

UK-EU WITHDRAWAL AGREEMENT VS NO-DEAL BREXIT: WHAT ARE THE PEOPLE IMPLICATIONS?

The UK Cabinet and EU leaders have now approved a draft withdrawal agreement setting out the terms of UK withdrawal from the EU. With the agreement still to be approved by the European and UK parliaments, we look at the potential people implications if the deal is approved compared with the implications of a 'No-deal' scenario.



Summary of people implications of Withdrawal Agreement vs 'No-deal' Brexit

- Little change is expected to UK employment rights on 29 March 2019 whether or not the draft Withdrawal Agreement is ratified.
- A 'No-deal' scenario is likely to have an immediate impact on employee mobility, data protection and European Works Councils but not on employment rights more generally.
- In a 'No-deal' scenario, EU citizens in the UK should still be able to apply to remain in the UK using the Settled Worker Scheme but it is unclear whether UK nationals working in the EU will benefit from similar protection.
- If the Withdrawal Agreement is ratified there will be a transition period during which all EU employment law will continue to apply.
- Despite long term scope for future watering-down or dismantling of EU-derived worker rights, this is not the current UK government's stated intention and any future trading agreement may involve some form of continuing commitment to shared employment standards.

Issue	Withdrawal Agreement	No-Deal	Key implications for UK employers
When will the UK leave the EU?	29 March 2019 However, if the Withdrawal Agreement is approved, there will be a transition period (see below).	29 March 2019, unless an extension is agreed with the EU.	
Will EU-derived employment laws and ECJ Judgments still form part of the UK's legal system once the UK leaves the EU?	Yes. During the transition period, EU employment law will continue to apply in the UK. This includes any new laws that are passed and ECJ judgments that are handed down during the transition period. The transition period is set to end on 31 December 2020, but it can be extended once if the UK and EU agree, by 1 July 2020. The final date by which the transition period will have to end is still being agreed - the EU has suggested December 2022. After the transition period, the 'No-deal' position will apply, except as agreed under the Northern Ireland backstop or future trading agreement.	Yes. The EUWA (see 'Key Terms') will convert EU law as it stands at the moment of exit into UK law. This includes both EU laws and ECJ judgments. EUWA provides that UK courts are expected to decide cases concerning retained EU law in accordance with pre-exit ECJ decisions. However, the Supreme Court can depart from ECJ decisions if it appears right to do so.	If the Withdrawal Agreement is approved, be aware that the UK will need to implement any new Directives which take effect during the transition period (e.g. the revised Posted Workers Directive, and potentially the Directive on transparent and predictable working conditions in the EU).
Will the UK courts need to pay any attention to future decisions of the ECJ?	ECJ decisions made during the transition period will be binding on the UK, and will become part of the retained EU law to be incorporated into UK law. Cases registered with the ECJ during the transition period will continue through the ECJ hearing process until completion. For up to four years after the end of the transition period, the European Commission can also bring infringement cases against the UK for breaches of EU law which occurred before the end of the transition period. After the transition period, the 'No-deal' position is likely to apply, except as agreed under the Northern Ireland backstop or if any future trading agreement says anything further about the ongoing influence of the ECJ.	Under the EUWA, Courts and tribunals may 'have regard to' anything done on or after Brexit by the ECJ and the EU, but are not obliged to apply future EU laws and decisions.	We are likely to see ongoing debate about the situations in which the courts can and will depart from ECJ decisions once EU law ceases to apply.

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Is the UK government likely to start repealing EU-derived employment laws once the UK leaves the EU?	During the transition period, EU employment law will continue to apply. After that, the government may look to repeal or depart from some principles of EU-derived law. However, there may well be limits on what they can do in this regard, as the final deal is likely to contain provisions around non-regression of labour standards. The UK and EU have signed a Political Declaration setting out a framework for the final deal, which contains broad commitments with respect to the European Convention on Human Rights, data protection and what it terms 'a fair and level playing field in respect of employment standards'. It remains to be seen exactly what this will encompass.	The current government's message has consistently been that it is committed to protecting workers' rights after Brexit, and that it will seek opportunities to enhance (rather than reduce) those rights. In the medium-long term, the government may look to depart from some principles of EU-derived law. However, the UK may find that it has to commit to a certain level of ongoing employment protection in order to reach a trade deal with the EU.	Employers should continue to plan on the basis that there is unlikely to be any significant repeal of EU-derived employment law rights.
What will happen to EWCs?	The EWC regime will continue in its current form during the transition period but will be unable to continue in its current form after that without EU agreement. The Withdrawal Agreement does not say anything about EWCs, but this will need to be covered as part of any future trade deal.	The government intends to maintain the status quo for existing EWCs to the extent possible, and has proposed amendments to the Transnational Information and Consultation of Employees Regulations 1999 to facilitate this. The amendments are designed to allow the existing rules around enforcement, employee representative rights and protections and sharing confidential information to continue. No new requests to set up an EWC would be able to be made post-Brexit, but requests that are already underway would be allowed to complete.	If an employer's central management is based outside the EU then it could adopt a wait and see approach to determine the impact of Brexit before determining what changes need to be made (if any). If the central management is in the UK it would be sensible to take advice now to consider the scope for future proofing e.g. the desirability and feasibility of moving central management. Advice should also be sought if an employer is in the process of setting up a new EWC.

KEY TERMS

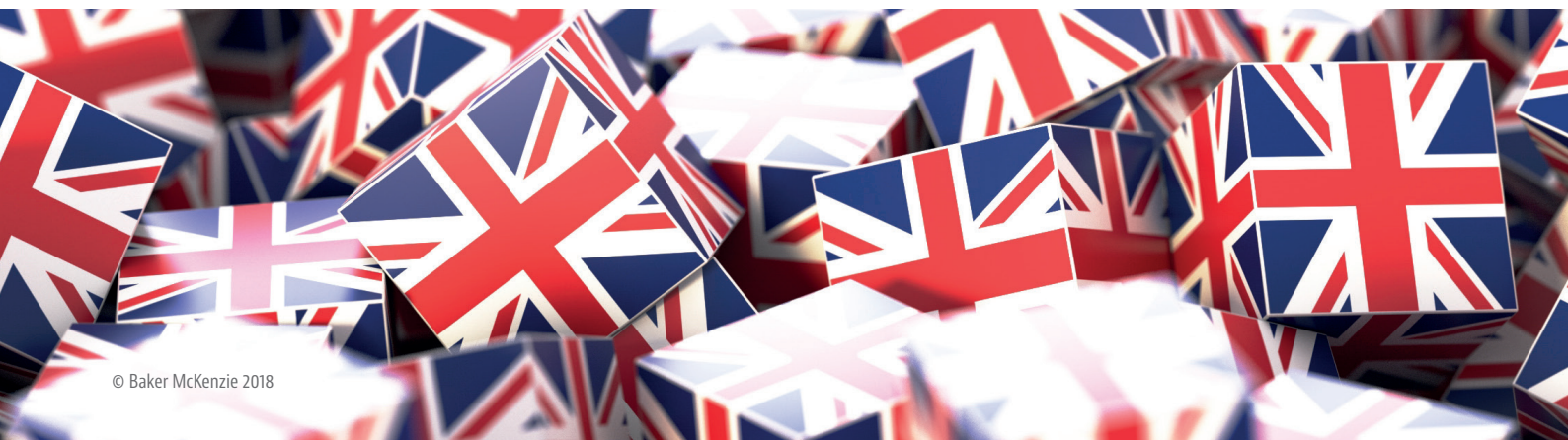
"Withdrawal Agreement" - Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018.

"EUWA" - The European Union (Withdrawal) Act 2018 (EUWA). This is the UK legislation which ends the supremacy of EU law in the UK and prepares the UK's legislative framework for withdrawal from the EU.

"EU Withdrawal Bill" - The European Union (Withdrawal Agreement) Bill. This is the legislation through which the UK plans to implement the Withdrawal Agreement into domestic law. A draft EU Withdrawal Bill has not yet been published.

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What is the Northern Ireland backstop and what effect will that have on employment law if it comes into play?	<p>The Northern Ireland backstop is the position that would come into play if the transition period ends without a deal being reached on how to maintain no hard border between Ireland and Northern Ireland. Under the backstop, there would be a single customs territory between Ireland and the UK, unless and until a different agreement is reached. Whilst the backstop is in operation, the UK would need to ensure that the level of legal protection is not reduced in respect of labour and social protection, fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level and restructuring. EU anti-discrimination laws must also continue to be observed.</p>	N/A	<p>The Northern Ireland backstop would effectively preserve EU employment law for as long as the backstop is in play. However, if a deal is not reached during the transition period, the UK is more likely to seek to extend the transition period than rely on the backstop.</p>
What will happen with EU citizens who are currently living in the UK (and vice versa)?	<p>EU citizens who are lawfully residing in the UK, or who start residing in the UK during the transition period, will be allowed to remain here on a long term basis. Once they have been living here for 5 years they will qualify for permanent residency. The same rules apply to UK citizens living in the EU.</p> <p>The right to permanent residence will only be lost if the individual leaves their country of residence for a period of 5 years or more.</p> <p>The UK government intends to implement these provisions through a new EU Settlement Scheme. EU citizens can apply for 'settled' status if they have been here for 5 years or longer. If they have been here for less than 5 years, they can apply for 'pre-settled status' to take them up to the point when they can apply for settled status. All EU nationals in the UK will have to apply for such status before the end of the transition period even if they have existing documentation.</p> <p>Note that applicants under the UK scheme won't have to provide evidence to confirm in what capacity they are in the UK (unlike the current rules).</p> <p>'Frontier workers', who are individuals working in the UK but living in another Member State or vice versa, will be able to obtain status under the Withdrawal Agreement allowing them to continue with their working and living arrangement, although there is uncertainty as to how the UK intends to deal with such individuals in practice.</p>	<p>The Government has indicated that even if the Withdrawal Agreement isn't approved, it will still honour the provisions in relation to protecting citizens' rights to the extent that it can do this on a unilateral basis. Therefore, in the event of a 'No deal' scenario, EU citizens already living in the UK should still be able to apply to remain under the EU Settlement Scheme. Unfortunately, the EU hasn't provided a similar undertaking for British nationals already living in the EU.</p>	<p>Employers should seek to reassure EU citizens working in the UK that they will be able to stay, even in a "No deal" scenario. Some employers are going further and offering sessions on a group or individual basis where EU citizens are given information about how to secure their right to remain in the UK. Similar sessions may also be offered to UK citizens working in the EU, although their position in the event of a "No deal" Brexit is less clear.</p> <p>Employers should consider taking steps to identify which key employees may be impacted and to consider offering assistance to them. This includes UK nationals working in the EU, or travelling there for business, who may have to fulfil additional immigration requirements in the event of the Withdrawal Agreement not being approved.</p>



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What ongoing protection against discrimination will EU and UK citizens have?	<p>The Withdrawal Agreement provides that, after the transition period, EU citizens working in the UK and UK citizens working in the EU must have lifelong protection from discrimination on grounds of nationality as regards employment, remuneration and other conditions of work and must have equal treatment in respect of employment conditions. These provisions are intended to be directly effective.</p> <p>The Equality Act 2010 already prohibits on discrimination on grounds of national origin. It remains to be seen if the UK government will provide additional specific protection for EU citizens as part of the proposed EU Withdrawal Bill. It also remains to be seen if EU Member States would introduce specific legislation to protect UK citizens or rely on the direct effectiveness of the Withdrawal Agreement.</p> <p>Under the Withdrawal Agreement the UK must set up an independent authority to monitor compliance with citizens' rights with power to make enquiries, receive complaints and bring legal claims before UK courts. Arrangements for this body are due to be included in the EU Withdrawal Bill.</p>	<p>In the UK, all employees are protected against discrimination on grounds of nationality under the Equality Act. EU citizens working here after Brexit would continue to benefit from this provision in the event of a 'No-deal' Brexit, but it does not protect EU citizens specifically.</p> <p>UK citizens working in the EU may not have the same protection, depending on local law. The current EU Race Equality Directive provides protection on grounds of racial and ethnic origin but not nationality.</p>	<p>Employers should be careful to ensure that they do not reject EU citizens for current vacancies on the basis of their nationality. Employers that are considering running training or awareness-raising on harassment or discrimination could consider whether to refer to the position of EU citizens. Employers may ultimately need to update diversity policies (for example to specifically mention EU citizens) but should wait until there is more clarity before doing so.</p>
What about EU citizens who want to work in the UK in future (and vice versa)?	<p>The UK and EU have signed a Political Declaration setting out a framework for the final deal, which makes it clear the UK has decided free movement will cease at the end of the transition period. The UK government has indicated that EU nationals would then be treated in the same way as non-EU nationals i.e. in order to work in the UK they will need to be sponsored by a UK employer under the Points Based System.</p> <p>It is still possible that if a wider trade deal is signed with the EU that this may include some preferential treatment for EU nationals coming to the UK or British citizens going to the EU, but failing that we will fall back upon the local immigration requirements in each jurisdiction. The Political Declaration states that the new system for dealing with mobility should be based upon the principle of 'non-discrimination between the Union's Member States and reciprocity' which suggests that the negotiators would prefer to deal with mobility issues at an EU level rather than to fall back on the local requirements in each country.</p>	<p>The UK government has recently indicated that if there is no deal, EU nationals arriving after 29 March 2018 would not qualify for settled status. This appears to represent a change from the government's original commitment to protect the rights of EU nationals arriving in the UK before 31 December 2020, even in a "No-deal" scenario.</p> <p>It seems that EU nationals arriving after 29 March 2019 will be treated in the same way as non-EU nationals i.e. in order to work in the UK they may potentially need to be sponsored by a UK employer under the Points Based System. However, the government hasn't yet set out the exact rules that will apply.</p> <p>On the flip side, the EU hasn't provided any assurances at all regarding the position of British nationals – whether existing residents or those newly arriving post-Brexit – in the event of a "No deal" scenario. The position of British nationals who want to work in the EU is therefore even less certain, although it is most unlikely that the EU will do anything to disadvantage long term residents.</p>	<p>If employers think that they may face skills shortages in the UK post-Brexit, they should make sure that their sponsor licences (normally used to sponsor non-EEA nationals) are in good order and that the business is up to date with all of its compliance obligations – in case it needs to sponsor newly arrived EU nationals under its licence after the 29 March 2019. This will need to be kept under review until the details of the UK's post-Brexit immigration system is clarified.</p>

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What about business travel?	<p>During the transition period EU citizens will be able to travel for business purposes in the normal way.</p> <p>The Political Declaration sets out a desire to agree visa free travel for short visits post-Brexit. (It also sets out a desire to agree special arrangements for research, study, training, youth exchanges and for short term business purposes in defined areas). However, whatever is finally agreed the new system will likely be more restrictive than it is at present.</p>	<p>It is not yet clear what requirements will be put in place for business travel post 29 March 2019 in the event of a "No-deal" Brexit. This applies both to those seeking to travel from the UK to the EU and vice versa.</p>	<p>Employers may want to consider undertaking an audit of the travel requirements within the business and the possible impact of any travel restrictions on British and EU national employees in the event of a "No deal" scenario.</p>
What will happen in relation to the recognition of professional qualifications?	<p>Individuals who have had their professional qualifications recognised in a different member state will be able to continue to rely on that during and after the end of the transition period.</p> <p>If someone has applied for (but not obtained) the recognition of their professional qualifications before the end of the transition period, their application will be processed domestically in accordance with the EU rules applicable when the application was made.</p>	<p>The government has published a technical notice dealing with the ability of professionals to provide services in the UK after exit day in a 'No-deal' scenario. For EEA qualified lawyers to continue to be able to carry out all of the same activities as UK qualified lawyers, they will need to be admitted into the UK legal profession before 29 March 2019. Likewise, other professionals, such as doctors, nurses, dental practitioners, veterinary surgeons, pharmacists and midwives who obtained their professional qualifications in another EEA country will need to apply to have their qualifications formally recognised in the UK prior to 29 March 2019.</p>	<p>If employers have employees whose professional qualifications have not been recognised in the UK, they should encourage those employees to seek formal recognition prior to exit day, and should consider providing them with support in relation to the process.</p> <p>Also bear in mind that new EU citizens who come to work for them after exit day (or the transition period), will be subject to the same rules and restrictions as non-EU citizens in relation to their professional qualifications.</p>
How might Brexit impact pension benefits provided under UK occupational arrangements?	<p>Provided sponsoring employers can continue to meet their ongoing funding obligations to the scheme, there will be no direct impact in terms of the pension benefits which current and former employees receive under these arrangements, in a deal or no deal scenario.</p>	(See Withdrawal Agreement)	<p>Employers with concerns about meeting funding obligations (eg because of any proposed restructuring or downsizing), should seek advice on those obligations, consider contingency plans and be ready to engage with trustees of DB schemes to discuss future financial support to the scheme.</p>
Does Brexit impact an employer's ability to employ UK workers via an EU entity (and vice versa)?	<p>No. UK law does not require there to be a local UK employing entity for UK workers and this is not impacted by Brexit. In (limited) other jurisdictions with rules on the identity of the employing entity this is not typically impacted by whether the entity is in the EU or not.</p>	(See Withdrawal Agreement)	<p>Employers should not need to change employing entities</p>



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How might Brexit impact data protection?	<p>During the transition period the General Data Protection Regulation 2018 (GDPR) will continue to apply and the EU must not treat data flows from the UK any differently from now. The Withdrawal Agreement contemplates that adequacy status will be granted to the UK before the end of the transition period. The Political Declaration confirms that the European Commission will start the adequacy assessment as soon as possible and that there should be appropriate co-operation between regulators.</p> <p>If adequacy status is not sorted out by the end of the transition period, the Withdrawal Agreement states that the UK will ensure a level of protection of personal data 'essentially equivalent' to EU law.</p>	<p>In the event of a 'No-deal', the UK will become a 'third country' for data protection purposes (a country not recognized as offering an adequate level of protection), which means that any transfer of personal data from the EU to the UK would need to be covered by appropriate contractual safeguards such as model clauses, or by the EU granting the UK adequacy status.</p> <p>The EU has stated that it will not start negotiating an adequacy decision until the UK leaves the EU on 29 March 2019. Because it will take some time to confirm whether the UK will be granted adequacy status, there will be a gap during which businesses would need to rely on contractual mechanisms. During that interim period the UK government has said that it will unilaterally accept data flows from the UK to the EU and in November 2018 the European Commission confirmed that if necessary, it will issue emergency legislation to cover data transfers from the EU to the UK on a temporary basis to avoid the need for contractual clauses.</p>	<p>Employers should wait until there is more clarity. Some employers are looking to enter into binding corporate rules but our understanding is that there is a significant backlog and that these may not be approved in time in the event of a 'No-deal' scenario.</p>
How might Brexit impact employee share schemes?	<p>During the transition period, the current employee share plans exemption from the prospectus requirements still applies. Currently this only applies to companies headquartered or listed in the EEA. This exemption is being widened in July 2019 to cover all employee share schemes regardless of where the company is headquartered or listed. This means that UK companies can rely on this exemption at the end of the transition period in relation to offers to EU employees.</p> <p>The position in relation to offers to UK employees after the end of the transition period should be reviewed nearer to the end of the transition period. It is anticipated (but not yet confirmed) that the UK will have adopted an employee share scheme exemption.</p>	<p>It is anticipated (but not yet confirmed) that an employee share scheme exemption from the prospectus requirements will be available for offers into the UK.</p> <p>However, UK companies would need to rely on an alternative exemption for offers into the EU between 29 March and 21 July 2019, as the employee share plan exemption will not be available. After that date, UK companies can rely on the widened employee share plans exemption.</p>	<p>For employee share plans (particularly share purchase plans) offered in the EU, UK companies may wish to consider whether an alternative exemption is available or alter the timing of their offer to avoid the period between 29 March and 21 July 2019.</p> <p>Companies should await further details of the UK exemption.</p>



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How might Brexit impact social security?	<p>The Withdrawal Agreement contains rules regarding social security co-ordination for UK citizens working in the EU (and vice versa). The EU social security rules will continue to apply to employees up until the end of the transition period. Under these rules, EU workers can be posted by their employer to a different Member State, but remain on their home state social security regime for a limited period. These rules will continue to apply after the end of the transition period to any employee posted before the end of the transition period.</p> <p>The position in relation to workers posted after the end of the transition period is currently unclear.</p> <p>The principle of aggregation of periods of contribution in any EU/EEA state when calculating entitlement for future allowances, such as state pension, will continue to apply during the transition period. Periods of contribution, both before and after the end of the transition period, will be taken into account for the purposes of aggregation when calculating entitlements after the transition period ends.</p>	<p>The social security position in relation to employees posted abroad at Brexit will revert to any relevant social security agreement or the default rules.</p> <p>The principle of aggregation would not automatically apply. Whether employees' social security contributions in the UK would be taken into account when calculating their entitlements to future allowances in another EU/EEA state (or vice versa) would be matter for individual negotiation between the UK and that state. This would apply to periods of contribution before and after Brexit.</p>	<p>When the EU rules cease to apply (either at the end of the transition period or on 29 March 2019), the country in which social security contributions are due may change. Employers should update their withholding and payroll processes to reflect this once we have further clarity on what will happen.</p>





Brexit

How We Can Help

Baker McKenzie's dedicated team can help you assess the impact of Brexit on your business. We have identified the key challenges that you should be considering as part of your Brexit strategy. Please contact one of our specialists for further information.

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