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# Labour & Employment 2021

**Contributing editors****Matthew Howse, K Lesli Ligorner, Walter Ahrens,  
Michael D Schlemmer and Sabine Smith-Vidal**

Morgan, Lewis &amp; Bockius LLP

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Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.



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# The future of flexible working for global employers following the covid-19 pandemic

Louise Skinner and Matthew Howse

Morgan, Lewis & Bockius LLP

The forced and sudden shift to remote working will long be recognised as one of the most significant impacts of the covid-19 pandemic for employers. Although government-imposed restrictions have fluctuated from time to time around the world, 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. The expectation is that, even after vaccination programmes are complete, a large proportion of employees will expect to work from home at least some of the time going forward in a hybrid model. Employers' response to this change in working habits may be crucial to their future success, and it brings with it many employment-law considerations.

Employers will wish to ensure that this shift towards flexible working does not negatively impact productivity, collaboration or company culture. While studies have shown that people can be as productive, if not more so, when working from home, the practical and operational advantages of an employer's entire workforce working from home could potentially be diminished when a substantial proportion of the staff returns to the workplace. In other words, remote working may be effective when everyone is in the same position, but it is likely to prove more challenging for employers when some employees remain working remotely while others return to the workplace. In determining their approach to flexible working going forward, each employer will need to risk-assess, design, implement new policies and procedures, and educate their staff on the expectations and parameters of the new working model. They will also need to consider applicable local law, bargaining and other collective agreements, and societal norms, recognising that it may be challenging to adopt a uniform approach across the different jurisdictions in which they operate. We set out below some of the key considerations global employers will need to address concerning flexible working in the aftermath of the covid-19 pandemic.

## New employee expectations

Permanent remote working is now being considered by both employers and employees who would not have considered this a viable option just 12 months ago. The World Economic Forum's latest Future of Jobs Report, published in October 2020, states that 44 per cent of workers can conduct their work remotely. Specifically in the United Kingdom, in a September 2020 poll of more than 2,000 office workers conducted by the British Council for Offices, nearly half of respondents said that they intended to work from home some of the time going well into 2021, and this was at a time when another national lockdown seemed unlikely.

The result of a long-term shift to flexible working is that employers will need to be thinking now about how they are going to respond to employee expectations of new working patterns when government guidance no longer requires people to work remotely in the different countries in which they operate. As so many employees have indicated a preference for remote working at least part of the time going forward, employers need to consider carefully how best to remain an employer of choice and stay competitive concerning the most flexible and desirable working practices. Some global employers have already confirmed plans to move to full remote working, whereas others have instead emphasised the benefits of in-person collaboration and indicated a preference for compulsory workplace attendance save in exceptional circumstances.

## Responding to increased flexible working requests

Many countries already have in place a legal framework addressing employees' rights concerning requesting flexible working arrangements. It has long been recognised that by allowing employees to work flexibly to help accommodate their family and other commitments, employers are likely to attract and maintain a more diverse and committed workforce. In the United Kingdom, for example, employees who have worked for their employer for at least 26 weeks have the right to make a flexible working request. Employers may refuse the application as long as:

- they handle the request in a reasonable manner;
- they notify the employee of the decision within the decision period; and
- they meet one or more of the eight grounds for refusing a request (which includes the burden of additional costs and the detrimental effect on the ability to meet customer demand resulting from the flexible working request).

The new ways of working since the first UK national lockdown in March 2020 may mean that employers will be more likely to grant flexible working requests than they would have been before the pandemic because they now have extensive evidence that it can work very effectively. On the other hand, they may find it more challenging to identify a reasonable basis to refuse a request, given that employees have had the opportunity to demonstrate how productive they can be when working remotely. Some employers may be hesitant to grant permanent flexible working requests until they know how effectively hybrid working arrangements, with some staff at home and some in the

workplace, will operate. Employers will need to weigh up the extent to which remote working will work for them as a business, and for which roles, over the long term.

In several countries, authorities are considering implementing new rules concerning flexible working requests. This may involve a shift towards the default position being a right to work flexibly, with employers needing to justify a requirement for permanent on-site working. Where employees in certain sectors have demonstrated that they can work effectively on a remote basis, such changes in the law may have a significant impact on the numbers of people who shift towards more permanent flexible working.

As well as agreeing to individual flexible working requests, many employers have shown their intention to be proactive by altering their flexible working policies in a more wholesale manner, such as allowing all staff to work remotely for a fixed amount of time each week or month, often 40 to 50 per cent of working hours. There will not be a one-size-fits-all solution for all employers, and effective flexible working practices will vary according to industry. However, employers should now be contemplating their future flexible working policies, taking into account their individual business needs, the needs of their employees and the need to remain competitive against their peers.

### **Applicable government guidance**

Employers will need to follow applicable government guidance concerning the attendance of employees in the workplace in the various jurisdictions in which they operate. In some countries, at the time of writing, the advice remains that office workers who can work from home should do so. Employers in such regions are therefore required to facilitate remote working wherever possible. Employers should assess business needs and consider whether the physical presence in the workplace is required. The employer must ensure that workplaces are safe for any employees who cannot work from home. Employers will also need to be prepared for the fact that future lockdowns may be required on short notice over years to come, to relieve anticipated strain on health authorities and mitigate the risk of widespread contamination. As such, employers should ensure that ongoing compliance with government guidance from time to time is expressly referred to when enacting any medium- to long-term remote working policies.

### **Parameters for flexible working**

Employers will need to plan for how they are going to deal with flexible working requests they receive in a post-covid world, bearing in mind that they will risk discrimination claims if they are perceived to make decisions on flexible working based on employees' protected characteristics. Several considerations will need to be addressed, including the way requests from employees with specific characteristics such as disabilities, or working parents, are dealt with. To mitigate the risks, employers should designate one person or team to oversee flexible working requests to ensure a degree of consistency in the decisions being made.

### **Innovation and efficiency**

Employers should consider how innovation and efficiency are affected by long-term flexible working.

Numerous studies have analysed the impact on worker productivity during enforced remote working. In particular, employees whose mental health suffers as a result of remote working are likely to be less productive than in an office environment. The social isolation associated with remote working, combined with the lack of clear work-life boundaries, can impact employees' motivation. Employees have also reported suffering from exhaustion associated with having more virtual meetings than they used to have face-to-face meetings in the office.

However, some studies have found employees' productivity has increased as a result of working from home. As employees have become used to working remotely, many have reported being able to eliminate distractions more effectively at home than in the office. There have also been reports of employees taking fewer sick days. Further, the lack of a commute means that some employees are committing more time to their work than they previously did in the office.

Concerning innovation, there are reports that the collaboration achieved by spending time with colleagues in the same workplace leads to greater communication and innovation, whereas home working can stifle innovation and creativity. On the other hand, a generous flexible working policy is likely to make an employer attractive to employees, thus drawing interest from top talent.

As such, employers will likely wish to assess whether the burden of office overheads is outweighed by the benefits of having all workers in the same place, or if in fact, remote working can lead to a more innovative and productive workforce within their particular business and sector.

## **Other legal and practical considerations**

### **Employers' duties towards employees' health and wellbeing**

In most jurisdictions, employers have a duty of care towards their employees to safeguard their health, safety and welfare. Such duty does not cease when an employee begins to work remotely, and employers have several considerations to take into account in this respect.

### **Workplace assessments**

In the United Kingdom, for example, employers have the same health and safety responsibilities for home workers as for any other workers. The Health and Safety Executive has outlined the need for employers to guide employees through workstation assessments at home, in particular regarding the use of display-screen equipment, to prevent neck or back injuries or related problems. Employers may wish to consider amending their health and safety policies to reflect the need to assist remote working employees with workstation assessments.

### **Equipment**

Employers should ensure that employees have the necessary equipment to work safely on a remote basis. This typically will include providing appropriate computer screens and ergonomic chairs. Employers should discuss equipment and technology with employees, agree on what is needed and support them in setting up tools to meet their needs.

### **Employee mental health**

A remote working environment can present a risk to workers who suffer from mental health issues, as remote working often means less personal interaction than might be expected in the office, leading to isolation and potential distress. Employers are therefore encouraged to put in place procedures to enable them to keep in direct contact with home workers and to recognise signs of stress as early as possible. Managers should be approachable and available and encourage team members to talk if they are having problems.

### **Contractual place of work**

Employers implementing full-time remote working will need to consider employees' contractual place of work. It is unlikely to be necessary to issue fresh employment contracts, but contracts may need to be varied to represent an employee's correct main place of work if they move to full-time remote working.

Employees who can work remotely may be keen to work internationally and fluidly. However, this may give rise to several

complications that will need to be addressed by both employees and employers. In particular, there are personal and corporate tax issues that need to be taken into account, and employers must ensure that these are given careful consideration to avoid unexpected liabilities. Additionally, employees changing the jurisdiction from which they work may give rise to various employment law, data protection and regulatory issues. For example, 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. Further, employers may find that applicable regulatory requirements do not permit employees to undertake certain work on a long-term basis outside of the regulated jurisdiction. As such, employers should carefully consider these issues before allowing an employee to work remotely from a different jurisdiction than their home location. Indeed, many employers are likely to implement policies that expressly provide that such practices will not be permitted on a long-term basis.

### Storing information and data protection

Employers should consider whether home workers need specific training on their obligations concerning data protection and confidentiality. Employers should also carry out a data privacy impact assessment of the data protection implications of employees working from home. The EU General Data Protection Regulation (Regulation (EU) No. 2016/679) requires that companies keep personal data private and secure regardless of where their employees are working.

Employers may also wish to review and revise their IT security policies to account for long-term remote working. To safeguard sensitive data, companies should ensure that all devices used by their employees for work are encrypted. Companies are also recommended to establish a virtual private network if they do not already have one in place.

### Insurance

Employers should check that their employers' liability insurance covers employees working remotely. This may be as simple as reviewing the definition of 'covered worker' in the insurance policy. If the appropriate insurance cover is not in place, employers should speak with their insurer or broker in the first instance. Employers will not wish to risk being without cover if an employee is injured while working from home. Employees should also check with their mortgage providers or landlords and their home insurers that there is no impact on their personal policies as a result of them working from home on a long-term basis and make appropriate adjustments if necessary.

### Managers identifying problems and mitigating risks

Teams operating remotely pose particular challenges to managers whose role it is to oversee the individuals working within them. Managers will need to make a concerted effort to keep in touch with their teams and to ensure that any concerns are escalated.

Managers should be trained on any new covid-19 protocols and policies (eg, which staff may be classed as vulnerable and how to enforce any new health and safety measures). Managers may also need refresher training on how to conduct difficult conversations and on resolving conflicts in the workplace and remotely. Managers must know where to locate company resources so that they can inform themselves and point staff to such materials as necessary.

Instances of whistle-blowing may prove more challenging for managers to deal with when working remotely. It is important that managers are clear about the process for dealing with concerns and notify employees.

It is also advisable to encourage managers to celebrate success with their teams and to promote well-being activities to instil a healthy and productive workforce. They should set realistic deadlines and

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workloads and be encouraged to have open discussions with their teams about hours of work, expectations and boundaries.

Managers should also be alert to any potential bullying or harassment issues. Communication can be more difficult on a remote basis, and there can be more room for misinterpretation that can lead to conflict between colleagues and misunderstandings between managers and their direct reports. There have also been many reports of sexual harassment during periods of remote working, as employees comment on colleagues' appearances online and have greater access to their personal settings. Managers should be alive to these issues and ensure that employees are informed about appropriate standards of behaviour, and act if any concerns are raised.

### Monitoring employees

There have been reports of employers increasingly using artificial intelligence technologies to carry out management functions, and further technologies, such as surveillance software, to monitor staff working remotely in the wake of covid-19 pandemic. As the number of staff working from home on a long-term basis increases, this is likely to be accompanied by greater use of technology to monitor staff and make management decisions. Employers will need to exercise caution as they implement any remote monitoring of staff, taking into account applicable data privacy laws.

### Expenses

Employees may be entitled to claim a deduction against taxable income for additional household expenses incurred as a result of regularly working from home under applicable local laws. Typically, these expenses must be incurred wholly, exclusively and necessarily in the performance of their employment duties, although the specific rules will vary depending on the regulations in the relevant jurisdiction. Employers should ensure they are aware of the applicable rules and can meet their obligations in this respect.

### Set clear expectations

It is important for employers with large numbers of employees working remotely to build healthy relationships with such personnel, based on trust and confidence. This includes agreeing on matters such as when employees should be available, how they will keep in touch, how work-life balance will be managed and how performance will be measured.



## **Conclusion**

There can be no doubt that enforced remote working during the covid-19 pandemic has caused a seismic shift for many employers, the impact of which will last for the foreseeable future. There are many important considerations for employers to take into account as they navigate the new normal of working practices. The challenge for employers is to ensure that they respond positively to these changes, in a way that works for their organisation and sector, ensuring that applicable local laws are adhered to and that expectations are clear for all involved. Being adaptable and responsive to employees' expectations, while maintaining a strong company culture and brand, will be fundamental to becoming an employer of choice in a post-pandemic world.

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