



# Leaving lockdown: Considerations for employers

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## Part 1: The future of work

*"The end of the 9 to 5?" "Goodbye long commute?" "Hello homeworking?"*

As we leave lockdown and look to the future of work, now is a pivotal time for employers to consider how they will shape their organisation's culture and working practices, and to what extent they will retain remote or flexible working practices and give up expensive office space.

We're already seeing that there is not a "one-size-fits-all" approach. Amazon and Goldman Sachs are returning to an "office-centric culture" in contrast to JP Morgan's plans for remote working to continue and Spotify's "Working from Anywhere" policies, which will give employees the choice to work full time from home or the office or a combination of the two and with more flexibility on their geographic location.

In Part 1 of our "Leaving Lockdown" series we look at employers options in light of key legal and practical considerations.

### Key battlegrounds

There are lots of competing interests for an organisation to consider when planning ahead; savings on real estate, employee wellbeing and morale, the need for employee supervision and support (especially for junior team members) and, crucially, what competitors are doing. In the post-COVID world, employees will see flexibility as a given, and the need to get this right will become an even more valued recruitment and retention tool.

One of the key battlegrounds will inevitably be an employer's preference to revert to an office-based culture versus decreasing property footprint – the likes of HSBC and Lloyds Banking Group have confirmed plans to reduce office space by 40% and 20% respectively over the coming years.

In making these decisions employers need to understand the employment law framework in which their businesses operate, which includes the following FAQs.

### Do employees have a legal right to work remotely?

In short, no, unless a contractual right is offered under an employee's terms and conditions of employment.

Whilst employees have no entitlement to work remotely or flexibly, if they have at least 26 weeks' continuous service they have a statutory right to make a flexible working request (once every 12 months) which may include changes to the hours

they work, where they work from and when their work is done.

Employers are required to carefully consider each flexible working request and can only refuse if the reason falls within one or more of the eight business reasons provided by statute. These business reasons are very broad. Reasons include: the burden of additional costs; an inability to reorganise work among existing staff; a detrimental impact on the performance or quality of work; inability to meet customer demand; inability to recruit additional staff; lack of work to do during the proposed working times; or planned business changes.

Given many workforces have effectively adapted to remote working, it will inevitably be more difficult to justify refusing flexible working requests in their entirety unless there are particular issues or inefficiencies, and refusals may negatively impact employee morale. Employers have three months to complete the process from start to finish.

Any improper refusal may lead to claims for up to eight weeks' pay, currently capped at £544 per week or, more often and more concerningly, possible claims of discrimination (depending on the circumstances) which are uncapped.

### What should employers be doing to prepare for a surge in flexible working requests?

To prepare for the anticipated surge in flexible working requests employers should ensure that they have in place a robust flexible working policy and homeworking policy. This may mean implementing new policies where none previously existed, or

reviewing current policies to ensure they are up to date and comprehensive. Homeworking policies should aim to ensure that employees are clear about working from home practices going forward and should set out expectations and guidelines to ensure work efficiency, supervision and protection of confidential information and data.

### Can an employer require employees to work mainly or entirely from home?

Some employers are keen to take advantage of homeworking, but are they able to make this a requirement for their employees?

To answer this, employers will need to look at the terms set out in an employee's contract of employment, in particular a "place of work" clause. If the terms of the employment contract prescribe that the individual is office-based then it could amount to a contractual change to require them to become mainly or entirely home-based. As always, contractual changes require consent from the employee and legal advice should be taken before varying contractual terms, especially if this impacts a large number of employees as collective consultation obligations may be triggered.

It will be important for an employer to consider any changes over the last year (i.e. to work from home) and whether these were or are express or implied variations to the employment contract, and made on a temporary or permanent basis. Many of the changes were brought in overnight given the nature of the pandemic and without the documentation or processes that would usually accompany such changes. Employers should review current arrangements and communications to take stock of their current position and help them plan effectively going forward.

### What key issues arise with homeworking?

If employers do want to continue with homeworking they should ensure they have thought through a number of associated issues that can arise, some of which are highlighted below.

- **Data protection and confidentiality** – how can employers ensure that confidential and sensitive data is being managed appropriately, is secure and protected?
- **Salary weighting** – how do employers grapple with the issues of salary levels (e.g would employers still apply a London salary uplift if the employee moves out of London and is working remotely)?
- **Employee wellbeing** – some people struggle with feelings of isolation and their mental health is impacted by the lack of face-to-face interaction

that permanent homeworking brings. How should employers deal with this?

- **Health & safety obligations** – an employer's health and safety obligations extends to those working from home. Have the relevant workstation assessments been carried out?
- **Performance and development** – working remotely can cause employers to struggle to identify issues or accurately evaluate the performance of their teams. Employers should dedicate time to planning how they manage performance and development remotely (look out for our upcoming podcast on this topic).
- **Insurance** – have employers checked that their employer liability insurance covers the activities of homeworkers?
- **Expenses, costs and allowances** – which costs that have been incurred as a result of homeworking should be covered by the employer? Are employees aware of which expenses are tax-deductible?

Employers should be aware that working remotely from abroad raises a myriad of further issues to consider (eg tax, local employment rights). We'll be covering this topic in an upcoming podcast so look out for this landing in your inbox.

**If you have any questions on any of the topics in this alert please contact the authors below or your usual Stephenson Harwood contact.**

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