

## EU exit: workers' rights and the London labour market

February 2017

- The EU has contributed much to the development of the legal framework that now exists in the UK, by introducing new, and in many cases superior worker employment rights, or reinforcing existing ones.
- EU employment law has set a minimum standard below which workers' rights must not fall, and EU membership, by providing access to the EU judicial system helps to ensure those rights are embedded in everyday working life across all member states.
- There is a risk that UK workers' rights could start to fall below minimum EU requirements, as EU law continues to evolve, and previously settled legal principles by the European Court of Justice could be left open to future challenge.
- Given the extent of the longer term uncertainty for workers' rights, the Mayor should set out a vision for a system of national laws and local regulations that supports the strengths of the London labour market, and promotes a working environment that is inclusive, fair and flexible for all workers and employers.
- It is now time for a more radical think about the role of the Mayor and London boroughs in tackling low pay. This could include enforcement of minimum wage legislation and lobbying for a minimum wage in London in line with the London Living Wage.

- Devolution presents a number of opportunities for the Mayor and London boroughs to better support people into well paid jobs, particularly through effective management of the adult skills budget and support for those with additional needs.

The London Assembly Economy committee has taken evidence from leading experts on employment, pay, and wider labour market issues, to understand the risks associated with EU exit for the London labour market and its workers.

The discussion with experts also considered the added value of EU migrant talent to the London economy, and this will be explored in a later report covering possible approaches to post-EU migration.

**The London Assembly Economy committee held a series of meetings to explore the effect of EU exit on London's key sectors and the people who work in them. If you have any comments or would like to find out more you can get in touch via [carmen.musonda@london.gov.uk](mailto:carmen.musonda@london.gov.uk).**

## EU exit: workers' rights and the London labour market

February 2017

### The role of EU legislation in protecting UK workers' rights

**Many UK workers' employment rights predate EU law.** Historically, the UK has led on the advancement of workers' rights, having already embedded rights relating to equal pay, maternity leave, health and safety and anti-discrimination, in the UK employment legal framework, prior to becoming a member of the EU.<sup>1</sup> According to Gerwyn Davies, Labour Market Advisor, Chartered Institute of Personnel and Development, the UK remains at the forefront of improving workers' rights, being seen as "something of a leader across the EU".<sup>2</sup>

**However, EU legislation has served to strengthen some pre-existing rights, extend the reach of others, and introduce new ones. In doing so, EU employment law has set a common bar and minimum standard across the EU, below which workers' rights must not fall.** Recent research highlights a wide range of enhanced workers' rights following EU intervention, which, according to the Trades Union Congress (TUC), in a nutshell "provide important employment protections, safeguard health and safety, and promote equality in the workplace."<sup>3</sup>

Examples include the entitlement for all workers to receive a minimum of 20 days paid annual holiday, benefitting an estimated two million workers for the first time, following implementation of the 1993 Working Time Directive.<sup>4</sup> Improved protections for expectant and new mothers, including the right to paid time off to attend antenatal appointments, were achieved through the Pregnancy Workers'

Directive.<sup>5</sup> And the EU Framework Equal Treatment Directive 2000 extended the scope for anti-discrimination rights to be considered on the grounds of age, religion or belief and sexual orientation; while the Health and Safety Framework Directive,<sup>6</sup> established broad-based obligations for employers to evaluate, avoid and reduce workplace risks. The minimum standard set by EU law thus creates a level of consistency for workers across the EU, provides welcome clarity for employers, and sets a bar that member states are obliged to meet.

**"The EU has given us a minimum floor and we have in many cases, superior rights, but that is the importance. It is a level below which we cannot drop."** Megan Dobney, SERTUC<sup>7</sup>

**Nevertheless, there are some areas where UK law in fact goes further than the bar set by EU legislation.** UK workers in full time employment are entitled to a minimum of 28 days' paid holiday, and part time workers pro rata. The statutory minimum maternity leave under EU law is 14 weeks, but 26 weeks, extendable to 52 weeks, in the UK. This is the longest on offer in Europe, although not all of it is paid leave.<sup>8</sup>

## EU exit: workers' rights and the London labour market

February 2017

### Prospects for workers' rights – the short term

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**UK workers' rights could be subject to repeal or amendment following an EU exit.** While it is possible that the Government will, for now, continue with the status quo, it could theoretically choose to repeal or amend any part of UK employment law underpinned by the EU. In addition to those mentioned above, workers' rights to a written statement of terms and conditions, information and consultation, collective redundancy, and protection when an employer's business becomes insolvent or is transferred, are potentially all at risk.

**Although the recently published White Paper commits the Government to protect and enhance workers' rights following an EU exit, a great deal of uncertainty remains.**<sup>9</sup> The proposed Great Repeal Bill should offer some measure of clarity and reassurance for workers that rights will stay intact as the UK transitions towards EU exit. The Bill, due to take effect once Article 50 has been triggered, will repeal the 1972 European Communities Act and transpose EU law into UK law. The committee would like to see the Prime Minister fulfil her early commitment to maintain existing workers' rights,<sup>10</sup> and her more recent assurance that under her leadership "not only will the Government protect the rights of workers set out in European legislation, we will build on them".<sup>11</sup>

While the Great Repeal Bill should help to address many concerns over short term uncertainties, it unfortunately does little to clarify the long

term picture. Commentators' opinions vary on the likelihood of change. For some, an EU exit has the potential to result in a complete re-write of workers' rights.<sup>12</sup> But others anticipate little change, given the intricacy and complexity of the relationship between EU law and UK law, and the time and expense involved to disentangle the two.<sup>13</sup>

**While the current legal framework strikes a pragmatic balance between protecting the rights of the worker and the interests of the employer there is always room for improvements.** Any review of workers' rights following EU exit will need to be considered and measured, and lead to revisions that work for both parties.

### Prospects for workers' rights – the long term

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**Over the long term, UK workers' rights could start to fall below minimum EU requirements, as EU law continues to evolve, and previously settled legal principles by the European Court of Justice (ECJ) could be left open to future challenge.** One prominent example is the right to a written statement of terms and conditions, underpinned by the 1991 Written Statement Directive, which is granted to some but not all workers.

The range of employment relationships now seen in the labour market has increased. On top of open-ended work (where no end date is specified, but neither is continuing work guaranteed), and well-known forms of atypical work, such as fixed-term work and part-time work,

## EU exit: workers' rights and the London labour market

February 2017

new forms of employment (for example, zero hours contracts), have emerged. EU policy makers recognise the potential challenge of applying the Written Statement Directive to these new forms of employment, and are currently evaluating its effectiveness.

There is a danger of UK workers, once outside of the EU, missing out on any positive outcomes from the ongoing evaluation of the Directive, and on benefits from other EU reviews focused on improving work-life balance and rights for workers posted to another EU state temporarily.<sup>14</sup>

ECJ case law contributes to the interpretation of EU employment rights, which member states are obliged to follow. This is unlikely to continue to be the case for the UK, when it leaves the EU, as the 'red lines' of immigration control and an end to ECJ jurisdiction continue to set the parameters for negotiating the terms for EU exit.<sup>15</sup> UK courts could, for example, choose not to follow the recent ECJ judgements which led to the calculation of holiday pay being extended to include commission payments and compulsory overtime, leaving UK workers at a disadvantage.<sup>16</sup>

Recent analysis concludes the ECJ has extended the scope of rights beyond limits that would have been set by domestic courts, and in the future the UK legal system may not necessarily pay the attention to its rulings that it might have done in the past.<sup>17</sup>

**Post-Brexit, UK courts may no longer be required to follow existing and future [ECJ] decisions, and may merely regard them as having persuasive force. An inevitable consequence of that approach would be the re-litigation of settled principle – for example, whether holiday pay needs to take account of non-guaranteed overtime and commission payments, or whether sleep-in shifts count as working time.** House of Commons briefing, August 2016<sup>18</sup>

**After the UK leaves the EU, the Government must make greater efforts to update legislation governing workers' rights to better reflect the way the economy is changing to embrace new digital forms of delivery, and provide clarity, certainty, and stability in the working environment for all workers.** In particular, the lack of clarity over what self-employment means and who should be classed as self-employed is unhelpful, as illustrated by the recent Uber judgement, which confirmed the right for Uber drivers to be classed as workers rather than self-employed.<sup>19</sup>

Classifying Uber drivers as workers opens up the entitlement to holiday pay, paid rest breaks and the right to be paid the national minimum wage – rights not currently extended to self-employed workers. This landmark ruling could pave the way for a complete rethink of the 'gig

## EU exit: workers' rights and the London labour market

February 2017

economy' business model, where companies use apps and the internet to match customers with workers.

The committee awaits the outcome of the Taylor Review into Modern Employment Practices. The review comes at a crucial time, looking at the implications of the 'gig economy' on workers' rights, and on employer obligations and choices. It is also exploring ways to increase opportunities for carers, people with disabilities and older people. Rights to be further explored relate to the minimum wage, maternity and paternity rights, pensions, auto-enrolment, sick pay, and holiday pay.

London's economy is changing and we are witnessing a rise in self-employment, driven in part by new digital platforms such as Uber. There will be benefits of these changes, for example, workers may be able to more effectively balance caring responsibilities with work. But there may also be risks and it is imperative that workers' rights are not eroded as employment models continue to evolve.

### **A London labour market outside of the EU: low pay and low-skilled?**

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**Given the extent of the longer term uncertainty for workers' rights after the UK leaves the EU, the Mayor needs to set out a vision for a system of national laws and local regulations that would best support the strengths of the London labour market – its openness and**

**flexibility – and continues on-going work towards a more inclusive and fair working environment that adequately rewards all workers.**

Overall, the London economy has recovered well from the 2008 financial crisis although as the committee's report *The Hourglass Economy: An analysis of London's labour market* found, not everyone has benefitted.<sup>20</sup> There are now 5.7 million jobs in the London labour market – the highest number since records began in 1996, and more people in employment than before the economic downturn. These jobs span a wide range of sectors, including some in areas of internationally-renowned specialisms such as financial and related services (350,000 employees), legal and accountancy (175,000) and film, TV and music (88,000).<sup>21</sup>

**London has successfully generated new jobs, but too many are low paid and low skilled.** Around one in five (18 percent) employees in London is on low pay, mirroring the picture across the rest of the UK. The incidence of low pay in full time employees in the UK is among some of the highest globally. International research shows that in 2013, low earnings incidence ranged between 25 percent in the United States – one in four – to nine per cent in Finland and six per cent in Belgium.<sup>22</sup> Trends in low pay have remained fairly static over the past 20 years, but analysis by the Resolution Foundation, following the Chancellor's Autumn Statement, and based on Government forecasts for higher inflation and lower growth, shows that there is a real risk that people on low pay will see a fall in real income over the next few years.<sup>23</sup>

## EU exit: workers' rights and the London labour market

February 2017

The rising trend in in-work poverty is a national concern, but especially affects workers in the capital as a result of the rising costs of living in London. London ranks among the most expensive cities in the world to live in with the second highest average rent costs and property purchase prices (see Chart 1).<sup>24</sup> The committee heard that during this current period of economic uncertainty and the likelihood of higher of inflation, it will be difficult to predict how effective existing measures (like the National Living Wage and the London Living Wage) will be in protecting living standards, particularly of lower paid workers, as the UK leaves the EU.

**Chart 1 - property costs in London compared with other world cities**



Source: CBRE Globing Living Report 2016

The London Living Wage (LLW) goes some way to alleviate the high costs of living in London – housing, transport and childcare for example, but there is a lack of any statutory basis for its adoption by London employers and so take-up remains low. Approximately 1000 of London's 970,000 private sector businesses are accredited LLW employers. The committee previously recommended measures to increase the adoption of the LLW. These could include the use of procurement rules, in line with the GLA's stated commitment to fair employment and ethical sourcing outlined in its procurement strategy; and, the expansion of business rates discounts to LLW accredited businesses across Greater London. We urge the Mayor to accelerate work on these measures to help reduce the proportion of Londoners facing in-work poverty.<sup>25</sup>

London has the highest rate of self-employment of all UK regions, with the self-employed accounting for 18 percent of all workers. However, the LLW does little to help these workers as their earnings often fall well below the LLW rate. Data show that two-thirds (67 per cent) of self-employed Londoners earn less than the equivalent of a full-time employee on the London Living Wage (LLW), currently at an hourly rate of £9.75.<sup>26</sup>

Conor D'Arcy, Policy Analyst, Resolution Foundation, highlighted to the committee, the added vulnerability of this group of workers in the context of a post-EU landscape. He said, "in the long run, if their earnings are not growing well, it does present a concern for how

## EU exit: workers' rights and the London labour market

February 2017

families are going to support themselves. When they are trying to fall back on rights when issues emerge...it is more of a concern.”<sup>27</sup> The rise in self-employed workers in the London labour market is symptomatic of a wider evolution that has seen the emergence of diverse employment models – such as the ‘gig economy’ – and a growing range of employment relationships – fixed-term working and short or zero hours contracts, for example. It will be vital to ensure that the rights of self-employed and other workers continue to evolve in line with these changes.

**It is now time for a more radical think about the role of the Mayor and London boroughs in tackling low pay by raising minimum standards and ensuring better enforcement.** This could mean lobbying for London boroughs to enforce minimum wage legislation and for the Mayor to lobby the Government for a minimum wage in London that truly reflects the higher costs of living and working in the capital. The National Minimum Wage (NMW) has established a baseline for earnings across the country for close to two decades and is the minimum pay per hour that almost all workers are entitled to. The National Living Wage (NLW), a higher rate of NMW paid to workers aged 25 years and over, and introduced by the Government in April 2016, has increased the baseline set nationally for a minimum rate of pay. While payment of the NMW is a statutory requirement, it is yet to be universally enforced.

According to Centre for London, “General awareness regarding the level of basic entitlement is low and the current regime of sanctions for non-

compliance is weak.” It argues for partial devolution of responsibility for enforcing the NMW to London boroughs, which could share good practice through London Councils, supported by the Mayor.<sup>28</sup> The committee considers this a sensible step forward in helping to reduce in-work poverty.

Research by Centre for London also sets out the case for a higher NMW in the capital to reflect: the higher median wage found in London; the higher productivity levels of the more dominant sectors in its labour market, (financial services, information and communication, real estate, professional, scientific and technical, and creative); and affordability, that is, the ability of London businesses to pay a higher minimum wage without jeopardising jobs and competitiveness.<sup>29</sup> The committee supports the principle of this argument, and calls for any London rate to be consistent with the current hourly rate for the LLW. At £7.20 per hour, the NLW is considerably below the £9.75 hourly rate for the LLW.

**The promotion of more well paid jobs offered on a flexible basis will be a key component of any strategy to tackle low pay and unlock the potential of London’s labour market.** Many of the newly created jobs in London are part-time and also low paid: research by the Timewise Foundation shows that almost half of low paid jobs are part-time. Forty-eight percent of part-time jobs paid less than the LLW in 2015, compared with 13 percent of full-time jobs.<sup>30</sup>

Quality, well-paid, flexible employment can be beneficial for workers, particularly those with caring responsibilities, and can enable employers

## EU exit: workers' rights and the London labour market

February 2017

to tap into a body of skills and experience, which is currently under-utilised. But, according to Timewise Foundation, such opportunities in London remain disproportionately low.<sup>31</sup> Part-time jobs, and flexible jobs, will need to be made available at all levels of business, Clare Ludlow of Timewise Foundation told the committee. Encouraging employers to promote flexibility in the job market, she said, is best done by presenting a strong business case for it.<sup>32</sup>

**“...you would make more difference in making businesses change the way they recruit and the way they design jobs by making a strong business case...There is a real opportunity for employers to think about how they design jobs to include the existing talent that is available in London.”** Clare Ludlow, Timewise Foundation<sup>33</sup>

**The Mayor must continue to work to reduce in-work poverty in the capital.** The committee welcomes the Mayor's commitment to make London a living wage city, but there is a need for greater clarity on how this will be achieved. This is particularly relevant given the increase in workers classified as self-employed and in low-pay. The committee's 2015 report, *The Hourglass Economy: an analysis of London's labour market* sets out a number of recommendations towards achieving a

living wage city. These included working closely with business leaders and trade unions, through an established working group to encourage improved contractual arrangements in the retail and hospitality sectors – the most represented low pay sectors in London; also for businesses to adopt fairer pay and conditions in line with their real needs and capability to pay. The report also recommended collaboration with the Department for Work and Pensions (DWP) to improve transparency across sectors when advertising job vacancies and to encourage greater take up of quality flexible hiring practices.<sup>34</sup>

### More powers to help people into work and improve skills

**Devolution presents a number of opportunities for the Mayor and London boroughs to play an enhanced role in supporting people into well paid jobs.** In the Autumn Budget Statement, the Chancellor of the Exchequer, Philip Hammond, committed to “*give London more control over the delivery of employment support services for the hardest to help.*” The committee welcomes the Chancellor's statement and supports the devolution proposals to enable the co-commissioning of a new work and health programme, to provide support to the long-term unemployed, and people with health conditions or disabilities, into work. Introduced in 2011, and due to be re-commissioned this year (2017), the DWP's main welfare-to-work programme for the long-term unemployed continues to deliver satisfactory outcomes for the long

## EU exit: workers' rights and the London labour market

February 2017

term unemployed, that is, those in receipt of Job Seekers Allowance (JSA). It performs less well for those with some of the more complex needs mentioned above.

A joint commissioning approach between the DWP, Greater London Authority and London boroughs to deliver employment support services through the proposed work and health programme will provide the oversight and nuanced response needed for tailored support, particularly to those with health conditions and disabilities.

The committee also welcomes the Chancellor of the Exchequer's commitment to devolve adult skills funding to London from 2019-20. This move will provide crucial support to Londoners to develop the skills they need to fill the diverse range of jobs in the London labour market.

The committee heard from Clare Ludlow, Director of Innovation at Timewise Foundation, that innovation in job-design and, in structuring apprenticeships to support progression out of low pay and into higher-skilled and better paid jobs, is vital. The proposal to structure some apprenticeships on a part-time basis resonates with the committee's call for the Mayor to work with the London Economic Action Partnership to design high-quality industry-tailored employment programmes and apprenticeships in key growth sectors.<sup>35</sup>

There is an opportunity for the Mayor, through the work of the Skills for Londoners taskforce, to support the development of part-time

apprenticeship programmes, to enable a wider range of people to acquire the skills they need to access the labour market.

### In conclusion

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**As the UK begins its transition out of the EU, the current model of employment rights will face a number of uncertainties. Enhanced national sovereignty and devolution, however, bring opportunities to better shape the London labour market.** We would urge the Mayor to make best use of these opportunities, not least by continuing to lobby Government for additional powers so that he can help create the best working conditions for all London workers.

While the Mayor does not hold influence over the legislative process, he should, in his discussions with Government, continue to ensure workers' rights remain a priority, and are in line with any improvements brought through future EU legislation.

Additionally, the Mayor, working with employer and employee representatives, could look to develop a model framework of what a good employer looks like, and an ideal balance of workers' rights and working conditions. This is particularly relevant following the Uber court rulings which have provided some clarity on workers' rights and entitlements. The Mayor's forthcoming Economic Development Strategy should set out his thinking on these issues.

## EU exit: workers' rights and the London labour market

February 2017

### Endnotes

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- <sup>1</sup> [UK employment rights and the EU](#), TUC, February 2016
- <sup>2</sup> [Transcript of Economy committee, 8 November 2016](#)
- <sup>3</sup> [UK employment rights and the EU](#), TUC, February 2016
- <sup>4</sup> [The Working Time Directive, \(1993/104/EC; 2003/88/EC\)](#)
- <sup>5</sup> [Pregnancy Workers Directive, \(92/85/EEC\)](#)
- <sup>6</sup> [Health and Safety Framework Directive, \(89/391/EEC\)](#)
- <sup>7</sup> [Transcript of Economy committee, 8 November 2016](#)
- <sup>8</sup> [Which countries in Europe offer the fairest paid leave and unemployment benefits?](#), Glassdoor Economic Research, February 2016
- <sup>9</sup> [The United Kingdom's exit from and new partnership with the European Union White Paper](#), Government White Paper, 2 February 2017
- <sup>10</sup> [Prime Minister's Speech, Conservative Party Conference Speech](#), 2 October 2016
- <sup>11</sup> [Prime Minister's Speech setting out the plan for Brexit negotiations](#), 17 January 2017
- <sup>12</sup> [The Guardian, 14 April 2016](#)
- <sup>13</sup> [Voting for a Brexit? Employment law implications if the UK leaves the EU](#), October 2014
- <sup>14</sup> [UK employment rights and the EU](#)
- <sup>15</sup> [The Financial Times, 8 January 2017](#)
- <sup>16</sup> [Williams and Lock and Bear Scotland, ECJ judgements made in 2016 and 2014 respectively](#)
- <sup>17</sup> [Brexit: impact across policy areas](#), House of Commons briefing paper 07213, August 2016
- <sup>18</sup> [Brexit: impact across policy areas](#), House of Commons briefing paper 07213, August 2016.
- <sup>19</sup> [Uber drivers win key employment case](#) BBC News, October 2016
- <sup>20</sup> [The Hourglass Economy: An analysis of London's labour market](#), February 2016
- <sup>21</sup> [GLA Economics](#), June 2016

- <sup>22</sup> [Low pay and in-work poverty: preventative measures and preventative approaches](#), European Commission, May 2016
- <sup>23</sup> [Bending the rules: Autumn Statement response](#), Resolution Foundation, November 2016
- <sup>24</sup> [CBRE Global Living Report](#), September 2016
- <sup>25</sup> [The Hourglass Economy: An analysis of London's labour market](#), February 2016
- <sup>26</sup> [Tough Gig – Low paid self-employment in London and the UK](#), Trust for London
- <sup>27</sup> [Transcript of Economy committee, 8 November 2016](#)
- <sup>28</sup> [Settle for nothing less: enhancing national minimum wage compliance and enforcement](#), Centre for London, December 2013
- <sup>29</sup> [London Rising: The Case for a London Minimum Wage](#), Centre for London, November 2013
- <sup>30</sup> [The Hourglass economy: An analysis of London's Labour Market](#), February 2016
- <sup>31</sup> [Ibid](#)
- <sup>32</sup> [Transcript of Economy committee, 8 November 2016](#)
- <sup>33</sup> [Transcript of Economy committee, 8 November 2016](#)
- <sup>34</sup> [The Hourglass Economy: An analysis of London's labour market](#), February 2016
- <sup>35</sup> [Ibid](#)