

What are the implications of Brexit for employment law in the UK?

These useful Q&As have been put together by the Employment Team at mfg Solicitors LLP and considers some of the potential implications of the UK leaving the EU in selected areas of employment law.

If you have any queries with any employment aspects of Brexit, please do not hesitate to contact Sally Morris on 01905 610410 or at sally.morris@mfgsolicitors.com.

Where are we with Brexit at the moment?

Until the UK leaves the EU, with or without a deal, the UK remains a member of the EU and therefore subject to EU law.

The precise implications for the UK if and when they leave EU will largely depend not just on what deal, if any, is agreed between the UK and EU, but also upon the unique circumstances facing each business. It should be emphasised that despite numerous high profile statements by the UK and EU about their strategies for the UK departure and future relationship, nothing has been agreed in law and therefore organisations must be flexible and plan for a number of contingencies depending upon the outcome of negotiations, including a no deal Brexit.

Will EU employment law continue to apply to UK law after Brexit?

A significant amount of employment law in the UK comes from the EU. Although some laws were created in the EU and have been enhanced in the UK, the EU in other cases has subsumed protections that were already offered in the UK.

Although the Government have proposed maintaining current UK employment laws, so that existing employment laws are unchanged following exit day, this will not carry legal effect unless the Withdrawal Agreement is passed. Therefore existing worker rights derived from EU law could be at risk in the event of a no deal Brexit.

In addition, the European Court of Justice will no longer have jurisdiction over UK courts and tribunals after exit day. Therefore the Supreme Court will become the most senior court in the UK, unless agreed otherwise between the UK and EU.

What is the impact of Brexit on the UK and EU workforce?

Whilst the UK continues to be a member of the EU, including during any transition period, the UK continues to benefit from the EU's four freedoms, including free movement of people.

In a no deal Brexit, the freedom of movement would end. Therefore UK nationals working in the EU would be subject to EU rules and the individual country's requirements. Similarly EU nationals working in the UK would be subject to UK rules. However EU nationals will be permitted to stay in the UK up to three months after exit day without a visa, but will need to apply for a visa if they want to stay for longer.

Businesses should therefore conduct an audit to identify UK nationals who are working in the EU, as well as EU nationals who are working in the UK, so that plans can be prepared for potential restrictions to their mobility. In particular, the immigration status of UK and EU workers could affect the ability of workers to carry out their duties and obligations under their employment contracts. Therefore organisations should consider the possibility of a business restructure or potential redundancies.

Can I refuse to employ an EU worker before Brexit?

Until exit day, EU nationals continue to have the legal unrestricted right to work in the UK. As a result, employers must continue to carry out eligibility checks on new employees, regardless of their nationality, before they commence employment, otherwise a business may face a civil penalty and be deemed to have committed a criminal offence.

In addition, whilst the UK remains a member of the EU, refusing to employ an EU worker on the basis of their nationality would amount to direct race discrimination.

How will Brexit affect discrimination law?

The Equality Act 2010 sets out the UK's laws which protect against discrimination and is primary legislation. Therefore laws relating to direct and indirect discrimination, harassment and victimisation on the basis of any protected characteristic will remain in force after Brexit.

Although possible, it is unlikely that the Government would repeal the Equality Act 2010 post Brexit. However, some legal commentators have suggested the possibility of introducing caps to financial awards in discrimination claims, as with unfair dismissal. There has also been discussion about introducing elements of positive discrimination, although nothing formal has been announced.

How will Brexit affect equality and human rights?

The Charter of Fundamental Rights of the European Union provides for the fundamental rights and freedoms of individuals. The Charter will no longer be considered domestic law following Brexit however the Charter will likely still have relevance.

The European Convention on Human Rights (ECHR) which sets standards for the protection of human rights, was largely incorporated into domestic law by the Human Rights Act 1998. We are therefore unlikely to see much change in respect of human rights law.

How will Brexit affect parental leave and pay?

UK maternity leave and pay preceded the EU rights. The fairly new right to shared parental leave and the right to request flexible working are domestic in origin and will continue after Brexit. Although some businesses find family friendly rights a burden, there is little political eagerness to restrict existing rights. It therefore seems unlikely that we will see any change to parental leave rights or pay post Brexit.

How will Brexit affect TUPE legislation?

TUPE is a complex issue for many businesses when they are sold or purchased, and therefore unsurprisingly, firms want to abolish TUPE. This is unlikely, but the Government will probably propose some small changes following Brexit to make the legislation more "business friendly", such as the ability to harmonise terms and conditions of employment following a TUPE transfer, however it is unlikely that we will see any substantial changes in this respect.

How will Brexit affect holidays and working time?

Working time and holiday entitlement is provided for under the Working Time Regulations 1998. Given that holiday rights are now well established and accepted by employers, it would be highly controversial for the Government to make any substantial amendments.

That being said given that some European Court of Justice decisions have been unpopular, following Brexit the government may want to retain a right to paid holiday based on basic pay and with limited rights to accrue and carry it over into new holiday years. The UK may also wish to remove the cap on maximum weekly working hours under the Working Time Regulations.

How will Brexit affect collective redundancy consultation?

The previous government reduced collective redundancy consultation obligations. It is not clear what would happen to this obligation following Brexit. It is possible that the obligations may be further reduced however they are not now as onerous. In any event trade unions would undoubtedly fight any plan to reduce or remove the obligations altogether.

How will Brexit affect agency workers?

It is possible that The Agency Workers Regulations 2010 may be removed entirely due to the complexity and unpopularity of the regulations. The regulations have also not yet become embedded in UK law and would therefore be easier to remove.

How will Brexit affect data protection?

Although GDPR, which took effect on 25th May 2018, is EU law, it was automatically incorporated into UK law at the time, and therefore will continue to apply in all exit scenarios. Although aspects of GDPR could be amended if the UK leaves the EU, there is likely to be little appetite to change the law, and therefore it looks like data protection regulations are here to stay.

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