

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.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: Information for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@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 available at www.hrcscotland.org/brexit.

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 applied 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.

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- The right to unpaid parental leave following birth or adoption and the right to time off for family emergencies.

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) Bill currently making its way through the UK Parliament, 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 clause 1(2) of the Bill states will continue to have effect ‘on and after exit day’.

What do we not *know* yet?

- We do not yet know what exactly will happen during a 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.
- We do not yet know whether the EU (Withdrawal) Bill as it stands at the moment will pass the House of Lords unamended. We also do not yet know whether the devolved legislatures – in particular the Scottish Parliament – will give it their legislative consent; and if they do, we do not know whether this consent will be given under the condition that the Scottish Parliament’s powers are increased, possibly even with regard to rights.
- We do not yet know what developments in rights terms will happen at the Scottish level. The First Minister recently appointed an advisory group on human rights leadership, which is due to report back to her by the end of 2018. It is possible that that group’s work will lead to policy changes and/or legislation in Scotland in the employment context but that will require greater powers to be given to the Scottish Parliament in this area.
- We do not yet know whether the Scottish Continuity Bill – a Scottish version of the EU (Withdrawal) Bill will enter into force. If it does, it will retain the Charter as far as some Scots law connected with EU law is concerned.
- We do not yet know how far the UK Government is intent on using its Henry VIII powers under the EU (Withdrawal) Bill to amend or repeal ‘retained EU law’ protecting employment rights.
- We also do not yet know how the courts will interpret the constraints regarding the justiciability of EU fundamental rights contained in the EU (Withdrawal) Bill.
- 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 Court of Justice of the EU 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 15 December 2017, the European Council agreed that the Brexit negotiations should move to phase 2. This means that key issues have been settled in principle: in particular, most issues on citizens' rights and the financial settlement.
- Phase 2 will first be dedicated to agreeing a transitional period where the UK will leave the EU but remain bound by EU law and entitled to (most) rights under EU law. Second, phase 2 will probably result in a basic agreement on what the future relations between the EU and the UK will be.
- In terms of rights it will remain to be seen whether the EU will ask the UK to remain committed to protecting current standards, in particular in the field of employment rights, and to remain signed up to the ECHR.

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- Internally, the EU (Withdrawal) Bill has received its third reading in the House of Commons and is currently being debated in the House of Lords. If there are no amendments voted through in the House of Lords, it can probably receive its Royal Assent before the summer. If there are, this may be delayed.

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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 hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit