

The Civil Society Brexit Project: Information

BREXIT AND EMPLOYMENT RIGHTS

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.civilsocietybrexit.scot

Who is this Civil Society Brexit Project: Information for?

This briefing is written for civil society organisations working in Scotland. For more information, civilsocietybrexitscot@gmail.com

What areas of rights does this Brexit Information briefing cover?

This briefing covers employment rights derived from EU law. There is some overlap with equality rights which apply to employment and these are covered in a separate briefing.

Which legal rights that particularly affect employment protection in Scotland are currently reserved to the UK Parliament and which parts are devolved to the Scottish Parliament?

Employment is a reserved area which means that employment rights are decided at Westminster. The UK Parliament is responsible for implementing EU law in domestic provisions. Relevant rights can be divided into individual rights, collective rights, and health and safety.

Individual rights include:

- Rights to equal treatment on the grounds of age; disability; gender reassignment; marriage or civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation and the right to equal pay on the ground of sex. These

rights are covered in detail in a separate briefing on Equality Rights.

- Rights for part-time workers to pro rata treatment with their full-time counterparts.
- Limits on the scope of fixed term contracts which make it more difficult for employers not to offer permanent contracts where appropriate.
- Rights relating to working time, including maximum working hours, rest periods, paid holidays and working patterns.
- Rights providing temporary agency workers with the same terms and conditions that would have apply if they were recruited directly.
- The right for employees to receive written confirmation of the terms and conditions applicable to their employment contract.
- The protection of pregnant women at work, including rights to paid maternity leave, breastfeeding, risk assessments, time off for ante natal care and the right not to be dismissed or discriminated against on the grounds of pregnancy or maternity.
- The right to unpaid parental leave following birth or adoption and the right to time off for family emergencies.

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Collective rights include:

- The right to protection against dismissal due to a transfer of undertaking and the right to information and consultation before a transfer is to take place.
- Protection for workers in the event of ‘collective redundancies’ (i.e. where 20 or more people are to be dismissed as redundant within a certain period) by requiring consultations with employee representatives
- Rights for employees to be informed and consulted about proposed changes to their workplaces in certain circumstances.

Health and safety protection at EU level provides guaranteed minimum requirements covering:

- Specific tasks (e.g. manual handling of loads)
- Specific hazards at work (e.g. exposure to dangerous substances or physical agents)
- Specific workplaces and sectors (e.g. temporary work sites, extractive industries, fishing vessels)
- Specific groups of workers (e.g. pregnant women, young workers, workers with a fixed duration employment contract)
- Certain work-related aspects (e.g. organisation of working time)

What do we know will happen to these legal rights when the UK leaves the EU?

According to the provisions of the EU (Withdrawal) Act 2018, these rights will be unaffected at the point when the UK leaves the EU. This is because they are already implemented by UK legislation and so fall into the category of ‘EU derived domestic law’ which section 2 of the Act states will continue to have effect ‘on and after exit day’. Such legislation can be amended by virtue of section 8 of the Act. Any amendments would have to go through the enhanced scrutiny procedure contained in Schedule 8 of the Act. This means that amendments would have to be actively approved by both Houses of Parliament.

What do we not know yet?

- We do not yet know what exactly will happen during any possible future transition period between the official date of Brexit and the entry into force of the new relationship between the UK and the EU. But it is likely that the UK will need to continue to conform with all EU rights during that period. For example, the EU recently adopted the Transparent and Predictable Working Conditions Directive, which is aimed at strengthening the rights of casual workers and improving their working conditions. The Directive needs to be implemented by EU Member States into their domestic law within the next three years and so would apply to the UK should Brexit (and any subsequent transition period) be delayed.
- We do not yet know what developments in rights terms will happen at the Scottish level. The First Minister’s Advisory Group on Human Rights published a report “Recommendations for a new human rights framework to improve people’s lives” on 10 December 2018 which may lead to policy changes and/or legislation in the field of economic, social, cultural and environmental rights in Scotland. However, in the employment context this would require greater powers to be given to the Scottish Parliament in this area.
- We do not yet know how far the UK Government is intent on using its Henry VIII powers under the EU (Withdrawal) Act 2018 to amend or repeal ‘retained EU law’ protecting employment rights.
- We do not know how the rights outlined above will be developed by the EU Court of Justice in the future, i.e. the rights protections there might have been if the UK had remained in the EU.
- We do not know how new EU legislation and policy will affect employment rights in the future

What are the main concerns around employment protection after Brexit?

- A key concern is regression compared with current protections. Although the rights provided by EU-derived domestic law will be preserved at the point

- of Brexit, they are not guaranteed beyond that and so there is a danger that the rights and protections will be rolled back over time which could have some serious consequences for employment rights.
- The Westminster Government will have the power to amend or repeal domestic legislation following exit day, including legislation which implements EU-derived employment rights. This is a matter of specific concern because many of the relevant employment rights outlined above are currently provided for in Regulations rather than in Acts of Parliament leaving them particularly vulnerable to repeal or amendment without full parliamentary scrutiny. This includes the working time rights and those applicable to part-time, temporary and agency workers and transfers of undertakings as well as some maternity and parental rights and health and safety provisions.
 - A parallel concern is that the UK might not follow rights developments at the EU level: this relates to both legislative developments and associated policy as well as developments in the case law of the CJEU which has been of great importance in interpreting and extending employment rights, particularly those relating to discrimination and equality (see the separate briefing on Equality Rights).
 - There is currently a proposal at EU level for the establishment of a European Pillar of Social Rights. If introduced, this initiative will focus on measures to enhance equal opportunities and access to the labour market, fair working conditions, and adequate and sustainable social protection. The UK will not be part of this initiative and could be left behind in the development of social law and policy.
 - The influence of EU legislation on employment law in the Member States is likely to continue post-Brexit. For example, there is a new proposal on work-family balance at EU level. If it makes it into EU law, the UK will be excluded. The proposal includes the introduction of five days of paid carers' leave, stronger protections from dismissal for new mothers and improved parental leave rights. This is accompanied by relevant policy proposals regarding improvements to the quality, affordability and accessibility of childcare and

long-term care; raising awareness of workers' rights and improving access to justice.

- In the context of employment there is an additional concern about the UK's future trade deals outside of the EU. Increased competition from countries with lower rights protections could have a direct effect on the UK's regulation of the labour market which could have a detrimental impact on employment rights.

What about in Scotland – are there particular concerns or opportunities affecting these rights because of devolution?

Employment is a reserved area and so the Scottish Parliament cannot take any direct action to protect the rights outlined under the current devolution settlement.

What happens now in the Brexit process?

- On 14 November 2018 the UK and the EU agreed a withdrawal agreement, which remains, however, unratified. The agreement would have seen the UK leave the EU as planned on 29 March 2019. The UK Government has so far been unable to ratify the agreement and it is not clear whether it will enter into force at all. The withdrawal agreement is accompanied by a political declaration
- For the UK Government to be allowed to ratify the withdrawal agreement, the European Union (Withdrawal) Act 2018 requires that the withdrawal agreement (plus the political declaration) is approved by the House of Commons and that the legislation implementing it – the European Union (Withdrawal Agreement) Bill – is passed. So far, the House of Commons has rejected the withdrawal agreement on three different occasions.
- The EU also has not yet ratified the withdrawal agreement. At EU level, ratification requires the approval of the European Parliament and a qualified majority in the Council.
- For this reason, the UK was unable to leave the EU as planned on 29 March 2019. The Brexit

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negotiating period was therefore extended until 31 October 2019. If the UK and the EU manage to ratify the withdrawal agreement before then, the UK might leave at an earlier date. If, however, the UK fails to hold European Parliament elections on 23 May, the UK will leave on 1 June without a deal.

- There remain three options for the UK at this stage:
 - 1) leave with a deal, which requires ratification of the withdrawal agreement;
 - 2) leave without a deal, which would happen automatically on 31 October 2019;
 - 3) revoke the Article 50 notification, which – as the European Court of Justice has confirmed – the UK can do unilaterally at any point in time before Brexit.
- Once the withdrawal agreement has been ratified, the EU and the UK will start negotiating their future relationship. The political declaration negotiated alongside the withdrawal agreement contains a rough sketch. It currently envisages an association agreement between the EU and the UK. This would mean that there would be a free trade agreement between the EU and the UK. The UK would agree to comply with EU rules in certain areas of trade. In addition, there would be a security partnership that would allow for cooperation in both internal and external security. However, the political declaration is not binding and was kept deliberately vague so that another future relationship – be it closer or looser – is still a possible outcome.

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WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at civilsocietybrexitscot@gmail.com

There is also information available online at www.civilsocietybrexit.scot