COVINGTON

Brexit: Employment Law Considerations

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International Employment

Following the vote by the United Kingdom in an advisory referendum to leave the European Union ("EU"), there is no immediate change to employment law in the UK.

Assuming that the referendum decision is put into effect (which still appears to be subject to significant political, legal and practical obstacles), the extent of any future changes will of course depend on two main issues:

- which form of "Out" is ultimately chosen/negotiated; and
- the political leanings of the British Government of the day.

European Economic Area ("EEA") Membership

"Out" covers a range of scenarios from EEA membership, through various intensities of bilateral agreements, to—ultimately—simple reliance on World Trade Organisation ("WTO") rules to define the relationship between the UK and the EU.

If the UK were to opt for—and be granted—EEA membership, then there would likely be no change to employment law (or indeed many other areas of law). EEA members—currently Norway, Iceland, and Liechtenstein—are obliged to apply most EU single market law, including employment law. The UK would also remain bound by future changes to EU employment law, though without being part of the legislative process which determines such changes.

If the UK were to opt for—and be granted—some looser relationship with the EU, then UK employment law would become a matter for the British Government (although the Northern Ireland Assembly can also legislate in this area, in respect of Northern Ireland). The rest of this note looks at possible consequences if the UK is not part of either the EU or the EEA.

How Might Change Be Effected?

The other main "Out"' political models available to the UK are:

i. the "Swiss" model (a range of separately negotiated bilateral treaties with the EU; Switzerland has approximately 130);

ii. the "Turkish" model (a customs union, which currently does not cover free access for services—a large component of the UK's economic output to the EU); and

iii. the "default" model (the WTO/free trade approach, where the UK would simply be a third party with no preferential access to the EU market).

In all three options, the European Communities Act 1972 ("ECA") would likely be repealed or amended. The ECA granted powers leading to the implementation in UK law of certain European employment laws, by way of domestic secondary legislation/regulations. These include the Working Time Regulations 1998, the Information and Consultation of Employees Regulations 2004, the Transfer of Undertakings (Protection of Employment) Regulations 2006

("TUPE"), and the Agency Workers Regulations 2010. If the ECA was repealed by Parliament, secondary legislation made under it (such as these regulations) would likely fall away, absent some saving mechanism.

Given the volume of EU law—not just employment law—affecting the UK, however, it looks unlikely in practice that the UK would be in a position to abolish or amend all EU-related law immediately. There would likely be a period when the current EU law position was maintained, unless and until new, alternative legislation was passed in the UK Parliament.

Discussions on whether to amend the current EU law position may also lead to discussions as to whether to repeal or revise primary and secondary legislation not made under the ECA (such as the Equality Act 2010, for example) on a piecemeal basis.

Is That Likely?

Our view at this stage is that no dramatic re-defining of UK employment law will be undertaken quickly by the existing or any future British Government.

The table below lists the legislation relied upon by UK Employment Tribunal claimants during 2014/2015—stating in each case whether the legislation is the creation of British Government or EU-derived:

Claim Description	Legislation	EU or British
Breach of contract	Various	British
Equal pay	Equal Pay Act 1970	British
Unfair dismissal	Employment Rights Act 1996	British
Redundancy pay	Employment Rights Act 1996	British
Written statement	Employment Rights Act 1996	British
Deductions from wages	Employment Rights Act 1996	British
Written terms and conditions	Employment Rights Act 1996	British
Written reasons for dismissal	Employment Rights Act 1996	British
National minimum wage	National Minimum Wage Act 1998 / National Minimum Wage Regulations 2015	British
Discrimination (disability, sex, race, religion, age, and sexual orientation)	Equality Act 2010	British—later supplemented by EU
Pregnancy detriment/dismissal	Equality Act 2010	British—later supplemented by EU
Redundancy—collective consultation	Trade Union and Labour Relations (Consolidation) Act 1992	EU

Working time	Working Time Regulations 1998	EU
Part-time regulations	Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000	EU
TUPE information and consultation	Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")	EU

The above table demonstrates fairly clearly that most UK employment regulation is self-imposed, reflecting modern employment and employee relations practices adopted by many other developed western democracies. UK dismissal laws, for example, are certainly more employer-friendly than those of many European and Asian countries, and are in many respects aligned more closely with the protections afforded by certain Latin American countries. Collective rights are respected in the UK, as they are in Canada and most of Latin America, but the UK does not operate the very strong employee participation models of, say, Germany (where works councils have a right of co-determination with respect to many employment decisions), France, Spain, Italy, and others. Extensive family leave rights, minimum wage, employee privacy and working time rules are, arguably, other examples of what might be described as good employment market practice.

More fundamentally, many UK employment rules give effect to international labour standards developed by the International Labour Organisation since 1919, such as the right to join trade unions/associate freely, the right to equal pay, and the right not to suffer discrimination on protected grounds.

That said, the UK legal system (and social policy) has become entangled with that of the EU (and other EU countries). Unknotting the ties would be a long, complex, and expensive process. Significant changes to employment regulation in an uncertain environment could meet with forceful resistance from other political parties, trade unions, workers, and other stakeholders.

Where Might UK Employment Regulation Be Considered Either out of Line with International Standards or Inconsistent with Good Business Practices?

Automatic transfer rules and agency worker rules are generally considered to be quite specific to the EU, although many countries outside the EU have similar (albeit watered down) regimes—for example, in Latin America. Whether the UK continues to be bound by both the Acquired Rights Directive (given effect in the UK by TUPE) and/or the Agency Workers Directive (implemented in the UK by the Agency Worker Regulations 2010) will ultimately depend on the form of "out" negotiated. As such, the scope for changing the rules could be limited or quite wide.

An entire repeal of the TUPE regime is unlikely, however; a large number of existing commercial agreements, particularly outsourcing arrangements, are based on the understanding that TUPE will apply to transferring employees in the event of a business change. Removing this regime or changing it significantly risks creating (even more) uncertainty for the business community. Also, it is important to remember that the UK courts have significantly developed the service provision change provisions of TUPE over time without being required to do so by EU law.

The Agency Workers legislation is arguably a lot less popular with employers. However, entirely removing the protections for this category of worker, which are now embedded in UK employment law, would not only be inconsistent with good business practice, but likely also face strong resistance from trade unions. Watering down, rather than removing, agency worker rights seems a more likely outcome, in time.

Another contentious area is holiday. The Working Time Regulations 1998 implemented the EU Working Time Directive, which has become a source of much uncertainty for UK employers. The right for employees to accrue holiday while on sick leave, and the fact that holiday pay should include certain overtime and/or commission payments, could be areas the UK Government might wish to restrict, along with introducing more flexible concepts not currently permitted under EU law (e.g. the rolling-up of holiday entitlement into pay).

Any Contractual Implications?

There are unlikely to be significant contractual changes required just because Brexit occurs (i.e. freestanding contractual changes not specifically relating to any changes of UK employment or other legislation). However, any protections such as post-termination restrictive covenants including specific reference to "the EU" may need to be assessed to ensure they still operate as intended with the UK outside that defined term. Any new employment contracts implemented post-June 23, 2016 should be flexible enough to allow for the possibility that the UK will not be part of the EU.

As the immigration position becomes clearer over the following years, it may be that employers will need to be more vigilant in policing the immigration status of their workforce, as there are significant civil and criminal penalties for employing individuals without permission to work in the UK. This may in future apply to EU nationals.

Practical Steps Employers Might Consider Now

- Review the composition of the UK workforce. Given that the Leave campaign stated they would implement a points-based immigration system, it seems possible that low-skilled, low-paid EU workers may struggle to obtain authorisation to work in the UK at some point in the future. We do not know yet whether EU nationals currently working in such roles would be required to leave the UK. In any event, employers might wish to audit the composition of their workforce to gauge how many EU nationals they rely on and whether there may be workforce shortages ahead. Of course, any recruitment or termination decisions at the present time should not be made purely on the basis of nationality, as that would be unlawful race discrimination.
- Assess any UK expatriates posted to the EU. At present, we do not know if UK citizens working in the EU would be allowed to stay or would have to apply for authorisation to work. It may be worth employers auditing whether they have any UK expatriates in EU-based roles who are likely to be there still in two-three years' time (or longer). This population may be affected by whatever immigration regime is finally negotiated with the EU.
- European Works Council ("EWC") agreements. These are based on an employer meeting certain employee threshold numbers in several EU Member States. If the UK is no longer a member of the EU, this might affect the validity of an EWC agreement that is in part based on numbers of UK employees. In any event, EWC agreements should be

reviewed to consider whether the Brexit situation, and any resulting employee changes, trigger a duty to inform and consult with the EWC.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Employment practice:

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