



BRIEFING PAPER

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Brexit: employment law

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1. UK and EU employment law

A substantial component of UK employment law is grounded in EU law. EU employment law where it exists provides a minimum standard below which domestic employment law must not fall.

In some cases EU law has entrenched at an international level provisions that already existed in domestic law; for example, race discrimination and certain maternity rights. In other cases, new categories of employment rights have been transposed into domestic law to comply with emerging EU obligations. These new rights were often resisted by the UK government during EU negotiations; for example, agency workers' rights and limitations on working time.¹

Subject to the provisions of the EU withdrawal arrangements or a subsequent trade agreement, withdrawal from the EU would mean that UK employment rights currently guaranteed by EU law would no longer be so guaranteed. In consequence, a post-Brexit government could seek to amend or remove any of these.

The precise mechanism by which this could be achieved would vary depending on the right in question:

- some rights are enshrined in primary legislation: these are alterable only by primary legislation (e.g. equality rights under the *Equality Act 2010*);
- some EU-derived rights are located in secondary legislation, and are therefore susceptible to revocation by secondary legislation (e.g. agency worker and working time rights);
- some EU rights have direct effect, meaning that individuals can rely directly on EU law (for example the right to equal pay contained in the Treaty²) – these rights would automatically cease to apply upon exit from the EU, absent any domestic legislation saving them, or new international obligation to maintain them.

The table at the end of this note lists EU employment rights together with their domestic implementing legislation.

The main point to note is that EU-derived employment rights featuring in primary legislation would be relatively insulated from the effects of leaving the EU, although would be newly susceptible to the possibility of change. Greater uncertainty surrounds the implications of Brexit for secondary legislation, in which much employment law is contained.

1.1 Secondary legislation

There are three ways by which EU employment law is implemented via secondary legislation:

- under [section 2](#) of the *European Communities Act 1972*, which provides a power to implement EU obligations via secondary legislation;

¹ For example, having negotiated concessions in the proposal that became the Working Time Directive and then abstained from the final vote, the UK challenged the Directive's legal basis; see: Case C-84/94 *UK v. EU Council* [1996] ECR I-5755

² [Treaty on the Functioning of the European Union](#), Article 157

- under a power contained in another Act of Parliament; and
- under a mixture of both, where, for example, certain parts of a set of regulations are made using the power in the 1972 Act, and other parts are made based on a power in a different Act.

Brexit's potential effect on employment rights contained in secondary legislation would differ depending on how that legislation was made. If it was made under the 1972 Act, or partly under it, it would likely need to be saved before we leave the EU (or perhaps partly saved, if based on a mixture of the 1972 Act and some other Act), otherwise it would cease to have effect going forward. The Government has already indicated that it would seek to preserve employment rights through the 'Great Repeal Bill' (see below). As such, the question that remains is less what would happen automatically once we leave the EU, more what powers would a government have to remove employment rights via secondary legislation after we do? The answer to that is, broadly: if the Great Repeal Bill saves EU employment rights contained in secondary legislation but does not move them into primary legislation, all employment rights contained in secondary legislation, no longer entrenched in international law, would be newly susceptible to revocation by secondary legislation.

1.2 Case law

A somewhat thornier – and important - question concerns the status of European Court of Justice (ECJ) case law. There is a sizeable body of ECJ case law interpreting EU employment rights, which domestic courts are currently bound to follow. In many cases, the ECJ has enlarged the scope of rights beyond the limits that would have been set by domestic courts. Post-Brexit, UK courts would no longer be required to follow existing and future ECJ decisions, and may merely regard them as having persuasive force. A potential consequence of that approach may be the re-litigation of controversial judgments, such as those relating to the calculation of holiday pay.³ Commentators have voiced uncertainty as to how best to prevent this, although some have suggested that transitional legislation, dealing with the issues discussed above, could also freeze in place principles derived from case law. For example, Stephen Laws (First Parliamentary Counsel 2006-2012) wrote:

How far should UK law originally deriving from EU law, so far as it survives, continue to be construed in its EU context? What relevance should ECJ judgments, past and future, continue to have on the construction of law with an EU inspiration?

A single Bill could apply a transitory patch - keeping most things in place, with general transitional modifications - until later primary or secondary legislation can produce more comprehensive solutions. But there will undoubtedly be demands for more of the detail to be settled early. It will be difficult, in practice to prevent a consideration of the issues involved in any later legislation from arising during the passage of a paving, patching Bill; but, if the

³ For example, see: [British Gas Trading Ltd v Lock & Anor \[2016\] EWCA Civ 983](#)

legislation is not to become totally unwieldy, some matters are bound to have to be postponed and so patched in the meantime.⁴

The Government has recently indicated (see below), that the 'Great Repeal Bill' will give effect to ECJ case law.

1.3 Creation of new laws

Once the UK withdraws from the EU it will no longer be required to transpose new EU law into domestic law. This, again, would be subject to the terms of any future legal relationship with the EU. The employment law consequences of this would be twofold. First, the UK would not be required to implement new EU laws promulgated in the employment sphere. Second, ECJ decisions, interpreting Directives that have already been implemented in the UK, would have no automatic binding effect on UK law.

⁴ Stephen Laws, ['Article 50 and the Political Constitution'](#), U.K. Constitutional Law Blog, 18 July 2016

2. The Government's position

Summary

At the time of writing the Government has confirmed the following as regards post-Brexit EU employment law:

- the Prime Minister has confirmed that workers' existing legal rights will be guaranteed during her period in office
- the 'Great Repeal Bill' will convert all current EU employment law into domestic law, whatever future relationship the UK has with the EU
- the direct effect of relevant EU rights will persist post-Brexit
- judgments of the European Court of Justice will be given effect in domestic law at the point of exit
- "EU-derived law, from whatever quarter, will be transferred into United Kingdom law in full at the point of exit".

In a July 2016 article on Conservative Home the Secretary of State for Exiting the EU, David Davis, wrote that "the flood of new regulation from Europe" would be halted upon Brexit, but went on to say:

I am not talking here about employment regulation. All the empirical studies show that it is not employment regulation that stultifies economic growth ... Britain has a relatively flexible workforce, and so long as the employment law environment stays reasonably stable it should not be a problem for business.

There is also a political, or perhaps sentimental point. The great British industrial working classes voted overwhelmingly for Brexit. I am not at all attracted by the idea of rewarding them by cutting their rights.⁵

During her speech to the Conservative Party conference in October 2016, the Prime Minister committed the Government to preserving EU-derived employment rights:

The final thing I want to say about the process of withdrawal is the most important. And that is that we will soon put before Parliament a Great Repeal Bill, which will remove from the statute book – once and for all – the European Communities Act.

This historic Bill – which will be included in the next Queen's Speech – will mean that the 1972 Act, the legislation that gives direct effect to all EU law in Britain, will no longer apply from the date upon which we formally leave the European Union. And its effect will be clear. Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end.

As we repeal the European Communities Act, we will convert the 'acquis' – that is, the body of existing EU law – into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses. But by converting the

⁵ [David Davis: Trade deals. Tax cuts. And taking time before triggering Article 50. A Brexit economic strategy for Britain](#), *Conservative Home*, 14 July 2016

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acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as they did before. Any changes in the law will have to be subject to full scrutiny and proper Parliamentary debate. **And let me be absolutely clear: existing workers' legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister.**⁶

Answers to a number of recent Parliamentary Questions have elicited:

The Government will bring forward legislation in the next session that, when enacted, will repeal the European Communities Act 1972 and ensure a functioning statute book on the day we leave the EU. This 'Great Repeal Bill' will end the authority of EU law and return power to the UK. The Bill will convert existing European Union law into domestic law, wherever practical.

The Government will set out the content of the Bill and its implications in due course.⁷

On 7 November 2016 Members of the House of Commons held a debate on 'Exiting the EU and workers' rights'. During the debate the Secretary of State for Business, Energy and Industrial Strategy, Greg Clark, said:

We will be using the legislation before this House to entrench all existing workers' rights in British law, whatever future relationship the UK has with the EU.

...

It is a helpful feature of this debate that we are able to say, clearly and unambiguously, that all the rights derived from membership of the EU will be imported into UK law through legislation in this House.

...

I will be very clear that all of the workers' rights that are enjoyed under the EU will be part of that Bill and will be brought across into UK law. That is very clear. There is no intention of having a sunset clause.

...

The clear intention is that all rights and protections available through the EU will come back to the United Kingdom and be active from day one. There will be no gap.⁸

In response to a question from Lady Hermon, the Secretary of State indicated that the direct effect of relevant EU employment law would continue post-Brexit:

Lady Hermon

The Secretary of State will know that the jurisprudence of the European Court of Justice established the principle of direct effect for various provisions of EU treaties and directives, meaning that they require no implementation at all by the Government. Will he confirm that, even with the great repeal Bill, those rights that are

⁶ [Prime Minister: Britain after Brexit: A Vision of a Global Britain](#), 2 October 2016

⁷ [Conditions of Employment: EU Law: Written question - 50867](#)

⁸ [HC Deb 7 November 2016 cc1302-1307](#)

directly effective, and on which workers can rely, will remain post-Brexit?

Greg Clark

Yes, the intention is that all workers' rights that derive from the EU will be brought into British law.⁹

In closing the debate, the Minister of State for Exiting the European Union, David Jones, answered questions asked by a number of Members:

The right hon. Member for Leeds Central ... asked what changes to employment legislation in the great repeal Bill will be made through primary as opposed to secondary legislation. Such issues fall to be considered during the passage of the Bill. The House will therefore have the opportunity to debate those issues in full in due course.

...

The right hon. Gentleman raised, as did the hon. Member for Great Grimsby (Melanie Onn), the issue of what will happen to EU case law and judgments of the European Court of Justice. I wish to make it clear that the starting position of the Government is that EU-derived law, from whatever quarter, will be transferred into United Kingdom law in full at the point of exit.¹⁰

⁹ Ibid., c1306

¹⁰ Ibid., c1363

3. Further reading

At present, the best discussion of the potential employment law consequences of Brexit is contained in Michael Ford QC's [advice](#) to the TUC.¹¹ For a discussion of the history of the EU's competence to legislate in the employment sphere see the Government's [*Review of the Balance of Competences between the United Kingdom and the European Union - Social and Employment Policy*](#)¹² and, in particular, Professor Catherine Barnard's expert evidence to the Review (available in [this](#) zipped file).

¹¹ Ford, M., *WORKERS' RIGHTS FROM EUROPE: THE IMPACT OF BREXIT*, 10 March 2016

¹² HM Government, *Review of the Balance of Competences between the United Kingdom and the European Union Social and Employment Policy*, 2014

Right	EU law	UK law
Agency workers		
Same basic terms and conditions after 12 weeks	Directive 2008/104/EC	Agency Workers Regulations 2010 (SI 2010/93), regs 5-10
Access to collective facilities, amenities and information about relevant vacancies	Directive 2008/104/EC	Agency Workers Regulations 2010 (SI 2010/93), regs 12-13
Unfair dismissal	Directive 2008/104/EC	Agency Workers Regulations 2010 (SI 2010/93), reg 17; Employment Rights Act 1996, Part X
Data protection		
Protections relating to the processing of and rights of access to personal data	Directive 95/46/EC	Data Protection Act 1998
Discrimination		
Discrimination (etc) related to sex, race, disability, sexual orientation, religion or belief, and age	Treaty on the Functioning of the European Union, Articles 8, 10, and 157; Directives 2000/43/EC, 2000/78/EC, 2006/54/EC	Equality Act 2010, Part 5
Equal pay	Treaty on the Functioning of the European Union, Articles 8, 10, and 157; Directive 2006/54/EC	Equality Act 2010, Part 5
Equal treatment in matters of social security	Directive 79/7/EEC	Various social security and pensions legislation
Fixed-term workers		
Measures to prevent abuse arising from successive fixed-term contracts (employee becomes permanent employee)	Directive 99/70/EC	Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034), regs 8–9
Non-discrimination	Directive 99/70/EC	Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034), regs 3-5
Health and safety		
Paid time off for health and safety representatives	Directive 89/391/EEC	Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)

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Insolvency

Employee payments from Secretary of State (e.g. unpaid redundancy pay)	Directive 2008/94/EC	Employment Rights Act 1996, sections 166–170, Part XII
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Information and consultation

Information and consultation representatives - prohibition of detriment	Directive 2002/14/EC	Information and Consultation of Employees Regulations 2004 (SI 2004/3426), regs 32-33; Employment Rights Act 1996, sections 48–49
Information and consultation representatives - unfair dismissal	Directive 2002/14/EC	Information and Consultation of Employees Regulations 2004 (SI 2004/3426), regs 30-31; Employment Rights Act 1996, Part X
Information and consultation representatives - paid time off	Directive 2002/14/EC	Information and Consultation of Employees Regulations 2004 (SI 2004/3426)
Information and consultation on collective redundancies; enforcement of protective award	Directive 98/59/EC	Trade Union and Labour Relations (Consolidation) Act 1992, Part IV, Chapter II
European Works Councils	Directive 2009/38/EC	Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323)

Maternity and parental rights

Maternity/parental leave	Directives 92/85/EEC and 2010/18/EC	Employment Rights Act 1996, Part VI, VIII; Maternity and Parental Leave Regulations 1999 (SI 1999/3312)
Right to suitable alternative work or pay if suspended on maternity grounds	Directive 92/85/EEC	Employment Rights Act 1996, Part VII
Prohibition of detriment	Directives 92/85/EEC and 2010/18/EC	Maternity and Parental Leave Regulations 1999 (SI 1999/3312), reg 19; Employment Rights Act 1996, Part V
Unfair dismissal	Directive 92/85/EEC and 2010/18/EC	Maternity and Parental Leave Regulations 1999 (SI 1999/3312), reg 20; Employment Rights Act 1996, Part X

Part-time workers

Non-discrimination	Directive 97/81/EC; Directive 98/23/EC	Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)
Unfair dismissal	Directive 97/81/EC; Directive 98/23/EC	Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), reg 7; ERA 1996, Part X

Posted workers

Posted worker rights	Directive 96/71/EC	Employment Relations Act 1999, sections 32(3), 44, Sch 9, Table 9 (repealed Employment Rights Act 1996, section 196)
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Terms and conditions

Written statement of terms and conditions	Directive 91/533/EEC	Employment Rights Act 1996, sections 1-7B, 11-12
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TUPE

Information and consultation	Directive 2001/23/EC	Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)
Unfair dismissal	Directive 2001/23/EC	Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), reg 7; Employment Rights Act 1996, Part X

Working time

Daily rest, weekly rest, rest breaks, paid annual leave	Directive 2003/88/EC	Working Time Regulations 1998 (SI 1998/1833)
Working time — prohibition of detriment	Directive 2003/88/EC	Working Time Regulations 1998 (SI 1998/1833); Employment Rights Act 1996, Part V
Working time — seafarers	Directive 99/63/EC; Directive 99/95/EC	Merchant Shipping (Hours of Work) Regulations 2002 (SI 2002/2125)
Working time — civil aviation	Directive 2000/79/EC	Civil Aviation (Working Time) Regulations 2004 (SI 2004/756)
Working time — road transport	Directive 2002/15/EC	Road Transport (Working Time) Regulations 2005 (SI 2005/639)
Working time — cross-border railway workers	Directive 2005/47/EC	Cross-border Railway Services (Working Time) Regulations 2008 (SI 2008/1660)

Young workers

Protection of young people at work	Directive 94/33/EC	Working Time Regulations 1998 (SI 1998/1833); Children and Young Persons Act 1933; Children and Young Persons (Scotland) Act 1937
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