fieldfisher

International Employee Mobility after Brexit

September 2016

International Employee Mobility after Brexit

Introduction

It appears that Brexit has taken the UK political elite by surprise and 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 until 2017 according to UK Prime Minister May. However, there are unlikely to be any immediate changes for international employers employing staff in the UK or UK employers employing staff in the EU, as the European Treaty provides for a negotiation period in case of an exit. Much will depend on these negotiations over the future relationship between the UK and the EU. Different options are possible, all with different outcome for employers and employees:

- ***The Norwegian, Icelandic and Liechtenstein model*** (remaining a European Economic Area (EEA)/European Free Trade Area State). Essentially, the UK would remain subject to much of the EU legislation, but with no voice in the decision-making process and with no right of veto. This option does not afford the government independence from the EU legislation or the European Court of Justice (ECJ);
- ***The Swiss model*** (developing a series of bilateral agreements with the EU);
- ***The Turkish model*** (negotiating to remain part of the Customs Union without full membership of the EU);
- ***A 'sui generis' model***—a new deal different from the others like https://www.chathamhouse.org/PUBLICATIONS/TWT/PREPARING-UKS-BREXIT-NEGOTIATION
- ***Total withdrawal from the EU***—In this eventuality, substantial changes to UK legislation could happen quickly.

That said, companies have to anticipate now and at least be in a position to reassure staff and senior management by identifying the possible issues and address them as much as possible as from now on.

I. In an international context

Social security/welfare in an international context

The determination of the social security scheme applicable to international mobile workers - EEA and Swiss citizens or third country nationals - being sent to the UK and being sent from the UK to the EEA (and in certain cases even outside the EEA) is regulated by the EU coordination regulations 883/2004 and 987/2009.

Once the UK leaves the EU ––these coordination regulations will be repealed and the bilateral treaties (concluded between EU Member States such as Belgium, France, Germany , Italy, … and the UK) in respect of social security will come into force again. These treaties are much more limited in respect of determining the social security/welfare scheme to be applied as well as in relation to the benefits covered; they do provide for a possibility to remain subject to the social security scheme of the home state but only for a very limited period (in most cases 2 years instead of 5 years). Furthermore these treaties do not provide for any regulation in respect of simultaneous employment which can result in the fact that the employee will, in principle, be subject to two (or more) social security/welfare schemes while working in different countries simultaneously. The same goes for the accumulation of social security/welfare benefits; even worse is the fact that the treaties do not provide for guaranteed rights in respect of health/sickness costs (doctor, dentist, hospital, ..). A case by case assessment and approach is to be advised.

Employment law and applicable legislation

EU Regulation 593/2008 determines the law applicable to employment contracts in a cross-border situation (i.e. every EU Member State has to apply the regulation when a case is presented before the court with an extraneous element). This Regulation determines that the legislation of the Member State where the activities are performed is—in principle - applicable. A number of exceptions exist in respect of a temporary assignment, or in cases of simultaneous employment on different territories for an employer and even if parties can demonstrate a closer link to a particular territory. Moreover parties can deviate from the rules and determine freely—within certain boundaries—the law applicable to the employment contract. The case law of the ECJ interpreted and nuanced these rules in the frame of the free provision of services. The ECJ ruled that in case of free movement of services, the service provider in one country should only be able to prove it offers equal protection to his assigned workers than the host Member State without having to scrupulously apply the host country rules in all their substance. This will probably no longer be possible. The UK legislation will have to be scrupulously applied without the possibility of being able to prove the employee benefits of the same protection in his home country as UK law would provide for. The same goes for UK employers employing staff on the EU territory. They will have to scrupulously apply the legislation of the EU state when sending an employee from the UK to a EU Member State.

Furthermore as the competent court is concerned, EU Regulation 44/2001 ("Regulation Brussels I") provides the legal framework for determining which EU's courts will be competent in legal disputes with an international element. In an international mobility scenario involving cross-border employment in one or more EU member states it is probable that at least some of the legislation of the state where the employee works will apply to the employment relationship (these are called mandatory (overriding) rules). This is applicable even if the employer has no presence in that state, and despite any choice of law made by the parties. Even if this Brussels I Regulation is repealed by the UK, based on Regulation (EU) 1215/2012, employees working in the EU for a UK based company will be able to litigate in the EU, regardless of any jurisdiction clause and despite the fact that their employer has no EU presence (i.e. no place of business in the EU).

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 businesses that depend on attracting international talent, will rely on the nature of any new immigration and visa rules. If there is a genuine attempt to limit net immigration to the tens of thousands then the restrictions will be severe.

II. UK internal legislation

Employment law

Brexit would 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 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 this 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 protection for employees. It is also likely that the maximum 48-hour week will 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. Alternatively, the Government may make changes to make the TUPE Regulations more business friendly, for instance, by making it easier for employers to harmonise terms and conditions.

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 conservatives)as unnecessary red tape which will create a burden on business. There may therefore be little resistance to amendments to the legislation.

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. . 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. 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. 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.

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. There could be a further reduction in the consultation period.

European Works Councils (EWC)

Regardless of whether the EWC is based in the UK or not, companies will have to check the EWC agreement to identify how Brexit will affect employee representative thresholds, whether structural provisions are triggered and whether any restructuring or other proposals that a company is considering will trigger a duty to inform and consult the EWC.

CJEU decisions

CJEU decisions have shaped the decisions of the UK courts and it is not known what would happen to any CJEU decisions handed down after Brexit. It is likely that the UK courts would continue to see CJEU decisions as persuasive rather than binding authority.

III. Practical steps

The ‘now’ is an analysis of the risks for your business in the current situation. 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.

International Employee Mobility after Brexit

International:

- Nominate a person or team of people who are responsible for monitoring employment, social security and immigration issues. Ensure all staff have a contact person 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 which in turn will give reassurance that the organisation knows what it is doing and what needs to be done as we approach Brexit.
- Staff may feel 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. International mobility policies are to be assessed and possibly adapted given the fact some EU legislation will be repealed. This, combined with a key point of contact with specialist international mobility knowledge (or access to such knowledge) is essential to retaining the best people.
- Ensure a close follow up on immigration issues and status to and from the UK.

In the UK:

- 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).
- 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.
- 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.
- Encourage workers to list their entitlements to pension and other social welfare benefits when starting to work outside the UK.

Key Contacts

Stefan Nerinckx
Partner
Employment Law Network Leader

E: sxn@fieldfisher.com
T: +32 (0)2 742 70 57
M: +32 (0)477 61 81 71

United Kingdom

Richard Kenyon
Partner - London

E: richard.kenyon@fieldfisher.com
T: +44 (0)20 7861 4001
M: +44 (0)7831 193 170

Nicholas Thorpe
Partner - London

E: nicholas.thorpe@fieldfisher.com
T: +44 (0)20 7861 4830
M: +44 (0)7917 086 107

Margaret Davis
Partner - London

E: margaret.davis@fieldfisher.com
T: +44 (0)20 7861 4187
M: +44 (0)7768 714 273

James Warren
Partner - London

E: james.warren@fieldfisher.com
T: +44 (0)20 7861 4823
M: +44 (0)7515 787 704

fieldfisher

David Gallagher
Partner - London

E: david.gallagher@fieldfisher.com
T: +44 (0)207 861 4349
M: +44 (0)7917 388 157

David Carmichael
Partner - Manchester

E: david.carmichael@fieldfisher.com
T: +44 (0)161 200 1783
M: +44 (0)7879 891 001

Belgium

Stefan Nerinckx
Partner, Brussels

E: stefan.nerinckx@fieldfisher.com
T: +32 (0)2 742 70 57
M: +32 (0)477 61 81 71

Anne Kamp
Partner, Brussels

E: anne.kamp@fieldfisher.com
T: +32 (0)2 742 70 32
M: +32 (0)477 31 34 11

France

Laurence Dumure—Lambert
Partner - Paris

E: Laurence.DumureLambert@fieldfisher.com
T: +33 (0)1 703 781 61
M: +33 (0)6 03 91 97 85

USA

Lynn McCloghry
Immigration Consultant, Silicon Valley—USA

E: lynn.mccloghry@fieldfisher.com
T: +001 (0)310 776 06 22
M: +44 (0)7917 018 251

Germany

Marcus Iske
Partner, Düsseldorf

E: marcus.iske@fieldfisher.com
T: +49 (0)211 987 092
M: +49 (0)173 597 6959

Marcus Kamp
Partner, Düsseldorf

E: marcus.kamp@fieldfisher.com
T: +49 (0)211 987 092
M: +49 (0)173 597 6210

Italy

Annalisa Cappiello
Attorney, Milan

E: annalisa.cappiello@fieldfisher.com
T: +39 (0)2 80673 1

Prof. Dr. Tiziano Treu
Of Counsel, Rome

E: tiziano.treu@fieldfisher.com
T: +39 (0)6 6977571