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Brexit: Implications for Employment Law

This note addresses the impact of Brexit on employment law in the UK and, in particular, looks at the current framework of UK employment law and considers those areas derived from EU law which may be subject to change. It is one of a series of *GTM Alerts* designed to assist businesses in identifying the legal issues to consider and address in response to the UK's referendum vote of 23 June 2016 to withdraw from the European Union.

Timing of Brexit

The UK has not left the EU. It will remain a member of the EU, and EU law will continue to apply in its territory, for some time.

Before exiting, the UK needs to go through the exit procedure set out in Article 50 of the Treaty on European Union, starting with notification to the European Council of its decision to leave the EU. The new UK Prime Minister, Theresa May, appointed on 13 July 2016, has stated that while "Brexit means Brexit", there should be no rush to serve the Article 50 notification. She and David Davis, the Secretary of State for the new government department in charge of managing Brexit, have supported the view that notification should not take place before the end of the year. However, the timing of any notification in 2017 remains unclear, with press reports of a delay until after elections in both France (April/May) and Germany (September/October), casting doubt on a notification in early 2017. The situation remains fluid – with the EU institutions and the remaining 27 EU Member States increasing pressure for formal negotiations to commence swiftly – but it is clear that notification may be delayed for some time to allow consideration of the UK's preferred exit terms and model for its future relationship with the EU. When the notification is made, it will trigger a two-year, extendible period of negotiation with the EU on the UK's terms of exit only. For more information on the timeline for Brexit, please see our previous *GTM Alerts*, "[Brexit: The Timeline](#)" and "[Brexit: Progress Report One Month In](#)".

At this time, it is not clear if negotiation of new arrangements with the EU will be conducted in parallel with the exit negotiations, or at a later stage. It is clear, however, that the UK intends to start discussing trade terms with non-EU countries as soon as possible.

Employment Legislation in the UK Generally

A significant portion of UK employment legislation is derived from EU law and in the short term there is likely to be little change to employment law as EU laws will continue to apply until the UK leaves.

The extent to which Brexit, when it occurs, will impact on UK employment law is uncertain. Whichever model is chosen for the UK's new relationship with the EU, it is likely that the European Communities Act 1972 (ECA), which incorporated EU law into the laws of England and Wales, Scotland, and Northern Ireland (UK Law) will be repealed, at least in part, upon Brexit. If the UK opts to join the EEA, EU law will be "reintroduced" in the UK by means of the EEA Agreement. For example, Norway was required to implement key EU directives on collective redundancies and agency workers before being allowed access to the single market as an EEA Member State. For more information on potential models for the UK's new relationship with the EU, please see our *GTM Alert*, "[Brexit: The UK's Options for Future Trade with the EU](#)".

With other models, EU laws will no longer automatically apply in the UK unless they have been implemented in the UK by means of Acts of Parliament.

Where there is no implementing Act of Parliament, there is potential for significant gaps in UK law because other EU-derived laws will fall away upon Brexit unless positive action is taken. The EU Treaty articles and regulations that apply directly in the UK without need for implementation will simply cease to apply. EU Directives, on the other hand, do not generally apply directly in the UK, but are implemented by UK secondary legislation, mainly under the authority of the ECA. Measures will need to be adopted to ensure that, as far as appropriate, these two categories of laws are either preserved collectively by means of a single piece of legislation – perhaps an amendment to the ECA – pending a proper review of their application in the longer term or replaced by individual laws (less likely in the short term given the volume of work required).

It is also important to note that some EU-derived domestic legislation has been "gold plated", in the sense that the UK has exceeded the minimum standards enshrined in EU law (an example being the UK statutory minimum holiday entitlement of 28 days versus the EU's minimum of 20 days).

The impact on key pieces of UK legislation is likely to be as follows.

Works Councils

The UK implemented the EU Works Councils Directive in the Transnational Information and Consultation of Employees Regulations of 1999, as amended in 2010. If not preserved by, for example, an amendment to the ECA, these Regulations will fall away. For those organisations with European Works Councils (EWCs), this is likely to mean that their composition and scope will be affected. EWC members in other countries would no longer be entitled to be informed about plans relating to UK operations and UK employees would be likely to lose their seat on the EWC.

Working Time

The Working Time Directive was implemented in the UK by the Working Time Regulations 1998. The Regulations set a maximum number of working hours of 48 hours per week, although a large number of companies make use of the UK's opt-out to enable employees to work hours in excess of the maximum. The UK has been vocal in its opposition to the 48 hour week and it is possible that, even if these Regulations are preserved immediately post-Brexit, the UK government will ultimately choose not to retain them. It might also adopt rules that simplify the provisions relating to paid holiday and

breaks, reversing aspects of recent case law stipulating that holiday should accrue during long-term sick leave and providing for holiday pay to be calculated by reference to base salary only, without commission or overtime.

Agency Workers

The Agency Workers Regulations 2010 implement the EU Directive of the same name. They provide for pay and working conditions equal to those for permanent employees and are unpopular with both the UK government and employers. Consequently, they may also not be preserved in their entirety in the longer term. If that were to happen, employers would no longer be required to pay agency staff the same as permanent workers, providing employers with more flexibility to choose between permanent staff and agency workers.

Equality Act 2010

The Equality Act 2010 implements four EU directives on equal treatment. It provides any employee with a protected characteristic (such as age, sex, race, disability, and religion or belief) with protection from discrimination and, on account of a 1993 ECJ decision, provides for uncapped compensation.

Because it is an Act of Parliament, the Equality Act will survive the repeal of the ECA. In any event, it is highly unlikely to be repealed, not least because it consolidates existing UK legislation in this area. There may, however, be a call to introduce a cap to the amount of compensation that can be awarded in the same way as currently applies in relation to unfair dismissal.

Collective Redundancy Consultation

The UK Trade Union and Labour Relations (Consolidation) Act 1988 (TULRCA) implements a 1998 EU Directive on collective redundancies. Currently, if an employer proposes to make redundancies of 20-99 employees within a period of 90 days or less, it must consult with representatives of the affected employees at least 30 days before the first dismissal takes place. Where 100 or more redundancies are proposed, consultation must begin at least 45 days before the first dismissal takes place. As an Act of Parliament, TULRCA will not be automatically repealed on Brexit, but it is possible that the employee threshold for triggering consultation could be increased or the consultation process could even be discarded completely.

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

The EU's Business Transfers Directive has been implemented in the UK in the form of TUPE which serves to protect employee rights on a business transfer. The UK has gold-plated TUPE by including transfers created by a service provision change, where there is a change of contractor (or work is first insourced or outsourced), in addition to the traditional transfer of an undertaking which arises on the sale of a business. A number of countries outside the EU have similar provisions and it is therefore unlikely the UK will repeal these rules after Brexit. However, there may be a relaxation in relation to provisions such as consultation requirements and allowing more flexibility to harmonise terms post-transfer.

Capital Requirements Directive (CRD IV)

CRD IV introduced changes to corporate governance and remuneration. In particular, it imposes a "bonus cap" on certain bankers and requires the remuneration of staff whose professional activities have a material impact on their risk profile, such as senior management and traders, to be publicly disclosed. The government has expressed concerns about the bonus cap in relation to the finance sector although it is anticipated that to remain within the Single Market, the UK will have to continue to implement CRD IV. The PRA and FCA already notified the European Banking Authority that they will comply with all aspects of the [EBA Guidelines on Sound Remuneration Policies](#), except for the bonus cap.

Free Movement of Workers

At present, in its capacity as a participant in the EU Single Market, the UK is bound to uphold the principle of freedom of movement. This concept that workers from each EU Member State can work in any other Member State without restriction has been a policy driver behind the development of harmonised employee rights and protections. Clearly, the scope of any changes as a result of Brexit will depend on the chosen model for the UK's future relationship with the EU and, in particular, the degree to which that model enables the UK to retain access to the EU Single Market.

If the UK ceases to be part of the EU Single Market and freedom of movement no longer applies, that places a question mark over the immigration and employment status of the EU citizens based in the UK and the UK citizens living in other Member States. We have addressed these issues in more detail in our *GTM Alert* "[Brexit: Immigration and Emigration](#)". This could be problematic for those UK sectors that rely on foreign nationals to make up large proportions of the workforce including (amongst others) hospitality, health care, construction, and agriculture.

Conclusion

The full implications of the UK's withdrawal from the EU are still being worked through and they will depend to a great extent on the model chosen by the UK for its future relationship with the EU. That choice will be heavily influenced by the new UK prime minister. Until there is greater clarity and certainty, businesses should continue to monitor developments.

Further information about issues relating to Brexit can be found [here](#).

This *GTM Alert* was prepared by **Naomi Feinstein** and **Russell Lamb** in Greenberg Traurig Maher's London office. Questions about this Alert can be directed to:

- > [Naomi Feinstein](#) | +44 (0) 203 349 8736 | feinsteinn@gtmlaw.com
- > [Russell Lamb](#) | +44 (0) 203 349 8708 | lambbru@gtmlaw.com
- > The GTM Brexit team:
 - > [Gillian Sproul](#) | +44 (0) 203 349 8861 | sproulg@gtmlaw.com
 - > [Lisa Navarro](#) | +44 (0) 203 349 8757 | navarro@gtmlaw.com
- > Or your [Greenberg Traurig Maher](#) attorney

For more information:

Greenberg Traurig Maher LLP
The Shard, Level 8
32 London Bridge Street
London, SE1 9SG
United Kingdom

T +44 (0) 203 349 8700

F +44 (0) 207 900 3632

www.gtmlaw.com

Albany +1 518.689.1400	Delaware +1 302.661.7000	New York +1 212.801.9200	Silicon Valley +1 650.328.8500
Amsterdam + 31 20 301 7300	Denver +1 303.572.6500	Northern Virginia +1 703.749.1300	Tallahassee +1 850.222.6891
Atlanta +1 678.553.2100	Fort Lauderdale +1 954.765.0500	Orange County +1 949.732.6500	Tampa +1 813.318.5700
Austin +1 512.320.7200	Houston +1 713.374.3500	Orlando +1 407.420.1000	Tel Aviv[^] +03.636.6000
Berlin⁻ +49 (0) 30 700 171 100	Las Vegas +1 702.792.3773	Philadelphia +1 215.988.7800	Tokyo[⌘] +81 (0)3 4510 2200
Berlin-GT Restructuring⁻ +49 (0) 30 700 171 100	London[*] +44 (0)203 349 8700	Phoenix +1 602.445.8000	Warsaw[~] +48 22 690 6100
Boca Raton +1 561.955.7600	Los Angeles +1 310.586.7700	Sacramento +1 916.442.1111	Washington, D.C. +1 202.331.3100
Boston +1 617.310.6000	Mexico City⁺ +52 55 5029.0000	San Francisco +1 415.655.1300	Westchester County +1 914.286.2900
Chicago +1 312.456.8400	Miami +1 305.579.0500	Seoul[∞] +82 (0) 2.369.1000	West Palm Beach +1 561.650.7900
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