

EMPLOYMENT

See EU Later: The Impact of Brexit on the Employment Law Landscape

1 February 2020

On 31 December 2020 the United Kingdom of Great Britain and Northern Ireland left the EU Single Market and Customs Union, as well as all EU policies and international agreements, ending the free movement of persons, goods, services and capital between the UK and the EU.

The future relationship between the UK and the EU will be governed by the EU-UK Withdrawal Agreement and the EU-UK Trade and Cooperation Agreement. A summary of the effect of those agreements, and their impact on Irish employers, is set out in this briefing.

THE AGREEMENTS

EU-UK Withdrawal Agreement

The Withdrawal Agreement was agreed on 17 October 2019 and entered into force on 1 February 2020. It includes the Protocol on Ireland and Northern Ireland, the substantive provisions of which apply from 1 January 2021. Amongst other

matters it protects the rights of EU citizens and UK nationals and safeguards the social and political stability on the island of Ireland after the withdrawal process.

EU-UK Trade and Co-operation Agreement

The Trade Agreement was provisionally agreed on 24 December 2020. It provides for tariff-free, quota-free trade and for sectoral cooperation in a number of important areas such as climate change, social and labour rights and a binding dispute settlement mechanism. The Agreement provisionally applies from 1 January 2021, pending approval and ratification in the European Parliament.

WORKER MOBILITY

Worker mobility has been an area of focus for Irish employers, particularly those with premises located in the UK and Ireland or who engage frontier workers (workers living in one jurisdiction but working in another).

Ireland is the only country in the EU to share both a land border and a joint history of immigration governance with the UK. Given this shared history, a bespoke set of immigration arrangements applies between the two nations. A summary of the implications of Brexit for people who were living and working in Ireland/the UK before 31 December 2020 is set out below:

Status	Irish Citizen	UK Citizen	Non Irish EU/EEA Citizen
Living and working in Ireland	No change	Common Travel Area	No change
Living and working in the UK	Common Travel Area	No change	Apply via UK Settlement Scheme before 30 June 2021
Living in Ireland, working in the UK	Common Travel Area	Common Travel Area	Apply for Frontier Worker Permit before 30 June 2021

Common Travel Area (CTA)

Irish and UK citizens can, without having to take further action, continue to freely work, travel and reside in either jurisdiction by operation of the CTA. The CTA predates the establishment of the EU, and the Withdrawal Agreement expressly recognises that Ireland and the UK may continue to make arrangements between themselves relating to the movement of persons between their territories.

On 8 May 2019, Ireland and the UK entered into a memorandum of understanding that set out the rights pertaining to Irish and UK citizens in relation to the CTA, including reciprocal rights for Irish and UK citizens to reside and work, among other related rights. The Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020 expressly provides that Irish citizens do not require leave to enter or remain in the UK, subject to certain conditions. Further legislative developments may be necessary in the near to mid-term.

UK Settlement Scheme

The UK's Settlement Scheme remains open for new registrants provided they have been living in the UK before 31 December 2020. While EU citizens can continue to work in Ireland without the need for an employment permit, if they reside in the UK and they are eligible to make an application under the UK Settlement Scheme, they should apply for permission to remain via the UK Settlement Scheme before 30 June 2021.

Applicants may be granted "Settled Status" or "Pre-Settled Status", depending on the amount of time they have been resident in the UK. Both statuses provide individuals with rights to live and work in the UK, subject in some cases to conditions. The UK has implemented a points-based immigration system that prioritises skills and talent for persons wishing to work in the UK who were not resident in the UK by 31 December 2020.

Frontier Worker Permit

The UK has provided welcome clarity for non-Irish citizens of certain states who work in the UK while living elsewhere. A new work permit has been introduced, which permits such individuals to continue to work in the UK. Any eligible person wishing to work in the UK while residing in an EU/EEA Member State (or in Switzerland) will be required to apply for a Frontier Worker Permit from 1 July 2021. A passport or national identity card can be used until 30 June 2021 – however, eligible persons should ensure that their application is submitted in sufficient time to allow for the processing of applications.

Eligible persons must satisfy the following criteria: (i) they must be citizens of an EU Member State, Switzerland, Norway, Iceland or Liechtenstein, (ii) they must be resident outside of the UK, (iii) they must have worked in the UK before 31 December 2020 and (iv) they must have worked in the UK at least once every 12 months since starting work in the UK. Persons who have not worked in the UK by 31 December 2020 will need to apply for a visa.

Short Term Business Trips and Temporary Secondments

The Trade Agreement provides that the EU and the UK shall allow (i) the entry and temporary stay of intra-corporate transferees, (ii) the entry and temporary stay of business visitors for establishment purposes without requiring a work permit and (iii) the employment of intra-corporate transferees, without the imposition of quotas. The Trade Agreement also facilitates short term business trips by requiring EU countries and the UK to allow entry of short term business visitors (visitors of up to 90 days in each six month period) without the requirement of a work permit or similar tests subject to certain conditions. Helpfully, visa free travel for short-term non-working visits is also set to continue.

SOCIAL SECURITY PROVISIONS

The Trade Agreement contains social security coordination measures aimed at protecting the entitlements of EU citizens temporarily staying in, working in or moving to the UK and of UK nationals temporarily staying in, working in or moving to the EU after 1 January 2021. A range of benefits are covered including pension entitlements, healthcare, pre-retirement benefits and maternity/paternity benefits. Generally speaking, subject to exceptions, a principle of "equal treatment" is provided to those covered by the Social Security Protocol. What this means in practice remains to be seen, as a myriad of derogations apply. The rules are without prejudice to existing CTA arrangements.

EUROPEAN WORKS COUNCILS

European Works Councils (EWCs) are established in multinational companies to enable the provision of information to and consultation of employees on the progress of the business and any significant decision at European level that may affect employment or working conditions.

The European Commission clarified that for the purpose of EWC legislation, the

UK is a "third country". Consequently the UK can no longer be the location of an organisation's representative agent in the EU and UK workers will no longer be included in employee threshold calculations for the purpose of EWC legislation. As a result, many companies with EWC arrangements in place moved the location of their EWC. Those who have not done so may find that an Irish representative agent has been appointed by operation of law. In such circumstances, employers should familiarise themselves with the Irish law governing such arrangements. The fact that many institutions have made a conscious decision to relocate their EWC to Ireland may also increase domestic queries regarding the operation of EWCs.

GOVERNING LAW AND JURISDICTION

Most contracts of employment and other employment arrangements (such as secondment arrangements) contain governing law and jurisdiction clauses. Brexit has shone a spotlight on the importance of such clauses, particularly in the context of frontier worker arrangements (i.e. where a person lives in one jurisdiction but works in another).

The position on governing law is not significantly affected by Brexit, as the applicable regulations are of universal application – the rules are generally the same regardless of whether the governing law chosen is an EU Member State or a "third country".

However, this is not the case for the rules on which courts have jurisdiction over a dispute – the pre-31 December 2020 regime has ceased to apply to the UK. There are other options available to parties, but as these are largely dependent on the applicable circumstances and may be subject to further agreement between the EU and UK, enforcement of court judgments in cross-border disputes may become less straightforward. Legal advice should be taken on the drafting of jurisdiction clauses and the enforcement of judgments involving UK workers and businesses.

DATA PROTECTION

The Trade Agreement provides for interim arrangements relating to the transmission of personal data to the UK. For the duration of a "specified period", commencing on 1 January 2021, transmission of personal data from the EU to the UK shall not be considered as a transfer to a third country under EU law, subject to certain conditions (i.e. that the UK doesn't change its data protection

legislation). The specified period will end on the earlier of an adequacy decision being made in relation to the UK by the European Commission or the expiry of 4 months after the commencement of the specified period (which can be extended to 6 months). Our Technology and Innovation Group's briefing provides useful guidance: [EU-UK Trade and Cooperation Agreement defers application of UK's status as a 'third country' under GDPR – Arthur Cox](#).

DRIVING LICENCES

Employers should ensure that employees who are required to drive as part of their duties are aware that UK driving licences are no longer recognised in Ireland where the holder lives in Ireland. Licences should be exchanged as soon as possible by following the guidelines set out by the National Driver Licence Service.

EMPLOYMENT LAW DIVERGENCE

The EU Charter of Fundamental Rights, which could previously be used to disapply UK legislation, is no longer part of UK law. Under the European Union (Withdrawal) Act 2018, EU-derived domestic legislation (e.g. Working Time legislation, Equality legislation) will generally continue to have effect in the UK, as will the principles in any EU case law decided before 31 December 2020 (subject to limited exceptions in the European Union (Withdrawal) (Amendment) Act 2020).

The Trade Agreement provides that the UK and EU must not weaken or reduce the level of labour and social levels of protection in place as at 31 December

2020, in a manner affecting trade or investment, including by failure to effectively enforce its law and standards. Parties are required to have in place and maintain systems for domestic enforcement of employment rights, including an effective system of labour inspections and the provision of effective remedies, but some commentators have raised concerns regarding the extent to which workers' rights are truly protected. It is not clear how in practice an "effect on trade or investment" will be measured and the definition of "labour and social levels of protection" would appear to leave the door open for regression in certain areas, provided that the overall levels of protection are not affected. An enforcement mechanism is in place, whereby a party shall have recourse to a panel of experts who can investigate and report on alleged failures, and "rebalancing measures" may, within certain constraints and subject to an arbitration process, be applied in the event of material impacts on trade and investment. It remains to be seen how effective this mechanism will be in resolving disputes, but for now, wholesale rolling back of employee rights appears to have been taken off the table by the UK Government due to negative media reaction.

Separate provisions also apply to working conditions transporting goods between the UK and the EU. Article 2 of the Northern Ireland Protocol imposes an additional obligation on the UK to ensure that no diminution of rights, safeguards or equality of opportunity occurs in Northern Ireland, in particular in the area of protection against discrimination. Cross border transfers is a common

issue that arises, particularly between the UK and Ireland. The position remains that separate advice should be taken, as there have always been differences between the application of the Acquired Rights Directive/TUPE, particularly in the context of service provision. Given that the jurisprudence of the European Courts drives many developments in this area, the extent to which this will be of persuasive authority after Brexit is a key point of interest.

CONCLUSION

The main impact of Brexit will be on employers in the UK, but there are some developments that Irish employers should be aware of, particularly if they employ persons on a cross-border basis, have operations in both the UK and Ireland or have shared services functions in the UK and Ireland (such as a shared HR function).

Employers should ensure that:

- they have reviewed their employee population and issued communications as necessary to ensure that their staff can continue to live and work without disruption;
- they keep an eye on developments in the area of data transfers between the UK and Ireland, particularly where a shared service HR function is in place; and
- they are compliant with any obligations that are now imposed upon them by operation of law (such as EWC obligations).

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