

BREXIT

Employment Implications

In the Referendum on 23 June 2016, the UK voted to exit from the European Union (EU). The UK Government is now likely to trigger the formal process for leaving the EU under Article 50 of the Treaty on the European Union by notifying the European Council of the UK's intention to leave, although the timing of this is unclear.

The precise implications for employment law are currently uncertain and might ultimately be limited, but there are some areas where employers should now be taking account of the possibility of future changes.

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What Happens Now?

Now that the UK electorate has voted for Brexit, the critical question is “what happens now?”. Whilst the result of the referendum is not legally binding on the UK Government, it is politically so. Therefore it is likely that the UK will present its application to withdraw from the EU in accordance with Article 50 of the Lisbon Treaty, although the timing is currently unclear. After a period of up to two years, unless extended by mutual agreement, the UK will withdraw from the EU. However, given the importance of the relationship between the EU and the UK, the UK Government will be obliged to have some formal relationship with the EU-27. What that relationship will be, and how the UK and EU-27 arrive at it is currently unknown.

Most commentators agree that there are five distinct models for that formal relationship, each with a different outcome for UK businesses. The possible implications for employment law under each model are set out in Appendix 1 of this briefing.

During the negotiating period, EU laws will still apply to and in the UK, and there may also be no, or very limited, employment law changes after the UK leaves the EU. Therefore, for the most part, we consider that no immediate changes will need to be made to employment laws and practices, and employers may wish to wait until there is further clarity on the UK's future relationship with the EU before implementing any changes. However, there may be matters that employers are currently facing where practical steps can be taken now to minimise the potential Brexit effect.

EWCs: If you are currently setting up a Special Negotiating Body and considering establishing an European Works Council ("EWC") governed by UK law, you should consider the possibility that EWCs may no longer be mandatory in the UK, or that an EWC agreement governed by UK law may no longer be compliant with the EWC Directive when the UK leaves the EU.

Holiday Pay: It is not clear to what extent UK courts should or will follow European judgments, past and future, after the UK leaves the EU. Given that EU laws will apply during the negotiating period, and it is uncertain whether any changes will be made following the end of that period, employers facing immediate pressure to implement changes to how they calculate holiday pay may decide to continue with those changes, but reserve the right to review and/or make changes in the future to protect their position. Other employers may want to adopt a "wait and see" approach before implementing any changes.

Long-term commercial / outsourcing agreements: The long-term nature of outsourcing agreements will often mean that the exit provisions are not triggered for some time, and potentially at a time in the future when the UK has left the EU. Whilst there is no indication that the UK Government is intending to repeal and/or make changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), Brexit increases the possibility for reform. Companies entering into, or re-negotiating outsourcing agreements, may therefore wish to build provisions into the agreement to cater for any future changes.

What are the UK/EU-27 relationship options following the vote to leave the EU?

1. UK joins the EEA and EFTA (“the Norway Model”)

Of the various relationship options being considered, the Norway Model would likely be the most straightforward option from the perspective of transitioning to it. Being part of the EEA would enable the UK to maintain its access to the EU internal market, and EU businesses would have access to the UK market, as the current free movement of goods, persons, services and capital between the UK and the rest of the EU would continue to apply. The UK would have to contribute to the EU budget and adopt EU laws in return for maintaining its position in the EU internal market. There would not be a common external tariff around the UK and the EU and so the UK would need to negotiate independent FTAs (as part of EEA and/or alone) with third countries. However, as a non-EU member, the UK would have only limited rights formally to participate in EU legislative processes and trade policy development.

As part of the EEA, the UK would no longer have to participate in a

number of EU policies, such as the common agricultural and fisheries policies (CAP), the common energy and transport policies, or the common foreign and security policy. However, withdrawal from such policies would be highly disruptive for those industrial sectors, and so the UK would likely have to negotiate some form of transitional arrangements whilst alternative policies are established. For example, the CAP protects EU farmers from unlimited third country imports, and in some cases subsidises over-production. Upon withdrawal from the EU, both would cease, and so the UK will have to replace them with an equivalent system.

Free movement of persons was perceived by Eurosceptics as a key driver for Brexit, so its retention given the Brexit vote is unlikely to be tenable and indeed may be a reason why the Norway Model is rejected.

There is also a significant question about the effect of an Article 50

withdrawal on the UK’s membership of the EEA. There is some commentary to the effect that if the EU withdraws from the EU under Article 50, that process does not cause the UK to withdraw from the EEA. This is because the UK is a separate signatory of and contracting party to the EEA, and so withdrawal from the EU may not result in automatic withdrawal from the EEA. Staying in the EEA may not be easily compatible with the vote for Brexit and so the UK Government may be required, as a political matter, to withdraw from the EEA Agreement under Article 127 of that Agreement at the same time as it withdraws from the EU under Article 50 of the Lisbon Treaty. If the UK withdraws from the EEA at the same time as the EU, this makes any subsequent re-application to the EEA a rather remote possibility.



2. A Customs Union (“the Turkish Model”)

The Turkish Model would remove tariff barriers on goods and certain agricultural products, but in addition, would erect a common external tariff around the EU and the UK. If this were the chosen model, the UK could export goods to the EU without then being subject to tariffs, although customs controls at the border would apply. The UK would also not have to contribute to the EU

budget and there would be no free movement of persons/employees.

A customs union of this kind is similar to current arrangements between the EU and Turkey. The Turkish Model does not, though, cover trade in services which currently accounts for a significant proportion of UK/EU-27 trade. The UK would therefore need to negotiate access to the EU internal

market for services. Furthermore, under this model, the UK would have to comply with large parts of EU trade policy without being able to influence most aspects of EU legislation.



3. Bilateral agreement(s) between the UK and EU (“the Swiss Model”)

The Swiss Model would be similar to the current Swiss/EU bilateral accord. This would involve negotiating individual sector-by-sector agreements with the EU and free trade agreements with EFTA countries. Switzerland has around 130 separate bilateral agreements with the EU. The Swiss Model would therefore be a significant endeavour for UK negotiators. Furthermore, UK businesses would not automatically

be entitled to full access to the EU internal market, whether for goods or services. There would be free movement of persons/ employees and the UK would have to contribute to the EU budget. There would be no common external customs tariff around the UK and EU so that the UK would need to negotiate independent FTAs with third countries. However, the EU has indicated that the Swiss Model is

not working well and as such, there is a question mark over whether it would adopt a similar arrangement with the UK. Nonetheless the model remains a potential option.



4. Free Trade Agreement (“FTA”) Model

Under a Free Trade Agreement Model, the UK would simply negotiate independent FTAs with third countries plus a straightforward FTA between the UK and EU. What such an FTA would contain is uncertain at this point, and it is unclear how distinct this option would be when compared to variants of the above options.



5. A simple WTO Approach

This model entails a “complete” Brexit, whereby the UK would not enter into any new agreements with the EU or with separate EU Member States. The WTO rules would apply to the UK’s right to trade with the EU in respect of both goods and services, but there would likely need to be some negotiations over a new Schedule of Concessions as the UK has not had to have one with the EU up to this point. There would be no free movement of persons/ employees and no obligation on the UK to contribute to the EU budget and it would not have any say in the EU legislative process. UK exports

to the EU would be subject to EU import tariffs, and the UK would have the right to impose “most favoured nation” (MFN) tariffs on exports from the EU-27. Under this approach, the EU would be very unlikely to waive duties on imports from the UK, since if the EU waived such duties, given MFN, all WTO Contracting Parties would have the right to ask for similar treatment.



Summary of post-Brexit options

	UK joins the EEA and EFTA (Norwegian model)	A customs union with EU 27 (Turkish model)	Bilateral agreements between the UK and EU-27 (Swiss model)	Multiple FTAs	Operating only under the World Trade Organisation rules (WTO)
	Norway Model	Turkish Model	Swiss Model	Free Trade Agreement	WTO Approach
Preferential access to EU Market for goods	YES (except certain agriculture and fish products), but must meet rules of origin	YES full (agricultural, steel and coal products are subject to rules of origin)	YES (except for certain agricultural products) but must meet rules of origin	YES but must meet rules of origin (generally applies to industrial and processed agricultural products only)	
Access to EU market for services	YES full	NO unless negotiated	YES but limited	NO unless negotiated	NO
Common external customs tariff	NO	YES	NO	NO	NO
Contribution to EU budget	YES	NO	YES (under respective bilateral treaties)	NO	NO
Free movement of persons/employees	YES	NO	YES (except Croatia)	NO	NO
Influence over EU legislation and trade policy	NO	NO	NO	NO	NO

How does the UK leave the EU?

Now that the UK has voted in favour of Brexit, the UK has to present an application to withdraw from the EU. This will take place under the conditions of Article 50 of the Lisbon Treaty.

The object of the Article 50 procedure is stated to be that:

"...the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union."

This Article has not been used before and there a number of uncertainties about its operation.

What is clear is that the Article 50 process will have to be completed within two years, except where all parties agree to extend that period. If the withdrawal negotiations conclude sooner, then the UK can leave the EU before the end of the two year period. It is highly likely that the 2 year period will be extended. For example, Greenland voted to leave the EU (then known as the EEC) in 1979, but only actually withdrew in 1985. For the UK to achieve the same result in 2 years with a far more complex set of facts seems extremely ambitious.

It is also clear that the UK will not have the right to be present in the "EU side" of the discussions about its withdrawal.

A key unknown is whether the discussions about the UK's future relationship with the Union will take place during the Article 50 withdrawal process. Does the Article 50 process oblige the two sides to agree on the formal relationship between them as part of the withdrawal process? Or is the negotiation of that formal relationship to be discussed after the conclusion of the withdrawal? While there may not be any practical difference in terms of outcome, there would be a significant difference in terms of timing. If the UK withdraws but only then seeks to negotiate, for example, a free trade agreement with the EU, this will significantly extend the period of uncertainty. This seems unlikely.

Baker & McKenzie contacts

Baker & McKenzie has created a Brexit Working Group which is considering, together with our clients, the potential legal and commercial implications of the UK's withdrawal from the EU, based on each of the potential relationship models described above. We are keen to engage with you about the possible impact that Brexit could have on your business or sector.

To learn more about the mechanics of leaving the EU and the implications for business follow our Brexit Blog [here](#) and Brexit website [here](#).

If you would like to discuss, please get in touch with one of the employment partners or your usual Baker & McKenzie contact.



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Appendix 1 – Employment implications of leaving the EU

MODEL 1: UK JOINS THE EEA AND EFTA ("THE NORWAY MODEL")

Area of Employment Law	Brief Description of potential impact	Impact (High, Medium or Low)
Business Transfers	Should the UK leave the EU, but remain in the European Economic Area ("EEA"), it would still be bound by the Acquired Rights Directive by virtue of Article 102 of the Agreement on the European Economic Area ("EEA Treaty"). As such, it would not be able to repeal secondary implementing legislation such as the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").	Low
Maximum working time, minimum rest periods, minimum annual leave	The UK would still be bound by the Working Time Directive, and would be unable to repeal the Working Time Regulations 1998.	Low
Obligations to inform and consult on collective dismissals	The UK would still be bound by the Collective Redundancies Directive, and would be unable to repeal the Trade Union and Labour Relations (Consolidation) Act 1992.	Low
Agency workers	The UK would still be bound by the Agency Workers Directive, and would be unable to repeal the Agency Worker Regulations 2010.	Low
Information and consultation	The UK would still be bound by the Information and Consultation of Employees Directive, and would be unable to repeal the Information and Consultation of Employees Regulations 2004.	Low
European Works Council	The UK would still be bound by the European Works Council Directive, and would be unable to repeal the Trans-National Information and Consultation of Employees Regulations 1999.	Low
Family friendly rights	The UK would still be bound by the relevant Directives (such as the Parental Leave Directive), and would be unable to repeal the respective implementing legislation.	Low
Discrimination	The UK would still be bound by the relevant Directives (such as the Equal Treatment Directive and the Equal Treatment Framework Directive), and would be unable to make any significant changes to anti-discrimination legislation.	Low

MODEL 2: A CUSTOMS UNION ("THE TURKISH MODEL")

Area of Employment Law	Brief Description of potential impact	Impact (High, Medium or Low)
Business Transfers	The position will be the same as for Model 5 (WTO) below: the UK will technically be able to amend employment legislation as it wishes, however practical and political restraints may prevent it from doing so.	The position will be the same as for Model 5 (WTO) below.
Maximum working time, minimum rest periods, minimum annual leave		
Obligations to inform and consult on collective dismissals		
Agency workers		
Information and consultation		
European Works Council		
Family friendly rights		
Discrimination		

**MODEL 3: BILATERAL AGREEMENT(S) BETWEEN THE UK AND EU
("THE SWISS MODEL")**

Area of Employment Law	Brief Description of potential impact	Impact (High, Medium or Low)
Business Transfers	<p>The repeal of the European Communities Act 1972 ("ECA") would have the effect of automatically repealing those regulations made under it (including TUPE), unless they are continued in effect. However the EU, fearing that lower employment standards in the UK will allow it to undercut other EU states, is likely to require the re-adoption of certain regulations as a condition of any bilateral agreement.</p> <p>Whether the EU will specifically include the reinstatement of TUPE as a condition will be subject to negotiations between the parties. However, the UK may find itself in a stronger negotiating position than Switzerland (who largely adopted this regime) and, as such, some change is to be expected, for example the Government may consider removing certain overly restrictive provisions, such as those dealing with changes to terms and conditions.</p>	Medium
Maximum working time, minimum rest periods, minimum annual leave	<p>The repeal of the ECA would have the effect of automatically repealing the Working Time Regulations. The EU is likely to seek its reinstatement as a condition of a bilateral agreement, however the UK will attempt to negotiate otherwise. Ultimately, the outcome will depend on the strength of the UK's negotiating position.</p>	Medium
Obligations to inform and consult on collective dismissals	<p>As the Trade Union and Labour Relations (Consolidation) Act is a piece of primary legislation, it will remain in force after the repeal of the ECA. Although the UK Government may then consider repealing it (and may be in a strong position to do so), the EU will attempt to negotiate its continuation as a condition of a bilateral agreement. Ultimately, the outcome will depend on the strength of the UK's negotiating position.</p>	Medium
Agency workers	<p>The repeal of the ECA would have the effect of automatically repealing the Agency Workers Regulations 2010. The EU is likely to seek its reinstatement as a condition of a bilateral agreement, however the UK will attempt to negotiate otherwise. Ultimately, the outcome will depend on the strength of the UK's negotiating position.</p>	Medium
Information and consultation	<p>The repeal of the ECA would have the effect of automatically repealing the Information and Consultation of Employees Regulations 2004. The EU is likely to seek its reinstatement as a condition of a bilateral agreement, however the UK will attempt to negotiate otherwise.</p>	Medium

Area of Employment Law	Brief Description of potential impact	Impact (High, Medium or Low)
	Ultimately, the outcome will depend on the strength of the UK's negotiating position.	
European Works Council	The repeal of the ECA would have the effect of automatically repealing the Trans-National Information and Consultation of Employees Regulations 1999. The EU may seek its reinstatement as a condition of a bilateral agreement, however the UK will be in a strong position to negotiate otherwise, using the Swiss exemption from this requirement as its model.	High
Family friendly rights	<p>The repeal of the ECA would have the effect of automatically repealing the relevant family rights regulations. However, the EU is likely to seek its reinstatement as a condition of a bilateral agreement.</p> <p>In any case, the UK is unlikely to reduce the scope of family rights, given that the existing rights offered are more extensive than what is required under EU law. Such benefits also remain popular with employees, as well as firms, who use such benefits to attract the best candidates. Nevertheless, some change is still possible, for example introducing an exemption for so-called 'micro-employers', for whom such rights present a disproportionate burden.</p>	Low
Discrimination	<p>As the Equality Act is a piece of primary legislation, it will remain in force after the repeal of the ECA. Although the UK Government may then consider repealing it, the EU will attempt to negotiate its continuation as a condition of a bilateral agreement. In any case, the Government would face considerable social and political barriers from within the UK if it attempted to make significant changes to the anti-discrimination regime.</p> <p>Nevertheless, the Government may look to introduce some changes, such as bringing in a cap for discrimination claims and permitting positive discrimination.</p>	Medium

MODEL 4: FREE TRADE AGREEMENT ("FTA") MODEL

Area of Employment Law	Brief Description of potential impact	Impact (High, Medium or Low)
Business Transfers	<p>What form this model would take in practice is uncertain, and it is unclear how distinct this option would be from the above models.</p> <p>On the assumption that the UK negotiates independent free trade agreements ("FTAs") with individual countries as well as a separate FTA with the EU, the position will be largely similar to Model 3 (Swiss Model) above: the UK will technically be able to amend employment legislation as it wishes, however the conditions of any free trade agreement may prevent it from doing so. Much will depend on the UK's ability to negotiate favourable terms.</p>	<p>The position will be the same as for Model 3 (Swiss Model) above.</p>
Maximum working time, minimum rest periods, minimum annual leave		
Obligations to inform and consult on collective dismissals		
Agency workers		
Information and consultation		
European Works Council		
Family friendly rights		
Discrimination		

MODEL 5: A SIMPLE WTO APPROACH

Area of Law	Brief Description of potential impact	Impact (High, Medium or Low)
Business Transfers	The repeal of the ECA would have the effect of automatically repealing TUPE (unless it is continued in effect). Nevertheless, the regime that replaces TUPE is unlikely to be very different, as despite its unpopularity, UK companies are familiar with the regime and many commercial contracts are based on it. The Government may, however, look to repeal certain overly restrictive provisions, for example, those dealing with the change of terms and conditions.	Medium
Maximum working time, minimum rest periods, minimum annual leave	<p>The repeal of the ECA would have the effect of automatically repealing the Working Time Regulations (unless it is continued in effect). Nevertheless, the regime that replaces it is unlikely to be very different. For example, the Government is unlikely to tamper with well-established annual leave requirements.</p> <p>However, the Government may look to remove the 48-hour maximum working week and the associated record-keeping obligations, which are unpopular with employers. Although there is no urgent need for such changes - employers may already seek waivers from their employees in relation to these requirements - the Government may nevertheless introduce changes to provide greater flexibility. The UK would also have greater freedom to determine how to calculate statutory holiday pay. As recent European Court of Justice decisions in cases such as <i>Lock v British Gas</i> could cease to be binding following a EU exit, the UK may choose to exclude payments such as commission and / or remuneration for overtime from holiday pay calculations.</p> <p>Any changes will have to be carefully negotiated: employers' associations are likely to push for concessions, while trade unions may push back on any perceived changes to the 'Social Chapter'.</p>	Medium / High
Obligations to inform and consult on collective dismissals	The Trade Union and Labour Relations (Consolidation) Act will remain in force after the repeal of the ECA. Although the UK Government may then consider repealing it, it is likely to face considerable opposition from trade unions.	Medium
Agency workers	The repeal of the ECA would have the effect of automatically repealing the Agency Worker Regulations (unless it is continued in effect). The UK Government may take this opportunity to ease the burden of businesses taking a new approach for this unpopular regime.	High
Information and consultation	The repeal of the ECA would have the effect of automatically repealing the Information and Consultation	Medium

Area of Law	Brief Description of potential impact	Impact (High, Medium or Low)
	of Employees Regulations (unless it is continued in effect). The UK Government may take the view that a similar regime is unnecessary in the immediate future, as uptake under the current regulations has been relatively low.	
European Works Council	The repeal of the ECA would have the effect of automatically repealing the Trans-National Information and Consultation of Employees Regulations (unless it is continued in effect). Like Switzerland, European Works Councils ("EWCs") will no longer be mandatory in the UK (though, as in Switzerland, trade unions may still encourage companies to set up EWCs, and to delegate UK employee representatives to such bodies). EWCs in undertakings which have their central management in the UK may need to relocate.	High
Family friendly rights	<p>The repeal of the ECA would have the effect of automatically repealing the relevant family rights regulations (unless it is continued in effect).</p> <p>However, the UK is unlikely to reduce the scope of family rights, given that the existing rights offered are more extensive than what is required under EU law. Such benefits also remain popular with employees, as well as firms, who use such benefits to attract the best candidates. Nevertheless, some change is still possible, for example introducing an exemption for so-called 'micro-employers', for whom such rights present a disproportionate burden.</p>	Low
Discrimination	The Equality Act will remain in force after the repeal of the ECA. Although the Government may then technically consider its repeal, it would face considerable social and political barriers from within the UK. Nevertheless, the Government may look to introduce some changes, such as bringing in a cap for discrimination claims and permitting positive discrimination.	Medium

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