

BREXIT BRIEFING

Beyond Brexit – employment rights

Implications of the UK's decision to leave the European Union for fair and safe working rights



Employment rights

Key points

- The European Union (Withdrawal) Act gained Royal Assent in June 2017. The Act will repeal the European Communities Act 1972 and incorporate current EU laws into UK law. Once the UK has left the EU, Parliament will decide which areas of EU-derived legislation should remain, undergo amendments, or should be repealed. This could include legislation on employment rights.
- At our **annual representative meeting in June 2018**, doctors made clear their worries that Brexit poses a major threat to the NHS and the nation's health. Given what is now known about the potential impact of Brexit on the NHS and the dangers a 'no deal' Brexit presents, the BMA voted to change our policy to oppose Brexit, and to support the public having a final say on the Brexit deal.
- The UK's withdrawal from the EU will have the potential to significantly affect working rights for doctors because:
 - The EWTD (European Working Time Directive) and the measures which it has transposed into the UK WTR (Working Time Regulations) – namely the limit of a 48-hour average working week, rest breaks and statutory paid leave – form key health and safety legislation. Alongside CJ (European Court of Justice) judgements (the SiMAP and Jaeger rulings which enshrined the principle of time spent on-call at the workplace being regarded as work, and other rulings such as those ensuring the correct calculation of holiday pay), this has reduced fatigue amongst doctors and improved the safety of both patients and doctors in the UK. The WTR could be repealed following Brexit.
 - EU law underpins the Equality Act 2010, including rights to equal treatment for part-time workers, health and safety protections for pregnant workers and rights to maternity leave, emergency time off for dependents, and parental leave. The government has committed to maintaining equality rights and transposing other rights into UK law upon withdrawal from the EU. However, they will become more vulnerable to amendment, narrower interpretation, and weaker enforcement following Brexit. This includes regulations protecting the employment status of fixed term and agency workers who may be more likely to be women or those with caring responsibilities.
 - UK workers have, up to now, been able to rely directly on the right to equal pay between men and women in Article 157 of the EU Treaty. Successful cases decided by the Court of Justice of the European Union (CJEU) under Article 157 have led to changes in UK equal pay law (e.g. including the right to equal pay for work of equal value, occupational pensions within the definition of pay, and increasing the back pay compensation for equal pay claims). Further progression along these lines is less likely to be enacted or enforced following Brexit.

– To minimise these potential effects, the UK should:

- Retain and protect the WTR after the UK's departure from the EU. In an NHS under huge pressure with unprecedented demand, doctors need strong legal recourse against being dangerously overworked more than ever.
- Ensure adequate funding and staffing levels in the NHS, in line with expert recommendations, rather than remove safety laws so that existing staff can be dangerously overworked (read the BMA's briefing on the impact of Brexit on workforce and future immigration policy [here](#)).
- Retain the safety requirements in the English 2016 TCS (terms and conditions of service) for junior doctors in order to avoid tiredness-related accidents. If any changes are to be made to this contract, it must be with the agreement of junior doctors as represented in national negotiations by the BMA.
- Junior doctors should have protected training time within safe working limits and with appropriate supervision, to avoid accidents related to a lack of experience.
- Retain existing equalities protections from EU law, adopt proposals that would provide guarantees or recognition of equality as a fundamental right as exists in EU law, and be alert to any potential erosion of equality, pregnancy/maternity, part-time worker and family leave rights in the UK following Brexit (including the effectiveness of remedies and enforcement).
- Fully incorporate the right to equal pay, in Article 157 of the EU Treaty, into UK law.
- Hold a vote so that the public can have the final say on the Brexit deal.

– For the UK, this approach would:

- Strengthen the current arrangements in the WTR, which allow doctors to opt out of the rules up to a maximum average 56-hour week if they wish, and already enables sufficient flexibility.
- Afford greater protection to patient care, protecting against the risks of fatigue in doctors and the risks of a dangerously overstretched, underfunded healthcare system.
- Ensure that current standards of equality in doctors' employment are upheld, rather than weakened.
- Ensure that the attractiveness of the UK as a place to work isn't reduced when compared with the rest of the EU, given the widespread and ongoing recruitment and retention problems.

Background

The UK's membership of the EU has had a significant impact on the development of employment rights for doctors. Legislation such as the EWT, the right to equal pay between men and women in Article 157 of the EU Treaty, and other EU laws around equality have strengthened safety and equality provisions for doctors in the UK. This improves patient care, as well as working towards creating a better work environment which is more likely to retain doctors – the effect of which is incredibly important given the current pressures on the NHS.

The probability of the UK's continuing compliance with such EU legislation following Brexit is, as yet, unknown. The BMA is keenly aware of the potential risks to doctors if such legislation is repealed, and opposes Brexit for a number of reasons including the threat posed to the NHS workforce by allowing key employment protections to be repealed.

This briefing provides an overview of what the BMA considers to be the main issues in relation to employment rights and Brexit. It incorporates the BMA's aforementioned recommendations in exploring how the UK can maintain and improve beneficial employment rights from EU legislation following Brexit, as well as flagging the potential implications of repealing such legislation.

Working time

Support for the EWT (European Working Time Directive) and the measures which it has transposed into the UK WTR (Working Time Regulations) – namely the limit of a 48-hour average working week, rest breaks and statutory paid leave – has basis in existing BMA policy. These regulations form key health and safety legislation, which alongside CJ (European Court of Justice) judgements (the SiMAP and Jaeger rulings which enshrined the principle of time spent on-call at the workplace being regarded as work, and other rulings such as those ensuring the correct calculation of holiday pay) has reduced fatigue amongst doctors and improved the safety of both patients and doctors in the UK.

Under the current provisions of the EU (Withdrawal) Act, no changes are expected to be made to any European directives or regulations transferred into UK law until after the UK has left the EU. This means that the earliest potential challenge to the WTR is unlikely to take place until April 2019. We believe the UK should not diverge from the EWT, and that relevant CJ rulings should be formalised in UK law to ensure no return to unpaid resident on-call working practices. These regulations are critical in protecting doctors from the dangers of overwork and patients from the impact of overtired doctors.

Following concerning reports in December 2017 of support within government for the removal of the WTR from UK law, the BMA wrote^a to the Prime Minister along with twelve leading health organisations, asking her to not remove the WTR but to properly invest in and resource the medical workforce instead.

The new 2016 TCS for junior doctors in England has an unprecedented package of safety limits and rest requirements, secured by BMA negotiators following engagement with wider membership who clearly indicated safety as their top priority. The requirements of the WTR, including a maximum 48-hour average week and minimum 11 hours' rest between shifts, are written into the TCS as contractually binding terms, rather than having a contract compliant with rules set out separately in statute.

^a <https://www.bma.org.uk/collective-voice/influence/key-negotiations/training-and-workforce/working-time-regulations>

Doctors in training

It is the BMA's position that high quality training can be delivered without needing to break the 48-hour average weekly limit, provided rotas are planned properly. The BMA secured agreement from NHS Employers that effective training and safe service provision could be delivered within these safety limits and were content to include the rules in the new 2016 contract in England.

There has been some misunderstanding about the impact of the WTR on medical education and training, and the Time for Training report written by Professor Sir John Temple (the Temple Report)^b sought to address this perceived reduction on training opportunities. The report noted the effect of rota gaps on training, and how rota changes to evening and night shifts are required to provide care in gaps at these times. As a result, these later shifts present very few supervised training opportunities.

The Temple report recognised the substantial tension between the requirements of education and training, the needs of the service and the WTR. This is particularly felt in surgical specialties where often the scope of the WTR can make it hard for trainees to continue in those conditions. However, ultimately the report stated that training could be completed in time within the WTR as long as the service was reconfigured and properly resourced – and it is notable that the Royal College of Surgeons Edinburgh supports retaining the WTR.

Any upward increase in the duration of the average working week could increase the amount of time available to trainees, but this time may not be used effectively for training as the education staff required (supervision, those needed for backfill and training body personnel and funding), will still not be available to allow trainees to train at a greater level. Ultimately, current problems associated with medical training would be most effectively addressed through increasing workforce numbers, increasing funding for education and training and supporting the role of Health Education England and devolved nation Deaneries' roles, not changing working hours and risking patient safety.

The protections of the WTR were written into the new junior doctor contract because both doctors and employers agreed that these safety limits were important. If formal negotiations are re-opened on any aspects of the 2016 contract, the priority will be tackling the problems that have emerged since the rushed introduction of this contract, not changing the safety protections that both sides agreed on.

Career grade doctors

Junior doctors remain an outlier in terms of the level of safeguards featured in their contract, which only applies in England and not the devolved nations, where trainees along with their other medical colleagues rely on the legal protection of the WTR and any agreements with individual devolved nation administrations. There are already some existing derogations from the WTR rest provisions for senior hospital doctors.

As a consequence of the uncertainty surrounding Brexit and its impact on the WTR, the consultant negotiating team has sought to specifically include a number of equivalent protections to those afforded by the WTR within the safeguards of the proposed 2018 contract to be used in England and Northern Ireland. This has been agreed in principle by employers' representatives in England and Northern Ireland.

^b https://www.hee.nhs.uk/sites/default/files/documents/Time%20for%20training%20report_0.pdf

The perception of improved work-life balance among staff, associate specialist and specialty (SAS) doctors is one of the reasons some choose this grade. As with trainees who choose more ‘plannable’ specialties, women may be more likely to remain SAS doctors due to family commitments and the potential option of fewer out-of-hours shifts required compared with consultant posts. The national contracts for SAS doctors also include a requirement to adhere to the maximum limits of the WTR in job planning, and we would be concerned about the equalities and safety implications of relaxing these provisions.

Equality, part-time workers, pregnancy and maternity, and work-life balance rights

The Equality Act 2010^c, rights to equal treatment for part-time workers, health and safety protections for pregnant workers and rights to maternity leave, emergency time off for dependents and parental leave are all underpinned by EU law. The government has committed to maintaining equality rights and transposing other rights into UK law upon withdrawal from the EU. However, they will become more vulnerable to amendment, narrower interpretation, and weaker enforcement following Brexit. This includes regulations protecting the employment status of fixed term and agency workers who may be more likely to be women or those with caring responsibilities.

The Equality Act 2010 and some aspects of our maternity and family leave rights go beyond the minimum required by EU law. Nevertheless, in some respects they are at risk of being weakened. Equality is recognised as a fundamental right and general principle of EU law. As such, EU law and the case law of the CJEU has played an important role in the development and effectiveness of rights in the UK. For example, it led to the adoption in the Equality Act of a specific right not to be discriminated against on grounds of pregnancy or maternity and protection from direct discrimination for carers of disabled people. EU law also ensures the right to effective and dissuasive remedies in discrimination cases.

UK workers have been able to rely directly on the right to equal pay between men and women in Article 157 of the EU Treaty. Successful cases decided by the CJEU under Article 157 have led to changes in UK equal pay law (e.g. including the right to equal pay for work of equal value, occupational pensions within the definition of pay, and increasing the back pay compensation for equal pay claims).

EU equality and work-life balance law is still evolving. For example, the European Commission has recently published a proposal for a new directive to improve work-life balance for parents and carers. It would substantiate the existing parental leave directive which provides workers with the right to 18 weeks’ parental leave that in the UK can be taken up to the child reaching 18 years of age and a right to emergency time off for family reasons. In addition to these rights, the new proposed directive would add a right to 5 days’ paid carers’ leave a year, proposes minimum payment for parental leave and allows parental leave to be taken flexibly rather than just as blocks of weekly leave.

^c This Act does not apply in Northern Ireland where a range of separate legislation covers some of the same areas

Key developments

- In December 2017, following concerning reports of support within government for the removal of the WTR from UK law, the BMA wrote to the Prime Minister along with twelve leading health organisations, asking her to not remove the WTR but to properly invest in and resource the medical workforce instead. The letter can be read [here](#).
- In February 2018, the Prime Minister responded to the letter stating that while 'This Government has committed not to roll back workers' rights', in the future 'it would be for Parliament and, where appropriate, the devolved legislatures to decide on employment law'. The letter can be read [here](#).
- In April 2018, members of the House of Lords overwhelmingly voted to approve a change to the EU (Withdrawal) Bill which would have prevented the Government from amending or overturning existing EU laws on employment rights after Brexit without full parliamentary scrutiny or consultation with stakeholders. This amendment was, unfortunately, overturned by MPs in June 2018, when the Bill returned to the House of Commons.
- The European Union (Withdrawal) Act gained Royal Assent in June 2017. The Act will repeal the European Communities Act 1972 and incorporate current EU laws into UK law. Once the UK has left the EU, Parliament will decide which areas of EU legislation should remain, undergo amendments, or should be repealed.

Summary

Membership of the EU has brought wide-ranging benefits to UK doctors through the adoption of European employment legislation into UK law. Such legislation makes better provision for patient safety and for equality of doctors' employment terms, both of which are beneficial to the NHS as a whole. The UK's decision to leave the EU has the potential to limit the future of such benefits, and to weaken those which currently exist, depending on Parliament's eventual decisions regarding which areas of EU legislation should remain, undergo amendments, or should be repealed following Brexit. There is therefore a substantial risk to the NHS around employment rights and Brexit, and it is vital that the government consider carefully the BMA's proposals, and the proposals of other key stakeholders, in the decision making process.

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