Briefing Paper

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Employment law post-Brexit

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Introduction

It appears that the Leave campaign does not have a single unified plan for leaving Europe, so the ramifications of Brexit are likely to be uncertain until at least the Autumn of 2016. There has been some mention in the press of greater freedom and relaxation of legislation and rules. However, given there is a two year notice period to exit the EU, there are unlikely to be immediate changes to EU derived UK employment law in the event of a vote to leave. Much will depend on the negotiations over the future relationship between the UK and the EU. That said, knowing what to expect and being in a position to reassure staff and senior management must be top of any HR managers 'To Do List'.

Employment law

Brexit is envisaged to be a move towards greater freedom of contract. The abolition of all laws that flow from Europe is theoretically a possible outcome. However, the uncertainty created and the fact that many EU laws, such as TUPE and certain strands of discrimination, are now fully embedded in the UK make universal abolition practically and politically difficult. The CBI has commented that businesses recognise the value of a framework of basic rights for employees (e.g. the national minimum wage) given that such regulations help the UK's labour market function effectively.

What is likely to happen is a gradual chipping away at certain employment rights once the Government has decided what to keep and what to discard.

The mechanism for repeal would suggest a prolonged period of consultation and transition. Those European laws that have been implemented in the UK by primary legislation (e.g. the Equality Act 2010) would need to be specifically repealed by the Government. Other European laws have been implemented in the UK by way of Regulations passed under the European Communities Act 1972 (e.g. the Working Time Regulations and TUPE). In the event the Government repealed the Communities Act 1972, it is uncertain whether any such Regulations made under it would automatically fall away or not.

Working Time

Working time is an area where we could expect some big changes. The Working Time Directive imposes a maximum working week and minimum paid statutory holidays. Without such legislation, employers could, in theory, impose longer working weeks with more limited rest breaks and no paid holiday and there would be no fall-back legal protections for employees. Limited changes are more likely such as a removal of the right to carry over annual leave when on sick leave and a return to the calculation of holiday pay on the basis of basic pay only (i.e. without including overtime or commission payments). It is also likely that the largely toothless maximum 48-hour week would be removed.

TUPE

This area of law is one where amendments could be made with little electoral risk for the Government.

The Government has already consulted on a proposal to repeal the service provision change test under TUPE in 2014. However, it decided that doing so would create uncertainty for business and no changes were made. A major objection was that a transferee, having received a workforce at the start of a service contract may have budgeted on the basis of being able to pass on employees at a replacement supplier through TUPE at the end of that contract. That transferee could be left with unbudgeted redundancies on the abolition of TUPE or of the service provision test in TUPE. This problem could, however, be mitigated with a gradual repeal of TUPE on a long transition period lasting several years. Alternatively, the Government may make changes to make the TUPE Regulations more business friendly, for instance, making it easier for employers to harmonise terms and conditions or to dismiss following a transfer. Until there is more certainty, any TUPE schedule on a commercial transaction should factor in the possibility of a changed regime.

Agency workers

The Agency Worker Regulations currently provide the minimum protection to agency workers required under EU law and have received little support from businesses. The legislation is viewed by many on the right as unnecessary red tape creating a burden on business. There may therefore be little resistance to amendments to the legislation and it is highly likely effort will be made to reduce the impact of this legislation, including a complete repeal if possible or removing the requirement for pay parity after 12 weeks.

Discrimination

Domestic protections against sex, race and disability discrimination have developed largely outside of EU intervention. It is almost inconceivable that the current Government would repeal the Equality Act in the event of a vote to leave. Anti-discrimination laws are therefore almost certainly here to stay. Uncapped discrimination awards may be vulnerable to change. The compensation cap originally contained within the Sex Discrimination Act 1975 was repealed in 1993. Regulations under the European Communities Act 1972, were made for the purpose of ensuring that the remedies available under domestic legislation relating to sex discrimination and to equal pay for men and women complied with the requirements of Council Directives 1975/117/EEC(1) and 1976/207/EEC(2). Removal of the equivalent cap in the Race Relations Act 1976 followed shortly behind. Brexit could allow the reintroduction of a maximum cap, as already exists for unfair dismissal awards.

Maternity rights

Many of the rights in the UK that protect women during pregnancy and maternity leave emanate from Europe. Interestingly, the right to statutory maternity pay in the UK exceeds the minimum required by the Equal Treatment Directive, with the EU minimum being 14 weeks' paid leave. It is unlikely that any Government would want to be seen to be removing existing equality rights but it is possible that these rights could be

vulnerable in the face of a Government in favour of deregulation, for instance by repealing the right of first refusal in a redundancy situation or the right to accrue annual leave whilst on maternity leave.

Collective redundancies

Often viewed as a burden on business, amendments to the collective consultation obligations could be seen as an easy win for the Government in the event of Brexit. There could be a further reduction in the consultation period but this is likely to be faced by resistance from the trade unions.

ECJ decisions

ECJ decisions have shaped the decisions of the UK courts and it is not known what would happen to any ECJ decisions handed down before or during any transitional period following Brexit. In particular, would they still be binding on the UK courts? Would previous UK cases that relied on ECJ decisions no longer be good law? It is likely that the UK courts would continue to see ECJ decisions as persuasive rather than binding authority.

Immigration

It is unlikely that staff who are working or studying visa-free in the UK or who are UK citizens in other EU member states will be affected in the short term as they will continue to have the benefit of the freedom of movement principle during the two-year negotiation period between the UK and EU.

If the UK does give up and/or restrict the right to free movement, then for businesses who rely upon attracting international talent, much will depend on the nature of any new immigration and visa rules. If there was a genuine attempt to limit net immigration to the tens of thousands then the restrictions would necessarily be severe. Please refer to our practical steps as to how best to address this.

Practical steps

The 'now' is an analysis of the risks for your business given all the uncertainty. The first step any employer can do now is to reassure staff and have in place a team of people made up from different parts of its business and functions to monitor and assess the impact and implications of Brexit. Until more is known, below are some steps which may help businesses overcome this period of political turmoil and uncertainty.

- Nominate a person or team of people who are responsible for monitoring employment and immigration issues. Ensure all staff have a contact to whom they can address questions or express concerns in all the countries in which the organisation operates. This will ensure all staff, wherever located, get the same consistent message and which in turn will give reassurance that the organisation knows what it is doing and what needs to be done as we go nearer to exit.
- Ensure staff are aware of all social media policies and that unauthorised statements or comments are not being made in the employer's name.
- Outsourcing/insourcing contracts, or other business transfers which are likely to occur after exit should be drafted so as to take account of the possibility of TUPE not applying in its current form, or no longer relevant when the contract expires/is renewed/completes. Thought should also be given to the potential for redundancies if the automatic transfer principle is removed/watered down including the possibility of being unable to carry on a service if staff do not transfer.
- Staff may be unsettled and anxious about how restriction to free movement may affect their right to live and work in the UK or other EU member states. Staff whose immigration status may be affected should therefore be made aware that the organisation will keep immigration status under review and will provide timely assistance and support to staff as and when appropriate. This combined with a key point of contact with specialist immigration knowledge or access to such knowledge is essential to retaining the best people.
- Employees should also be made aware that EU nationals working in the UK can apply for a Registration Certificate as proof of their right to live and work in the UK. Although optional it may provide some additional comfort for employers. Further, employees who have lived in the UK for more than 5 years should, if they have not already done so, be encouraged to think about applying for permanent residence sooner rather than later so they will have time to resolve any glitches in their applications.
- There may be many reasons to consider delaying recruitment because of the present uncertainty on new immigration and visa rules, but if businesses are confident about their future, the possibility of future visa limits is one reason to hire now rather than later.
- At the other end of the market, a reduction in free movement could lead to labour shortages and wage inflation in lower skilled jobs. Employers, especially those to which the new Apprenticeship Levy will apply should be thinking strategically about apprenticeship programmes and attracting and retaining talent at the lower end not just the top.
- Employers should adopt or restate policies to prevent any bullying or victimisation of staff working in the UK under freedom of movement rules or more generally on account of race or nationality. The general situation is very delicate, and employers should ensure that genuine debates on Brexit do not spill over into behaviour which could be construed as a breach of a behavioural policy.

Conclusion

The overwhelming message is to take the opportunity to analyse the risk, and plan for the medium to long term. We will continue to monitor the implications and post updates on our Employment Blogs.

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