



CLYDE&CO

Employment rights

Impact of Brexit

September 2016

Introduction

Clyde & Co's employment team have conducted a technical assessment of the potential impact of BREXIT on employment law.

We have broken employment law down into the various different rights and responsibilities and for each, have analysed whether the source is from the EU or not; and then considered what the impact of leaving the EU is likely to be on those rights and responsibilities, including the likelihood of reform.

The two areas that we consider are most likely to be affected are:

- **TUPE** there may be changes to rules on penalties for failure to inform and consult and it may become easier to harmonise terms post-transfer and
- **Agency Worker Regulations** these regulations are complex and unpopular and are likely to be a target for reform

Contact us to find out more.

Nature of right	EU source	Likelihood of reform
Contractual rights and wages		
Written particulars of employment.	Contracts of Employment Directive. Originally a domestic right.	s.1 Employment Rights Act 1996: technically at risk of change, but unlikely to be a priority.
Right to: <ul style="list-style-type: none"> • A minimum notice period • An itemised pay statement • Be paid the national minimum wage and, if over 25, the national living wage • Not have deductions made from wages unlawfully • Pension contribution from employer under auto-enrolment scheme 	Domestic right.	Domestic rights so unlikely to change.
Termination of employment		
Unfair dismissal.	Unfair dismissal is a domestic right. BUT Automatic Unfair Dismissals relating to TUPE, pregnancy, maternity leave, parental leave, acting as an employee representative and asserting working time rights, are all based on EU rights.	Domestic right, so unfair dismissal unlikely to change. Automatic unfair dismissal for TUPE reasons is derived from EU, law so may change.
Written reasons for dismissal. Right to a redundancy payment and to paid time off to look for alternative work in the event of redundancy.	Domestic right – no EU equivalent.	Domestic right, so unlikely to change.
Whistleblowing rights		
Right not to be dismissed or subjected to a detriment in relation to the making of protected disclosures (whistleblowing).	Domestic right – no EU equivalent.	Domestic right, so unlikely to change.

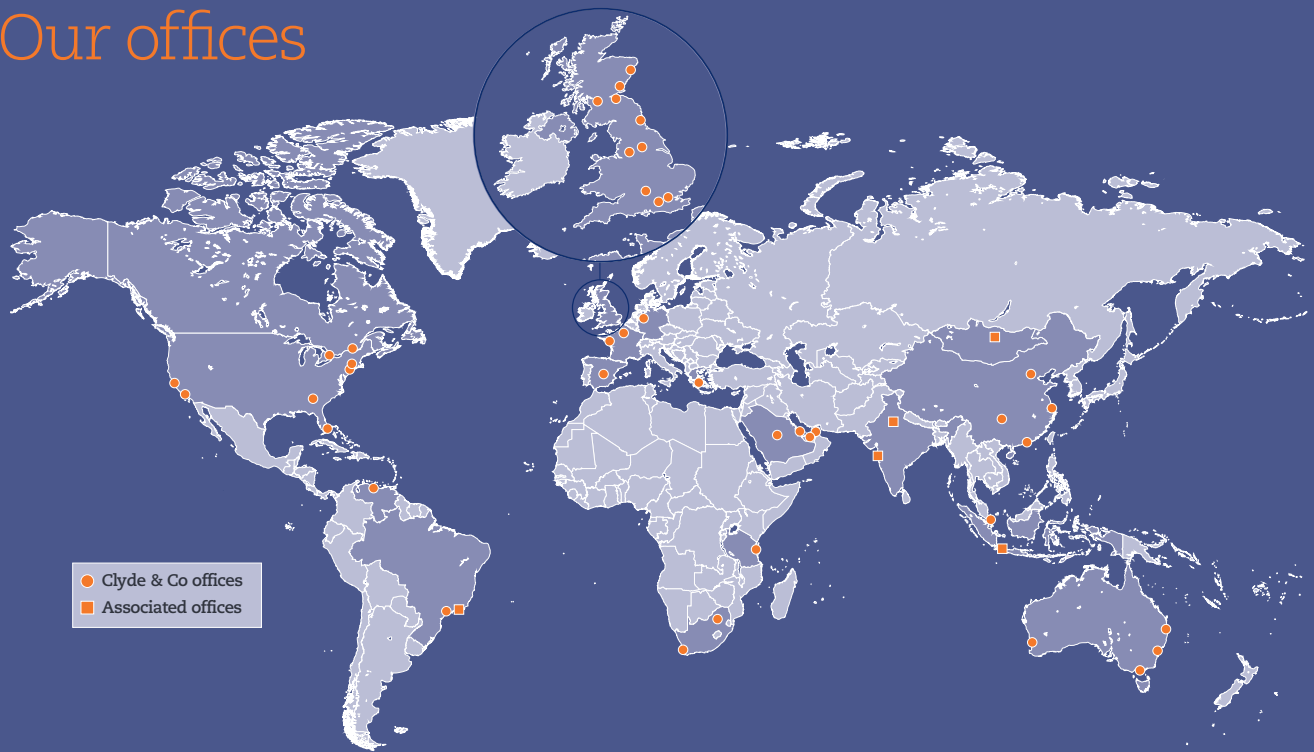
Nature of right	EU source	Likelihood of reform
TUPE and collective consultation		
<p>Right for contract of employment to transfer from transferor to transferee in event of relevant transfer.</p> <p>Right not to be dismissed or subject to contractual changes in the event of a transfer (unless for an ETO reason).</p> <p>Information to and consultation with appropriate representatives over proposed transfer and its implications.</p>	<p>TUPE is derived from the EU: Acquired Rights Directive.</p>	<p>This will depend on the terms of any negotiated exit, but TUPE is likely to stay - the UK has already 'gold plated' Directive provisions by introducing Service Provision Changes.</p> <p>Overall, there is a chance of change or amendment to amend provisions relating to:</p> <ul style="list-style-type: none"> • Harmonisation of terms and conditions post transfer; and • Pre transfer consultation requirements and penalties
<p>Consultation with appropriate representatives over proposed redundancies of 20 or more employees within a 90 day period.</p>	<p>The redundancy related collective consultation requirements in the Trade Union and Labour Relations (Consolidation) Act 1992 are derived from the EU: Collective Redundancies Directive.</p>	<p>Collective consultation periods for 100 or more redundancies have already been cut from 90 to 45 days.</p> <p>What happens next will depend on the terms of any negotiated EU exit. Employers may wish Parliament to repeal redundancy notification and consultation obligations, but this is likely to be opposed by organisations representing employee interests.</p>
Fixed term employees		
<p>Right to be treated no less favourably than a comparable permanent or full time employee (and associated rights).</p>	<p>The EU Fixed Term Workers Directive protects fixed-term workers from being treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.</p>	<p>Very few cases are brought under the UK regulations protecting fixed term workers.</p> <p>It is unclear whether protection for fixed-term workers would be a target for repeal; given public outcry over use of zero-hours contracts, repealing protections for fixed-term workers could be unpopular.</p>

Nature of right	EU source	Likelihood of reform
Family rights		
Paid time off for ante-natal care; 26 weeks' ordinary maternity leave and up to 26 weeks' additional maternity leave.	The EU's Pregnant Workers Directive encourages improvements in the health and safety at work of pregnant workers and those who have recently given birth or who are breastfeeding. It also entitles women to two weeks leave before and/or after giving birth, with a total maternity leave entitlement of 14 weeks leave.	UK maternity entitlements exceed those set out in the Pregnant Workers Directive and are unlikely to be altered post Brexit.
Right to statutory maternity pay.	The Pregnant Workers Directive obliges women taking maternity leave to be paid a sum equivalent to sick pay.	In the UK Statutory Sick Pay is currently GBP 88.45, whereas Statutory Maternity Pay is higher: <ul style="list-style-type: none"> • The first six weeks: 90% of their average weekly earnings (AWE) before tax • The remaining 33 weeks: GBP 139.58 or 90% of their AWE (whichever is lower) This is unlikely to change as a result of Brexit.
Right to 26 weeks' ordinary adoption leave, 26 weeks' additional adoption leave and statutory adoption pay. Right to two weeks' paternity leave in connection with birth or adoption and statutory paternity pay.	Domestic right – no EU equivalent.	Domestic right, so unlikely to change.
Right to shared parental leave and shared parental pay. Right to unpaid time off in connection with an emergency affecting a dependent. Right to request a change to contractual terms for the purpose of working flexibly.	Domestic right – no EU equivalent.	Domestic right, so unlikely to change.
Right to eighteen weeks' unpaid parental leave per child.	The EU Parental Leave Directive provides that all employees have a right to at least four months of unpaid parental leave, of which one month is non-transferable.	UK rights exceed the minimum EU entitlement but take-up has been limited. This is unlikely to be a priority area for reform.

Nature of right	EU source	Likelihood of reform
Discrimination		
Protection from direct and indirect discrimination, harassment and victimisation.	<p>Three separate EU directives deal with discrimination:</p> <ul style="list-style-type: none"> • The Equal Treatment Directive (2006/54/EC) covers the protected characteristics of sex, marriage and civil partnership, pregnancy and maternity, and gender reassignment • The Equal Treatment Framework Directive (2000/78/EC), which covers the protected characteristics of age, disability, religion or belief and sexual orientation • The Race Directive (2000/43/EC) 	<p>The UK implemented a raft of anti-discrimination legislation, pre-dating the relevant EU directives, covering sex, race and disability. The EU's regulations resulted in the introduction of protection on the grounds of religion/belief, age and sexual orientation. All discrimination laws are now incorporated into the Equality Act 2010.</p> <p>There is unlikely to be much appetite for repeal or reform of UK discrimination laws, although it is likely that a cap on discrimination compensation could be introduced.</p>
The right to equal pay	Article 157 of the European Treaty requires each Member State to ensure male and female workers are paid equally.	<p>The Equal Pay Act of 1970 was implemented in 1975 partly as a result of the requirements of the relevant EU Treaty in force at the time. Equal Pay laws are now set out in the Equality Act 2010.</p> <p>With Gender Pay Gap Regulations soon to be published, it is unlikely that rights to equal pay will be affected by Brexit.</p>
Working time		
<p>Right to 48 hour maximum working week (unless opted out).</p> <p>Right to daily and weekly rest and to rest breaks between period of work.</p> <p>Right to compensatory rest in case where the above rights are modified or excluded.</p> <p>Right to paid annual leave.</p> <p>Right to payment in lieu of holiday on termination of employment.</p>	EU Working Time Directive (originally passed in 1993) sets limits on working hours, rest breaks and annual leave entitlement.	<p>The UK Working Time Regulations 1998 reflect the opt out that the UK obtained, so that employers may modify or exclude some of their provisions by negotiation with workers or their representatives by way of: collective agreement, workforce agreement, or individual agreement with the employee (most commonly used for opt-out in relation to working hours).</p> <p>It is worth noting that the UK requires employers to give more holiday than the EU Directive does.</p> <p>The Working Time Regulations are a likely target for reform, having been amongst the most complex and unpopular of all EU derived regulations, with working time and calculation of holiday pay being particularly controversial. Specifically there could be more clarification on whether holiday can accrue during periods of other leave, whether holiday can be carried forward and how to calculate holiday pay.</p>

Nature of right	EU source	Likelihood of reform
Agency workers		
The right to equivalent terms and conditions after 12 weeks continuous service and associated rights.	EU Temporary Workers Directive requires that employers must provide assigned temporary workers with basic working and employment conditions that are no less favourable than if they had been recruited direct by the hirer, covering: remuneration; paid holiday, working hours, overtime, maternity and anti-discrimination provisions and, arguably, pension contributions.	<p>In the UK, these are implemented as the Agency Worker Regulations 2010 and they provide for a 12-week qualifying period for agency worker rights.</p> <p>The rules are complex and unpopular and are most likely to be the target of any post-Brexit Government legal reforms.</p>
Other rights		
Right to belong to a trade union.	<p>The right to join a trade union is a fundamental right under Art 11 of the European Convention on Human Rights, to which all EU Member States must be a signatory.</p> <p>There is no separate EU law relating to Trade Union membership.</p>	Domestic right, implemented by the Trade Union and Labour Relations (Consolidation) Act 1992, so it is unlikely to change.
<p>Right to be accompanied at a grievance or disciplinary hearing.</p> <p>Right to time off for various statutory purposes including trade union duties and activities, jury service, public appointments, study or training and pension scheme trusteeships.</p> <p>Protection in relation to Sunday trading.</p>	Domestic right – no EU equivalent.	Domestic right, so unlikely to change
Right to protection from detriment for exercising statutory rights which apply to employees.	Specific protections apply in relation to rights based in European Law.	<p>These specific protections are reflected in the UK laws implementing the EU rights, so that protection extends to dismissal related to: TUPE, pregnancy or maternity leave, parental leave, acting as an employee representative and asserting working time rights.</p> <p>Technically at risk of change but unlikely to be a priority area for amendment.</p>

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