FAQs about the return to work and hybrid working arrangements

As we get closer to an end to lockdown restrictions many employers are now beginning to consider what a return to working life will look like. In this briefing, we examine some of the most frequently asked questions about the return to work and hybrid working.

For the vast majority of employers in the services sector, the pandemic has drastically shifted what a normal working environment looks like and resulted in a huge shift to home working.

Some employers, such as Morgan Stanley and Goldman Sachs have made public statements supporting a return to a 100% working from the office model, while others are now keen to reduce their overheads completely and pursue a 100% remote working model.

Many employers prefer to adopt a middle ground and pursue a hybrid working strategy. However, a shift to a hybrid working arrangement throws up many potential issues for employers that need to be considered in advance.

Do we need to change employment contracts if we adopt a hybrid working model?

Before the pandemic, most employment contracts stipulated that employees' normal place of work was the office. This was, of course, something that the pandemic made impossible for significant periods of time for many.

Employers considering a move to a hybrid working system may be wondering whether this will mean that they need to change

employment contracts for their existing staff. Some contracts may already permit the employer to change an employee's normal place of work or working arrangements on reasonable notice.

If employment contracts do not allow such flexibility, a belt and braces approach would be to ask employees to document their agreement to any change in writing. Employers who do wish to formalise these changes have the option of achieving this by consent, imposing the change or terminating employees' contracts and re-employing them on new terms. In most cases, consent is likely to be the simplest route forward.

Terminating the employment of employees who do not agree to changes will require consultation and may also expose the business to statutory claims such as unfair dismissal, as well as potentially triggering collective consultation obligations. Imposing changes is not a risk-free route either and employees may work under protest after the change has been implemented or argue that they have been constructively dismissed.

Many employers, particularly those who adopt a flexible model going forward, may take the view that, if changes have been agreed in consultation with the workplace and by consent, they are comfortable with not seeking written confirmation of the change and relying on an employee's ongoing conduct as evidence of their acceptance of the new arrangements.

Irrespective of the approach that they take with existing staff, employers who do not already have language in their contracts allowing them flexibility to change an individual's place of work may at least want to amend their standard terms of employment for new employees.

What if we don't know how we want to work when we return to the office?

Having worked remotely or largely remotely for many months, the patterns of hybrid working that best suit a business, or a

particular team may not be clear yet. For many employers, it will be a question of trial and error to determine the pattern of working that best fits the needs of the business, its clients and its staff.

For example, some employers may initially wish to trial having certain days where everyone attends the office. However, such arrangements may become impracticable or even illegal in the event of a third (or even fourth) wave. They also create a demand for larger premises for a small proportion of the week which will then be empty the rest of the time. Other employers may start out working on one hybrid model and need to adapt it as a result of the practical difficulties encountered, such as ensuring adequate supervision for staff.

Employers should bear in mind that the model of hybrid working that they adopt now may need to be revisited in the future. It is important that this is communicated to staff at the outset and that employers do not contractually commit to a working model that may need to be changed.

Transparency is key and employees should be clear that there will inevitably be further review as a hybrid model is trialled. Employers who do keep their working arrangements under review should consult with staff and give them notice of any anticipated or proposed changes.

If employers are amending the terms and conditions of staff to allow for hybrid working arrangements, they will also need to ensure that their contractual terms are sufficiently broad to enable them to alter arrangements on an ongoing basis.

What if some people are unhappy about coming into the office?

Inevitably not all staff will be pleased with a move to hybrid working. Some may prefer a full-time working from home model and others may prefer to work full-time in the office.

The latter group of employees may be easier to appease, and

many hybrid working models can easily accommodate employees working in the office for more than a few days. Employees who make flexible working requests and ask to work full time from home are considered further below.

For some employees, the fear of catching or passing on covid may be driving a reluctance to work from the office. For example, because they, or someone that they live with, are in a vulnerable or shielded category. If an employee's health condition is a disability, then unreasonably refusing to change their working arrangements could be discriminatory. Employers should take the time to understand these concerns and assess what measures they can introduce to address them.

Employers should also bear in mind that those raising health and safety concerns or refusing to attend the office on health and safety grounds can have additional legal protections and these situations will require careful handling.

Can we require all staff to be vaccinated when returning to the office?

For a full discussion about whether employers should require all staff returning to the office to be vaccinated, please see our recent 'no jab no job?' webinar.

How do we deal with flexible working requests?

Employees with over 26 weeks' service can make a flexible working request for any reason. Many employers are anticipating an increase in flexible working requests over the coming months.

On the face of it, flexible working requests are relatively easy to refuse. An employer must give one of eight prescribed statutory reasons, which include a detrimental effect on ability to meet customer demand or a detrimental impact on quality or performance.

However, employers faced with requests to allow people to work from home for all of their working time may find it more difficult than they did before the pandemic to refuse those requests. For example, are they concerned about lower quality work because there are fewer opportunities for supervision when remote working? Employers should also consider what evidence they have in support of that from the past 12 to 18 months.

Even if an employer's reason for refusing a request falls within a prescribed ground under the flexible working legislation, that refusal could still give rise to a discrimination claim (on the grounds of sex, for example, where someone has requested flexible arrangements to accommodate their childcare commitments).

How should we deal with people who want to work abroad?

There have been increasing numbers of people who have begun to work 100% remotely over the last 18 months or so and many have been requesting to do so from abroad.

If an employee wishes to work abroad on a part-time or full-time basis, employers will need to consider carefully the tax, immigration and employment law implications at the outset.

By way of example only, individuals working abroad will need the appropriate visa arrangements to do so – a holiday visa or a right to be in the country will not necessarily give them the right to work in that jurisdiction. Employing someone who works remotely abroad may also trigger tax or social security obligations in the country in which they work for both the employer and the employee. By working abroad either some or all of the time, the employee may also benefit from local statutory employment law protections.

Employers also need to ensure that line managers are alive to the risks above and do not informally approve working arrangements of this nature (either explicitly or implicitly)

without informing HR and the business of them.

This note is prepared for information purposes only and addresses some complex legal issues, it should not be used as a substitute for obtaining legal advice.

If you have any questions on the topics raised in this note, please contact your usual BDBF contact or Amanda Steadman (AmandaSteadman@bdbf.co.uk).

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