Brexit employment issues: an update

Article 50 has now been triggered. The instinctive reaction to the 'Brexit' vote was that it would have substantial implications for UK employment law. However, this may not be borne out in practice; at least not in the short term. The Government has proposed that the Great Repeal Bill will maintain the protections and standards that benefit workers; all current EU employment law will be converted into domestic law whatever future relationship the UK has with the EU.

Although the intention is that there will be no immediate change to EU derived employment laws, in practice EU derived legislation with a cross border element (such as that relating to European works councils and cross border mergers) may nevertheless require revision depending on the outcome of the Brexit negotiations.

This Briefing provides an update on some of the key Brexit related employment law issues.

Employing EU citizens

At present there is no change to the UK's relationship with the EU in relation to its visa and immigration rules. Non-UK employees (whether EU/EEA/EFTA or other) who are currently lawfully working in the UK may continue to do so unless and until their immigration status changes.

What the position will be further down the line is as yet unclear; however it is likely that some immigration requirements will change and EEA citizens may have to apply for a work visa under the Points Based System (or any successor system).

From a practical perspective employers, if they have not already done so, should undertake an audit of their domestic workforce to identify which workers (or key workers) rely on the UK's membership of the EU to work in the UK to assess possible areas of vulnerability. A similar exercise should be carried out to identify British citizens in any EEA located workforce.

In addition to an individual's immigration status there may be issues in relation to professional qualification equivalence following Brexit and a watching brief should be maintained on developments in this area.

The current uncertainty about the immigration position of EEA nationals in the future could make it tempting to make recruitment decisions that will avoid complications. Managers involved in recruitment should be made alive to the potential discrimination claims (against the company and themselves) that could arise out of recruitment decisions where nationality is an influencing factor.

Key issues

- Employing EU citizens
- Employee relations considerations
- Potential redundancy/relocation issues
- European works councils
- European case law
- Future reform

Employee relations considerations

The Brexit vote has clearly given rise to much anxiety and uncertainty in the population at large and this is also likely to be reflected in the workplace. Employers should consider appointing an individual or team (in HR or as appropriate) to act as a point of contact for staff to raise concerns and/or ask questions, for example about the ability of EU nationals to remain working in the UK post Brexit, or, to address concerns in relation to media and/or other speculation about the relocation of operations to outside the UK.

At the very least poor or a total absence of communication is likely to lead to poor workforce engagement, lower productivity and a general lack of morale.

Redundancy/ relocation issues

In some cases companies may elect to reduce the size of their UK presence and relocate elsewhere within the EEA. If such relocation/off-shoring is contemplated the following issues should be considered:

- Do the proposals trigger a collective redundancy exercise?
- Does the off-shoring/relocation exercise give rise to a TUPE transfer?
- If so does this affect who is responsible for any pre transfer collective redundancy consultation?
- Can relocation clauses be invoked in lieu of making redundancies?
- Must the off shore roles be offered as suitable alternative employment during any redundancy consultation exercise?
- If off-shore roles are declined can any occupational or statutory redundancy pay be withheld?
- Is there a European and/or domestic works council(s) that has to be consulted?

European works councils

Companies that have a European works council (EWC) may have to revisit their arrangements depending on the final stance taken by the EU. If central management for the purposes of the EWC legislation is currently based in the UK and/or the EWC agreement is governed by English law and/or the EWC covers a UK workforce then there is a real prospect that current arrangements will have to change. In light of this companies should:

- Check whether the EWC agreement contains any adaptation provisions allowing for amendment of the EWC agreement and the composition of the EWC in the event of corporate structural and other changes;
- Assess the risk of a new EWC negotiation process being triggered upon Brexit.

European case law

An important consideration for employers' understanding of their legal obligations is whether our domestic courts will continue to consider themselves bound by the pre and post Brexit decisions of the ECJ in relation to Directives from which our domestic legislation is derived. For example, in relation to holiday pay claims, English courts and employment tribunals have read words into the legislation in order to give effect to the decisions of the ECJ.

It is proposed that after the Great Repeal Bill is implemented existing ECJ judgments will be given effect in our domestic law at the point of Brexit. Going forward however will this approach continue to be adopted? In October 2016 the Prime Minister stated very clearly that "*the judges interpreting our laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end".* This suggests that in the event that ECJ judgments develop employment law principles (and potentially expand employment rights) beyond the principles established in European case law at the point of Brexit then the English courts will not be bound to follow such decisions when interpreting our domestic legislation.

Future reform

Although the Prime Minister has pledged that as long as she remains in office, workers' existing legal rights will continue to be guaranteed, there must be scope for some EU derived rights to be amended in the long term. What then are the potential candidates?

The thorny subject of holiday and holiday pay is one possibility. In particular what should be taken into account for the purposes of calculating the rate of holiday pay? Although the law has evolved to a certain extent on this front there are still outstanding questions: should bonuses be taken into account, should voluntary overtime pay be included and so on. To the extent that such issues are not judicially resolved prior to Brexit will a future government have the appetite to create legislative certainty on this front?

A limit on the right of sick leavers to carry holiday forward to subsequent holiday years could also be reviewed along with weekly working limits and what counts towards working time.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) are broadly regarded as providing legal certainty in the context of business sales and contracting out scenarios so TUPE's wholesale repeal is unlikely. That said business is likely to welcome any amendments that will make it easier for transferees to amend terms and conditions of employment following a transfer. So this could be another potential candidate for reform.

This is of course entirely speculative and only time will tell what employment law changes are regarded as a priority

Contacts

Chris Goodwill
Partner

Imogen Clark
Partner

Mike Crossan
Partner

Alistair Woodland
Partner

Tania Stevenson
Senior Professional Support Lawyer

T: +44 (0) 20 7006 1000
F: +44 (0) 20 7006 5555

To email one of the above please use:
firstname.lastname@cliffordchance.com