



Adaptation

Future Workspaces

Redefining what your workspace and workforce looks like post-pandemic

hcr

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Managing a disparate workforce is the chief challenge of the decade.

As we carefully steer out of pandemic working practices and into something combining the old and the new, there are adaptations to be made by both employer and employee. It falls to line managers and leaders to navigate these waters carefully and commercially.

A lack of visibility of employees working at home can make this tricky, and you will naturally have different levels of trust and confidence in each person and work situation. Taking a broad-brush approach with company policies is often the easiest way. Many of our clients are seeking our advice on how to treat each case fairly and with consistency in order to avoid claims. Many are using what they learn to improve their overall policies as a result.

In this chapter, we'll show you how we, and our clients, are adapting to a new world.

Michael Stokes, Partner, Head of Employment and Immigration

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ADAPTATION 1 - Culture

Our clients say:
Has wholesale workplace culture changed? Has hybrid working brought an expectation that employees working from home should be available 24/7?

Joe Curtis, Director and Co-founder of II Investments Limited:

“ More junior and inexperienced staff can't learn in the same way that previous generations used to. I was able to learn by observing colleagues in their day to day, but I find that it is much more difficult for the baton to be passed down in this way with the increase in home and hybrid working, and I feel a responsibility to our staff to ensure that they are able to improve and develop by having that personal contact. ”

We say:



Oliver Weiss, Partner

Pre-pandemic, only 5.7% of workers were fully home-based. Eight weeks later, it was 43%.

Whilst the public health threat has since waned, homeworking has remained immensely popular, and for many businesses the concept of hybrid working is very much the new norm.

Unlike the concept of flexible working, which is a broader concept around working patterns and working time, and in respect of which there is legislation giving workers certain limited rights, no equivalent statutory framework exists around hybrid working. This means that the extent to which it is practised will depend on arrangements agreed between employers and their staff. Whilst some employers actively embraced hybrid working by promoting it during their recruitment drives and creating specific policies and contractual entitlements for their staff, many employers simply adopted hybrid working more or less by default, as a pragmatic response to external factors.

A consensus appears to have developed around the desirability of hybrid working, with supporters of hybrid working arguing that it improves wellbeing and therefore productivity, and also supports diversity and inclusion. But whilst the direction of travel seems firmly set for hybrid working to remain, there are some potential downsides and some employers are moving in the opposite direction.

Having taken a largely pragmatic view of hybrid working until now and, in many cases, simply muddled along, it is likely that employers will now increasingly seek to define their approach more rigidly, via specific policies and employment contracts. As boundaries are more clearly identified, employees will likely be paying increased attention to how employers approach hybrid working when deciding where to apply – and consideration of an employer's approach to hybrid working will become a firmly established part of the wider concept of workplace culture. ”



Oliver Weiss

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Chris Porges, CEO of the Solutions Business division of staffing company Goodman Masson:

I have not witnessed or heard a lot of noise about people being expected to “always be on” because of home working. I do notice that the awareness and preparation for annual leave has been eroded. If you’re not sitting next to the person telling you how excited they are about their upcoming holiday, you’re less aware. In addition, I think the attitude of employees to ‘take the odd call’ even when abroad on holiday has increased as we, and the tech we use, are used to working on the go/remotely.

Pre-arranged time off and daily working hours have become less sacrosanct – but I think this is driven by all in the employment chain recognising the huge step in trust and autonomy that the home working revolution has produced.

During the pandemic **48%** of remote employees reported working past midnight.

Gen Z were most likely (**54%**) to work these hours, whilst Baby Boomers were least likely (**34%**)

Skynova

I think the attitude of employees to ‘take the odd call’ even when abroad on holiday has increased





Encourage a healthy work-life balance by promoting flexible schedules

ADAPTATION 2 - Remote onboarding

Our clients say:

We are really struggling to ‘onboard’ people properly when they work remotely – to make them feel a part of the team and understand our culture – because it’s harder to build relationships via screen. Retention is harder and staff turnover is increasing. We want a healthy culture, both in and out of the office, but how can we do this with half of our staff working remotely and not ‘engaging’ or ‘buying in’ but instead just ‘doing the necessary’?

UK staff turnover has increased by **7.7%** since 2019.

Fully remote roles are predicted to have a **4.5%** lower turnover rate than office jobs.

HR Review



We say:

Peter Orton, Legal Director



Firstly, be clear about your non-negotiables from the outset, particularly during the onboarding process, and communicate those to everyone regularly. That is not to say that you need to give all new employees a copy of the code of conduct or a hard and fast set of rules, but be clear about the culture of your workplace, your business's core values, and the vision for the business – to ensure that employees not only know what you are trying to achieve but can buy in to the 'why'. At the same time, seek to understand the 'why' of your employees. Why do they do what they do, what gets them fired up, how do they like to work, and how does that fit with the business's vision?

Secondly, prioritise employee wellbeing. Encourage a healthy work-life balance by promoting flexible schedules. Encourage open discussions about preferred work styles, hours, availability windows, and best methods for collaborating effectively – whilst still being clear as to the expectations and needs of the business (like responsiveness to customers, minimum staffing levels, and availability). Allow employees to tailor their work schedules and locations within reasonable boundaries, considering their individual circumstances, as well as the needs of the business. Encourage regular breaks, exercise, and self-care practices.

Thirdly, foster open and inclusive conversation. Ensure that communication channels are accessible to all employees, both remote and on-site. Leverage technology to facilitate real time collaboration and ensure that information is shared transparently. Encourage active participation, feedback, and ideas from all team members to create an inclusive work environment. Foster a sense of belonging by organising team building activities that bring remote and in-office employees together, both virtually and in-person, and think outside the box when it comes to what team building and social events might involve.

Finally, invest in professional development. Supporting the growth and development of all employees, irrespective of their physical presence, is crucial for building a thriving workplace culture. Offer virtual training sessions, workshops, and mentorship opportunities to support employees' growth and skills enhancement. Providing avenues for continuous learning demonstrates a commitment to employees' career progression, keeping them motivated and engaged.

Building a thriving workplace culture requires intentional efforts to bridge the gap between remote and on-site employees and is an ongoing process whereby adapting strategies to meet evolving needs is essential in today's dynamic work environment.



Peter Orton

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Mark Smith BEM, Director of Ridgmont Holdings Ltd:

We experimented with remote working, initially through necessity during Covid lockdowns, and then subsequently in an attempt to optimise organisational performance.

All our companies have reverted to office working with remote or home working being conducted only by exception. Whilst the workplaces are certainly more flexible than before Covid, the norm is 'in office' working. It was found that office working increased productivity, improved morale for the majority of staff, and helped safeguard the right culture and behaviours.





ADAPTATION 3

- Reducing working from home

Our clients say:

We have had a policy in place since the pandemic of allowing people to work from home and only needing to come into the office once a week, but we want to increase the requirement. How can we do this?

Allow sufficient time to adjust and consider an incremental increase in the number of office days per week

7 in 10 companies (72%) have implemented a return to the office, with 2 in 5 (42%) reporting higher levels of employee attrition than anticipated.

People Management

We say:

Harpreet Kaur, Senior Associate



- 1 Communication – be honest and maintain open and transparent communication with your employees. Explain the reason behind the change and highlight the benefits of increased in-person collaboration.
- 2 The gradual approach – a sudden shift may be jarring for employees. Allow sufficient time to adjust and consider an incremental increase in the number of office days per week.
- 3 One size may not fit all – recognise that some employees may have unique circumstances which might make it more difficult for them to adjust to a change in your hybrid working policy. Be flexible and make exceptions where necessary, being mindful of those staff whose protected characteristics may mean that they have a need for a particular working pattern, thus minimising the risk of discrimination or other costly claims.
- 4 Prioritise employee wellbeing – encourage open dialogue so that staff feel comfortable to discuss any challenges that they may face with the proposed change in policy.

But remember that ultimately, and legally, an employer can take steps to impose such a change, even if this means by variation of contract if necessary. A cost/benefit analysis will assist in establishing whether the potential damage to staff relations is justified by the need for staff to attend the office more regularly.



Harpreet Kaur

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Our clients say:

We generally allow complete flexibility regarding hours and office attendance to our staff, but there are some staff who we want to require to work certain set hours and come into the office more regularly. Can we treat our staff differently?

ADAPTATION 4

- Differentiating between people

Male managers are significantly more likely to mostly or completely work from the office

(48% v 38%).

CMI

We say:

Zoe Michael, Associate



Employers generally have flexibility on what terms they can offer staff members (for example, they may require a receptionist to come into the office as their job cannot be done from home). However, whilst employers still possess a certain amount of control and flexibility on the terms they offer their staff, they need to be mindful not to unlawfully discriminate against individuals when offering those terms.

By contrast, if an employer would like to amend an existing contract, a clause permitting the change (known as a variation or flexibility clause) may assist. Alternatively, seek agreement for contractual change with the staff member, through a process of consultation, and document this change. Offering some sort of consideration (i.e. an additional benefit/pay in exchange of the change) usually helps to minimise argument or disruption to the workforce. As a last resort, if the current contract allows the employee more freedom to choose where they work than the business can now tolerate, the organisation could dismiss and re-engage the individual on new terms, with provisions setting out the required location, or number of days to be worked in the office. However, this approach comes with a significant risk of potential claims and is likely to be time consuming for employers, as well as risking damage to staff relations.

It may be the case that the contract is silent on working arrangements but the staff handbook/policy on work locations needs to be updated. In order to do so, employer should be considering the following questions:

- 1 How long have the current arrangements been in place? What was originally agreed? Is there any argument that custom and practice applies, which may mean consultation for contractual variation will need to be considered?
- 2 Are there any existing agreements where the organisation promised to provide advance notice to such changes?
- 3 Are there any overriding agreements (such as collective bargaining agreements imposing restrictions on such changes)?
- 4 Are there any other statutory restrictions preventing such a change (for example, any health and safety regulations which may need to be complied with)?

There are risks to this approach. Treating staff members differently may lead to direct or indirect discrimination claims where an individual has been treated less favourably on the grounds of a protected characteristic (i.e. race/age/sex/religion etc) or where a policy/practice applies to staff in the same way but has a worse effect on certain staff due to their personal circumstances.



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We say:

Temi Obembe, Solicitor



Amending an employment contract without consent could leave an employee feeling like they have no other option but to resign and claim constructive dismissal.

However, a practical view needs to be taken as a policy/practice will always be at risk of detrimentally impacting a certain class of individuals. An organisation can objectively justify the application of a practice/policy by demonstrating that it is a proportionate way of achieving a legitimate aim. So if they can show that there is no reasonable alternative to enable them to run an efficient service, then they are likely to defeat an indirect discrimination allegation. To reduce these risks:

- 1 Maintain an open communication with staff members (including regular feedback surveys) to minimise disharmony in the office and promote positive staff relations.
- 2 Have a well-drafted and effective equality, diversity and inclusion policy.
- 3 Provide regular anti-discrimination training to staff members.
- 4 Where possible, obtain confirmations from staff members that they were informed of significant policy or contract revisions.
- 5 Ensure any policies/terms imposed which indirectly discriminate against staff members can be objectively justified (i.e. that there is no reasonable alternative).



Maintain open communication with staff members to minimise disharmony in the office



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73% of disabled staff felt they were either as productive or more productive when working from home.

UNISON

In 2021, a worker was awarded **£180k** after an employment tribunal found that making her work until 6pm – therefore not being able to pick her daughter up from nursery – placed her at a disadvantage.

Mirror





You may have a duty to make adjustments to address any substantial difficulties caused by workplace arrangements

ADAPTATION 5 - Honouring contracts

Our clients say:

We have an employee who has been working at home for some time, first because of Covid and then because of a disability. We don't think that he is working his contracted hours and he doesn't seem to be doing much work. How do we deal with this – can it be investigated as a disciplinary matter?

Elizabeth Swinburn, Partner



If the employee is not working their contracted hours then this may well be a conduct issue. However, if this relates more to a lack of output and underperforming, this may be better dealt with as a performance matter with recourse to your capability procedure. To the extent possible, the concerns that you have about the employee should be fully investigated and then framed accurately at the start of the process. If you suspect that the employee is not working their hours but do not have proof, consider steps which would require him to log their working hours and demonstrate outputs.

Whether it is a conduct or capability issue, it is crucial that the employee knows the case against them. However, the investigation itself may well help you to frame the concerns you have more precisely, and better determine whether they should be dealt with as a disciplinary or capability matter, or both.

We say:

If the employee is disabled within the meaning of the Equality Act 2010, you may have a duty to make adjustments to address any substantial difficulties caused by workplace arrangements. This would depend on what is reasonable in the circumstances and whether any adjustment would help the employee to overcome those difficulties. This could include changing the employee's duties and/or providing additional training, or making adjustments to your capability and/or disciplinary procedure itself, such as holding meetings outside of the workplace.

To avoid any potential disability discrimination claims, you should consider whether any adverse action you take against the employee as a result of poor performance, including dismissal, can be objectively justified. This means that you need to be able to show that you have a legitimate aim (such as meeting productivity targets) and that you have acted proportionately in the way you treat the employee.



Elizabeth Swinburn

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Our clients say:

We have an employee who is being investigated for a disciplinary matter. However, she has been signed off sick because of mental health issues and claims that she is not well enough to take part in the investigation. This has been dragging on for several months so can we go ahead and complete the investigation without the employee's contribution?

We say:

Waleed Tariq, Solicitor



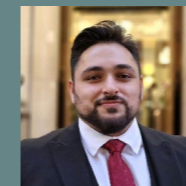
A reasonable disciplinary process requires that any employee facing disciplinary allegations should have an opportunity of giving a statement and providing evidence during the investigatory stage. In a situation like this you will have conflicting priorities.

On one hand there is a need to ensure that matters are dealt with without unreasonable delay, particularly if it is a serious case in which other employees' interests are involved. On the other hand, the employee may genuinely not be well enough to attend an investigation meeting or indeed a disciplinary hearing. Even if the employee has a fit note which states that they are unfit to work, they may be well enough to attend an investigation meeting and it is important to maintain communications with them to explore how to best conclude the process. Ignoring allegations will not make them go away. It may also be the case that unresolved disciplinary allegations add to mental health concerns, so it may be in the employee's best interests to continue with the process, even if they cannot do their normal day's work.

You could, subject to the employee's consent, obtain medical advice from an occupational health practitioner, or the employee's own GP, as to whether the employee is fit to attend a short meeting, even if they are not fit to carry out their usual duties. You could ask for advice as to when they are likely to be well enough, or what adjustments could be made to enable them to attend or otherwise participate in the disciplinary process. This will involve seeking their consent to obtain a medical report.

If medical advice confirms that the employee is well enough to attend a meeting and take part in the investigation but they still say that they are not well enough, you could invite the employee to submit written representations so that they still have the ability to contribute and the process can be progressed.

If the employee is given repeated opportunities to attend a meeting but refuses to attend because they say they are not well enough (even where medical advice confirms that they are), and they do not submit any written representations when given the opportunity to do so, you could proceed with the investigation in their absence on the basis of the available evidence. Keeping records of all the communications will minimise the risk of later claims of unfairness.



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ADAPTATION 7 - Distracted by children

Our clients say:

I suspect that some of my staff who work at home have taken their children out of childcare and are actually caring for their young children whilst they are supposed to be working. Whilst I am sympathetic because of the cost of childcare, I am concerned that, if my employees are looking after small children during working hours, they are not focussing fully on their work and so are not being as productive as they could be. What can I do?

The average annual nursery bill for a family with a child under 2 has increased by **44%** since 2010, now costing **£7,212**.

The UK now has the second highest childcare costs among leading economies.

TUC

Alerting the employee to the fact that they are not being as productive as they once were, may be a better way of dealing with the problem

“

Rebecca Kirk, Partner

If you have employees who are unproductive and underperforming, then you may wish to firstly raise your concerns with them informally. Query whether they are in fact caring for their children whilst they are working from home and whether this is having an impact on their productivity. Informal discussions are often appropriate to begin with, as alerting the employee to the fact that they are not being as productive as they once were, may be a better way of dealing with the problem than launching straight into an investigation and formal proceedings. You should keep records of the lack of productivity and remind the employee of what is expected of them.

We say:

Either way, ensure that the employee knows that a formal capability process could be started if the required level of performance is not achieved or maintained. Of course, targeting any enquiries about lack of productivity solely towards employees with childcare responsibilities could lead to allegations of direct or indirect sex discrimination since, statistically, women are more likely than men to have primary childcare duties. Care should therefore be taken to ensure that any enquiries about productivity are carried out fairly and consistently across your business, on the basis of sound evidence gathered, and that you can demonstrate an approach that is free from bias.

Conversely, if your employee assures you that they are fully engaged on work and not caring for children, but you later find out that this is not true, there may be a case for disciplinary action.

”



Rebecca Kirk

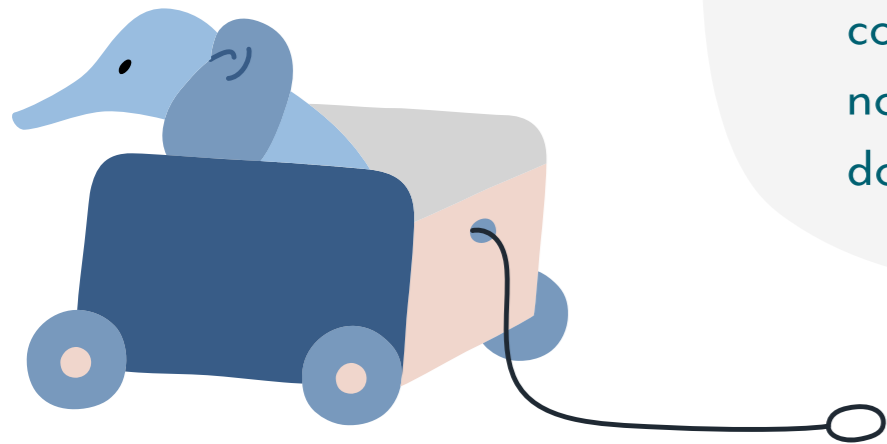
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ADAPTATION 8

- Bare minimum working



Our clients say:

We have an individual who performs well in their job but cannot work outside of their contracted hours, or attend networking events with clients due to family commitments. Is there a discrimination risk if they do not get promoted as quickly as someone who is able to do the extras on top of the contracted work?

We say:

Zoe Michael, Associate



Possibly. The individual might argue that you are applying a provision, criterion or practice (e.g. a requirement that you must go above and beyond your contracted hours to be considered for promotion) that puts women at a particular disadvantage compared to men. This is because women are more likely to have family commitments (childcare) that means they are unable, or less likely, to be able to work outside of their contracted hours.

Unless you were able to show that this practice was a proportionate means of achieving a legitimate aim, it would be indirect discrimination. In practice, to demonstrate this proportionality, you would have to show that you have considered reasonable alternatives to your promotion criteria and done your best to come up with an approach that balances business objectives with minimising detrimental impact on employees with childcare responsibilities.

This is easier said than done. Performance standards that are measurable in terms of output and value to the business, such as what can be achieved by working more efficiently and effectively, are more likely to be a safer and discrimination-free means of making promotion decisions than merely whether an individual works outside contracted hours – which is no guarantee of productivity at all. Indeed, reliance on working extra hours alone as a basis to justify promotion is unlikely to pass the scrutiny of an employment tribunal.



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Take an approach that balances business objectives with minimising detrimental impact on employees with childcare responsibilities



Valerie Lambert, Partner

The Equality Act 2010 prohibits unfair discrimination in the workplace on the basis of an individual's 'protected characteristic'.

Family commitments are not a protected characteristic, but individuals who experience unfair treatment due to family commitments may have protection due to being caught under sex discrimination (as women are more likely to have family commitments than men), pregnancy, maternity discrimination, or marriage and civil partnership discrimination (if it can be shown that they experienced less favourable treatment due to being married or a civil partner).

Generally, if employers can objectively justify that the application of a policy is a proportionate way of achieving a legitimate aim they can defend indirect discrimination claims, however that analysis is very case specific. Employers can address potential imbalances impacting on individuals with family commitments by:

- 1 Having an equality and diversity policy in place.
- 2 Introducing workplace family-friendly policies such as parental leave, partner's leave, keep in touch days and flex-return, all of which could help reduce the burden on persons with family commitments.
- 3 Having policies which measure performance in other objective ways (for example, an individual may not be able to physically attend networking events, however they may be able to add value to the business in other ways – referrals/writing articles to promote the business/attending remote networking meetings).
- 4 Having a flexible working policy in place which allows employees to work additional hours to suit their personal commitments.
- 5 Providing training on diversity and equality to educate staff and help senior managers create empathy so they can try to address any imbalances which exist in the workplace due to demands from home.
- 6 Communicating with employees regularly – having an honest communication will help employers/employees to work together, so individuals with families can make arrangements in advance and feel more included.
- 7 Sending out surveys to staff regularly/obtaining feedback from them, so employers can work out if certain policies are effective and what needs to change.

We say:



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It can be useful to have a flexible working policy in place which allows employees to work additional hours to suit their personal commitments



What to do next

We can support you with every aspect of adapting your workspace and employing your people. Our workforce, immigration, employment, and sector specialists are on-hand to help you tackle any legal obstacles in your path:



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About HCR

We like to ask questions that go beyond our clients' legal challenges.

And we like to build lasting relationships, so that we can get under the skin of a project and advise on both business and personal matters, never sitting on the fence.

The working office affects us as individuals and employers, and as a firm with ten offices and 800 staff, we're keen to explore the challenges around workspaces and employees, to understand what the future looks like. For us and for our clients.

Our employment and immigration team provides expertise on all aspects of employing your people, from contracts and polices to settlement agreements, restructuring, TUPE, grievances, discipline and bullying. They have grown rapidly over the last five years, as they continue to provide great service to hundreds of clients.

Your business is complex and ever-changing. You don't want a bolt-on solution every time you discover a new challenge, you want a partner who understands where you've come from and where you're headed, and who has your best interests at heart.

So we truly partner our clients. We are pragmatic, and we fight your corner as if we were defending our own. Because if we don't, then what's the point?

This project has shown us that employers are still experiencing challenges associated with changes to work arising from the pandemic and lockdowns, in 2023.

And we want to help you tackle them.

Join the conversation



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