



# Health and Safety Post-Brexit

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Expert View - By Stephen Thomas

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**There are many questions about Brexit which will only start to be answered once Article 50 of the Treaty of Lisbon has been invoked by the UK Government, which Prime Minister Theresa May has indicated will be before the end of March 2017.**

One of the many questions Brexit poses is: "What will happen to the UK's laws once we leave the EU?" Concern that leaving the EU will result in the UK removing or substantially changing Health and Safety laws will result in an erosion of worker protections and accountability for offenders has been voiced by a number of organisations, from Trade Unions to pro-business organisations, through to professional Health and Safety bodies. While the reality is that we are very much in uncharted territory, we do have some indication of what to expect in regards of Health and Safety in a post-Brexit landscape.

## A Bonfire Of Red Tape?

Even before 2010 when the UK's Coalition Government was formed, Health and Safety law was under attack; commonly ridiculed by the media in silly season "bonkers conkers"<sup>1</sup> stories and lambasted by pro-business advocates as nanny-state policing and a stifling burden on business. The fresh, business-focused Government then promised a "bonfire of red tape".

The "bonfire" began as a pair of Government-commissioned reports<sup>2</sup>, the results of which declared UK Health & Safety law to be "broadly fit for purpose", and proposed minimal changes which, once implemented, have had very little impact beyond a few minor legal adjustments and revocations of redundant Regulations; essentially UK Health & Safety law was okay and not the problem many were led to believe.

With this in mind, it would be very hard for the current Conservative Government to backtrack on the findings and justify significant change to the UK's Health & Safety legal infrastructure, which would almost certainly result in serious disputes at a time when both industrial and country-wide unity is essential.

## Can The UK Afford To Lose Or Water Down Health & Safety Laws?

It is well documented<sup>3</sup> that sensible and proportionate risk management saves businesses money and reduces costs, some of which are not immediately apparent, such as paying sick pay, process disruption, paying for temporary or agency workers, increased insurance costs, legal defence fees, compensation claims, poor business reputation and negative publicity.

According to the Health and Safety Executive's (HSE) latest set of statistics covering 2015-2016<sup>4</sup>, 30.4 million working days were lost due to work-related illness and workplace injury along with an estimated cost of £14.1 billion resulting from injuries and ill health from current working conditions. Should employer Health & Safety duties be in some way watered down or relaxed, then these figures are likely to rise, placing greater burden on the UK economy (not to mention the already overtaxed NHS) during what may be a vulnerable time for the UK.

## **Will A 'Hard' Brexit Make A Difference?**

While 'Hard' and 'Soft' Brexit are fictitious terms to help simplify a difficult subject, it really boils down to the negotiated relationship with the EU on issues such as whether the UK keeps access to the EU Single Market, and restriction of free movement of EU citizens to the UK.

In her speech in January 2017, Ms. May strongly indicated that the UK will be negotiating what may be termed a Hard Brexit, leaving the Single Market but retaining access to it. Of course this will be subject to discussion with the EU, who may seek to ensure that relevant UK laws meet the same standards as those applied by EU directives.

A possible settlement may be reached similar to Norway's membership of the European Economic Area (EEA). In this case the EU would almost certainly require the UK to remain subject to EU Directives. Currently the UK has substantial influence in how EU Directives are drafted, but should an EEA-type agreement be reached, the UK would need to comply with EU laws but have no direct influence over them, much the same as Norway.

At the other end of the scale, securing a Hard Brexit would give the UK complete control over its laws and borders but at the likely expense of free access to the EU Single Market, thereby significantly increasing the costs of trade with EU companies.

## **What Health & Safety Changes Might We See In A Hard Brexit?**

Assuming that a Hard Brexit comes into effect, changes will likely focus on eliminating what are seen as contentious 'regulatory burdens' where

employers feel that they are at a disadvantage compared to other countries, or the cost of compliance is too great compared to the risks. Possible areas of focus include:

- The Working Time Regulations 1998, which are estimated by the Open Europe think tank to cost the economy £4.4bn each year.
- Directive 2006/25/EC - artificial optical radiation, the requirements of which the UK has struggled to implement.
- The Construction, Design and Management Regulations 2015 which were amended to include temporary structures and private households within the scope of 'construction work' in order to comply with EU Directives.
- The requirement for Employers to meet the cost of eye and eyesight tests for Display Screen Equipment work.
- The Agency Workers Regulations 2010.

Surveys<sup>5</sup> have shown that employees are concerned about the effect on their employment status, with many workers believing that they need to up-skill in order to remain competitive in the job market. Furthermore, there are concerns<sup>6</sup> that there may be a 'brain drain' in the Health & Safety sector, with top professionals and leaders seeking employment in the EU, or further afield.

## **Indyref2 And Devolution**

So, what if Nicola Sturgeon's demand for a second independence referendum is met? Putting aside the legal uncertainties, should Scotland leave the United Kingdom but remain in the EU what would it mean for Scottish Health and Safety?

As with other legal areas, many parts of Scottish, Welsh and Northern Irish Health & Safety law devolve from England on subjects such as smoking, care, and food safety. However these, and most other UK-wide laws, derive mainly from EU Directives and so would be highly unlikely to change should any part of the UK decide to become independent but remain in the EU; Scotland included.

## **How About Enforcement?**

For the most part, the enforcing authorities have remained quiet regarding Brexit, but there are indications for what we can expect in the future. Interestingly, the HSE's 2016/17 Business Plan<sup>7</sup> refers to their current relationship with the EU as being to:

- Influence and negotiate changes arising from EU review of the Health and Safety acquisition.
- Lead and negotiate on European Directives, transposing into UK law in line with government policy.
- Influence and negotiate changes arising from EU reviews of key plant protection active substances and directly impacting EU Regulations.

The HSE plan carefully avoided any reference to the possible impact that Brexit may have on their role

in the EU, or indeed the EU's role in UK Health and Safety.

Nevertheless, one of the recurring themes that the HSE keeps going back to is simplifying Health and Safety compliance. The HSE is primarily doing this by removing many of the Approved Codes of Practice (ACoPs) to Regulations and replacing them with business-focused guidance.

While this potentially relaxed attitude to compliance allows businesses to deal with situations in their own way, the real result is that where previously HSE detailed exactly what organisations had to do to comply with the requirements of Health & Safety law through the ACoPs, the guidance simply provides general 'goal setting' standards.

In Croner's experience, that is fine if a business has an experienced competent person<sup>8</sup> for Health and Safety on site, but less so if the employer needs practical 'how to' help.

## **What Can Employers Do?**

For now, and the foreseeable future, conscientious employers should continue to comply with Health and Safety laws as they currently stand.

Organisations struggling with Health and Safety are advised to get organised now, given the disruption to the economy that may come once Article 50 is triggered, followed by the subsequent divorce from the EU. Brexit notwithstanding, sensible and proportionate risk management is proven to help businesses save money and prevent extreme loss associated with accidents or ill health.

Furthermore, since new Sentencing Guidelines were brought into effect in February 2016, heavier fines are being handed down to companies who commit

Health and Safety and Food Safety offences, making it even more business-critical that organisations manage H&S issues.

Also inflation and the cost of living are likely to increase when import costs rise, further reducing workers' income at a time when already many are not receiving sufficient pay rises. This may lead to greater financial stress for families, so employers should consider how they can support their employees. Stress management<sup>9</sup> will be important and employee assistance programmes can be a cost-effective way to help workers cope with the demands upon them, both in and outside of work.

### So What Does This All Mean?

The future of UK Health and Safety law can be thought of in two possible ways: a Hard Brexit allows the UK complete control over its laws, however, dissent in the workforce and disruption

to industry would almost certainly ensue should the Government decide to substantially change or revoke Health & Safety laws.

Conversely, a situation where some form of access to the Single Market is retained would probably see the UK obliged to continue to follow EU Directives, which account for roughly two thirds of Health and Safety laws, while enjoying less say in how those Directives are made. Furthermore future trade agreements with other countries or blocs might see other compliance requirements imposed on the UK.

Regardless of our post-Brexit relationship with the EU, employers should know that sensible and proportionate Risk Management pays for itself both morally and financially in what is going to be an uncertain and possibly tumultuous time.



### About The Author

**Stephen Thomas** has been working at Croner for over 15 years advising thousands of clients on a daily basis with a wide range of health & safety issues through his role of Health & Safety Helpline and Technical Team Leader. A graduate member of IOSH, Stephen holds the NEBOSH National Diploma in Occupational Health & Safety and is an ISO 9001 Quality Management System Auditor.

<sup>1</sup> See <http://www.hse.gov.uk/myth/september.htm>

<sup>2</sup> Common Sense, Common Safety - A report by Lord Young of Graffham to the Prime Minister following a Whitehall wide review of the operation of health and safety laws and the growth of the compensation culture and Reclaiming health and safety for all: An independent review of health and safety legislation by Professor Ragnar E Löfstedt

<sup>3</sup> See <http://www.hse.gov.uk/leadership/benefits.htm>

<sup>4</sup> <http://www.hse.gov.uk/statistics/>

<sup>5</sup> For example a Chartered Institute of Personnel and Development (CIPD) survey of 1000 working adults

<sup>6</sup> Quote by the President of the International Institute of Risk and Safety Management (IIRSM), Siobhan Donnelly.

<sup>7</sup> <http://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan1617.pdf>

<sup>8</sup> <http://www.hse.gov.uk/involvement/competentperson.htm>

<sup>9</sup> <http://www.hse.gov.uk/stress/standards/>