On June 23, 2016, the United Kingdom (UK) will hold an “in or out” referendum to decide whether it should remain a member of the European Union (EU). If the UK chooses to leave the 28-member European Union, one certain consequence of that decision is that the UK will have the ability to change a significant portion of its existing employment law, which derives from EU law.

In practice, it will be difficult to make significant changes to many areas of UK employment law, and it is unlikely that there will be any wholesale changes made in the immediate aftermath of a British exit (or “Brexit”) from the EU. More probable are adjustments to existing employment legislation that will continue the recent trend of providing more flexibility to employers to decide the makeup of their workforces and the terms and conditions of employment offered to employees. With the referendum fast-approaching, here are some of the areas of UK employment law that could be reformed, as well as points to consider for companies with employees based in the UK and elsewhere in the EU.

Agency Workers

The Agency Workers Regulations 2010 derive from the EU’s Agency Workers Directive and, amongst other obligations, require businesses to provide agency staff with the same pay and working conditions that directly employed staff performing a similar role receive. Often cited by employers as unnecessarily burdensome, these regulations are an obvious target for repeal. Doing so would advantage employers by reducing the cost of using agency staff and might encourage more frequent use of agency workers as part of the workforce.

TUPE

Another possible target for reform or amendment is the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which implement the EU’s Acquired Rights Directive into UK law. In 2014, various amendments were made to TUPE with the intention of mitigating some of its practical difficulties. Arguably, those amendments did not go far enough. In the event of a Brexit, further change to TUPE could be made, easing employers’ ability to modify employment contracts and harmonize terms and conditions of employment following a TUPE transfer and relaxing the information and consultation requirements before a TUPE transfer.

Working Time
The Working Time Regulations 1998 (WTR) are another aspect of UK employment law with origins in EU law, namely the EU’s Working Time Directive. Employers would likely welcome an amendment of the WTR, particularly to simplify its rules governing the accrual of holiday during sick leave and the calculation of holiday pay, which has been made more complicated by recent case law.

Data Protection

The EU’s Data Protection Directive (DPD) currently forms the basis of data privacy and protection laws in Europe. This will soon be replaced by the long-awaited General Data Protection Regulation (GDPR) which, together with the EU-US Privacy Shield framework (anticipated to become effective from June 2016), will introduce tighter protections regarding the transfer of personal data both within and outside of the EU.

In the event of a Brexit, the UK will need to ensure continued protections for the transfer of personal data that are equivalent to the protections found under EU law. Therefore, amendments will be required to the UK’s Data Protection Act 1998 (which currently implements the DPD) to take account of rules under the GDPR and the EU-US Privacy Shield.

Discrimination Law

Further down the scale, significant changes to existing UK laws prohibiting direct employment discrimination and indirect discrimination or harassment would be controversial and are unlikely to occur. Indeed, the UK’s commitment to preventing both forms of discrimination in the workplace predates its membership in the EU.

If there are to be changes in UK employment equality law, they are expected to be limited and possibly include the introduction of a cap on discrimination compensation (similar to the unfair dismissal compensation cap) and/or the introduction of rules allowing positive discrimination (or affirmative action) to increase the representation of underrepresented groups in the workplace—reforms which to date have not been possible due to the UK’s membership of the EU.

Free Movement of Persons

Perhaps the most immediate concern for employers is that a Brexit would end the automatic right of UK nationals to live and work in EU member states, as well as the right of nationals of EU member states to live and work in the UK. Immigration control is currently an important political topic in the UK and one of the central issues being discussed in the lead up to the referendum on membership in the EU. Therefore, although it is unlikely that there will be immediate changes to the ability of migrant workers to work in the UK and the EU, an exit from the EU may ultimately result in the introduction of a new immigration system which could reduce the ability of EU nationals to work in the UK. This could result in service or skills gaps for a number of employers.

Conclusion

While uncertainty makes detailed long-term planning difficult, there are some practical steps that can be completed now to help prepare for the possibility of a UK exit from the EU. Employers doing business in the UK and EU should review how many employees within their workforces may be affected by the loss of an automatic
right to travel and work freely across the EU, as well as the potential impact a Brexit might have on contractual provisions or policies which currently apply to employees working in the EU and may require amendment.