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Global overview

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The future of the global workforce

It is a challenging time for multinational employers, which have probably never faced greater challenges in managing a global workforce. More than two years of unprecedented developments stemming from the covid-19 pandemic have brought on numerous changes affecting the workplace: disruption and innovation in companies' business models, evolving government guidance, heightened competition to attract and retain talent, new employee expectations, and a dramatic shift to remote and flexible working arrangements. Employers' responses to these changes are crucial to their future success and raise numerous employment law considerations.

The rise of hybrid and remote working

As the impact of the pandemic diminishes, employers have developed a variety of approaches to what their workplaces will look like going forward. Employers' approaches and employees' expectations differ by region, country and industry. Employers in the financial services industry generally appear to be taking a stricter approach to make a full return to the office, while other industries, such as technology and life sciences, have tended to have employees working remotely throughout the pandemic, with a return to the office taking place tentatively – or even not at all.

In the UK, a majority of employers have moved to some form of hybrid working, with some allowing employees to work from home only one day each week, some permitting fully remote working, and many requiring 40 per cent to 60 per cent of the time in the office. In France, employees and employers tend to consider two days per week working from home as the right balance; few employers allow fully remote arrangements, and some have required employees to make a full return to the office. In China, where cases have been rarer, most companies started to require employees to return to offices in 2020, although some multinational corporations are allowing hybrid working to keep practices consistent across global jurisdictions and to allow employees greater flexibility. Several governments have indicated that they are looking to change the law on flexible working by giving employees more scope for requesting a new working pattern. For example, the German government has proposed a new remote working law.

Employee expectations v business requirements

With many employees seeking more flexibility in working arrangements and considering the robust competition for talent, employers that take the time to properly consult with their employees about future working practices are likely to have the most successful policies going forward. However, employers must also consider whether business needs can be met when people are working remotely some or all the time. The answer will vary depending on the industry as well as the culture of the organisation.

Many employers recognise a benefit in some level of in-person collaboration but are allowing flexibility in terms of how and when that happens. Some employers strongly believe that in-person collaboration

most of the time is necessary – but the reaction of the talent population to that approach remains to be seen. Logistical considerations enter the mix as well. Some types of employees, such as engineers, may require a technology setup that is too difficult to replicate in a remote working office, while others may require access to information that the employer would not deem to be secure on a home network, so remote working may not be prudent from an IP protection perspective. And, while remote working can be very effective when most of the employee population is working from home, it is more challenging when employees are working on a hybrid basis. Meetings can be more difficult, people can be left out of important discussions, and it may be more difficult to meet customer needs. So, while successful home-working during the pandemic may be a relevant factor, it should not be determinative as to whether it will be effective in the longer term when others are on a hybrid basis or fully in the office.

Government guidance may also need to be considered. In China, local governments in many locations have been pushing companies for many months to maintain at least 50 per cent attendance in the office and try to reach 70 to 80 per cent attendance to spur the economy and create a greater sense of normality.

Employment policies and practices

When implementing hybrid working models, employers may need to consider adjustments to employment policies and practices. Having in place a remote working policy, where permitted, will help codify the rules, parameters, and expectations. Among the items to include in a remote working policy are minimum required time in the office, security requirements for working remotely, parameters for taking leave, expectations for checking in with managers, and requirements regarding remote working location. If a remote working policy affects the terms of an employment contract, it may be necessary to amend the contract.

Training on managing a hybrid workforce may help mitigate the risk of claims, and some employers are conducting training for managers and workshops within teams to ensure that employees understand the expectations of the new working format. There may be health and safety laws that extend to work from home environments, so employers should understand the applicability of local laws and provide appropriate support to ensure safe working environments. Additional monitoring and measures may be needed to keep information secure in remote work environments, particularly in regulated sectors where regulators will require evidence of steps taken to ensure security of information and protect consumer interest.

Employers may wish to take additional steps to monitor and manage employees' mental health in a remote or hybrid working environment. Many employees have reported mental health concerns throughout the pandemic, including struggles with long-term remote working and the associated isolation, or with various aspects of the return to the office. The need may be more acute in some jurisdictions where mental health issues are not discussed as openly. It will be important for employers

to provide support for the workforce and ensure that mental health and wellbeing are treated as priorities.

Remote work from a different jurisdiction

Employers are grappling with many risks associated with remote working elsewhere from the company's location. Many employees relocated during the pandemic to allow remote working closer to family, or in locations thought to be safer or better for their families, and often do not wish to return. Employers are faced with potentially significant liability if they have displaced employees all over the world presenting tax, employment law, regulatory and immigration risks.

The tax and social security risks when an employee works from another jurisdiction include permanent establishment risk, and local income tax and social security liabilities (which the employer may be directly liable for, not the employee).

Immigration status may present a challenge, as employees may not have the legal right to work in the host country. This is a particular issue across Europe and the UK following Brexit.

An employee working in a location other than their home jurisdiction may trigger different statutory employment law protections. In many countries, an employee will benefit from statutory employment protections simply by virtue of performing work in the host country for more than a very temporary period. Even within the same country, local law may provide for different leave requirements and entitlements, benefits, and other regulations that affect the rate of pay.

Finally, depending on the industry, there may be regulatory and compliance issues with having an employee perform work from outside of the regulated territory.

While there is absolutely scope for laws in the future to adapt to recognise the 'digital nomad' who works from anywhere, at the current point in time, most legal and regulatory frameworks do not permit this without risk.

Litigation risks

Employers will likely see an uptick in several types of employment claims stemming from the post-pandemic workplace. There has already been an increase in complaints by employees of manager harassment in connection with remote or hybrid working practices or following the return to the workplace. There also appears to be a higher incidence of sexual harassment claims as people come back together in the workplace after extended periods of working remotely.

Also expected is a rise in claims by employees alleging retaliation or wrongful termination for having raised health and safety concerns, particularly as people return to work locations and are concerned about safety protocols (or lack thereof).

Employers are likely to experience a large uptick in flexible working requests. This may bring on an increase in discrimination claims if employees perceive that they are being treated inconsistently or less favourably.

Employers may be faced with the prospect of terminating employees who refuse to go to the office, or who have moved to another jurisdiction and refuse to return to employer premises. Such situations may give rise to claims of unfair dismissal.

Conclusion

Amid all these challenges, how can employers successfully manage a global workforce and remain an employer of choice in the new working world? Communicate, communicate, communicate! The employers that have most successfully navigated the pandemic have kept channels of communication open with employees, ensuring that they understand what is expected, know how to raise concerns, and can share their thoughts on the most effective working practices and safety measures going forward.

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