

Corbyn's Brexit "bonfire" of workers' rights - is it likely?

At the start of the official campaigning period for the "in-out" referendum on Britain's membership of the EU, Jeremy Corbyn announced that a vote for a Brexit would result in the Tories dumping "*rights on equal pay, working time, annual leave, for agency workers, and on maternity pay as fast as they could get away with it. It would be a bonfire of rights that Labour governments secured within the EU*".

Is that true? Can the UK simply abolish a big chunk of its employment laws?

If so, will there be general support for such a move?

For the reasons explained below, we believe that the most likely casualties from a Brexit are the Agency Workers Regulations and a move away from EU-led holiday pay calculations.

But, the first point to bear in mind is that a vote in favour of a Brexit is just the starting point. If the "out" camp were successful, the UK would need to give two years' notice of its exit and during that period, and possibly beyond, seek to negotiate the terms of its future relationship with the EU.

Looking at existing models, such as the Norwegian relationship with the EU, one possibility is that the UK would continue to abide by EU legislation, at least in areas such as employment.

Even if the UK adopted a different arrangement which did not require it to adopt EU legislation, there might be a fairly minimal impact on UK employment laws. For example, Parliament might choose to give EU Regulations continuing direct statutory effect in the UK. Adjusting the UK's legal framework to achieve an orderly transition following departure from the EU would, by itself, be a hugely complex process. As a result, in the short-term only essential changes are anticipated.

Returning to our original questions above, we consider below what existing employment measures are likely candidates for repeal following a Brexit.

The "unlikelies"?

1 Equal pay legislation is UK-originated and likely to survive a Brexit

The UK's equal pay legislation predates its EU membership and so seems likely to survive a Brexit.

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The Equal Pay Act was enacted in 1970 and came into force in 1975. Its provisions are now found in the Equality Act 2010, a primary source of UK legislation. Although UK and EU laws have been entwined since the passing of the European Communities Act 1972 (the “1972 Act”), even if Parliament repeals the 1972 Act following an “out” vote, our equal pay legislation would remain in-force and could only be abolished by a further Act of Parliament.

We believe that it is highly unlikely that Parliament would want (and the public would allow it) to repeal existing equal pay measures. This is particularly true bearing in mind recent government initiatives to stamp out the gender pay gap.

It is important to remember, however, that EU equal pay laws are enshrined in treaties as well as Directive. Currently, employees can enforce Treaty rights directly against their (private or public) employer in the ECJ. This right would be lost following a Brexit. In addition (depending on the form of a Brexit), UK courts and tribunals would no longer be bound by ECJ decisions with the result that future case law might water down the impact of past ECJ judgments and disregard future ECJ pronouncements. UK courts will be more inclined to implement the intentions of parliament than to adopt EU-compliant interpretations.

2 UK discrimination legislation is unlikely to be revised substantially

The UK’s sex, race and disability legislation predates the EU Regulations, although it has been amended to comply with EU measures. For example, the prohibition on pregnancy discrimination has been revised to abolish the requirement for a comparator. All UK anti discrimination rights are now found within the Equality Act 2010 and as such, their future retraction will require primary legislation - which we do not believe will have the support of Parliament, society or business at large.

Although Parliament would be able to amend UK discrimination legislation following a Brexit so as to deprive UK workers of certain protections imposed by EU Directives, we suggest that it would be unlikely to make retrospective changes.

3 Family-friendly and maternity rights are, by and large, enshrined in UK law

Mr Corbyn is concerned that a Brexit will impact on maternity pay and rights. It is true that UK maternity laws have joint UK and EU origins, with the latter ensuring a more favourable pay regime. These laws have been implemented partly through Acts and partly through Regulations. But, as things currently stand, UK maternity laws exceed minimum EU requirements.

It is, therefore, possible that post Brexit some changes will be introduced – most notably to the right to carry forward holiday which

has accrued during maternity leave. However, as regards maternity pay, this right is now engrained in the UK's work culture and we question whether there will be much political will (and power) to attack it, as suggested.

The right to unpaid parental leave originates from the EU and is enshrined in UK Regulations. As such, it is, in principle, susceptible to abolition. However, few major employers object to this right and, bearing in mind government's efforts to encourage women to return to work after maternity leave and to have both parents share childcare more equally, we suggest that the abolition of this right is unlikely to be a priority following a Brexit.

Finally, the protections afforded to part-time and fixed-term employees originate from the EU but are enshrined in UK Regulations. They too, are therefore, susceptible to repeal, should there be a political and social appetite to do so. In reality, abolition of these rights is likely to have limited impact, as few claims are brought under the relevant Regulations, primarily because there are other, more attractive, alternatives (e.g. indirect sex discrimination claims). As for the right to request flexible work, it has UK origins and a Brexit would not impact on it in any way.

4 Anything else? Business transfers and consultation duties are part of business culture

Employee's rights on business transfers and outsourcing (under TUPE) and for collective consultation are now enshrined in UK law and it is telling that Mr Corbyn has not suggested that they would be lost. In our opinion these rights (although originating in the EU) are now so enshrined in UK law and UK labour culture that no significant changes would be expected. It is also interesting to note that Parliament chose to introduce wider TUPE protections for employees than was strictly necessary under the EU Directive, which further supports the belief that there would be little interest in weakening or removing such protections post Brexit.

And the "possibles"

1 Agency workers' rights may be a victim of a Brexit

Mr Corbyn has predicted that a "yes" vote could result in a blitz on the rights of agency workers and, in this respect, we think he might be correct. Businesses have consistently objected to rights under the EU Temporary Workers Directive. Once the dust settles, and depending on the format of a possible Brexit, it is possible that this legislation would be repealed in the UK.

2 Working hours and holidays – some changes may be introduced

Workers' rights under the Working Time Regulations 1998 have previously been described as "*political incorrectness gone mad*".

The most controversial elements of the Working Time Regulations, from our experience, are holiday pay and (to a lesser extent) the 48-hour limit on a working week.

A Brexit may trigger a review of the Working Time Regulations and, again depending on what format this will take, possible revision or abolition. Whether this is a good thing or a bad thing is a political, not a legal, question.

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