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Reopening the Workplace: Key Considerations for UK Employers

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Today's agenda: Sign-posting the issues

- Compliance with local directives and industry-specific requirements
- Social distancing plans
- Screening protocols and safety measures
- Tracking and reporting employees infected with COVID-19
- Pandemic preparedness and business continuity plans
- Reintegrating staff, including from furlough and home-working
- Planning and implementing individual and collective redundancy consultation
- The role of trade unions and other employee bodies
- Review of policies and contracts, including remuneration and annual leave issues
- Whistleblowing and litigation risk
- The importance of culture to successful workplace reintegration

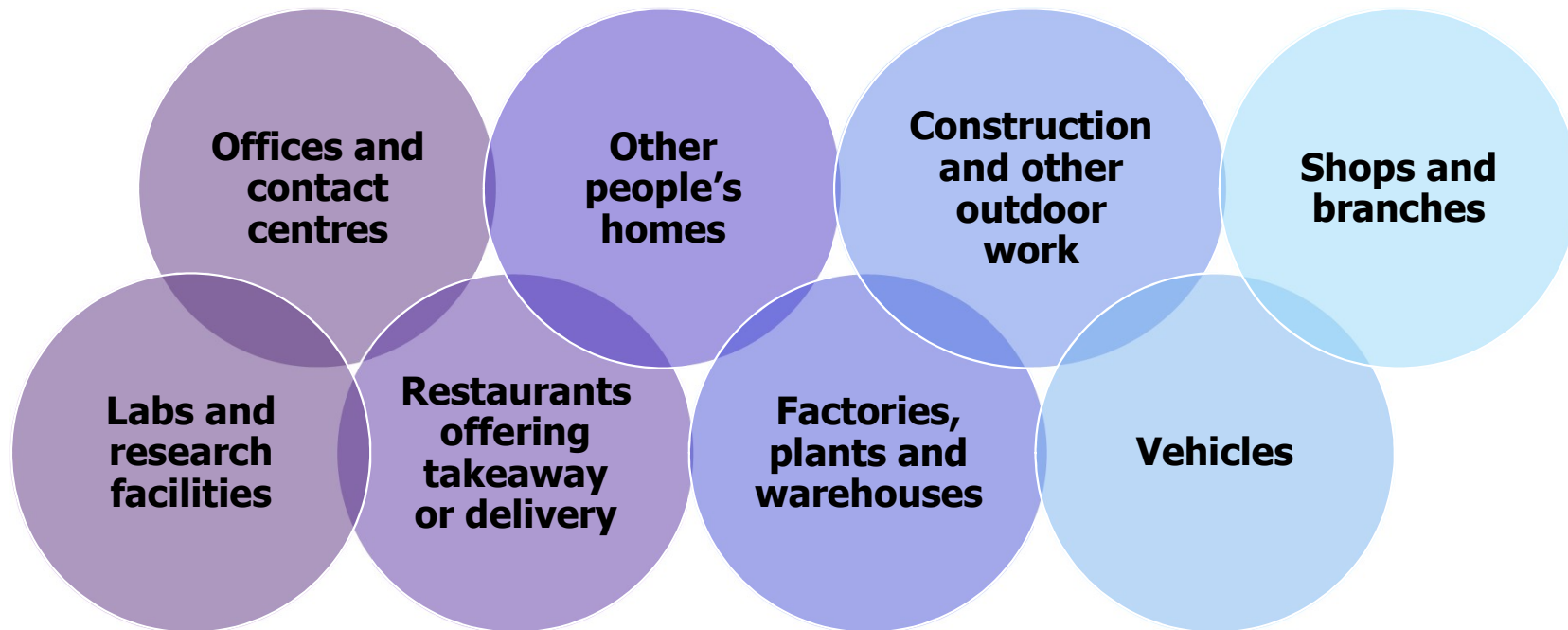
Compliance with local directives and industry-specific requirements

- Industry-specific guidance released on 11 May
- Employers to determine how to implement guidelines and manage risk
- Employers with more than 50 employees expected to publish the results of risk assessments on their website
- Clinically extremely vulnerable individuals have been strongly advised not to work outside the home
- Clinically vulnerable individuals, who are at higher risk of severe illness should be helped to work from home, either in their current role or in an alternative role and should be offered the option of the safest available on site roles
- One-size-fits-all approach unlikely to be appropriate
- Deciding which employees are essential to restart on-site activities will be difficult. Some may be very keen to return, others less so
- Potential backlash against continued remote working from those concerned they need to be physically present in the workplace to justify role / avoid redundancy

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Industry-specific guidance



Offices and contact centres guidance

Staggering arrival/departure times to reduce crowding in & out

Reducing congestion, e.g. by having more entry points

Handwashing/hand sanitation at entry & exit points

Using screens to create a physical barrier between people where appropriate

Staggering break times & using outside areas for breaks

Reducing job and location rotation e.g. assigning employees to specific floors

Avoiding employees working face-to-face



Social distancing plans

- Legal requirement or a way to address employee concerns/reduce employer liability?
- Latest government guidance should be reflected in any plan. Key aspects may include:

Physical workspace modifications

Limiting in-person interactions and physical contact

Training

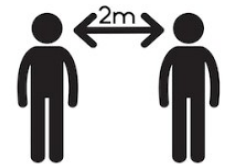
Employee scheduling



PPE

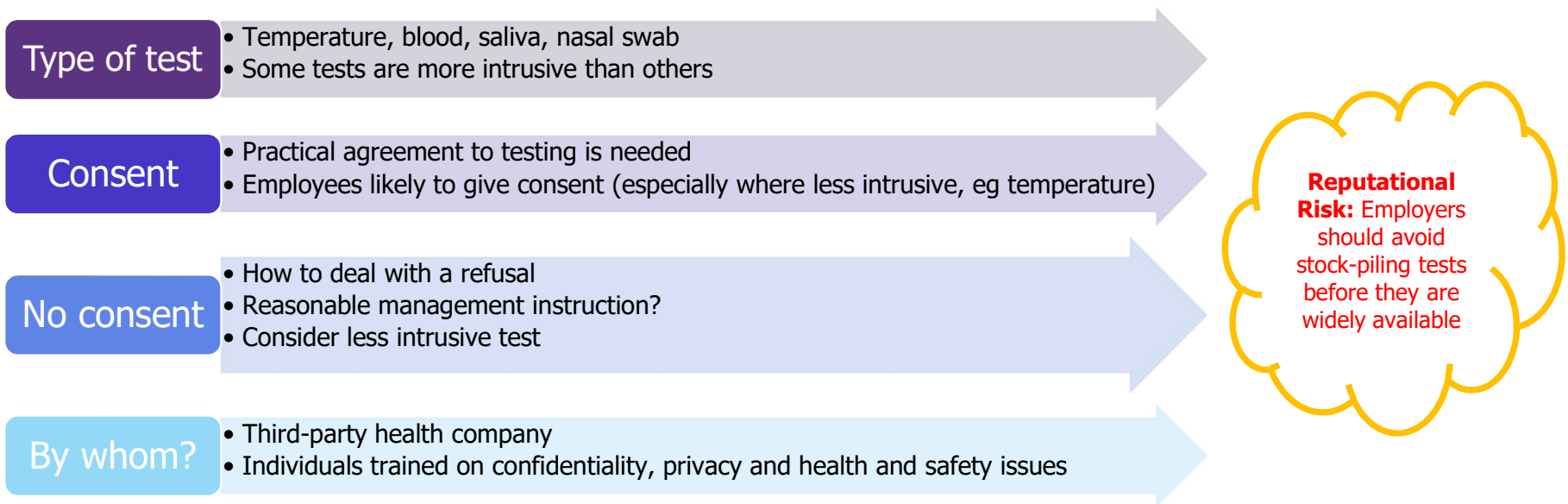
Cleaning and disinfecting

Safety communication plan

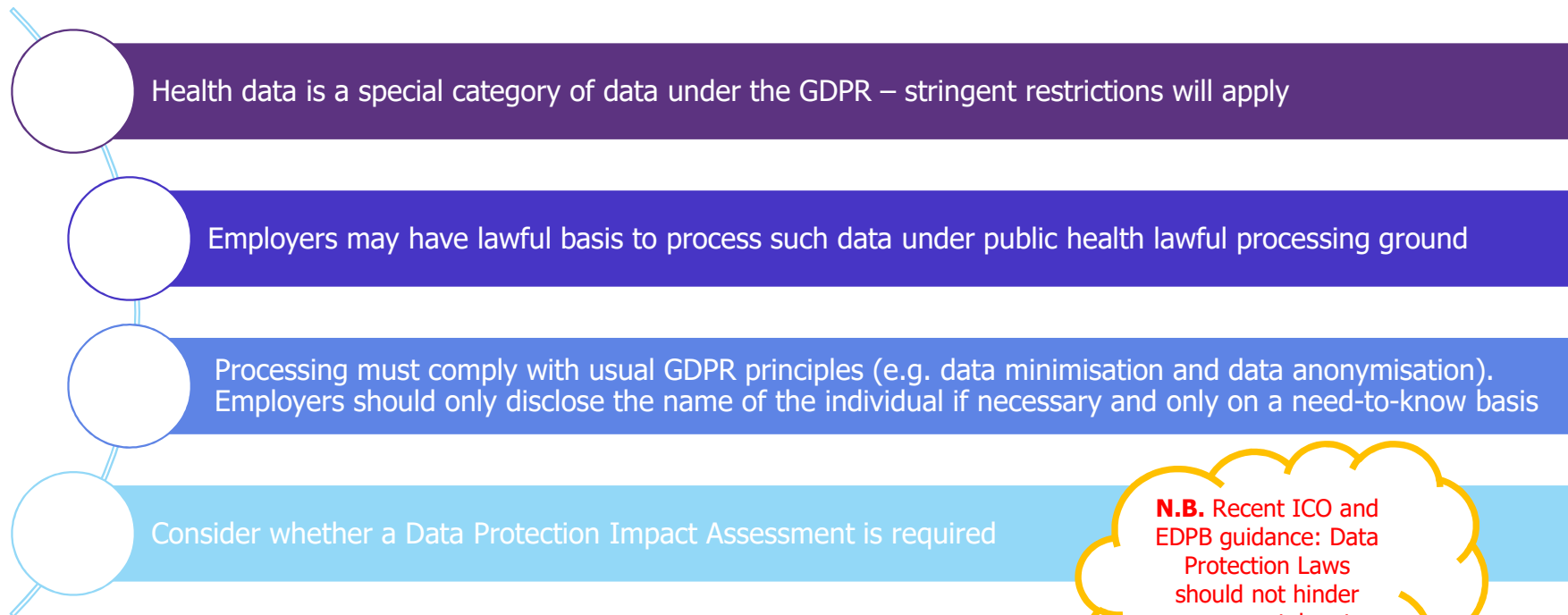


Screening protocols and safety measures

- Employer's duty to protect health and safety of staff and provide a safe workplace – first step: keep out infection!
- Measures: questionnaires, self-assessment, temperature screening and other physical checks on staff and third parties.



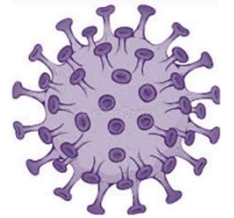
Tracking and reporting employees infected with COVID-19



Pandemic preparedness and business continuity plans

Business continuity

- Consider impact on management, communication, and staffing as some operations are on-site while other employees (or entire teams) continue to work flexibly
- COVID-19 working groups should change focus from crisis to recovery



Pandemic preparedness

- Review and revise pandemic response plans to respond to another potential outbreak of the virus
- Consider whether to require vaccination once developed



Pandemic preparedness and business continuity plans

Pandemic response plans should address:

- Lessons learned
- What new processes/procedures should be put in place to prepare for a potential recurrence
- Management and HR succession if any leadership team is sidelined
- Updates to PR messaging regarding crisis management issues
- Other potential outbreaks in the workplace
- Other potential disruption, e.g. hurricanes, earthquakes, terrorist attacks, or a new viral/bacterial outbreak



Reintegrating staff: furlough

How do we end furlough and what do we need to consider?

- The Government announced on 12 May 2020 that the Job Retention Scheme (JRS) will be extended until the end of October 2020.
- The JRS will continue as before until the end of July. It will then be made more flexible in August, September and October with the possibility of bringing furloughed employees back part-time. From August, employers will also be asked to make contributions to the scheme. Full details will be published by the end of May.
- Employees will continue to receive 80% of their wages until the end of October while on furlough.

Redundancies required

- Begin assessing consultation obligations
- If 20 or more employees affected at one establishment, consider collective consultation obligations
- Consider starting employee representative election process in advance of JRS end date

Redundancies not required

- End furlough in accordance with furlough agreement (if applicable) or by notifying employees
- Communicate social distancing measures
- Consider creating FAQ-style document with guidelines on key issues, e.g. best practice for travelling by public transport and approach on annual leave accrued during furlough

Reintegrating staff: home-working

How do we bring staff back from home-working and what do we need to consider?

Gradual resumption of workplace activities in accordance with government guidance (split-teams and/or only certain business operations)

Employers should notify employees of plans to reopen workplace and what measures have been introduced to ensure their safety

Accommodate employee concerns where possible

Careful consideration should be given to certain categories of employees (e.g. individuals on "extremely vulnerable" list and working parents)

Ensure any decision is applied consistently to reduce discrimination risk

Planning and implementing individual redundancies

Individual redundancy

- Service requirement- continuous service of at least two years
- Redundancy- business closure, workplace closure or diminished requirements for employees to do work of a particular kind
- Acting reasonably in all the circumstances

Reasonableness test

- Fair warning
- Fair consultation
- Fair selection criteria
- Consider alternative roles

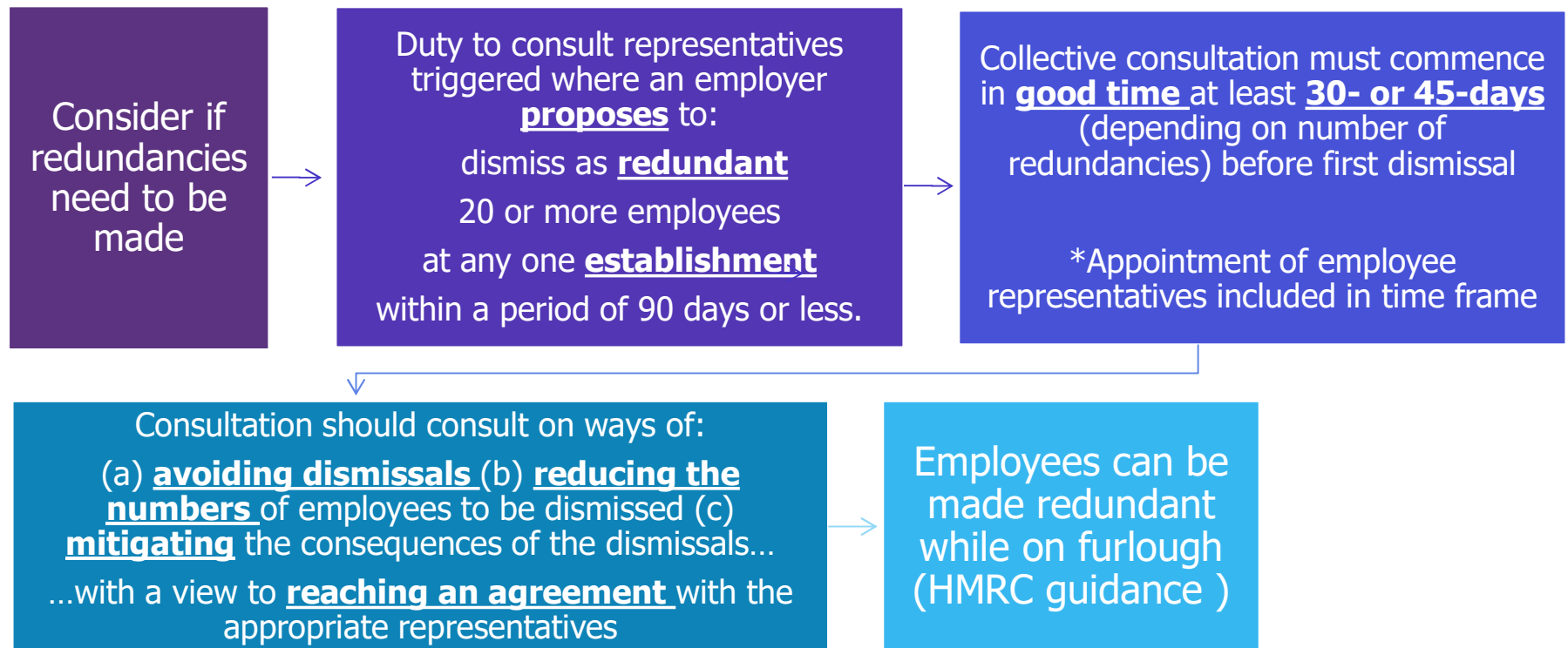


Practical challenges

- Consulting staff who are working remotely/furloughed
- Logistical issues- access to records/consulting remotely
- Right to be accompanied to redundancy meetings remotely
- The impact of selection criteria on employees who are shielding and/or more vulnerable

Voluntary redundancy

Planning and implementing collective redundancy consultation



Planning and implementing collective redundancy consultation: current considerations

Consider starting the **employee representative election process** in advance of the Job Retention Scheme end date (NB: furloughed employees CAN act as employee representatives without breaking furlough)

Consider timing of **consultations** (when employers don't know the full terms on which the Job Retention Scheme is extended or how quickly lockdown will be lifted in practice)

Consider difficulties that appropriate representatives might have to access affected employees who are furloughed. Furloughed employees may:

Have caring responsibilities

Not speak English as a first language

Need disability-related reasonable adjustments to access virtual meetings

Have limited access to the internet

The role of trade unions and other employee bodies

- Managing worker-employer relationship by challenging measures put in place by the Government and/or employers to mitigate effects of COVID-19
- Where employers recognise a trade union, trade union representatives have statutory duties to investigate potential hazards in the workplace and complaints raised by employees
- Employer engagement with union (or other representative body):
 - Agreeing social distancing plans to provide input on proposals.
 - Collective redundancy consultation.
 - Changes to terms and conditions.
 - Helping to communicate guidance to employees and providing a route to raise questions/concerns.



Contracts and policies

- COVID-19 impacts many aspects of employment relationship
- Good time now to review contracts and policies to:
 - Anticipate issues on lifting of lockdown
 - Consider whether contracts and policies need updating

Leave policies

- Review carryover policies following WTR amendment
- Emergency Volunteer Leave

Pay, benefits, and incentives

- Temporary suspension to pay rises and reduced pay
- Deferral of bonus or commission payments

Travel policies

- Align with government guidance
- Restrict to essential business travel only?

Sickness reporting and policies

- Sick pay for COVID-19
- Sick pay and self-isolation
- Evidence of sickness

Contracts and policies

- Review and update employment/agency/contractor contracts to give employer/principal contractual rights in the event of further shutdown

Layoff, furlough, and wage deduction provisions

- Add flexibility to place employees on furlough or reduce working hours / pay
- Layoff is a contractual right only
- Speeds up process (particularly in relation to obtaining consent)
- Prepares for another pandemic or prolonged business downturn

Termination provisions

- In contractor and agency agreements
- In the context of COVID-19 or related business downturn

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 is accessible to all staff

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

Other litigation risk

Potential spike in **employee misconduct, grievances** and **health and safety litigation** as employees adapt to their new workplaces following isolation

E.g. 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

E.g. increase in **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, or are required to undertake work in a way that makes them uncomfortable

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

Direct and indirect **discrimination** risks – ensure decisions are applied consistently and are not based on protected characteristics. Addressed in EHRC COVID-19 guidance

E.g. manager asks female employee who is working from home to check in more than a male employee due to a stereotypical assumption that a woman may be more distracted from work by her children (direct) OR requiring all employees to work in the office, which may have a greater impact on vulnerable people with underlying health conditions / disabilities (indirect)

The importance of culture to successful reintegration



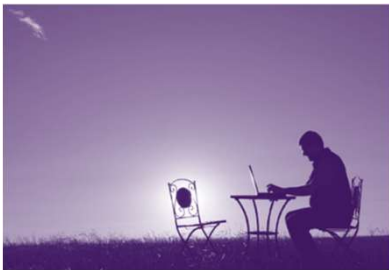
Impact of COVID-19 on workplace culture will depend on how employer has reacted to the crisis

A positive workplace culture motivates workers and has a positive effect on culture in the long term

Post-lockdown, be mindful of mental health issues (exacerbated by remote working, isolation, job security)

Increase in flexible working may mean better gender equality in some roles (lack of flexible work arrangements is often cited as a significant source of the gender pay gap)

The importance of culture to successful reintegration



COVID-19 has sped up the adjustment to new ways of working

Strong workplace culture is particularly important where certain operations remain onsite while other employees (or entire teams) continue to work remotely

Refusing flexible working requests will need to be carefully justified where the employee has been productive and successful while working remotely during the pandemic

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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 non contentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

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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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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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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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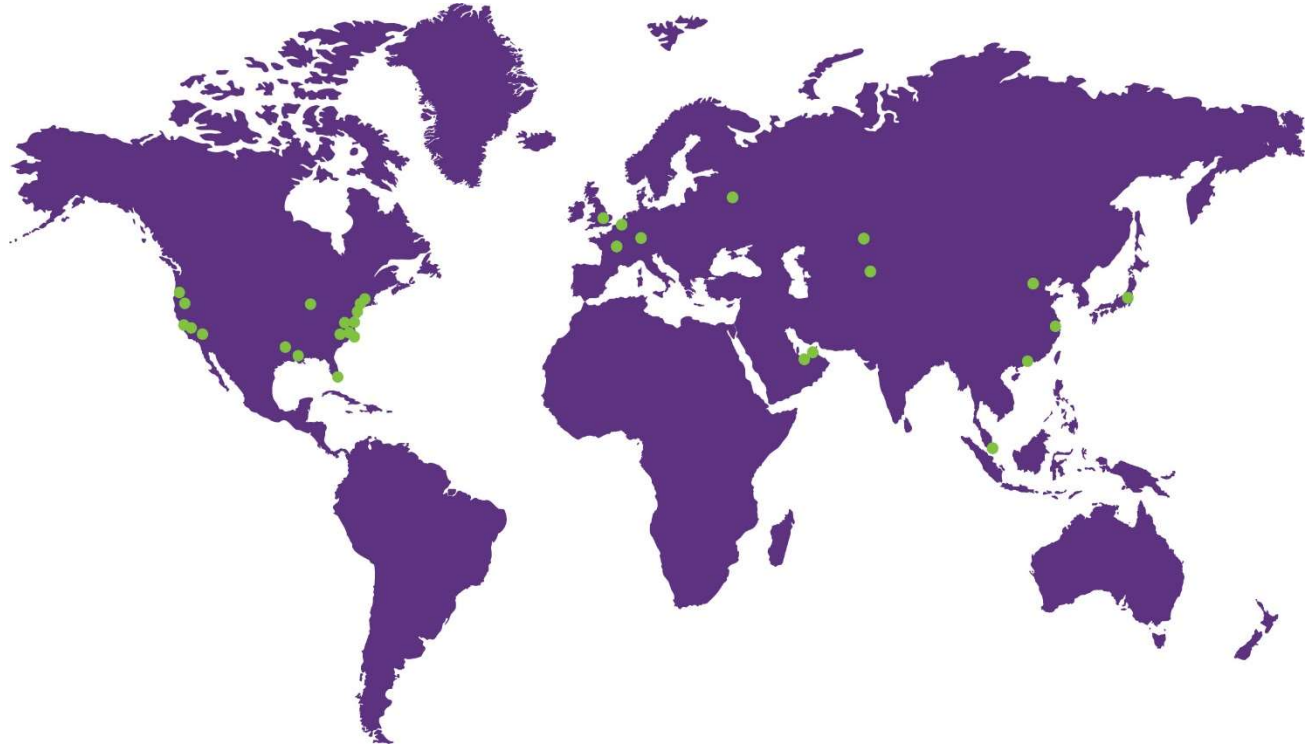
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