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Employer Update

New York State Expands Protections for Women in the Workplace

*By Gary D. Friedman and Thomas McCarthy**

In This Issue

This year, a number of New York State laws aimed at expanding protections for women in the workplace and regaining New York's place among the most progressive employment jurisdictions in the country went into effect. In particular, these laws—building upon the wave of momentum towards pay equity generated by the Obama administration's focus on the federal Equal Pay Act and the national movement towards greater wage transparency—strengthen New York's equal pay requirements. The laws also prohibit New York employers from discriminating based on familial status and require employers to reasonably accommodate employees with pregnancy-related and childbirth-related conditions, among other changes. This article examines the most impactful of the recent changes to New York State law, and provides practice tips for employers regarding compliance and risk prevention.

Background

On October 21, 2015, New York Governor Andrew Cuomo signed into law a series of bills known as the "New York Women's Agenda." These bills, aimed at "break[ing] down barriers that perpetuate discrimination and inequality based on gender,"[1] went into effect on January 19, 2016. Three of the bills, in particular, are most applicable to larger employers: (1) one modifies the New York Labor Law's equal pay provisions to afford employees broader protections and prevent employers from prohibiting employees from discussing their wages; (2) another prohibits employment discrimination based on familial status; and (3) a third requires employers to provide reasonable accommodations for pregnancy-related and childbirth-related conditions.

Changes to the Equal Pay Act

The Achieve Pay Equity Act (APEA) (bill number S.1/A.6075) amends New York State's equal pay law (New York Labor Law Section 194(1)) in several significant ways that decrease the effectiveness of many of the levers that employers traditionally have used to defend against equal pay lawsuits. As such, the APEA appears to hold the greatest potential risk among the Women's Agenda for New York employers.

First, the APEA expands the workplace locations that may be compared for purposes of determining whether an employer pays men and women equally. Like its federal counterpart, the New York equal pay law prohibits an

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employer from paying wages to an employee at a lower rate than the rate at which it pays employees of the opposite sex in the "same establishment" for "equal work" performed under "similar working conditions." The "same establishment" requirement has traditionally meant that to establish an equal pay claim, a plaintiff must establish that he or she was paid less than employees working in the same physical workplace location. The APEA, however, expands the definition of "same establishment" under New York law to include all of an employer's locations in the "same geographical region, no larger than a county," taking into account factors such as population distribution and economic activity. As a result, while the relevant comparators for an equal pay claimant under the federal Equal Pay Act are generally limited to other employees working in the same store, warehouse or office as the claimant, the pool of relevant comparators for an equal pay claimant under New York law may now extend to other employees at all workplace locations maintained by the employer in a given municipality or county. Thus, even if a company pays all sales clerks within a particular store in New York equally, a female sales clerk in that store may be able to bring an equal pay claim under New York law if she is paid less than a male sales clerk employed at another of the company's stores in a different town in the county. As such, New York employers should be prepared to justify disparate wages in separate locations.

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Second, the APEA narrows the exception to New York's equal pay requirement for pay differentials based on factors other than sex. Previously, New York's equal pay law, like the federal Equal Pay Act, required employers to pay men and women equally for equal work, unless a pay differential is based on "any… factor other than sex." As amended by the APEA, the New York Labor Law now limits the exception to the equal pay requirement to pay differentials based on a "*bona fide* factor other than sex, such as education, training, or experience."[2] While this change may appear small on its face, it increases the burden placed on employers to prove that the "catch-all exception" applies. The APEA further requires the "*bona fide* factor" to be "job-related with respect to the position in question and … consistent with business necessity."[3] These concepts, borrowed from Title VII case law, are found nowhere in the federal Equal Pay Act. As a result, many federal Equal Pay Act cases—traditionally an important guidepost for interpreting New York's equal pay law—have now been rendered irrelevant for the purpose of interpreting the New York State statute. New York employers should review whether the factors that comprise their compensation decisions (market forces, for example) would meet the new "bona fide factor" test. Even if an employer can meet that test, however, an employee may still prevail on an equal pay claim under the New York Labor Law, as amended by the APEA, if the employee can show that (i) the "employer uses a particular employment practice that causes a disparate impact on the basis of sex," (ii) "an alternative employment practice exists that would serve the same business purpose and not produce such [a] differential," and (iii) "the employer has refused to adopt such an alternative practice." Employers should thus be particularly attuned to any equal pay allegations by employees that are accompanied by suggestions for modifying the employer's pay practices. A dismissive response to an employee's suggestion may later be cited by an employee in an equal pay action.

Third, in a change that has generated comparatively less coverage, the APEA facilitates employees' efforts to discover any pay disparities that may exist by providing that New York employers may not prohibit

employees from inquiring about, discussing or disclosing their own or other employees' wages. The APEA does, however, permit employers to enact "written policies" that impose "reasonable workplace and workday limitations on the time, place and manner" of employees' discussions about wages, such as, for example, prohibiting employees from discussing another employee's wages without that "employee's prior permission."[4] An employee's failure to abide by such a policy provides an affirmative defense for the employer, should the employee bring a claim alleging that the employer took an adverse employment action against him or her for inquiring about, discussing or disclosing wages. Employers should also note that the law contains a carve-out that allows employers to prohibit employees who have access to wage information as part of their essential job functions, such as human resources and payroll employees, from disclosing the wages of other employees to individuals who do not otherwise have access to such information, aside from disclosures in connection with a complaint, charge, or investigation.[5]

While the National Labor Relations Act (the "NLRA") has long been interpreted to prohibit employment policies that ban employee discussions of wages, its scope is limited (*e.g.,* the NLRA does not cover "supervisors"). Many employers—in the interests of keeping competitively sensitive pay information confidential from competitors and preventing workplace conflicts over justifiable pay differences—therefore maintain policies in their employee handbooks or standard confidentiality and non-disclosure agreements prohibiting employees from discussing their wages. In the wake of the APEA, however, companies that employ workers in New York will have to review their policies to ensure compliance with the APEA's new ban on policies that prohibit employees from discussing their pay.

Beyond the impact on basic company policies, the APEA's pay transparency provisions raise questions about the confidentiality of wage information generally. Plaintiffs' lawyers will likely argue that, at least within New York State, the legislature has determined that compensation information is not information that should be declared confidential in a litigation context. Some courts may reevaluate whether sealing compensation information in filings is appropriate, or whether to endorse confidentiality stipulations between litigants that declare compensation information confidential. Furthermore, the EEOC has proposed revising the Employer Information Report (EEO-1) to include collecting pay data from employers with 100 or more employees.[6] These "sunshine" efforts surrounding pay data may have significant competitive consequences.

Finally, as amended by the APEA, the New York Labor Law now provides for liquidated damages of up to three hundred percent (300%) if an employer willfully violates the equal pay provisions. By contrast, the federal Equal Pay Act permits recovery of liquidated damages up to two hundred percent (200%) for a violation.

Familial Status Discrimination

The End Family Status Discrimination (bill number S.4/A.7317) modifies the New York State Human Rights Law (NYSHRL) to add "familial status" as a protected category under the employment discrimination provisions of the NYSHRL, a separate classification that does not exist under Title VII. As amended, the NYSHRL defines "familial status" as being pregnant, having custody of a minor child, or being in the process of obtaining legal custody of a minor child.[7] New York employers are therefore prohibited from discriminating against an employee or applicant based on the fact that he or she has small children at home. The law also forbids employers from asking about familial status during the hiring process. The legislative history of the bill suggests that state lawmakers were particularly concerned about single parents who are denied jobs or promotions based on employers' stereotypes about a single parent's level of commitment to his or her job.

In the wake of these changes at the state level, New York City Mayor Bill de Blasio signed legislation on January 5, 2016, expanding the New York City Human Rights Law's (NYCHRL) protections. As a result, as of May 4, 2016, the NYCHRL now prohibits discrimination in employment based on "caregiver status." The NYCHRL defines "caregiver" as anyone

who provides direct and ongoing care for either a minor child or care recipient, regardless of whether the child or care recipient is biologically or legally related to the caregiver.[8] "Care recipient" is defined as anyone with a disability who (i) is a "covered relative" or (ii) is a person that resides in the caregiver's household.[9] These changes to the NYCHRL expand the City law's protections beyond "familial status." Whereas the New York State law was designed to combat assumptions about parents' commitment to their jobs, the City law addresses similar assumptions about employees who care for elderly or disabled friends or family members.

Employers should re-evaluate their disability policies with respect to reasonable accommodations and determine how to integrate pregnancy-related and childbirth-related conditions.

Reasonable Accommodation for Pregnancy

The Protect Women from Pregnancy Discrimination Act (bill number S.8/A.4272) requires New York employers to provide reasonable accommodations to employees and applicants with a pregnancy-related condition. While the New York State Division of Human Rights has interpreted the sex and disability protections of the New York State Human Rights Law to encompass sex and disability conditions, the legislature was concerned about confusion in the case law, and codified the Division's existing interpretation of the law. The law defines "pregnancy-related condition" to mean "a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function."[10]

Employers should re-evaluate their disability policies with respect to reasonable accommodations and determine how to integrate pregnancy-related and childbirth-related conditions. Some "reasonable accommodations" could include more rest for pregnant employees and/or modified work schedules. Employers with employees in positions that require intense physical labor should consider whether they have the flexibility to offer temporary administrative work. Employers should also be cognizant of the fact that the accommodation mandate does not only apply to employees before the birth. The Fair Labor Standards Act already requires all covered employers to provide break time for nursing mothers to express breast milk, as well as a separate space in which to do so that is not a bathroom, but new mothers may need additional accommodations to perform the necessary functions of their positions.

Finally, the Remove Barriers to Remedying Discrimination Act (bill number S.3/A.7189) revises § 296 of the New York State Executive Law to provide for the award of attorneys' fees in a successful claim of sex-based discrimination. Those who practice regularly in this area are well aware that Title VII and other federal discrimination statutes already provided for attorneys' fees, as did relevant New York City statutes and New York State equal pay law. Thus, plaintiffs asserting discrimination claims under New York State law would often include federal or city discrimination claims in the action in order to collect attorneys' fees. The modification to the state law brings it more in line with the federal and city statutes in allowing for the award of attorneys' fees on successful sex discrimination claims, although it should be noted that attorneys' fees are still not available under New York State law for discrimination claims based on age, race, sexual orientation, or any protected characteristics other than sex.

Practice Tips

The following are some suggested ways in which employers may respond to the new state gender legislation:

- Perform an analysis of the company's workforce to determine whether any pay disparities exist between employees of the opposite sex performing the same job. This analysis should extend to all locations within a county, so that employers can identify and be prepared to defend any differences between separate locations.

- Consider standardizing job titles across the entire workforce. This could allow for more cost-effective identification of pay differentials.
- Review wage policies to determine whether differences in wages can be explained by any of the specific factors identified in the statute. Instruct management to carefully consider any proposed changes to the pay system aimed at addressing pay disparities.
- Review disability and accommodation policies and integrate pregnancy-related and childbirth-related impairments into the process.
- Educate and train individuals with the authority to hire, fire, or promote employees on assumptions regarding the work capabilities of parents or guardians of small children.

1. http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A04272&term=2015&Summary=Y&Actions=Y&Memo=Y
2. N.Y. Labor L. Art. 6, § 194(1)(d).
3. *Id.*
4. N.Y. Labor L. Art. 6, § 194(4).
5. *Id.*
6. https://www1.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm
7. N.Y. Exec. L. § 292(26).
8. N.Y.C. Admin Code § 8-102.
9. *Id.*
10. N.Y. Exec. L. § 292(21-f).

The Employment Implications of Brexit

By Ivor Gwilliams, Chris Marks and Barry Fishley

Background

Following the UK's vote to leave the European Union (EU) by a narrow majority (52% in favour), there has been a frenzied period of speculation as to what a Brexit will actually mean. Businesses around the world, especially those with staff based in the UK, are still considering what plans they should be making and how they can best ensure stability for their workforces.

In this article, we explore some possible implications for employers arising out of a Brexit. We also suggest some practical steps that they can consider taking now to put themselves in the best possible position.

What happens next?

The UK has not actually left the EU as a result of the Brexit vote. For the time being, nothing has changed and all legal rights should continue unaffected.

The exit process will be triggered formally when the UK serves notice of its intention to withdraw from the EU. This is expected to be done in accordance with Article 50 of the Treaty on European Union, which provides for a period of up to two years for the negotiation of the UK's withdrawal terms before exit.

The exit process will be triggered formally when the UK serves notice of its intention to withdraw from the EU. This is expected to be done in accordance with Article 50 of the Treaty on European Union, which provides for a period of up to two years for the negotiation of the UK's withdrawal terms before exit. This period can only be extended with the unanimous consent of all EU member states. Theresa May, the newly-appointed British Prime Minister, has indicated that she intends to trigger Article 50 before the end of this year. However, she is likely to seek informal talks with other EU leaders before triggering Article 50, in order to assess the UK's bargaining position and ensure that she starts the formal exit process at the optimal time.

In all likelihood, discussions have already begun between UK representatives and their counterparts at EU institutions. These discussions will be focussed on the UK's post-Brexit relationship with the EU; most significantly the terms of a UK-EU trade deal. Quite what that deal will look like is uncertain. There will be significant tension between the UK's desire for continued tariff-free access to the EU single market and the political imperative for the UK Government to be seen to take steps to control EU-UK migration, which was one of the key factors underlying the Brexit vote. Achieving both of these goals will be very difficult.

In shaping the UK's post-Brexit relationship with the EU, there are various models to draw from. At one end of the spectrum is the World Trade Organisation model. This would be the "purest" form of Brexit, needing no formal agreement and allowing the UK complete control over immigration. However, it would involve a significant deterioration in UK-EU trade terms and is widely viewed as an extremely unlikely outcome. At the other end of the spectrum, the "Norwegian model" would involve the UK remaining as a member of the European Economic Area (the EEA) and allow the UK continued tariff-free access to the EU's internal market. However, it would also require the UK to abide by a significant portion of EU law, accept the free movement of EU citizens and make a sizeable contribution to the EU budget. It is likely that the final outcome will be somewhere between these two scenarios.

In any event, it is likely to take a number of years (most estimates are between two and five years) to re-shape the complex web of legal, trade and political relationships that have been created over the UK's 43 year membership of the EU. In the intervening period, during which the UK's future position will become progressively clearer, it will be more or less business

as usual. In particular, the UK will remain a member of the EU and EU law will remain applicable in the UK.

Effects on Businesses

The effect of a Brexit on any business will depend on some key factors:

- Is the business in a regulated sector, such as financial services or pharmaceuticals? If so, there will be uncertainty for some time about the extent to which the UK operations of the business will be subject to different regulation from those in the EU.
- Does the business rely on movement of employees around the EU, including to and from the UK? Any EU citizen can freely move to and work in any other EU country: at some point in the future this may cease to apply in relation to the UK.
- Has the business used the UK as the headquarters for its European operations? Some of the advantages of this may go as a result of the UK's exit, such that businesses may wish to consider another location. Alternatively, the UK government may introduce significant new incentives (such as extremely low corporate tax rates) which tip the balance back in favour of remaining domiciled in the UK.
- Does the business trade with or within the EU or use the EU as a base for trade with other countries? The UK may take some time to replicate, through bilateral trade deals, the benefits it currently enjoys as an EU member. On the other hand, the UK may be able to secure new trade deals with other countries (perhaps including India, China and the USA) which ultimately put UK-domiciled businesses in a better trading position than those based in the EU.

How will UK employment change?

Until exit negotiations are concluded, there is unlikely to be any immediate change to UK employment laws as a result of the decision to leave the EU. David Davis, the UK's new Secretary of State for Exiting the EU, has said that "regulation already in place will stay for the moment, but the flood of new regulation from Europe will be halted". He has also said that:

> "it is not employment regulation that stultifies economic growth, but all the other market-related regulations, many of them wholly unnecessary. 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."

Overall, it therefore seems likely that UK employment law will remain relatively stable in a post-Brexit world, certainly in the short term.

However, looking forward, it must be borne in mind that many key areas of UK employment law are derived from EU law. These include family-friendly rights; anti-discrimination laws; the protection of employment rights on the transfer of a business (the so-called 'TUPE Regulations'); and the right to paid holiday. In theory, the UK Government could repeal all of this, but this seems unlikely for three reasons: (1) because, as a condition of any trade deal between the UK and the EU, the EU may insist on a certain threshold of employment rights being maintained in the UK, not least because the EU will not want the UK to be more competitive than EU member states by applying lower employment standards; (2) because the UK Government will not want to abandon employment protections that are either popular with voters or regarded as sensible and fair by both employees and the business community alike; and (3) because abandoning a raft of employment laws in one go would be complex, time consuming and lead to increased uncertainty for businesses. Therefore, it is likely that the UK will retain a considerable part of EU-derived employment law with only piecemeal amendments.

Nonetheless, there may be some concrete decisions for the UK Government to take in relation to UK employment law. These will stem from the fact that some EU-derived employment laws (such as the TUPE Regulations (see below)) have been implemented in the UK by means of 'secondary legislation' introduced by a government minister under powers granted by the European Communities Act 1972 (the ECA). If the ECA is repealed (which will almost certainly be the case upon Brexit), then all secondary employment legislation made under it would fall away unless deliberately retained. This contrasts with the situation regarding

so-called 'primary legislation', such as the laws governing discrimination and equal pay, which would remain in force until repealed. In practice, this means that the UK Government will need to make a case-by-case decision upon Brexit about what parts of secondary employment legislation to keep. For administrative ease (and to ensure stability), the government may simply opt to preserve all secondary employment legislation or the vast majority of it in the immediate aftermath of a Brexit, but there will doubtless be a detailed review of all EU-derived employment laws at some point.

The UK employment landscape is, therefore, unlikely to change dramatically and any change is likely to be gradual. However, areas where we may eventually see changes to employment law in the UK following Brexit are as follows:

Free Movement of People

Free movement of people – along with the free movement of goods, services and capital - is one of the four freedoms of the EU's single market. It gives all citizens of EU countries the right to move freely, to stay and to work wherever they wish within the EU. Without doubt, the most important implication of Brexit in an employment context is how Brexit will affect this right.

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.

In the longer term, many businesses which rely on large numbers of unskilled workers from the EU (for example, in farming and manufacturing) are likely to be most affected by restrictions on EU nationals working in the UK.

In the longer term, many businesses which rely on large numbers of unskilled workers from the EU (for example, in farming and manufacturing) are likely to be most affected by restrictions on EU nationals working in the UK. Such UK businesses actively recruit workers in the EU due to the lack of demand from UK workers to carry out such jobs. Restrictions on the freedom of movement may lead to the need to increase wages to attract job applicants.

Businesses which rely on skilled workers from the EU may also face difficulties in recruiting and/or retaining such individuals. Such individuals may be deterred from applying for (or remaining in) positions with UK businesses due to the uncertainty surrounding their immigration status.

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 their inception 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 provides 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 Work 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.

Data Privacy

Data privacy is clearly an area of importance to employers, who process the personal data not only of their employees, but also others, such as customers. The UK's Data Protection Act, which governs the processing of personal data in the UK, was enacted to bring UK law in line with EU data privacy laws. By 25 May 2018, the UK is required to implement the new EU data protection framework in the form of the General Data Protection Regulation (the GDPR). Although Brexit provides the UK with more scope to dictate its own data privacy regime, it seems unlikely that the UK would repeal or significantly modify the Data Protection Act. Moreover, given the timing on implementation of the GDPR, the UK will (notwithstanding the Brexit vote) need to continue with its preparations for the adoption of a new EU-driven regime.

Even if, following Brexit, the UK Data Protection Act were repealed or modified or the UK derogated from the GDPR obligations, UK businesses operating in the EU would still need to ensure that there is adequate protection regarding the processing of personal data satisfying the obligations laid down in the GDPR, as many of these obligations will apply to organizations located outside the EU which process EU citizens' personal data.

A departure from the EU's approach in respect of data privacy laws would inevitably result in the European Commission considering the adequacy of the UK's data privacy laws. This may then result in similar investigations to those we have seen in respect of personal data transfers from the EU to the US which has resulted in the newly adopted EU-US Data Privacy Shield, following the recent European Court decision in *Schrems v Data Protection Commissioner* ruling the Safe Harbor arrangement inadequate.

A divergence between the UK's and the EU's data privacy laws could also result in UK businesses being required to take further steps to protect personal data when transferring personal data between the UK and EEA jurisdictions. Whilst mechanisms are currently available for the transfer of personal data outside the EEA, such as entering into model clauses (a standard set of terms issued by the European Commission for the transfer of personal data outside the EEA), the legality of these mechanisms (following the *Schrems* case) has already been challenged by national data protection regulators, which adds to the uncertainty for UK-based businesses which operate in the EU. According to the UK Information Commissioner's Office (which enforces data protection rules in the UK), a focus on "international consistency" and "working closely with regulators in other countries" will continue to be the main objectives for the UK.

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 behavior will not be tolerated and will be the subject of disciplinary action.
- Employers should ensure 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.

Conclusion

As explained above, it is unlikely that there will be any immediate changes in UK employment law as a result of the Brexit vote. Once the UK and the EU have concluded their negotiations, any changes are likely to be gradual following consultation with the business community, trade unions and other interested parties.

In the meantime, there will be many uncertainties. Businesses, investors and their advisers will need to think creatively and imaginatively and prepare to respond in a flexible way as the situation develops over the next few years.

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