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**It's Work but Not as We Know It: Adapting
the Workplace to the Post-Pandemic World**

Matthew Howse, Louise Skinner, Lee Harding & Pulina Whitaker

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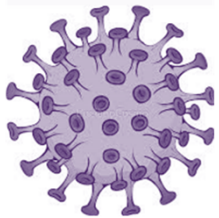


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Key Actions for Reopening

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Key Actions for Reopening



RISK ASSESSMENT

Conduct a COVID-19 risk assessment in consultation with workers (and unions if applicable).

IMPLEMENT

Implement the health and safety measures identified as necessary following the risk assessment. Consult staff (and unions if applicable) on the measures that are introduced.

POLICIES AND PROCEDURES

Review policies and procedures. Consider whether amendments will be necessary and whether new policies and procedures are required

EDUCATE

Staff will need educating on any new protocols. Managers will need specific training on how to enforce new measures and on supporting staff.

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Compliance with Government Directives and Industry-specific Requirements

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Compliance with Government Directives and Industry-specific Requirements

UK Government Guidance

Industry-specific guidance was published on 11 May 2020 and has been updated regularly throughout the pandemic. Guidance for employers is also available on medical testing and the NHS Test and Trace service.

At-risk individuals

Clinically extremely vulnerable people can now return to work provided the workplace is COVID-secure but they should be offered the safest available on-site roles (remote working is encouraged for such individuals)

No one-sized fits all approach

Deciding which employees are essential to restart on-site activities will be difficult. Some may be very keen to return, others less so. Be flexible wherever possible, particularly in light of new "work from home where possible" guidance.

Risk Assessment

Employers with more than 50 employees are required to publish the results of their risk assessments on their website (all employers are expected to do so)

At-risk individuals

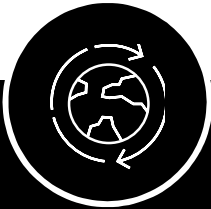
Your risk assessment should have particular regard to staff who are clinically vulnerable and clinically extremely vulnerable, and consider whether any measures can be put in place to mitigate the risk posed to such individuals

Remote working

Potential backlash against continued remote working from those concerned they need to be physically present in the workplace to justify role / avoid redundancy or who have poor remote facilities or difficult home working conditions

Compliance with Government Directives and Industry-specific Requirements

Key Legislative Changes and Government support



Annual Leave

The Government relaxed the restriction on carrying over the four weeks' leave derived from the Working Time Directive. Workers may carry-over untaken WTD leave where it was not reasonably practicable to take it in the leave year due to COVID-19 (e.g. increased demand due to COVID-19 meant the employee could not take holiday).



Emergency Volunteer Leave

New form of statutory unpaid leave. Employees may volunteer for 2, 3 or 4 consecutive weeks in essential health and social care services if they obtain an "emergency volunteer certificate" and give 3+ days' notice. Employees are protected from detriment and dismissal in such circumstances.

EVL may become more significant in light of the second wave



Job Retention Scheme

The CJRS ends on 31 October 2020 and was closed to new entrants from 30 June 2020 (to be replaced by the Job Support Scheme from 1 November 2020 till 30 April 2021). New legislation provides HMRC with new powers to scrutinise use of COVID-19 support schemes. Employers should begin auditing their use of the CJRS ahead of the amnesty period deadline to avoid potential fines for inadvertent misuse.

New Job Support Scheme (JSS)

JSS to replace JRS

- The UK Government has outlined the JSS, a new sixth-month scheme (from 1 November 2020 to 30 April 2021), to avoid widespread redundancies and protect viable jobs in businesses that are facing lower demands over the winter period due to COVID-19.
- The JSS is based on a German-style system of wage subsidies where the government will contribute towards the wages of employees who are working fewer than normal hours as a result of decreased demand over winter.

Employee Eligibility

- Employees must be on an employer's PAYE payroll on or before 23 September 2020.
- For the first three months, employees must be working at least 33% of their normal hours.
- For every hour worked, employers will continue to pay employees their usual wages. For every hour that is not worked by the employee, both the employer and the government will each pay one third of the employee's usual wages and the employee will forego the final third. Employees who use the JSS can receive at least 77% of their usual wages, up to the cap of £697.92.

Employer Eligibility

- All employers with a UK bank account and part of the PAYE system and all small and medium-sized enterprises (SMEs) will be eligible.
- The JSS also applies to businesses who have not previously used the furlough scheme. Large businesses will need to meet a financial assessment test and demonstrate that their business has been adversely impacted by COVID-19 and that their turnover has decreased by at least a third.

Considerations for Employers

- Employers will generally need to seek agreement with their employees to make the temporary changes to their employment contract.
- Implied or express consent is likely to be valid, but consent should be documented and provided to the employee.
- Employers participating in the JSS will be unable to give employees notice of redundancy.



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Health and Safety, Whistleblowing and other Litigation Risks

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Health and Safety, Whistleblowing and other Litigation Risks

Health and Safety

Statutory Duty

Employers have a statutory duty to provide a safe place of work and general legal duties of care towards anyone who may be accessing or using their place of business.

Employees have independent statutory duties to take reasonable care for their own health and safety, and that of other persons, and to co-operate with you to ensure that your rules are complied with.

Required Action

Carry out suitable and sufficient risk assessments to identify risks (including home-working environments). Implement measures to minimise risks. Employers must take all reasonable practicable steps to minimise the risks.

Consult with employees (or elected representatives or unions, as applicable) about measures introduced that affect their health and safety. Train employees on new risks COVID-19 poses to their health and safety.

What health and safety measures should be introduced?

See the UK Government's Working Safely Guidelines for examples.

Common measures include:

- Regular cleaning of public places
- Allowing remote working where possible
- Stationing employees two metres apart
- Splitting workforce into teams and/or staggering work times



Health and Safety, Whistleblowing and other Litigation Risks

Whistleblowing

Employers may receive complaints regarding failures to abide by health and safety guidance or to properly assess and address risk

Concerns may qualify as protected disclosures. If so, individual is protected from detriment and dismissal

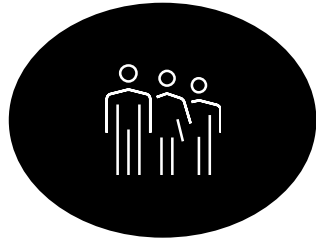
Ensure workers are **trained** on how to respond to whistleblowing complaints. Review whistleblowing policy and ensure it accessible to all staff

Employers who following government guidance are likely to have an adequate defence to allegations. **No financial cap** on compensation in whistleblowing claims



Health and Safety, Whistleblowing and other Litigation Risks

Other Litigation Risk



Employee Misconduct and Grievances

Potential for sexual harassment issues as employees return to the workplace or other harassment complaints where employees fail to respect personal space or comply with safety guidelines



Health and Safety Litigation

Complaints relying on sections 44 and 100 of Employment Rights Act 1996, which protect employees from detriment and dismissal in certain health and safety cases



Breach of contract, unfair dismissal, unlawful deduction of wages

Sudden impact of COVID-19 may have forced employers to make quick and important decisions to protect the business. Potential increase in claims relating to unlawful deduction of wages, unfair dismissal and/or breach of contract, among others



Discrimination

Direct and indirect discrimination risks – ensure decisions are applied consistently and are not based on protected characteristics



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Managing Continued Home- working in the Medium to Long Term

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Managing Continued Home Working in the Medium and Long Term

Managing Remote Working

Government Guidance

Employers are once again required to facilitate remote working wherever possible. Employers should assess business needs and consider whether physical presence in the workplace is required. They should also consider the needs of employees who are struggling with continued home-working.

Dealing with Increased Requests

Going forward, consider how to deal with requests and how to choose between them. Risk of direct/discrimination risk. In order received? Preference to those with statutory rights (e.g. disabilities)? Relevance of different reasons? Consistency? Appoint same person/team to oversee?

Mental Health

Put procedures in place so you can keep in direct contact with home workers to recognise signs of stress as early as possible. Be approachable, available and encourage team members to talk if they are having problems.

Statutory Requests

All employees with 26 weeks' service are eligible to request flexible working. Employers may refuse the application but must handle the request in a reasonable manner.

Workplace Assessments

Employers have the same health and safety responsibilities for home workers as for any other workers. Provide workers with advice on completing their own basic assessment at home.

Equipment

Employers should check that employees have the right equipment to work safely. Discuss equipment and technology with employees, agree what is needed and support employees in setting up new equipment or technology.

Managing Continued Home Working in the Medium and Long Term

Managing Remote Working

Set Clear Expectations

Build a healthy relationship of trust and confidence. Agree when employees should be available, how they will keep in touch, how work-life balance will be managed and how performance will be measured.

Storing Information and Data Protection

Homeworkers may need specific training on their obligations in relation to data protection and confidentiality. Employers should also carry out a data privacy impact assessment of the data protection implications of employees working from home.

Mortgages and Insurance

Employees will need to check there are no issues with them working from home with their mortgage provider/landlord, and their home insurer. Employers should check their insurance to make sure they are covered for remote workers using business equipment.

Expenses

Employees may be entitled to claim a deduction against taxable income for certain household expenses and travel costs. These expenses must be incurred wholly, exclusively and necessarily in the performance of their employment duties.

Childcare

Employers should be sensitive and flexible to staff with childcare responsibilities wherever possible. Consider whether a more flexible homeworking arrangement can be implemented (e.g. different hours and flexible deadlines).

Place of Work

Employers implementing full-time remote working will need to consider employees' contractual place of work. Employees may be keen to work internationally and fluidly, but this may give rise to various employment law and data protection issues.

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Potential Discrimination Risks arising from Different Working Models

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Potential Discrimination Risks arising from Different Working Models

Discrimination Risk



Check that return to work plans do not disadvantage certain protected groups.

If disadvantages are identified, consider what adjustments could be made and/or whether proposed plans are a proportionate means of achieving a legitimate aim.

Certain vulnerable individuals may be classed as disabled. You may have a duty to make reasonable adjustments.

Consider issues regarding links to COVID-19 vulnerability and age, gender and ethnic origin. Employers may need to prioritise individuals who are exposed to a different degree of risk.

Potential Discrimination Risks arising from Different Working Models

Protected Characteristics

Do not make decisions based on protected characteristics (save in exceptional circumstances e.g. reasonable adjustments).

Age

Disability

Gender
reassignment

Marriage and
civil
partnership

Pregnancy
and maternity

Race

Religion or
belief

Sex

Sexual
orientation

Potential Discrimination Risks arising from Different Working Models

Examples

Direct Discrimination

E.g. A manager asking a female employee working from home to check in with him more than a male employee, because of an assumption that the woman is more likely to be distracted by her children.

E.g. An employer deciding it will no longer recruit candidates from any ethnic minority to front-line roles after finding out some ethnic minorities are disproportionately impacted by coronavirus.

Indirect Discrimination

E.g. Mandating that all employees return to work on a set date (this may adversely affect certain groups with protected characteristics).

E.g. Taking over communal staff facilities to create extra work space for social distancing, disadvantaging employees with religious beliefs who lose prayer spaces - this can only be justified if use of these rooms is the only way the employer can ensure employee safety

Discrimination arising from a disability

E.g. An employer rejecting a late appeal against redundancy because an employee's learning disability meant they needed extra help - the employee has been treated unfavourably because of something arising from their disability (rather than because of the disability itself).

Potential Discrimination Risks arising from Different Working Models

Communicate and Document



Communication

- Involve staff in decision-making progress
- Pay attention to specific communication needs (do you have employees on maternity leave for example?)
- Have conversations with staff about particular concerns



Documentation

- Record decisions and decision making progress
- This will help ensure you do not inadvertently discriminate against a particular group of individuals and help evidence that your actions are objectively justified

Hybrid Working

Pay close attention to the disparity between remote workers and "physically present" staff. Continue to communicate virtually. Do not inadvertently treat "physically present" staff more favourably.

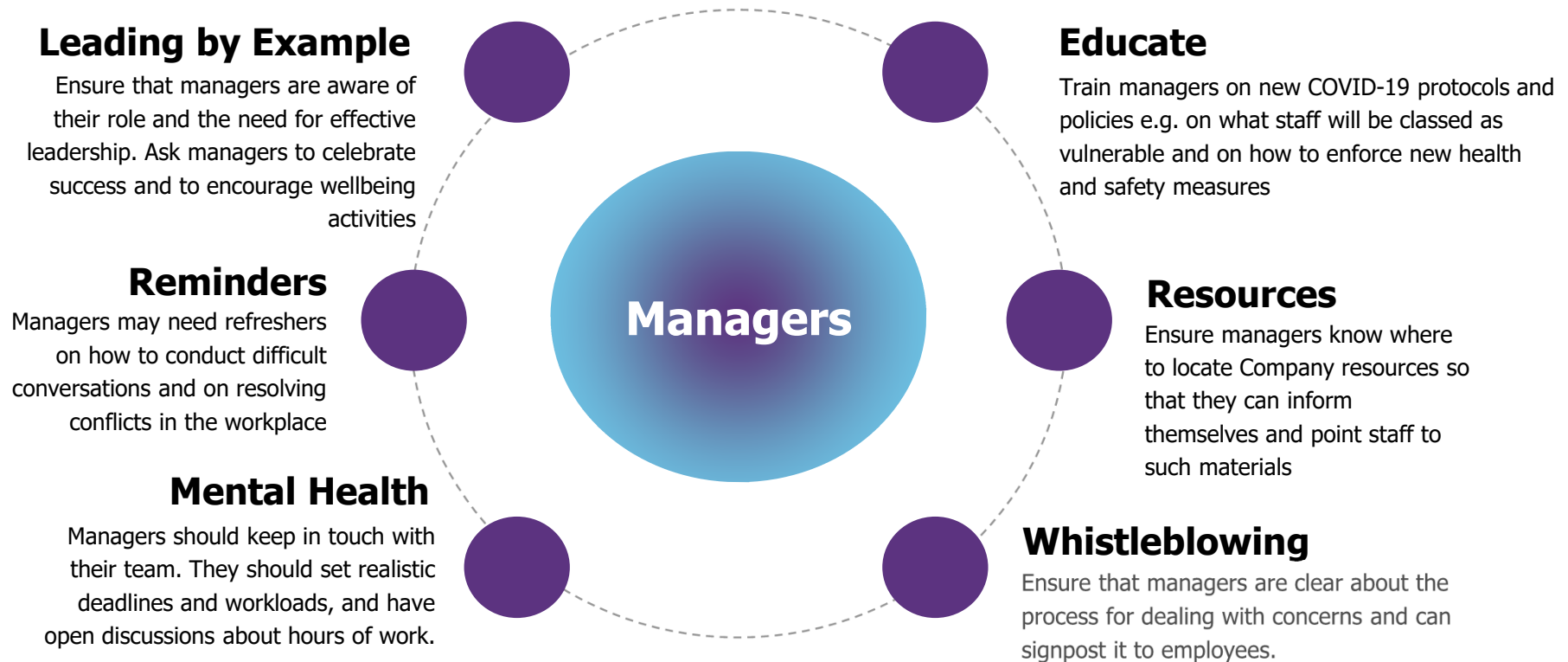


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How to Ensure Managers can Spot Issues and Mitigate Risk

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How to Ensure Managers can Spot Issues and Mitigate Risk





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How to Manage Tension Between Colleagues

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How to Manage Tension Between Colleagues

Context

The pandemic has had an unequal impact across the workforce. Some employees have been furloughed, while others have been extremely busy and frustrated about being unable to take time off. This unbalanced dynamic means negative feelings could arise as more employees return to work.

Educate

Train employees on what conduct is expected of them and be consistent in how you enforce non-compliance.

Provide managers with adequate people management training.

Foster a "Speak-Up" Culture

Barriers to conflict resolution = lack of trust by employees in senior management, lack of leadership and role-modelling by senior management, lack of confidence in challenging inappropriate behaviour and lack of trust in line management. Tackling these issues will help conflict to be resolved at an early stage and through informal processes.

Remote Conflict

Challenges may arise from workplace conflict issues in the 'new normal' era of remote working. Many employees will be 'out of sight' and there is therefore a risk that conflict may go unnoticed or is avoided until it grows to an unmanageable level. Facilitate connection by fostering team interaction with social video calls and tackle conflicts early.

Introverts vs. extroverts

Also consider the tension between personality types as employees are asked to return to the workplace over time

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Survey Results - COVID-19 UK Employment Survey

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Survey Results - COVID-19 UK Employment Survey

COVID-19 Survey

Our COVID-19 UK Employment Survey was carried out between 26 June and 10 July 2020, and involved a significant sample of employers in a wide variety of sectors.

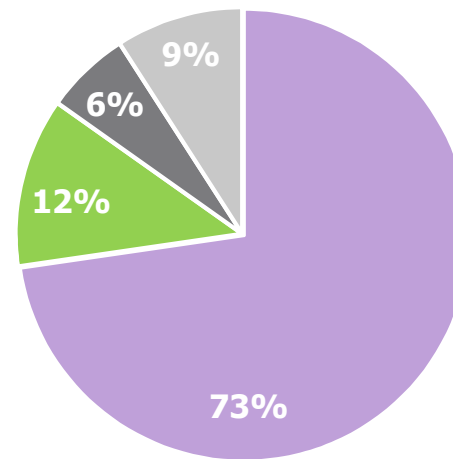
The survey looked at the use of the CJRS, changes to holiday carryover policies, whether employers have compelled employees to take holiday during the pandemic, return-to-work dates

The survey also looked at the measures employers have introduced before reopening their workplace.

Survey results - COVID-19 UK Employment Survey

Have You Furloughed Employees?

Interestingly, the large majority of our surveyed employers had not taken advantage of the Job Retention Scheme.

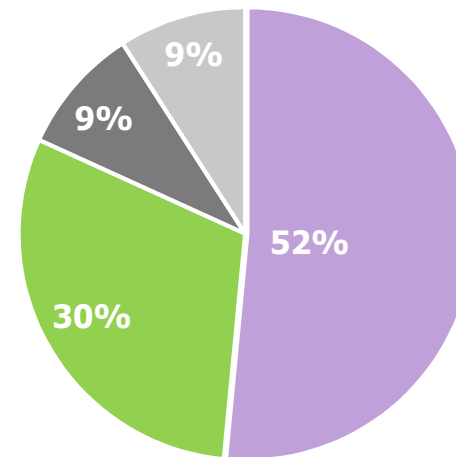


■ No ■ Yes (approx. 25% of workforce) ■ Yes (amount not specified) ■ Not Specified

Survey Results - COVID-19 UK Employment Survey

Holidays Encouraged

Despite amendments to legislation granting employers more flexibility regarding holiday carryover, over half of surveyed employers had not allowed employees to carryover additional holiday this year. Of those who have, the large majority have allowed for an additional five to 10 days carryover with a small minority permitting an extra 10-20 days carryover.

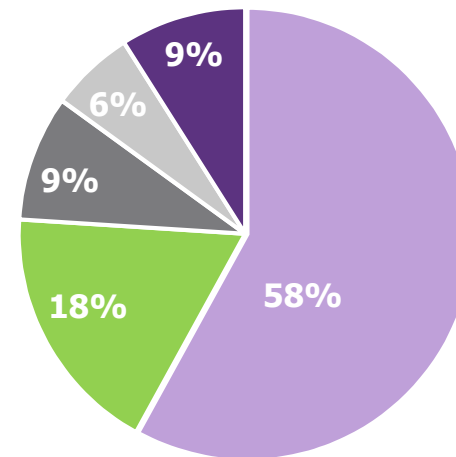


■ No change ■ Additional 5-10 days ■ Additional 10-20 days ■ Not specified

Survey Results - COVID-19 UK Employment Survey

Holidays Encouraged

Although possible in theory (provided employers give notice to their employees), over three quarters of businesses surveyed had not compelled staff to take holiday during the pandemic either at all or on most occasions.

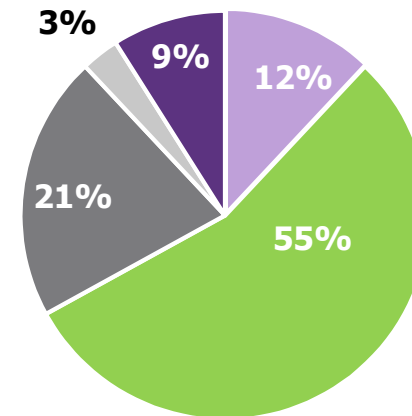


■ No ■ Mostly No ■ Mostly yes ■ Yes ■ Not specified

Survey Results - COVID-19 UK Employment Survey

Most employers reported that their staff would return to the workplace between September and December 2020. A smaller but substantial amount stated that employees would only return in 2021. Interestingly, only one business reported that they would shift to remote working on a full-time basis.

Return Spread



- Prior to September
- September - December
- January onwards
- Fully Remote
- Not Specified

Survey Results - COVID-19 UK Employment Survey

Other Key Take-Aways

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1

Risk Assessments

- 83.3% of respondents had completed COVID-19 risk assessments

2

Voluntary vs. Mandatory Return to Work

- 83.3% of respondents reported that they will ask staff to return on a voluntary basis

3

Consultation

- 53.3% of respondents had consulted with their staff on changes to the workplace

4

Temperature Testing

- Less than half of respondents reported that they would implement temperature testing or other COVID-19 testing

Biography



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As practice group leader for Morgan Lewis’s labor and employment practice in London, Matthew Howse represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and noncontentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

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Biography



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Louise Skinner provides sophisticated, strategic advice on all aspects of employment law, with particular focus on regulatory employment matters. Described as “truly exceptional and insightful” by clients in The Legal 500 UK guide, Louise advises on issues including investigations, contractual disputes, whistleblowing, discrimination and restraint of trade. Louise has particular experience in the financial services, life sciences, and sports, media and entertainment sectors.

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Biography



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Lee Harding has a broad and versatile practice that goes beyond the provision of traditional legal services. Lee's practice is focused on the myriad legal implications arising out of a rapidly changing workplace: flexible working, five generations in the workplace, giving workers a voice, and the crossover between employment and the regulatory environment, to name but a few. The nontraditional legal services that Lee offers require a proactive approach to managing workplace issues before they escalate. He engages with a wide range of stakeholders to deliver sophisticated and actionable solutions that resonate across the entire business.

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Biography



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Pulina Whitaker's practice encompasses both labor and employment matters as well as data privacy and cybersecurity. She manages employment and data privacy issues in sales and acquisitions, commercial outsourcings, and restructurings. Pulina provides day-to-day advisory support for multinationals on all employment issues, including the UK's Modern Slavery Act and gender pay reporting requirements. She also advises on the full spectrum of data privacy issues, including compliance with the General Data Protection Regulation.

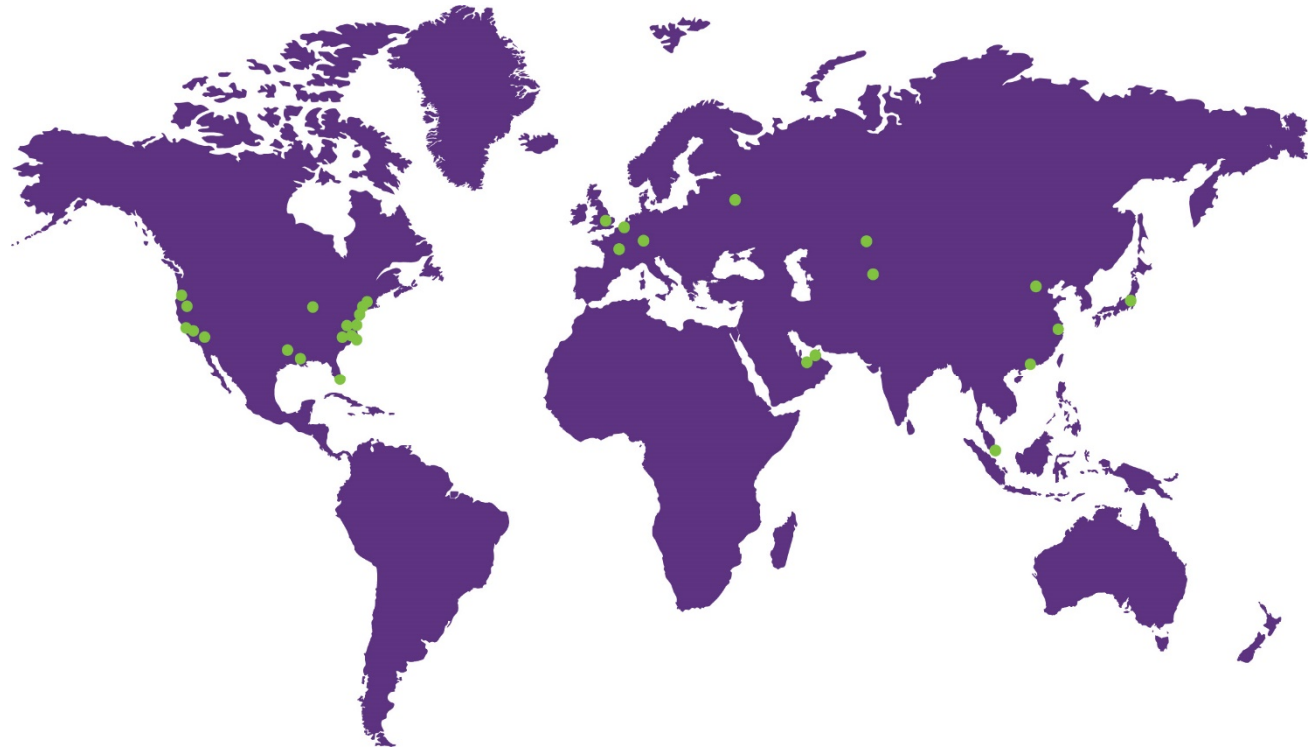
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Latin America
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