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REOPENING THE WORKPLACE: THE NEW REALITY FOR UK EMPLOYERS

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Presenters



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**Hybrid working is
here to stay. For now.**

**Competitors are
adapting, and
adapting fast.**

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Today's agenda

- 1. Remote working. Will it last?**
 - Hybrid & cross-border working
 - What are the employment issues?
 - What are the practical issues?
- 2. Vaccination. Can you compel employees to be vaccinated?**
 - Employer incentives and mandates
 - Privacy considerations
- 3. Trade Secrets and confidentiality**
- 4. Conclusion**

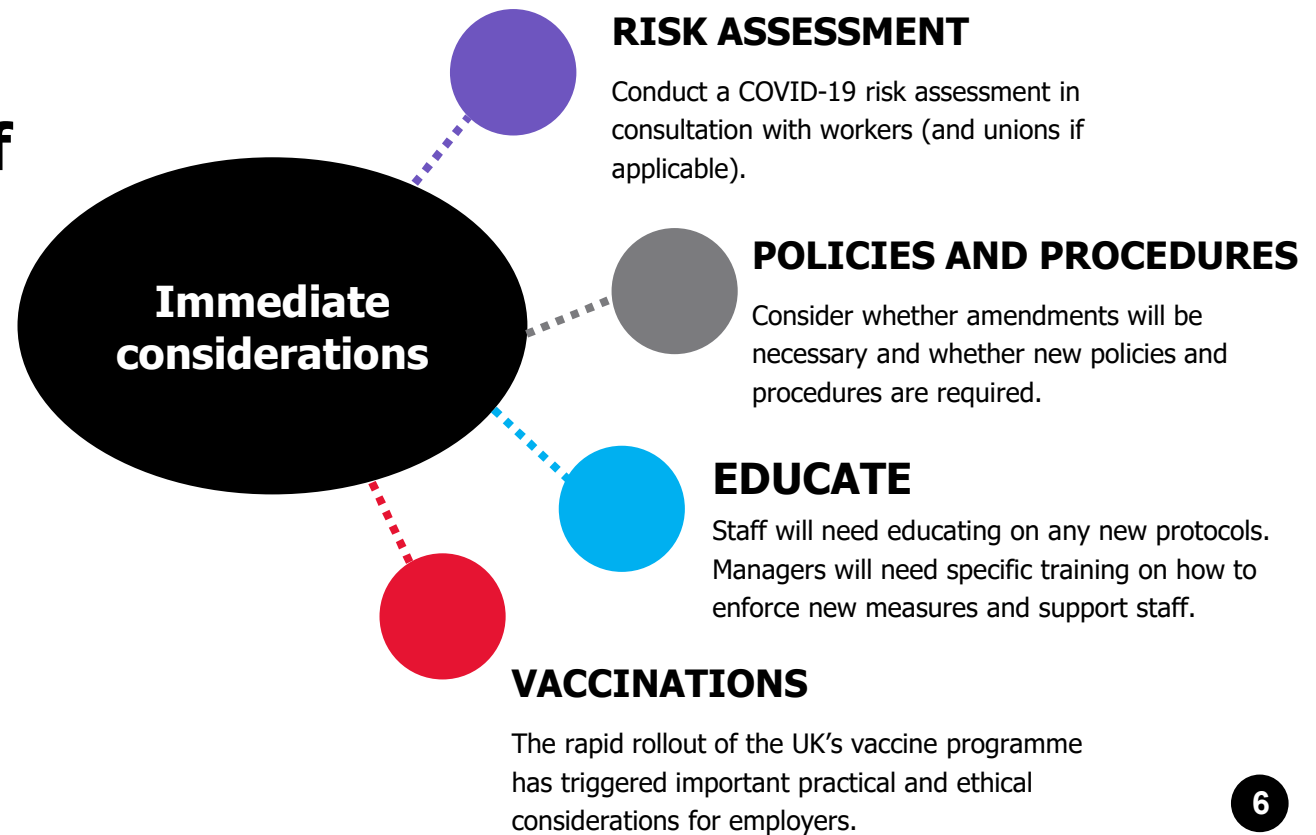
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What is the current picture for employers?

Emerging out of lockdown.

Government guidance states that workers should continue to work from home, and employers must take every step possible to facilitate this unless it is not possible for workers to do their job remotely. But, employers are planning for a relaxation of the rules.

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Will remote working last?



12-months of remote working

The fact that many of the world's largest economies have remained in some form of lockdown for more than a year has dispelled any doubts that the shift to remote-working is a short-term phenomenon.



Shift in employee expectations

Employers will need to consider now about how they are going to respond to their employees' expectations of new working patterns when government guidance no longer requires people to work remotely.



Hybrid model?

The expectation is that, even after vaccination programmes are complete, a large proportion of employees will expect to work from home in a "hybrid" model at least some of the time going forward. An Employer's response to this change in working habits may be crucial to its future success, and there are many employment law issues associated with an Employer's response.

What are we seeing in the market?



Market Response

Employers are adopting different approaches - from a permanent or a rotational remote working model - to compulsory workplace attendance save in exceptional circumstances.



Impact

Employers' flexible working policies may affect whether they remain or become an employer of choice. Flexibility will be an important recruitment and retention tool.



Employers' Approach

Employers will need to risk-assess, design and implement new policies and procedures, and educate their staff on the expectations and parameters of new working models.

Managing Continued Home Working in the Medium and Long Term

Managing Remote Working

Government Guidance

Employers are still required to facilitate remote working wherever possible. Employers should assess business needs and consider whether a 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 to avoid direct/discrimination risk. Considerations include: Dealing with them 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

Considering putting 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 considerations, data protection and tax issues.

Flexible working and cross-border issues



Employee requests



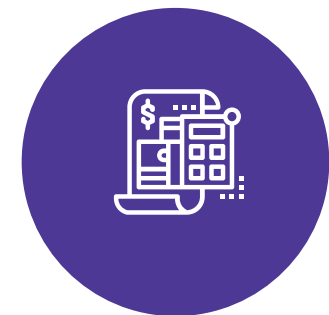
Flexible working



Legal and regulatory issues



Unexpected liabilities



Costs

Hybrid Working

There will not be a one-size-fits-all solution for all employers, and effective flexible working practices will vary according to industry.

What are the employment issues?

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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.

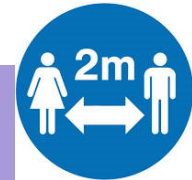
Employees have independent statutory duties to take reasonable care for their own health and safety, and that of other persons, and to co-operate with you to ensure that your rules are complied with.

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 reasonably 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, the individual is protected from detriment and dismissal

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

Employers who follow government guidance are likely to have an adequate defence to allegations. Note that there is **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



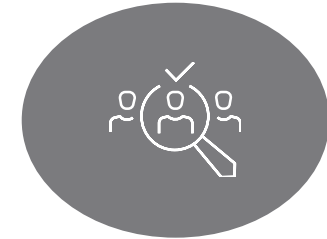
Health and Safety Litigation

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

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 workspace 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 the decision-making process
- Pay attention to specific communication needs (do you have employees on maternity leave for example?)
- Have conversations with staff about particular concerns that they may have



Documentation

- Record decisions and the 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

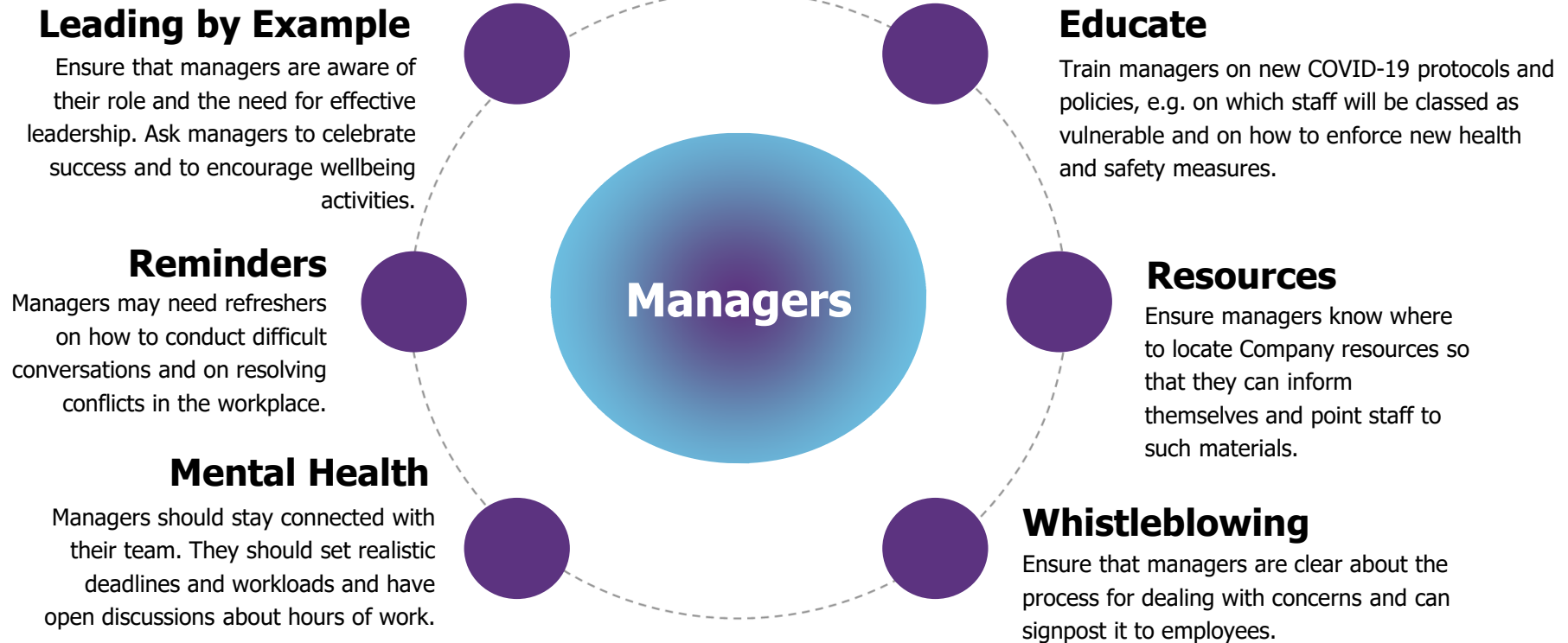
Hybrid Working

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.

The knock-on issues...

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How to Ensure Managers can Spot Issues and Mitigate Risk



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 = 1) lack of trust by employees in senior management, 2) lack of leadership and role-modelling by senior management, 3) lack of confidence in challenging inappropriate behavior and 4) lack of trust in line management. Tackling these issues will help conflicts 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 interactions with social video calls and tackle conflicts at an early stage.

Introverts vs. extroverts

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

Employer mandates and incentives: legal issues and workforce considerations

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Can an employer *require* its employees to be vaccinated? (1)

In short: this is unlikely without risk of claims.

Mandatory medical treatment, including vaccination, is in theory prohibited!



Employers must consider some key questions:

1. Can receiving a vaccine be considered a **reasonable management request**?
2. Is there a **medical examinations clause** in their employment contracts, and if so, could they compel a vaccination at common law?
3. Could employees have **valid reasons for refusal**, such as due to disability and religious beliefs? **Human rights** considerations are also important.
4. What sort of **publicity** may arise from an employer-mandated vaccination programme?
5. Could employers implement a “**no jab, no job**” approach?

Can an employer *require* its employees to be vaccinated? (2)

A "no jabs, no jobs" stance raises several issues e.g. discrimination and data privacy



"No jabs, no jobs"?

- The UK Government recently stated that it is "**up to businesses**" to decide whether they want to their employees to be vaccinated.
- Some employers are considering making it a **contractual requirement** that new and existing employees are vaccinated.
- Each employer needs to consider its justification for introducing the requirement based on its own risk profile, having regard to the safety of its workforce, customers, visitors etc.
- This is likely to amount to an employer-mandated "vaccine passport" and could leave employers open to **risks of legal challenges** on discrimination grounds and presents additional data privacy issues.

Can an employer *require* its employees to be vaccinated? (3)



- The Health and Safety at Work Act 1974 obliges employers to take reasonable steps to reduce any workplace risks.
- ACAS advice:
 - If an employer deems it necessary for staff to be vaccinated, it must be agreed with staff/unions and put in writing (i.e. in a policy).
 - A refusal to be vaccinated could result in a disciplinary procedure (dependant on whether vaccination was necessary for the employee to carry out their duties, e.g. a care home worker).
- Article 8 Rights:
 - Maximizing the number of employees who can attend work safely *could* be a legitimate aim.
 - Allowing employees to return to offices only if they have been vaccinated and leaving other workers working remotely *could* be justifiable.

Context is
key!

Can an employer *encourage* its employees to be vaccinated?

Employers have broad discretion as to whether to encourage their employees to get vaccinated. ACAS guidance advises that employers should support staff in getting the vaccine.



Marketing

Employers could promote the importance and benefits of being vaccinated in internal communications, such as via health and wellbeing campaigns.



Financial Incentives

Employers could introduce financial incentives to encourage vaccination, such as paying for the costs associated with taking the vaccine, including travel to a vaccination centre, and paying employees for the time off to get vaccinated.



Negative Incentives

In theory, employers could elect to not allow employees to return to the office, or to take part in certain events, if they have not had the vaccine. However, this could be interpreted as compelling employees to have a vaccination, giving rise to risk.






Employers will need to consider the extent to which they encourage employees to be vaccinated, balancing all relevant stakeholder rights and interests, given that it is ultimately a personal choice for each employee.

Mandatory employer COVID-19 testing

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Mandatory employer testing

Many employers are introducing lateral flow testing for employees who cannot reasonably do their job from home. This new dynamic presents further employer considerations:

-  Responding to an employee's refusal to be tested – business interests vs right to bodily integrity
-  Ensuring that other infection control measures remain in place
-  Privacy considerations: handle personal data lawfully, fairly and transparently
-  Accuracy of lateral flow tests is in question
-  Be transparent with employees about why tests are being conducted and how data will be used

Privacy considerations

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Privacy considerations

Privacy obligations are stringent under the UK GDPR and the DPA 2018.

GDPR Obligations

The UK GDPR places general obligations on data controllers and processors to ensure lawful processing, transparency of data processing, restricted access to data and the security of data stored by employers. Data cannot be excessive to the lawful purposes.

Transparency

Employers must be clear how the data will be used, protected and restricted.

Collecting vaccine status data

Employers need a clear and compelling reason to collect the data. They also need a lawful processing basis e.g. legitimate interest and also working capacity assessment, public health or employment law obligations for health/disability or belief data.

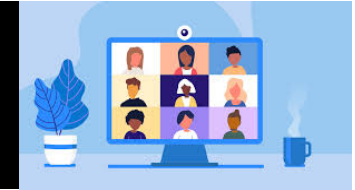
Storing personal data

If data is stored in a system (e.g., HRIS), a Data Protection Impact Assessment (DPIA) may be required. It must be retained for a limited period and deleted when no longer necessary.

Vicarious Liability

Where there is a personal data breach by an employee during the ordinary course of their employment, the employer is at risk of being vicariously liable for the breach.

Monitoring employees



Employers must be careful when considering using technology, such as surveillance software, to monitor staff working remotely.

Employer Duties

- Ensure that the Working Time Regulations are followed (e.g., rest breaks).
- Be mindful that employers do not have unrestricted monitoring rights and must conduct a DPIA when using technology to conduct monitoring to show that it is necessary and justified.
- Ensure that transparency is implemented by having policies on monitoring and they are communicated to employees.

Use of Technology

- Some employers have adopted technology such as 'lone worker apps' or other software that employees can use to check-in and check-out.
- Employers may monitor employees' work activities, but the monitoring level needs to be proportionate and reasonable.
- Where employee personal data is involved, employers must ensure they have identified a legitimate and specific purpose for processing that data.

Risks

- Inappropriate and disproportionate monitoring could lead to claims involving employees' right to respect for private life under Article 8 of the European Convention on Human Rights.
- Employees have data protection rights and can claim that excessive monitoring amounts to a breach of mutual trust and confidence (implied in employment contracts) leading to constructive dismissal claims.

Confidential Information & Trade Secrets

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Protecting confidential information and trade secrets in the new normal (1)

- Increased remote working may have weakened loyalty between employer and employee
- Employees may have more opportunities to take confidential information and store it on personal devices at home
- Consider how to mitigate risk of misuse of confidential information
 - Prevention is better than a cure
 - Regular team calls or virtual socials to maintain employee relationships
 - Maintain positive culture
 - Engender loyalty



A loyal workforce is the best protection

Protecting confidential information and trade secrets in the new normal (2)

Challenges arising from homeworking

- Loss of control of confidential information
- Third party risk from co-habitants
- Hard to prevent misuse, but tech makes it easier to track downloads/printing
- Temptation to monitor employees in their own home:
 - Pros: prevention of data theft; increased productivity; sharing best practice
 - Cons: invasion of privacy; damage to morale; demonstrates a lack of trust



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Protecting confidential information and trade secrets in the new normal (3)

Day-to-day

- Identify confidential information or trade secrets within the business and create a register to monitor ownership or control
- Physical security e.g., provide shredders/privacy screens
- Electronic security e.g., password protection; limit access to folders
- Confidentiality policy → Communicate policy to employees → Regular training



Upon exit

- Exit interviews: remind employees of their contractual obligations
- Follow up with reminder letter:
 - Has a template letter been used from a foreign office such as the US?
 - Does the letter go beyond what the employer can enforce?
- Signed letter confirming the employee has/will comply with obligations
 - Include certain obligations in severance agreements
 - Consider inserting a clawback provision



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ICO Guidance for Remote Working

- Cloud storage
 - Helps prevent staff from using own personal storage services
 - Consider password protection and only giving full permissions to key staff
- Emails
 - Consider ICO guidance to protect against phishing attacks
- Manage security risks of using devices remotely
 - Most preferable: use of company devices
 - Least preferable: use of personal devices
 - Implement mobile device and remote working policy
- Rights of third parties
 - Consider privacy rights of housemates that might appear in your camera



Conclusion

1

Hybrid working

- Managing remote working in the medium to long-term.
- Remaining competitive.

2

Employment issues and the practical consequences of flexible working

- Health & safety, whistleblowing, litigation and discrimination risks.
- Managing tension and mitigating risk as employees are asked to return to the office.

3

Vaccinations

- Employer mandates and incentives.
- Ethical, legal and data protection concerns.

4

Privacy concerns

- Monitoring employees.
- Protecting confidential information and trade secrets.

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/
topics/coronavirus-
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



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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Pulina Whitaker's practice encompasses data privacy and cybersecurity as well as employment matters. Co-head of the firm's global privacy and cybersecurity practice, she manages employment and data privacy issues on an advisory basis and in sales and acquisitions, commercial outsourcings, and restructurings. Pulina manages international employee misconduct investigations as well as cross-border data breach investigations. She has been appointed as a compliance monitor for the United Nations and for USAID. She is also a trustee of Hostage International.

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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 a particular focus on the financial services, life sciences, sports, media, and entertainment industries.

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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.

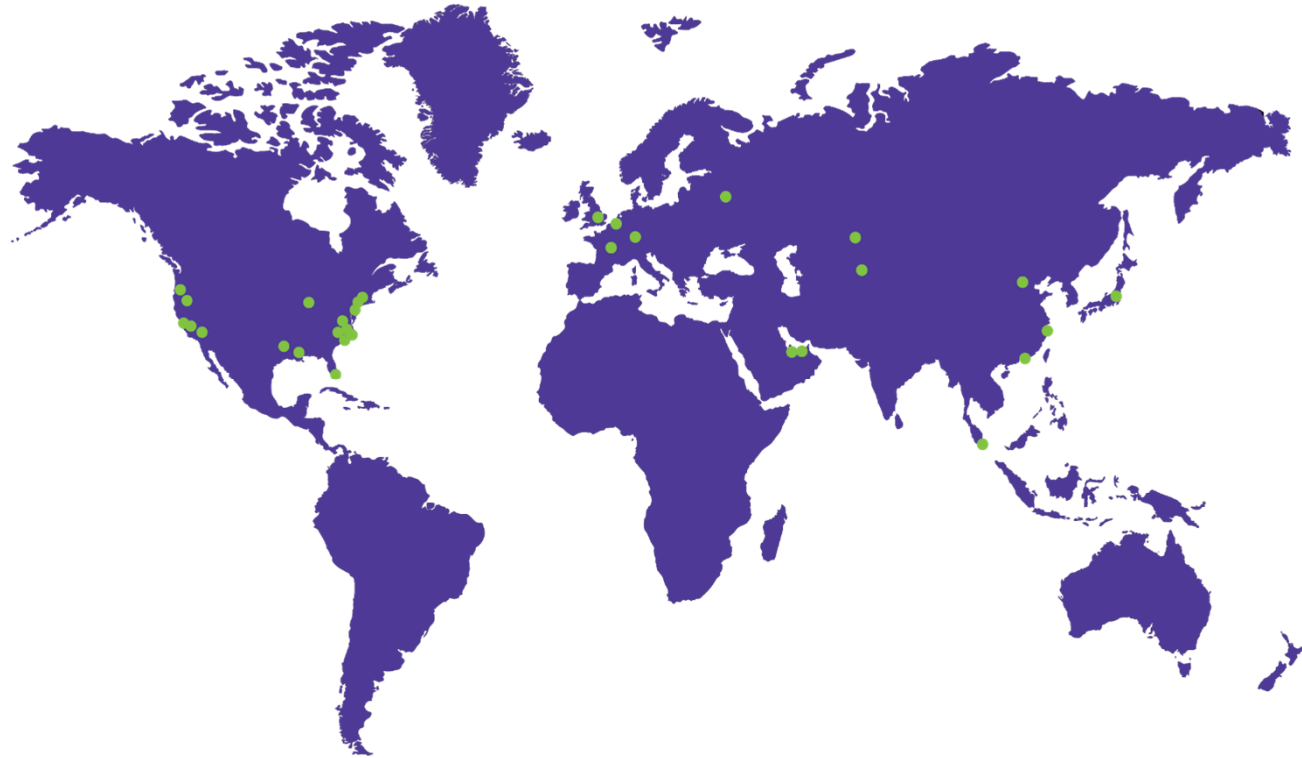
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