Weil

Brexit

What are the employment implications?

In this note, we explore some possible implications for employers and their workforces following Brexit and we also suggest some practical steps that employers can consider taking now to prepare for Brexit.

How will UK employment change?

Most commentators agree that, aside from the key issue of free movement of workers, the UK employment landscape is unlikely to change dramatically and any change is likely to be gradual as it is thought that the UK Government will be reluctant to repeal, in one go, a swathe of employment protections that are either popular with the electorate or that businesses in the UK are used to dealing with. Further, David Davis, the UK's new Secretary of State for Exiting the EU, has previously said that

"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 [employment] rights."

However, areas where we may eventually see changes to employment law in the UK following Brexit are as follows:

Free movement of people

Until the UK formally leaves the EU, all EU citizens (including those working in the UK) should continue to have free movement within the EU. However, in due course, if/when the UK leaves the EU, Brexit will potentially affect EU nationals who work in the UK but do not have the right to live and work permanently in the UK and it will also potentially affect UK nationals working in the other EU countries. Absent any other arrangements being put in place, the freedom of EU nationals to live and work in the UK would end upon the UK leaving the EU and EU nationals would be subject to UK immigration controls that apply to non-EU nationals. Therefore, it is anticipated that transitional arrangements will be put in place to enable EU citizens working in the UK to remain following Brexit. However, it is not yet certain whether this will apply to EU citizens who have already been in the UK for five years (and, therefore, qualify for the right to remain permanently in the UK), those living and working in the UK on the date of the Brexit vote (in June of this year), or those living and working in the UK on the date that the UK leaves the EU. Quite what arrangements will be put in place will depend on the nature of the future relationship between the UK and the EU. However, EU nationals working in the UK can draw comfort from the fact that the UK Government will be mindful to protect the rights of UK citizens working in other EU countries and the EU will expect any such protections to be reciprocated for its citizens working in the UK.

For the time being, those EU nationals who qualify are likely to accelerate applications for permanent residence in the UK or British citizenship. Businesses may wish to consider assisting any of their key workers who fall into this category with such applications.

Anti-discrimination and family friendly rights

An overhaul or complete watering down of anti-discrimination and family friendly rights in the UK is unlikely as this would prove politically unpopular. There would, of course, also be strong resistance from trade unions. However, one possible change would be the imposition of a cap on discrimination compensation which (unlike unfair dismissal compensation) is currently uncapped. Another possible change would be to allow positive discrimination for particular under-represented groups (for example, to force companies to increase the number of women in boardroom roles) which is not permitted under EU law.

Transfer of undertakings

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (the "TUPE Regulations") implement an EU Directive known as the Acquired Rights Directive. The TUPE Regulations ensure that employees employed in a business in the UK automatically transfer with that business if it is sold/transferred (by way of an asset/business sale as opposed to a share/stock sale) and also ensure that the terms and conditions of transferring employees are preserved and protected as part of that process. The regulations also apply upon a 'service provision change' (e.g. an outsourcing or insourcing arrangement). The TUPE Regulations have, since theirinception in 1981, had their critics. However, the principle

that the rights of employees should, in such circumstances, be protected has been established for some time and provided businesses with a degree of certainty in this area. As a result, the UK is likely to retain the TUPE Regulations without substantial amendments.

However, some changes are still possible and might include an amendment to allow employers to more easily harmonise terms and conditions of employment of transferred employees post-transfer to align them with their existing workforce. There may also be a watering down of the information and consultation obligations required in relation to a TUPE transfer.

Collective redundancy consultation

Collective redundancy consultation obligations (which are triggered when an employer proposes to dismiss 20 or more employees during a period of 90 days or less) have already been watered down by a previous UK Government. Therefore, their application does not present a particularly onerous burden for most large businesses. However, there may well still be pressure, particularly from smaller employers, to further erode these obligations. Possible changes may include removing the collective redundancy consultation obligations entirely or (more likely) increasing the threshold which triggers the obligations from 20 affected employees to, for example, 100 affected employees.

Agency workers

The revocation (or amendment) of the UK's Agency Workers Regulations is possible, as this piece of legislation is complex and has proved highly unpopular with employers in the UK. At present, after 12 weeks, agency workers in the UK are entitled to the same pay and basic working conditions as equivalent permanent employees. Revoking the regulations would prove attractive to employers as it would reduce the costs associated with using agency staff and provide greater flexibility.

Holidays and working time

Certain holiday rights derived from the EU's Working Time Directive and EU case law have proved unpopular with UK businesses due to the added cost they give rise to. These rights, which may be removed, include employees' rights to continue to accrue holiday during sick leave and the requirement to include overtime and commission in the calculation of statutory holiday pay. The removal of the 48-hour weekly cap on working hours is also a possibility, although the existing ability for UK employees to opt out may render this unnecessary.

Remuneration and bonuses

CRD IV (the Capital Requirements Directive) places restrictions on remuneration and bonuses under EU regulations in the financial services sector. Unsurprisingly, this has not proved popular with those working in financial services. The removal of the "bonus cap" (currently limited to 100% of fixed remuneration or 200% with shareholder approval) is, therefore, a possibility. Any such removal could place financial services providers in the UK at a competitive advantage over their EU counterparts as providers in the UK would be able to recruit the best talent by being able to offer greater financial incentives. However, the removal of such restrictions may be resisted by the UK Government in the context of the UK's long-standing desire to maintain strong regulation within the financial services sector.

European Works Councils

A European Works Council ("EWC") is an employee representative body set up to consult with employees on European-wide decisions such as transactions. A business can be required to set up a EWC if it has at least 1,000 employees across EEA member states and at least 150 employees in each of two or more of those member states. Subject to the outcome of negotiations between the UK government and the EU, the obligation to establish a EWC may be removed. Separately, where the management of the EWC is based in the UK, it may be necessary to change the location of the EWC to another EEA country. Businesses should also assess how Brexit will impact EWC employee representative thresholds, as discounting UK employee numbers from the EEA workforce could bring the EEA workforce below the threshold necessary for establishing a EWC.

Practical tips for employers

In addition to keeping standard checks on the immigration status of employees under review, employers should consider extending audits to a review of expatriate and secondment arrangements between the UK and EU member states to check when they end or how they can be terminated and whether employees have been promised repatriation or redeployment to other countries. Employers may also want to take more active steps to ensure that they are able to retain key workers valuable to their business by encouraging such workers to apply for a registration certificate to prove their right to live and work in the UK and to assist them with their applications for permanent residence (for example, by paying for legal advice). Employers entering into long-term secondment arrangements should also

ensure they have the ability to allow them to alter or terminate such arrangements in circumstances where immigration requirements preclude the continuation of the secondment.

Employers should consider whether there is a need to put in place retention agreements or new incentive arrangements for key employees who are thinking of changing jobs and/or country location as a result of the UK leaving the EU.

If a restructuring is necessary, employers should ensure there is sufficient time to implement any redundancy programs.

The result of the UK vote to leave may have led to tensions in the workplace which may manifest itself in ethnic minorities being subjected to discrimination and/or harassment. Employers should consider circulating anti-discrimination and anti-harassment policies to staff to remind them that such behaviour will not be tolerated and will be the subject of disciplinary action.

Finally, employers should ensure that managers and others involved in the recruitment process do not discriminate against EU nationals in job applications on the basis that their long-term eligibility to continue working in the UK is unknown.

For further information please contact:

Ivor Gwilliams
Counsel
ivor.gwilliams@weil.com
+44 20 7903 1423