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UK Employment Flash

Insights into the latest employment news

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Brexit: Where Does UK Employment Law Stand Now?

Workers' rights have been central to the Brexit debate, particularly as Prime Minister Theresa May reached across the political divide for support for her Brexit deal. The UK government has made assurances on workers' rights that give some indication of the direction of UK public policy post-Brexit.

The EU (Withdrawal) Act 2018 provides that all European Union law (including EU legislation relating to employment and workers' rights) will be transposed into domestic UK legislation on the date that the UK leaves the EU. If the UK leaves the EU with the deal proposed by Theresa May, there would be no immediate change to the UK employment law regime. However, following an implementation (or transitional) period (which was initially anticipated to last until at least December 2020 but will almost certainly be pushed back given the current delay to the UK's withdrawal), the UK would be free to diverge from EU legislation. It is this potential divergence and what it might mean for UK employment law that has caused much political debate. If the UK leaves the EU without an agreed deal, then the immediate legal position is unclear, and any potential divergence is likely to be sooner.

Since the 2016 Brexit referendum, the UK government has consistently asserted its intention to not only protect but also enhance UK employment rights following Brexit. From the July 2017 report commonly referred to as the Taylor review and its assessment of modern working practices to the continuing discussion on how the interests of employees are represented on company boards, employment rights have been at the centre of discussions about the post-Brexit landscape.

This work culminated, on 6 March 2019, with the UK government publishing proposed new legislation titled "Protecting and Enhancing Worker Rights After the UK Withdrawal From the European Union". The proposed legislation would allow Parliament to consider on a case-by-case basis whether the UK should align with EU employment law. Specifically:

- Each time the EU adopts new legislation enhancing workers' rights or health and safety standards, the UK government would publish a statement setting out the divergence with UK law and whether the UK government plans to pass legislation to align domestic legislation with the new EU law; and
- Whenever a new UK law is introduced that departs from EU-derived legislation on workers' rights, the UK government would either make a statement of "nonregression" that the new legislation does not undermine an existing EU-derived right or that it intends to pass the legislation even if it results in regression from an existing EU right.

While the draft legislation is ambitious in terms of seeking to align UK and EU employment law following Brexit, it will depend on the government in place at the time as to whether the mechanism it provides for results in any real change to UK policy.

General Data Protection Regulation and Preparations for Brexit

If the UK leaves the EU with the deal proposed by Prime Minister Theresa May, multinational organisations operating in the UK will need to ensure that their intragroup data transfer mechanisms are ready for the end of the transition period. Ensuring the continued free flow of employee data will be central to the preparation.

A UK exit under the prime minister's proposed deal would mean the UK would enter into a transitional period that was initially anticipated to last until at least December 2020 — though this deadline will almost certainly be pushed back given the current delay to the UK's withdrawal. During that period, EU law and rulings of the European Court of Justice will continue to apply in the UK, and the data protection regime in the UK will not change.

However, businesses operating in the UK and the EU should continue to make preparations to ensure the free flow of personal data within their organisations following the end of the transitional period or, if earlier, the date the UK leaves the EU without a deal. While the UK has indicated that it will continue to comply with the EU's data protection regime regardless of the shape of the future EU-UK relationship, organisations will need to ensure that appropriate mechanisms are in place to continue to facilitate the flow of personal data, whatever the outcome of the negotiations.

Well-prepared businesses will have considered this before 29 March 2019 (the original Brexit date), but the following should continue to be reviewed.

- If cautious, prepare for the UK to not be recognised immediately by the European Commission as offering an adequate level of protection for personal data.
  - Given that the UK already applies EU data protection standards, it seems likely that the European Commission will rule that the UK continues to provide an adequate level of protection for personal data. However, any such adequacy decision can take time and could be held up for political reasons. Therefore, the cautious approach would be to prepare for no such ruling to be immediately forthcoming. UK Information Commissioner Elizabeth Denham has noted that "although it is the ambition of the UK and EU to eventually establish an adequacy agreement, it won't happen yet. Until an adequacy decision is in place, businesses will need a specific legal transfer arrangement in place for transfers of personal data from the [European Economic Area] to the UK, such as standard contractual clauses."
  - Multinationals operating in the UK and the EU should ensure that mechanisms are in place to facilitate data transfers from the EU in the event that the UK is not deemed to have adequate data protection standards.
- Watch closely for decisions and updates from the UK Information Commissioner's Office (ICO).
  - Once the transitional period comes to an end, it is likely that the UK ICO will be the highest authority in the UK on data protection matters. Its rulings and guidance will be helpful in assessing any future divergence from the EU regime. In the run-up to 29 March 2019, the ICO produced helpful guidance on the impact of Brexit on UK data transfers and should continue to do so during any implementation period.
- Assess which non-EU jurisdictions have made rulings about the data protection adequacy of the UK.
  - On 14 March 2019, the Dubai commissioner of data protection confirmed that the UK will continue to be recognised by Dubai as a jurisdiction offering an adequate level of protection for personal data transferred outside of Dubai. The UK previously enjoyed this status as a member of the EU. On 15 March 2019, Japan's Personal Information Protection Commission made a similar ruling, and a number of other jurisdictions are expected to follow suit.

New Rules on Taxation of Independent Contractors

Starting in April 2020, large and medium-sized private sector companies must account for tax and national insurance through PAYE (pay as you earn withholding) for independent contractors they retain through personal service companies. These changes to the tax regime are likely to increase tax liability and administrative burdens for private sector organisations that use independent contractors.

The tax rules, known as IR35, apply to individuals who provide services to a client through their own personal service company or partnership. In broad terms, under IR35, individuals engaged through a personal service company are taxed as direct employees (or directors) of their client. Currently, in the private sector, it is the responsibility of the personal service company or partnership to determine whether IR35 applies. As of 6 April 2020, this determination will be the responsibility of the client. The implementation of this reform is subject to an ongoing public consultation, responses to which are due by 31 May 2019.

If IR35 is deemed to apply, the client will need to deduct income tax and employee national insurance contributions from the fee that it pays to the personal service company or partnership, and it will need to account for employer national insurance contributions (as it would for a direct employee). The employer national insurance contributions are paid in addition to the worker's remuneration.

When assessing whether the independent contractor would be considered an employee of the client, the client will need to apply the usual tax status test. This test considers a number of factors, including whether the contractor has a right of substitution, the degree of control the contractor is subject to and how integrated the contractor is within the client's organisation. This test is not clear-cut, and there is no one factor that will determine tax (or employment) status for certain. The test is highly fact-specific and should be applied on a case-by-case basis. As is currently the case, the tax status tests are (and will remain) different from methods for determining the employment status of the independent contractor for employment rights purposes.

Where there is a supply chain (for example, where the ultimate client engages an independent contractor through a number of subcontractors or intermediaries), the determination of IR35 status at one end of the chain may not find its way to the entity responsible for operating payroll. The new rules address this gap. If HM Revenue & Customs (HMRC) is unable to collect the tax and national insurance due, then the liability for that amount will pass along the supply chain until it is recovered. This approach could potentially lead to an entity being liable for uncollected tax and national insurance liabilities even if there is a long supply chain with multiple intermediaries between it and the relevant independent contractor, and even if that entity is not responsible for operating payroll.

The new rules also increase the administrative burden on clients in relation to disputes. Currently, if an independent contractor disagrees with a client's IR35 assessment, then HMRC will deal with the appeal. The current consultation does not suggest any mechanism for an independent determination of disputes between the contractor and the recipient of the contractor's services as to whether IR35 applies.

Given the significance of these changes to the IR35 regime, clients engaging significant numbers of independent contractors should start preparing for the 2020 implementation of the new rules, including by:

- establishing robust internal processes to regularly review the tax status of its independent contractors engaged through a service company in order to assess the application of IR35 and deal with any subsequent disputes;
- ensuring that changes to working practices are taken into account when continuing to assess whether the IR35 regime applies; and
- budgeting for the additional employer's national insurance (and administrative) costs related to engaging independent contractors who fall within the IR35 regime.

Tightening the Rules on Nondisclosure Agreements

In light of recent high-profile cases of alleged misuse of nondisclosure agreements (NDAs), particularly in a number of #MeToo cases, the government has announced new proposals to tighten the rules on the use of NDAs and confidentiality clauses in employment and settlement agreements.

NDAs serve as useful tools at all stages of the employment relationship. On entry into an employment contract, NDAs are invaluable for employers seeking to protect their confidential information and trade secrets. At the end of the employment relationship, a well-drafted NDA in a settlement agreement can allow both the employer and the employee to achieve a "clean" break.

However, NDAs — colloquially known as "gagging clauses" — have received increased scrutiny in recent months largely in connection with the #MeToo movement and as a result of a number of high-profile individuals accused of putting undue pressure on former employees to accept financial settlements in exchange for their silence, sometimes in relation to alleged criminal behaviour (including in cases of extreme sexual harassment). As a result, broadly drafted NDAs that purport to prevent former employees from notifying regulators or law enforcement agencies about misconduct or criminal behaviour, or that prevent complaints of sexual harassment from being appropriately dealt with, are currently under review.

Some commentators have suggested an outright ban on all NDAs relating to harassment and discrimination. Instead, the government's consultation includes proposals that would introduce legislation to:

- prevent the use of workplace confidentiality agreements (typically found in employment contracts or settlement agreements) to thwart reports of assault or other criminal conduct to the police, or the disclosure of information in criminal proceedings or to appropriate regulators;
- require a clear, written description of rights before workers sign confidentiality clauses in employment contracts or settlement agreements; and
- extend the law so that workers must receive independent legal advice on the effect of and limits on any confidentiality clauses in settlement agreements.

The proposals aim to prevent some of the reported excesses in the use of NDAs to silence serious allegations of harassment in the workplace (or misunderstandings, in the case of vague or broadly drafted NDAs), particularly where there is a strong public interest in these issues being publicised and dealt with. In a number of high-profile cases, some employers have consistently used NDAs to silence workplace complaints of serious and persistent sexual harassment, including in some cases extreme conduct involving potentially criminal acts that the government feels should have been investigated further.

The consultation also draws attention to the Women and Equalities Select Committee's recommendation that the government provide standard, approved wording for confidentiality clauses that clearly sets out what the clause does and does not prevent an employee from disclosing. While there is concern that such wording would quickly become out of date and require frequent revision, standard wording could provide clarity for all parties and might avoid arguments that confidentiality provisions are void for not meeting the new requirements clearly enough. Alternative proposals include a statutory exclusion from NDAs that plainly sets out the limitations on any confidentiality provision.

The consultation period closed on 29 April 2019, and draft legislation could be proposed later this year.

Recruiting and Retaining More Women in the Workplace

In early 2019, the Women and Work All Party Parliamentary Group (APPG) published a toolkit, "How to Recruit Women for the 21st Century" (the Toolkit), that challenges employers to overhaul their recruitment processes in order to employ more women. It also makes a series of policy recommendations for the government to assist women entering, progressing in and returning to the workplace.

The APPG is a cross-party organisation made up of a number of stakeholders, including members of Parliament, who have a particular interest in addressing gender imbalance in the workplace.

During the course of 2018, the APPG reviewed the recruitment process of private, public and voluntary sector organisations and produced its findings and recommendations in a Toolkit comprising practical suggestions for employers to assist them in improving their recruitment processes and attract more female talent.

The Toolkit focuses on a number of key issues, including:

- Attracting female talent from the outset.
  - The initial stage of the recruitment process — the job-design and advert placement, integral to getting the right people through the door — is considered essential.
  - For example, does the advertised job default to traditional working hours, or does it make clear that the job is eligible for job-sharing, part-time work, flexible hours or work-from-home arrangements?
  - The APPG's research suggests that a stigma remains with flexible working — it is usually seen as a "privilege" granted only after successful completion of a probation period or after a sufficient amount of time has passed.
  - The Toolkit encourages employers to change their internal policies so that flexible and agile working is the default, unless there is a genuine business reason why it would not be appropriate.
- Supporting women who are returning to work following a career break.
  - The APPG's research shows that women who want to return to work after a career break face a number of barriers. For example, employers may be reluctant to interview or hire women with a gap in their curriculum vitae.

  - Such women make up an essential and significant percentage of the highly skilled female workforce. The economic benefits associated with bringing back women with middle-management-level experience or above are estimated to be valued at approximately £151 billion.
  - The Toolkit emphasises that access to retraining and reskilling is a priority for removing the perceived barriers. This can be achieved through implementing refreshment training, returner programmes, mentoring schemes, coaching and sponsorship.
- Developing a pipeline of female talent.
  - This element is particularly pertinent for industries that have not traditionally attracted women. For example, the APPG report that only 2% of those working in manual trades are women.
  - The Toolkit advocates backing or implementing outreach initiatives from an early age (as young as school age) to kick-start the pipeline.
  - The APPG advocates that women who do work in industries with low female representation have a responsibility to talk openly about their professional trajectory so that they can be seen as visible and relatable role models.

Some of the recommendations in the Toolkit are specifically addressed to the government. Those include:

- Breaking down gender pay gap data — which larger employers with 250 or more employees must publish annually — to include other data categories such as age, ethnicity and disability, and requiring smaller companies to publish their data;
- Introducing a diversity fund to enable small and medium-sized enterprises to offer coaching and mentoring to help women progress in the workplace;
- Removing barriers for young women to enter apprenticeships, including the introduction of an apprenticeship bursary fund for low-income women and women in other underrepresented groups (such as ethnic minorities); and
- Strengthening the Equality Act 2010 to provide better protection for disabled people from discrimination if they have a protected characteristic in addition to their disability, with a focus on gender.