

THE PEOPLE AGENDA 2022

After a relatively fraught two years dealing with one Covid-related issue after another, and in many cases overseeing a dramatic transition to entirely new ways of working, there is no sign of a break ahead for HR professionals and employers. There are a number of significant employment law developments on the cards for the rest of 2022. So, roll up your sleeves and get ready... it's going to be another busy year!

This toolkit is designed to help businesses prepare for the legal developments that are expected over the coming 12 months. Click on the links at the right of each page to navigate through the key areas of change.

- Covid-19
- Diversity and Inclusion
- Diversity reporting
- Gender identity
- Holidays
- Protecting vulnerable workers
- Hospitality workers
- Agency workers
- Employment contracts
- Employment status
- Agile and flexible working
- Social responsibility and sustainability
- Immigration

[COVID-19](#)[DIVERSITY AND INCLUSION PART ONE](#)[DIVERSITY AND INCLUSION PART TWO](#)[DIVERSITY REPORTING](#)[GENDER IDENTITY](#)[HOLIDAYS](#)[PROTECTING VULNERABLE WORKERS](#)[HOSPITALITY WORKERS](#)[AGENCY WORKERS](#)[EMPLOYMENT CONTRACTS](#)[EMPLOYMENT STATUS](#)[AGILE AND FLEXIBLE WORKING](#)[SOCIAL RESPONSIBILITY AND SUSTAINABILITY](#)[IMMIGRATION](#)[CONTACT US](#)

COVID-19

As we enter our third year of the pandemic, Covid-related issues will no doubt continue to dominate HR agendas. In order to reduce absences and costs, as well as build consumer confidence, more businesses may consider implementing policies which encourage or mandate vaccination, including contractual sick pay policies which penalise the unvaccinated. We expect to see the lawfulness of these policies tested in the tribunals. Businesses will also need to grapple with what approach to take if the government removes all legal requirements to self-isolate.



DIVERSITY AND INCLUSION - PART ONE

It is well known that businesses which genuinely embrace diversity and inclusion attract and retain the best talent, which will be critical over the coming months as businesses seek to recover from the impact of the pandemic. Research shows that a more diverse workforce leads to greater innovation, and better outcomes for both customers and brand. Creating an inclusive culture, in which everyone's voice is heard and respected, and in which staff feel valued, results in a more engaged, motivated and productive workforce. For these reasons, we expect D&I initiatives to be high on the list of priorities in 2022.

There are also a number of legislative proposals in the pipeline that will further the D&I agenda, although the progress of these depends on the availability of parliamentary time:

- **Greater protection from redundancy for pregnant mothers and new parents:** currently, a woman on maternity leave is given priority in respect of any suitable alternative vacancies, before being made redundant. The government intends to extend this protection to apply from the date on which the expectant mother gives written notification of her pregnancy, to six months after her return from maternity leave. It is possible that this protection may also apply to adoptive parents, and to parents taking shared parental leave. There have been calls for a blanket ban on making an expectant or new mother redundant unless her employer ceases to carry on business, but there is no sign that any new legislation would go that far.
- **Neonatal leave:** the government intends to introduce up to 12 weeks' statutory paid neonatal leave for parents of babies requiring neonatal care, to be taken after the end of maternity or paternity leave.

DIVERSITY AND INCLUSION - PART TWO

- **Carers' Leave:** the government has committed to introducing a right for employees with caring responsibilities to take up to one week's unpaid leave per year. The leave may be taken as a single block or as individual days or half days.
- **New duty to prevent sexual harassment:** under this proposal, employers would be under a new duty to prevent sexual harassment in the workplace, and staff would once again be protected against harassment by customers and other third parties. It is likely that, where an employer is able to show that they have taken "all reasonable steps" to prevent the harassment, they will not be held liable for the harassment.
- **Possible extension of time limit for bringing discrimination claims:** the time limit for bringing claims under the Equality Act 2010 may be extended, recognising that the circumstances of such claims (for example, maternity discrimination) often make it difficult for the individual to submit their claim within current time frames.

We expect equal pay claims to feature prominently this year, following several claims heard in 2021 involving supermarkets. It would be surprising if this trend did not extend into the wider retail sector and beyond.

There is also a growing recognition of the impact that the menopause, domestic violence, and mental health have on attendance and productivity, with many employers implementing policies to support workers facing these challenges.

DIVERSITY REPORTING

This year, we are likely to see progress towards greater transparency and reporting of diversity data. Publishing and monitoring this data can help employers understand the challenges faced by certain demographics and inform action to tackle the root causes.

- **Review of the gender pay gap regulations:** the government plans to conduct a review to assess whether the regulations are achieving their aim of reducing the overall gender pay gap or imposing an unnecessary burden on employers. We may see changes to the reporting regime as a result of the review, including the extension of the regime to employers with fewer than 250 employees and possibly the introduction of financial penalties for non-compliance.
- **Introduction of ethnicity pay gap reporting:** although the consultation on mandatory ethnicity pay gap reporting closed in January 2019, the government is yet to publish its response. An increasing number of employers are already collating and analysing their ethnicity pay data and many are publishing this voluntarily.
- **Consultation on disability workplace reporting:** the government is currently consulting on the desirability and practicality of implementing disability workplace reporting, on a voluntary or mandatory basis, with the aim of recording information about disabled people in the workforce, rather than the pay received by disabled people.

GENDER IDENTITY

Gender identity is an increasingly relevant topic for employers and can be controversial. It is estimated that there are approximately 600,000 trans people in the UK. We are likely to see a greater number of trans and gender identity issues coming to the fore as employers seek to navigate between strong and opposing views on the mutability or otherwise of birth gender.

- In 2021, in the landmark case of *Forstater v v CGD Europe* and others, the Employment Appeal Tribunal (EAT) held that the claimant's belief that birth sex cannot be changed, and that transwomen are male, was a philosophical belief qualifying for protection under the Equality Act 2010.
- In 2022, we are expecting the EAT's judgment in the case of *Mackareth v Department for Work and Pensions and another*, which concerns the refusal of a doctor to address transgender patients by their chosen pronoun, due to his belief that a person cannot choose their gender.
- The EAT is also due to consider the case of *Higgs v Farmor School* which concerns the dismissal of a teacher for social media posts which her employer considered transphobic and whether Mrs Higgs' lack of belief in gender fluidity is worthy of respect in a democratic society and capable of protection.

HOLIDAYS

Many HR professionals are waiting with bated breath for the Supreme Court's judgment in *The Harpur Trust v Brazel*, which has far reaching implications for the way in which employers calculate holiday pay for employees who work only part of the year.

- Mrs Brazel is a music teacher who works term-time only.
- Her employer calculated her holiday pay by multiplying the hours that she had worked in the preceding term by 12.07%.
- The Court of Appeal agreed with Mrs Brazel that she should, in fact, be entitled to 5.6 weeks' paid leave, the same as a worker who works throughout the year.

If the Supreme Court agrees with the Court of Appeal's decision, its decision could impact how holiday pay is calculated, not just for part-year workers, but also for agency workers and those engaged on short-term contracts.

PROTECTING VULNERABLE WORKERS

We expect the development of greater protections for the more vulnerable workers in society, particularly those in the gig economy, with more individuals recognised as workers and entitled to valuable employment and worker rights. UK employers and law makers may well be influenced by the EU's proposed directive and other measures to improve the working conditions of those working via digital labour platforms (although the UK is no longer required to implement EU laws).

Single labour market enforcement agency

We could see the establishment of a single labour market enforcement agency, consolidating three existing enforcement bodies (the Employment Agency Standards Inspectorate, the Gangmasters and Labour Abuse Authority, and HMRC's National Minimum Wage Team) to improve enforcement through better coordination and sharing of intelligence.

Right to a more predictable contract

The government has also announced that, when parliamentary time allows, it will introduce a new right for workers with variable hours (including agency workers and those on zero hours contracts) to request a more predicable contract after 26 weeks' service, providing them with more certainty about their working hours. Again, the UK may be influenced by the rights and protections set out in the EU's directive on transparent and predictable working conditions, although it is not required to implement this.

HOSPITALITY WORKERS

In 2022, we expect improved working conditions and greater rights for workers in the hospitality sector. The government recently unveiled plans to overhaul tipping practices and to ensure that all tips ultimately go to staff rather than having to share these with their employer. The proposed changes will impact around two million workers in the hospitality and leisure sectors and around 190,000 businesses in the UK, many of whom earn the national minimum or living wage and rely on tips to supplement their income. New legislation, together with a statutory Code of Practice on Tipping to ensure fairness and transparency, are expected when parliamentary time allows.



AGENCY WORKERS

The Court of Appeal is considering the case of *Angard Staffing Solutions Ltd v Kocur* and others, which assesses the rights of agency workers relative to comparable employees who are directly recruited by the hirer. One of the issues to be decided is whether agency workers have a right to apply and be considered for relevant vacancies with a hirer on the same terms as direct recruits and whether they have the right to work the same shift lengths. The Court of Appeal’s judgment could greatly enhance the rights of agency workers, with consequential costs for employment businesses and hiring companies.





EMPLOYMENT CONTRACTS

There are a number of potential legislative changes that will impact the drafting and enforceability of contractual provisions, including possibly:

- introducing a requirement for mandatory financial compensation for the duration of the non-compete restriction, a practice which is common in a number of European countries;
- extending the prohibition on exclusivity clauses in zero hours contracts to low earning employees, enabling them to seek additional work elsewhere when not offered sufficient hours by their employer; and
- restricting the use of non-disclosure agreements and confidentiality clauses in employment contracts and settlement agreements.

EMPLOYMENT STATUS

We expect the courts and tribunals to continue the trend of recognising individuals as workers or employees entitled to valuable employment rights, including in the case of *Baker and others v Royal Mail*.

- More than 100 postmasters and sub-postmasters are taking the Post Office to an employment tribunal in a bid to be recognised as 'workers', which would give them rights such as paid annual leave, national minimum wage and whistleblowing protection.
- The case is due to be heard in February 2022.

If the tribunal recognises sub-postmasters as workers, the judgment will have significant financial ramifications for the Post Office and may prompt it to consider alternative, more cost-effective employment models.

AGILE AND FLEXIBLE WORKING

The Covid-19 pandemic accelerated changes in ways of working that might otherwise have taken decades to happen. We expect the majority of office-based workplaces to offer their staff some form of hybrid working on a permanent basis going forwards.

Managing a remote or hybrid workforce

One of the challenges of managing a largely remote workforce is combatting the risk of burnout. There have been calls for the government to introduce a legal right to disconnect, reflecting developments in other European countries. Another challenge is how to deal with requests to work remotely from overseas, given the legal and practical implications that arise when a formerly UK-based employee changes to working remotely from overseas.

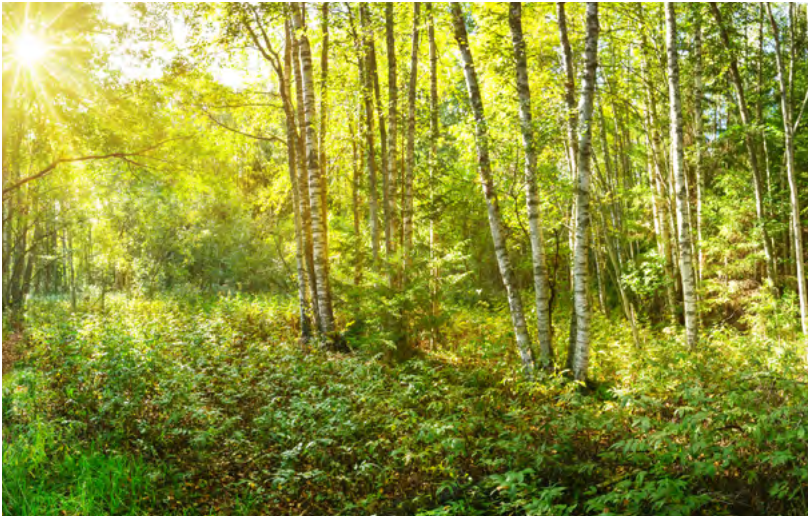
Flexible working from day one?

Recognising that the pandemic has prompted a shift in how flexible working is perceived by workers and employers, the government has proposed giving all employees the right to request flexible working from the first day of their employment. Currently, employees have to wait 26 weeks until they are legally entitled to make a flexible working request. The government is not, however, proposing to extend the right beyond a mere right to request: employers will still be entitled, in certain circumstances, to lawfully refuse a request for flexible working. The government's consultation on flexible working closed in December 2021 and the government's response is awaited.



SOCIAL RESPONSIBILITY AND SUSTAINABILITY

Environmental, social and governance (“ESG”) issues will continue to be key priorities for HR professionals and employers in 2022, given the importance placed on social responsibility and sustainability by investors, clients, customers and potential hires alike. Employers are recognising the value of an organisation’s ESG credentials when recruiting and retaining the best talent in an increasingly competitive market. In addition to an organisation’s effect on the environment, potential hires are influenced by an organisation’s impact on its workforce and wider community relations, including the focus that it places on issues such as diversity and inclusion, modern slavery, mental health, employee rights and its corporate social responsibility programmes.



- HOME
- COVID-19
- DIVERSITY AND INCLUSION PART ONE
- DIVERSITY AND INCLUSION PART TWO
- DIVERSITY REPORTING
- GENDER IDENTITY
- HOLIDAYS
- PROTECTING VULNERABLE WORKERS
- HOSPITALITY WORKERS
- AGENCY WORKERS
- EMPLOYMENT CONTRACTS
- EMPLOYMENT STATUS
- AGILE AND FLEXIBLE WORKING
- SOCIAL RESPONSIBILITY AND SUSTAINABILITY**
- IMMIGRATION
- CONTACT US

IMMIGRATION

There are significant changes to the immigration system on the horizon for 2022.

Points-Based Immigration System Sponsorship Roadmap

The Home Office has released a 'Points-Based Immigration System Sponsorship Roadmap' which sets out the key reforms that employers can expect to see between 2022 and 2024. Amongst other things, the roadmap refers to technological improvements to the sponsor management system, new online tools, such as an inter-departmental salary check feature in conjunction with HMRC and an increased use of technology to monitor sponsor compliance. The reforms are aimed at making improvements for businesses and reducing processing times and simplifying day-to-day processes.

Online right to work checks

Other highlights that are coming in 2022 include the introduction of digital online right to work checks. These digital checks will be optional for British nationals (using new Identity Document Validation Technology) and manual checks will still be possible but digital online checks will be compulsory for non-British nationals holding biometric residence permits or cards or a frontier worker permit.

New Global Business Mobility route

The Home Office has indicated a new Global Business Mobility route will be introduced in Spring 2022 which is aimed at overseas businesses wishing to establish a presence in or transfer staff to the UK. We understand that this route will consolidate the intra-company transfer route and other business mobility immigration routes into a single route and, as with the ICT route, there will be no English language requirement. We are also anticipating the introduction of two further routes – the scale-up route and the high-potential individual route – but the details of these are yet to be confirmed.

CONTACT US

If you would like any further information on anything you have read in this document then please get in touch with your usual Stevens & Bolton contact or one of the people below.



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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice and should not be used as a substitute for such advice.

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