Double Impact of BREXIT and COVID-19 on UK Employment Law

10 Key Questions

QED Training Briefing- Winter 2021

Information Pack

and

UK Employment Law

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Introduction

The double impact of BREXIT and COVID-19 19 has generated a wide range of questions about employment rights and responsibilities. This briefing identifies 10 recurring issues. It presents what we hope is an accurate account of employment law prevailing at the time of writing -6th January 2021. The UK is in a state of flux and therefore things can and do change very quickly.

This briefing will therefore be updated as swiftly as possible to reflect these changes and any other unexpected legal as well as political developments. However, in case of doubt get in touch with us at: -

qedworks@hotmail.co.uk

In the meantime, this briefing profile and attempts to answer the following 10 key questions: -

1. Can an employer require employees to have a coronavirus (COVID-19) vaccination?
2. How should employers carry out right to work in the UK checks for European nationals following Brexit?
3. Is an electronic signature on a settlement agreement valid?
4. What should an employer do if an employee's application for settled status is not successful?
5. What is IR35?
6. If an employee is advised to self-isolate to avoid the risk of spreading coronavirus, are they entitled to sick pay?
7. When does overtime have to be included in holiday pay?
8. Can an employee take annual leave while on furlough?
9. What impact will Brexit have on employment law?
10. When does an employer need a sponsor licence?

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1. Can an employer require employees to have a coronavirus (COVID-19) vaccination?

Employers have a duty to ensure, as far as reasonably practicable, the health and safety at work of their employees. Asking employees to agree to a vaccination against coronavirus (COVID-19) is likely to be a reasonable step to take to reduce the risk to employees' health.

Vaccinations are not currently available for employers to buy privately to provide for their employees, but employers can encourage employees to take up the vaccine when they are eligible under the national programme.

However, if employees do not agree to a vaccine, employers are limited in what they can do, beyond encouraging take up. An employer could consider informing employees that refusing a vaccination could lead to disciplinary action.

There is a risk that such a policy could cause employee relations problems, as employees may feel strongly that this should be a personal decision. It would also raise several legal issues, with a particular risk of complaints relating to discrimination on grounds of religion or belief, disability, and age; constructive dismissal; and human rights issues. Employers should be aware that employees may have a medical reason for not getting the vaccination.

It is currently unlikely that an employer would be able to use health and safety grounds to justify taking disciplinary action against an employee for refusing a vaccine, particularly in the early stages of the vaccination programme.

This may change over time, when more is known about the effects of the vaccination programme, but there is still likely to be an extremely high threshold to meet to justify such a policy. It may be possible in exceptionally high-risk circumstances, where alternative measures have been taken into consideration and where the policy accounts for the circumstances of individual employees.

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2. How should employers carry out right to work in the UK checks for European nationals following Brexit?

Employers must continue to carry out right to work checks for all workers before employing them, as was the case prior to Brexit. Employers can continue to use European Economic Area (EEA) and Swiss passports and national identity cards as evidence of an individual's right to work in the UK until 30 June 2021.

Employers can also use the online checking service to confirm that a candidate has settled or pre-settled status and therefore has the right to work in the UK. However, up to 30 June 2021, candidates do not have to agree to share their status using the online checking service. They can provide their passport or national identity card as an alternative. Government guidance suggests that, up to 30 June 2021, an employer that insists on seeing evidence of settled or pre-settled status risks a complaint of race discrimination.

Following the UK's departure from the EU on 31 January 2020, a transition period was in place until 31 December 2020. EEA and Swiss nationals who were in the UK before the end of the transition period have until 30 June 2021 to apply for either settled or pre-settled status, which will give them the right to work in the UK.

There is no requirement for employers to carry out retrospective right to work checks for existing EEA and Swiss national employees to confirm that they have settled or pre-settled status. In other words, if an employer has conducted a compliant right to work check for an EEA or Swiss national before 1 January 2021, it does not need to repeat this.

EEA and Swiss nationals entering the UK from 1 January 2021 will not be able to apply for settled or pre-settled status. Because free movement between the UK and the EEA ended on 31 December 2020, they will require a visa to be able to work in the UK under the new immigration system. Therefore, to confirm the right to work of EEA and Swiss nationals arriving in the UK on or after 1 January 2021, employers will need to see evidence of their visa alongside their passport or national identity card.

EEA and Swiss nationals are not required to share their settled or pre-settled status prior to 30 June 2021. This may present an issue for employers with new starters between 1 January and 30 June 2021, as they may not know if the employee was already in the UK before 1 January 2021, and therefore whether they require a visa. Government guidance on right to work checks does not address this specific issue.

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3. Is an electronic signature on a settlement agreement valid?

Yes, the parties to a settlement agreement can sign it using an electronic signature (also known as a digital signature or e-signature). The purpose of signatures on a settlement agreement is to provide evidence that the parties agree to the terms and intend the agreement to be binding. Section 7 of the Electronic Communications Act 2000 provides that electronic signatures are admissible as evidence in any legal proceedings where the authenticity of the document is in question.

The Act gives a wide definition of electronic signature. It can be anything in electronic form that is incorporated into, or otherwise logically associated with, any electronic communication and that purports to be used by the individual creating it to sign.

To provide stronger evidence that the electronic signature is authentic, the parties could use a secure online electronic signature platform. Such platforms can provide evidence that the signature is linked to the person's email and IP address, and evidence of the time the signature was made.

4. What should an employer do if an employee's application for settled status is not successful?

Employees who are European Economic Area (EEA) or Swiss nationals, who are in the UK prior to the end of the Brexit transition period on 31 December 2020, can apply for settled status, which will give them the right to remain indefinitely in the UK. An applicant who has not been resident in the UK for five years will be granted pre-settled status, which can be converted to settled status after five years' residence. The deadline for applications for settled or pre-settled status is 30 June 2021.

Settled or pre-settled status can be refused on grounds of eligibility, for example if the individual is not an EEA national (or a qualifying family member) or is not resident in the UK. It can also be refused on grounds of suitability, for example if the individual has been convicted of a particularly serious crime or is deemed to be a threat to public security.

If an application is refused the applicant can apply again at any time up to 30 June 2021, submitting new information or evidence. In some circumstances, the applicant can apply for an administrative review of the decision.

An employer could consider providing an employee with access to legal assistance for a further application or an administrative review. Ultimately, if the employee does not obtain settled or pre-settled status, they will not have the right to work in the UK and will need to apply for immigration permission under an alternative route.

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5. What is IR35?

IR35 relates to the situation where a worker (e.g., a contractor, freelancer, or consultant) supplies their services to an organisation via an intermediary (e.g., the individual's own personal service company). IR35 is also known as the off payroll working rules and the intermediary's legislation. "IR35" refers to the number of the original Inland Revenue (now HM Revenue and Customs) press statement about the rules. The IR35 rules are aimed at preventing tax avoidance where a worker is engaged through an intermediary. IR35 applies if the worker would have had employee status had they been engaged directly by the end client.

Reformed IR35 rules have applied to the public sector since April 2017 and will be extended to the private sector from 6 April 2021. The extension to the private sector was delayed from April 2020 due to the coronavirus (COVID-19) crisis. Under the reformed rules it is the client engaging the worker that is responsible for assessing their employment status to determine whether IR35 applies. The reformed rules provide that, if IR35 does apply, the party that pays the worker's fees (this could be the engaging client or an agency) is deemed to be their employer for tax and national insurance purposes. The fee-payer must pay national insurance contributions (NICs) and the apprenticeship levy (if applicable) in relation to the worker and must deduct income tax and employee NICs from their fee. Under the IR35 rules in place in the private sector until 6 April 2021, the intermediary is responsible for deciding whether IR35 applies and for operating PAYE in relation to the worker if it does.

6. If an employee is advised to self-isolate to avoid the risk of spreading coronavirus, are they entitled to sick pay?

Current government guidance is that anyone who has a high temperature, a new continuous cough and/or a loss of, or change in, their normal sense of taste or smell should stay at home (i.e., self-isolate) for at least 10 days from the onset of symptoms. If they live with others, everyone in the household should stay at home for 10 days, even if they have no symptoms. Someone without symptoms who has tested positive for coronavirus (COVID-19), must self-isolate for at least 10 days from the date of the test. People may also be instructed by the NHS test and trace service to self-isolate if they have had close recent contact with someone who has coronavirus (COVID-19).

Employees who are staying at home in accordance with government advice or advice from the NHS test and trace service, are entitled to statutory sick pay (SSP), even if they are not ill. Employees who are unable to work because they are "shielding" due to being at extremely high risk from coronavirus because of certain underlying health conditions are also entitled to SSP.

The Government has introduced temporary legislation with the effect that individuals who are unable to work because they are self-isolating, or shielding are deemed to be incapable of work for the purposes of SSP. People who are required to self-isolate after travelling abroad are not entitled to SSP, unless they are ill.

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7. When does overtime have to be included in holiday pay?

Holiday pay must be calculated based on the employee's normal pay. Where an employee normally works overtime, this should be included in the calculation of their holiday pay.

Overtime that the employer is contractually obliged to offer and that employees are required to work must always be included in holiday pay.

In *Bear Scotland Ltd and others v Fulton and others; Hertel (UK) Ltd v Woods and others; Amec Group Ltd v Law and others [2015] IRLR 15 EAT*, the Employment Appeal Tribunal (EAT) held that regular overtime that is not guaranteed, but that employees are required to work when it is offered, must also be included.

There is no definition setting out how regularly overtime must be worked for it to be included, but the general principle is that pay that is "normally received" should be included in holiday pay. If an employee has worked a settled pattern of overtime over a period, payment for that overtime is pay that they normally receive and must therefore be included in holiday pay.

Where there is no settled pattern of overtime, the employer should calculate average pay over a reference period leading up to the period of annual leave, although the courts have not addressed what a suitable reference period would be.

The Court of Appeal addressed the question of whether overtime that is voluntary must be included in the calculation of holiday pay in *East of England Ambulance Service NHS Trust v Flowers and others [2019] IRLR 798 CA*. It held that voluntary overtime must be included if it is part of a pattern of work that is sufficiently regular and settled for payments made in respect of it to amount to normal remuneration. This will be for tribunals to decide on the facts of each case.

The right to be paid for non-guaranteed overtime in holiday pay derives from case law of the European Court of Justice, and so applies only to holiday pay for the four weeks' minimum annual leave under EU law, not to the additional 1.6 weeks provided for by the Working Time Regulations 1998 (SI 1998/1833).

Employers should decide their policy on how to treat the additional 1.6 weeks' statutory minimum leave and any additional contractual entitlement but may decide to include pay for overtime in all holiday pay to avoid complicating the administration of payments.

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8. Can an employee take annual leave while on furlough?

Government guidance on Holiday entitlement and pay during coronavirus (COVID-19) confirms that furloughed employees can take annual leave, without the furlough period being disrupted.

Employers must pay furloughed employees their normal rate of pay for a period of holiday, rather than any reduced amount they receive during the furlough. They must top up the amount they can claim under the Coronavirus Job Retention Scheme.

From 1 July 2020, furloughed employees can work on a flexible, part-time basis for their employer (known as flexible furlough). The employer can claim under the Coronavirus Job Retention Scheme for the hours that the employee does not work and is recorded as being on furlough.

HM Revenue and Customs guidance on the scheme states that, where an employee is flexibly furloughed, "any hours taken as holiday during the claim period should be counted as furloughed hours rather than working hours".

It goes on to say that employers should not place an employee on furlough simply because they are on holiday for that period. Therefore, an employer's decision about whether to furlough an employee should not be influenced by any annual leave, but if an employee takes annual leave during a period covered by a flexible furlough arrangement, the employer should record any hours they were due to work as furlough. It can claim for these hours under the scheme, ensuring that it pays the employee their normal rate of pay for the annual leave.

Many employers that have furloughed employees will not be in a financial position to pay them in full during annual leave. These employers can refuse any requests for annual leave during the furlough period by giving the required notice. Employees will be able to carry over unused leave in some circumstances.

Where an employer can afford to top up the pay of a furloughed employee, it may consider requiring them to take annual leave during the period of furlough.

Whether or not this can be done in compliance with the Working Time Regulations 1998 (SI 1998/1833) remains uncertain.

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9. What impact will Brexit have on employment law?

Although much UK employment law is derived from EU law, the UK's withdrawal from the EU is unlikely to have an immediate impact on employment law. Following the UK's exit from the EU on 31 January 2020, EU law continued to apply to the UK during the transition period, which ended on 31 December 2020. At the end of the transition period, existing EU law was converted into domestic UK law. Most EU Directives are already implemented in the UK by regulations or Acts of Parliament; for example, the EU equality Directives are implemented by the Equality Act 2010. It will be for Parliament to decide whether to retain, amend or repeal domestic legislation.

Commentators have identified the harmonisation of contracts after a TUPE transfer; the calculation of holiday pay; agency workers' rights; and the introduction of a cap on compensation in discrimination claims as examples of areas, currently governed by EU law, where changes could be made in the future by a Government looking to roll back employment regulation.

Many areas of domestic law that are derived from EU law have been heavily influenced by decisions of the European Court of Justice (ECJ), for example working time, TUPE and discrimination law. Under the European Union (Withdrawal) Act 2018, UK courts will not be bound by decisions of the ECJ made after the end of the transition period on 31 December 2020. The UK Supreme Court will be bound by ECJ decisions made before that date to the same extent as it is bound by its own case law. The Act also gives the Government the power to make regulations allowing lower courts and tribunals to deviate from existing EU case law. There is therefore some uncertainty over the status of ECJ decisions made before the end of the transition period.

10. When does an employer need a sponsor licence?

An employer needs a sponsor licence if it intends to employ a foreign national who requires a UK visa, under certain immigration routes. From 1 January 2021, a new immigration system applies equally to European Economic Area (EEA) nationals (except Irish nationals) and other non-UK nationals. Prior to 1 January 2021, employers needed a sponsor licence to employ foreign nationals from countries outside the EEA under tier 2, or the skilled worker route, and certain other routes of the immigration system. Employers that do not currently have a sponsor licence will need to apply for one if they wish to recruit any non-UK nationals, including those from inside the EEA, under the skilled worker route (and certain other routes) from 1 January 2021.

An employer will not need a sponsor licence to employ an EEA national who has settled or pre-settled status, or to employ an Irish national. When an employer has a sponsor licence it can issue certificates of sponsorship to individual foreign nationals. The individual then uses the certificate to apply for a visa. Employers can sponsor an employee only if the role meets the minimum requirements relating to skills and salary.

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