

Brexit, Employment Law And Global Mobility

Juliet Carp of Dorsey & Whitney (Europe) LLP takes a closer look at the employment law implications of the UK's referendum decision to leave the EU.

UK Employment Law – Business As Usual

The UK's "Brexit" vote has political weight but, as has been discussed at length, does not bind the UK Parliament or the EU. Even a firm decision by the UK to trigger the formal "Article 50" two year exit process will not immediately affect UK employment or immigration law. Employment law is currently expected to remain relatively static even after the UK leaves the EU. The outcome for immigration law is far more uncertain but, given that immigration has been a key issue in the Brexit debate, it does seem likely that after Brexit free movement between the UK and Europe will be more restricted.

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European "Local Hires"

It follows that employers in the UK are likely to be more restricted in their ability to treat Continental European nationals as "local hires". Assuming "New EU" nationals are no longer able to freely travel to the UK to look for jobs, there will be an increasing need

to offer potential recruits "expatriate terms". These might include, for example, terms limiting the period of employment, setting immigration conditions and providing for relocation and repatriation support. Employees without an expectation of permanent settlement in the UK may well expect more practical support, e.g. in relation to temporary housing, education, tax assistance etc.

Working Across Europe

Corresponding constraints are likely to apply to UK nationals seeking to move permanently to other parts of the EU.

Tempering this is, of course, the huge number of UK nationals who currently hold more than one EU passport, or who could potentially apply for another EU passport. Many would, presumably, remain free to travel and work in "New EU" countries permanently, or temporarily, even after Brexit.

Even without the large number of potentially EU-mobile Europeans that will remain in the UK after Brexit, it does seem unlikely that New EU will critically limit the ability of UK nationals to make business trips to Europe, given the flexibility already offered to non-EU nationals. Common sense tells us that the number of short-term business trips and international commuter arrangements is more likely to increase.

All this points to more work for global mobility specialists – but this is work that global mobility teams in international businesses are used to managing, and there is plenty of time to build up capacity. Smaller organisations with less in-house expertise will naturally find change more challenging to manage.

Business Relocation

It is accepted that some businesses will be under commercial pressure to relocate to other European locations. Examples might be:

- Organisations receiving significant EU funding that is conditional on physical location of certain activities in the EU
- A need for financial services activities to be located in the right place to ensure that EU "passporting" rights are retained (or can be obtained in future)
- Manufacturers and retailers buying or selling products from/to European markets (and elsewhere) who may need to respond to additional trade tariffs.

The extent of this pressure will of course depend on both the nature of the business

and the outcome, or anticipated outcome, of negotiations between the UK and EU (and other trade partners). Any decision to relocate business activities is likely to take account of all the usual commercial balancing factors such as the cost of relocation, appropriate labour supply in the new location; ongoing transport, resource, staffing, tax and other costs etc. Currently, we can only speculate on the likely extent of relocation.

If a business, or part of a business, is relocated from the UK to another European jurisdiction, individual UK-based employees are likely to either transfer to a new "host" location (most likely, given the corporate tax context, to be employed by a new employing entity registered in that host location), or to be subject to dismissal in the UK for redundancy. Moving a discrete activity from the UK to another European location will inevitably require consideration of a range of UK employment laws, including transfer of undertakings laws (known here as "TUPE"), redundancy and other dismissal laws.

In addition, laws applicable in the new host location will need to be taken into consideration, for example, host country immigration and employment laws and those that might impact on future running and closure costs if the move is not successful. Potential ongoing employer social security costs alone may be sufficient to discourage some businesses from making a move.

Timing will be important for legal compliance and to minimise relocation costs. For example, because formal collective consultation obligations may be triggered under both TUPE and redundancy legislation (and potentially equivalent host country laws), a period of consultation may be required before firm decisions related to international relocation are made. As with any complex employment law process, it is good to keep people in mind when planning. The reality, given the challenges presented by changing dual careers, languages, children's education etc., may be that many employees will choose not to move, and necessary staff may require considerable incentive to do so. Managing redundancies, incentives and "special deals" (such as transitional commuter arrangements) for key individuals in parallel is likely to not only be complex but very expensive. It remains to be seen whether many businesses will attempt large scale international relocation

and whether, in reality, some UK-based activity will simply be discontinued.

Commuters, Consultants And Other Quick Fixes

A special mention should be made of international commuter arrangements as these are often cited as a potential “quick fix”. They can, of course, be just that. But, apart from the inevitable impact of frequent travel on individuals (which should not be underestimated), these arrangements are particularly complex for an employer to set up and administer. Working part-time or temporarily in another jurisdiction does not relieve the employer of all the usual compliance that goes with international assignments, from preparing new documents to administering accommodation assistance, expenses and tax and social security compliance properly.

Another “quick fix” may be to hire local “consultants” to work temporarily on a self-employed basis where EU work is needed in the short-term, on the basis that contractor arrangements are easier to administer and terminate. They often are, but businesses should be careful not to inadvertently hire a self-employed “commercial agent” (bringing with it onerous termination penalties and other obligations), or to fail to comply with employment obligations where, in reality,

the individual is not self-employed. Penalties for failing to comply with European payroll tax and social security obligations can be particularly severe.

Beware too, the temptation to assume that having employees work remotely could help the business avoid the “people” complexity of an international relocation. Home working employees are still employees and closing down a UK operation and leaving the employees to work at home in the UK is unlikely to help a business successfully argue with tax authorities that the work is carried out somewhere else.

Brexit, Global Mobility And Employment Law

As in other areas, the Brexit vote has had little immediate impact on laws relating to global mobility. It is a fair bet, though, that global mobility specialists will be busier in years to come. Little is technically new here, but the costs of getting things wrong may be considerably higher as the number of affected people rises. And, as always with developing expertise, public authorities will become more adept at managing things too: recent focus on business visitor compliance being a good example.

Going forward, getting things “right” is also likely to require much closer collaboration between global mobility

specialists and specialist UK (and host) HR teams as businesses try to mesh together the often conflicting demands of global mobility efficiency with redundancy-related obligations.



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