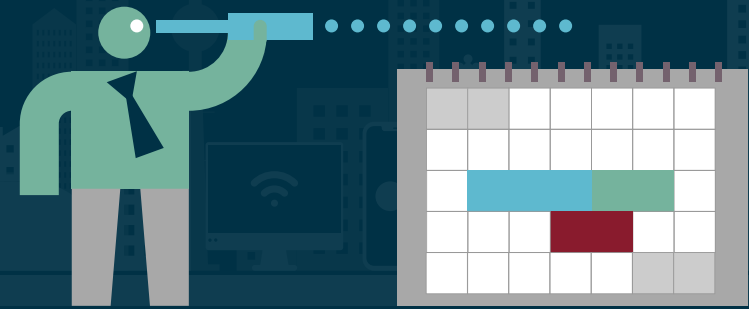


2022: What's on the HR agenda for employers

January 2022



Introduction

Employers emerging from the pandemic are having to adapt to new challenges and legal developments impacting on their workforces. We look at the issues and actions for HR as we head into 2022.

Underpinning all the drivers identified in this guide will be ensuring your documentation and processes are fit for purpose in this new working world and managers are equipped to deal with the new challenges it brings.

We are seeing increasing concerns around managing a hybrid team, performance issues and staff health and wellbeing; use of workplace technologies is also emerging as an issue for employers where more informal means of communication are being used by teams increasing the risk of both harassment and discrimination claims and data protection and confidentiality issues. There are also concerns that whistleblowing claims will become more commonplace as issues, particularly around health and safety, ESG etc. rise up the agenda.

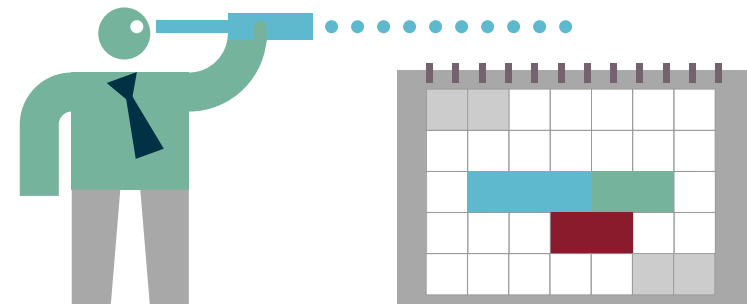
We are supporting our clients in adapting to new ways of working through training for their HR and management teams, contract and policy reviews, and advising on managing hybrid working issues.



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Key dates in 2022

1 April:

National minimum wage rates increase

4 April:

Deadline for gender pay gap reporting

5 April:

End of the adjusted Covid-19 right to work concessions

6 April:

New digital right to work checks for non-British nationals

6 April:

Increase in NICs by 1.25% for both employers and employees

11 April (to be confirmed):

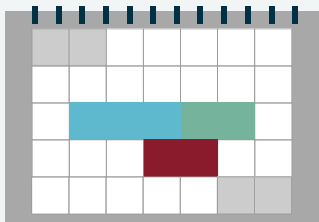
Statutory sick pay increases to £99.35

11 April (to be confirmed):

Family leave statutory pay rates increases to £156.66

Watching brief:

- **Flexible working:** Outcome of consultation on flexible working reforms awaited.
- **Business protection:** Outcome of consultation on non-compete provisions awaited.
- **Sexual harassment:** Details of the new legislative duty on employers to prevent sexual harassment (including provisions protecting against third party harassment) which is due to come into force during 2022/early 2023. is awaited, along with a new EHRC Code of Practice on Sexual Harassment
- **Enforcing rights:** Establishment of the new single enforcement body for employment rights.
- **Menopause:** Outcome of call for evidence on “Menopause and Work” awaited.
- **Carer’s leave:** Outcome of government’s consultation on a statutory right to one week’s unpaid carers leave each year awaited.
- **Neonatal leave:** Awaiting draft legislation following consultation.
- **Ethnicity pay:** Outcome of consultation on ethnicity pay gap reporting awaited.
- **Data protection:** Outcome of the Information Commissioner’s Office consultation on updating guidance on employment practices awaited.
- **Holiday pay:** Supreme Court decisions on holiday pay awaited.
- **Non-disclosure agreements:** We are expecting new legislation to tackle the misuse of non-disclosure agreements (including confidentiality clauses) in employment documentation. No draft legislation has been published. In the meantime, employers should understand any restrictions put in place by regulators, including those on legal advisers advising on agreements.
- **Redundancy protection:** The government has consulted on enhancing redundancy protection to prevent pregnancy and maternity discrimination. No draft legislation has yet been published.



1. Covid-19

We have been supporting clients throughout the pandemic with the immediate pressures that it has brought on businesses and staff. Businesses must continue to adapt their working practices in light of infection rates, government guidance and their legal obligations.

Actions

Guidance: Keep on top of the latest government guidance for England (and from the devolved administrations in Wales, Scotland and Northern Ireland) and any local authority guidance in the region you are operating in.

H&S: Ensure health & safety risk assessments are up to date, and that staff are clear on the expectations of them in the workplace, including compliance with self-isolation rules.

Wellbeing & Long Covid: Continue to support staff health and wellbeing; ensure managers are sensitive to any individual concerns and know how to deal with them appropriately. Is there specific guidance for those who are clinically extremely vulnerable or pregnant? Be alive to issues arising from symptoms of Long Covid; will reasonable adjustments be appropriate?

Vaccinations & testing: Encourage staff who are eligible to take up booster jabs. Where Covid-19 testing and/or vaccination is under consideration as a requirement within your business, take legal advice on the risks of any proposals – maintaining employee trust and confidence, data privacy and discrimination risks will all need to be considered.

International travel: Remain alert of evolving testing, quarantine and other requirements across different jurisdictions, impacting on business travel and staff taking holidays caught up in new requirements on short-notice.

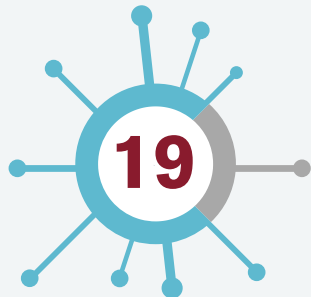
Contract terms: Build flexibility into staff terms and conditions to meet business needs should infection rates rise significantly.

CJRS: Where financial support was received under the Coronavirus Job Retention Scheme be aware that any claims may be subject to scrutiny from HMRC; keep records of any claims and supporting documentation in accordance with legislative and government guidance.

Holiday carry-over: Identify any staff members who may still seek to rely on the amendment to the Working Time Regulations 1998 enabling carry over of EU holiday where it was not reasonably practicable to take it in the leave year *“as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society”*.

Covid-19 guidance:

- **England**
- **Wales**
- **Scotland**
- **Northern Ireland**



2. Hybrid working & flexible working requests

Many employers are currently considering new permanent or remote hybrid working models in light of the advantages identified during the Covid-19 pandemic for businesses and employees in permitting some flexibility in working arrangements.

We are also anticipating increasing flexible working requests; while some employers have offered hybrid working arrangements going forward, it is recognised that for some businesses and job roles this is not straightforward or the arrangements may not reflect an individual's personal needs.

Actions

Hybrid working models: As we have seen over the past year, remote/hybrid working models expose businesses to new risks which should be carefully considered, including data protection, health and safety and misuse of confidential information and intellectual property. Permitting employees to work from overseas may also bring complex immigration, tax and social security issues.

Our **Hybrid Working Tool** guides you through the risks and challenges in putting in place these arrangements.

Right to disconnect: Hybrid working arrangements also throw a spotlight on mental health and wellbeing issues, with trade unions calling for the government to bring in a "right to disconnect" and which has been introduced in other jurisdictions.

Flexible working requests: Ensure managers are trained to identify and deal appropriately with any flexible working requests; in addition to the statutory request procedure, employers must ensure that they do not respond in a way which breaches the implied term of trust and confidence or which is discriminatory.

Associated discrimination: In drawing up policies and/or dealing with requests, recent case law has suggested that not only individuals with a protected characteristic, but also those who are associated with someone with a protected characteristic may bring a claim for indirect discrimination. The case may be appealed.

The government **is consulting on reforming the statutory flexible working procedure**. The consultation looks at:

- Making the right to request flexible working a "day one right".
- Changing the current administrative process underpinning the right to request flexible working including the frequency of requests.
- Considering whether the eight statutory business reasons employers can put forward to refuse a statutory flexible working request remain valid.
- Introducing a requirement for an employer to suggest alternatives where a request to work flexibly cannot be accommodated.
- Raising awareness that the current legislative framework does allow for temporary arrangements to be agreed between employee and employer.



3. Pay & reward strategies

The acceleration of hybrid working has inevitably seen organisations scrutinise their reward packages, as they look to attract and retain staff. There is an increasing relevance of understanding what each employee wants and how this is changing.

The government remains committed to cracking down on National Minimum Wage (NMW) abuse; proposals are moving forward to create a specific enforcement body to monitor abuse of this and related employment rights.

Actions

Reward strategy: Consider whether your existing reward strategy is still fit for purpose:

- How does your compensation strategy align with your workforce strategy – for example is employment pay still weighted in line with place of work?
- How can benefits be tailored for individual employees? Many organisations now offer a flexible benefits package allowing individuals to “pick and choose” from a range of benefits such as private medical insurance, gym membership, access to office space, support for fertility treatment, additional family leave etc
- Consider whether your benefits package reflects wider corporate commitments; for example green initiatives (company cars, cycle to work, public travel incentives), bonuses to promote employee engagement and company culture.

Any changes to compensation and benefits may trigger a breach of an individual's employment contract and employee relations issues. Legal advice should be taken.

Statutory rates: Ensure the new statutory rates relating to the National Living Wage (NLW) and NMW and those which are applicable on family leave and sickness are reflected (see below).

National insurance contributions: From April 2022, there will be a 1.25% increase in NICs for both working age employees and employers. From April 2023, the levy will be formally separated out to become a separate tax on earned income (and NICs rates will return to their current levels).

Ensure staff are paid at least the NLW or NMW. These rates increase on 1 April 2022 as follows:

- NLW for workers aged 23 and over rises from £8.91 per hour to £9.50;
- NMW for workers aged 21 to 22 rises from £8.36 to £9.18;
- NMW for workers aged 18 to 20 rises from £6.56 to £6.83;
- NMW for workers aged under 18 rises from £4.62 to £4.81; and
- NMW for apprentices rises from £4.30 to £4.81 an hour.

On 11 April 2022 (to be confirmed) the rates for statutory maternity pay, maternity allowance, shared parental pay and adoption pay, together with statutory parental bereavement pay increase to £156.66. The rate of statutory sick pay will also increase on 11 April 2022 (to be confirmed) to £99.35.



4. Business protection

Business protection is high on agendas from a people and data perspective given the move to hybrid working and the current war for talent.

We are seeing an uptick in data protection issues, particularly breach and data subject access requests, as a result of remote working.

Actions

Restrictive covenants: Review restrictive covenants for fitness for purpose. Keep in mind that we may see significant developments in light of the government consultation (see below).

Other provisions:

- Enhance related restrictions, such as confidentiality, professional networking, database rights and IP restrictions as appropriate to ensure they are fit for purpose.
- Consider how other provisions can be strengthened such as notice provisions and garden leave and also the forfeiture provisions in cash, equity and other retention/incentive schemes.

HR processes:

- Review on-boarding and exit processes to identify risk areas and ensure a robust paper trail is in place should action be needed.
- Review your approach to retention and succession planning to identify any areas of risk.

GDPR: Ensure data breaches can be quickly identified and that a clear process is in place to deal with any issues. Consider what training is needed for line managers in identifying and dealing with data subject access requests and understanding information that legally could be required to be disclosed.



Non-compete provisions

The government published a consultation looking at the continuing role of non-competition clauses in employment contracts (although it also raises questions as to whether reforms should be extended to other forms of post-termination restraints (non-dealing, non-solicitation, non-poaching and protection of goodwill) and to wider workplace agreements.

Proposals include:

- Making post-termination non-compete clauses in employment contracts enforceable only when the employer provides compensation to the employee during the term. The level of compensation considered would be a percentage of the former employee's average weekly earnings prior to termination during the non-competition restraint.
- Making post-termination non-compete clauses in employment contracts unenforceable.

Please read more [here](#).

ICO employment practices code

The Information Commissioner's Office (ICO) is reviewing its current employment practices code to address changes in data protection law and reflect the changes in the way employers use technology and interact with staff. A link to its review is [here](#).

5. Health & wellbeing

Many employers are finding that individuals have reassessed their work life balance and want to retain the flexibility they've enjoyed during the pandemic. A competitive remuneration package may not be sufficient on its own to attract new talent, who are increasingly focused on well-being and working in a way that is sustainable for their physical and mental health.

Actions

Wellbeing awareness: With increasing levels of work-time lost to mental health conditions, such as stress and anxiety and increased awareness of emotional wellbeing more generally, it will be vital for managers to be equipped to pick up the signs that an employee might be struggling and to understand how to sensitively support them and direct them to the right support systems.

Part of this will be addressing the challenge of work life boundaries being blurred for team members who are working from home or working at different times of the day and night, driving a pressure for others to respond. Trade unions are calling for the government to bring in a "right to disconnect" and which has been introduced in other jurisdictions.

Our combined health and safety and employment teams have been helping clients address these issues through targeted training. We are also a signatory of the Mindful Business Charter and we would be happy to share our experiences of implementing this within our workplace.

Domestic abuse: The Covid-19 lockdowns highlighted concerns around domestic abuse and the role of employers in spotting when there may be a problem and providing support and/or directing employees to other support available. Consider whether it is appropriate to put in place a specific policy to support employees and managers for when issues arise. Consider what other resources can be made available – external and internal – to support employees.

Disability Equality strategy

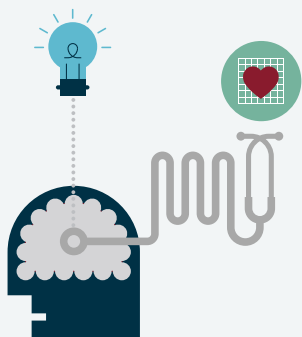
The government published a new Disability Equality Strategy during 2021 and we wait to see what proposed reforms will be progressed in 2022. The strategy proposes:

- Better information and resources for employers;
- Raising awareness around reasonable adjustments;
- Transforming the government's "access to work" scheme;
- Strengthening guidance on supporting disabled people and those with long term health considerations;
- Innovating and improving occupational health systems; and
- Enabling better use of the fit note system.

Changes are also being proposed to statutory sick pay.

Domestic abuse

The government published a response to its call for evidence on how employers can support survivors of domestic abuse at work [here](#) and which sets out a number of ways in which employers can support victims of abuse within the employment relationship.



6. Diversity & inclusion

Diversity and inclusion remains a priority area with many businesses recognising the role that diversity has played in their recovery from the Covid-19 pandemic.

Actions

Diversity spotlight: While diversity & inclusion has been high on the agenda for many years, employers are now building into that agenda emerging issues of inclusivity, such as the challenges of the menopause and those faced by the neurodiverse members of the workforce. You can hear more about neurodiversity and how employers can support neurodiverse employees in our podcast [here](#). Other issues which are being raised in the media and by organisations as areas impacting on the employment relationship include premenstrual dysphoric disorder and support for those affected by miscarriage.

One area of diversity & inclusion perhaps overlooked over recent years is age related issues, with both younger members of the workforce and older workers having been more greatly impacted by the Covid-19 pandemic. Employers are now looking at recruitment initiatives and flexible working arrangements that will both attract and support these workers, alongside similar initiatives to promote social mobility. A challenge for many employers is creating a supportive culture for all employees. We are seeing employers increasingly put in place a range of initiatives – from updating policies and providing regular training to managers and staff, through to ambassadors, focus groups and other initiatives, such as external speakers and talks from senior figures in the organisation to raise awareness.

Gender pay: Employers with 250 employees are required to report on their gender pay gap. While concessions were in place for Covid-19 these have now ended and employers should revisit any actions identified in light of their last round of gender pay reporting and the impact of any changes to the workforce.



Menopause

A **call for evidence** on “Menopause and Work” closed on 17 September 2021 and we wait for the response.

Carer's leave and neonatal leave

The government has consulted on a new statutory right allowing qualifying employees to take a week of unpaid leave each year to provide care. A response is awaited. Draft legislation introducing a statutory right to neonatal leave is expected.

Ethnicity pay gap reporting

We are still waiting for a response to the government's consultation back in 2019 on ethnicity pay gap reporting; this is still on the agenda with the government stating it will publish a response in “due course”.

Sexual harassment

Draft legislation is due to be published on a new duty to prevent sexual harassment at work (due to come into force during 2022/early 2023).

Disability workforce reporting consultation

The government has published a consultation looking at **workforce reporting on disability** (voluntary and mandatory) for employers with 250 and more employees. It seeks to understand what information is currently collected by employers on disability in the workforce, the impact to business and the behaviours it causes, including any information currently collected on the proportion of disabled people in the workforce. The consultation will close on 25 March 2022.

7. Sustainability: Green jobs & Green HR

COP26 has made decarbonisation a business imperative with the UK government's commitment to "building back greener" as we transition to net zero emissions by 2050.

"Green HR" themes are coming to the fore supporting ESG agendas and underpinning other business commitments around decarbonisation and related business practices and the UK's ambitious environmental commitments.

Actions

Our webinar looks at issues and actions for employers. [Listen here.](#)

Green jobs: Employers need to consider what new roles need to be created to support the green economy and employer commitments and initiatives. As well as highly specialised roles relating to the specific industry/sector, more generally employers are looking at new roles to support their businesses such as sustainability managers, recycling operatives and green transport officers. Employers should plan for any need to upskill or reskill those in existing roles, such as operations, facilities, business development managers, data controllers, software developers and maintenance engineers.

Reskilling: Employers are increasingly looking to ensure they have the right skills in their workforce to support their decarbonisation commitments and other initiatives, and as well as adapting existing talent and recruiting in those with green skills, employers should give thought to what training can be provided for existing staff. It will be important to understand what government support is available for reskilling staff.

Green HR: HR will need to develop environmentally friendly HR processes, practices and systems and policies to support any commitments and initiatives. Employees will need a good understanding of the role they have to play in meeting any targets and objectives and what steps they need to take to reduce their environmental impact.

HR's role in driving sustainability:

Recruitment and selection

Job descriptions should reflect sustainability practices and knowledge requirements and provide for flexible working to limit the impact of vehicle emissions and commuting. Consider how recruitment and selection methods can be made environmentally friendly.

Performance management

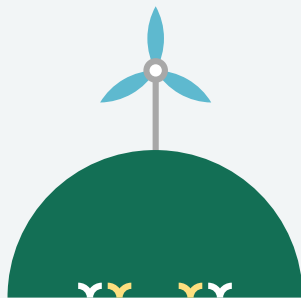
Consider assessing performance against sustainability objectives and targets in the appraisal process and linking sustainability values to the reward, pay and benefits strategy.

Learning and development

Aim to embed sustainability into all aspects of learning and development, for example, providing sustainability performance information during the induction process and train all employees in environmental issues relevant to their role.

Leadership and engagement

Employers should aim to epitomise "ethical leadership", for example having sustainability role models at senior leadership and ensuring accountability throughout all levels of the business.



8. Digitalisation

Increasing hybrid working has seen employers look to use digital tools, for example to measure productivity through increased monitoring, such as checking internet traffic or verifying emails sent. They can also be used to address concerns over employees increasingly working outside their normal hours or when they are perhaps unwell and should be resting.

Businesses are increasingly exploring automation of recruitment and other internal processes, such as performance reviews, work distribution or promotion decisions. With concerns that such processes may introduce bias or discrimination inadvertently, it will be important to consider if automation is the right answer to address the process in hand and if so, how it really works. This is an area where we are starting to see litigation.

Many businesses are also preparing for an increasing need for digital skills; the government is providing some support for skills training supporting recruitment and personal development strategies.

Actions

Impact on jobs: Pre-empt where existing jobs may be impacted by the introduction of technology; a recent report indicates that while some areas, such as management posts, may be relatively unaffected in the short term, other roles will suffer. Consider what measures should be put in place to help employees re-skill and any government support available.

Ultimately redundancies may be necessary and it will be important to comply with individual and collective consultation obligations.

Using AI: Employers wishing to exploit AI need to develop their “data consciousness” to ensure that they manage their own data effectively and that it is protected where possible with intellectual property rights and contractual provisions.

AI may also give rise to discrimination issues – we are starting to see some cases coming before the Employment Tribunal.

Monitoring: Remember that any monitoring of employees, including monitoring performance for those working remotely using digital tools, must comply with the GDPR.

Consider the health and wellbeing impact on increasing digitalisation, with many working longer hours and unable to “switch off”. Following the lead of France and Belgium a number of jurisdictions are putting place domestic laws around a right to disconnect to ensure home life is protected. We wait to see if any specific proposals will be introduced in the UK.

In the UK, the All-party Parliamentary Group has called for an “Accountability for Algorithms Act” to curb employers’ use of technologies that monitor workers and setting performance targets determined by algorithms.

We are also closely tracking **proposed legislation at an EU level** on the use of AI in employment and which will impact international businesses.



9. Global mobility

The end of the freedom of movement with the UK having left the EU is only now becoming a reality and businesses must consider any staff travel between the UK and EU and vice versa carefully. The Trade and Cooperation Agreement (TCA) between the UK and EU provides some consistency on business travel rules but it is important to remember that immigration rules remain individual to each country; it is a complex area and one which will continue to evolve.

In addition, with increased mobility on the agenda, a shifting political landscape and increased international competition for the best talent, a growing emphasis on compliance is apparent and one employers will need to pay close attention to.

The past year has seen extensive reform of the UK immigration rules and this is still an evolving area. The UK government recently announced plans to establish a "Global Mobility visa" in spring 2022. The aim of this new visa is to help overseas business establish a presence in the UK or to transfer its staff to the UK to undertake corporate work that a resident worker would not be able to undertake.

Global mobility visa

The new global mobility visa route will build upon, and aims to simplify, the existing intra-company visa route (which since the changes in January 2021 is now considered by many as redundant), and is part of a much bigger picture to improve business mobility. The new visa will seek to consolidate the traditional intra-company transfer visa route and the other business mobility visas, such as business visitors and sole representatives, into a single more streamlined route. It is aimed at senior or specialist workers, graduate trainees, UK expansion workers, secondment workers and service suppliers.

The new route will still require the migrant worker to be sponsored by a UK business who has a sponsor licence, the jobs must be of the appropriate skill and salary threshold, and the migrant worker must be an existing employee with a minimum length of employment overseas. The employment will be flexible and the migrant worker will be able to switch into a permanent role and there will be no English language requirement, thus opening up the opportunity for more employees who will be eligible.

The benefit of this new route means that the sponsors will have more flexibility as to the migrant workers that they sponsor, and will give them greater flexibility in terms of visa length. This route also sets out to remove the Sole Representative route meaning that sponsors can send more than one worker to the UK, which has often been a limiting factor to many, and it gives a more streamlined transition into the sponsorship system for other visa types. The UK government is yet to set out the finer details of this route, but it looks to be one that is aimed at the more senior and specialist workers and, if it is done correctly, could be a significant step forward.



9. Global mobility

Actions

Meeting Talent demands: With unprecedented demand for the best talent, consider your recruitment needs and strategy for the medium to long term. If you believe this will involve overseas recruitment, including the EU, consider obtaining a sponsor licence if you do not already possess one. If you do, ensure your licence is up to date and you have sufficient certificates of sponsorship available to meet demand. We can help you assess these needs and plan for the future.

Hybrid working: With increasing number of employees opting to work from outside the UK in light of greater flexibility permitted under hybrid working patterns, employers should be aware of the legal risks which may arise. As well as data protection, health and safety and misuse of confidential information and intellectual property, overseas working raises complex immigration, tax and social security issues.

Our **Hybrid Working Tool** guides you through the risks and challenges in putting in place these arrangements and our Business Visitor tool (for subscribers to our global mobility platform), can assess the risk of overseas working requests from an immigration, tax and employment perspective for any jurisdiction when considering such requests.

Business travel: Update business travel policies to take into account the requirements of the TCA. It will also be important to remain alert to evolving Covid-19 testing, quarantine and other requirements across different jurisdictions, impacting on business travel and staff taking holidays caught up in new requirements on short-notice.

Right to work checks: Ensure that you comply with the current requirements on right to work checks (for all staff, including those recruited from overseas). The current Covid-19 concessions on right to work checks come to an end on 5 April 2022. From 6 April 2022 a new digital process for right to work checks will be introduced; employers will no longer be able to accept physical documents (save for British nationals) as evidence of right to work and must instead use a new online verification process for anyone with a visa.

Right to work checks

The end date for the temporary adjusted checks has now been deferred to 5 April 2022 (inclusive).

From 6 April 2022, **a new digital process for right to work checks** will be introduced. Employers will no longer be able to accept physical documents (save for British nationals) as evidence of right to work and must instead use a new online verification process for anyone with a visa. An individual will need to give their prospective employer an access code by providing their details **online**. On receipt of this code, an employer will need to **input the code** and individual's date of birth. The share code is valid for 30 days and if the check is not completed within this time, a new code will be required. Employers should take a clear copy of the online profile confirming they have the right to work and make sure the photograph resembles the individual being hired (at present this can be done via video call if the office is closed but this concession is due to end in April 2022 at which point the check will need to be carried out in person). Businesses will not need to undertake retrospective checks for anyone employed prior to 6 April 2022 using physical documents.



10. Contingent workforces

Businesses are being transformed by technological, social and environmental change, and by the impact on trading of repeating cycles of Covid.

Many organisations are responding by looking for more flexible workforces using models which allow temporary or seasonal or remote hiring of specialist workers. We all know that the legal landscape relating to contingent working is becoming more complex in many countries but this does not seem to be stopping many organisations from increasingly relying on contingent workforce arrangements, and there are many workers increasingly only available on that basis – be it self-employed contractors, agency workers, zero hours workers or other types of remote or occasional workers. In November 2021 the Financial Times reported that the number of people in England and Wales working this way had trebled in five years – three in 20 adults found work this way at least once a week in 2021.

And those organisations which already having use contingent workforce arrangements are looking at how the legal landscape is changing and scrutinising their current models of engagement to ascertain whether they remain fit for purpose in the new world of work and under new tax and employment rights regimes.

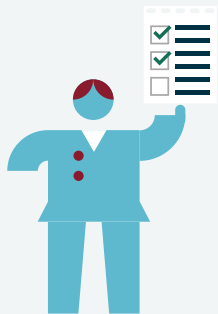
As part of this we are seeing organisations increasingly considering the use of umbrella companies and US-style employer of record models as a model of engagement which has led to recent UK government proposals relating to new regulation (see below). And we are seeing many organisations look hard at their use of self-employed workers after the April 2021 changes in the UK to IR35, with reports of many now putting the foot back in the water and engaging personal service company contractors again after initial decisions to blanket-ban use of them.

Against this backdrop the UK government is pressing forward with plans to put in place a single enforcement body to crack down on abuse relating to workers' rights in labour supply chains and we expect a rise in UK government enforcement of IR35 in 2022-3, and an increasing focus on tax evasion in the labour supply chain under the Criminal Finances Act (with “dodgy” umbrellas being particularly looked at by HMRC).

Umbrella companies

The government has **issued a Call for evidence** about how “umbrella companies” – employment intermediaries, similar to US professional employer organisations (PEOs)/employers of record – operate and what is bad (and good) about them. The document confirms the government's commitment to bringing umbrellas under the regulatory regime (with criminal sanctions) currently administered by the Employment Agencies Standards Inspectorate. It makes fairly clear that there will be further regulations to deal with non-payment of workers, skimming of payroll and non-payment of holiday pay by umbrella companies. It is noted that accreditation by an industry body is not a guarantee of compliance.

At the same time HMRC is targeting use of “dodgy” umbrellas and has stated that some models they use involve “tax fraud”. As such, end users which are heavily reliant on relevant umbrella arrangements, may be liable for unlimited fines if they cannot show they took reasonable steps to prevent the relevant tax evasion.



10. Contingent workforces

On top of this the EU has issued a draft Directive in December 2021 requiring organisations which use technology (which means gig worker platforms and probably most staffing businesses) to arrange work for self-employed workers to prove the workers are self-employed with a new 5 step test.

So where workers are engaged (directly or indirectly) on a contingent basis, it will be important to ensure compliance. This becomes more complicated when expats and local workers are working from overseas locations or where supply chains have become long and hard to audit.

Particular current areas of risk include:

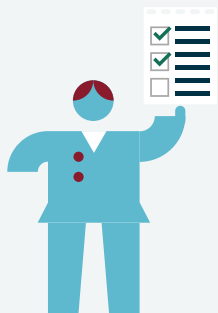
- National minimum wage investigations into labour supply chains, including end users of contingent workers who turn a blind eye to what is going on in the supply chain.
- Getting holiday entitlement and pay right for contingent workers also remains a particularly complex area and one still evolving through case law, with a likelihood of significant class actions in 2022.
- Use of “dodgy” umbrella or employer of record companies with a risk of unlimited fines for failing to take reasonable steps to prevent tax evasion
- Getting IR35 wrong – HMRC will be gathering data in 2022 about volumes of PSCs paid “outside IR35” i.e. without deduction of tax. The April 2021 IR35 rules apply where medium or large private sector organisations, or the public sector, directly or indirectly receive services performed by an individual via a professional service company (PSC). This can be through staffing companies, umbrella vehicles, outsourcing companies or consultancy companies. Liability for determining whether or not an agreement falls inside or outside IR35 now rests with the end user (the company using the services). Where an end user fails

to carry out the IR35 determination or incorrectly categorises the arrangement as outside IR35 and the PSC is paid gross, it will be liable for PAYE and NICs relating to the PSC, and HMRC may apply interest for late payment and a penalty. We expect tax assessments to be raised against end users of PSC services who have not got on top of compliance.

- Reliance on self-employed models across the EU in the face of the proposed EU Directive.
- Formal and informal cross border consultancy arrangements with people who have (re-) located to (usually warmer) countries – tax authorities are aware of this trend and looking at the tax status of workers doing this and the liabilities of “employers”.

Holiday rights

Two important cases on holiday rights came before the Supreme Court in 2021. We now await the decisions and which may potentially require businesses to revisit holiday pay calculations for staff and revisit the potential for historic liabilities. There may be class actions in 2022.



10. Contingent workforces

Actions

Flexible “contract” workforces: Businesses keen to harness the benefits of flexible contract workforces will need to understand the legal and practical challenges this brings including workplace tax and social security, status misclassification and class actions relating to employment, risk of criminal prosecution to the extent there is failure to take reasonable steps to prevent tax evasion in the supply chain; VAT and corporation tax liabilities; permanent establishment tax risk; protection of intellectual property rights; claims in respect of holiday pay and minimum wage; and supply chain issues with increased use of intermediaries.

Our specialist workforce solutions team are advising a number of clients on implementing a flexible “contract” workforce without creating liabilities.

Managing risk in supply chains: With increased HMRC activity relating to enforcement of IR35 and the use of tax avoidance and tax evasion in the staffing supply chain, especially in relation to umbrella companies, it will be important to identify risks and take appropriate action. Businesses should also be alert to potential action by tax authorities relating to overseas workers working from homes outside the UK for UK employers, as well as the continuing focus on NMW breaches.



New workers' watchdog

The Department of Business, Energy & Industrial Strategy **has announced** in its latest consultation response a “*new workers' watchdog*” which will provide a “*one-stop shop*” approach to tackle modern slavery, enforce minimum wage rates and protect agency workers (responsibility for which is currently spread across three different bodies) as well as delivering “*a significantly expanded remit*”.

The new body will also have greater flexibility in the sanctions that can be issued to tackle the spectrum of non-compliance with an expansion to the reach of compliance notices and civil penalties. Given that the head of the body is the former head of the Gangmasters and Labour Abuse Authority which regularly use its intervention powers to close down things it does not like, we can expect more intervention.

The new body will continue the **existing Naming and Shaming scheme** which has an important deterrent effect and this enforcement activity will also be extended to cover other regulations protecting the pay of workers, including those employed through agencies. The government is also looking to replicate this approach for the enforcement of holiday pay for vulnerable workers and statutory sick pay avoiding individuals going through a “*lengthy*” Employment Tribunal process.

The new watchdog will also enhance workers' rights by providing a “*single, recognisable port of call for workers so they know their rights and can blow the whistle on bad behaviour*”. To help businesses understand the rules, the new body will provide guidance on best practice, complementing the work already carried out by existing authorities such as the Advisory, Conciliation and Arbitration Service. It will seek to build strong links with community and worker groups to spread awareness and support engagement with at-risk groups, including the low-paid and those in sectors at higher risk of abuse such as the construction industry.

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