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NAVIGATING THE NEXT.

The Future of the Global Workforce: Considerations for Multinational Employers

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January 12, 2022

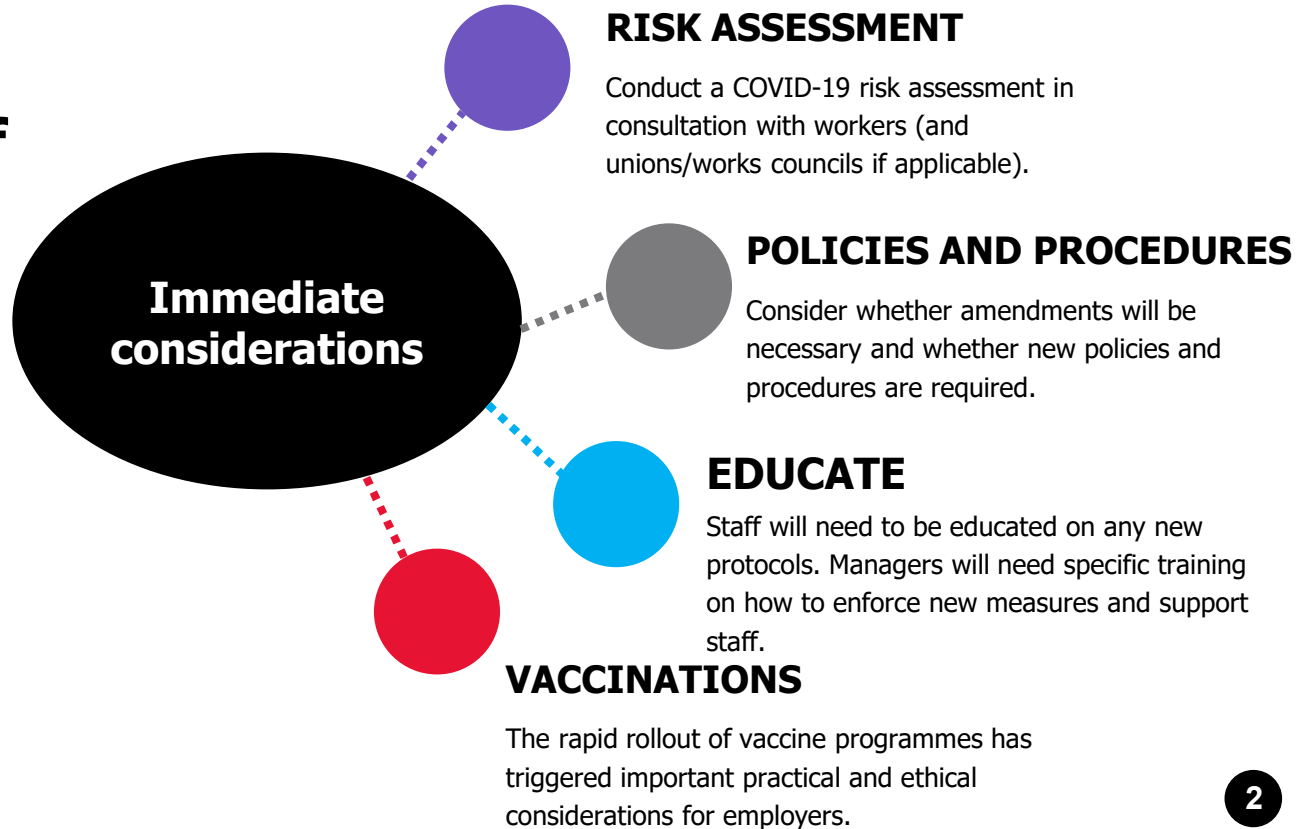
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What is the current picture for employers?

Emerging out of lockdown.

Authorities in many countries are requiring that workers should continue to work from home during the Omicron outbreak, unless it is not possible for workers to do their job remotely. However, most employers are preparing to facilitate a return when possible.

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Will remote working last?



22 months of remote working

The fact that many of the world's largest economies have remained in some form of lockdown for almost two years 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 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 and Hybrid Working in the Medium and Long Term

Managing Remote Working

Government Guidance

Employers in many countries 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 potential 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.

Flexible Working Requests

Many countries have in place legislation dealing with flexible working, and employers should ensure that they understand and comply with the applicable framework in each country to mitigate the risk of claims.

Workplace Assessments

Employers often 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 and Hybrid 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. In some countries, they may be eligible to receive stipends connected to home-working.

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.

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 in some countries giving rise to legal protection 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 applicable government guidance are likely to have an adequate defence to allegations but employers must be alive to the risks



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/accommodations.

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.

How to Ensure Managers can Spot Issues and Mitigate Risk

Leading by Example

Ensure that managers are aware of their role and the need for effective leadership. Ask managers to celebrate success and to encourage wellbeing activities.

Reminders

Managers may need refreshers on how to conduct difficult conversations and on resolving conflicts in the workplace.

Mental Health

Managers should stay connected with their team. They should set realistic deadlines and workloads and have open discussions about hours of work.



Managers

Educate

Train managers on new COVID-19 protocols and policies, e.g. on which staff will be classed as vulnerable and on how to enforce new health and safety measures.

Resources

Ensure managers know where to locate Company resources so that they can inform themselves and point staff to such materials.

Whistleblowing

Ensure that managers are clear about the process for dealing with concerns and can signpost it to employees.

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

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



"No jabs, no jobs"?

- Rules regarding **mandatory vaccination** vary considerably across jurisdictions – some Governments are requiring employees to be vaccinated, while others will not allow vaccination data to be gathered and used by employers.
- 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. and based on applicable local rules.
- A "one size fits all" approach across borders will be *very* challenging.

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

Employers have broader discretion as to whether to encourage their employees to get vaccinated. Most Governments suggest 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 (save where vaccines are mandated by law).

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

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 in UK and EU countries (e.g., rest breaks).
- Be mindful that employers may not have unrestricted monitoring rights and may need to conduct impact assessments when using technology to conduct monitoring to show that it is necessary and justified.
- Ensure that transparency is implemented by having policies on monitoring.

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 should be proportionate and reasonable.
- Where employee personal data is involved, employers should 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 (in the UK and EU).
- Employees often have data protection rights and may claim that excessive monitoring amounts to a breach of mutual trust and confidence (implied in employment contracts) leading to potential constructive dismissal claims.

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



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 confirming the employee has/will comply with obligations
 - Include certain obligations in severance agreements
 - Consider inserting a clawback provision where legally permissible



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