

A BRIEFING OF THE EFFECT OF THE RETAINED EU LAW (REVOCATION AND REFORM) BILL UPON EMPLOYMENT LAW RIGHTS AND OBLIGATIONS

21 October 2022

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The Employment Lawyers Association

19 October 2022

INTRODUCTION

1. The Employment Lawyers Association (“ELA”) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers.
2. ELA’s role is not to comment on the political merits or otherwise of proposed legislation. Policy decisions are for Government and the policy debate is for politicians and not for the expert employment lawyers who make up the membership of ELA.
3. A Standing Committee, chaired by Louise Taft, was set up by the Legislative and Policy Committee of ELA to comment on issues arising from the UK leaving the EU, from which a Working Party was formed to consider the Retained EU Law (Revocation and Reform) Bill which we shall just call The Bill. The members of the Working Party are listed at the end of this paper and include experienced partners from solicitors’ firms and a KC.

EXECUTIVE SUMMARY

4. This document is a briefing paper. It is not an exhaustive analysis of the Bill. It aims to inform those who are not employment law experts the effect of Bill employment rights and obligations. The policy choices are for the Government. ELA does not enter the policy field. However, we aim to inform and explain to legislators, workers, employers and business of the effects, intended or not, of the Bill.

What does the Bill do?

5. First, the Bill sets a default that will ‘turn off’¹ employment rights covering holiday pay, agency workers, part-time and fixed-term workers, maximum working weeks for office workers, HGV drivers and fisherman and abolish maximum annual hours for commercial pilots, and no longer preserve the employment contracts of workers when their business is bought by another. There are many other rights which are affected that we consider below.
6. Second, the Bill sets a default that removes from British law three principles at the end of 2023. The Bill seeks to erase, as if it they never existed, the interpretive principles and settled decisions which the Courts have relied upon to give a settled and

¹ A phrase used by Catherine Barnard, Cambridge Professor of European and Employment Law

predictable meaning to tens of employment law rights and obligations which are derived from EU law. The Three Principles are:

- 6.1. Direct Effect;
 - 6.2. Supremacy of EU law; and
 - 6.3. General principles of EU law.
7. Abolishing direct effect removes rights such as a facet of equal pay law which is being used by tens of thousands of women to claim equality with better paid men will be turned off at the end of 2023. It sets a default to abolish rights such as the right to normal pay during holiday enjoyed by millions of workers or the ability to carry over holiday pay from one year to another when sick. It sets a default to remove from UK law, the legal reasoning that has helped to extended discrimination and other protections to atypical and gig workers.
 8. Abolishing the principle of supremacy, together with abolishing the general principles of EU law and the removal of direct effect means that the settled meaning not only of EU Regulations but also any primary Acts of Parliament (such as, for instance, the Equality Act 2010) will not be the same after 2023. Accordingly the Bill affects primary Acts of Parliament as they may be interpreted in the future. An employment dispute centred on the meaning of a legal right in December 2023 may have a completely different outcome to one which arises in January 2024.
 9. This will create legal uncertainty. Legal certainty is a fundamental constituent of any efficient legal system. Where, as here, the settled and predictable meaning of a considerable body of employment law is wiped away then there is uncertainty and unpredictability. Legal uncertainty can undermine any plan for growth as neither employers nor employees will have clarity as to the meaning of large parts of employment law that affect investment and the cost of labour.
 10. Finally, the Bill grants Governments wide powers, often described as 'Henry VIII powers' after the power of an absolute monarch, to revoke, restate and wholly rewrite all of the affected regulations subject to one condition: any rewriting must always reduce and never impose additional regulatory burdens.
 11. The Bill does provide options for the Government to preserve interpretive principles and other parts of EU law and the regulations. But that requires positive action. However, given the volume of legislation and case law that needs to be considered that may be affected and the limited time that the Government has given itself to do this (31 December 2023), ELA is very concerned that there is not enough time for this task to be properly carried out.

What does ELA Recommend?

12. Until a full audit is carried out both employers and workers may wake up, on New Years' day 2024 to a landscape of uncertainty, unknown employment rights and obligations which will simply become fertile ground for litigation, delay, with unintended consequences and uncertainty striking at the attractiveness of the UK as a destination for international investment.

13. As a result of the Retained EU law Government dashboard all the employment regulations that may be directly affected by the Bill are set out. However, the full range of rights that may be affected by the three principles has not, so far as we are aware, been the subject of any audit.
14. ELA strongly counsel that before the Bill is given further Readings and before it goes into Committee:
 - 14.1. Government carries out a comprehensive audit as to the effect of abolishing:
 - 14.1.1. the regulations within the scope of the Bill; and
 - 14.1.2. the principles of direct effect, supremacy and EU general principles on the meaning;
 - 14.1.2.1 of all retained EU regulations; and
 - 14.1.2.2 on rights under Acts of Parliament.
 - 14.2 Government review the outcome of the audit and ensure that the powers under the Bill are used to preserve the three principles as are required to maintain certainty in the meaning of law prior to further reform so as to maintain certainty in the meaning of law and avoid the vacuum of uncertainty during any transition from old to new law.
15. The Bill will allow Government to rewrite all legislation affected without a consultation process. Consultation informs legislation as lawyers, employers' groups, employees' associations, Unions, business groups and others affected by employment rights raise issues that even the well informed officials at BEIS may not have considered. We recommend that Government carry out full consultation of its proposals to ensure that the Governments' political objectives, on which we do not comment, are achieved with a full understanding of the potential effects of its legislation.
16. Finally, we recommend that Government resource the exercise fully at BEIS. In a period of a little over a year the Government plans to legislate in such a way so as to create the same amount of secondary legislation in employment law as it has over the past 50 years. In addition, for the reasons set out above this legislation will affect a much wider number of rights than just the regulations that are its target. If the integrity of employment law in the UK is to be protected, it requires BEIS to be fully resourced so that the consequences can be properly considered.
17. We deal with employment law but the effects will be replicated in all the fields of law which rely, like employment law, to a large extent both on EU derived legislation and the three principles.

THE BILL

What does the Bill do?

- 18 The Bill ‘turns off’ all employment law which comes from the EU law, which is not in already in an Act of Parliament, by the end 2023 unless saved or amended by the Government in that time.²
- 19 The Bill also:
- a. stops other EU laws that applied directly into the UK from 1972 to the end of 2023 from continuing to be used in the UK from 2024;³
 - b. stops EU law being sovereign⁴ which together with the deletion of EU general principles from EU law and the abolishing of direct effect from the end of 2023 (the three principles) means that the settled meaning, ambit and effect of UK law as it has been interpreted over the past 50 years disappears;⁵ and
 - c. grants the UK Government almost unlimited powers to amend all affected regulations by a positive procedure in Parliament as long as no new regulatory burdens are imposed.⁶

So What?

- 20 The Bill directly affects every employment regulation passed as a result of EU laws since 1972 either under the European Communities Act 1972⁷ or in order to comply with an EU obligation⁸. That is a lot of employment regulation.
- 21 However, the Bill also indirectly affects primary legislation in the UK in a way that may not have been fully considered. As the three principles are turned off and no longer form part of retained law, any EU regulations which are not turned off and all Acts of Parliament, such as the Equality Act 2010 or the EU rights introduced by the Employment Rights Act 1996, would no longer be interpreted through the prism of the three principles that put much of the flesh on the bones of employment rights under primary legislation.
- 22 The principal issue is uncertainty. By wiping the slate clean of all the decisions on which our Courts have relied to build up a settled interpretation of EU law that runs through British employment law like a stick of rock, the Bill will create, on 1 January 2024, a raft of EU employment rights whose application, scope and meaning is unclear. Lawyers will no longer be able reasonably to predict the effect of workers’ rights or employers’ obligations. Businesses will no longer be able reasonably accurately to predict their obligations. Workers will be uncertain as to the scope, meaning, application or entitlement to their working rights.

² Clause 1 The Bill

³ Clause 3 The Bill

⁴ Clause 4 The Bill

⁵ Clause 5 The Bill

⁶ Clause 15 The Bill

⁷ Clause 1(4)(a) The Bill

⁸ Clause 1(4)(b) The Bill

- 23 Fertile ground for litigation will be seeded – litigation begets the triplets of cost, delay and uncertainty: that deters investment.
- 24 On 1 January 2024 the interpretive principles which have created well understood rights and obligations are guillotined, abolished and wiped from the slate. The hundreds of domestic cases that are based on European principles are erased from the record and the edifice of 50 years of incremental understanding of the regulations is torn down and replaced by a void. There is no phasing out of the old as new decisions supersede them. There is no transition period. There is no gradual introduction of the new principles. The old is abolished. Until new decisions emerge over the next 50 years, there is a vacuum. That vacuum can only be filled by litigation and appeal, after appeal in an Employment Tribunal system that is unlikely to make its first decisions until 2025 or 2026 given the current delays and before any question of any appeal.
- 25 Of even greater concern are the known unknowns and the unknowns. The Bill is blind to that which it intends to abolish – it is no mean task to identify all the regulations that the Bill intends to abolish – that is the tip of the iceberg. No audit has been carried out of the hundreds of employment cases which have been decided over the past 50 years putting flesh on the bones of those identified bare regulations. It is those decisions that have brought clarity and meaning so that they are now well understood. Their meaning will be swept away and with them some rights, which would not even exist without the interpretive principles of direct rights, supremacy and general EU principles, will simply be extinguished and die – nobody knows how many and with what effect.
- 26 Without a clear understanding of all the cases that will be swept away, the cliff edge of the end of December 2023 poses unknown dangers.
- 27 The Bill also gives the Government wide powers to revoke, amend and change legislation. We note that those wide powers include de facto maintaining the effect of the status quo. However, once the Bill is passed the Government would have to take positive steps to make this so.
- 28 Legislators may then be faced with an unenviable choice, as a result of the ticking clock set by the Bill that, when faced with new and rewritten regulations presented by Government – they have an unenviable choice either to affirm the new rewritten regulations with inadequate consideration as to the changes and consequences or let the current regulations lapse so that no employment law and or rights are preserved.

Which employment rights in practice could this affect?

29. For example if the Government did not positively act then all of the following laws would disappear:

29.1 The daily limit of 8 hours per day or the limit of 40 hours per week for children;⁹

⁹ Regulation 5A Working Time Regulations 1998.

- 29.2 The right of a worker to a 20 minute break in their shift and a break from work each day and a day off every week or 2 days off every 14 days;¹⁰
- 29.3 Paid holidays at the same rate of pay that a worker should get when they are working;¹¹
- 29.4 The right of an NHS worker who has worked through the pandemic and been unable to take their paid annual leave, to carry that leave over;¹²
- 29.5 Maximum hours not just for office workers but also for safety critical workers such as airline pilots¹³, sea-fisherman¹⁴ and HGV drivers;¹⁵
- 29.6 The obligation on employers to make an assessment of health and safety risks to their workers or keep such a risk assessment up to date;¹⁶
- 29.7 The right of part-time¹⁷ and fixed-term¹⁸ workers to be treated, pro rata, similarly to permanent workers unless the employer can justify that treatment;
- 29.8 The right of Agency Workers that they should, after 12 weeks, receive the same basic working and employment conditions such as pay or rest periods as a directly employed worker;¹⁹
- 29.9 Rights to take parental leave;²⁰ and
- 29.10 Mean that when a business buys another business there is reasonable certainty as to which workers transfer to the new business so that the purchaser knows which employees it is getting, and workers know that they can't just be dismissed because of the transfer.²¹
30. In our experience as lawyers these regulations are used every day by workers and employers in every court and tribunal. Lawyers are asked to advise on them and use the certainty of past decisions to be able to give answers to clients that allow them to conduct their business and resolve their disputes in a settled, stable and well understood framework of law – this reduces disputes and litigation.
31. Many of these laws – such as rights to take parental leave and rights for part time workers – impact more women than they do men. The Bill's equality impact assessment confirms the Government's commitment to upholding high standards in equalities but does not expressly acknowledge the potential disparate impact of revoking these regulations.
32. It is important to emphasise that paragraph 29 are only examples and not a comprehensive list of legislation that would disappear unless the Government positively acts to prevent it. We have set out at Appendix 1 a broader review of the legislation affected although it is only illustrative and far from a comprehensive review given the time available. At Appendix 2 we have taken three of the Regulations that may be

¹⁰ Regulations 10, 11 & 12 Working Time Regulations 1998.

¹¹ Regulations 13 and 16 Working Time Regulations 1998.

¹² Regulation 13(9)-(13) Working Time Regulations 1998.

¹³ Regulation 9 Civil Aviation (Working Time) Regulations 2004.

¹⁴ Regulation 6 Fishing Vessels (Working Time: Sea-fishermen) 2004.

¹⁵ Regulation 4 Road Transport (Working Time) Regulations 2005.

¹⁶ Regulation 3(1) Management of Health and Safety at Work Regulations 1999/3242.

¹⁷ Regulation 5 Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

¹⁸ Regulations 3 & 4 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

¹⁹ Regulations 5, 6 & 7 Agency Workers Regulations 2010.

²⁰ Regulations 13-16 Maternity and Parental Leave etc Regulations 1999

²¹ Regulations 5 & 7 Transfer of Undertakings (Protection of Employment Regulations) 2006.

affected by the Bill and analysed, in more detail, the consequences of the Bill. However, this is but one snapshot of a narrow review undertaken in a short period of time. This is an exercise that needs to be carried out by Government, in detail, without which Parliament will not know the effect of the proposed Act.

What do you mean that the Bill turns off these regulations?

33. Unless Government positively acts to save the regulations then any regulation is simply abolished from the end of 2023. If the Government positively acts then it can extend the laws until 23 June 2026²² which is the tenth anniversary of Brexit.

What other EU laws that did apply directly in the UK does the Bill turn off?

34. The Bill does not just turn off regulations. It turns off EU law that the European Union (Withdrawal) Act 2018 kept in British law. The examples are wide ranging.

35. They include two of the most used parts of employment law that tens of thousands of women in supermarkets use to compare themselves to better paid men who work in the same business in their equal pay claims.²³ If this right is taken away, many women who suffer sex based unequal pay would no longer be able to bring their claims. It would remove incentives for employers to eradicate such disparities. Equal Pay rights in the Equality Act 2010 do not go as far and have, since 1976²⁴, been supplemented by EU law.

36. The Bill also turns off the direct effect of many parts of EU law that the Courts use to interpret regulations in domestic law so as to bring certainty to their meaning.

37. The turning off of this type of EU law is amplified by the Bill abolishing the principle of supremacy of EU law together with the general principles of EU law. We consider these other matters that are turned off in the next two questions and then consider their effect together.

What is the principle of the supremacy of EU law?

38. The principle of supremacy of EU law means that EU law takes precedence over UK law. The principle of supremacy operates together with general principles of EU as one of the central ways by which EU derived regulations like those set out above are interpreted, whenever there is any uncertainty. We explain below the types of general principles of EU law that are turned off and then consider how the turning off of EU laws that directly applied in the UK is amplified first by the abolition of the supremacy of EU law and yet further amplified by the abolition of the general principles of EU law.

²² Clause 2 The Bill

²³ Article 157 Treaty on the Functioning of the European Union on the ability of women to compare themselves to men for equal pay if their pay is determined by the same single source as is the case, for instance, with many (mostly female) supermarket shop workers comparing themselves to (mostly male) distribution staff.

²⁴ Defrenne v Sabena, Case 43-75

What are the general principles of EU Law?

39. General principles of EU law are used by lawyers, courts and tribunals to interpret EU law. They are legion. They can range from the principle of effectiveness such as, for instance, that any employment right should be given effect and should not, for instance, be locked up behind an unaffordable paywall for workers or be so hard to enforce as to be pointless such as when an employer deliberately misleads a worker about their right to holiday pay.
40. A further example of a general principle of EU law is the Marleasing²⁵ principle. That principle is used by Court so that, until the end of 2023 if the Bill is passed, a UK court or tribunal interpret UK regulation, if possible, as conforming with the purpose of the Directive which it implements if the Directive can be seen to grant concrete defined rights that should be in force by a particular date.

So what is the practical effect of abolishing direct effect, supremacy and the general principles of EU law taken together?

41. The UK regulations set out the black letter law. They are the bare bones of the law. There is often uncertainty as to what the words on the page mean. Where the regulations give effect to a Directive such as, for instance in the case of the Working Time Directive, the Courts use the Directive to help them understand the meaning of the Regulations. Directives, unlike UK law, set out their purpose and their aims in recitals – those aims help a court or tribunal to interpret a regulation.
42. As a result of EU law currently having supremacy over UK law, a court, informed by the understanding of the purpose of the Directive, can give the regulation a conforming interpretation by using firstly the Marleasing general principle of EU law and secondly the doctrine of supremacy of EU law so as to interpret the domestic regulation to give effect to the intention of the EU Directive. For instance
- 42.1 One example affects tens of millions of worker who benefit from holiday pay rights. The application of direct rights, supremacy and general principles have meant that previous Court decisions have been overruled so that workers are entitled to the same pay that they earn at work when on holiday, or that workers who are misled as to their working status don't lose holiday pay when their employer refuses to pay them their entitlement;
- 42.2 Another example is the definition of worker, or in the discrimination context the definition of employee, which status has been read, as a result of EU law, as extending health and safety rights and many other rights such as holiday pay and discrimination law to a wide range of workers such as gig workers and other atypical workers. This litigation has taken over 20 years culminating in the Supreme Court's decision in *Uber* which has brought a measure of certainty. All of this would now be less certain and could reopened.²⁶

²⁵ *Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89

²⁶ *Allonby v Accrington and Rossendale College* [2004] ICR 1328 applied by hundreds of decisions of Tribunals as exemplified by *Jivraj v Hashwani* [2011], *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29, *Uber v Aslam* [2021] UKSC 5 on the meaning variously of section 83(2) Equality Act 2010, Section 230(3)(b) Employment Rights Act 1996 and

43. The meaning and understanding of the regulations has taken years and many different appeal cases (at great individual expense) to give the certainty of understanding of the law that we now enjoy. For instance, litigation began in 2001 over whether workers were able to carry over annual leave if they were too sick to take it. This was finally settled many cases later by *Plumb* in 2015 with a carry-over right of up to 18 months.²⁷ This is not unusual. The common law incrementally decides issues before a settled understanding emerges. The default of the Bill is to sweep all this accrued understanding away and not provide any clear statement of what the law will be going forward.
44. If Government does not want to change the settled meaning of UK law as it is understood today, then it would need to audit all the conforming interpretations that have affected regulations from court decisions and translate those court decisions into the body of the new or replacement regulations.
45. If that is not done, and that is a policy decision for the Government, then even if all the regulations were preserved, the abolition of direct application, supremacy and general principles will result with the UK waking up on 1 January 2024 to a New Year where large swathes of employment law that no lawyer will be able to accurately predict or advise upon, causing uncertainty for workers and employers.

What powers does the Bill give the Government to change Employment law?

46. The Bill grants the Government very wide powers to change or not to change employment law. The Bill also grants the Government powers not to abolish EU effects in respect of certain law.
47. The powers of the Government include retaining EU law and the principles of supremacy and general principles such as:
 - 47.1 The power to keep retained EU law and the principle of EU supremacy of that retained EU law in respect of specific provisions;²⁸
 - 47.2 The power to restate law where the default effect of restatement is to give effect to Clauses 3, 4 and 5 of the Bill but that, on the other hand, the restatement could also create an equivalent effect to supremacy of EU law and/or the general principles of EU law;²⁹
 - 47.3 The power to revoke regulations earlier than the end of December 2023 and not replace them;³⁰

many of the rights under Regulations framed in the same was as Section 230(3)(b). In Health and Safety law the effect of *R (on the application of IWUGB) v Secretary of State for Work and Pensions* [2021] ICR 372 which resulted in amended regulations being approved by Parliament coming into force on 6 April 2022.

²⁷ *Commissioners of Inland Revenue v Ainsworth* [2005] IRLR 465, *Stringer v HMRC* [2009] IRLR 214, *NHS Leeds v Lerner* [2012] IRLR 825, *Sood Enterprises Ltd v Mr Colin Healy* UKEATS/0015/12/BI, *Plumb v Duncan Print Group Ltd* [2015] IRLR 711

²⁸ Clause 8 The Bill

²⁹ Clause 12 The Bill

³⁰ Clause 15(1) The Bill

- 47.4 The power both to revoke the regulations and replace them with regulations that meet the same objectives;³¹
- 47.5 The widest of all powers whereby the regulations can be revoked and replaced by the Government with whatever they think is appropriate. Unlike the other parts of clause 15 this is subject to an affirmative resolution.³²
48. There is a fetter on all the powers in that any changes under clause 15 may not increase the regulatory burden so that clause 15 provides a one way street only for deregulation.³³ This is problematic because the one concrete way in which to challenge Government regulation under the Bill is if it introduces new regulatory burdens. This ties the hand of the Government that may wish to provide balance in a regulation by reducing some rights but enhancing others. The Bill would appear to allow challenge to the enhancements but not to the reduction.

What business is it of lawyers to give this opinion?

49. We have no policy view. We simply set out the effect and potential effect of the Bill.
50. If passed the Bill would mean that swathes of well understood, settled employment law and the principles to interpret them are put on a doomsday clock by the end of 2023 if Government does not act.
51. The Bill would then give Government wide powers to revoke, amend and change legislation. We note that those wide powers include de facto maintaining the effect of the status quo. However, once passed the Government would have to take positive steps to make this so.
52. The Government would be giving itself so much to do in 2023. Parliament might be faced by rafts of legislation in 2023 where the Government introduces new, rewritten legislation, under the affirmative procedure but with inadequate time for proper consideration.
53. Legislators may then be faced with an unenviable choice – affirm the new rewritten regulations with inadequate consideration or let the current regulations lapse so that no rights were protected.
54. The practical effect for businesses and workers would be uncertainty, lack of predictability as to the meaning of the law with the increased costs from litigation and appeals as meaning of the laws are redefined. Where employment law is unpredictable, as would be the case here, that can not only create costs for our clients both employees and employers but also reduce investment because businesses would no longer be able to predict the effect of laws.
55. Employment Tribunal proceedings can often take more than two years to resolve due to the backlog that existed before Covid and the further backlog contributed to by Covid and the reduction in sitting days available to Tribunals. Therefore, it will take

³¹ Clause 15(2) The Bill

³² Clause 15(3) The Bill

³³ Clauses 15(5) and 15(10)

many years for the first cases even to reach a first instance appeal and then further time as the many cases are resolved that would be required to restore employment law to its current level of predictability. That choice is, of course, for Government and politicians and not for ELA. However, we have set out above the potential consequences and ramifications of the Bill.

56. ELA reaffirms its apolitical status and its willingness to inform and counsel Government and Parliament, including meeting legislators and giving evidence to committees and officials as to matters that may affect employment law and how it is used by workers and employers.

The Working Party

Louise Taft, Chair of ELA Brexit Standing Committee
Catrina Smith, Chair of ELA Legislative and Policy Committee
Paul McFarlane, Chair of ELA
Caspar Glyn KC, Deputy Chair of ELA
Brian Campbell, ELA Brexit Standing Committee
Kiran Daurka, ELA Brexit Standing Committee
James Davies, ELA Brexit Standing Committee
Robert Davies, ELA Brexit Standing Committee
Arpita Dutt, ELA Brexit Standing Committee
Clare Fletcher, ELA Brexit Standing Committee
Eric Gilligan, ELA Brexit Standing Committee
Alan Jones, ELA Brexit Standing Committee
Anthony Korn, ELA Brexit Standing Committee
Esther Langdon, ELA Brexit Standing Committee
Louise Mason, ELA Brexit Standing Committee
Charlotte Pettman, ELA Brexit Standing Committee
Bruce Robin, ELA Brexit Standing Committee
Sybille Steiner, ELA Brexit Standing Committee
Michael Whitbread, ELA Brexit Standing Committee
David Widdowson, ELA Brexit Standing Committee

APPENDIX 1

OVERVIEW

EU Legislation	UK Enactment	Summary Effect of Legislation	Summary Assessment of the Impact of Bill's proposals on employers and/or employees	Short summary of effect of the Bill
Directive 91/533/EEC obligation on employer to inform employees of the conditions applicable to the contract or employment relationship	Parts of Ss 1-4 Employment Rights Act 1996	To require employers to provide key information about the terms of employment contract to employees in writing	Medium	This Directive is reflected in UK primary legislation but the interpretive principles that affected it as retained legislation through which primary legislation would be interpreted can no longer be used. The meaning of the law may be uncertain.
Directive 92/85/EEC Pregnant Workers Directive	Employment Rights Act 1996, Management of Health and Safety at Work Regulations 1999 Social Security Contributions and Benefits Act 1992	Relates to the health and safety at work of workers who are pregnant, have recently given birth or are breastfeeding	Medium / High	This Directive is reflected in both UK primary and secondary legislation. The secondary legislation may be revoked unless the Government acts positively to retain it. This Directive is reflected in UK primary legislation but the interpretive principles that affected it as retained legislation through which primary legislation would be interpreted can no longer be used. The meaning of the law may be uncertain.
Directive 94/33/EC on the protection of young people at work	Children and Young Person Act 1933 Working Time Regulations	Limits the employment and hours of work of young people	High	See notes on the WTR in Appendix 2
Directive 96/71/EC Posted Workers Directive as amended by Directive 2018/957/EU	Posted Workers (Enforcement of Employment Rights) Regulations 2016 Posted Workers (Agency Workers) Regulations 2020	Requires employers to ensure workers posted to the EU benefit from certain local terms and conditions of employment	Low/Medium	UK employees working in the EU will no longer be able to require their UK employers to ensure that their terms and conditions of employment are on a par with locally employed colleagues.

Directive 97/81/EC on part-time work	Part Time Employees (Prevention of Less Favourable Treatment) Regulations 2000	Establishes the principle of non-discrimination on the basis of part-time work and that e.g. part-time employees should benefit from the same terms and conditions (pro rata) as full-time employees	High	UK employees who work part-time would no longer have the protection of parity of terms requirements.
Directive 98/59/EC On collective redundancies	Chapter II Trade Union and Labour Relations (Consolidation) Act 1992	Sets out the requirement for collective consultation and the notification of a relevant public body in the event of a collective redundancy	Medium / High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied. The meaning of the law may be uncertain. However, ss198A and B (pre-transfer consultations) would be rendered obsolete if TUPE were no longer in force.
Directive 99/70/EC on the protection of fixed term workers	Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002	Establishes the principle of non-discrimination for fixed term workers such that they have the right not to be treated less favourably than permanent employees in relation terms and conditions unless objectively justified.	High	Fixed term employees would no longer have the right to no less favourable terms or to be informed about permanent roles.
Directive 2000/43/EC Equal treatment irrespective of racial or ethnic origin	Equality Act 2010	Directive to combat discrimination on the grounds of racial or ethnic origin	Medium / High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied.
Directive 2000/78/EC	Equality Act 2010	Establishes a general framework for equal	High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied such as, for

Equal Treatment Directive		treatment in employment and occupation and combatting discrimination on the grounds of religion or belief, disability, age or sexual orientation		instance, the general principles that extend coverage to atypical working relationships. Equal Pay rights would be considerably eroded.
Directive 2001/23/EC Acquired Rights Directive	Transfer of Undertakings (Protection of Employment) Regulations 200	Contains the principle of automatic transfer of employment and the protection of employees on the sale of a business	High	In the event of a business sale, employees would no longer automatically transfer to the buyer of the business and would no longer have protection against dismissal or of their terms and conditions of employment. Note that TUPE goes further than required by the Directive in containing TUPE obligations and rights on insourcings, outsourcings and changes of service provider. Query therefore whether the service provision change rules would, absent action by the Government, survive.
Directive 2001/86/EC Involvement of employees in European Companies	European Public Limited Liability Company (Employee Involvement) Regulations 2009	Establishes the principle of employee involvement in European Companies	Low	
Directive 2002/14/EC Establishes a framework for the information and consultation of employees	Information and Consultation of Employees Regulations 2004	Provides for the establishment of national works councils	Medium	Works councils have not been widely adopted by UK employees and employers. However, consideration should be given to the effect of repeal on existing works council arrangements.
Directive 2002/15/EC Working time in the transport sector	Road Transport (Working Time) Regulations 2005	Sets limits on working time for those in the transport industry and provides for rest breaks and regulates night work	High in sector	See general commentary on WTR
Directive 2003/88/EC Working Time Directive	Working Time Regulations 1998	Sets limits on working time, provides for rest breaks, regulates night work and provides	High	The fact that the UK had negotiated a derogation from the Directive in that employers and employees could voluntarily agree to opt out of the 48 hour week lessened the impact of the WTD in the UK. However, workers are still protected if they do not agree to opt out of the limit and, in

		for paid holiday		any event have fall back protections in the shape of minimum rest breaks on a daily and weekly basis. The WTR also gave a statutory right to minimum paid holiday in excess of the requirements of the Directive. While many employees have a contractual right to paid holiday, lower paid and atypical workers in particular benefited from a statutory right to paid holiday.
Directive 2006/54/EC Equal Treatment Directive as regards men and women (re-cast)	Equality Act 2010	Establishes the principle of equal treatment as between men and women regarding access to employment, training, promotion, working conditions and pay and prohibits harassment	High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied. The three principles often give the rights real effect.
Directive 2008/94/EC Covers the protection of employees in the event of insolvency	Employment Rights Act 1996	Requires the state to step in to support employees who are affected by the insolvency of their employer	Low / Medium	The requirements are contained in primary legislation but the interpretive principles that are abolished are not often used in respect of that legislation so the effect is likely to be low / medium.
Directive 2008/104/EC On temporary agency work	Agency Workers Regulations 2010	Entitles agency workers to the same basic working and employment conditions as if they had been employed directly, to access collective facilities and to be informed of vacancies at the employer	High	The Supreme Court will consider in 2023 some of the rights under this regulation. Agency workers' rights to parity after 12 weeks depend, to a large extent, on the three principles and their effect.
Directive 2009/38/EC European Works Councils	Transnational Information and Consultation of Employees Regulations 1999	Regulated the establishment of European works councils in businesses with sufficient	Low	UK employees no longer covered by the EWC Directive once the UK left the EU.

		numbers of employees in more than one member state		
Directive 2010/18/EU On parental leave	Employment Rights Act 1996 and the Maternity and Parental Leave etc Regulations 1999			The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied. The three principles often give the rights real effect.
Directive 2016/943/EU Trade Secrets Directive	Trade Secrets (Enforcement etc) Regulations 2018	Gives trade secret holders remedies for breaches of confidence	Low	

APPENDIX 2

DETAILED CONSIDERATION OF THE EFFECTS ON EU LEGISLATION

This Appendix considers in more detail the effects of the Bill on Regulations which cover but three key areas of employment law that we as practitioners encounter regularly.

Equal Pay

1. Retained EU law plays a significant role within equal pay law. While the Equal Pay Act 1970 came into force before the UK joined the EU, EU law has shaped and influenced equal pay law within the UK for over 4 decades.
2. The uncertainty of removing retained EU law in relation to settled equal pay law, which is a complex area of equality protections affecting mostly women, is likely to be significant. Much of the case law over the years has brought clarity and added protections to female workers, including:
 - a. who they can compare themselves to;
 - b. a greater understanding as to what amounts to a stable employment relationship during which the employer is liable for inequality; and
 - c. establishing how discrimination can be shown where particular disadvantage is difficult to prove allowing a woman to use significant statistics to show a difference in pay.
3. A recent example of retained EU law being applied to a British case relates to the issue of comparability – namely, against who can a claimant compare herself in order to establish a right to equal pay. Statute requires a claimant to compare her terms of employment to that of a real comparator. Under the Equality Act 2010, an equal pay claimant (A) can only rely on a comparator (B) working for the same employer or an associated employer at a different establishment if "common terms" apply at the establishments (either generally or as between A and B) (*section 79(4)*).
4. To date, it has been possible to rely, alternatively or additionally, on Article 157 of the TFEU, which enables a Claimant to compare herself against employees in the same establishment or service and where the terms and conditions are attributable to a single source. In a reference to the CJEU just before the withdrawal of the UK from the EU³⁴, the Watford Employment Tribunal sought clarification as to whether the concept of "single source" applied in equal pay cases where the claims are about equal value. The question was answered after the UK's exit from the EU and confirmed the position that Article 157 can be relied upon in equal value claims. This is allowing mostly female supermarket shopworkers to compare themselves with mostly male colleagues working in distribution.

³⁴ *K & others v Tesco Stores Limited* (C-624/19)

5. Prior to the reference being made, a number of cases in the UK had considered the concept of single source and, dependent on the facts, either held that there was no single source to which pay inequality could be attributed³⁵ or accepted that there could be a single source³⁶. *The reference to the CJEU in K & others did not alter retained EU law, and the single source test had been considered by our courts on more than one occasion in the past in relation to equal pay claims, particularly in claims where comparators are cross-establishment and employed by the same employer.*
6. In the event that the EU concept of single source is removed from equal pay law, the consequence will be that some claimants will have live claims reliant on the single source test, while future claimants with the same claims will only be able to rely on the domestic law, giving rise to different gateways into the same litigation.

Working Time

7. Clauses 1-2 of the Bill set the defaults to abolish the following rights:
 - a. Maximum hours not just for workers in general (which can be opted out of)³⁷ but also for safety critical workers such as airline pilots³⁸, sea-fisherman³⁹ and HGV drivers;⁴⁰
 - b. The daily limit of 8 hours per day or the limit of 40 hours per week for children;⁴¹
 - c. Restrictions on night work due to the health and safety consequences of it and provision of health assessments on being assigned to such work;⁴²
 - d. The right of a worker to a rest break where their works poses a risk to their health and safety plus a 20 minute default break in their shift and a break from work each day and a day off every week or 2 days off every 14 days with an obligation to keep records to ensure that the rights are vindicated;⁴³
 - e. Exceptions to the rules about daily and weekly rest breaks for emergencies and other justifiable business reasons as well as an exception for a worker when they change their shift pattern;⁴⁴
 - f. Paid holidays at the same rate of pay that a worker should get when they are working for 4 weeks of the year, a right to a balancing payment if the worker leaves not having taken their leave entitlement and restrictions on a worker taking too much leave in their first year of employment;⁴⁵

³⁵ Robertson v DEFRA [2005] IRLR 363

³⁶ Asda Stores Ltd v Brierley [2019] EWCA Civ 44

³⁷ Regulation 4 Working Time Regulations 1998.

³⁸ Regulation 9 Civil Aviation (Working Time) Regulations 2004.

³⁹ Regulation 6 Fishing Vessels (Working Time: Sea-fishermen) 2004.

⁴⁰ Regulation 4 Road Transport (Working Time) Regulations 2005.

⁴¹ Regulation 5A Working Time Regulations 1998.

⁴² Regulations 6A and 7 Working Time Regulations 1998.

⁴³ Regulations 8, 9, 10, 11 & 12 Working Time Regulations 1998.

⁴⁴ Regulations 21, 22, 23 and 24 Working Time Regulations 1998.

⁴⁵ Regulations 13, 14, 15A and 16 Working Time Regulations 1998.

- g. The right of an employer to determine when leave is taken so that it can regulate its business;⁴⁶
 - h. The right of an NHS worker who has worked through the pandemic and been unable to take their paid annual leave, to carry that leave over;⁴⁷ and
 - i. An ability to claim compensation for breach of these rights or where annual leave payments are not made.⁴⁸
8. Clauses 3-5 of the Bill abolish Direct effect rights, the supremacy of EU law and general interpretive principles of EU law. This has the default effect of
- a. Abolishing the right of workers whose employer has misled them as to their working status and evaded paying any holiday pay during the whole of their employment so that the worker will get nothing and the rogue employer is unjustly rewarded for the evasion of legal rights;⁴⁹
 - b. The right to holiday pay that reflects normal pay at work so that holiday pay would no longer reflect bonuses, commission or overtime;⁵⁰
 - c. The right of a sick worker to carry over leave for up to 18 months when they are too sick to take paid annual leave;⁵¹ and
 - d. The principle of effectiveness so that where a right is breached then an effective remedy must be provided where the procedural requirements must not make it virtually impossible or excessively difficult to exercise the rights conferred under the regulations.⁵²

Transfer of Undertakings

9. The Bill would result in the following:
- a. employees would no longer transfer automatically on the transfer of a business. The automatic transfer of employees on a change of service provider, insourcing or outsourcing is also likely to be affected, although the precise impact of the Bill is unclear given that the service provision change rules were introduced by the UK government to help provide certainty for businesses and therefore "gold plate" the EU directive;
 - b. Most of the liabilities associated with the employees would remain behind with the transferor and no longer transfer to the transferee (though continuity of service for those employees taken on by a buyer or new service provider would be preserved under the Employment Rights Act 1996);

⁴⁶ Regulation 15 Working Time Regulations 1998.

⁴⁷ Regulation 13(9)-(13) Working Time Regulations 1998.

⁴⁸ Regulation 30 Working Time Regulations 1998.

⁴⁹ *The Sash Window Workshop Ltd v King* [2015] IRLR 348, *Smith v Pimlico Plumbers* [2022] IRLR 347

⁵⁰ *Evans v Malley Organisation Ltd t/a First Business Support* [2003] IRLR 156 *Bamsey v Albon Engineering & Manufacturing* [2004] IRLR 457, *Robinson-Steele v RD Retail Services Ltd* [2006] ICR 958, *Lock v British Gas* [2014] ICR 813, *Dudley Metropolitan Borough Council v Willets* [2017] IRLR 870, *East of England Ambulance Service NHS Trust v Flowers* [2019] IRLR 798;

⁵¹ *Commissioners of Inland Revenue v Ainsworth* [2005] IRLR 465, *Stringer v HMRC* [2009] IRLR 214, *NHS Leeds v Lerner* [2012] IRLR 825, *Sood Enterprises Ltd v Mr Colin Healy* UKEATS/0015/12/BI, *Plumb v Duncan Print Group Ltd* [2015] IRLR 711

⁵² *Levez v T. H. Jennings (Harlow Pools) Ltd* [1999] ICR 521 CJEU §82

- c. Employees would no longer have additional protection against dismissal by reason of a transfer and their terms and conditions and any collective agreements relevant to them would no longer be protected;
- d. Trade union recognition would no longer be protected; and
- e. Employees would no longer have the right to have their representatives informed and consulted about a potential transfer.

10. The impact of the above would be that:

- a. buyers of businesses, and new service providers and their clients would no longer be able to expect that the workforce would, by and large, be retained. While employees do not have to transfer, they do so automatically unless they object. In the absence of TUPE, the parties would have to go through an offer and acceptance process which could result in greater attrition and loss of key personnel, skills and individual and collective knowledge which in turn could undermine deal certainty;
- b. If employees no longer transfer automatically, business sellers and transferors will be left with stranded severance costs which may include notice pay and redundancy costs. At the moment there are significant numbers of out-sourcing arrangements in both the private and public sector which have been entered into on the understanding that, on termination, the employees would transfer to the new provider and the current provider would not be left with these costs; and
- c. Bidders for businesses and outsourcing contracts would be able to undercut each other by planning detrimental changes to terms and conditions or the size or location of the workforce - whereas at present, all bidders have, to this extent at least, to play on a level playing field and reduce costs by e.g. innovation and new ways of working.