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# TECHNOLOGY MARATHON

**Digital Transformation: Key Considerations  
When Implementing Digital Solutions**

Mike Pierides, Zachary Hill, and Louise Skinner

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# Presenters



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# Agenda

- Introduction: Digital Transformation
- Key Employment Considerations
  - Transfer of Personnel
  - Integration of Personnel
- Implementation Litigation

# Introduction: Digital Transformation



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# What do we mean by Digital Transformation?

*the adoption of digital technology to transform services or businesses, through replacement of non-digital or manual processes with digital processes or replacement of older digital technology with newer digital technology*



## Vertical

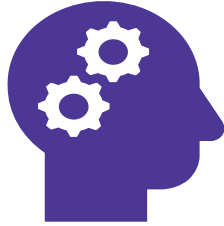
- Product
- Business Line
- Division



## Horizontal / Cross-Functional

- Across Business Lines
- Support Functions
- Front, middle and back office

# Digital Transformation



Rethinking of how an organization uses:

*technology*

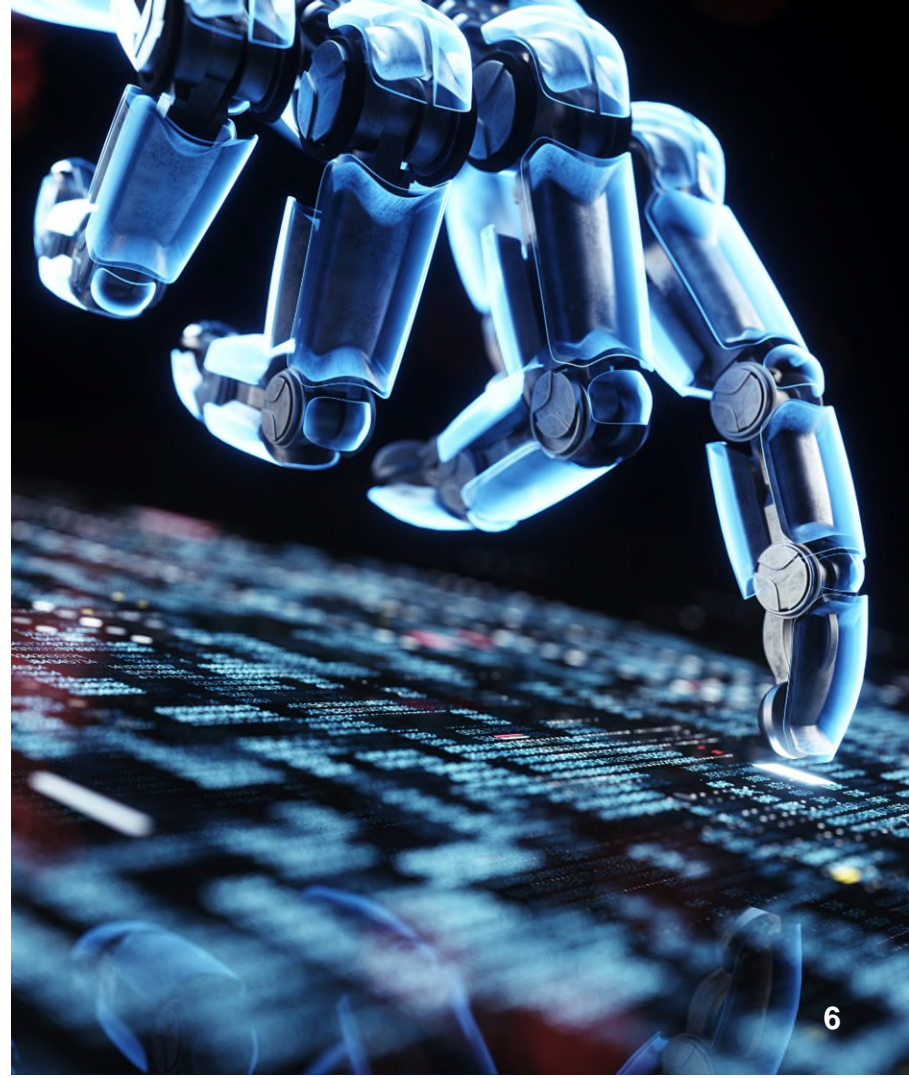
*people*

*processes*

**in pursuit of new business models and new revenue streams, driven by changes in customer expectations around products and services.**

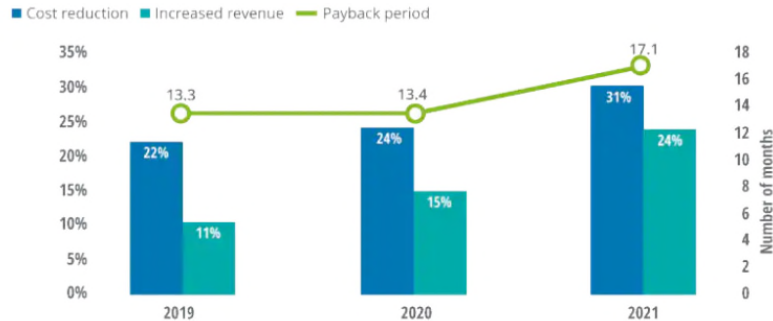
*What is digital transformation? A necessary disruption,*  
Clint Burton, CIO, June 24, 2021

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# Digital Transformation – Defining Success

Reducing costs, increasing revenue remains a key objective for automation (Deloitte)



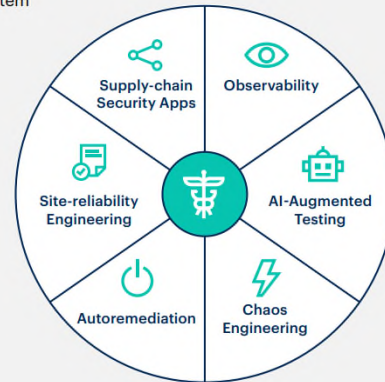
Notes: 2019: N=302; 2020: N=320; 2021-22: N=341.  
Source: Deloitte analysis.

Deloitte Insights | deloitte.com/

Optimising resilience: “By 2025, organisations that invest in building digital immunity will increase customer satisfaction by decreasing downtime by 80%.” (Gartner)

## Digital Immune System: Optimise Resilience

Six elements of a digital immune system



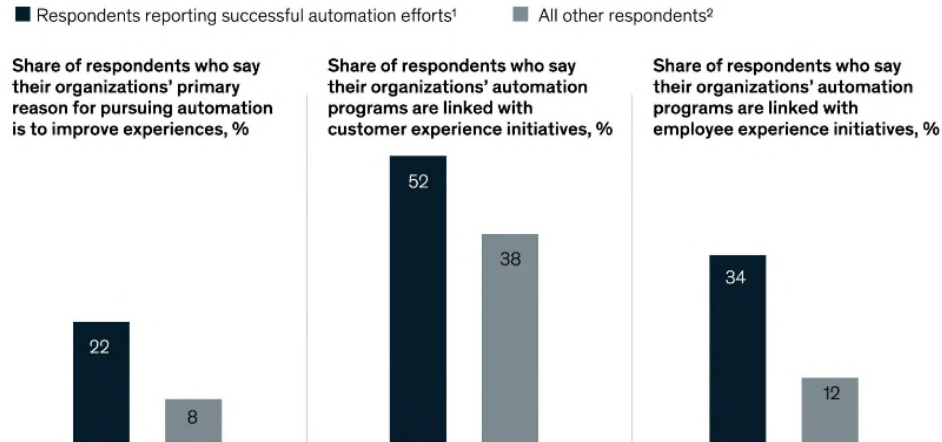
**76%**  
Digital teams responsible for revenue

**80%**  
Less downtime

Source: Gartner

# Digital Transformation – Defining Success (CONT'D)

Successful automation efforts are more likely than others to be driven by an interest in improving customer and employee experience.



<sup>1</sup> Respondents who said that their organizations have been "successful" or "very successful" at meeting their automation targets; n = 154.  
<sup>2</sup> n = 64.

McKinsey  
& Company

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"Nearly half of respondents (46 percent) say the COVID-19 pandemic accelerated their organizations' deployment of new automation technologies. The main motivators for companies to speed up their efforts were the increased need to reinvent their business models and **customers' greater adoption of digital channels.**"

"**Organizations with successful automation programs tend to be those that treat customer and employee experience as a strategic priority.** In other words, a major goal of their automation efforts is not just to reduce expenses or make processes more effective but to increase satisfaction among customers and employees."

McKinsey, 'Your questions about automation, answered', July 8, 2022



# Trends 2022: Training

- Companies are struggling to fill vacancies and retain experienced staff amid record resignation rates.
- In this environment, a robust learning and development engine is fast becoming a critical asset.
- The ability to upskill your people assists both the supply and demand sides of the labor challenge.
- Effective capability building helps companies to fill skill gaps using staff they already know and trust, and those people relish the opportunity to learn, develop and grow their roles, aiding retention.

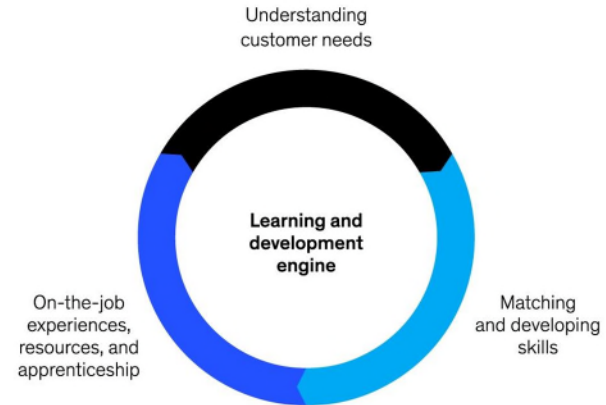
*McKinsey & Company*

"Today, the flexibility of talent to perform work is dependent on creating a culture of mobility that facilitates workers taking on new roles and learning new skills."

*Fortune 100 CIO*

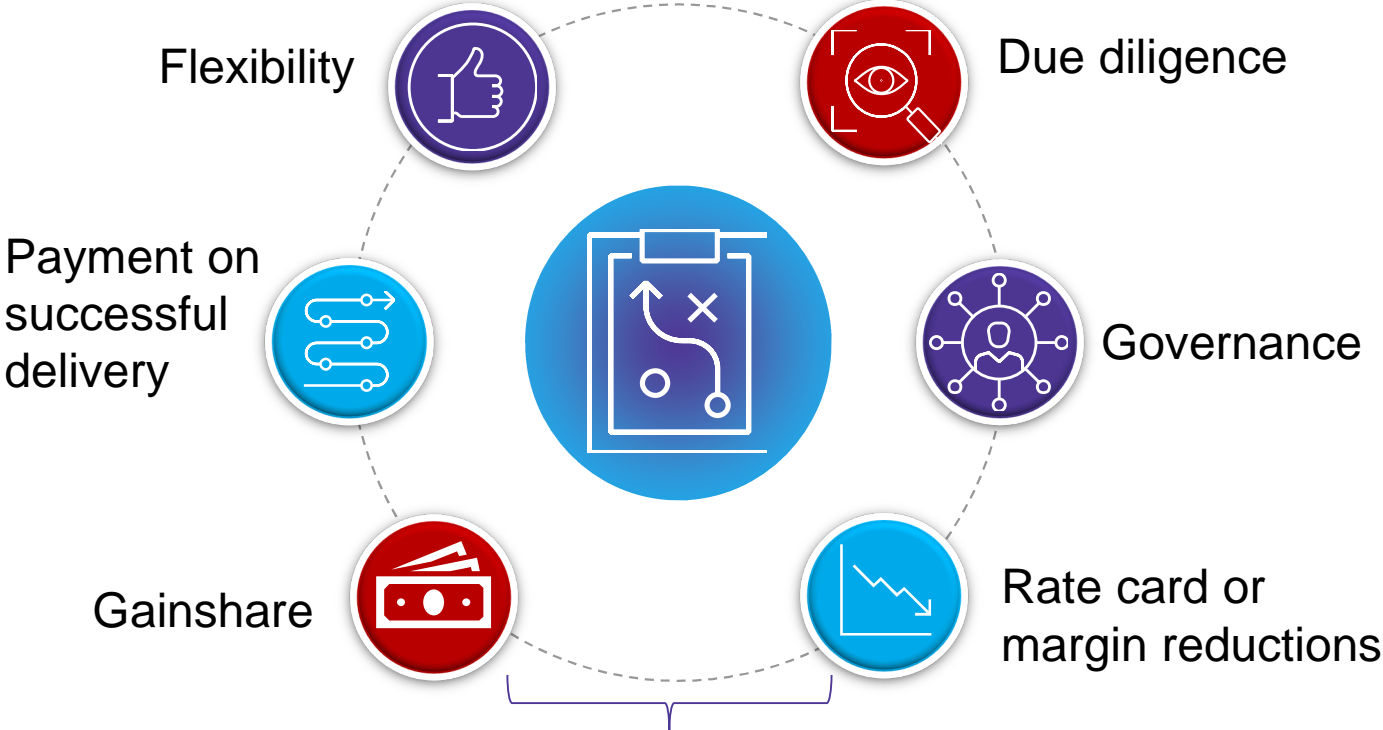
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**The learning and development engine powers a continuous capability building process.**



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# Success: Contractual Tools



# Keys to Success

Leadership and  
Communication

Capability  
Building

Empowering  
Workers

Using the Right  
Tools

# Defining Indicators and Consequences in the Contract

## Success Indicators

- Overall objectives
- Scope, workstreams and governance
- Critical Deliverables
- Milestone Dates
- Completion / acceptance criteria
- Milestones tied to payments

And for any ongoing services:

- Service Levels
- Critical Deliverables
- Customer satisfaction results
- Savings commitments
- Record-keeping
- Multi-vendor collaboration

## Consequences if Indicators are Not Achieved

- No payment
- Milestone credits (escalators?)
- Reimbursement for costs
- Responsible for unrealized benefits / savings

And for any ongoing services:

- Credits
- Remediation
- Third party costs (costs of audit)
- Step-in
- Termination
- Damages

# Success: Governance is King


Frequency of meetings and report deliveries

Escalation Procedures

Records retention and oversight



# Key Employment Considerations



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# Employment Law Issues: Transfer of Personnel (TUPE)

## Outsourcing and TUPE

- Adopting, integrating, and implementing digital solutions can involve:
  - Organisations that previously provided services using its own internal resources (employees/assets) deciding to transfer those resources to an external supplier (“first generation outsourcing”)
  - Subsequent transfers of services from an outgoing supplier to an incoming supplier (“second generation outsourcing”)
  - Customer taking outsourced services in-house (“in-sourcing”)
- Outsourcing, second generation outsourcing or in-sourcing can fall within the TUPE regulations.



# Employment Law Issues: Transfer of Personnel (TUPE)



**TUPE applies on a “relevant transfer”, which occurs where either there is a:**

- Business transfer
- Service provision change

**If TUPE doesn't apply, employee consent is required for employment to transfer**

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**What is a service provision change?**

- Activities cease to be carried out by a person (“a client”) and are carried out instead by another person on the client’s behalf (“a contractor”)
- Activities cease to be carried out by a contractor on a client's behalf and are carried out instead by another person (“a subsequent contractor”) on the client's behalf
- activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf and are carried out instead by the client on his own behalf



**Practical points:**

- Contracts of employment automatically transfer on their existing terms (subject to limited exceptions)
- Changes to contractual terms and conditions are restricted
- Transferring employees are protected against dismissal
- Obligations to inform and consult, and to provide certain information
- Provisions in the commercial agreement may be required (e.g. entry and exit provisions)



# Employment Law Issues: Transfer of Personnel (TUPE)

## Who transfers under the automatic transfer principle?

- Employees (potentially includes workers)
- Employed by the transferor (can sometimes include employees of other entities if they predominantly work in the transferor)
- Assigned to the organized grouping
- Employed immediately before the transfer

Ordinarily, when an employee becomes employed by a new employer, the employment contract with their previous employer terminates, continuity of employment is broken and they enter into a new employment contract with their new employer. This is not the case where there is a “relevant transfer”.

# Employment Law Issues: Transfer of Personnel (TUPE)

## Things to consider and plan for if TUPE applies

Determine whether TUPE applies ASAP

Allow time for consultation

Identify transferring employees

Employment Ts & Cs may need to be replaced. DD therefore required.

Is a moratorium on employee movement and hiring decisions required?

Are other jurisdictions involved? Local advice may be required

**N.B.** Local law can throw up issues e.g. re-badge timing and automatic transfer principles



# Employment Law Issues – Integration of Personnel

## Key employment law points regarding integrating transferred employees

### CHANGING EMPLOYMENT TERMS

- General rule = any variation to a transferring employee's contract transferred under TUPE is void if the sole or principal reason for the variation is the transfer itself. However, contractual changes are permitted if they are unrelated to the transfer.
- Transfer-related variations are permitted in certain limited circumstances, such as: (a) if there is an "**ETO reason**" entailing changes in the workforce provided that the employer and employee agree that variation; or (b) the employee's employment contract permits the particular variation.
- **ETO reason** = reasons relating to the: (a) profitability or market performance of the new employer's business; (b) nature of the equipment or production processes which the new employer operates; or (c) management or organisational structure of the new employer's business
- Harmonization of terms: constitutes a change by reason of the transfer (i.e. void) and cannot qualify as an ETO reason.
  - However, changes which benefit the employee, or which are broadly neutral are unlikely to be challenged. Changes which are negative are likely to be more contentious. In that case, the buyer may need to consider alternative approaches to secure employee buy-in.
  - Consensual changes will be permitted but dismissals for refusing to accept changes in order to harmonize their terms likely to be automatically unfair.
- Bridging arrangements are common as a practical approach of reducing the risk of employees bringing claims. Transferee retains employees on their existing terms for a defined period of time before being moved onto the transferee's standard employment terms.
- Dismissing and re-engaging is a higher risk approach. Settlement agreements can be used but this can be an expensive and time consuming approach, particularly if large numbers of employees are involved.

# Employment Law Issues – Integration Best Practices

**Line managers should make reasonable allowances during periods of adjustment**

**Team meetings should be used to integrate any new employees with their line managers and existing staff**

**Use the induction process to introduce rules, policies and standards so they know what is expected of them and how things should be done**



**Check employees understand the terms which transferred over with them**

**Listen to employee suggestions and consider holding discussion to generate ideas to improve processes.**

# Implementation Litigation



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# Implementation Litigation: Digital Solutions

- Constant implementation or implementation planning
  - Replacing existing solution
  - Adding new component (Big Data, AI)
  - Moving to the cloud
  - Upgrading existing solution
- Complex process
  - Vendor selection and procurement
  - Implementation planning and training (consultants)
  - Go-live and post-go-live



# Implementation Litigation: What Could Go Wrong?

- Delay
  - Increased implementation costs
  - Extended costs for legacy solution
  - Delayed efficiencies
- Overpromise, underdeliver
  - Can be internal and external
  - Efficiencies never materialize
  - Over budget implementation
- Failure around go-live
  - Potential chain reaction



# Implementation Litigation: Who Gets Blamed?

- Organization
  - Project management
  - Functional experts
- Solution vendor
  - Early-stage representations
  - Any consulting involvement
- Consultants
  - Key project management
  - Key implementation work and expertise





# Implementation Litigation: Potential Claims

- Parties – Race to the courthouse
  - Solution vendor – Fraud, breach of contract
  - Consultants – Fraud, breach of contract
  - Organization – Withheld payment, declaratory relief
- Limitation of Liability – Fraud workaround
  - Pre-contract statements potentially fair game
  - Potentially avoids limitation of liability clause
  - Reputational harm



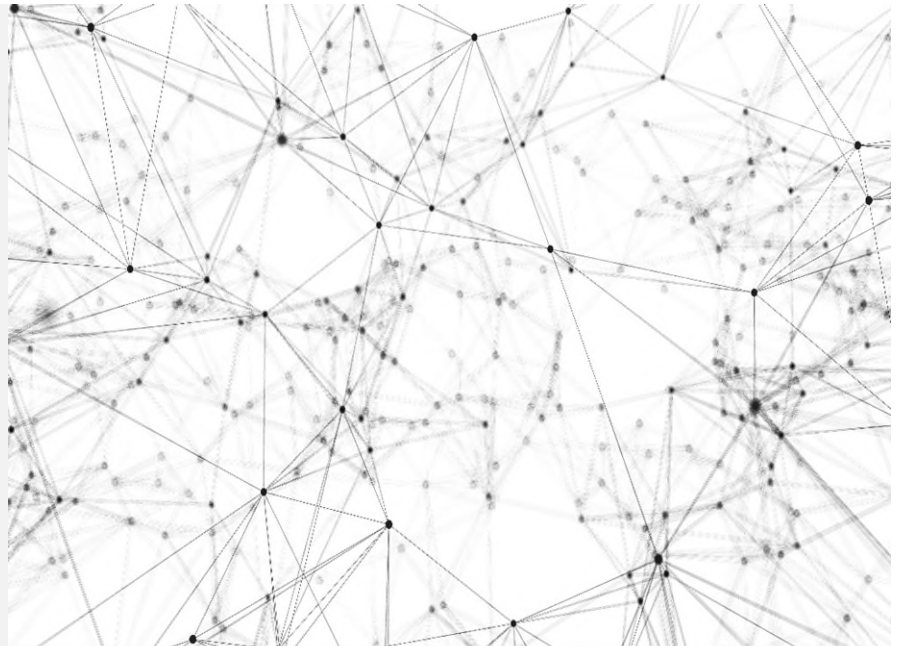
# Implementation Litigation: Discovery Issues

- Organization often controls the documents
  - Positive – investigation materials
  - Negative – discovery costs
- Complex, non-custodial documents are key to causation story
  - Source code
  - Large data quantities
  - Many iterations of files



# Implementation Litigation: Expert Issues

- Damages – consider economist and forensic accountant
- Causation
  - Battle around industry standards
  - At least one causation expert and multiple consulting experts
  - Functional and technical expertise required



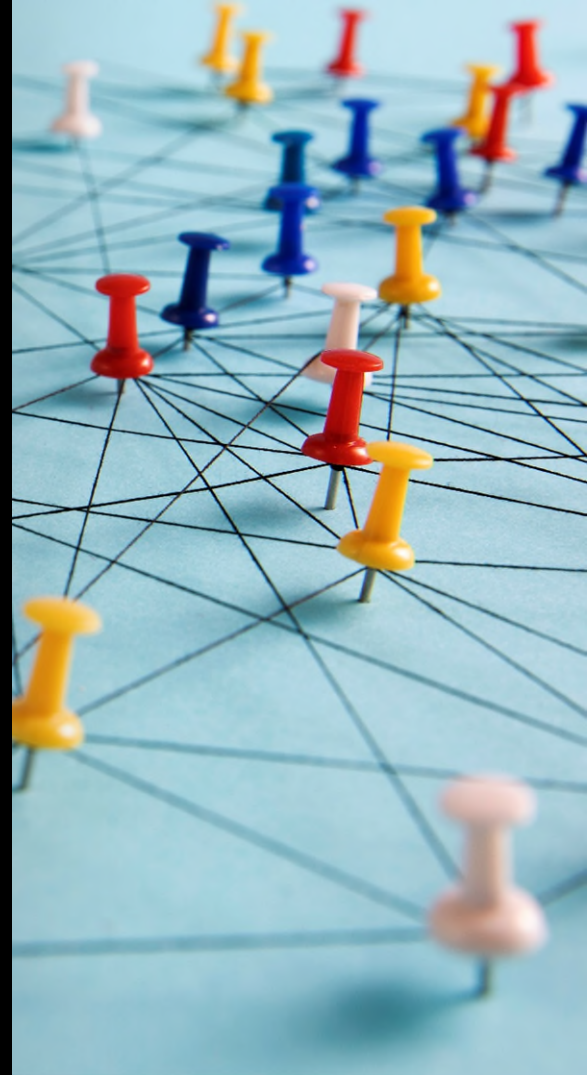
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To help keep you on top of developments as they unfold, visit the website at [www.morganlewis.com/topics/ukraine-conflict](http://www.morganlewis.com/topics/ukraine-conflict)

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# Biography



## **Mike Pierides**

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**Mike Pierides'** practice encompasses a wide breadth of commercial and technology transactions. Deputy leader of the firm's technology, outsourcing & commercial transactions practice and co-leader of the digital solutions working group, Mike advises on major outsourcings, strategic restructurings following divestments or acquisitions, and technology-specific transactions such as licensing and "as a service" arrangements. He is also active advising on new technologies such as blockchain and artificial intelligence.

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**Zachary (Zack) Hill** is a litigator with a focus on strategic problem solving and a strong technical aptitude. Relying on his trial experience and broad expertise in all phases of litigation, Zack represents clients in the technology, energy, and pharmaceutical industries, with a particular focus on competition and contract disputes in the business software space.

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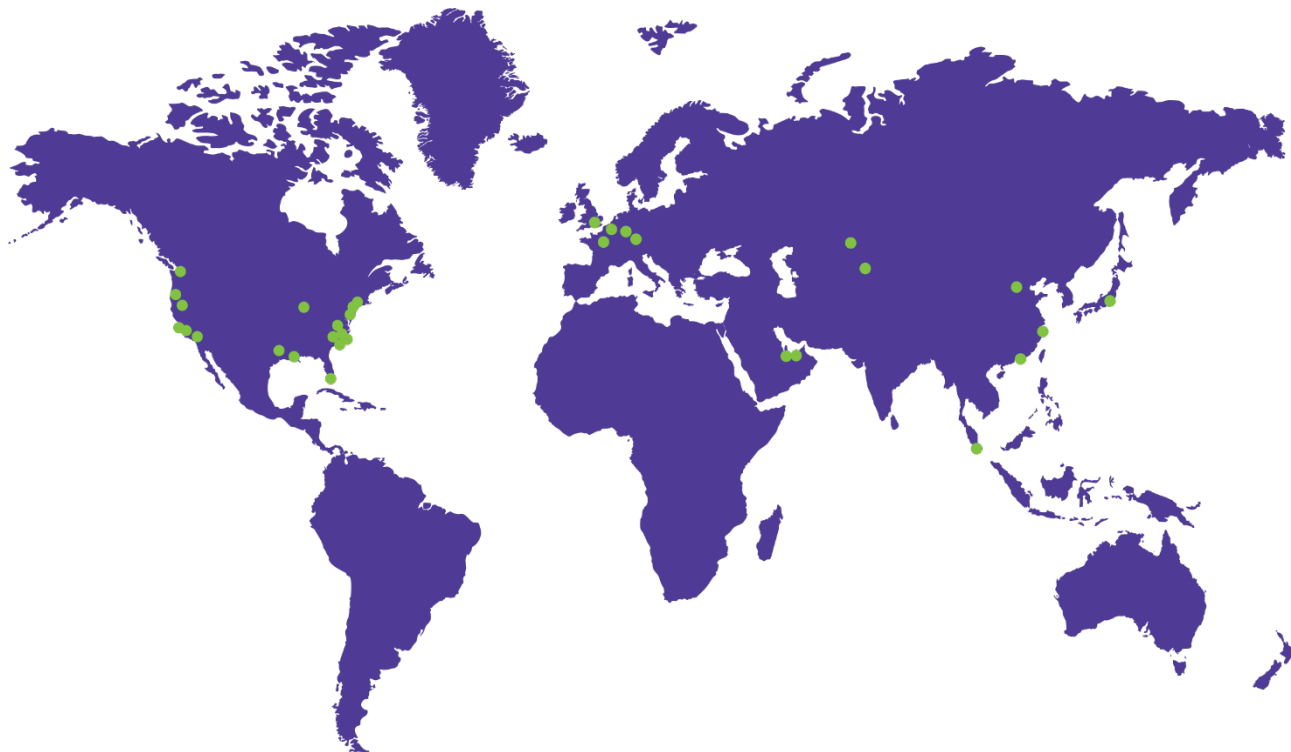
**Louise Skinner** provides sophisticated, strategic advice on all aspects of employment law, with particular focus on regulatory employment matters. Described as “truly exceptional and insightful” by clients in The Legal 500 UK guide, Louise advises on issues including investigations, contractual disputes, 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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