Brexit: The employment law implications

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On 23 June 2016, British voters will determine whether the UK will leave the EU (also known as 'Brexit'). Given that many UK employment rights are in some way derived from European law, what consequences would leaving the EU have on employment law?

This will depend in large part on (a) the mechanics of the

UK's withdrawal from the EU and (b) what kind of agreement is reached between the UK and EU going forward.

The means of withdrawal are important because EU law is enshrined in UK law in multiple ways. Anything incorporated into UK law via an Act of Parliament will be entirely unaffected by a Brexit unless the Government actively sought to repeal it. Any statutory instruments introduced under the European Communities Act 1972 could be removed by repealing that Act; however, as this would bring all the regulations underpinning it to an end, it is an option the Government would be unlikely to take. In any event, Tribunal judges are likely to consider themselves bound by earlier decisions of the ECJ and domestic appeal courts even after the relationship with Europe has changed.

If the UK wants to retain the ability to trade freely within the EU, some kind of agreement would need to be negotiated to permit that. The UK could follow Norway's example by remaining in the European Economic Area and the European Free Trade Association, Sweden's model of staying in EFTA only, or forge its own path. Any kind of agreement is likely to come with the caveat that the UK continues to enforce EU social rights, in which case changes could only be minimal.

Wholesale change to EU-derived law is unlikely. This is partly because some laws currently align with Government policy; for example, UK entitlements to parental leave and flexible working are actually more generous than that provided for in the EU. Secondly, making extensive changes would cause significant upheaval to businesses and undermine legal certainty.

In reality, the most the UK government is likely to do in the event of a Brexit is to make small, gradual amendments to employment legislation. For example, the following changes may be considered:

- the addition of a cap to compensation awarded in respect of discrimination;
- an amendment to TUPE regulations to allow employers to harmonise contractual terms;
- reform of holiday pay laws to restore the entitlement to base salary only (following European decisions including overtime and commission in the calculations);
- removal of the cap on bankers' bonuses (currently limited to 100% of their fixed remuneration, or 200% with shareholder approval);
- removal of the weekly cap on working hours (though the ability to opt out may render this unnecessary); and
- revocation of, or amendment to, the largely unpopular Agency Workers Regulations 2010.

In the short term, there is very little employers can do to anticipate any of these changes, as so much is uncertain. Even if the UK votes to leave the EU, it must give 2 years' notice of its departure, so it will be some time before the real impact of a Brexit is felt.

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