of limited use to employers.

What is the impact for EWCs?

UK-based EWC arrangements can continue to operate until the end of 2020. However, with effect from 2021, they must be rehomed in another EU Member State in order to remain valid for EU law purposes, otherwise they will be deemed to be based in the Member State with the highest employee headcount (please see our Briefing: Possible hard Brexit: Prepare to rehome your UK EWC).

Employers with UK arrangements should therefore consider their choice of Member State and take steps to appoint their EWC representative agent in that Member State before 2021. In this context, the UK Central Arbitration Committee ("**CAC**") has helpfully ruled (in favour of Hewlett Packard who pre-emptively relocated their special negotiating body to Ireland on account of Brexit uncertainty) that companies can "forum shop" to choose the most favourable law for their EWC, as long as they act in good faith. However, as this is only a first instance ruling, the cautious approach is still for employers to make a logical and reasoned choice, having regard to their employee footprint and factors such as familiarity and cultural fit, to reduce the risk of a subsequent challenge.

EWC agreements (whether governed by UK law or the law of another Member State) should be reviewed more generally to identify the impact on UK rights to participate in the EWC and on the mandate of UK representatives from 2021. If these are tied to the UK's EEA membership, then such participation rights and mandates could fall away automatically, or as a result of structural change provisions, at the end of the transition period.

This is an issue likely to be raised by EWC discussions in 2020, and employers should plan their response. The EWC Directive allows "third country" employees to participate in EWCs by agreement. A decision to exclude the UK is likely to have negative industrial relations consequences, particularly for employers with a material UK presence. If it is agreed that

UK employees can continue participating in the EWC, EWC agreements should be amended before the end of the transition period to provide for this

Could a future trade deal avert these changes?

The UK and EU have committed in the Political Declaration to uphold "social and employment standards at the current high levels" and to negotiate a comprehensive relationship agreement. While such an agreement could avert some of the post-transition uncertainty (or "no deal" implications) outlined above, significant employment law change is still likely given the UK is no longer a Member State and the UK-EU relationship will be on a very different footing. Also, unless a comprehensive deal is agreed in time, these "no deal" implications will have effect from 2021, and employers are advised to plan on that basis.

Can employers expect further UK employment law changes from 2021?

Further changes are likely, but the detail is, as yet, unclear. In the short term, the Government has said that it intends to protect and enhance workers' rights after Brexit and will do so in a new Employment Bill. In the longer term, the direction of UK employment law (and in particular its divergence from EU law) will depend very much on the future UK-EU relationship. Changes could be made to resolve some difficult and burdensome areas of EU-derived rights, or to help make the UK a more attractive jurisdiction for foreign investment. It is unlikely that areas where the UK has gold-plated EU law (for example, family-friendly rights) will change. Possible areas for reform could be the working-time opt-out, holiday pay rules and the rules on equal treatment of agency workers. However, there is no indication yet that such reform is on the cards.

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