SQUIRE PATTON BOGGS

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Quarterly Board Briefing

Labour & Employment: UK

Looking to Q2 2024 and Beyond...

Executive Summary

Key

Red – Take Action

Amber – To Be Considered

Green – To Be Aware Of

Hot Topics Radar

This Hot Topics Radar shows how the legal changes and actions to be taken relate to some of the issues which we know to be high on the board's agenda:

- ESG – Social
- Diversity, Equity and Inclusion
- Harassment
- Whistleblowing & Investigations
- Workforce Reporting

In the Spotlight section of this Board Briefing we consider the increasing trend for employers to mandate that employees now work from the office rather than remotely.

Quarterly Board Briefing | Labour & Employment – UK | Looking Forward to Q2 2024 and Beyond

This briefing aims to provide boards with a guide to key upcoming legal changes and actions to be taken next quarter, and includes additional notes for Legal and HR teams in the Spotlight section at the end. Please note, this document does not cover all legislative changes, just those we view to be of particular relevance to the board.

Topic	Key Date(s)	Overview	Action Required	Risks/Opportunities
Take Action				
The Worker Protection (Amendment of Equality Act 2010) Act 2023	Royal assent – 26 October 2023 The Act will come into force one year after it is passed (likely to be Autumn 2024)	This new legislation will amend the Equality Act 2010 and place a new pre-emptive duty on employers to take "reasonable steps" to prevent sexual harassment of employees in the course of their employment. For more information, see New Duty on Employers to Prevent Sexual Harassment at Work (UK).	• The countdown is now on for employers to review the steps they currently take to prevent sexual harassment in the workplace and consider whether they might need to do more to satisfy this new mandatory duty.	• An employer that breaches this new duty could face proceedings by the Equality and Human Rights Commission, as it will have new powers to enforce stand-alone breaches, i.e. even without sexual harassment having taken place. • If an employee brings a successful complaint of sexual harassment, an employer risks an uplift in compensation of up to 25% if the tribunal is satisfied that the employer had breached the new duty to take reasonable steps to prevent it. There is no requirement that the employer's breach should have led to harassment.

Topic	Key Date(s)	Overview	Action Required	Risks/Opportunities
Take Action				
Changes to the Flexible Working Regime	• Royal assent – 20 July 2023 • Expected to come into force on 6 April 2024	The government is making changes to the flexible working regime. Acas has also issued an updated version of the statutory Acas Code of Practice on handling flexible working requests. It has been updated to reflect the forthcoming changes to the legislation. A failure to comply with the Code does not in itself expose an employer to the risk of a claim, but the Code may be taken into account by a Tribunal in any proceedings. See our *Employment Law Worldview* blog on the draft Code that was published for consultation. The key changes are as follows: • Employees will be entitled to request flexible working from day one of their employment • Employees will be entitled to apply for flexible working twice in any 12-month period (rather than the current one request) • Employers will be under an obligation to consult the employee before rejecting a request, and the decision period within which an employer is required to process the request will be reduced from three to two months • Employees will no longer be required to explain the effects that the changes they are applying for would have on the employer and how they might be dealt with Read our *Employment Law Worldview* blog for a more in-depth discussion of the changes.	• Changes to existing policies will be necessary to reflect the new position. • Employers should also update managers on the new rights and obligations to maximise compliance with the new provisions.	The board will need to consider its approach to flexible working requests going forward. For more information, please review our Spotlight at the end of this document.

Topic	Key Date(s)	Overview	Action Required	Risks/Opportunities
Take Action				
Economic Crime and Corporate Transparency Act 2023 Note – Would only apply to large corporates and partnerships. "Large" means organisations meeting two out of three of the following criteria – more than 250 employees, more than £36 million turnover and more than £18 million in total assets.	• Royal assent – 26 October 2023 • Statutory guidance regarding the failure to prevent fraud offence is expected later in 2024	The Act creates various new corporate offences, including the offence of failure to take reasonable steps to prevent fraud. The government has produced a factsheet on the offence, which states "under the new offence, an organisation will be liable where a specified fraud offence is committed by an employee or agent, for the organisation's benefit, and the organisation did not have reasonable fraud prevention procedures in place. It does not need to be demonstrated that company bosses ordered or knew about the fraud."	• In-scope organisations should review the factsheet and consider a review of their current fraud prevention procedures, pending further clarity from the government.	• Fines for failure to take steps to prevent fraud will be unlimited, so this needs to be on the board's agenda.
Diversity and Inclusion on Company Boards and Executive Committees	In-scope companies were required to make these disclosures in their annual reports for financial years starting on or after 1 April 2022.	The Financial Conduct Authority (FCA) published its policy statement on diversity and inclusion on company boards and executive management in April 2022. In summary, the FCA introduced new listing rules to require issuers to include a statement in their financial report setting out whether they have met specific board diversity targets on a "comply or explain" basis. See our Q2 2023 UK Board Briefing for further details of the new requirements. In March 2023, the FCA published Primary Market Bulletin 44, which contains more information about what the FCA expects in the statements and the steps firms should take.	• In-scope companies should review the policy statement, Primary Market Bulletin 44 and the changes to the rules in detail to ensure that they comply with the new reporting requirements, including ensuring that there is an adequate strategy in place for data gathering.	• Nothing in these changes legitimises positive discrimination to achieve those targets, so care must be taken to maintain the integrity of the recruitment/ promotion process.

Topic	Key Date(s)	Overview	Action Required	Risks/Opportunities
To Be Considered				
Consultation – Statutory Code of Practice on Dismissal and Re-engagement	• Consultation issued – 24 January 2023 • Consultation closed – 18 April 2023 • Outcome issued – 19 February 2024 • Likely to come into force during the Summer of 2024	The Department for Business, Energy and Industrial Strategy (BEIS) issued a consultation on its new Draft Code of Practice on Dismissal and Re-engagement (Draft Code). Following the consultation period, BEIS has now issued an updated Code. For our detailed analysis, please read our *Employment Law Worldview* blog.	• Review updated Code.	• Any potential rule changes have yet to be implemented, so there is no risk at this stage, *per se*. • However, the board should carefully consider its approach to any dismissal and re-engagement situations in the meantime. • The Code will not prevent fire and re-hire practices but imposes significant practical burdens on employers to show them to be a genuine last resort.
Call for Evidence on Non-financial Reporting Requirements	• Published – 24 June 2023 • Closed – 16 August 2023	Following on from the publication of its "Smarter Regulation" policy paper, the government has also published a call for evidence on non-financial reporting requirements. For more information, please refer to our Q3 2023 UK Board Briefing.	• Review consultation paper (no obligation) but note that the deadline for inputting to the response has passed.	• No immediate risk, as there has been no legal change yet.

Topic	Key Date(s)	Overview	Action Required	Risks/Opportunities
To Be Aware Of				
Ethnicity Pay Gap Reporting	In 2018, the government launched a consultation on mandatory ethnicity pay reporting. The consultation closed in January 2019. The government issued its response in July 2023.	In its response, the government has now confirmed that it will not be legislating to make ethnicity pay reporting mandatory at this stage. For more detailed analysis of the guidance, please see our blog.	• Review guidance. • Consider whether to collect data and make voluntary disclosures.	• No immediate risk, as no legislative changes are proposed. • However, there is a clear benefit in increasing diversity and inclusion. Investors are also increasingly expecting to see this sort of data, and so those companies concerned with ESG ratings may wish to make voluntary disclosures. • Note: Labour has recently announced proposals to extend the remit of the equal pay legislation to cover ethnicity and disability, should it get into power, so it is worth bearing this in mind.

Topic	Key Date(s)	Overview	Action Required	Risks/Opportunities
To Be Aware Of				
Joint Discussion Paper – Improving Diversity and Inclusion in Financial Services and Associated Consultations **NB: Applies to Financial Services Only**	Responses to the joint discussion paper were sought by 30 September 2021. Responses to the consultations were sought by 18 December 2023. Outcomes: awaited.	The FCA, the Prudential Regulation Authority (PRA) and the Bank of England (the Regulators) published a joint discussion paper seeking views on regulatory plans to improve diversity and inclusion in financial services. For more information, please see our Q3 2023 UK Board Briefing. Subsequently, the PRA and FCA each published a consultation paper entitled, respectively, "Diversity and inclusion in PRA-regulated firms" and "Diversity and Inclusion in the financial sector – working together to drive change". The proposals within the papers are largely aligned, but they do diverge in some respects. Their aim is to "drive change" by linking D&I to a firm's overall strategy, ensuring that strategy is embedded in the firm's day-to-day operations and culture, requiring firms to gather D&I data to inform improvements; and by developing an understanding of "what good looks like" across the sector.	• Review consultations but note that deadline for inputting to the responses has passed. • Firms that are in-scope of the proposals would be well advised to assume that the proposals will come into force – it is more of a "when" than an "if".	• No immediate risk, as no legal change yet. • In terms of timeline, while there will be a 12-month period between confirmation of the final rules (likely to be at some stage in 2024) and those rules coming into force (likely to be in 2025), we anticipate that firms will not wish to wait until then to start preparing and so this should be on the board's agenda.

Spotlight on: The World of Work – Can We Get Everyone Back Into the Office Now?

It is clear from the press that there has recently been a widespread strategic shift in terms of how much homeworking employers are willing to allow.

There is no need to rehearse the whys and wherefores of how the current widespread hybrid working situation came to be (the less said about that period of time the better), but it has left many employers with challenges.

In the post-pandemic period, it seemed that things would never go back to the way they were, with employees regularly in the office from Monday to Friday, and that the flexibility afforded by the advances in technology and the ability to work from home was here to stay. But even those hybrid or remote working arrangements stated to be temporary or just during the COVID-19 pandemic or at the employer's discretion will long since have become contractual through custom and practice.

However, increasingly we are seeing businesses seeking to encourage/mandate (a subtle but important distinction) their staff to work from the office for a certain percentage of their hours, or a minimum number of days per week, while other employers have recently hit the headlines for pushing for a full return to the office.

The reasons for doing so are fairly obvious – from facilitating better collaboration across teams, to ensuring juniors receive adequate supervision, and as discussed in a recent Sunday Times article ("Thank God it's Skive Day, How Britons Started Slacking on Fridays") reversing the potential among some workforces for Friday becoming a de facto third weekend day.

That is not to say that the gains from the switch to remote or hybrid working have all fallen away. Let us not forget that studies have shown there to have been numerous gains from an inclusivity perspective due to the increased availability of remote working, particularly for working mothers and those with disabilities who might otherwise have had to leave employment, or not ever have been able to join in the first place.

But when even Zoom is requiring its own staff to be physically present to the office, it is a sign that things are changing for fully remote or mostly remote workforces.

Navigating this is a tricky issue for employers, and understandably there is often resistance from staff (some of whom have moved out of easy-commuting distance of their workplace), with many citing the fact that during the pandemic they managed to work entirely remotely, often with productivity gains and certainly without employer complaint – so surely employers cannot now rely on any arguments to do with quality/quantity of work to refuse homeworking now?

Throw into the mix the fact that the basis on which employees have continued to work from home once COVID-19 restrictions eased may not always have been properly agreed upon, let alone documented, plus the upcoming changes to the law on the right to request flexible working (see here for more info) and it is understandable that many employers are grappling with their next steps.

It is for this reason that the recent case of Wilson v. Financial Conduct Authority (and see more detail below) has been very timely and the source of much interest among employers and employees alike. The Financial Conduct Authority (FCA) was found to have lawfully refused Miss Wilson's flexible working request to work entirely remotely, despite her excellent performance doing just so throughout the pandemic period.

As stated in the judgment of this particular case, "this is a case which raises a key issue in the modern workplace, and which will no doubt be the subject of continued litigation. The availability of good quality technology to link people together has had a wide-ranging impact on the traditional structures of business operation. The need for staff to provide a physical presence at an office location is a debate which many companies are now engaged in…".

Can Companies Mandate an Increased/Full Return to the Office?

Although this decision will not be binding on other courts or Tribunals as a first instance decision and very fact-specific (with fewer management responsibilities, Miss Wilson would almost certainly have succeeded), there are some useful takeaways for employers as they navigate these issues going forwards.

We have set out below our five top things to remember if you are planning to try and encourage/mandate an increased/full return to the office:

1. Check the basis on which staff are currently working from home, as this will determine any process you have to follow.

- For example, if employees' contracts allow for homeworking or have been varied formally or by implication to allow this then, absent any reserved right within that contract for the company to make unilateral changes to that arrangement, you would need to consult with staff about any proposed change to their terms and conditions of employment.
- By contrast, if a company had introduced a remote working policy after the lockdowns were unlocked, but included wording in that policy in which the business reserves the right to make changes depending on, e.g., operational needs, making changes to arrangements might be more straightforward, at least as a matter of contract.
- One option might be to announce the change in the hope that most people will agree and then deal with any employees who are not happy/have a different contractual arrangement on an individual basis. The fact that an increasing number of other companies have made announcements about this will perhaps help, as it will not feel totally out of step with the zeitgeist.

2. Be careful about pushing through the change via dismissal and reengagement.

- There has been much press regarding (using the government's terminology) "unscrupulous" employers using "fire and re-hire" tactics (i.e. terminating the employment of employees who refuse to agree to changes to terms and conditions of employment and immediately offering them re-employment on the new terms) to force through changes to terms and conditions.
- In response to some of the recent examples of this, the government is introducing a new Code of Practice (see here). This is likely to come into force during the summer of this year, meaning the restrictions on using this tactic will not apply until then.
- However, there may be adverse reputational consequences if this approach is taken in the meantime in any event, so these should be carefully weighed up (see "Non-legal risks" below).
- As a result, the breach of contract implicit in mandating is best left as a last resort, with initial focus on encouraging – carrot rather than stick.

3. Be prepared for an increase in flexible working requests

- If the company is able to impose the new policy, it is very likely that it will receive an increase in the number of formal flexible working requests asking to be allowed to work from home in response.
- And, yes, the law is changing to widen the right to request flexible working (including by making it a day one right, shortening the employer's time to respond and removing the obligation for employees to give any thought to the potential impact on the employer and how this might be dealt with). See here for changes that will apply from 6 April 2024.
- Any such request by an employee to work fully or partially from home will need to be duly considered by the company in accordance with the statutory flexible working regime, on a case-by-case basis and on its own individual merits. It will not be permissible for the company to simply reject such a request as a matter of course on the basis that it does not align with its general working from home policy or on unevidenced assertions of intangible or anticipated prejudice to quality or output.

4. Watch out for discrimination

- It is entirely possible to refuse a flexible working request lawfully (remember the statutory right is a right to request, not a right to have) and relatively hard for an employee to bring a successful claim, provided the company has followed the process, considered the application on its individual merits and established a sound business reason for saying no.
- Potentially, the bigger risk is that an individual might bring a claim of indirect discrimination. For example, a policy bringing everyone back to the office may have an adverse impact on women who are arguably more likely to have childcare obligations (known as the "childcare disparity").
- This leads to two main issues for employers. First, defending a discrimination claim is harder than defending a flexible working claim, as the burden of proof falls on the employer to show that there was not discrimination, rather than requiring the employee to prove that there was. Second, the employer may need to show that any such policy can be objectively justified – so if there is a non-discriminatory way of achieving the same aim, the employer would need to take that approach instead.
- In either case, the sensible employer will amass as much evidence as it can that fully or largely remote working has been or will be (as a minimum) sub-optimal. So far as practicable, this should be based on concrete examples of where things have gone wrong in that or any similar case. Ideally, this should have been picked up at the time, but even if it was not, it can still be relied upon. Vague waffling about lack of team spirit and collegiality will not be enough here, any more than the reservation of outstanding stereotypes of homeworkers lacking care or commitment.

5. Be aware of the non-legal risks

- Those risks mainly involve issues of recruitment, retention, motivation and productivity. There is no doubt that following the pandemic, many employees have embraced home/hybrid working and now expect this to be part of a meaningful work-life balance.
- Against this, however, there are clearly a number of benefits that come with people working together in the office, including improved culture, increased collaboration, better productivity (the productivity argument can go both ways) and enhancing the corporate "glue".
- Ultimately therefore, companies need to balance their own specific operational/business requirements, the potential benefits of increased office working and the reasons they wish to do this, against the potential disadvantages of the kinds noted above, to determine what is commercially best for them. This will differ from business to business and sector to sector.
- It would also be worth having an eye on what others (the competition) are doing in the sector.
- The final outcome might involve a combination of both mandating attendance and incentivising.

Miss L Wilson v. FCA

Facts

Miss Wilson was a senior manager for the FCA. She had been employed since 2005 and her contract stated that her place of work would be at a physical office location. Early in 2020, it was agreed for "health reasons" that she would work from home. No further details are given, but this seems to have been for COVID-19-related reasons and, in any event, shortly after most of the FCA's staff were also told to work from home during the lockdown.

Following the easing of COVID-19 pandemic restrictions, the FCA introduced a policy that staff should attend the office for at least 40% of their working hours, with up to 60% permitted to be worked remotely. Miss Wilson submitted a flexible working request to be allowed to work entirely remotely, without ever attending the physical office location. Her request was denied, on the basis that if she did, there would be a detriment to the quality and performance of her work. This was notwithstanding the fact that while working at home, her performance had been excellent. Miss Wilson's appeal was rejected, so she brought an Employment Tribunal claim alleging that the decision made was based upon "incorrect facts". She denied that there would be any detriment to the quality and performance of her work as demonstrated by her excellent performance whilst homeworking.

Decision

The Tribunal did not agree that the FCA had based its decision upon "incorrect facts", but rather considered that the relevant manager gave "clear and cogent evidence" in relation to the decision-making process, which took into account Miss Wilson's excellent performance and was not seeking simply to enforce the FCA's attendance policy on a blanket basis. Miss Wilson had managerial responsibilities within the FCA and an overall senior position leading the department. It was, therefore, reasonable for the FCA to find that some of her duties would be subject to a detriment if performed entirely online, e.g. meeting and welcoming new staff members, internal training supervision and department needs. It was expressly noted that online working limited the ability to observe and respond to non-verbal communication that might arise outside of a formal event, e.g. spotting a member of the team with their head in their hands at their desk.

It is worth noting that Miss Wilson's position in this case was fairly entrenched and even when offered a compromise of coming into the office less frequently than the FCA's policy of 40%, she did not agree to this – claiming that technology allowed her to work just as effectively as if she had been in the office. If she had been willing to compromise on this, she might at least have salvaged some extra home-working out of the position, rather than the rigid 60% provided for by the policy.

A Brief Recap on the Right to Request Flexible Working

The right to request flexible working has been available to employees since 2003, but in various iterations.

When the right was first introduced, it was, broadly speaking, an extension of the various family friendly rights available in the UK in that (subject to fulfilling the eligibility requirements) employees could only make a request in order to help them to care for certain children and adults. In order to be eligible to make a request, employees needed to have 26 weeks' continuous service, and have been limited to making one statutory request per year.

Fast forward to 2014 and the law was changed such that eligible employees are able to request flexible working for any reason.

Skip on a decade and in 2024 the right will change again.

The Employment Relations (Flexible Working) Act 2023 will come into force on 6 April 2024. Acas has also issued an updated version of the statutory Acas Code of Practice on handling flexible working requests. It has been updated to reflect the forthcoming changes to the legislation. A failure to comply with the Code does not in itself expose an employer to the risk of a claim, but the Code may be taken into account by a Tribunal in any proceedings. See our *Employment Law Worldview* blog on the draft Code that was published for consultation.

The key changes from April are these:

- Employees will have the right to request flexible working from day one of their employment
- Employees will be entitled to apply for flexible working twice in any 12-month period
- Employers will be under an obligation to consult the employee before rejecting a request, and the decision period within which an employer is required to process the request will be reduced from three to two months
- Employees will no longer be required to explain the effects they think that the changes they are applying for would have on the employer and how they might be dealt with

None of the changes outlined above will make a significant difference to the current regime in terms of the basic structure. They will also still not give employees a statutory right to work flexibly. The existing list of eight prescribed reasons for which an employer may reject an application remain the same, such as burden of additional costs, detrimental effect on ability to meet customer demand, inability to reorganise work amongst existing staff, detrimental impact on quality or performance and so on). However, they will have an impact on an employer's ability to manage such applications.

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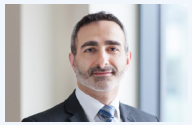

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