A Guide to the **Employment and Immigration Law Implications of Brexit**

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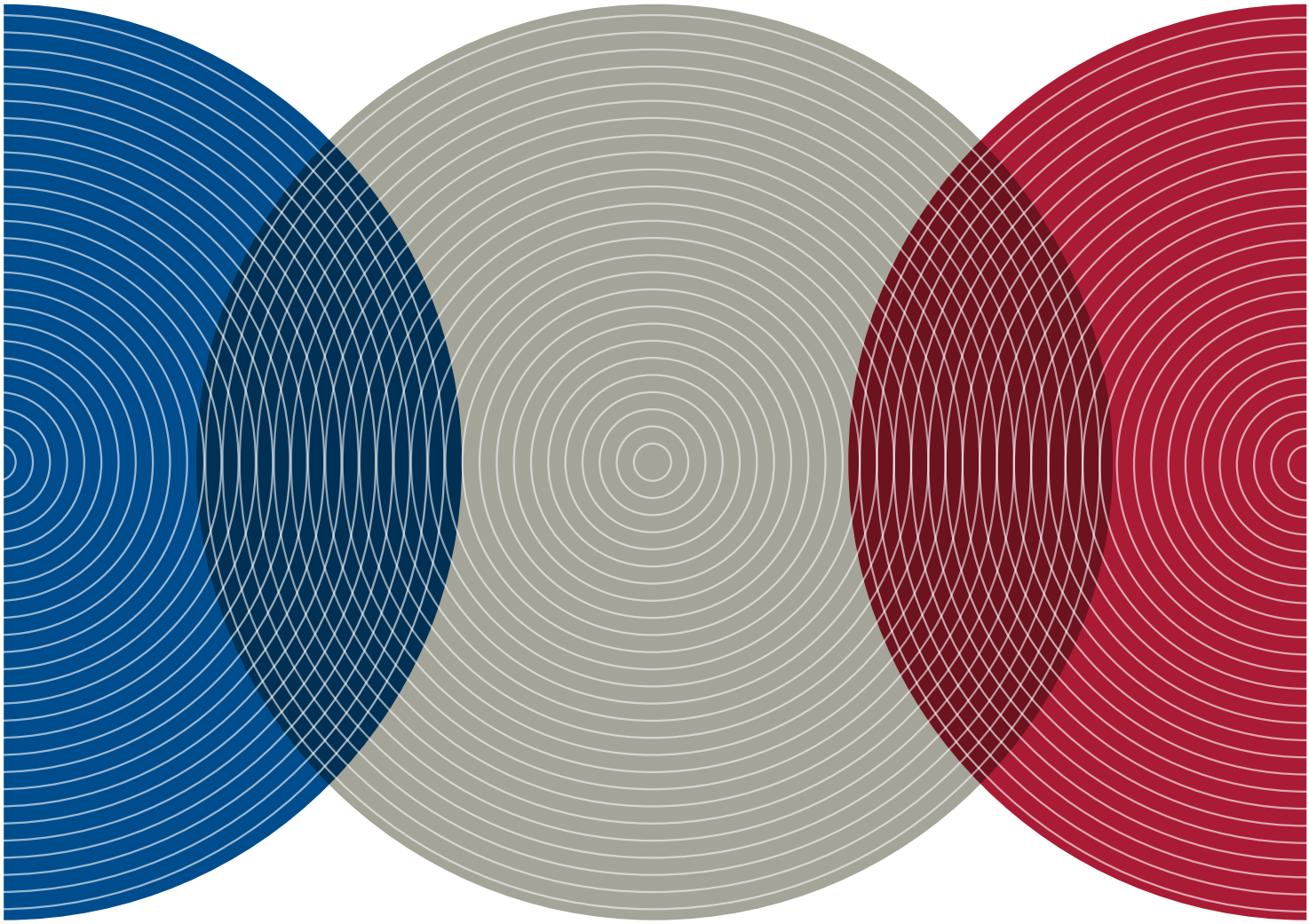

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As the likelihood of a no-deal Brexit continues to increase, the implications for employment and immigration law will undoubtedly be an ever growing concern for employers. On 24 January 2019, the Government published the General Scheme of the Miscellaneous Provisions (Withdrawal of the United Kingdom from the European Union on 29 March 2019) Bill 2019 (the "**Omnibus Bill**").

The Omnibus Bill is still at a preliminary stage and it is still possible that a no-deal exit may not occur meaning any future arrangements with the UK are still far from certain. At present, the Bill contains good news for employers in that its focus lies largely in maintaining the Common Travel Area and its associated rights and privileges thus allaying immigration concerns for Irish employers of UK citizens. However, the Government itself has recognised that the draft Bill may need to be adjusted in light of ongoing developments. On that basis, we consider the possible options and implications for employment law, based on a scenario where the UK will ultimately, sooner rather than later, be a non-EU country and summarise the current regime relating to work permits and citizenship for non-EEA nationals so that employers can be prepared for the worst case scenario.

The Common Travel Area

The Common Travel Area ("**CTA**") is an open border travel area between the UK and Ireland. It has existed since the foundation of the State in the 1920s but on an administrative, as opposed to a legislative basis.

Current operation of the CTA

As part of the CTA, Ireland and the UK cooperate on immigration matters and citizens of CTA countries may enter the CTA without a passport check.

For non-CTA citizens, immigration checks for travel within the CTA are minimal but individuals must still hold immigration permission for the CTA country they desire to enter. At present EU and EEA citizens may be subject to passport checks when travelling to or between CTA countries as Ireland and the UK are not party to the Schengen Agreement.

Two visa programmes have been launched which rely on Ireland-UK co-operation on immigration matters: the Irish Short Stay Visa Waiver programme and the British-Irish Visa Scheme, allowing short-term visitors from certain non- EEA countries to travel to and around the CTA on the basis of a single visa.

Legal status of the CTA

CTA arrangements have for the most part been put in place on an administrative basis. The operation of the CTA is also reflected in three Protocols annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. Protocol 20 in particular refers expressly to the CTA, stating that Ireland and the UK are free to "continue to make arrangements between themselves relating to the movement of persons between their territories".

The CTA post-Brexit

The Omnibus Bill is largely predicated on maintaining the CTA as a key part of the contingency planning and preparations surrounding Brexit. This includes continued cooperation between Ireland and the UK on immigration matters. The extent to which this will be possible is, as of yet, unclear as Ireland's maintenance of the CTA will be subject to its obligations as an EU Member State. Following Brexit, the border between the UK and Ireland will also be the border between the UK and the EU. As part of its Contingency Action Plan, the European Commission has called on Member States to take a generous approach to UK citizens resident in their territory and has already adopted a proposal for a Regulation which exempts UK nationals from visa requirements for short stays, provided that all EU citizens are equally exempt from UK visa requirements. Therefore, provided some level of reciprocal agreement can be obtained from the UK in the event of a no-deal scenario, it may be possible to continue to operate the CTA largely

in its current form but it remains to be seen what border arrangements might come into play for people and goods. The Commission have also stated that any contingency measures adopted at a national level should be compatible with EU law and must be temporary and revocable.

Immigration Requirements – A Worst Case Scenario

The hallmark of Brexit is, regrettably, its uncertainty and any arrangements in respect of the Common Travel Area or general visa requirements for UK citizens post-29 March 2019 are predicated on a certain level of reciprocity from the UK.

The EU has consistently stated that any arrangement reached between Ireland and the UK on the continuation of the CTA must "fully respect the rights of natural persons conferred by Union law" and must not affect "the obligations of Ireland under Union law, in particular with respect to free movement for Union citizens and their family members, irrespective of their nationality, to, from and within Ireland". In other words, Ireland's ability to continue the CTA on a bilateral basis is subject to its obligations as a Member State and as such, some restrictions on the free movement of workers between Ireland and the UK may ultimately be necessary. In that case, an Irish firm with any personnel who work in the UK may be subject to greater restrictions as would UK employees in Ireland, while staff seconded to the UK from EU countries (and vice-versa) may also face greater controls. In either event, a business's ability to allocate resources with flexibility within the organisation in the respective jurisdictions will be affected. In such circumstances, UK nationals may be subject to the same requirements as non-EEA nationals seeking to enter into employment in Ireland. If this situation arises, the first practical step would be to assess the eligibility of a UK national to apply for Irish citizenship and long term residency in Ireland.

Employment Permits

In general, an employment permit is required for non-EEA nationals to enter into employment in Ireland. An employment permit is issued by the Minister for Jobs, Enterprise and Innovation following an application by the employing company or the non-EEA national, in prescribed circumstances. In general terms, when applying for an employment permit an employer must be able to show that at least 50% of its employees are EEA nationals (the "50:50 Rule"). In the case of start-up companies, the 50:50 Rule may be waived where the company has registered with the Revenue Commissioners as an employer within the last two years, and the company has a letter of support from either Enterprise Ireland or IDA Ireland. The three principal categories of employment permit are outlined as follows:

- **Critical Skills Employment Permit:** The Critical Skills Employment Permit is designed to attract highly skilled individuals to Ireland to address critical shortages of skills in the labour market. The Critical Skills Employment Permit is available for occupations with an annual salary of €60,000 or more and for certain specified occupations on the Highly Skilled Eligible Occupations List with an annual salary of between €30,000 and €59,999. The applicant must have also received a job offer of a minimum of two years' duration to qualify for a Critical Skills Employment Permit;
- **General Employment Permit:** Unlike the Critical Skills Employment Permit which specifies certain eligible occupations, the General Employment Permit assumes all occupations with a minimum annual salary of €30,000 to be eligible unless otherwise specified. Therefore, all occupations are eligible unless excluded under the list of Ineligible Categories of Employment for Employment Permits. The main attraction of the General Employment Permit for prospective candidates is that it permits a broader range of occupations than the other classes of employment permit and may be obtained in respect of a 12 month contract of employment; and
- **Intra-Company Transfer Employment Permit:** Intra-Company Transfer Employment Permits are designed to facilitate the transfer of senior management, key personnel or foreign employees undergoing a training programme of a multinational corporation to its Irish branch. Foreign nationals remain on their foreign employment contract throughout their time in Ireland and must have been employed with the foreign employer for at least six months before the transfer.

Employers can also avail of permits to facilitate short stays in Ireland by employees or to allow for the provision of services by a foreign contractor employing non-EEA nationals.

- **Short stay business visa:** A short stay business visa allows an individual to travel to Ireland for up to 90 days for activities related to his/her job. These activities include attending meetings and conferences, negotiating or signing agreements or contracts. Short stay visas also allow individuals to work in Ireland for 14 days or less however in this case only one short stay business visa will be permitted in a period of 90 days.

- **Atypical Working Scheme:** The Atypical Working Scheme can be used where a non-EEA national will be travelling to Ireland to work for a period of greater than 14 days. It is most frequently used where a skill shortage has been identified, or where an individual is required to provide a specialised or high skill to an industry, business or academic institution, though it can also be used in other limited circumstances. Visa-required non-EEA nationals are required to apply separately for a visa following receipt of approval under the Atypical Working Scheme.
- **Contract for Services Employment Permit:** The Contract for Services Employment Permit ("CFSEP") allows non-EEA nationals working for a foreign contractor which is contracted to provide services directly to an Irish company on a contract for services basis, to transfer to Ireland to work on the Irish contract. The permit is limited to positions required for the service of the contract and employees must have at least 6 months service pre-transfer and be in receipt of an annual remuneration of at least €40,000. Employees remain employed, salaried and paid by the foreign contractor. A CFSEP can be granted for up to two years initially, subject to renewal up to a maximum of three years. However, a CFSEP can only be used for the term of the underlying contract.

Entitlement to Irish Citizenship: Irish Passports

Individuals born outside the island of Ireland are entitled to Irish citizenship if either of their parents was an Irish citizen born on the island of Ireland. If these criteria are met the individual may apply for an Irish passport under Irish law, irrespective of where they reside.

An application for Irish citizenship can also be made if a parent, while not born in the island of Ireland, was an Irish citizen at the time of the applicant's birth. In most cases applications of this type are made through a grandparent who was born in Ireland. An individual may also qualify for citizenship if one of their parents obtained Irish citizenship through Naturalisation or Foreign Birth Registration before they were born. In these cases, Irish citizenship can be passed on to the next generation as the parent was an Irish citizen at the time of the applicant's birth.

Residency

Applications for Long Term Residency in Ireland are currently processed as an administrative scheme. Persons who have been legally resident in the State for a minimum of five years (*ie* 60 months) on the basis of employment permits may apply for a five year residency extension. Such persons may be exempt from employment permit requirements.

In the absence of an entitlement to Irish citizenship or a successful application for long term residency, non-EEA nationals must apply for an employment permit to work in Ireland.

Business Should Not Assume A Common Set of Employment Laws

Post-Brexit, businesses in Ireland will no longer be able to assume that a similar employment law regime applies in the UK. This will impact on a number of important areas of employment law, especially for multinational businesses.

Brexit will break the connection between UK employment law and EU legislation. The UK's European Union (Withdrawal) Act 2018 imports the powers of EU Directives into domestic law such that employment rights will largely remain unchanged, including employment rights of those working in the UK on a temporary basis. However it is likely that there will be a gradual shift towards divergence as new EU legislation emerges which the UK is not required to – and then does not – adopt or follow.

In addition, the role of the Court of Justice of the EU ("**CJEU**") in relation to the UK will cease, which would affect the interpretation and application of those EU-derived UK laws that remain.

Mergers and Acquisitions

The Transfer of Undertakings Regulations, which afford automatic transfer rights to employees transferring with business and business assets, are a highly significant factor in certain mergers and acquisitions, as well as in outsourcing arrangements. Other EU legislation gives employees similar representation rights in, for example, cross-border mergers. There will be a material impact on business transfers if these regulations and laws no longer apply (or are varied significantly) in the UK, so that a different regime applies in the UK compared with Ireland. Such changes might include reduced employment rights on a transfer and reduced information and consultation requirements.

Information and Consultation

EU legislation in relation to works councils, as well as EU collective redundancy legislation, provides for extensive information and consultation with employees in particular circumstances. Any post-Brexit disapplication, amendment of, or reduction in, these requirements will impact on organisations having businesses in both jurisdictions. It may very well be that such organisations (and, indeed, in other European countries) will choose to apply current information and consultation processes post-Brexit, but nonetheless the legal requirements may well change and therefore will require some consideration and attention.

Remuneration

In recent years the EU has introduced significant regulation of remuneration in the financial services sector (including under MiFID, AIFMD, UCITS V and Solvency II). The Capital Requirements Directives (III and IV in particular) have been controversial in the UK, especially arising from the 'bonus cap' under CRD IV. What seems likely to be the disapplication of these directives

in the UK post-Brexit would allow UK institutions both greater freedom to determine how much to pay in bonuses, and greater flexibility in how these are paid, albeit subject to whatever domestic UK regulation might replace these EU-derived constraints. This may have an impact for financial services employees in Ireland where more stringent EU regulation will continue to apply.

Working Time

Over the years the UK has challenged and sought derogations from some of the requirements of the Working Time Directive in terms of maximum working hours, and has provided for the "contracting out" of certain working time provisions. Working time law has also been extended significantly by the CJEU, including in relation to the rights and entitlements of employees to holiday pay during sick leave, as well as over-time in reckoning annual leave.

Discrimination

EU law has driven a huge extension of the law in relation to discrimination between categories of workers, not only for traditional equality matters such as gender and race, but also fixed-term workers, part-time workers and agency workers. This law has also been extensively developed at EU level. Brexit may lead to UK law moving in a different direction, narrowing the more expansive EU level approach.

Employer Insolvency

EU law ensures payment of employees' outstanding claims in the event of employer insolvency principally by requiring Member States to establish an institution to guarantee the payments. The Workplace Rights Technical Notice published by the UK Government states that the relevant transposing legislation will remain in place in the event of a no-deal Brexit and the protections provided for all UK, EU and non-EU employees working in the UK will continue to operate. The Notice warns that UK and EU employees who work in another EU country for a UK employer may no longer come within the scope of the implementing legislation of the relevant Member State.

The Omnibus Bill provides for an amendment to the Protection of Employees (Employers' Insolvency) Act 1984 to ensure that Irish employees whose UK based employer becomes insolvent will continue to be protected.

European Works Council

The European Works Council Directive allows workers to request, in certain circumstances, that their employer establishes a European Works Council ("**EWC**") to provide information and consult with employees on issues affecting employees across two or more EEA states. The EWC regime will need a reciprocal agreement in place for the UK and EU if it is to continue in its current form. In a no-deal scenario, the UK will no longer count as a Member State and UK employees will no longer count as employees within the Member States. This will affect the analysis of whether an entity is a Community-scale undertaking or Community-scale group of undertakings to which the Directive applies and employers with existing EWCs may have to re-assess the level of employee representation on EWCs and special negotiating bodies established pursuant to the Directive.

Potential Post-Brexit Landscape: Possible Options and Implications for Employment

The UK's withdrawal from the EU represents unchartered waters for the EU as well as its member states. Ultimately the precise implications of the UK's withdrawal from the EU will depend on any ultimate agreed arrangements that replace it.

The arrangements could follow a variety of existing models or come to a unique bespoke agreement. The existing possible options include:

- joining the European Economic Area ("**EEA**");
- joining the European Free Trade Association ("**EFTA**");
- establishing a Customs Union with the EU;
- negotiating an EU/UK Bilateral Trade Agreement; or
- in the absence of an alternative arrangement being negotiated the default position would be for trade to be conducted via World Trade Organisation ("**WTO**") rules.

These options all impact the employer/employee relationship in different ways.

EEA

Membership of the EEA facilitates full access to the single market subject to compliance with single market rules and a significant financial contribution. EEA members accept most EU legislation but enjoy no voting rights at EU level. Certain areas such as laws regulating agriculture and fisheries are excluded from the EEA. Crucially EEA members agree to respect the "four freedoms" so acceptance of the free movement of people, goods, services and capital would be a precondition for admission.

EMPLOYMENT IMPACT

This option would have little impact on employment and the free movement of people.

EFTA/"Swiss Model"

The UK could also adopt the "Swiss model" ie join EFTA and gain access to the single market through a series of bilateral agreements with the EU. EFTA is an intergovernmental organisation established to promote free trade and economic cooperation and its membership entails less onerous obligations than membership of the EEA. Its members are under no general obligation to apply EU laws. However members have little formal power in making EU single market rules and in addition must pay for access to the single market.

EMPLOYMENT IMPACT

Switzerland has a bilateral agreement on the free movement of persons with the EU. Both employed and self-employed people have the right to enter, reside and take up work in any state which has signed the agreement (Switzerland, EU or EFTA member states).

Customs Union

Establishing a customs union, would create a form of free trade area with a common external tariff. In this scenario the UK would be obliged to apply the same import quotas, customs duties, etc agreed with the customs union.

EMPLOYMENT IMPACT

The UK would also be obliged to negotiate entry/exit and employment permit requirements with individual EU member states.

WTO

In the absence of a mutually acceptable trade relationship being reached between the UK and the EU the default position would be for their relationship to be governed by WTO rules. In this scenario the UK would not be bound by single market rules and UK exports to the EU would be subject to the EU's common external tariff. The UK would not be bound or benefit from EU/third country free trade agreements and would need to negotiate its own free trade agreement with third countries. Aside from third party free trade agreements, the UK would also have to renegotiate its membership with the WTO itself as its current participation is based on its EU membership. This represents the most onerous option for the UK and would be seen as largely unattractive due to the lack of market access.

EMPLOYMENT IMPACT

The WTO has no provisions for free movement of labour so under this scenario free labour mobility between the UK and the EU would cease and again entry/exit and employment permit requirements would need to be negotiated with individual EU member states.

Bilateral Trade Agreement

Finally, the UK could negotiate a bilateral trade agreement with the EU. However in this scenario EU-negotiated agreements with non-EU trade partners would cease to apply to the UK. The UK would then need to also negotiate its own bilateral agreements with non-EU countries.

EMPLOYMENT IMPACT

The implications of a bilateral trade agreement on employment would depend on the negotiated terms of the agreement.

Conclusion

Employers with operations in the UK and/or doing business with the UK do need a contingency plan based on the UK being a non-EU country. Some form of special arrangements relating to the four freedoms are likely but, given the issues in the UK referendum, certain restrictions on free movement of people which will directly impact employment are likely. Although the intention of the Omnibus Bill is to preserve the CTA insofar as possible, given the variety of uncertainties surrounding that approach, employers would still be best advised to familiarise themselves with current immigration law in Ireland.

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