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BREXIT: IMPLICATIONS FOR EMPLOYMENT LAW, PENSIONS AND IMMIGRATION

In the aftermath of the EU referendum, and before the complex negotiations over the detail of our future relationship with the EU have begun, clients will understandably be concerned about the possible implications of Brexit across all areas of their business.

This note examines the possible impact for HR teams – looking at employment law, pensions and the very thorny topic of immigration.

EMPLOYMENT

The most important point is that very little change is likely in the short- to medium- term. It is, of course, possible that economic unrest may see clients looking again at their UK staffing levels, but any redundancies and restructurings will be conducted under the existing legal framework with which HR professionals will be familiar.

Many fundamental aspects of UK employment law are underpinned by EU legislation – particularly important in this regard being anti-discrimination provisions, working time controls and the data protection regime. The appetite for reform (realistically, deregulation) of those areas will depend on the political realities at the time, but it is hard to foresee any meaningful revision in many areas. Most significantly, anti-discrimination legislation is likely to remain unchanged, although it is conceivable that compensation might be limited.

Many of the core elements of the legislative framework do not, of course, derive from the EU – so family-friendly leave, unfair dismissal, the national minimum wage, sick pay, the Employment Tribunal system and the new gender pay gap reporting regime will remain on the statute books unless or until the government wishes to try to amend them.

Where change is a more distinct possibility, is in the areas of EU-derived employment law which have never had the widespread support of all political factions. The TUPE Regulations and the Agency Worker Regulations are probably the two most obvious of these, and it is realistic to suppose that Theresa May's government would have those provisions on any deregulation wishlist. One might also see a relaxation of the collective consultation obligations on large-scale redundancy exercises, and withdrawal from the posted workers arrangements.

The Working Time Regulations have proved one of the most intractable areas of employment since their introduction in 1998. It seems unlikely that fundamental aspects of the existing regime - the 48-hour maximum working week (with the ability to opt out), control over daily and weekly rest breaks, restrictions on night work etc. – will change in the near future, but it is more probable that some of the problematic rules on holiday entitlements and holiday pay may come under close scrutiny.

The data protection regime is, of course, currently due to be substantially reformed by the new EU General Data Protection Regulation. How much of the new Regulation to adopt and how best to balance the right to privacy, data sharing and business efficiencies will be real challenges facing the UK.

The final major area of uncertainty in employment law is the future of human rights. The EU referendum does not affect the UK's obligations under the European Convention on Human Rights, but it is hard to predict confidently that our adherence to that Convention will be maintained in the longer term.

PENSIONS

As in the employment sphere, the referendum result will produce no immediate change in pension regulation, and the future will depend very heavily on the detailed exit negotiations that await us.

The biggest short-term effect is likely to be the impact of markets on funding levels for defined benefit schemes and investment returns for defined contribution schemes.

In the longer-term, there are more fundamental issues facing UK pension schemes. They may avoid prospective EU laws requiring insurance-style funding and might not be affected by the much-anticipated new pensions directive, which was agreed earlier this month. Click here to read our analysis of the new directive. The precise implications for UK schemes will depend on whether implementation is required before exit negotiations are complete, however the DWP have stated that they do expect to implement it. UK schemes may also avoid possible requirements to equalise guaranteed minimum pensions, an uncertain and administratively complex exercise driven by the interaction of historic UK legislation and EU law.

The pensions aspects of the TUPE Regulations could be reviewed. The so-called "Beckmann" rights - early retirement rights that transfer to the purchaser of a business even when the standard retirement rights do not - have proved very controversial in the wider business community.

IMMIGRATION

Although there has been speculation that, as a result of the referendum, the UK may decide to breach its EU Treaty obligations and impose immigration controls on EEA nationals before it formally withdraws from the EU, in reality this is extremely unlikely. Consequently, EEA nationals are likely to continue to have the ability to exercise their right of free movement to come to live, work and study in the UK up to the point that the UK leaves the EU.

When the UK does leave the EU, it is likely that transitional arrangements will be put in place for EU citizens who wish to remain in the UK to be granted permission under the UK Immigration Rules. It will be interesting to see what the criteria will be for those who are currently working in the UK and what the application process will involve, as there are at least two million EEA nationals currently working in the UK.

In the meantime, there are steps that EEA nationals who are currently in the UK and concerned about their status can take to consolidate their position in the UK. For example, EEA nationals who have been studying and or working in the UK for at least the last five years may have a right of permanent residence in the UK. In order to satisfy the permanent residence requirements, the EEA national must have resided in the UK for a continuous period of five years. This means that the individual must not have been absent from the UK for more than six months in any given 12 month period. In addition, the EEA national must provide evidence that s(he) has been exercising an EU Treaty right throughout this period. For example, if the EEA national has been in employment, s(he) should provide a letter from their employer(s) confirming their period(s) of employment, their payslips and bank statements covering the relevant period and / or their P60 End of Year Certificates. If the EEA national has been studying, s(he) must provide a letter from their school / college / university confirming their dates of study, together with evidence that they possessed comprehensive sickness insurance for the relevant period(s).

Once an EEA national has held a right of permanent residence for 12 months and has obtained a document certifying permanent residence, they may be eligible to apply for British citizenship. However, it is important to note that British citizenship applications are subject to residence requirements which are stricter than those for permanent residence.

If an EEA national has not been in the UK for long enough to apply for a document certifying permanent residence, or does not currently satisfy the continuous residence requirements, they may wish to limit their overseas travel so that they do not exceed the six months in any given 12 month residence requirement.

It is, of course, difficult to predict the UK immigration law changes that will be implemented once the UK leaves the EU. There will still be a need for skilled migrants to safeguard the continuing growth of the UK economy. In addition, in order to maintain its "open for business" stance, the UK will have to continue to allow international businesses to transfer skilled staff from their overseas offices and local UK companies to hire overseas workers to fill roles which require skills which are not present in the resident labour market.

In any event, in the longer term, there are likely to be huge policy and operational changes to the UK immigration system, as it is only currently designed to cope with processing immigration applications from those coming from outside the EEA. The increase in the number of applications which it will have to deal with if all EEA nationals become subject to immigration control mean that major reforms will be necessary to avoid a backlog of applications building up resulting in significant delays.

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