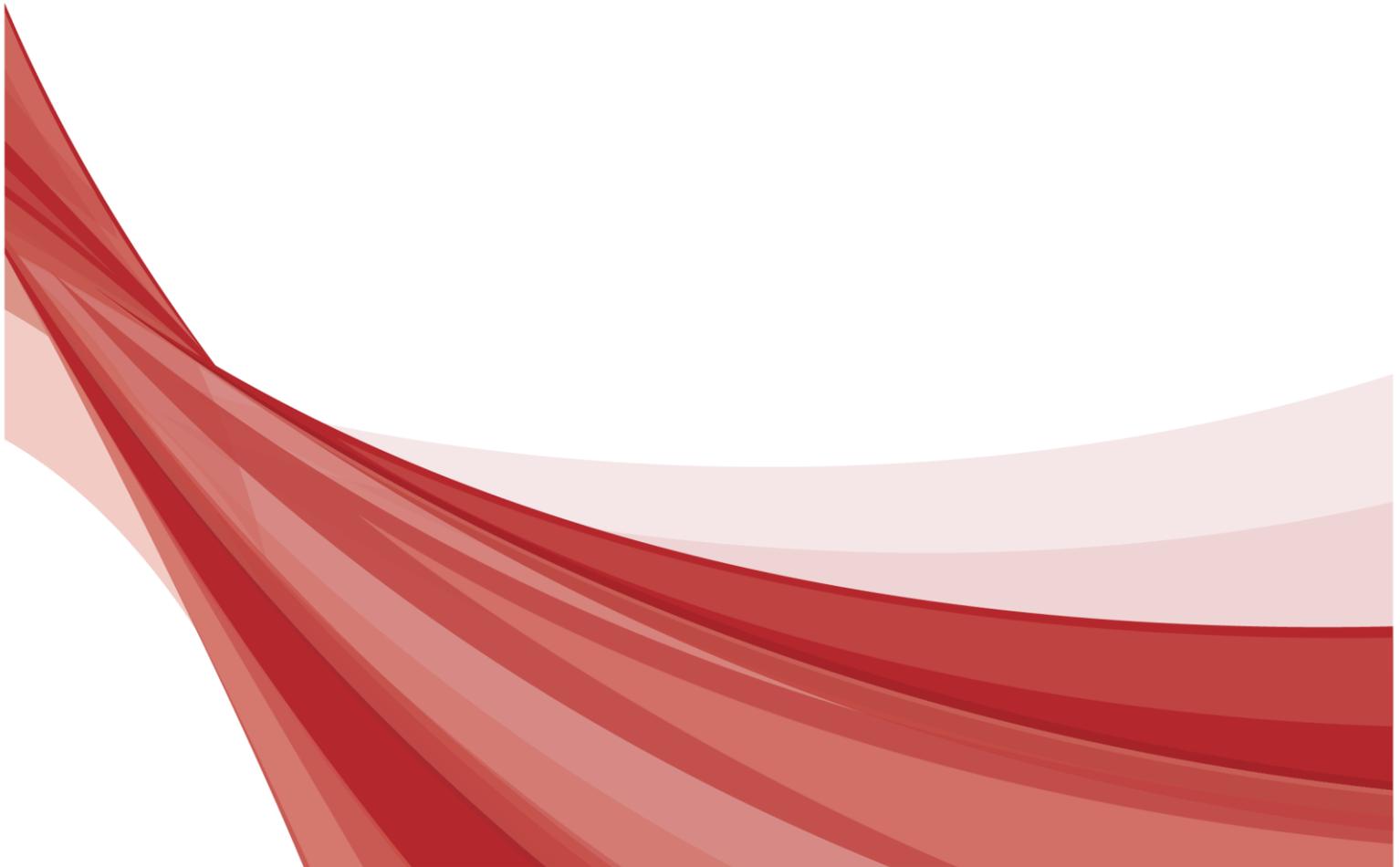




Protecting Health and Safety after Brexit

A TUC briefing



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Section one

Background

Following the June 2016 referendum, in March 2017 the UK Government gave notice under Article 50 of the Lisbon Treaty, that Britain would be leaving the EU. From that date a two-year window began during which talks will take place on what the details of the “divorce settlement” with the EU will be. In the meantime Britain is still bound by the obligations and responsibilities of EU membership.

Once the talks are completed the European Parliament and the European Council need to ratify them. The withdrawal agreement must be ratified by March 2019, so the talks on this probably need to be finished by October 2018.

The exit talks are separate from the negotiations on the future relationship with the EU after Brexit so the agreement is likely to need to include “transitional arrangements”, so that Britain can continue trading under EU rules to allow the talks on an agreement on future arrangements to be extended. These talks are likely to be very long and complex. Even if all existing EU regulations were to continue to apply, most will have to be restructured as they previously relied on EU institutions, and the talks will also have to lay the foundations for new trading relationships with the EU and the rest of the world.

Section two

Health and safety - the EU connection

The outcome of the negotiations over the new relationship between the UK and the EU will determine what kind of health and safety system the UK will have. The UK joined the EU in 1973, and since then, the European Union has played an important role in protecting the health and safety of working people. The biggest change was the Health and Safety Framework Directive (89/391/EEC) and five “daughter” directives, which established broad-based obligations on member states to ensure that employers evaluate, avoid and reduce workplace risks in consultation with their workforce. At the time, little was required to implement the new regulations as Britain already had a legislative system which met most of the requirements of the Framework Directive in respect of assessing and managing risk, as well as the duties of employers. The Framework Directive mirrored much of what was in the 1974 Health and Safety at Work etc (HSW) Act, but also the Regulations that had been made under it such as the Safety Representatives and Safety Committees Regulations 1977, however some of the Directives went further than the existing UK laws so it was necessary to extend the law. Six new sets of regulations (called the ‘six pack’), together with Approved Codes of Practice and Guidance Notes were enacted on 1 January 1993.

A range of other health and safety directives, implemented through national regulations have also come about as a result of EU directives. These cover the management of specific workplace risks such as noise or work at height, as well as the protection of specific groups of workers (including new or expectant mothers, young people and temporary workers). Specific directives cover areas such as construction work, asbestos, chemicals, off-shore work, etc.

Although the pace of activity peaked soon after the introduction of the ‘six-pack’, legislative activity has continued and health and safety regulation in the UK has been firmly driven by the EU. 41 out of the 65 new British health and safety regulations introduced between 1997 and 2009 originated in the EU.

Section three

What is the risk?

Before the referendum the TUC gave a [strong warning](#) that the rights of workers to a safe workplace could be threatened by a vote to leave the EU, as could many employment rights. Now that that the decision to leave the EU has been made, what is likely to happen?

During the campaign, many of those who supported Brexit insisted that all employment laws, including health and safety laws would be protected if Britain were to leave. However not all agreed, as the following quotes from prominent Brexit supporters shows.

- Boris Johnson said “We should go into those [EU] renegotiations with a clear agenda: to root out the nonsense of the social chapter – the working time directive and the atypical work directive and other job-destroying regulations”
- John Redwood called for a “social chapter opt-out”
- Priti Patel wanted to “halve the cost of social and employment legislation”
- Michael Gove talked about “battery of job-destroying European measures from the Working Time Directive, to the varied provisions of the social chapter.”

Since the referendum, the Government has consistently said that it does not wish to reduce existing employment protection. The official Government position, as set out in the White Paper in January, is to protect and enhance workers’ rights in the UK, and during the 2017 General Election campaign the Conservatives promised not to reduce existing EU rights at work, but this commitment is only for the coming Parliament and does not cover future EU rights if there are any improvements.

There are also a lot of voices arguing for reductions. The Daily Telegraph is running a campaign to “Cut EU red tape” as part of the negotiations and has called on the Conservative Party to promise a “bonfire of EU red tape”. At the top of its list is the Working Time Directive. This is a health and safety regulation that protects working people against the most excessive of working hours and requires employers to give their staff breaks. The Telegraph campaign is strongly supported by the former Secretary of State for Work and Pensions, Ian Duncan Smith.

What is the risk?

In addition to the Working Time Directive there is pressure for Britain to opt out of the “Social Chapter”, which is now included in Title X on social policy (article 153) of the Treaty on the Functioning of the European Union and contains eleven issues that the EU agreed to address. The first of these is “improvement in particular of the working environment to protect workers' health and safety”.

Some go even further. John Longworth, the former director general of the British Chamber of Commerce, who was also a member of the Health and Safety Commission for six years and is currently co-chair of the Leave means Leave lobby group, wants the government to target, not only the Working Time Directive, but also “overburdensome working from height requirements”, as well as “ludicrously bureaucratic laws like the ergonomics directive” (there is no such law). Simon Boyd, the head of REID steel, sent MPs a letter which detailed a list of workers' rights on areas such as working hours, holiday pay and health and safety that he wants abolished once Britain leaves the EU. Conservative MP, Jacob Rees-Mogg has said that Britain could slash safety standards 'a very long way' after Brexit and that standards that were 'good enough for India' could be good enough for the UK.

“The Leave campaign promised people more control over their lives. But now bad bosses are trying to hijack Brexit to let them walk all over working people. No-one voted to leave to lose vital protections like safe working hours and fair holiday pay.” – Frances O’Grady, General Secretary of the TUC.

The government has already announced that it is to deal with the transition of EU regulation into UK regulation through a “Great Repeal Bill”, which will convert EU derived safety law into UK legislation.

The Great Repeal Bill, yet to be published, is expected to mean that all laws stemming from EU directives, including all the “Six Pack” and the Construction (Design and Management) Regulations, will be transferred into UK law. Directly effective laws that apply without the need for specific UK legislation, such as the REACH Regulations, will also be copied onto the statute book to achieve a “stable and smooth transition”. This will allow the UK to leave the EU without opening up gaps in the statute book. The government says that parliament “will be able to decide which elements of that law to keep, amend or repeal” after all the regulations have been transferred, but there will be no guarantees for the future, or assurances that existing rights will be protected unless there is a strong non-regression clause,

It will be difficult for the “Great Repeal Bill” to exactly reproduce all current EU rules and allow the UK to consider regulatory reform at a leisurely pace post-Brexit. The House of Lords Constitution Committee has pointed out that, in many areas, the existing laws will need to be amended to take account of new regulatory regimes that will have to be put in place. Once it is accepted

that the Bill is unlikely to be simply a copy and paste exercise, the Committee warns that the government could use its powers to make further changes without full scrutiny. This can happen because of the wide-ranging power ministers have to amend or repeal regulations, including on health and safety. The Great Repeal Bill is also likely to include powers known as Henry VIII clauses which would permit Ministers to amend Acts of Parliament with little parliamentary oversight. This falls short of the Prime Minister's promise to protect and enhance working people's rights.

Health and safety law could also be undermined by the proposals from the Government to give historical rulings of the European Court of Justice the same weight as those of the British Supreme Court, meaning they will be able to be overturned by future rulings of the Supreme Court.

Despite promises that they will not reduce existing regulation, the Government's record is not encouraging. Two years ago they forced through a law that removed millions of self-employed workers from any health and safety protection and the Government has already indicated that it wants to reduce existing EU protection. A [report](#) for the DWP on the HSE's approach to Europe contained an Annex which outlined a number of proposals that the Government wanted to make to reduce health and safety regulation. These included repealing the Optical Radiation Directive, repealing part of the Chemical Agents Directive, abolishing the requirement for employers to provide eyesight tests for display screen equipment users, and removing the requirement for small, low risk businesses to make a written risk assessment.

In respect of eye tests, the report wrongly states that the tests are required because of a misconception that computer use can damage eyesight, while the actual reason is that poor eyesight leads to bad posture – a cause of musculoskeletal disorders. Also employers with less than five workers already do not have to do a written risk assessment under UK law.

“The Prime Minister must also make good on her promise to build on workers' rights by putting them at the heart of the UK's future trade deal with the EU. There must be a guarantee of a level playing field with our EU partners – not a race to the bottom on workplace rights. We don't want hardworking Brits to miss out on new rights that workers in other European nations get.” – Frances O'Grady, General Secretary of the TUC.

The Government's current deregulatory shopping list was written before the referendum took place, but it is very unlikely that the Government will drop its proposals to cut back on health and safety laws and the Great Repeal Bill might make it much easier for it to do so. Once Britain leaves, depending on any agreement with the EU, further reductions in protection could be pursued.

What is the risk?

This was confirmed by [advice](#) to the TUC before the referendum from Michael Ford QC who wrote on the impact of Brexit on workers' rights from Europe that "if the last Government were not constrained by EU law to provide some effective remedy for breach of the Directives - which it now purports to do so by criminal law alone, without civil claims - it may well have taken the further step, consistent with its logic of reducing the 'perception' of burdens on business by repealing in whole or in part some of the health and safety regulations which implement EU law. In this light I think that many of the regulations which implement duties in EU health and safety Directives are both legally and factually vulnerable in the event of Brexit, to be replaced largely by a common law duty of care alone."

Over the next few years the European Commission is also planning to review all existing health and safety regulations. That review is already underway and it has identified six directives that are in need of updating. They also plan considerable changes to the regulations on carcinogens which will lead to the directive being extended to include chemicals that can cause genetic changes (mutagens) and there are proposals to look at how chemical exposure limits are set. The European Commission programme will also be looking at better enforcement and implementation of health and safety law. In a separate process they are looking at developing a new European Pillar of Social Rights which the Commission wants to cover all EU states. On the 26 April 2017, the Commission confirmed that occupational safety and health was to be an important part of this.

By the time all these health and safety initiatives are implemented, Britain will probably have left the EU and there is a real risk that, even if existing regulations are maintained, protections for British working people will start falling behind the rest of Europe very quickly.

Section four

The negotiations

In part, the ability of the UK Government to deregulate health and safety will depend, not only on the Great Repeal Bill, but also the outcome of the negotiations with the EU. Theresa May's public position is against membership of the internal market, although many Tories and employers say that access to the internal market is necessary. Owen Paterson, a Conservative MP who strongly supported Brexit said "only a madman would actually leave the market."

The European Commission has made it very clear that, if the UK wants tariff-free and barrier-free access to the single market after Brexit, then Britain would be likely to need an arrangement similar to those negotiated with Norway and Liechtenstein. Among the conditions accepted by Norway and Liechtenstein are that they must abide by all EU single market standards and regulations such as health and safety regulation, without any say in their formulation. They agree to translate all relevant EU laws into their domestic legislation without consulting domestic voters. Of course that does not mean that these arrangements will apply to the UK, or that any agreement will cover health and safety law.

The European Parliament, which also has a role in approving any final deal with Britain, has already agreed a resolution on the Brexit negotiations. Amongst the things that the European Parliament is [demanding](#) are that any future agreement between the UK and the EU is conditional on continued adherence to EU social legislation and policies.

The European Parliament has also confirmed that they will not allow the UK to remain in the single market unless it signs up to all four pillars, one of which includes workers' rights. That would mean using EU regulations on health and safety as minimum standards. In addition, it stated that Britain would have to continue to accept the jurisdiction of the European Court of Justice.

If Britain does not remain covered by the trade deals that the EU negotiates with other countries, then it will have to negotiate its own trade agreements. The European Parliament has stated that "it would be contrary to Union law for the United Kingdom to begin, in advance of its withdrawal, negotiations with third countries."

The negotiations

This means that, initially at least, British working people would probably only be able to rely on the protection of international agreements should a future Government decide it wants to deregulate health and safety. The main international agreements come from the International Labour Organisation, which is a UN body. There are 13 ILO conventions on health and safety. These conventions are international treaties, which, if they are ratified by member states, mean that the country agrees to abide by them. They are different from EU regulations, which must apply in all EU member states and can be enforced by the European Commission and by the European Court of Justice. Once a country has ratified a convention, a complaint can be made to the ILO if it does not implement it.

ILO conventions are an important guarantee of our rights to a safe workplace. Having minimum standards means that there is a level playing field (even if a relatively low one) so you would expect that industrialised countries like Britain would not only try to ensure they meet these basic standards, but would go well beyond them. Sadly that is not the case and the UK government has refused to ratify most [ILO Conventions](#) on health and safety. Out of the 13 ILO conventions on health and safety, the UK government has ratified three. That means that the other ten do not apply in the UK and the UK does not have to abide by these conventions. Even in the three cases where the Government has ratified the conventions there is no mechanism to compel the Government to implement them in legislation and nor is there a mechanism to punish breaches.

The result is that, without an agreement with the EU to abide by their minimum standards, there will be no legal barrier to a future Government reducing health and safety rights to almost any level should they decide, and British working people could have fewer fundamental protected safety rights than workers in many developing countries.

Any future trade agreements could also have an impact on future health and safety standards. The trade agreements Britain has been party to as a member of the EU, such as the EU-Korea Free Trade Agreement, have involved commitments to uphold core labour standards¹ set by the ILO which cover freedom of association, freedom from forced labour, child labour, and freedom from discrimination, but do not include the right to a safe workplace.

Many existing trade agreements also have provision for investor-state dispute settlement (ISDS). These allow corporations to take a country to a dedicated tribunal dealing only with such cases if they think that any government actions threaten their profits. Egypt has already been sued over their minimum pay laws and Uruguay and Australia have been sued over tobacco laws via

¹ Unlike other ILO conventions, ILO member states are required to abide by core labour conventions whether they have ratified them or not.

ISDS courts in international trade agreements. Health and safety regulations could be equally at risk if a foreign investor thinks they are too strong.

The biggest risk of this happening is around chemicals where Britain currently follows, at a minimum, EU provisions. This is a real possibility if the UK negotiates a future trade deal with countries like the USA that contains ISDS. As UK chemicals regulations are stronger than regulations in most other non-EU countries, in particular the USA, the USA could insist that the UK accept any chemicals or exposure standards that have approved as part of any future trade deal, especially given the risk of litigation via ISDS from USA based companies.

Chemical regulation is also likely to cause other problems post-Brexit. At the moment there are various chemicals regulations. One of them, the carcinogens directive, is currently being revised and improved with new limit values for a number of chemicals. However many of these changes will not come into law until after the UK has left the EU and so the improvements will not automatically apply. This could lead to lower standards in the UK.

Another important chemicals regulation is REACH which requires producers or importers to prove that their chemicals are safe to use. The EU approach is very different from that used outside Europe, where it is usually the responsibility of the Government to prove a chemical is unsafe before they restrict its usage. If Britain leaves the EU without remaining part of the REACH accreditation process then the UK will have to set up its own system for determining the safety of chemicals. This will mean that producers and suppliers will have to go through another process which could make them less likely to want to manufacture or import in Britain. The alternative, which would be to have chemical safety regulated through trade agreements, would mean that workers in the UK would be at the mercy of the regulatory system in other countries, such as the USA, where many of the standards are much weaker.

The negotiations will also have to consider the rights of the many thousands of workers who are currently employed providing occupational health coverage, including occupational physicians, occupation nurses and physiotherapists. At present there are specific regulations covering the recognition of professional qualifications that allow those with appropriate qualifications to work in the UK. Many occupational health providers rely on overseas professionals to function and anything that threatens their ability to work in the UK could seriously undermine the ability of providers to cope with demand. The TUC is calling for the Government to unilaterally grant a right to remain for EU citizens.

Section five

What workers need after Brexit

Health and safety protection is a major issue for all workers. Our regulatory framework, most of which is based on European legislation, has been reviewed four times in the past seven years and each time it has been judged to be effective and “fit for purpose”. However that does not mean that the health and safety system we have is good enough. In the UK, over 20,000 people die prematurely every year because of their work, most of them from exposure to dangerous chemicals and carcinogens. 600,000 people are injured at work every year. 1,300,000 people are suffering from a work-related illness. A million of these cases are a result of just two causes – musculoskeletal disorders such as back pain, and depression and anxiety caused by work related stress.

We must protect what we have, but there is also a need to go further than simply asking for the “status quo” to be retained. We have to call on the government to improve standards. During the next few years the EU is going to be bringing in new regulations on chemicals and is also committed to addressing issues of growing concern, such as psychosocial risks, musculoskeletal disorders and ageing. We must ensure that the UK Government implements any improvements in the EU regulatory system. But they also need to take a lead in showing that they are committed to tackling the huge burden of death, injury and disease that work causes by looking at their own solutions.

The TUC has a list of new regulations that we believe are needed. That includes a commitment to remove all asbestos in the workplace; legally binding regulations on stress; a maximum temperature in the workplace; a duty on all directors to ensure safe working conditions; new standards on silica and diesel exhaust; a requirement on all medium and large employers to have safety representatives and a safety committee; and a new regulation on preventing musculoskeletal disorders.

The Government also has to tackle the challenges that changes to the working environment and new ways of working could have on health and safety. As the gig economy grows, more and more people are – genuinely or otherwise - working for themselves, meaning they are not covered by the health and safety procedures of those they work for. If this type of work accelerates, the UK needs to introduce regulations to help protect such workers. Restoration of legal protection for the self-employed could be part of that, but a full review of employment status is also needed.

Section six

TUC Priorities

- The TUC is calling for respect for EU health and safety standards to be at the heart of any future partnership agreement between the UK and EU to ensure that UK regulation remains in the future, as an absolute minimum, at the level afforded to EU workers. We will also revisit and intensify attempts to gain improvements in the existing British regulations to try to deal effectively with issues such as stress, carcinogens etc.
- Britain should commit to ensuring that trade agreements include provisions that ensure both parties respect the Decent Work agenda that includes the ILO core conventions. In addition, the UK must sign up to those ILO health and safety conventions that it has not yet ratified. Trade deals should not contain special ISDS-style courts that allow corporations to challenge laws.
- Since the referendum there has been a significant increase in abuse and threats against migrants. The TUC will continue to work with groups like Hope not Hate on ensuring that BME and migrant workers are protected from abuse, violence and discrimination at work, and also seek to secure the right to remain for EU migrant workers already here.
- Our biggest protection against any assault on our rights is strong unions in every workplace. The TUC will be continuing its health and safety organising campaign which aims to ensure that health and safety issues are used to increase and strengthen the trade union presence.



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