

Speaking notes for White Paper Conference talk

Summer of '21 and beyond: what does the 'new normal' workplace look like?

- **Intro**

The extraordinary events of the Covid-19 crisis have resulted in a dramatic increase in home and flexible working for UK employees.

At the time of recording this seminar, people who can work from home are still advised to do so. The Government has indicated that it intends to lift the work from home guidance post 21 June, if conditions allow at that point. With that in mind, many employers are considering what their workplace will look like in the summer and beyond. The Government's flexible working taskforce is also drawing up guidance to support the emergence of new hybrid ways of working.

There have been high profile announcements from employers such as Nationwide, KPMG, Google and Spotify on their future working model, ranging from full choice for employees to work wherever they choose, to hybrid models of agile working combined with time in the office. The evidence suggests that many employees would like flexibility to continue to work from home in the longer term.

The BBC recently surveyed 50 of the UK's biggest employers and 43 of the firms said they would embrace a mix of home and office working, with staff encouraged to work from home two to three days a week. Of the remaining seven, four firms said they were keeping the idea of hybrid working under review.

Permanent changes to working models require careful consideration of a range of employment law issues, as well as the potential broader implications for workplace culture. An employer's approach to emerging from lockdown should be consistent with its corporate culture and values. The experience of lockdown may itself have changed the corporate culture, with technology and remote working becoming more accepted. The approach may even be an opportunity to build and develop the culture of the organisation.

In the first part of this webinar we are going to focus on key considerations arising in relation to hybrid working models. In particular we are going to look at:

- Whether it is appropriate to make contractual changes or implement new policies
- What engagement may be needed with employees and stakeholders
- How to deal with flexible working requests and employees who may refuse to return to the office

- **Looking first at the issue of the employment contract**

The employment contract will specify the normal place of work. Employers should exercise caution before making contractual changes. Hybrid working arrangements with limited or informal home-working will likely not require wholesale changes to employment contracts. It may still be appropriate to state the normal place of work as the office, and then deal with flexibility to work from home under a policy, which we will come on to discuss shortly.

However, if you intend for employees to work from home on a permanent basis, then contractual changes may be appropriate. Some key contractual considerations that you may want to provide for in that situation are to:

- (i) Specify if the normal place of work is the home;
- (ii) Consider whether there should be a trial period and/or a periodic review of home working;
- (iii) Reserve the right to require employees to attend the workplace if needed;
- (iv) Ask the employee to confirm that the terms of their lease, mortgage and/or home insurance policy don't prevent them from working from home;
- (v) Stipulate that the employee must inform you if they change address;
- (vi) Specify that the employee is responsible for regulating their own working time and taking appropriate breaks, since there will be less direct employer oversight; and
- (vii) Specify that the place of work needs to be within the UK (and we will come on to discuss potential issues in relation to overseas working).

If contractual changes are required for 20 or more employees, employers should be mindful of triggering formal collective consultation requirements.

• **Turning then to look at employment policies**

So if an employer is not making contractual changes, should the employer put in place an agile working policy or review its current policy to consider whether it is still fit for purpose? Yes. If employers do not have an agile working policy and intend to offer some form of home working, then it would be prudent to introduce an agile working policy (or to review the current policy and consider whether a refresh is required). This policy will set the parameters of what the employer expects and how it is intended to work in practice.

What should the policy cover? It will be important to specify what the employer's expectations are in relation to the split of time in the office and at home, and what flexibility may be required e.g. an employee may need to attend the office at short notice to meet business needs. It may also include other forms of agile working such as flexible start and finish times.

In formulating an agile working policy it will be important to engage with employees and stakeholders to ensure that the policy aligns with what their business does, its purpose, client needs, the legal and regulatory framework and - importantly - their values and culture.

Employers should also review and update other policies to reflect home-working e.g. policies on privacy/data protection, IT security, confidential information, health & safety and expenses.

Policies should state that they may be updated/amended from time to time, since this is a developing area.

Staff engagement and input from other stakeholders in the business on policy formulation can be helpful - this can identify key issues to reflect in the policy and can encourage compliance.

Employer requests

It is also important to consider the flipside – what if the employer wants to mandate home working (on a full or part time basis) but an employee does not wish to work from home? Whilst many people

have experienced the benefits of homeworking during the pandemic and will want to continue some form of homeworking in the longer term, there are many others who do not feel the same.

When the government is no longer instructing people to work from home, it may be difficult for employers to direct their employees to work from home if they want to come into the office. Employers who would like employees to work remotely should be aware of potential pitfalls:

- (i) Consider whether the request is reasonable, bearing in mind the employee's subjective circumstances.
- (ii) This may require contractual consent from the employee, depending on the existing terms of employment regarding work location.
- (iii) And as noted before, if contractual changes are required for 20 or more employees, employers should be mindful of triggering formal collective consultation requirements.
- (iv) It is also important to consider the reason why employees may not want to work from home. Some employees may want to come in to the office because that is simply their personal preference and how they work best. However, others may have a particularly challenging home environment, such as employees with young children present in the house or employees who do not have a dedicated workspace or one that they have to share with their family members or flatmates. Employers should assess if any new policy would have a disproportionate impact on any groups of employees that have a protected characteristic (e.g. young employees or those with caring responsibilities). If so, any change in policy will need to be objectively justifiable to avoid successful discrimination claims.

Refusals to return to work

What if an employee refuses to return?

There isn't a one-size-fits-all solution for this. Obviously it's important to understand and consider the specific reasons for refusal and an employer should engage with an employee directly to understand and discuss this.

All employees have a statutory right not to be subjected to any detriment or dismissed for refusing to come to work in circumstances where the employee has a reasonable belief that they are in "serious and imminent danger". For the purposes of this statutory protection, the issue is whether the employee reasonably and genuinely believes they are in serious and imminent danger. It's not relevant that you disagree about the danger – the question is whether the employee's perspective is reasonable. This can include danger caused by the behaviour of work colleagues. In situations where this protection applies, the employee would be entitled to stay at home for as long as they are refusing to return to the workplace because of serious and imminent danger. This statutory provision was designed for extreme health and safety emergencies where an employee has no reasonable option but to take evasive action. It was not designed with Covid-19 in mind and it is difficult to predict how an Employment Tribunal will apply it to the current risks.

The ongoing uncertainty over the risks presented by Covid-19 combined with the constantly changing picture may mean that ETs regard an employee's concerns as reasonable even if they have no particular vulnerability, the employer is complying with all guidance and no cases of Covid-19 have been found in the workplace. Alternatively, employees may need to show that they have a vulnerability and that there are significant health and safety lapses before it is reasonable for them to consider themselves in serious and imminent danger.

If an employee asserts that they are refusing to work for this reason, you need to make sure that you investigate their concerns and provide a reasoned and documented response.

If you are satisfied that you have provided a safe working environment then unless there are reasonable grounds for the employee refusing to return to the workplace that would make the instruction to return unreasonable, then an employer could, if it wanted to, take disciplinary action against the employee.

However – my advice would be to proceed with caution. There might be reasons for refusal which you are not fully aware of and so you should approach this openly with the employee and avoid applying a blanket disciplinary approach. Failure to act reasonably and to carefully consider the employee's reasons for refusing to return may give rise to discrimination claims.

Flexible working requests

It is also important to remember that employees have a statutory right to make a flexible working request.

Since 30 June 2014, employees with at least 26 weeks' continuous employment have been able to make a statutory request, in writing, for flexible working, for any reason. If they do make a request, employers must deal with that request in a reasonable manner and notify the employee of the outcome (including any appeal) within a three-month period – unless that timeframe is extended by mutual agreement. Only one request can be made in any 12-month period, and if an employer wishes to reject a statutory request, it can only do so on one of the following grounds:

- the burden of additional costs;
- detrimental effect on the ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality of work;
- detrimental impact on performance of employee;
- insufficiency of work during the periods the employee proposes to work; or
- planned structural changes.

Since home-working has been brought to the fore by Covid-19, I predict that employers may see more flexible working requests from employees in the future which involve home-working. Objectively justifying refusing a flexible working request may be tricky for employers if an employee has been able to demonstrate that the role has been performed well remotely, so employers may need to give more thought to such requests going forward. Of course it is a very different situation to work from home when all of your colleagues are also working from home (as will have been the case for many employees in the last year), as compared to when most or all of your co-workers are back in the office. We know that in the past significantly more women than men have sought flexible working arrangements and this seems likely to continue, rejection of requests risks indirect sex discrimination claims. Home-working for disabled employees could potentially be a reasonable adjustment, so employers should be mindful of their legal obligations.

There may be future change to the law on flexible working. One of the government's proposals outlined in the Queen's Speech in December 2019 was to make flexible working the default, unless employers have a good reason not to and as mentioned earlier, the Government's flexible working

taskforce is currently drawing up guidance on hybrid working models. Employers may need to adapt their practices if new guidance or even legislation is introduced.

I am now going to come on to talk about some tricky issues that arise in the context of agile working:

Health & safety

Employers remain responsible for the health and safety of their employees while working from home. Employers must conduct a suitable and sufficient risk assessment of all the work activities carried out by home-workers to identify potential hazards and assess the degree of risk to them or anyone who may be affected by their work. This does not necessarily require an in person assessment – many employers have conducted surveys to fulfil this requirement. Some issues for employers to be mindful of are:

- (i) There are specific health and safety duties if the employer provides the home-worker with equipment.
- (ii) Employers should provide home-workers with any necessary health and safety guidelines and ensure they are complied with.
- (iii) For employees with particular needs, for example pregnant women or those with back problems or other physical disorders, it may be appropriate to provide specialised equipment for them or to carry out an in-person assessment of their home workstation.

Employers should also be mindful of mental health considerations. As we emerge out of lockdown, it is important to remember that employees will have had very different experiences. Some may be desperate to return to the office while others may prefer to continue to work from home. Some employees may be struggling with worries about their own health or the health of those close to them. These very different experiences and concerns all need to be considered and acknowledged. Questionnaires, pulse surveys and informal discussion may all alert employers to mental health issues being experienced by employees.

Consider what support is available. Most employers offer employee assistance programmes and wellbeing and mental health support. Publicising these resources and ensuring ease of access is essential to such programs serving their purpose.

Some home-workers find the distinction between work and home life is blurred and that there is less support from colleagues when they are less visible. Employer initiatives can improve employee wellbeing and present an opportunity to identify individuals who are struggling e.g. introducing a “buddy” system and arranging regular team catch-ups or one-on-one virtual coffees. Consideration should be given to providing training about the mental, as well as the physical, safety aspects of working at home. Employers should also consider providing specific training to managers, about how they can properly manage staff who are working from home and how they can recognise signs of stress and anxiety when you are not in the physical workplace.

The HSE guidance on home-working is a helpful source of additional information on this.

The next tricky issue that we are going to look at is requests from employees to work from abroad

There are A few key issues for employers to consider here:

- (i) Firstly, in many jurisdictions employees may acquire local employment rights from day one so employers should consider the risks and consequences of these upfront. Local employment law advice may be helpful.
- (ii) Immigration permissions: does the employee have the right to work in the other country?
- (iii) Take tax advice. Employers with employees who relocate could be considered to have a “permanent establishment” in the country they are working from, potentially exposing the employer and employee to tax in the host country under the relevant local tax regime. Policies and contracts should make it clear if the employee is expected to bear the personal tax liability of working overseas.
- (iv) Local regulatory and compliance considerations should also be thought through. For example, consider whether the presence of employees may require the establishment of a local branch. And UK regulatory implications could be affected by substantial periods abroad – e.g. how will adequate supervision of employees working abroad take place?
- (v) For global businesses, it may be helpful to consider whether an international secondment/assignment or permanent employment with a local entity may be more appropriate than remote working for the UK business.

- **Turning next to the tricky issue of Data privacy and confidential information**

Protecting data and confidential information is a key consideration. This is clearly harder for the employer to control outside the office, but under the General Data Protection Regulation (“GDPR”) and Data Protection Act 2018 data breaches caused by home-workers could have severe consequences for the employer such as substantial fines. Some tips to ensure that you are compliant in this area:

- (i) Train staff periodically on protecting personal data.
- (ii) Spell out in policies specific steps employees must take to protect data and confidential information, such as: encrypting/password protecting data; locking computer terminals when not in use; ensuring wireless networks are secure; being mindful of people viewing screens or hearing work conversations; and storing and disposing of hard copy documents properly, for instance locking them in a cabinet and bringing them back to office confidential waste bins.
- (iii) Ideally, provide employees with employer devices to ensure correct employer security controls are in place. If employees are permitted to use their own device, they should have remote access to employer apps and email systems so that the employer’s data is kept separate from their own personal data.
- (iv) Employers should ultimately satisfy themselves that the arrangements they put in place mean the risk of a data breach is low e.g. by undertaking a data privacy impact assessment.

The Information Commissioner’s Office’s guidance on home-working is a helpful source of additional information.

- **Employee monitoring**

Another aspect of data privacy is the thorny issue of employee monitoring. There have been reports of employers using so called “spyware” to monitor employees working from home – time spent online, keystrokes etc. and there have even been some reports of more intrusive monitoring such as requiring employees to keep a video call with their manager open all day.

Some forms of employee monitoring are permitted, but employers need to balance this against employees’ right to privacy, bearing in mind the Human Rights Act 1998, the GDPR and the DPA. Some key considerations here are as follows:

- (i) Employers need a legitimate reason for carrying out monitoring and to have thought through whether their aim could be achieved less intrusively, having carried out a data privacy impact assessment.
- (ii) Employers should be mindful of sending a negative message to employees. If monitoring cuts across values or culture, or appears intrusive, it could affect trust and confidence and also productivity.
- (iii) Employers should be transparent with employees about what monitoring will be carried out. The reason for monitoring should be explained – monitoring for compliance reasons is less risky than monitoring with no clear purpose.
- (iv) But employee monitoring is not always bad news. Some monitoring of home-workers could help promote values and culture, by keeping in check bullying and harassment and ensuring whistleblowing issues do not get missed.

Again, the Information Commissioner’s Office is a good source of additional information.

The final tricky issue we are going to look at is management and supervision of employees working from home

Employers should consider how employees will be managed and supervised when working from home. Extra consideration will need to be given to how managers will keep in touch with and supervise employees.

- (i) How will regular contact or oversight be conducted?
- (ii) Employers should consider whether targets and performance measurement indicators are sufficiently clear that they will be in a position to assess the quality and quantity of an employee’s output when they are not under the watchful eye of their manager in the same way as when in the office.
- (iii) Senior staff may need extra training on how to manage workers who work remotely. ACAS offers general training on this.

The regulatory angle

If you are an employer who works in a regulated environment then there is an additional angle to this. The FCA have highlighted certain challenges associated with home-working, such as the risks surrounding market abuse compliance given the difficulties of monitoring who may receive inside information. The FCA has also identified that home-working gives rise to new challenges for conduct risk, given that staff are not working in proximity to their peers and without the usual support infrastructure and oversight in place.

Firms should also assess how regulatory requirements on supervision and training can be adequately discharged for home-workers. Technology can, of course assist e.g. ensuring all training

courses are available on the intranet and updating training on risk to deal with new risks posed by home-working. Some roles are not suitable for home-working.

Since this is a developing area, closely following guidance issued by relevant regulators on home-working is essential. HR teams should closely liaise with their compliance teams on this.

The FCA's Director of Market Oversight has spoken about the FCA's expectation that firms will have adequately addressed the risks of home-working. And a further FCA statement in November 2020 recommended that the Chief Executive Officer Senior Management Function should be accountable for ensuring there is an adequate process for following and adhering to government guidance.

So in the last 20 to 30 minutes we have covered a lot of ground. Clearly there are a lot of issues for employers to consider in formulating and implementing agile working policies.

The key takeaways for employers are:

- Consider what working model works best for their business, bearing in mind what their business does, its purpose, client needs, the legal and regulatory framework and - importantly - their values and culture.
- Consider whether contractual change is required or whether it is necessary to introduce a new agile working policy or amend current policy to ensure it is fit for purpose. Consider potential changes required to other ancillary policies.
- Engage with employees and stakeholders to ensure that key issues are reflected and increase compliance – and remember that formal employee consultation may be required.
- Be prepared to deal with tricky issues with employees not wanting to return to the office (either at all or to the extent the employer wants them to). Take time to engage with employees to understand the issues and find the best way forward, mitigating the risk of discrimination claims.
- Be mindful of health and safety obligations and data privacy issues while employees are working from home.
- Be wary of permitting employees to work from abroad without fully considering potential tax, employment law and regulatory considerations.
- And finally, there may be additional management and supervision considerations, especially if an employer is regulated.

Thank you for listening.