

BREXIT: ISSUES FOR RETAIL EMPLOYERS



Harassment at work

Retail employers should be mindful of harassment in the workplace following the vote to leave the European Union. In particular, employers should take steps to protect their EU migrant worker population from harassment on the grounds of nationality from colleagues and or third parties, such as customers. Since the referendum, EU nationals have reported a rise in xenophobic attitudes, for example, being asked by colleagues when they are planning to "go home" or how long they have been in the UK.

Employers also need to take steps to protect old workers from harassment on the grounds of age. The analysis of the referendum vote revealed a gap in the voting patterns of young and old. It is easy to imagine how arguments about the Brexit vote might break out in the workplace and descend into age-related insults on both sides with the young dismissed as "naïve" and the old described as "out of touch."

It is also advisable to monitor the tone of discussions and behaviours connected with the Brexit vote, to avoid allegations of bullying or harassment associated with the worker's voting choice.

Continued and future employment of EU nationals

The retail sector relies heavily on EU nationals to meet its workforce needs, for example, in warehouses and depots. If the UK negotiates a deal which requires the continuation of free movement of persons (e.g. the Norwegian EEA model) then no material changes to the current rules are expected.

However, if free movement of persons is **not** part of the continuing relationship with the EU (e.g. if we opt for a Customs Union model or the "full Brexit" WTO model) then the impact on retail employers could be more significant:

- ▶ In the short term, it is not yet clear whether EU nationals currently residing in the UK would be required to leave. This will ultimately depend on the deal which is struck with the EU. However, even the Leave campaign stated prior to the referendum that EU citizens who were "lawfully resident" in Britain should automatically be granted indefinite leave to remain.
- ▶ In the long term, it would become more difficult for EU nationals to work in the UK. There could be a points-based system, which would make it harder for low-skilled EU nationals to work in the UK. This may make it harder for retailers to recruit sufficient staff. This may mean employers will need to recruit from outside the EU. It could also lead to upward pressure on wages in order to attract domestic job applicants.

Possible reforms to the UK's employment law framework following withdrawal from the EU:

Could the UK Government repeal EU-derived employment law? If the UK negotiated a relationship with the EU along the lines of the Norwegian EEA or Swiss models, there would, in practice, be little scope to amend EU-derived employment laws. However, if the UK opted for a "full Brexit", adopting the WTO model, there could be some degree of change. Some of the key areas of interest for retailers are discussed below.

- ▶ **Discrimination:** the Equal Treatment Directive is implemented in the UK by way of a primary act of Parliament, the Equality Act 2010. Protection from discrimination is now embedded within UK society and there is likely to be little support for a reduction in discrimination and equal pay protection within the workplace. One possible change is the introduction of a cap on compensation in discrimination claims, which would not be possible under EU law.
- ▶ **Working time:** the Working Time Directive (WTD) was enacted in the UK by way of the Working Time Regulations 1998 (WTR). It is unlikely that we would see the complete deregulation of working time as such a move would be very unpopular with trade unions and employees. A more realistic prospect is that the Government would retain the WTR but repeal some of the more unpopular provisions such as: (i) the maximum 48-hour working week; (ii) record-keeping obligations; and (iii) provisions on calculation of holiday pay
- ▶ **Business transfers and outsourcings:** the Acquired Rights Directive was implemented via the TUPE regulations. In theory, a full Brexit would mean that TUPE would fall away. However, it is unlikely that the Government would permit the complete deregulation of this area. Such a move would be very unpopular with trade unions and employees. Further, many commercial outsourcing agreements have been priced on the basis that TUPE applies and/or will do so in future. A more realistic prospect is that the Government would retain TUPE, but would seek to amend it to make it less burdensome on business. One possible area of change would be to make it easier to harmonise terms and conditions of employment post-transfer.
- ▶ **Agency workers:** the Temporary Workers Directive (TWD) regulates the working conditions of temporary workers by providing that basic working conditions for assigned temporary workers (i.e. agency workers) are no less favourable than for ordinary employees. The TWD was enacted in the UK by way of the Agency Workers Regulations 2010 (AWR), under which agency workers gain these rights after they have completed a 12-week qualifying period. In the event of a full Brexit, it is possible that the Government would not retain the AWR, either in the current form or otherwise. This would reduce the burden on retail employers to equalise certain employment conditions for agency workers.
- ▶ **Family-friendly rights:** different EU Directives establish the framework for "family-friendly rights" – for example, the Parental Leave Directive and the Pregnant Workers Directive. These rights are now embedded within our employment law framework. Indeed, the UK has exceeded many of the minimum EU requirements, for instance, when it introduced the system of shared parental leave in 2015. It would be an unpopular move to allow minimum protections to fall away. However, employers who enhance these rights (e.g. by providing enhanced maternity / paternity / shared parental pay) may seek to reduce these entitlements in the longer term.

Retail employers should monitor the Government's proposals in these areas and lobby appropriately for desired changes.

Employment laws which are not derived from EU law would be unaffected by Brexit (e.g. the right not to be unfairly dismissed, protection for whistleblowers, the right to be paid in accordance with the national minimum wage etc). That said, retail employers may wish to lobby to have such rights pared back given the financial uncertainty that accompanies a post-Brexit economy.



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