

# **STANDING AT A CROSSROAD: BREXIT AND THE FUTURE OF WORKERS' RIGHTS**

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# Introduction

The end of the transition period on the 1st January 2021 was a significant milestone for the United Kingdom, representing complete withdrawal from the European Union and the beginning of a new relationship with Europe. The UK is no longer required to remain in step with Brussels on a variety of policy areas, including employment legislation. In recent months, speculation has focused on how the balance between regulations and worker protections could change to facilitate a post-Brexit vision of a low-regulation, low-tax economy, referred to by many of its proponents as 'Singapore-on-Thames.'<sup>1</sup>

In order to get beneath the speculation, we've conducted a literature review and held a series of expert interviews with individuals spanning academia, trade unions and EU agencies, aiming to understand the risks and opportunities potential future scenarios present for the UK's rights and protections landscape.

This briefing explores what divergence from the EU could mean in practice for different worker groups. But it is important to recognise that the relationship between EU workers' rights and national law is complex. EU directives ensure the balance between regulation and worker protections by maintaining a level playing field. This concept has two central aims; preserving minimum standards and guaranteeing that no member state has a competitive advantage over another. Nevertheless, these directives all contain in-built flexibility, and serve as a 'floor', with states having authority to go further if they choose. Indeed, the UK has a history of going above the minimum standards set by the EU in a variety of areas, including annual leave, paternity leave and pay, and the right to request flexible working for all employees.

Therefore, it is conceivable that the UK diverges below EU standards on some areas, but goes beyond EU requirements on others. Rather than a linear trajectory in a single direction, the future landscape of workers' rights and protections is therefore better framed as a set of complex decisions for policymakers, employers and workers to contend with over the coming years. Any changes are likely to be incremental, particularly given that policymakers will need to focus on the socioeconomic impacts of Covid-19 over the short term. As a result, this briefing takes a longer-term view in mapping out potential scenarios for change.

## Workers' rights and protection issues prior to Brexit and Covid-19

Insecurity in the UK labour market has been steadily increasing, while simultaneously a series of long-term trends driving changes in the way we work, including casual work without guaranteed hours and rising self-employment and platform work. For some, these trends have increased flexibility and driven improvements in their working lives. For others, these changes have heightened insecurity, having brought about 'one-sided flexibility.'<sup>2</sup> Although employment levels held up relatively well in the wake of the 2008-09 financial crash, this was associated with unprecedented reductions in the real level of earnings, particularly by comparison with the level that might have been expected in the absence of the recession. By 2014, real wages – both per week and per hour – dropped by around 9% compared with their peak levels in 2008.<sup>3</sup> The precipitous drop in real earnings indicates the types of jobs being created. In other words, the economic recovery was achieved by low paid, and often insecure, forms of employment.

This point was reinforced by an interviewee, who made the case that the prevalence of shorter fixed term or temporary contracts and the increasing use of third-party labour contractors have made it harder for UK workers to enforce their rights. Furthermore, they highlighted that increased use of contracting and agency work has limited the reach of emergency interventions introduced in response to Covid-19 among some of the most insecure workers. While workers without guaranteed hours and agency workers would qualify for support through the furlough scheme, this is contingent on their employer allocating shifts that would then be subsidised through the scheme. Incentives and obligations for employers to complete the paperwork necessary are limited, and workers who feel they should have been furloughed have no route to challenge the decision. We can see that, in this instance, these longer-term trends have meant that many workers aren't seeing the benefit of the UK's more ambitious worker rights and employment support measures as access isn't universal.

The longer-term trend towards heightened labour market insecurity is compounded by deep structural inequalities that characterise the UK labour market. Women, parents and carers, black and minority ethnic and disabled workers face particular barriers to entering and progressing in the labour market, and are more likely to be in

insecure work.<sup>4</sup> The employment rate among disabled people is 54%, compared with 82% among non-disabled people,<sup>5</sup> and disabled people in work are less likely than their non-disabled counterparts to be employed as managers, directors or senior officials, or to be employed in professional occupations.<sup>6</sup> Additionally, Black and Minority ethnicity workers face significant pay gaps, particularly among workers born outside the UK<sup>7</sup>, and workers in particular ethnic groups may be more vulnerable to being paid below the living wage.<sup>8</sup>

In 2017, The Taylor Review of Modern Working Practices found that the labour market was

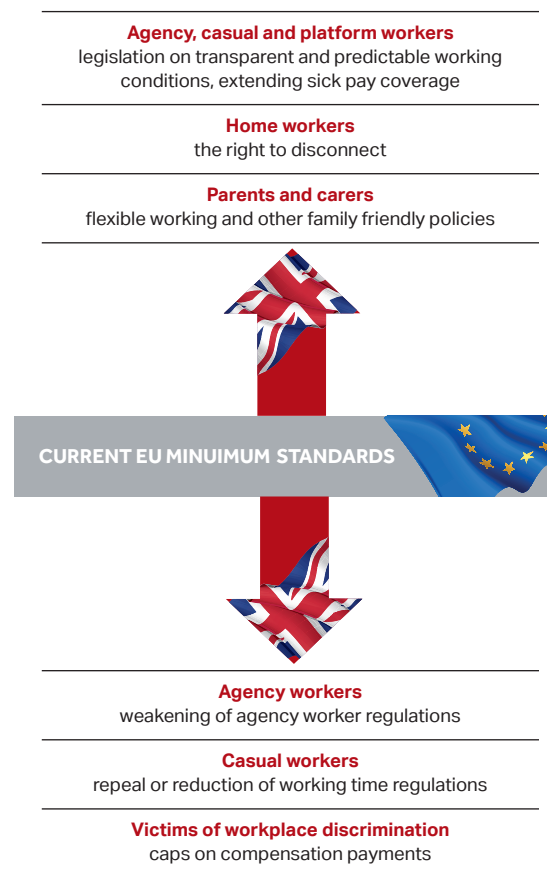
changing due to the emergence of new business models and different forms of 'gig economy' working. The review focused on three areas: tackling exploitation, increasing clarity in the law and helping people to know and exercise their rights. One of the key recommendations was the creation of a single enforcement body for employment rights.<sup>9</sup> In response to this review, the Government published the Good Work Plan in 2018, which accepted many of the recommendations and set out their vision for the future of the UK labour market.<sup>10</sup> Legislation in this area is planned in the form of the Employment Bill, but we still don't know when this will happen or what form it will take.

## What could change post Brexit? Understanding divergence from the status quo

There have been signals over the last ten years that support for a more deregulated UK labour market is growing, with key figures within the UK Government expressing ambitions to relax elements of employment legislation.<sup>11</sup> The groups of workers who would be most at risk are those who are affected by rising insecurity and structural inequalities, as set out above. A legal expert that we spoke to highlighted that 'those who are most likely to lose are the ones who don't have employee or worker status, as they are often the most precariously employed.'

With the UK no longer an EU member, there is potential for significant changes to regulations and legislation affecting workers in both the UK and at the EU level. Changes to either framework would move us away from having a similar set of rights and protections to workers in the EU, either as worker protections worsen (which we describe as diverging down) or because they improve (framed here as 'diverging up'). It is important to note that neither the literature review or stakeholder interviews raised the possibility that the EU will diverge below the minimum standards that it has already established.

**figure 1 - Illustrative examples of how the UK might diverge up or down from the EU on workers' rights**



## UK 'diverging down'

A literature review found a series of proposed changes to regulations and rights in the UK. The Red Tape Challenge, launched in 2011 by the coalition government aimed to reduce 'unnecessary' regulation, identified areas of equality legislation as being within scope.<sup>12</sup> Additionally, Adrian Beecroft's 2011 report on employment law identified equality legislation and agency worker regulations as key areas 'impeding on efficiency and competitiveness', and also suggested the introduction of exemptions from certain regulations for small businesses.<sup>13</sup>

It is important to note that the UK diverging down would constitute deviating from the level playing field as enshrined in the Brexit deal, which would result in consequences in the form of trade sanctions imposed by the EU. Nevertheless, all interviewees thought that change over the coming months and years is likely. When asked to highlight key areas of rights and protections where divergence below the current EU minimum standards is likely, working time regulations, agency worker regulations, caps on compensation claims for discrimination, and exemptions for small businesses were consistently emphasised.

### Changes to working time regulations

Changes to the Working Time Directive could potentially include removing the 48-hour limit to the working week or altering eligibility for holiday pay. This was recently proposed through the now cancelled post-Brexit review of workers' rights<sup>14</sup>, and may present an area of focus for the Prime Minister's new Taskforce on Innovation, Growth and Regulatory Reform.<sup>15</sup> Under the directive, requests to work longer hours would currently be deemed 'unreasonable', meaning that a worker who refused to take on additional hours couldn't be dismissed on that basis. Changes to the directive could have particular impacts for some workers groups. For example, the exclusion of overtime hours in calculating holiday pay, could drastically impact casual workers such as those on zero hours or part-time contracts heavily reliant on overtime.

### Changes to agency worker regulations

Agency worker regulations ensure they have to be treated the same as employees from day one of an assignment with respect to benefits such as eating facilities, childcare provision and work-related transport. Crucially, agency workers who have been with the same firm for 12 continuous weeks have the right to equal paid holiday and the same automatic pension enrolment as those doing the same job as workers or employees.<sup>16</sup> In 2016 The Resolution Foundation found that there were 865,000 agency workers in the UK (3% of the total workforce) projecting this number to exceed 1 million before the end of 2020.<sup>17</sup> As a result, any changes to the legislation on agency workers could have an impact on a significant portion of the workforce.

It has been claimed that agency worker regulations are 'unwieldy, unpopular with business and not noticeably popular with workers either.'<sup>18</sup> Although the regulations hadn't come into place at the time of Beecroft's report on Employment Law, he recommended that their implementation would lead to 'damaging results.'<sup>19</sup> Almost all interviewees raised the possibility of changes to agency worker regulations, with one stating that 'we're very concerned about agency worker rights being diluted.'

Agency workers are more likely to be from groups that suffer wider labour market and societal inequalities. They are more likely to be younger and less qualified than the overall workforce, and those from BAME backgrounds form a disproportionately large share of the UK's agency workforce: 19% of the agency worker population is from an ethnic minority, compared with just 12% of the overall workforce. Members of the Black, African and Caribbean labour force are more than three times as likely to be agency workers than average.<sup>20</sup>

### Caps on compensation payments for discrimination

In his 2011 report on employment law, Adrian Beecroft recommended introducing a cap on compensation payments for employment discrimination.<sup>21</sup> Until now, EU rules have prevented UK government ministers from doing so. In 2013, the UK Government introduced a new law to amend the limit on compensation for unfair dismissal,



which is not protected in EU law.<sup>22</sup> Now that we have left the EU, the government would also be able to apply this policy to discrimination. This would affect workers with protected characteristics under the Equality Act 2010 – which includes age, sex, race, disability, sexual orientation, and religion.<sup>23</sup> Successive Governments have stated ambitions to improve fairness and inclusion at work, but limiting compensation for discrimination could undermine this, by dissuading victims and whistle-blowers from raising discrimination issues within organisations.

### Exemptions from existing regulations

Another route for divergence could be changing the application of existing regulations. For example Beecroft's report on employment law proposed exemptions for small businesses in a variety of areas, including unfair dismissal, pension auto-enrolment, flexible parental leave and equal pay audits.<sup>24</sup> This would impact a significant portion of the workforce, as according to the Federation of Small Businesses at the start of 2020 employment in small businesses (with 0 to 49 employees) was 13.3 million, equating to 48% of total employment.<sup>25</sup>

Another way that the application of existing regulations could be amended is via the introduction of freeports; secure customs zones where goods can be imported, manufactured, stored and exported without being subject to customs duties.<sup>26</sup> Government consultation document states that regulatory flexibility is one of the aims of establishing freeports, raising the risk that workers' rights and the quality of jobs will be reduced in freeport areas.<sup>27</sup> However, it is significant that we aren't seeing business voices calling for changes to or exemptions from existing regulations, with the increased focus on attracting investment to support the recovery, this area could soon be back in focus.

## EU 'diverging up'

'Diverging up' could occur in some areas as the EU advances new worker rights and protections which would no longer apply to the UK. Key areas where this is expected include the 'right to disconnect', transparent and predictable working conditions and improving working conditions in the gig economy. In the following section, we explore these possibilities and what equivalent developments in the UK landscape could look like. Most interviewees agreed that these changes in the EU would be likely, although one interviewee suggested that it 'would be an interesting political cost choice for the EU if they decide to unilaterally as a block go up if the UK does not.' In such a situation, the EU would be effectively handing the UK a competitive advantage in terms of trade. Could the UK now be a brake on the political will of the EU member states to be more progressive?

### The right to disconnect

Recently, a majority of the European Parliament voted in support of introducing the 'right to disconnect'.<sup>28</sup> The 'right to disconnect' refers to a worker's right to be able to disengage from work and refrain from engaging in work-related communications, such as emails or other messages, during non-work hours.<sup>29</sup> On a national level, France is considered to be a pioneer in legally recognising this new right. Since 2017, employers in France with more than 50 workers are obliged to draw up a charter of good conduct, setting out the hours when staff are not supposed to send or answer emails.<sup>30</sup>

Almost all workers would benefit from this new rule aimed at promoting better work-life balance, especially those working exclusively from home during the pandemic. Research by Eurofound in April 2020 found that 27% of people working from home reported that they had worked in their free time to meet work demands, and 28% of those working from home report working in their free time every day or several times a week, compared to 8% of office workers.<sup>31</sup> A significant number of workers in the UK would stand to benefit if this right was introduced, with nearly 47% of people in employment doing some work at home by April 2020.<sup>32</sup> As highlighted by one interviewee, 'the regulations we have at the moment are not sufficient for this kind of new, digitalized working environment.'

## New Directive on Transparent and Predictable Working Conditions

The new Directive on Transparent and Predictable Working Conditions, which will be implemented across all member states by 2022, sets new rights for all workers in the EU, particularly addressing insufficient protection for workers in more precarious jobs. It aims to ensure that these rights cover all workers in all forms of work, including those in the most flexible non-standard and new forms of work such as zero-hour contracts, casual work, domestic work, and platform work.

While the UK Government committed to take forward some of the Directive's provisions in its December 2018 Good Work Plan, including a new requirement for written statements<sup>33</sup> most of the substance of this directive is not currently covered by UK law.

Stakeholders highlighted that workers should be given the right to a contract reflecting the normal hours of work, and that there should also be robust rights around notice of shifts and compensation for cancelled shifts, 'then you would basically come down on some of the abuses of zero hours contracts. Those contracts are the most obvious examples of insecure work.'

The upcoming Employment Bill may address this, with the right to advanced notice of shifts and shift changes was a Taylor Review recommendation accepted by the government. This proposal will be critical in improving the rights of some of the most insecure workers, and should therefore be prioritised.

## Improving working conditions in the gig economy

President Ursula von der Leyen recently confirmed that an ambition to improve the working conditions in the platform economy as one of the key new initiatives for EU in 2021.<sup>34</sup> The European

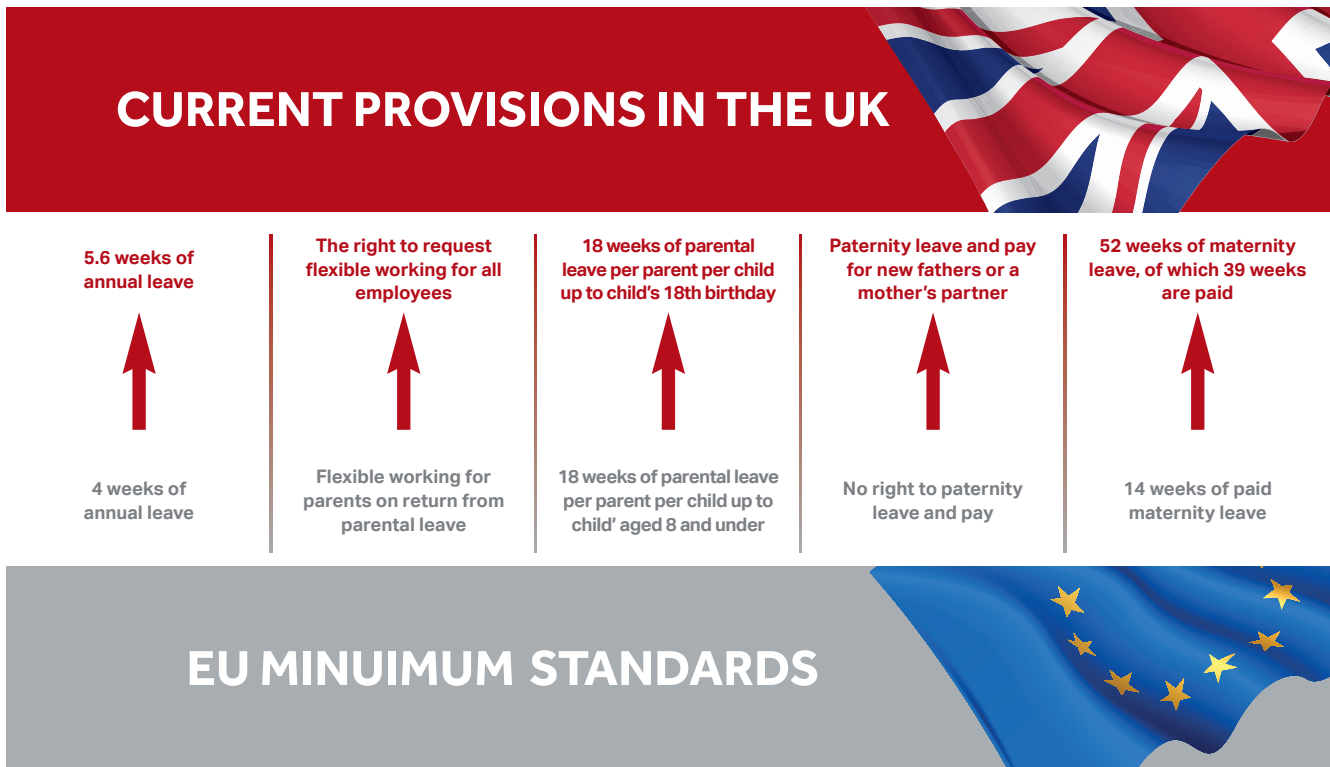
Commission is currently consulting with trade unions and employers' organisations on the need and direction of possible EU action in this area.<sup>35</sup> While platform workers are not a homogenous group – they are spread across a variety of sectors and occupations – any changes in this area will likely be targeted towards improving conditions for the most insecure platform workers. This issue is already on the agenda in the UK to some extent, with extending rights and protections to platform workers featuring in the recommendations of the Taylor Review of Modern Working Practices,<sup>36</sup> and the more recent Supreme Court ruling that Uber drivers should be classed as workers rather than self-employed contractors.<sup>37</sup>

Platform work was raised as a key area with scope for improvement within the UK by almost all interviewees. A legal expert that we interviewed made the case that those working in the gig economy are currently among the least protected workers, and as such the presumption of employee status could be introduced, opening the door to a range of rights. They acknowledged the potential difficulties in doing so, and suggested that if this was not feasible, platforms should be made responsible for certain rights, regardless of how their workers are classified. In addition, COVID-19 has shone a light on the need for a proper safety net of sick pay is crucial. As self-employed contractors, platform economy workers in the UK don't currently have access to sick pay, and platforms should therefore ensure that their workers have access to sickness benefits.

## UK 'diverging up'

In the past, the EU has acted as a floor rather than a ceiling, and many workers' rights in the UK are not contingent on EU legislation. Indeed, the UK has a history of going above the minimum standards set by the EU in a variety of areas:

figure 2 - Examples of where UK policy exceeds minimum EU standards



This precedent of going beyond the minimum, and the Business Secretary's recent affirmation that "We are not going to lower the standards of workers' rights ... We want to protect and enhance workers' rights not row back on them"<sup>38</sup> suggests that the UK will continue to be ambitious about workers' rights and protections. But what should that ambition look like?

The recommendations set out in the Taylor Review represent a positive step in the right direction, and are expected to comprise the bulk of the upcoming Employment Bill. However, this agenda can and should be taken further in the months and years ahead. As one interviewee put it, the upcoming Employment Bill is 'an opportunity to implement the missing bits of the Good Work Plan.'

With this in mind, what are the other areas that could be prioritised if the UK is to 'diverge up' from the EU on worker rights and protections?

### Sick pay

More comprehensive support for workers through periods of sickness should be prioritised. While the EU does not set a minimum level of sick pay, all Member States provide sick leave and sickness benefits.<sup>39</sup> The UK's statutory sick pay is currently just £95.85 per week, which is significantly below the National Minimum Wage, and some of the most insecure workers, such as those on zero or low hours contracts and platform workers are often not eligible for sick pay in the first place. As one stakeholder pointed out, 'one of the things that we have learned from Covid-19 is that having a proper safety net of sick pay is crucial – particularly for jobs that have a lot of contact with people, which a lot of these gig economy jobs do.' The UK should follow international example on this; half of all OECD countries expanded paid sick leave provisions last year.<sup>40</sup>

## Flexible working and other family friendly policies

Additionally, the Employment Bill should introduce more ambitious legislation on flexible working. Currently, workers in the UK have the right to request this after 24 weeks in post. This means that many lose out if they require flexibility from the beginning, and crucially, it is a right to request, not a right to flexibility, which means employers can easily refuse.

However, consensus challenging this is growing. Stakeholders highlighted that enforced homeworking during the pandemic has led more people and organisations to realize that the way we work can change. Offering flexibility at point of hire, unless it is not possible due to the nature of the role, should be seriously considered. This would benefit many workers, particularly parents and those with caring responsibilities. Taking this agenda further, the low uptake of shared parental leave should be addressed, through clearer regulations and guidance for employers.

## Enforcement

A key priority should be resourcing enforcement bodies sufficiently. Consolidating existing enforcement bodies - including the Employment Agency Standard Inspectorate, the Gangmasters and Labour Abuse Authority and the part of HMRC that currently enforces with the National Minimum Wage and National Living Wage – into a new Single Enforcement Body was a key element of the Good Work Plan laid out in 2019.<sup>41</sup> However, one interviewee raised concerns, commenting that 'when organizations have merged, it's seen as an opportunity for cost cutting, and we think the budgets have been under pressure as it is.' Furthermore, it was emphasised that immigration enforcement should be decoupled from other sorts of enforcement so that people feel able to report breaches.

# Conclusion

This briefing has shown that rather than being a linear trajectory in one direction or the other, the future of workers' rights and protections in the UK will consist of a complex set of decisions to be made over time. This could result in a number of scenarios, with the UK diverging up or down on various issues, while the EU likely continues with progressive policy initiatives. It remains an open question as to which current EU-derived employment rights a future UK Government would in fact repeal, adjust preserve or further extend. Such decisions will be shaped by the political mandate of the Government of the day, the outlook of key Ministers within it, and pragmatic decisions about what is politically feasible at the time. Additionally, the wider implications of any changes, including for the level playing field and the potential imposition of trade sanctions, would have to be taken into consideration.

Nevertheless, our research has identified key areas currently within scope for potential deviation below EU minimum standards, including working time regulations, agency worker regulations, caps on compensation claims for discrimination, and exemptions. The worker groups who would be most affected by these deviations have been suffering insecurity, low pay and poor working conditions long before Brexit and the onset of Covid-19.

At the same time, the findings of our research and interviews point towards a number of opportunities for policymakers to embrace. The EU is continuing with progressive new policies such as the right to disconnect, ensuring transparent and predictable working conditions, and improving conditions in the gig economy, and these are all areas that the UK should be looking to make progress in too. But our ambition shouldn't stop there. Post-Brexit, the UK should continue building on its history of going beyond EU minimum standards, introducing policies on a broad range of workers' rights and protections including improving sick pay, enforcement of rights, and flexible working and other family friendly policies. Instead of pursuing a deregulatory agenda, government should prioritise strengthening rights and protections as part of a strong economic recovery that benefits all.



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