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UK EMPLOYMENT LAW: 2022

YEAR IN REVIEW AND A LOOK FORWARD TO 2023

22 November 2022

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Today's Topics



Remote and hybrid work in the new employment landscape



Flexible working consultation and changes to worker status



Pay transparency, reporting, and the 'social' aspects of ESG



Developments in diversity, equity and inclusion



The use of artificial intelligence in employment decision-making



Culture and conduct in the workplace



What to look out for in 2023



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Remote and hybrid work in the new employment landscape

The New Normal



**Flexible
Working**



**Hybrid
Working**



**Digital
Nomads**

Changing Practices, Changing Attitudes?

Source: [CIPD, April 2022](#)

AN UPDATE ON
FLEXIBLE AND
HYBRID WORKING
PRACTICES

Flexible working

- **37%** of employers have seen an increase in requests
- **42%** say they are more likely to grant requests than before the pandemic
- **52%** believe it important to offer flexibility when advertising jobs

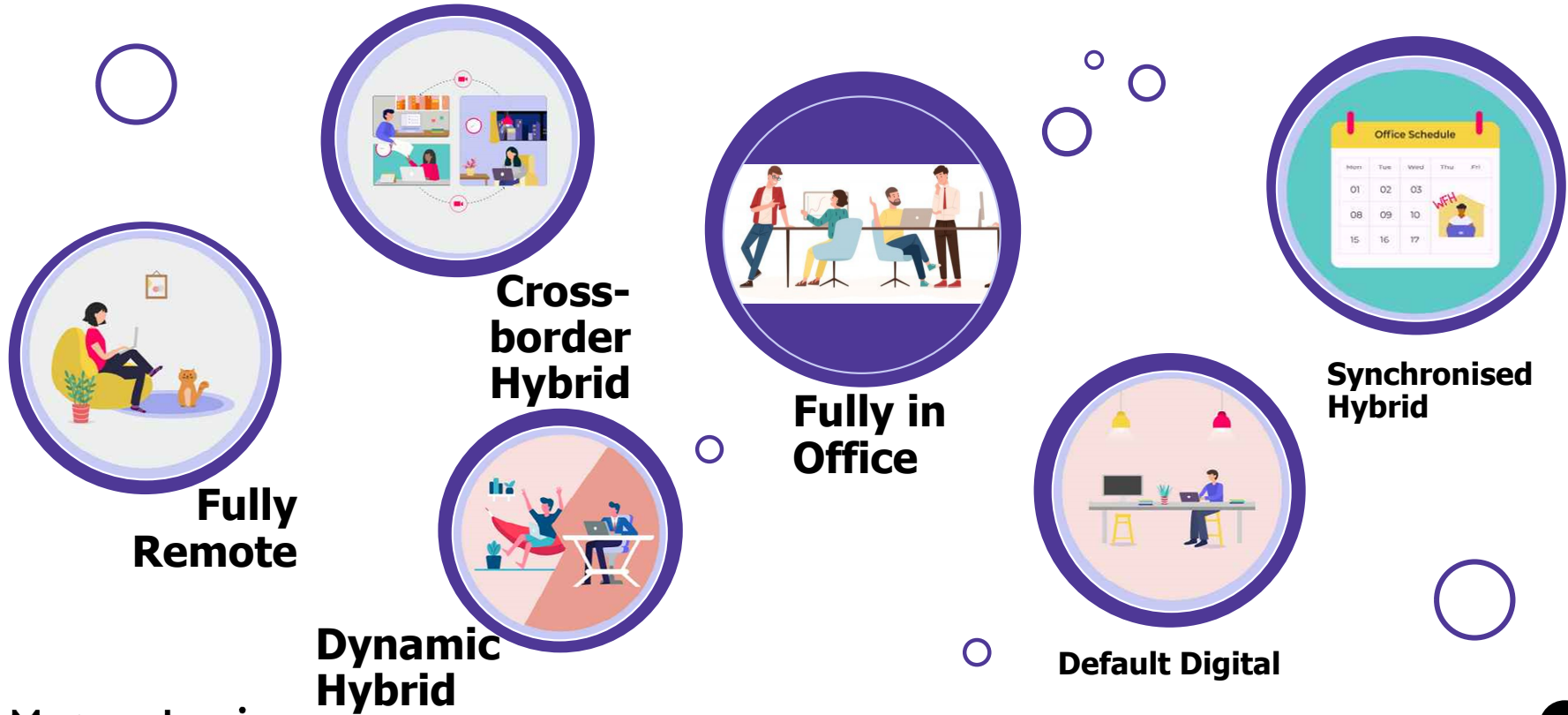
Hybrid working

- On average, employers expect **21%** of their workforce to work from home all the time and **40%** to work from home on a regular basis
- **41%** of employers experiencing more home/hybrid working believe this has increased productivity/efficiency

Employees' perspectives...

- **51%** say they have flexible working arrangements (55% for women, 47% for men)
- **54%** expect to be in the workplace all or most of the time post-pandemic
- **39%** would like to work from home all / most of time

Hybrid Working Models



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Lessons from 2022: Remote & Hybrid Working

Employers should consider changes to working methods which are effective from a business perspective and meet employees' needs where possible.

Mental health and workplace assessments

Put procedures in place to 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.

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.

Contractual place of work

Employers implementing full-time remote working should check whether contracts may need to be varied to change the employees' main place of work and include obligations to attend the office on reasonable request.

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 employers' liability insurance to make sure they are covered for remote workers using business equipment.

Have a strategy

Weigh up the extent to which remote working will work for you as a business, and for which roles, over the long-term.

Employers should continue to 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.

Lessons from 2022: Flexible Working Requests

The UK Legal Position

- Employees with at least 26 weeks' continuous employment can make a statutory request, in writing, for flexible working, for any reason
- Only one request can be made in any 12-month period

Workers and Consultants?

- Only employees are eligible to make statutory flexible working requests
- The right does not apply to self-employed contractors, consultants or agency workers

How Should Requests be Dealt With?

- In a reasonable manner
- Notify the employee of decision within the three-month period
- Only refuse a request on one or more of the following grounds: (1) the burden of additional costs; (2) detrimental effect on ability to meet consumer demand; (3) inability to reorganise work among existing staff; (4) inability to recruit additional staff; (5) detrimental impact on quality; (6) detrimental impact on performance; (7) insufficiency of work during the periods the employee proposes to work; or (8) planned structural changes
- 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.

Hybrid/Flexible Working: Further Considerations

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

Employers need to continue 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.

Training

Employers should consider implementing training / working groups to facilitate hybrid working and to promote good culture.

Hybrid/Flexible Working: Further Considerations

Claims

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

Amend existing policies and draft new remote working policies; discrimination, harassment and bullying policies; data protection policies; and refresher training courses.

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.

Complaints

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.

Digital Nomads: Risks (1)

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.

Immigration Issues

Employers should consider whether the employee requires a work permit and/or visa as well as any issues that could arise on an employee's return to the UK. Depending on the employee's activities, it may be possible to characterise their stay as a business visit, however, restricting the employee in this way may be impractical and become difficult to justify for longer periods of time and can raise concerns at immigration control.

Data Protection Concerns

If an employee's role involves processing personal data, this could give rise to data protection issues, especially if the employee is requesting to work from a country outside of the EEA which is not subject to the General Data Protection Regulation (GDPR).

Digital Nomads: Risks (2)

Permanent Establishment

Where companies do not have a permanent presence in the jurisdiction that its employees wish to relocate to, a permanent establishment may be deemed to have been created depending on local laws and duration.

Tax Liabilities

The presence of employees may create a taxable presence for corporate tax purposes and require employers to operate payroll withholding. Complex income tax and social security arrangements, dependent on place of residence/working time may require specialist tax advice.

Local Employment Laws

An employee could gain employment rights from another jurisdiction which could be more favourable to the rights provided under the law of their home country, such as rates of pay, annual holidays and, importantly, rights on termination.

Regulatory Rules

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). They may also differ by jurisdiction with potential obligations to ensure the health and safety of an individual working remotely.

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.

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Flexible working consultation and changes to worker status

Flexible Working Consultation: Awaiting the Outcome

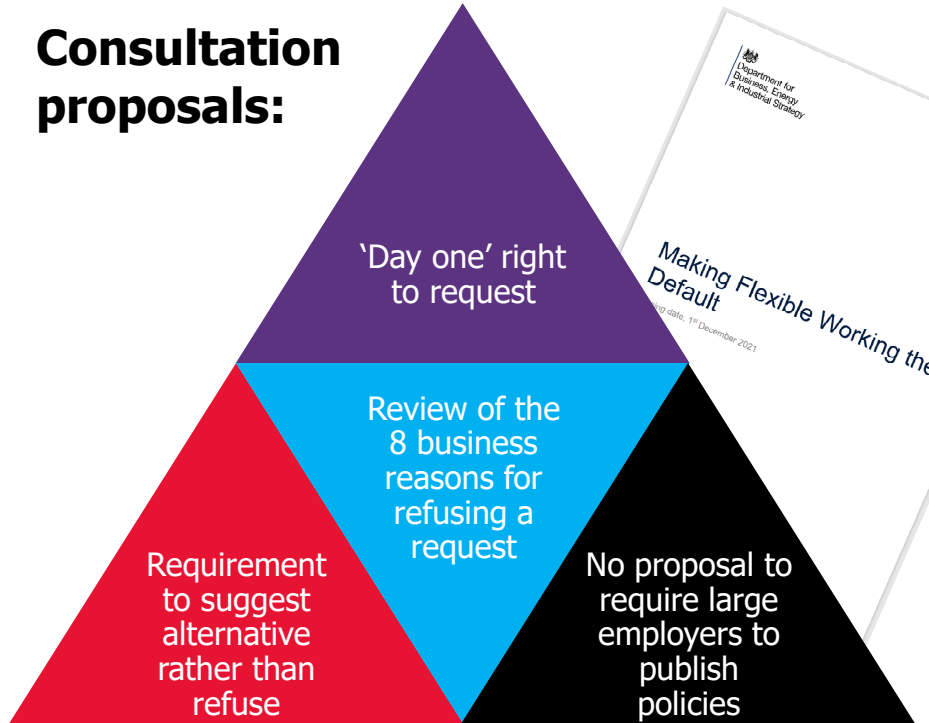
Background

Govt has been airing proposals since around October 2018, at one stage mooted a duty on all employers to assess whether a job can be done flexibly

Govt published consultation *Making flexible working the default* on 23 September 2021

Consultation closed on 1 December 2021

Consultation proposals:



Current situation

The gov't has not yet responded to the consultation

31 October 2022 – responding to a written question, BEIS only confirmed the gov't would respond 'in due course'

Looking ahead to 2023 – employers should be prepared to review their policies following gov't response

Worker Status: How did we get here, and where are we now?

(Still where we started)

30 Nov 2016

BEIS launches the Taylor Review

Independent Review of Employment Practices in the Modern Economy

Builds on earlier reports produced during the Coalition years, informed by issues arising from the 'gig' economy

Remit includes the question of employment status

11 July 2017

Taylor report published

Good work: the Taylor review of modern working practices

Worker status recommendations included greater clarity, renaming workers who are not employees 'dependent contractors'



20 Nov 2017

Parliamentary inquiry into Taylor Review

A Framework for Modern Employment.

The Work and Pensions Committee and the BEIS Committee encouraged the govt to build on and enact many of the Taylor Review recommendations and provided wording for draft bill codifying case law on status



Feb & Apr 2018

Govt responds to Taylor Review and committees' report

Govt concludes that most Taylor recommendations require further consultation and publishes four consultations on proposals relating to employment status, agency workers, enforcement and transparency

17 December 2018

Govt publishes Good Work Plan policy paper

Builds on govt's earlier response.

Billed by govt as "the biggest package of workplace reforms for over 20 years"



26 July 2022

Govt responds to employment status consultation

Some four years after consultation closed

Maintains status quo
Recognises consensus that status quo has issues but no consensus on reform

Non-statutory guidance published (no substitute for case law)



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Pay transparency, reporting, and the 'social' aspects of ESG

ESG: Where does pay equity come in?

ESG Considerations For Responsible Employers

Growing focus placed on the 'social' element of ESG, which concerns a business's impact on its employees, workers, contractors and the wider community

Diversity and inclusion, and equal pay, are key metrics within the 'S' of ESG

Important for (1) reputation and value, (2) productivity and (3) legal compliance

Beyond legally required reporting, many businesses offer voluntary disclosures and set goals related to social issues

Internal audits are also common and provide organisational leadership with reliable assurance on the effectiveness of ESG management

Recap: pay equity in UK & EU in 2022



Summary of UK and EU Gender Pay Reporting Requirements

Jurisdiction	Requirement	Threshold
UK	Gender pay report	Over 250 employees
Austria	Gender pay report	Over 150 employees
Belgium	Gender pay report + references in the Annual Audit	Over 50 employees
Denmark	Provide pay data to Government body	35 or more employees
Finland	Gender pay report	30 or more employees
France	Gender pay report + catch-up plan	50 or more employees
Germany	Gender pay report + employees' right to pay information	Over 200 employees (over 500 for report)
Ireland	Gender pay report	Over 250 employees (to reduce in stages to 50)
Italy	Gender pay report	Over 50 employees
Norway	Gender pay report	Over 50 employees
Portugal	Gender pay report, action plan and remuneration policy	50 or more employees
Spain	Wage registers (applies to all companies) and equality plans	50 or more employees (for the equality plan)
Sweden	Gender pay report + action plan	25 or more employees
Switzerland	Internal gender pay analysis	100 or more employees

Pay Equity in the UK



UK Gender Pay Reporting

Employers with 250 or more employees on their 'snapshot date' (6 April for private companies) must comply with regulations on gender pay gap reporting.

The 250 employee threshold is:

- Based on the number of individual employees
- Part-time workers and employees within a job share each count as one employee
- Agency workers count towards the agency's headcount

Applies to the legal entity employing the employees. No requirement to aggregate across group companies.

Information to be Published Annually

- Percentage of men and women in each hourly pay quarter
- Mean (average) gender pay gap using hourly pay
- Median gender pay gap using hourly pay
- Percentage of men and women receiving bonus pay
- Mean (average) gender pay gap using bonus pay
- Median gender pay gap using bonus pay

A Look Ahead to 2023: Pay Equity in the EU



Proposed new European Commission directive on pay transparency

Significant Change

If adopted, the new measures will from 2024 apply to all Member States, many of whom do not have pay equity legislation in place. Companies affected will be EU companies with at least 50 employees. Final text being negotiated. Progressing under ordinary legislative procedure.

Why is it Needed?

The Gender Pay Gap persists in the EU (14%) despite the right to equal pay being enshrined in law.

Key Features

- Equal work of equal value
- Pay transparency for jobseekers
- Right to information
- Gender pay gap reporting
- Joint pay assessment

Impact

- Compliance costs and increased administrative burden
- The meaning of “work of equal value”
- Litigation risk



A Look Ahead to 2023: Beyond gender reporting?

Ethnicity Pay Reporting in the UK – still voluntary, for now

The UK gov't's consultation seeking views on ethnicity pay gap reporting by employers closed in January 2019.

The gov't published its response, *Inclusive Britain*, on 17 March 2022, confirming that ethnicity pay reporting will remain voluntary 'at this stage'.

The Race Disparity Unit's consultation on draft standards for ethnicity data closed on 30 August 2022.

The report of the Commission on Race and Ethnic Disparities followed on 31 March 2021.

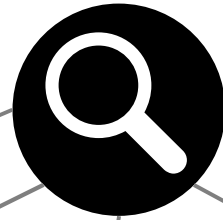
The gov't also committed to supporting employers who wish to publish their ethnicity pay gaps with new guidance.

2023 will likely see employers reviewing their approaches to voluntary reporting to take into account the gov't's standards and guidance when these are published.



A Look Ahead to 2023: Beyond gender reporting?

Disability Reporting?



Closed consultation
Disability workforce reporting
We are analysing your feedback
Visit this page again soon to download the outcome to this public feedback.

Following Thriving at Work independent review in 2017, DWP developed a voluntary framework

Aimed at employers with 250+ employees. Inc reporting on disability, mental health and wellbeing in the workplace

Employers are not required to disclose whether they are using the voluntary framework. Uptake relatively limited

Dec 2021 to April 2022: Disability Unit consulted on workforce disability reporting for large employers (250+)

It remains unclear whether the govt will seek to introduce any mandatory requirements

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Developments in diversity, equity, and inclusion

DEI in 2022 & 2023

What's new?

What's coming?



MENOPAUSE

There is a growing awareness of workplace issues associated with the menopause, as well as calls for legislative and policy reform – but there is limited government action

FERTILITY RIGHTS

There is currently no statutory right to leave for employees undergoing fertility treatments and no protection against unfavourable treatment, though new legislation has been proposed

OTHER PROPOSED REFORMS

The government is backing several private members' bills with DEI implications, e.g. bills to protect employees with caring responsibilities & with children receiving neonatal care

Developments Relating to Menopause

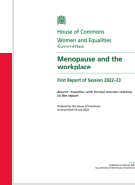
Lots of recommendations for policy and legislative reform, limited govt action

18 July 2022 – DWP policy paper



- Govt response to independent report on menopause and employment commissioned in July 2021
- Announced appointment of Professor Dame Lesley Regan as the first Women's Health Ambassador for England
- Confirmed no changes to be made to Equality Act

28 July 2022 – Women & Equalities Committee report recommends:



- Commencement of section 14 of Equality Act (combined discrimination)
- Consultation on how to create new protected characteristic of menopause & duty for employers to provide reasonable adjustments
- Day-one right to request flexible working
- UK Menopause Ambassador
- Menopause leave pilot in public sector

12 Oct 2022 – All-Party Parliamentary Group on Menopause report:



- Concludes inquiry on menopause impacts & policy reform. Recommends:
- Govt support for employer-led awareness-raising campaign
- Govt guidance on best practice for employers. Report includes examples of current employer policies which the APPG regards as best practice

Menopause – Emerging Best Practice

Steps employers can take to support employees experiencing menopause:

Engagement

Talk openly about menopause and provide training and awareness sessions, support, and information

Policies

Implement a bespoke menopause policy and review other relevant policies, such as sickness absence policies and flexible working policies from a menopause perspective

Leave

Consider introducing menopause leave or broader paid leave for “life events” that could be used by those experiencing menopause

The practical stuff

Review equipment, supplies, and protocols—e.g., breathable uniforms, fans, etc.

Other legislative developments in DEI to track in 2023...

Bill started in the House of Commons

- ✓ 1st reading
- ✓ 2nd reading
- ✓ Committee stage
- 8 Report stage
- 3rd reading

1

Neonatal Care (Leave and Pay) Bill

- Private Members' Bill to make provision about leave and pay for employees with responsibility for children receiving neonatal care.
- 15 July 2022 – govt announced backing.

Bill started in the House of Commons

- ✓ 1st reading
- ✓ 2nd reading
- ✓ Committee stage
- 8 Report stage
- 3rd reading

2

Carer's Leave Bill

- Private Members' Bill to make provision about unpaid leave for employees with caring responsibilities.
- 21 October 2022 – govt announced backing.

Bill started in the House of Commons

- ✓ 1st reading
- ✓ 2nd reading
- ✓ Committee stage
- 8 Report stage
- 3rd reading

3

Protection from Redundancy (Pregnancy and Family Leave) Bill

- Private Members' Bill to give protection during/after pregnancy or after maternity, adoption or shared parental leave. Govt backing.

Bill started in the House of Commons

- ✓ 1st reading
- 8 2nd reading
- Committee stage
- Report stage
- 3rd reading

4

Fertility Treatment (Employment Rights) Bill

- Private Members' Bill to require employers to allow employees to take time off from work for appointments for fertility treatment.
- 9 Nov 2022 – Nickie Aiken MP launched Fertility Workplace Pledge

Spotlight: Fertility Treatment (Employment Rights) Bill

Proposed to introduce workplace protections for people undergoing in vitro fertilisation (IVF).

Significant Change

If adopted, the new measures will apply to all workplaces in the UK, many of whom do not have provisions for employees undergoing fertility treatments in place.

Why is it Needed?

There is currently no statutory right to leave for employees undergoing fertility treatments (although employees can use their annual leave allowance) and no protection against unfavourable treatment.

Key Features

Protection from unfavourable treatment of employees undergoing fertility treatments.
Statutory right to take time off work to attend fertility appointments; and for connected purposes.

Impact

Compliance costs and increased administrative burden to introduce and amend relevant policies and/or benefits packages.
Litigation risk.

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The use of AI in employment decision-making

What do we mean by AI?

It's not that simple...



“At its simplest form, artificial intelligence is a field, which combines computer science and robust datasets, to enable problem-solving. It also encompasses sub-fields of machine learning and deep learning [...] These disciplines are comprised of AI algorithms which seek to create expert systems which make predictions or classifications based on input data”

IBM Cloud Education

What is Artificial Intelligence? 3 June 2020



“artificial intelligence means technology enabling the programming or training of a device or software to—

- (i) perceive environments through the use of data;
- (ii) interpret data using automated processing designed to approximate cognitive abilities; and
- (iii) make recommendations, predictions or decisions; with a view to achieving a specific objective”

UK legislation

Definition in SI made under National Security and Investment Act 2021



“‘artificial intelligence system’ (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with”

European Commission

Proposed Regulation laying down harmonized rules on AI.

How is AI being used in employment?



Understanding the workforce

AI and related technologies collate, categorise and increasingly interpret data for employers - ideally providing readily updatable management information more quickly, accurately & comprehensively



Informing decisions about employees

This includes systems that provide the data – and sometimes recommendations – which employers rely on when making decisions about, for example, recruitment, promotion, task allocation, redundancy selection, etc



Making decisions about employees

Automated decision-making, with no 'human in the loop', typically used as a solution to the problem of achieving fairness and efficiency when dealing with a large volume of data

AI: Discrimination Risks

People analytics software is becoming increasingly popular as HR becomes more data driven.

Advantages

- Optimising recruitment and promotion processes by:
 - reducing time to hire;
 - increasing recruitment quality; and
 - minimising unconscious bias.

Disadvantages

- Potential discrimination
 - Particularly regarding neurodiverse employees and/or ethnic minorities.
 - Speech and writing patterns used can amplify human biases causing the AI to favour certain demographics.



Action: Complete due diligence before implementation and be open with candidates about how technology is being used. Be mindful of emerging local laws on the use of these technologies.

AI: Developments in 2022 & beyond in the UK and EU

UK

Limited progress in new legislation and official guidance, but there have been some developments:

- 18 July 2022 – Kwasi Kwarteng (BEIS) and Nadine Dorries (DCMS) published a policy paper, *Establishing a pro-innovation approach to regulating AI*
- 1 September 2022 – EHRC issued new guidance on AI and public services, with further guidance to follow in next three years



EU

Aspiration to make EU a global hub for trustworthy AI may mean EU leads lead on establishing best practice in the regulation of AI. Anticipated legislation:

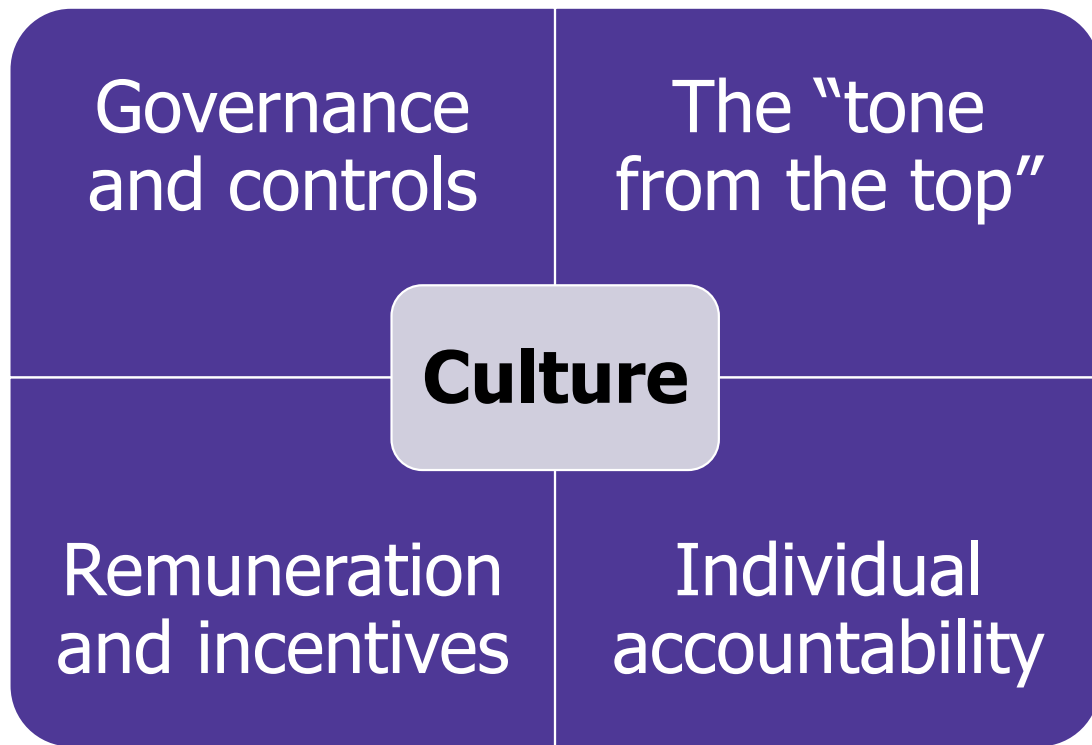
- Regulating AI systems – On 21 April 2021, the Commission adopted a proposal for a Regulation laying down harmonised rules on AI (including its development, placement on the market and use of in the EU). The Regulation will apply to both public and private bodies inside and outside the UK, as long as the AI system is placed on the EU market or its use affects people located in the EU. It is moving through the EU legislative process
- Regulating their consequences – On 28 September 2022 the European Commission adopted a proposal for a Directive on adapting non-contractual civil liability rules to artificial intelligence (AI). The Directive will harmonise certain rules for claims for compensation in cases where AI-related damage is caused due to wrongful behaviour, including unlawful discrimination based on algorithmic processing



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Culture and conduct in the workplace

Heightened Global Regulatory Focus on Culture and Personal Conduct



Heightened Global Regulatory Focus on Culture and Personal Conduct



Conduct & Culture: What to look out for in 2023



Lifting of 'banker's bonus cap'

The govt's decision to scrap the limit on the ratio of a bonus to fixed pay for material risk takers is reportedly one of the few survivors from September's 'mini-budget'.

Likely to increase scrutiny of pay and conduct in financial services.

It is unclear when this change will come into effect (amendment of the PRA Rulebook and FCA Handbook will be required).

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Enforcement action

In recent years the FCA and other regulators have not only stressed the importance of conduct and culture in their public statements, they have also taken enforcement action in this area, including against individuals.

2023 may see further instances of this trend, including for misconduct occurring outside the workplace



Dealing with consequences of hybrid working?

Returning to the topic we started on today, with the new normal well-established we anticipate seeing more and more cases of problematic conduct and culture in which remote or hybrid working is a **contributing or causative factor**.

This will include situations where the efficacy of **compliance systems** is challenged by new ways of working.



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Final Round-up: a few other things to look out for in 2023

The legislative landscape in the UK: More questions than answers?

- A new UK legislative programme for employment law?
 - Queen's Speech in December 2019 announced plans for new Employment Bill
 - So far, it has not materialised, and personalities in govt have changed
 - Aside from backing private members' bills, TBC whether new proposals will emerge
 - Retained EU Law (Revocation and Reform) Bill could have significant impact
- And what about data protection?
 - Data Protection and Digital Information Bill introduced 18 July 2022 – but second reading pulled in September and not yet rescheduled
 - Unclear how the Bill sits with DCMS' announcement in October 2022 that govt plans to replace UK GDPR with a 'British data protection system'....
 -and with the Retained EU Law (Revocation and Reform) Bill

THANK YOU

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