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# RETURNING TO THE WORKPLACE: OPEN FOR BUSINESS?

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# Presenters



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# Today's agenda

## 1. Hybrid & cross-border working

- What are the employment issues?
- What are the practical issues?

## 2. Privacy Considerations

- Privacy obligations
- Monitoring employees

## 3. Vaccination & testing

- Can you compel employees to be vaccinated/ tested?
- Disclosure of vaccination status

## 4. Conclusion

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# What is the current picture for employers?



## Immediate considerations

### **RISK ASSESSMENT**

If not already done, conduct a COVID-19 risk assessment in consultation with workers (and unions if applicable) on return-to-work protocols or review existing risk assessments in light of the constantly changing rules.

### **VACCINATIONS**

The rapid rollout of the UK's vaccine programme has triggered important practical and ethical considerations for employers.

### **EDUCATE**

Staff will need to be informed of new protocols. Provide training to managers on how to enforce new measures and support staff.

### **POLICIES AND PROCEDURES**

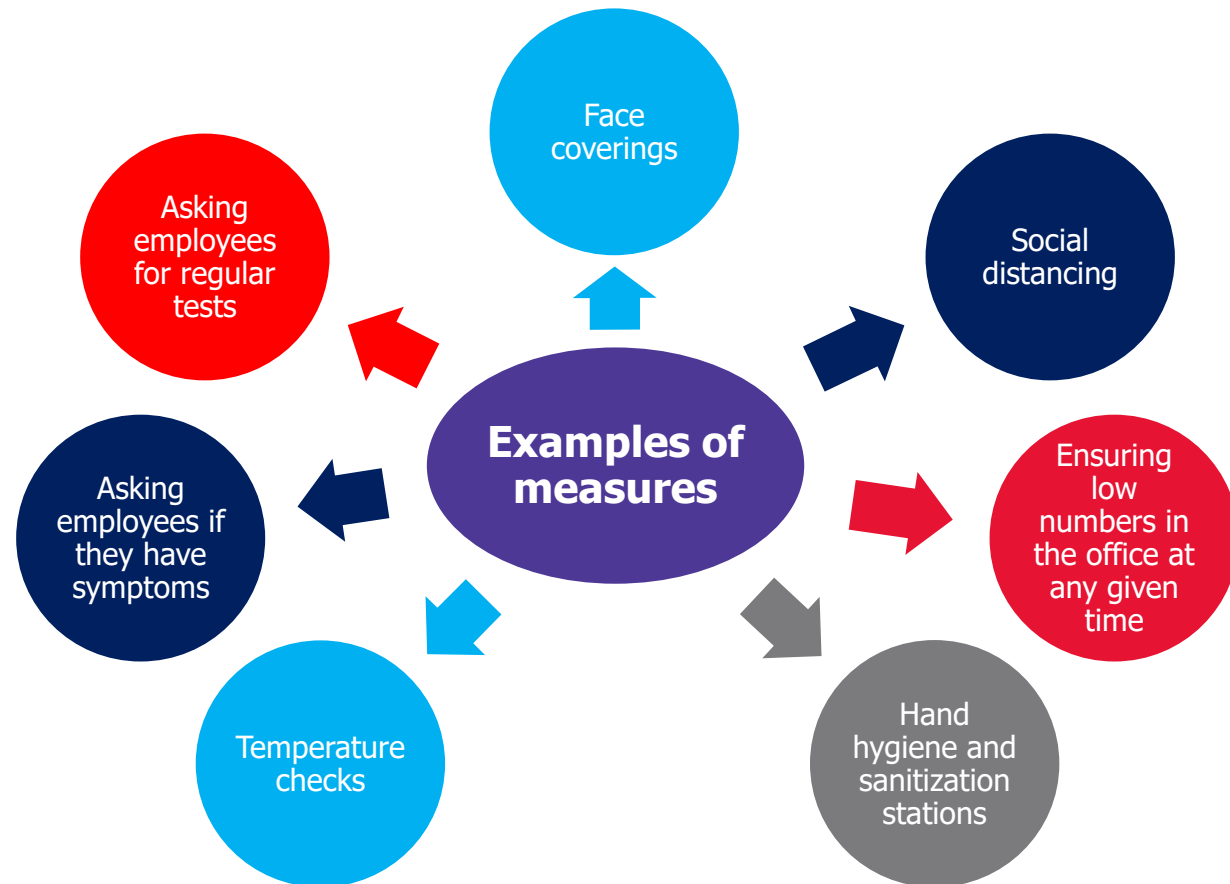
Consider whether amendments will be necessary and whether new policies and procedures are required. For example, consider modifying office space, providing ventilation, and sanitizing high-contact areas more often.



# What is the current picture for employers?

In the UK, government restrictions have been lifted. The government is no longer instructing people to work from home.

However, continued nervousness among employers to maintain their statutory and common law duty to ensure a safe and healthy work environment means many are still keeping restrictions in place.



# What are we seeing in the market?



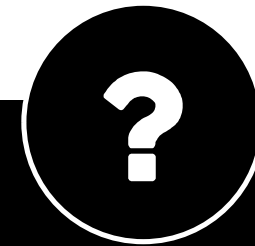
## Market Response

Employers are adopting different approaches - from a full return to office with vaccination mandate in place – to “soft vaccine mandates, with unvaccinated employees permitted to work remotely – to fully flexible policies on return to work and vaccination status.



## 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.

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

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

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# Hybrid working

A hybrid model combines remote and flexible working practices with office-based working.

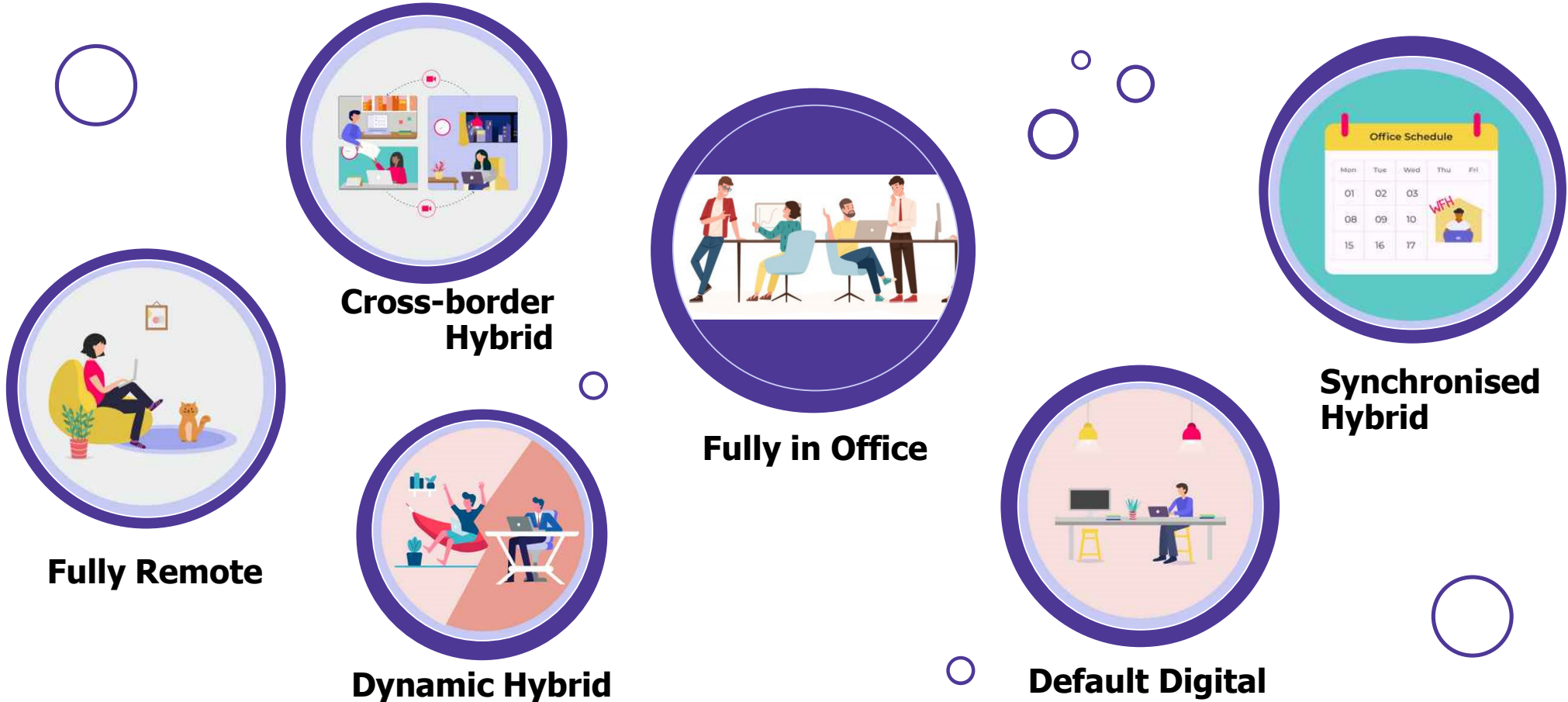
Hybrid models should consider what work is done, where work is done, how work is done and who does the work.



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Post-covid  
Hybrid Model Exploration

# Hybrid working models




# Flexible working requests

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

There may be a greater emphasis for employers to carefully consider flexible working requests from employees, especially in light of the current climate and shift in remote and hybrid working patterns.

Employers will not only be expected to deal with these requests consistently to avoid discrimination claims, there may also be a greater onus placed on employers to consider whether other alternatives may be offered to the employee making the request.

 BBC

## Mother refused 5pm finish wins £185,000 payout

Alice Thompson wanted to work shorter hours to pick her daughter up from nursery, but ended up resigning. The former estate agent spent tens ...





# Hybrid/flexible working: further considerations (1)

## Set Clear Expectations

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

## Employees' preferences

As offices start to reopen, employers will need to consider how to coordinate differing preferences amongst employees.

From a practical perspective, it may be more difficult when *some* people are in the office than when *everyone* was at home.

## Mental Health

Consider putting procedures in place so you can keep in direct contact with workers at home and those returning to the office to recognise signs of stress as early as possible.

Be approachable, encourage and facilitate good communication channels.

# Hybrid/flexible working: further considerations (2)

## Claims

Possibility of more harassment claims as people struggle to work together again, including a rise in sexual harassment claims.

## 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.

## Training

Employers should implement training / working groups to ease the transition back to in person working and to promote good culture. Ensure channels for reporting concerns are clear and that managers know how to deal with complaints raised. Flagging complaints procedures, grievance policies, whistleblowing policies/hotlines to managers so they are aware of how to deal with complaints.

# Remote working and cross-border considerations



## Key Considerations

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 issues.

## Employment Law

Local employment protections:

- minimum rates of pay
- paid annual holidays
- rights on termination

## Regulatory

These can vary across sectors and may depend on the individual circumstances of each case (e.g. the nature and seniority of the role being performed)

## Data

Does the employee's role involve processing personal data?

Consider data protection issues

## Tax

Consider the following risks:

- income tax liability
- social security liability
- the employer is regarded as having created a "permanent establishment" there for corporation tax purposes.



# **Return to office: What are the employment risks?**

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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.

# **Health and safety, whistleblowing and other litigation risks**

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# Health and safety, whistleblowing and other litigation risks (1)

## 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
- Good ventilation (including air conditioning)



# Health and safety, whistleblowing and other litigation risks (2)

## 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 (3)

## 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.

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### 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

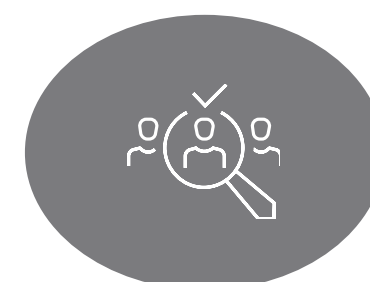
Sudden impact of COVID-19 may have forced employers to make quick and important decisions to protect the business. Potential increase in claims relating to unlawful deduction of wages, unfair dismissal and/or breach of contract, among others.



### Claims – the CJRS

**Mhindurwa v Lovingangels Care Ltd** - an employee was unfairly dismissed when the employer failed to consider using the CJRS as an alternative to redundancy.

**Handley v Tatenhill Aviation Ltd** - an employment tribunal found that dismissing an employee despite the existence of the CJRS did not render the dismissal unfair.



### Discrimination






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

# **Mandatory employer COVID-19 testing**

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# Mandatory employer testing

**Many employers are requiring lateral flow testing for employees who cannot reasonably do their job from home. This 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. Health data is “special” category data, which has extra protections under data protection law.
-  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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# Testing requirements

UK employers can mandate testing based on their own risk assessment, but subject to employment and privacy considerations.

Employers may wish to consider the COVID-19 certification.

Employers can request recent test results or vaccination status.

Privacy processing grounds: public health; health and safety of employees. Employers must request proportionate data only.



# Privacy considerations (1)

**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 excessively processed.

## Transparency

Employers must be clear how the data will be used, protected and restricted. Provide privacy notices or change existing notices if needed.

## Collecting vaccine status data

Employers need a clear and compelling reason to collect the data. This includes a lawful processing basis e.g. legitimate interest or legal obligation under Article 6 GDPR **and also** an additional condition under Art 9 GDPR – for employers this is likely to be public health or health and safety of employees (the employment law ground).

**Consent alone is not enough.**

# Privacy considerations (2)

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

## Data Protection Laws

An employer's activities may fall outside the scope of data protection laws in certain cases. For example, if an employer only asks for verbal confirmation of testing / vaccination, or if someone just looks at a person's device / hard copy on entry, and does not record the information.

This is a common approach that employers are considering as a workaround, to mitigate against data privacy concerns raised by employees.

## 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.

DPIAs should also be considered more generally before any COVID-19 testing measures or vaccination protocols are implemented.

## 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. Ensure employees are trained on their obligations e.g. confidentiality.

# Monitoring employees: hybrid working

**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 that 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.

# **Employer vaccine mandates and incentives: legal issues and workforce considerations**

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# Can an employer *require* its employees to be vaccinated to return to the office? (1)

Each employer must consider its own risks and health and safety objectives.

*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, pregnancy or maternity or age? **Human rights** considerations are also important.
4. What sort of **reaction** may arise from an employer-mandated vaccination programme?
5. Could employers implement a “**no job, no return to the office**” approach?



# Can an employer *require* its employees to be vaccinated to return to the office? (2)

A "no jabs, no return to the office" stance raises several issues e.g. discrimination and data privacy



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## "no job, no return to the office"?

- The UK Government has stated that it is "**up to businesses**" to mandate vaccines or testing requirements.
- Some employers are considering making it a **contractual requirement** that new and existing employees are vaccinated, especially where in contact with vulnerable people or need to travel frequently.
- Care home staff to work from home from 11 November 2021, must be fully vaccinated by then. However, the government mandate for care home staff is subject to judicial review.
- Employers need to take into account that it takes 2 weeks after the second dose to be fully vaccinated, so they **need to work backwards** if there are deadlines in place.
- 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. They must also have a policy for dealing with accommodation requests.
- This may leave employers open to **risks of legal challenges** on discrimination grounds/unfair dismissal and presents additional data privacy issues.

# Can an employer *require* its employees to be vaccinated to return to the office? (3)



Context is key!

- 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.

# 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.*

# Can employers *mandate* that employees are vaccinated? (1)

The rules across Europe with regard to whether employers can ask about vaccination status differ significantly.

In the UK, employers can ask for proof of vaccination status **BUT** employers should adhere to data privacy rules and be mindful of risks where action is taken in relation to unvaccinated employees – refusal to make job offers or termination of employment of unvaccinated staff *may* give rise to unfair dismissal and discrimination claims.

Vaccination status is health data and therefore, special category data under the GDPR. Consent alone may not be sufficient for collecting and processing data. **Employers must be able to identify another condition / legal basis to rely upon.**



# Can employers *mandate* that employees are vaccinated? (2)

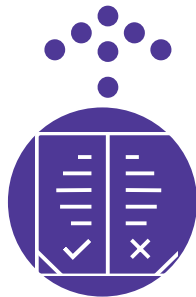
Employers in the US are taking a harder stance vs employers in EMEA and APAC

Examples in EU:

- **Italy / Spain / France / Poland / Germany / Belgium / Ireland** – not advisable for employers to request proof of vaccination status as this creates risk from a data privacy perspective SAVE where specific industry rules require it.
- **UK / Jersey / Denmark** – employers to carry out their own risk assessment to determine if this is necessary or whether alternative measures like testing or restrictions such as the wearing of face coverings in common spaces and conducting temperature checks will be sufficient.



# Broad spectrum of employer approaches to vaccination/continuing safety measures



Some employers are asking for voluntary disclosure (i.e. asking but not mandating that status is disclosed)



Some employers are differentiating in terms of protocols where people are vaccinated versus unvaccinated – e.g. regular testing for unvaccinated employees, continued use of PPE – but this may lead to discrimination risks



Some resistance from employees on the basis that there is still spread of virus among vaccinated people – as such, some employers continuing testing / PPE / social distancing measures for all staff, regardless of vaccination status

# Vaccine mandates and potential exemptions

## Varies by industry:

- Some financial services employers are taking a more hard-line approach in terms of mandating vaccinations and testing and asking employees to return to the office now.
- Pharma industry employers are typically more risk averse and are taking more time to require a wide-scale return.
- Spectrum of approaches based on perceived health and safety risk for each individual employer.

## Protected characteristics:

- **Age** (less likely to be a concern as time progresses as more than 80% of the population over 16 have received second dose)
- **Pregnancy/maternity/fertility**
- **Disability**
- **Religious beliefs**

# Conclusion

**1**

## **Hybrid working**

- Managing a flexible working environment.
- Remaining competitive.

**2**

## **Employment issues and the practical consequences of flexible working**

- Health & safety, whistleblowing, litigation and discrimination risks.
- Managing tension and mitigating risk.

**3**

## **Privacy concerns**

- GDPR considerations.
- Monitoring employees.

**4**

## **Vaccinations and Testing**

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



# 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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**Lee Harding, Partner**

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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.

# 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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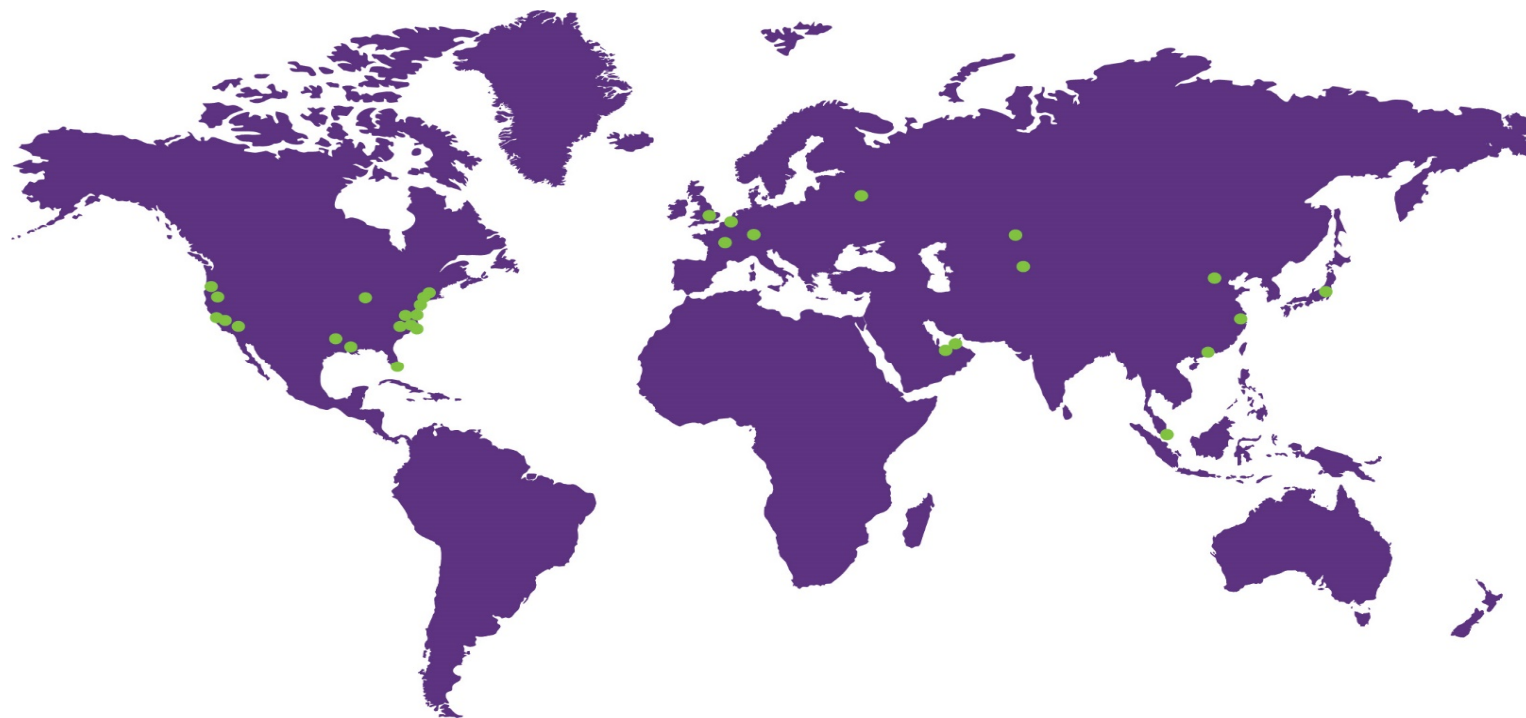
Pulina Whitaker's practice encompasses data privacy and cybersecurity as well as employment matters. Co-head of the firm's global privacy and cybersecurity practice, she manages employment and data privacy issues on an advisory basis and in sales and acquisitions, commercial outsourcings, and restructurings. 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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