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UK Employment Flash

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Ensuring a Safe Workplace and Mandating Vaccinations

UK employers will need to consider a range of em ployment and health and safety issues this autumn as they finalise and implement their return-to-work plans. We shine a light on mandatory vaccinations, how to manage employees who refuse to return to the workplace and COVID-19 risk assessments.

Following the widespread rollout of COVID-19 vaccinations this year, and with the UK government guidance on working remotely now lifted, employers in the UK face a variety of challenges making sure the workplace is safe as employees return to the office. This is made more difficult given the changing risk profile of the virus.

While in many jurisdictions vaccinations are required as a condition of returning to the office, outside of certain care settings, where vaccinations are mandatory, vaccine requirements have not been tested in the English courts. Public Health England advice supports employers in encouraging employees to get vaccinated to protect themselves and others from infection, but employers that mandate vaccinations as a condition of returning to work could risk potential discrimination claims from employees who are not vaccinated for health or religious reasons. Mandatory vaccination clauses in employment contracts, for either new hires or existing employees (who would need to agree to such an amendment), present similar issues. As a result of this uncertainty, and to minimise the potential for claims, many UK employers have instead required either vaccination or evidence of a negative COVID-19 test as a condition of entry to the office.

Employers will likely have to manage employees who refuse to return to the workplace, either because they possess a protected characteristic under the UK's Equality Act 2010, live with someone who does or fear the health risks of the daily commute. While employees may be protected from dismissal or detriment if they reasonably believe that returning to their usual workplace places them in serious and imminent danger, recent tribunal decisions have shown that a general fear of contracting COVID-19, if the individual is not clinically extremely vulnerable, is unlikely to be sufficient to bring a claim, especially where the employer has adopted a comprehensive COVID-19 risk assessment and follows latest government guidance. Nevertheless, employers should follow best practice where possible and consult with individual employees to understand their concerns and explain any reasonable steps taken to mitigate the risk.

Employers should keep in mind the general requirement to carry out health and safety risk assessments, including a health and safety risk assessment in relation to the specific COVID-19 risks associated with a return to the office. These will help employers demonstrate that any measures they implement are proportionate and have been considered in light of the risks of COVID-19 and office working. If there are significant changes in the risk profile

of the virus — a surge in cases, for instance, or vaccine efficacy wanes significantly over the autumn and winter — then previous health and safety assessments will need to be updated.

Since the UK has moved to Step 4 of the government roadmap to return to normality and fulsome restrictions on face coverings and social distancing, including in the workplace, have been dropped from the advisory guidance, the onus is on employers to make their own decisions, guided by legal advice, on the appropriate health and safety measures for their staff.

Flexible Working: Unintended Consequences for Employers

Some companies might be reconsidering location-weighted salaries if employees work remotely. Remote working could also have consequences for diversity programs and give rise to discrimination claims if the employees who opt to work from home are not representative of the workforce.

A recent BBC survey found that most people in the UK do not believe workers will return to the office full-time after the coronavirus pandemic. The UK government is also considering proposals to allow all employees the right to request flexible working from day one at a new employer (rather than the current requirement of waiting six months after they start work). Whatever the outcome of these proposals and changing employee expectations, a certainty of the post-pandemic world is that the rise of flexible and remote working will redefine the workplace. For employers managing this new landscape, there are unintended pitfalls to be wary of.

With added flexibility and hybrid working, some employers are considering pay cuts for employees who work from home or removing location-weighted salaries for jobs based in more expensive cities like London. Employers seeking to roll out pay cuts or similar measures would need to make changes to employment contracts, which would require employee consent. It is unlikely that employees will agree to pay cuts in exchange for greater flexibility, at least not without a clear understanding of the business case for the cut. For employees based in more expensive cities, removing location-weighted salaries may also be poorly received as the cost of living is usually higher compared to other regions. Any employer considering this route should consult with employees and bear in mind restrictions in the employment contract and the potential impact on employee relations.

A further consideration for employers contemplating hybrid working is potential exposure to indirect discrimination claims. If it can be shown that the majority of home workers are on lower salaries and have a protected characteristic (such as sex, race, age or disability) or that most employees who unsuccessfully submit flexible working requests have a protected characteristic, companies may be opening themselves up to indirect discrimination claims. While these present a potential liability exposure, the added publicity risk can affect employers' reputation and ability to attract employees.

Even if employers roll out flexible working policies with the best intentions, they should take steps to consider ramifications on their ability to retain, train and promote talent. In particular, if the majority of employees who take up flexible work options are women, this may deepen the gender divide and pay gap in the workplace and have consequences for the ability to promote or retain such employees, especially if their flexible work arrangement is held against them. Some of these consequences may only become apparent years down the line and may have an impact on the diversity of future senior leadership. Employers should consider, as a matter of law and workplace culture, what steps they can take to ensure employees on hybrid or flexible working arrangements do not get left behind.

For employers rolling out new flexible working policies, a sensible approach would be to engage employees on the proposals. Initiating a trial period and collating employee feedback can help employers spot unintended pitfalls and develop their policies. While there is no single, universal approach to flexible working, each employer's stance sends a message to their employees on what the organization values and will have implications on managing talent, the organization's brand and employee relations for years to come.

Employers' Discretion To Deny Flexible Working Requests Is Limited

A recent Employment Tribunal decision in relation to an employer's refusal to grant a flexible working request from a working mother highlights the dangers for employers in applying a blanket policy of refusing such requests.

On 12 August 2021, an English Employment Tribunal (case no. 2205199/2019) awarded a claimant £185,000 after her request for flexible working was refused. The claimant was an estate agent who asked to work four days a week and to finish early at 5 pm when she returned from maternity leave so she could pick up her daughter from nursery. Her employer refused to consider her request.

While this was only an Employment Tribunal decision and not binding on other courts and tribunals, the size of the award is significant. It is a reminder that applications for flexible working must be considered carefully, particularly at a time where requests may become more frequent if employees have become accustomed to flexible working arrangements throughout the pandemic.

Under English law, all employees have a legal right to request flexible working once they have worked for an employer for at least 26 weeks, and employers must address requests in a 'reasonable manner'. This does not mean that all applications for flexible working have to be approved. However, employers must take time to consider the request, whether it will be possible to accommodate it and, if not, whether a refusal might create a potentially discriminatory practice.

While this particular claim was bought before the COVID-19 pandemic, it is worth considering what it could mean in the current environment. Where employers are proactively putting flexible working policies in place, and given that many employees have already worked flexibly for the last 18 months, refusals of flexible working requests might be more readily held to be unreasonable. In addition, flexible working and the willingness of employers to embrace flexible working patterns often goes hand in hand with diversity and inclusion initiatives. Failure to deal with an application for flexible work in a reasonable manner can have serious consequences both in terms of the risk of employee claims and reputational damage.

Proposed Duty of Employers To Prevent Sexual Harassment in the Workplace

The UK government has published its response to the 2019 consultation on the prevention of sexual harassment in the workplace. This includes a proposed positive duty on employers to prevent sexual harassment and a review of the time limit to bring discrimination claims in the Employment Tribunal.

In 2019, at the height of the #MeToo movement, the UK government issued a consultation paper to seek views on how best to strengthen laws to protect employees and other individuals from sexual harassment at work. Proposals at the time included the introduction of a positive obligation on employers to take action to eliminate sexual harassment, holding employers responsible for the harassment of its employees by third parties while at work and consideration of the time limits for bringing claims in the Employment Tribunal and available remedies.

The government response adopts much of the original proposals and, while light on detail, sets out the likely framework for new laws to protect employees.

New duty to prevent sexual harassment

The focus of the proposals is a positive duty on employers to take 'all reasonable steps' to prevent sexual harassment at work. Employers are already liable for harassment at their workplace unless they can demonstrate that they have taken all reasonable steps to prevent it, but the new duty would require employers to be proactive and it would expose them to a potential claim even if harassment does not actually occur.

During the consultation employers and their advisers raised concerns about the required standard of 'reasonable steps' and how to benchmark the preventative action required. The government's response does not address this with explicit examples, saying that employers should have flexibility and the standard should be proportionate to the workplace in question. However, the Equality and Human Rights Commission (EHRC) is due to publish a draft code of practice for consultation in the next few months.

The EHRC's consultation paper is likely to be based on an earlier guidance paper that pushed for the onus to be placed on employers to make enquiries about the experience of protected groups in the workplace. The guidance also recommended a review of policies, training for managers and employees, harassment risk assessments and measures to ensure that any allegations of harassment are thoroughly investigated.

As highlighted in the consultation period, this preventative duty could be difficult to enforce. To meaningfully impose a preventative duty and differ from the current remedies that apply only after the event, the new law would need to be enforceable absent an act of harassment. Suggestions have included giving the EHRC a general monitoring and enforcement power (which would need to be accompanied by additional resources) and a flat rate level of compensation for aggrieved employees, similar to the protective award of up to 13 weeks' pay per employee for a failure to inform and consult under the Transfer of Undertakings (Protection of Employment) (TUPE) rules.

Third party harassment

The UK government has previously introduced and then repealed laws that enabled employees who had been harassed at work by a third party, such as a supplier, client or customer, to seek compensation from their employers. The government is considering a reintroduction of this law, but questions remain as to how many incidents of harassment need to occur before the employer should be liable, and the extent to which such third-party harassment would be covered by the proposed new preventative duty.

Extension of time limits for discrimination claims

Employees who complain of harassment or other discrimination at work are required to seek early conciliation with the Advisory, Conciliation and Arbitration Service (ACAS) within three months of the last act complained of before they can then present their claims to the Employment Tribunal. This period will be extended only if the Employment Tribunal determines that it is 'just and equitable' to do so. The government has indicated that it is considering an extension of this period, possibly to six months, for all discrimination claims. While this might create uncertainty for employers, it would give parties more time to settle any related disputes before a claim needs to be filed.

The government has stated that the new laws will be implemented 'when parliamentary time allows'.

FCA Consultation on Diversity and Inclusion on Company Boards and Executive Committees

The Financial Conduct Authority (FCA) has issued a consultation paper seeking views on proposed changes to the Listing Rules that would require companies to disclose annually on a 'comply or explain' basis whether they meet specified board diversity targets and to publish diversity data on their boards and executive management.how to manage employees who refuse to return to the workplace and COVID-19 risk assessments.

Following a recent discussion paper published jointly by the FCA and the Prudential Regulation Authority on ways to promote diversity and inclusion across the financial services sector, the FCA has launched a consultation (CP21/24) on proposals to improve transparency for investors on the diversity of listed company boards and executive management teams. The proposed rules are intended to encourage a broader consideration of diversity and to include diversity policies as part of ESG assessments, and strengthen disclosure over time. The consultation is open for responses until 20 October 2021 with the new rules potentially coming into effect at the end of this year.

Scope

The requirement would apply to companies based in the UK and overseas issuers with equity shares, or certificates representing equity shares, admitted to the premium or standard listing of the FCA's Official List. The proposal does not apply to issuers of debt securities, securitised derivatives or miscellaneous securities, open-ended investment companies (OEICs) or 'shell companies'.

Proposed changes

Companies would be required to disclose annually in their financial report whether they meet the following diversity targets:

- at least 40% of the board should be women (including individuals self-identifying as women);
- at least one of the senior board positions (chair, CEO, SID or CFO) is held by a woman (including individuals self-identifying as a woman); and
- at least one member of the board is from a non-White ethnic minority background (as categorised by the Office for National Statistics).

The 'comply or explain' approach will allow overseas issuers, for example, to set out any national or cultural context for their figures.

In-scope companies would be required to publish standardised numerical data on the gender and ethnicity diversity of their boards, senior board positions and executive management teams in a format specified in an annex to the consultation.

The FCA further proposes to amend DTR 7.2.8AR, which currently requires companies to disclose in their corporate governance statement the diversity policy applied to their board, to facilitate disclosure about any diversity policies that apply to the key board committees (particularly, the remuneration, audit and risk committees) and to take into account wider diversity characteristics such as ethnicity, sexual orientation, disability and socio-economic background. Companies should provide further data where possible.

Implications

The proposals set out in the FCA consultation build on the existing provisions of the UK Corporate Governance Code 2018 regarding board diversity, and the recommendations of the Hampton-Alexander Review (final report published in February 2021) and the Parker Review (2017), reinforcing the existing 'voluntary' targets and disclosures as regulatory requirements.

The proposals are made against the backdrop of increasing investor and regulator focus on ESG issues, including diversity. Similar diversity rules for NASDAQ were approved in August 2021. The proposed Listing Rule targets are not quotas, but rather positive benchmarks for issuers to report against in a consistent and transparent framework. It is expected that the breadth of diversity characteristics will expand over time, with continuing heightened focus on ESG strategy and corporate governance practices.

Changes to Rules Governing the Transfer of Personal Data

The UK Information Commissioner's Office (ICO) is consulting on data protection and employment practices, the European Commission (EC) issued new Standard Contractual Clauses (SCCs) for the transfer of personal data outside the European Economic Area and the ICO commenced a consultation on three draft documents to facilitate international transfers outside of the UK.

On 12 August 2021, the ICO launched a public consultation on data protection and employment practices, intended to inform the ICO's upcoming employment practices guidance. Responses to the survey may be submitted here or by emailing employmentguidance@ico.org.uk before midnight UK time on 21 October 2021. There have been significant changes in the data protection landscape since the ICO's previous employment practices guidance was published, particularly with regard to data transfers.

On 4 June 2021, the EC published new SCCs for the transfer of personal data outside of the EEA. The SCCs align more closely with the EU's General Data Protection Regulation 2016/679 (GDPR) and seek to provide additional safeguards for international data transfers, as required following the landmark case of Data Protection Commissioner v Facebook Ireland Limited, Maximillian Schrems (Schrems II).

The new SCCs became effective on 27 June 2021. Until 26 September 2021, organisations can choose whether to rely on the old SCCs or the new SCCs to safeguard their transfers. On 27 September 2021, the old SCCs will no longer be a valid transfer mechanism for new data transfers. Companies relying on the old SCCs at that time will have until 26 December 2022 to transition to the new SCCs, after which the old SCCs will no longer be valid. For further details, please see our June 2021 Privacy & Cybersecurity Update.

It is important to note that the new SCCs do not apply to transfers outside of the UK in light of the UK's withdrawal from the EU and EEA. As such, the ICO are working on a UK-specific mechanism for safeguarding such transfers in accordance with the UK GDPR. The ICO has currently published three documents, all in draft form:

- **The draft international data transfer agreement (IDTA)**. The draft IDTA contains language for controller-to-controller, controller-to-processor and processor-to-processor transfers (though, notably, not processor-to-controller transfers). It is made up of (1) tables, (2) extra protection clauses, (3) commercial clauses and (4) mandatory clauses.
- **A draft international transfer risk assessment and tool**. Following Schrems II, organisations transferring personal data of EEA/UK data subjects to third countries must complete a risk assessment of the destination country. The ICO's draft international risk assessment and tool is designed to be used for this purpose.
- **A draft UK addendum to the SCCs.** This addendum can be appended to the new SCCs and will be a welcome addition for organizations transferring data from both the EEA and the UK to third countries. It appears that, once finalized, this addendum will allow such multinational businesses to avoid having to enter separately into both the IDTA and the EU's new SCCs.

A public consultation on these documents is currently open until 7 October 2021. For further information, please see our August 2021 Privacy & Cybersecurity Update.

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