

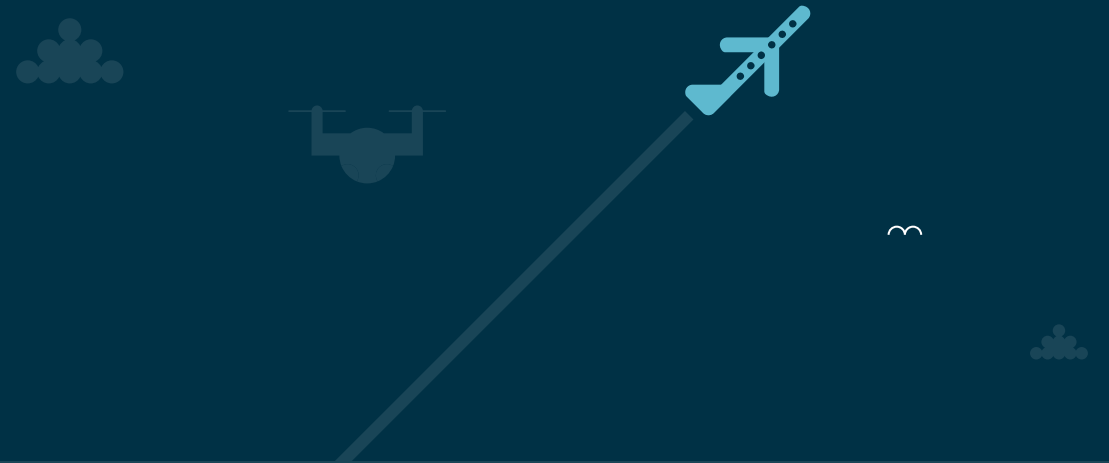
# Hybrid working: 'The Risk Factor'

## Risk Review and Reset: For growth beyond 2022



The rapid transition to hybrid or remote working models exposes businesses to new risks – risks that threaten the bottom line if not addressed. The last couple of years has shown that the transition to remote/hybrid working has become almost a standard way of working and the courts and regulators will, increasingly, ensure laws are complied with and rights respected.

In this document we outline some of the key risks we're advising on right now and how we can help your business mitigate them.



## 1. Tax and regulatory liability resulting from employees working abroad



### Risk 1

## Tax and regulatory liability resulting from employees working abroad

**During the course of 2020, many employees returned to their home or preferred place of work abroad and many now remain working overseas. This has significant employment and tax implications. Employers may be required to operate payrolls and pay tax outside the UK. Employees may suffer unexpected tax liabilities and compliance burdens to regularise their positions and may look to employers to assist. Ongoing working abroad may expose the business to the risk of creating permanent establishment; tax liabilities on profits outside the UK; an obligation to register for (and charge) VAT locally; and an obligation to obtain local operating licences and work permits.**

### How we can help

Our tax, employment and immigration teams can help you audit your remote workforces, drawing on our international experience. We can advise in respect of current and future payroll, tax and immigration issues and obligations, including how to mitigate the risks and (where appropriate) effect a transition of your workforce back to the UK or to permanently change employees' place of work. Our workforce solutions team can also work with you to understand how different business models may mitigate the risk of a permanent establishment and other tax and regulatory risks in the countries in which your employees are based.



## 2. Health and safety risks while home working



### Risk 2

## Health and safety risks while home working

**We anticipate increased personal injury claims and interest from the Health and Safety Executive in how businesses approach new working-from-home practices at what are millions of new 'workplaces' around the country. There will be a focus on ergonomics and workstation set-up, as well as the management of employee mental health risk, particularly stress. Businesses should undertake risk assessments now in relation to home working and consider what actions they may need to take.**

### How we can help

Our health and safety team (working with an ergonomist) can review current measures in place in respect of home working and provision of work equipment. We can assist you in drawing up a risk assessment and advise how best to approach this virtually to ensure you are satisfying your duty of care.





## Risk 3

### Tax and employment status claims

#### 3. Tax and employment status claims

**Businesses were already increasingly hiring contingent workers to control headcount, manage employee rights, entitlements and related claims and to take advantage of tax efficiencies. Increased remote working may make businesses bite the bullet on staff projects with an even greater proportion of contingent workers. But legislators and regulators are on the lookout. Without a full review of the nuts and bolts of the working relationship, you may fall foul of tax legislation and breach the rights of workers – resulting in employment and tax-related claims further down the line. In M&A deals this is becoming an increasingly important due diligence area and problems can delay or damage deals.**

#### How we can help

Our workforce solutions team provide a strategy workshop reviewing your current workforce model and advising on how best to structure any future engagements to minimise costs and risk. This covers tax and regulatory issues, including IR35, CFA, VAT and NMW, as well as employment status risk and mitigation.





## Risk 4

### Data protection risks arising from new monitoring practices and technology

#### 4. Data protection risks arising from new monitoring practices and technology

**In response to the remote working phenomenon, businesses have implemented new software packages and monitoring practices to keep track of productivity and performance remotely. Without the right safeguards in place (in privacy notices, employee communications, policies and supplier contracts), both data security and individual privacy rights are at risk.**

### How we can help

Our specialist data protection and cyber security teams can review your new systems and practices in the context of data protection compliance and cyber security risk and advise on how to integrate those new ways of working in a way that mitigates the risk of complaints, claims, enforcement action and reputational damage.





## Risk 5

### Risks associated with real estate portfolios

#### 5. Risks associated with real estate portfolios

**The issues for our clients in relation to the management of their real estate has been exasperated by the pandemic. Businesses are re-evaluating their real estate portfolios and gauging future needs, whether that means down-sizing or needing more space. A review of your current real estate use and future needs is a crucial part of your future of work strategy, not to mention the efficient management of your real estate portfolio.**

**Risks around terminating leases, as well as complying with dilapidations liabilities and other end-of-lease obligations, need to be carefully managed. If not given the proper attention, these can be very costly and time-consuming.**

### How we can help

Our real estate and property litigation teams are on hand to help navigate these risks. As part of a two-stage process, they will meet with you and your management team to establish the real estate implications of your future of work needs – both short term and long term. In light of your requirements, they will undertake a review of your current real estate profile/portfolio to establish your legal liabilities, future issues and any current flexibility. They will work with you to develop an action plan to achieve the agreed goals.

They will then assist with delivery of the agreed action plan. This will be bespoke for each project, but may include: terminating or varying existing occupation agreements; entering into new occupation agreements; working with property managers on issues such as dilapidations; providing vacant possession; and using the Landlord and Tenant Act to extend or curtail your occupational requirements.



## Risk 6

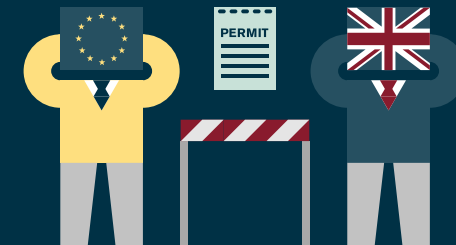
### Risks of non-compliance with work permit duties

#### 6. Risks of non-compliance with work permit duties

Changing work practices coincides with the impact of Brexit and the new immigration rules. Without proper planning, the recruitment and use of overseas talent will be hard hit by immigration changes. For example, approximately 80% of the current EEA workforce in retail, transport and hospitality will be ineligible for sponsorship under the new immigration system despite its relaxation (unless changes are introduced). Work visas may also be required for employees of pan-European businesses where people travel and work between European offices. A full understanding of, and planning around, these changes is essential to ensure the continued smooth running of business operations.

#### How we can help

Our immigration team can help you navigate the changes resulting from the new Immigration Rules and Brexit to ensure continuity and compliance.





## Risk 7

### Staff attrition and pay related tribunal claims

**Remote workers may still be being paid based on pre Covid-19 'office location' rates. There are already murmurings of discontent around geo-pay (such as London weighting) and costs associated with working from home. Getting your future compensation strategy right is essential to attract and retain key talent, avoid discrimination claims and incentivise staff.**

#### 7. Staff attrition and pay related tribunal claims

### How we can help

Our employment and incentives teams can advise in respect of the key issues to consider when modelling different pay and benefits scenarios and how best to avoid the pitfalls that can result in staff departures and pay-related tribunal claims. Our pensions team can help employers achieve better value for pension spend, with options including a transfer to Master Trust, salary sacrifice and harmonisation of pension terms.







## Risk 8

Risk of misuse of confidential information and intellectual property by employees (and ex-employees)

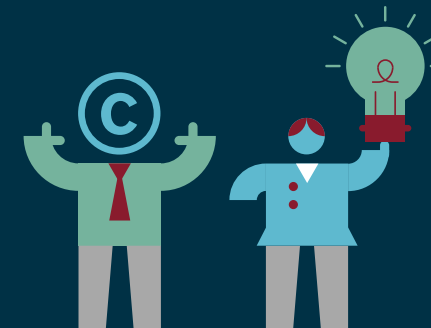
**Remote working and co-working presents new risks in respect of business protection. Without proper protective measures in place, businesses risk losing control of their confidential information and intellectual property.**

**Remote working also poses challenges in relation to licensing intellectual property from third parties and ensuring effective compliance with licence terms across your organisation.**

## How we can help

Our employment, IP and commercial disputes teams can assist you in reviewing measures in place to ensure your business data and IP remain safe and secure in both a remote and a shared office space environment. We can also review licence coverage and advise on strategies to reduce the risk of infringement claims by third parties.

8. Risk of misuse of confidential information and intellectual property by employees (and ex-employees)





## Risk 9

### Employment tribunal discrimination and flexible working claims

Employees are now considering how they would like to work in a world beyond Covid-19. We are already seeing an increase in flexible working requests (with more to come) as employees look to get a step ahead of their colleagues and establish a permanent flexible working arrangement. Responding to these reactively, on an individual basis and without an overall workforce strategy, could result in discrimination and flexible working-related claims.

### How we can help

Our employment team can assist you in avoiding legal risk when determining your workforce strategy, and establishing a flexible working response plan so that you are business ready for the increased number of creative working requests we will experience into, and beyond, 2021.

9. Employment tribunal discrimination and flexible working claims





## Risk 10

### Commercial risks and disputes arising from new ways of working

As we all adjust to new ways of working, taking proactive steps now while reviewing or implementing a new working model can reduce the risk of commercial disputes. These include:

- **co-working schemes: ensuring access to equipment, facilities, utilities and the use of on-demand spaces;**
- **implementing new technology solutions: risks from failure of compatibility/interoperability among multiple platforms; issues where a service provider fails to deliver against SLAs/KPIs; delays in software implementation or upgrades and licence overage; and**
- **termination of commercial contracts with technology partners, licensors and facility providers.**

### How we can help

Our commercial disputes team offers a tailored workshop to help you spot and avoid disputes in the context of your new/proposed way of working. The workshop can be adapted to your specific needs and cover the cause of commercial disputes, how to spot the early warning signs and the proactive steps you can take to minimise risks. You will take away a bespoke list of action points.

10. Commercial risks and disputes arising from new ways of working





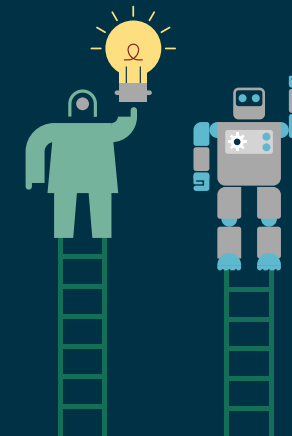
## Risk 11

Re-structuring, redundancies and changing terms and conditions of employment while maintaining company culture

**Many businesses are dealing with the multiple challenges arising from the changing skill-sets needed to grow the business and the need to retain a strong business culture. Businesses are investing in online and virtual training programmes to upskill and reskill their workforces in order to reposition their businesses in a post-Covid-19 world. The pace of this may increase as governments offer employers tax breaks or other incentives to upskill/reskill workers affected by automation. Workforce re-structuring and changing of roles can result in constructive or unfair dismissal claims if not handled sensitively and in accordance with consultation requirements.**

### How we can help

Our employment team can advise in respect of business re-structuring, redundancies and changing terms and conditions of employment to enable workforces to adapt and transition, and legal issues to consider when reviewing talent development programmes. We are also assisting businesses grappling with the tricky issue of maintaining culture while re-structuring.



11. Re-structuring, redundancies and changing terms and conditions of employment while maintaining company culture

## Risk Review and Reset: Have your say

To discuss any of the risks, please contact one of the experts below or speak with your usual Osborne Clarke contact:



**Paul Matthews**  
**Partner**

T +44 117 917 3592

paul.matthews@osborneclarke.com



**Olivia Sinfield**  
**Partner**

T +44 20 7105 7480

olivia.sinfield@osborneclarke.com

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