ALLEN & OVERY

Brexit law: your business, the EU and the way ahead

Brexit – Post-transition Q&As for employers

The end of the Brexit transition period on 31 December 2020 has reshaped the landscape for employers. In our updated Q&As, we look at the impact for employment law and at considerations for in-house counsel and HR teams.

The EU-UK Trade and Cooperation Agreement (TCA) signed on 24 December 2020 averts some of the post-transition uncertainty by introducing a level playing field for employment standards, and by temporarily lifting restrictions for personal data transfers from the EEA to the UK. For the most part, it will be business as usual for employers. However, policies and practices will need to be changed in certain areas (such as worker mobility), and potentially in the future to take into account any divergence in employment laws.

How does the TCA affect employment law?

The TCA does not change employment law, but it does limit the ability of the EU and the UK to change their employment laws in the future. This is because, as a condition of receiving trade benefits (for tariff and quota-free trade), the EU and the UK have agreed not to reduce the high levels of employment protection in place as at 31 December 2020 ("exit day") in a manner that affects trade or investment between them, including by failing to enforce such protection effectively. This so-called "non-regression clause" aims to prevent one party from seeking a competitive edge by offering a lower cost, or less regulated, employment law regime than the other.

A dispute resolution procedure provides for a panel of experts to intervene where there is an alleged breach of the non-regression clause and when the parties cannot resolve the matter. If a party is found to be in breach, they could be required to take measures to address the situation (for example, by repealing a new law), or they could be subject to "rebalancing measures", including tariffs, if the breach is a significant divergence that materially impacts trade or investment.

The overall effect is that the UK and EU are still free to set and change their employment laws, and will only risk consequences under the TCA if they scale back employment protection (below the exit day level) in any major way that affects trade or investment between them. This is a high threshold, and any alleged impact on trade and investment must be based on reliable evidence. Therefore, while UK law is likely to remain broadly aligned with EU law protections as at their exit day level, there is scope for future divergence. We consider what this might mean for the future direction of UK employment law below.

Other TCA provisions to note are the EU's and UK's commitments to respect, promote and implement multilateral labour standards and agreements (such as ILO Conventions), and the UK's commitment to continue respecting the rights set out in the European Convention on Human Rights (ECHR), meaning that the ECHR will remain relevant to UK employment law.

Our Briefing, *Brexit certainty at last? An overview of the new EU-UK trading relationship*, considers the wider aspects of the TCA.

What is the status of EU employment legislation in the UK from 2021?

EU law and EU-derived rights that were in effect at exit day have been converted into a new body of "retained EU law" under the EU (Withdrawal) Act 2018. This retained EU law will continue to apply in the UK and is unaffected by the TCA. It includes rights already implemented through domestic legislation (discrimination, TUPE, working time and collective consultation rights among others). The UK is not bound by directives that are due to be implemented from 2021, such as Directives on Whistleblower Protection, Work-life Balance and Transparent and Predictable Working Conditions, but UK legislation will be aligned with many aspects of these and may be aligned further given the UK's commitments under the TCA. The UK already has comprehensive whistleblowing legislation and this would only require limited changes to conform to the new EU law standards. Employers may, however, wish to apply the EU law standards across their pan-European operations (including the UK) in any event to operate a single whistleblowing policy.

UK employment legislation is otherwise largely unchanged, save for minor revisions to make it workable post-transition and substantive changes to the UK regime for European Works Councils (see further below). Employers should also note that the retained EU law version of GDPR is known as "UK GDPR" and the GDPR as it continues to apply in the EU is known in the UK as "EU GDPR". Core principles and data subject rights are unchanged in the UK GDPR, but restrictions may affect future data transfers from the EEA to the UK if no adequacy decision is made for the UK (discussed further below). Data protection policies and privacy notices should be reviewed and updated if necessary.

What is the status of ECJ case rulings in the UK from 2021?

ECJ rulings will continue to be influential as UK courts and tribunals must have regard to those rulings given up to exit day ("retained EU case law") when deciding a dispute concerning retained EU law. The Supreme Court and Court of Appeal and the corresponding appellate courts in Scotland and Northern Ireland may, however, depart from retained case law as they can from their own case law. This could lead to some divergence in the future, subject to the UK's non-regression commitment (though case rulings are unlikely to have an impact that will meet the threshold of affecting trade or investment between the EU and the UK). UK courts and tribunals may also have regard to any new ECJ rulings that are relevant to matters of retained EU law. This could mean litigation in areas such as holiday pay – becoming all the more complex, lengthy and costly given the need to consider, potentially, four bodies of case law – retained EU case law, domestic case law (both before and after exit day), as well as new ECJ rulings that may be relevant to the dispute.

Can employers expect further UK employment law changes from 2021?

The UK is free, in principle, to depart from retained EU law, retained EU case law and future EU law, subject to the risk of consequences under the TCA. In the short term, however, there appear to be no such changes on its agenda. On the contrary, the UK Government has dispelled recent speculation that it plans to scale back EU-derived protections on working time, confirming that its aim is to protect and enhance – not reduce – workers' rights.

Consistent with that aim, a new Employment Bill in 2021 will introduce a single labour market enforcement body as well as provisions on carers' leave, neonatal leave and pay, extended maternity redundancy protection, flexible working as a default (unless employers have good reasons not to allow it) and rights of vulnerable workers to request a more predictable and stable contract after 26 weeks' service. Reform to stimulate the UK's economic recovery post-Covid is also under consideration, with a review of the rules on non-competition clauses underway.

There could additionally be some changes to implement the UK's commitment under the TCA to enforce employment rights effectively. This is because several of the enforcement mechanisms required by the TCA – such as the need for an effective system of labour inspections and for interim relief as a general remedy – are available to only a limited extent in the UK.

In the longer term, UK employment law is likely to remain broadly aligned with EU law protections (as at exit day) on account of the TCA, but some future divergence is inevitable given the UK-EU relationship is now on a different footing. Only major changes could risk consequences under the TCA, for example, the repeal of TUPE or the Working Time Regulations – these are clearly off the UK's agenda. However, we could see changes seeking to relax some of the more restrictive aspects of EU-derived rules, such as on holiday pay calculations, holiday carry-over and working time record-keeping, and diverging from new EU laws, to allow employers more flexibility without undermining workers' rights.

How is worker mobility affected?

The end of free movement rights has practical implications for staff business travel and for the secondment or assignment of workers between the UK and the EEA. A new UK points-based immigration system now applies to EEA (as well as to non-EEA) nationals seeking to work in the UK, while immigration controls in the relevant Member State apply to UK nationals seeking to work in the EEA. Special arrangements continue to permit UK and Irish nationals to move freely between the UK and the Republic of Ireland.

UK, EEA or Swiss nationals who were living in a Member State or in the UK before exit day can still apply for "settled status" (if they have been resident for five years) or for "pre-settled status" (until they accrue the

five years' residence required for settled status) under the EU Settlement Scheme. This will entitle them to continue living and working in that location. Applications should be made before the deadline of 30 June 2021, and employers may wish to check that eligible employees have these in hand.

The TCA permits visa-free business visits between the UK and the EU for a period of up to 90 days in any six-month period to carry out certain business activities, such as attending meetings or conferences, engaging in consultations with business associates or attending trade fairs. For visits involving work or other activities, or that exceed 90 days, work visas will be required. Temporary work routes facilitated by the TCA, such as intra-corporate transfers of managers and specialists, are also subject to visa requirements. The Posted Workers Directive, however, no longer applies to postings of EU and UK workers into the UK and EU respectively.

Employers should check local rules in the destination country to identify whether visas, permits or other documents are required, having regard to the purpose and duration of the trip or stay. International mobility teams may need extra resource to manage these issues. If the arrangements affect professionals (such as accountants or lawyers who are UK nationals, or EU nationals with qualifications acquired in the UK), they should also check that their qualifications are recognised in the destination country, and that they are authorised to provide services there. (The TCA does envisage the possibility of future EU/UK agreement being reached on the mutual recognition of certain qualifications.) The UK Government has published a series of guides to help businesses identify the restrictions that apply: **click here** and **here**.

Separately, the TCA includes a protocol for continued coordination on individual social security rights. This broadly replicates the regime under the EU Social Security Regulations and aims to ensure that workers moving between the EU and the UK only pay into one country's social security scheme at a time. As a general rule, contributions will be paid in the country where work is undertaken, but special rules apply for so-called "detached workers" (those seconded/assigned by an employer to work in the UK or an EU Member State) and to workers who work in two or more countries. Detached workers can continue to pay contributions in their home country, provided that their work in the host country does not exceed two years. (All EU Member States have now confirmed that they will apply these rules on detached workers.) Again, employers should check local rules and procedures in each case, noting that the regime that applies (ie the EU Regulations or the TCA) depends on whether a secondment or assignment began before or after 1 January 2021.

What is the impact for cross-border data transfers?

Under the UK Data Protection Act 2018, transfers of personal data from the UK to EEA countries (and other countries and territories covered by EU adequacy decisions as at 31 December 2020) can continue without the need for further appropriate safeguards. The position on transfers of personal data from the EEA to the UK is more complex because the European Commission has not yet made adequacy decisions in relation to the UK although, on 19 February 2021, it published draft adequacy decisions. This is only the first step in the process, and the TCA provides a temporary bridging period in order for it to be completed and for final decisions to be adopted. The bridging period allows transfers of personal data from the EEA to the UK to continue freely for an initial four-month period (until 30 April 2021), which is automatically extendable to 30 June 2021 if neither party objects or, if earlier, until final adequacy decisions are made for the UK.

Employers therefore have a period of grace but may wish to implement appropriate safeguards for transfers of personal data from the EEA to the UK from the 1 July 2021 cut-off, in case no adequacy decisions have been adopted by then. In most circumstances, this would involve relying on the EU's standard contractual clauses or, for occasional transfers, a derogation such as contractual performance. Privacy notices will also need to be updated to reflect any change in approach.

Do employment contracts need to be amended?

Contractual provisions that refer to the "EU" or "EEA", for example restrictive covenants, confidentiality or IP obligations with geographical restraints linked to the EU or EEA, should be amended to expressly include the UK if this is intended. References to EU legislation applicable in the UK should similarly be updated to refer to the retained EU law equivalent in the UK (as amended from time to time). These drafting changes will mitigate against the risks of contractual uncertainty, and of provisions being unenforceable post-Brexit.

Will this affect the choice of governing law or a jurisdiction provision?

Amending regulations provide for substantively the same governing law regime as applied under the Rome I Regulation to continue applying in the UK post-transition. This means that the UK courts will still respect a chosen governing law for an employment contract, subject to any mandatory rights of another country that prevail over it, and EU Member States will take the same approach. Employers do not therefore need to change governing law clauses on account of Brexit, unless it is appropriate to do so for a particular employee, and should bear in mind that employees can still qualify for employment rights in the countries in which they work regardless of the chosen law.

The question of which national courts should decide an employment dispute connected with the UK and another EU Member State is more complicated as different regimes could apply. The Recast Brussels Regulation is revoked for proceedings commenced post-transition, save that UK employers (who will be "third country" employers) can still be sued in a Member State under that regime; the regime is also retained to allocate domestic cases between jurisdictions within the UK. The TCA does not provide a replacement, but the UK is awaiting a decision on its application to re-accede to the Lugano Convention which provides for almost identical rules.

In the meantime, UK common law rules or the EU regime could apply to determine jurisdiction over employment disputes. The position remains (and would not change under the Lugano regime) that the rules favour the employee as the weaker party in an employment relationship and make it easy for them to enforce or defend their employment rights in the forum most convenient to them. Exclusive jurisdiction clauses are therefore likely to be of limited use to employers, unless entered into after a dispute has arisen.

What is the impact for EWCs?

EWCs can no longer operate validly from the UK from 2021. Many employers have elected to relocate their UK arrangements to an EU Member State to continue operating under that Member State's law post-transition. If no such election was made, the EWC is deemed to have been transferred to the Member State with the greatest number of employees. (Please see our Briefing**,** *Possible hard Brexit: Prepare to rehome your UK EWC*, for further background).

There is the separate question of whether UK employees and their representatives can continue to participate in EWCs. This will depend on how EWC agreements are drafted. If participation rights are linked to EEA membership, UK rights and mandates could have fallen away automatically or as a result of structural change provisions post-transition. Ongoing UK participation could be agreed, but employers should decide if this is appropriate. A key factor will be whether other non-EEA European operations (such as in Switzerland or Turkey) participate in the EWC and treating UK operations consistently.

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