K&L GATES

United Kingdom Employer Guide

2024

CONTENTS

Introduction 4

Employment Relationship 5

I. Pre-Employment 5

Immigration Requirements 5

Reference/Background Checks 5

Police and Other Checks 5

Medical Examinations 6

Minimum Qualifications 6

II. Types of Relationships 6

Employee 6

Independent Contractor 6

Labour Hire 6

III. Instruments of Employment 6

Contracts 6

Codes or Rules 7

Registered Agreements 7

Policies 7

IV. Entitlements 7

Minimum Employment Rights 7

Discretionary Benefits 11

Termination of Employment 12

I. Grounds 12

II. Minimum Entitlements 12

Payments/Notice 12

III. Redundancy 12

Statutory Entitlements 12

Genuine Redundancy 12

Consultation 12

Payment 12

Protection from Redundancy (Pregnancy and Family Leave) Act 2023 13

IV. Remedies 13

Dismissal Actions 13

Business Transfer and Restructuring 14

I. Legal Requirements 14

Transfer of Business 14
II. Restructuring 14
Notification 14
Consultation 14
Protection of Assets 16
I. Confidential Information 16
II. Contractual Restraints and Non-Competes 16
III. Privacy Obligations 16
IV. Workplace Surveillance 17
V. Data Subject Access Requests 18
VI. Workplace Investigations 18
VII. Managing Performance and Conduct 18
VIII. Bullying and Harassment 19
Bullying 19
Harassment 19
IX. Discrimination 19
X. Unions 20
Representation 20
Right of Entry 20
Industrial Disputation 20
XI. Remote/Hybrid Work 20
Brexit Update 21
Authors and Contributors 22

INTRODUCTION

As we look back on 2023 and ahead into 2024, alongside the typical changes relating to increase in statutory family-related pay and sick pay and the National Minimum Wage, there have also been a number of significant proposed changes in many other areas of employment law. From the post-Brexit reform agenda to a series of private members' bills and UK Government consultations, 2023 has seen a cultural shift and move towards greater flexible working, greater redundancy protection for pregnant employees and those returning from family leave, and greater leave entitlements for eligible employees.

This UK Employer Guide covers key employment law considerations for employers with employees based in the United Kingdom. It also covers key proposed employment law updates for 2023/2024, which, although not yet implemented by the UK Government, could require employers to make a significant number of changes to their internal policies and procedures.

KEEP UP TO DATE ON THE LATEST DEVELOPMENTS

Find updates to the Global Employer Guide along with recent developments on labor, employment, and workplace safety issues across the globe by visiting **K&L Gates HUB**.

K&L Gates LLP. Global counsel across five continents.
Learn more at klgates.com.

EMPLOYMENT RELATIONSHIP

I. PRE-EMPLOYMENT

Immigration Requirements

Employers must ensure that their employees are legally allowed to work in the United Kingdom.

Freedom of movement between the United Kingdom and the European Union ended on 31 December 2020. The United Kingdom has implemented a points-based immigration system, which applies equally to EU and non-EU citizens. Employees from outside the United Kingdom, excluding Irish citizens, will need to qualify for a visa allowing them to work in their own right or be sponsored by an employer to come to the United Kingdom.

Routes for sponsorship include:

- A skilled worker route – for workers who have a job offer in an eligible skilled occupation from an approved sponsoring employer.
- An intra-company transfer route – for employers who want to transfer a worker from part of their business overseas to work in the United Kingdom.

Employers will now need a sponsor licence to hire most eligible employees from outside the United Kingdom.

Companies wishing to establish their first presence in the United Kingdom may use a UK Expansion Worker Visa to allow a senior employee, with extensive and relevant industry experience, to migrate to the United Kingdom.

Reference/Background Checks

An employer is permitted to contact a prospective employee's referees and previous employers to gather and verify information. However, save for certain regulated industries, there is no general legal obligation on an employer to provide a reference. It is becoming increasingly common for previous employers to confirm dates of employment only. An employer should also take account of its UK General Data Protection Regulation (UK GDPR) and Data Protection Act (DPA) obligations when considering or undertaking background checks. The UK GDPR is the retained EU law version of the General Data Protection Regulation (GDPR), and the DPA is the UK's implementation of the GDPR. All references and background checks must be limited to what is proportionate for the purpose of the recruitment.

Police and Other Checks

These are permitted with the applicant's consent, if necessary, to determine suitability for a particular job, such as working in the financial sector or working with children and vulnerable adults. Particular jobs may have specific requirements for a Criminal Records Bureau (CRB) check to be undertaken. Certain criminal convictions become spent after a set period time, after which applicants are entitled to hold themselves out as having a "clean" criminal record.

An employer should also take account of its UK GDPR or DPA obligations when considering or undertaking criminal records checks because additional conditions apply in relation to processing criminal convictions data under the DPA. Information related to criminal convictions collected in the recruitment process needs to be deleted once it has been verified through a CRB disclosure, except in limited circumstances where the information is clearly relevant to the ongoing employment relationship.

Medical Examinations

Medical examinations are permitted with the applicant's consent, if necessary, to determine fitness for a particular job. However, employers who seek medical examinations must ensure that they do not:

- Breach UK GDPR or DPA rules regarding the "special category" personal data which they receive as a result of making those checks.
- Discriminate on the basis of any ground (most obviously disability, but see further the "Discrimination" section of this UK guide below) revealed by the results of the examinations or searches.

Minimum Qualifications

Businesses may ask for minimum qualifications to assess an applicant's suitability for a role.

II. TYPES OF RELATIONSHIPS

Employee

Individuals can be employed on a full-time or part-time basis, on a fixed-term or ongoing contract, or on a casual basis. Employees are entitled to a variety of employment rights, such as holiday and sick pay, and their employers must pay national insurance contributions (NICs) to HM Revenue and Customs (HMRC) in addition to their employees' wages.

Independent Contractor

Businesses often engage self-employed contractors on a fee-for-service basis. However, with certain limited exceptions, contractors do not have any employment rights, and businesses do not need to pay NICs in addition to their consultancy fees.

Employment tribunals and HMRC will scrutinise the relationship between any contractor and the organisation for which the contractor performs services to ensure that the relationship is not used to avoid tax or to "contract out" of giving an individual employment rights. On 6 April 2021, new "off-payroll working" rules (commonly known as IR35) came into force, which increase the tax risks for end-user companies who use independent contractors who contract through their personal service companies.

Labour Hire

Agency workers are often engaged by hiring businesses for short periods and are common in industries such as building and construction or information technology. Agency workers are not employed by the hirer and may not even be employees of the agency. However, agency workers must be given the same access to communal facilities, such as canteens, car parks and child care. They also acquire certain rights after working for the hirer for more than 12 weeks and must be given the same basic rights (such as pay, hours, rest periods and annual leave) as the hirer's own employees.

UK employment law also recognises a third, hybrid category called a "worker". A worker is someone who provides services personally and is not in business on his or her own account but who is not an employee. Workers qualify for certain limited rights, for example, the right to be paid the National Minimum Wage and the right to paid holiday leave.

III. INSTRUMENTS OF EMPLOYMENT

Contracts

Employment contracts can be oral or in writing, although there is a statutory requirement that an employee or worker receives a written statement of particulars of employment on or before the date the employment commences. This statement must contain certain specified information, for example,

details of pay, notice periods, duties, holidays, training, paid leave and hours of work. The statement must also contain a reference to the employer's disciplinary and grievance procedures (see the "Policies" section of this UK guide below).

Failure to provide an employee or a worker with a statement in accordance with Section 1 of the Employment Rights Act 1996 can lead to an employee being awarded two to four weeks' salary.

Codes or Rules

Trade unions may negotiate collective agreements with employers within a certain industry. Such an agreement may cover:

- Terms and conditions of employment and conditions of work.
- Hiring, firing and suspension.
- Allocation of work.
- Discipline.
- Union membership.
- Union recognition.
- Facilities agreements.
- Procedures.
- Other machinery of collective bargaining.

Collective agreements are legally binding only where they are in writing and stated to be so or where the agreement is incorporated into the worker's contract.

Employers can also establish internal employee works councils in order to consult with their employees about economic- and employment-related matters, although these work councils are relatively rare in the United Kingdom.

In the absence of the employer recognising a trade union or works council, there are no industry-wide collective bargaining agreements which apply by default as there are in some other countries.

Registered Agreements

UK employment law does not recognise this concept.

Policies

Employers must provide employees with their disciplinary and grievance policies, either in the employee's contract of employment itself or in a separate policy or handbook. A written health and safety policy is also legally required for businesses that employ five or more people.

While there is no other requirement for employers to put other policies in place, it is strongly advised that employers establish an employee handbook that contains details of all other relevant policies. Employers should have an anti-bribery policy, as this will help them demonstrate that they have put adequate procedures in place designed to prevent bribery and, therefore, defend any corporate prosecution under the Bribery Act 2010.

IV. ENTITLEMENTS

Minimum Employment Rights

Hours of Work

There is a statutory restriction on the number of hours that an employee can work. Employees may not, on average, work more than 48 hours per week.

However, employers can ask that employees consent in writing to "opt out" of the 48-hour weekly working limit. If employees opt out, they must be able to "opt in" on no more than three months' notice.

Holidays

Employees and workers have a statutory entitlement to paid holiday leave of 5.6 weeks per year. This can include public holidays, of which there are normally eight a year in England and Wales. They cannot be paid in lieu of this entitlement, except on termination, and employees/workers must take four weeks of their statutory entitlement in each holiday year, but they can carry any remaining holiday over to another holiday year if the employer is in agreement.

Maternity Leave

All employees are entitled to paid leave to attend antenatal appointments and one year's statutory maternity leave, regardless of length of service. This is made up of 26 weeks' Ordinary Maternity Leave (OML) and 26 weeks' Additional Maternity Leave (AML). All employees who qualify for OML will qualify for AML.

A pregnant employee has the right to Statutory Maternity Pay (SMP) if she has been continuously employed by her employer for at least 26 weeks as at the date that is 15 weeks before the due date for the birth. SMP is paid for 39 weeks from the time the employee starts maternity leave and is payable at two rates:

- The first six weeks are payable at 90% of the employee's average weekly earnings.
- The remaining 33 weeks is paid at the lower of the "prescribed rate", currently £172.48 per week or 90% of the employee's average weekly earnings.

Employers often offer enhanced maternity pay.

An employee who has taken OML has the right to return to the same job on the same terms and conditions as those under which she was employed before her absence.

An employee who returns to work after AML is also entitled to return to the same job on the same terms and conditions as if she has not been absent. However, in this case, if it is not reasonably practicable for the employer to offer the employee her original job, she is entitled to be offered another suitable alternative position.

Paternity and Shared Parental Leave

Employees who support a child's mother or adopter (of any gender) also have an entitlement to either one whole week or two consecutive weeks of paid paternity leave (at the set amount) within 56 days of a child's birth or placement for adoption, provided they have 26 weeks of continuous service with their employer at the end of the 15th week before the expected week of childbirth/placement and continue to work for the employer until the baby is born/placed with them for adoption. This includes the birth of a child to a surrogate mother where the employee (and their partner) expects to obtain a parental order.

Under the United Kingdom's shared parental leave regime, these employees can also share up to 50 of the 52 weeks of the other parent's statutory maternity or adoption leave and up to 37 of the 39 weeks of statutory maternity or adoption pay provided:

- The employee has 26 weeks' continuous service with his or her employer at the end of the 15th week before the expected week of childbirth/placement.
- The other parent must have worked in at least 26 of the 66 weeks before the expected week of childbirth/placement and had earnings of at least £390 in total in 13 of those 66 weeks.

For both parents to share the shared parental leave, each parent must earn on average at least £123 a week to be eligible for shared parental leave.

Parental Leave

Employees (of any gender) who have one year's service are entitled to take time off work to look after a child or make arrangements for the child's welfare. They may take up to 18 weeks' unpaid leave per child up to the child's 18th birthday. No more than four weeks may be taken in any one year (unless the child is disabled), and leave must be taken in multiples of one week. Parents of disabled children are entitled to take single days of leave.

Since 6 April 2020, all employed parents have the right to two weeks' leave if they lose a child under the age of 18 or suffer a miscarriage or stillbirth. Parents are also able to claim statutory pay for this period, subject to meeting eligibility criteria.

In addition, there is a statutory right for employees to take time off for dependants, which gives all employees, regardless of service, a right to take a reasonable period of time off to deal with an emergency involving a dependant. Again, this is unpaid.

Neonatal Care Leave

The Neonatal Care (Leave and Pay) Act 2023 makes provision for up to 12 weeks statutory leave and pay for employees whose children are admitted to neonatal care for at least seven days. However, these new rights will not come into force until April 2025.

For those who qualify, the right to neonatal care leave is a "day one" right, so there is no minimum service requirement. The right to receive statutory neonatal care pay requires 26 weeks of service and earnings on average of at least £123 a week, which mirrors the entitlement to maternity pay. Employers should therefore consider updating their policies and procedures, and amendments will likely be needed to contracts of employment to reflect this new entitlement.

Flexible Working Arrangements

The Employment Relations (Flexible Working) Act 2023 received royal assent on 20 July 2023. All employees with at least 26 weeks' continuous employment will be able to make two requests for flexible working arrangements (currently one request) that support a work-life balance, irrespective of whether or not they have caring responsibilities. The employee triggers the procedure by making a written request. The employer will then have a two-month decision period (currently three months) (which can be extended by agreement) within which to consider the request, discuss it with the employee (if appropriate) and notify the employee of the outcome. The employer must deal with the application in a reasonable manner and may only refuse a request for one (or more) of eight specified reasons.

This act has two other key reforms to the flexible working legislation:

- Employers will have to consult with their employees, as a means of exploring the available options, before rejecting their flexible request.
- There will no longer be a requirement for employees to set out how the effects of their flexible working request might be dealt with by the employer.

The UK Government had consulted on extending this right to all employees from the beginning of their employment, which would make the right to request flexible working a "day one" right. However, there is no mention of this within the act. The UK Government also emphasized that this will remain a right to request and not a right to have.

This act will likely come into force in July 2024.

Personal/Carer's Leave and Compassionate Leave

Other than the parental bereavement leave referred to above, employees do not have statutory rights to personal and compassionate leave; however, employers will usually have policies permitting employees to take such leave.

As the law currently stands in the United Kingdom, employees who care for dependants (including their spouses or civil partners, children, parents or people living in the same house as the employee) are entitled to unpaid time off to provide assistance where a dependant falls ill, gives birth or is injured or assaulted to make provision for the care of that dependant or in consequence of the death of a dependant. Employees can take time off because of unexpected disruption, and parents can also take time off to deal with unexpected incidents involving their children while they are at school.

The Carer's Leave Act 2023 received royal assent on 24 May 2023. The new law will entitle employees to take one week's unpaid leave in any 12-month period to provide or arrange care for a dependant with a long-term care need. The right will be available from the first day of employment, and employees will not have to provide evidence of their caring responsibilities when requesting the leave. Employees who take carer's leave will get the same employment protections available for other family-related leave, including protection from dismissal.

The new law is not expected to come into force before April 2024.

Community Service Leave

Employees in the United Kingdom are not granted a direct right to take time off for jury service; however, they are protected from being subjected to a detriment or being dismissed as a result of being summoned to attend or being absent from work on jury service. Employers are not required to pay employees during absence for jury service and (unless the contract provides for payment) this does not constitute a detriment.

Long Service Leave

There is no statutory entitlement to a period of leave after employees have worked for an employer for a particular length of time. Employers may choose to grant employees a period of sabbatical and, if so, would normally set this out in their staff handbook.

Public Holidays

Employees are entitled to paid leave for each day which is proclaimed a public holiday in countries in which they work. If an employer requests an employee to work on a public holiday, they are usually entitled under the contract of employment to additional pay or time off in lieu, although this is not legally required.

Sick Pay

The employer does not have to continue to pay normal salary during illness (unless the employer has agreed to do so in the contract of employment). Instead, employees are entitled to be paid statutory sick pay from the employer for the first 28 weeks of linked absence in any period of three years. The first three days of absence do not count; the employee only becomes entitled to statutory sick pay on the fourth day of absence. The current rate of statutory sick pay is £109.40 per week.

Remuneration (Minimum Remuneration, Rules for Variable Remuneration)

As of April 2023, the minimum wage is £10.42 per hour for an adult worker over the age of 23 and is £10.18 per hour for an adult worker over the age of 21. Different rates apply to younger workers. These rates are reviewed each year.

Notice Periods

After one month's service, an employee is entitled to receive a minimum of one week's notice of termination of employment from the employer. Once an employee has been employed for at least two years, an employer is required to give one week's notice per complete year of service up to a maximum of 12 weeks after 12 years' service. The minimum notice period required to be given by an employee (regardless of length of service) is one week. The employer and employee can agree to longer notice periods (and often do so) but never less than the statutory minimum.

An employer can dismiss without notice if the employee is guilty of gross misconduct.

Pension

All employers must automatically enrol all eligible workers in a pension scheme that meets certain requirements and make minimum contributions to that scheme in respect of those workers (except where a worker chooses to opt out of the scheme). This regime has been phased in over a number of years.

Discretionary Benefits

There is no legal obligation on employers to provide any other form of benefit other than salary and pension contributions (except where the worker chooses to opt out of the scheme), although it is common for employers to do so to remain competitive in the recruitment market.

Employers will often pay contractual sick pay in excess of the statutory minimum and provide additional holiday leave entitlements, as well as other commonly provided benefits, such as private health insurance, life assurance and critical illness cover.

In relation to bonuses, employers may also choose to incentivise employees by including bonus provisions in employees' contracts, dependent on the employee achieving certain defined aims or offering discretionary non-contractual bonus schemes, payable by reference to a wider variety of factors, such as team or business performance.

Many employers also operate tax-efficient benefits, such as cycle to work and child care voucher schemes.

TERMINATION OF EMPLOYMENT

I. GROUNDS

An employee's employment may be terminated by notice being given by either the employer or the employee, or by the employer without notice in cases of gross misconduct, mutual agreement, frustration or the end of a fixed-term contract.

II. MINIMUM ENTITLEMENTS

Payments/Notice

When an employer terminates an employee's employment for reasons other than serious misconduct, it must give the employee his or her contractual notice period or the statutory minimum (calculated as described in the "Entitlements" section of this UK guide) if greater. Employers may be able to pay the employee in lieu of notice if the contract provides for this.

Notice does not need to be provided when an employer terminates an employee for gross misconduct. When an employee resigns, he or she has to give the contractual notice period.

III. REDUNDANCY

Statutory Entitlements

Payment on termination includes:

- Outstanding wages for hours already worked.
- Accrued but untaken annual leave.
- Payments in lieu of notice and payments in respect of any contractual entitlements that would have been payable during the notice period (if applicable).
- Redundancy pay (if applicable).

Genuine Redundancy

Once an employee has completed two years' continuous employment, he or she is entitled to a statutory redundancy payment if dismissed "by reason of redundancy". A genuine redundancy situation will arise where:

- An employer has stopped, or intends to stop, carrying on the business either altogether or in the place where the employee is employed.
- There is no longer a requirement for an employee or employees to carry out work of a particular kind.

Consultation

Employers must follow a fair procedure and consult with their employees before making them redundant. The scope of employers' consultation duties depends on the size of the business, and employers who are considering making more than 20 employees redundant have more onerous consultation obligations. Further details of employers' consultation rights are provided in the "Restructuring" section of this UK guide.

Payment

The amount of the statutory redundancy payment is calculated in the same way as the basic award for unfair dismissal (see the "Dismissal Actions" section of this UK guide). An employee's weekly pay, up to the statutory limit currently capped at £643, and a maximum of 20 years' service can be taken into

account when calculating the statutory redundancy payment, which as at 6 April 2023 is capped at a maximum of £19,290.

Protection from Redundancy (Pregnancy and Family Leave) Act 2023

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 received royal assent on 24 May 2023.

Prior to this act, only employees on maternity leave, shared parental leave or adoption leave had protections in a redundancy situation under the Employment Rights Act 1996. These protections gave these specific employees the right to be offered first access to suitable alternative vacancies, if one was available, before being dismissed by reason of redundancy. Failure to do so being automatically unfair.

This act extends the protection to a wider group, which includes (i) a pregnant employee who is in a protected period of pregnancy, (ii) an employee who has recently suffered a miscarriage and (iii) parental leave returners.

This act came into force on 24 July 2023.

IV. REMEDIES

Dismissal Actions

Employees with two years' service can challenge the fairness of their dismissal by bringing a claim against their employer for unfair dismissal in an employment tribunal. In order to successfully defend such a claim, the employer has to demonstrate that it has a fair reason for dismissal and that it has followed a fair procedure.

There are five potentially fair reasons:

- Redundancy.
- Misconduct.
- Capability (including performance or illness).
- Potential breach of a legislative requirement if the employer were to continue to employ the employee (e.g., if he or she did not have a visa).
- Some other substantial reason that justifies dismissal.

BUSINESS TRANSFER AND RESTRUCTURING

I. LEGAL REQUIREMENTS

Transfer of Business

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) prescribes a number of rules that apply if there has been a "relevant transfer".

These rules apply in relation to:

- Asset purchases, where there is a transfer of a business, or part of a business, that is an economic entity (defined as an organised grouping of resources that has the objective of pursuing an economic activity, which includes divisions of businesses) and that economic entity retains its identify following the transfer.
- Service provision changes by which a client:
  - Outsources work by engaging a contractor to do work on its own behalf.
  - Transfers outsourced work from one contractor to another.
  - Brings an outsourced contract "in house", provided that in all cases the activities carried on after the change in service provider are fundamentally or essentially the same as those carried on before the change and that the client (where relevant) remains the same throughout.

TUPE does not apply in relation to share purchases, as there is only a change in the shareholders of a company and there is no transfer of the economic entity's business. However, if there is an internal reorganisation involving the transfer of assets, such as a hive-up or hive-down of assets as a precursor to a share purchase, then TUPE will apply to those transfers.

II. RESTRUCTURING

Notification

Employers can dismiss an employee by reason of "redundancy" because they are closing down a particular division, business or the physical location where the employee worked or where they have a reduced requirement for that employee.

Employees are entitled to a statutory redundancy payment, which is calculated by reference to their pay, age and their length of service. An employee's weekly pay, up to the statutory limit, and a maximum of 20 years' service can be taken into account when calculating the statutory redundancy payment, which as at 6 April 2023 is capped at a maximum of £19,290.

Consultation

Where 20 or more employees are being made redundant over a period of 90 days or less at one establishment, an employer must inform and consult employee representatives over a period of 30 days before the first dismissal takes effect. Where 100 or more employees are being made redundant over the same period at one establishment, the required consultation period increases to 45 days. Employers must also inform the UK Government of their intention to make more than 20 employees redundant.

Employers who fail to comply with these information and consultation requirements may be liable to pay up to 90 days' pay in respect of each employee whose rights were breached and could be subject to fines for failure to notify the UK Government. Employers who are proposing to make less than 20

employees redundant must follow a fair procedure and consult with them in an appropriate fashion so as to minimise the risk of unfair dismissal claims being brought against them.

PROTECTION OF ASSETS

I. CONFIDENTIAL INFORMATION

Most contracts of employment include provisions protecting the confidentiality of an employer's confidential information, including intellectual property and trade secrets.

II. CONTRACTUAL RESTRAINTS AND NON-COMPETES

Confidentiality provisions restrict employees from using confidential information for anything other than the performance of their duties. These provisions restrain employees from using confidential information during and after termination of employment (although, if employment contracts do not include this prohibition, employees will have a limited implied duty not to use or disclose their ex-employers' trade secrets but would be free to use or disclose all other types of confidential information).

As a general principle, an employer can potentially enforce clauses preventing the employee from working for a competitor or from soliciting the employer's employees and customers. These restrictive covenants must protect a legitimate business interest of the employer (such as trade secrets or client connections) and must be reasonable in all circumstances. Restrictive covenants may be enforceable for a reasonable period of up to 12 months (as appropriate, which will be based on the employee's seniority and position) after termination of an employee's employment.

III. PRIVACY OBLIGATIONS

Information that an employer stores about its employees will constitute "personal data" under the UK GDPR. In summary, it is legitimate for an employer to store and to process personal data to the extent that such information is necessary for the purposes of administering the employment contract or for another legal basis, outlined below.

Employers should not generally rely upon employees' consent as a legal basis for processing their personal data because such consent cannot usually be demonstrated to be "freely given", due to the imbalance of power between the parties and because consent may be withdrawn at any time.

A number of principles apply to the processing of personal data, including that the data must always be kept up to date, secure and may not be transferred outside the United Kingdom unless a legal basis applies and certain conditions are met.

Employees must be provided with information about what information the employer collects about them and how it is used and processed. Personal data should be retained for no longer than necessary for the purposes for which it is processed, and the employer should put in place a retention policy in relation to its employment records.

Under the UK GDPR, at least one of the following legal bases must apply when processing this personal data:

- Consent of the individual.
- Necessity for the performance of a contract to which the data subject is party.
- Necessity for compliance with a legal obligation.
- Protection of the vital interests of the data subject or another natural person.
- Public interest.
- Legitimate interest pursued by the controller or by a third party.

The processing of sensitive personal data (i.e., ethnic origin, political opinions, religious beliefs, union membership, genetic or (certain) biometric data or data relating to health or sexual orientation) is

prohibited in principle, but there are some limited exceptions under UK GDPR (e.g., processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law, or data processing necessary to protect the vital interests of the employee).

A further useful condition permitting employers to process sensitive personal data of employees is where the data processing is necessary to comply with obligations or rights under UK employment law. Employers are required to have an appropriate policy document in place when processing sensitive personal data, and an employee privacy notice will usually fulfil this requirement. Employers are obliged to inform both employees and applicants in detail about the collection and processing of their personal data, including data sharing, international transfers and legal rights in this regard. Such information should generally be provided through privacy notices for each category of employee and applicant in order to only convey the information relevant to that category.

Employers should notify employees and applicants of any substantial updates to the privacy notices.

Employers are required to maintain records of their personal data processing activities (ROPA). In the context of employment law, this includes documenting what, how, why, for how long and by whom employee data is collected and processed, details of transfers to third countries (if any) and information about technical and organizational security measures.

The ROPA must be provided to the Information Commissioner's Office upon request and failure to establish or maintain a ROPA up to date would in and of itself be a breach of UK GDPR and the DPA.

Data sharing with third parties (including service providers, such as payroll providers, and marketing partners) must be thoroughly assessed and framed within a data sharing agreement to ensure that UK GDPR requirements are complied with all through the data life cycle. Additionally, both disclosure to and acquisition from third parties must be indicated in the ROPA.

There are no intragroup exemptions, so group companies have to be treated as third parties and any data flows among group companies need to be carefully assessed.

There are limited ways in which data can be transferred to third parties outside the United Kingdom. Where the recipient is not located in a country benefiting from an "adequacy decision", or all involved parties have implemented binding corporate rules, a data transfer agreement will generally need to be implemented to ensure that UK GDPR requirements are complied with all through the data life cycle.

Non-compliance with UK GDPR might result in fines up to £17.5 million or up to 4% of the global annual turnover, whichever is higher.

The United Kingdom is currently in the process of adopting a new data protection framework in coming months, which may affect the above.

In 2023, the UK Government introduced a new version of the Data Protection and Digital Information Bill. With the bill, the United Kingdom aims to amend the existing UK GDPR post-Brexit.

A UK-US Data Bridge has recently been established, as an extension of the EU-US Data Privacy Framework. In September 2023, the UK Government laid adequacy regulations before Parliament. The regulations should act as a safeguard for the transfer of personal data from the United Kingdom to the United States under UK GDPR Article 44 once they come into force on 12 October 2023.

IV. WORKPLACE SURVEILLANCE

The records or recordings made as a result of workplace monitoring are likely to contain personal data. Workplace monitoring is subject to the UK GDPR, and relevant matters in relation to workplace

monitoring must be taken into account, including whether a legal basis applies to the monitoring and processing of the resulting personal data.

Employers should consider whether workplace surveillance is the right thing to do in all circumstances, proportionate and necessary in order to achieve a legitimate aim. Employers should limit the areas in which monitoring takes place to protect employees' privacy adequately and limit the people who have access to such recordings. Covert recording is rarely justifiable and should only be used in exceptional circumstances. Employers should aim to introduce data protection "by design" and should carry out a data protection impact assessment when contemplating any new data processing activity, including surveillance of employees, and employees must be informed about the personal data collection and processing involved in workplace monitoring. The records and results of workplace monitoring should be subject to a retention policy and should be deleted if they are no longer necessary to keep them in order to fulfil the purposes for which they were collected.

V. DATA SUBJECT ACCESS REQUESTS

Employees have several statutory rights under the UK GDPR with regard to their personal data, namely:

- Right to access, rectify or delete their data.
- Right to restrict the processing.
- Right to data portability.
- Right to object.
- Right to freely withdraw consent.

Upon receiving such Data Subject Access Request, the employer will need to address the request within one month of its receipt; this can be extended by an additional two months in particularly complex cases.

VI. WORKPLACE INVESTIGATIONS

Employers may conduct workplace investigations if they have a legal basis and if they can justify it (e.g. to determine policy breaches, misconduct or misuse of confidential information). Employers should be aware that monitoring workers often includes capturing sensitive data for which additional conditions apply.

Employers must have disciplinary and grievance procedures that set out how they must approach, deal with and investigate complaints or issues they have with their employees. These procedures will provide for the employer to investigate any disciplinary or grievance issue by, for example, interviewing witnesses and taking witness evidence, as well as reviewing factual evidence.

Employers are entitled to inspect the employee's professional computers, emails and mobile phone and to copy the data. However, files, folders and emails identified by the employee as "personal" may only be accessed where the employee has been invited to be present.

VII. MANAGING PERFORMANCE AND CONDUCT

Where an employer is contemplating dismissing an employee or taking other relevant disciplinary action (e.g., a written warning) in relation to misconduct or poor performance, it should follow a disciplinary process that includes:

- Sending the employee a statement setting out the reasons why the employer is contemplating disciplinary action or dismissal together with the basis of those reasons.
- Holding a meeting to discuss the matter.
- Informing the employee of the decision.
- Holding an appeal meeting if the employee requests an appeal.

Failure by the employer to follow this procedure may result in an employment tribunal finding any subsequent dismissal to be procedurally automatically unfair, and damages can be increased by up to 25%.

VIII. BULLYING AND HARASSMENT

Bullying

Employers are expected to recognise and protect the dignity of their employees. It is recommended that employers have anti-bullying and anti-harassment policies in place that clearly state:

- That all forms of bullying and harassment are unlawful and will not be tolerated in the workplace.
- The steps that the organisation will take to prevent bullying and harassment.
- That those found to have taken part in bullying or harassing behaviour will be subject to the company's disciplinary procedure.

Employees who make a complaint after being bullied or harassed will be raising a "grievance", which the company must investigate in accordance with its grievance policy.

Harassment

Harassment is defined as unwanted conduct related to a relevant protected characteristic (see the "Discrimination" section of this UK guide below) that violates or intends to violate an individual's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

Sexual harassment is prohibited in the United Kingdom.

If an employer does not adequately respond to an employee's allegations of harassment, especially if a grievance has been raised, the employee may be entitled to resign and then bring a claim against his or her employer for unfair constructive dismissal and discrimination.

The Worker Protection (Amendment of Equality Act 2010) Bill seeks to introduce a requirement for employers to take all reasonable steps to prevent both third-party harassment and sexual harassment during the course of employment. Employers should be aware of this new responsibility, as, if enacted, the bill will give employment tribunals the power to uplift compensation by up to 25% in circumstances where an employment tribunal finds that sexual harassment has taken place and an employer has breached its duty to take all reasonable steps to prevent the harassment.

This bill is in the final stages of consideration by the UK Government.

IX. DISCRIMINATION

All employees, regardless of length of service, have the right to not be discriminated against on the grounds of race (including colour, nationality or ethnic origin), sex, disability, religion or belief, sexual orientation, gender reassignment, pregnancy and maternity, marriage and civil partnership, or age. This applies when offering employment, in the course of employment or in respect of its termination.

Damages for discrimination are uncapped and include an award for injury to feelings, where applicable.

Employees who bring, or might bring, discrimination claims or complaints about harassment or become involved in another employee's discrimination complaint are protected from suffering any detriment because of their actions or potential actions. If an employee is subject to detriment, he or she can also bring a claim for victimisation.

X. UNIONS

Representation

Trade unions can be recognised by an employer voluntarily or by the union following a statutory procedure which, if successful, enables the trade union to negotiate collective bargaining agreements on certain employees' behalf. It is not mandatory for employees to be recognised by a trade union.

Right of Entry

Trade union members can accompany employees during disciplinary and grievance hearings.

Industrial Disputation

It is only lawful to take industrial action (e.g., strikes, lockouts, slowdowns, overtime bans) under certain circumstances prescribed by the Trade Union and Labour Relations (Consolidation) Act 1992.

The Strikes (Minimum Service Levels) Act 2023 received royal assent on 20 July 2023. This act provides anti-strike measures, such as a minimum service level to be in place during any period of strike across several sectors, including health services, fire and rescue, education and transport.

XI. REMOTE/HYBRID WORK

Providing employees with options for remote and hybrid working is encouraged in the United Kingdom. When considering offering such arrangements to employees, employers must consider:

- Updating health and safety procedures and ensuring they have adequate insurance for home working.
- Updating contractual provisions relating to the place of work.
- Availability of specialist equipment that may be necessary for an employee to carry out his or her job.
- Confidentiality of work when working from home or public spaces.
- Tax consequences, such as working abroad or using company equipment for non-business use.
- Security of data to ensure compliance with data protection obligations.

Employers must ensure that salary, benefit packages, holidays and sick pay remain the same between remote or hybrid workers and those who work from the workplace, to avoid risk of discrimination.

Trial periods may be used by employers to evaluate the efficacy of remote or hybrid working.

BREXIT UPDATE

On 29 June 2023, the Retained EU Law (Revocation and Reform) Act 2023 received royal assent. This act aims to abolish all EU law that is not specifically reinstated or replaced. This may affect a number of EU-derived secondary legislation, including the Working Time Regulations 1998, Agency Worker Regulations 2010 and TUPE.

We encourage employers to keep up to date on developments around this act, as possible alterations to the existing legal framework could have a serious impact for both employers and employees.

AUTHORS AND CONTRIBUTORS

Paul Callegari

Practice Area Leader, Office Managing Partner
London
+44.20.7360.8194
paul.callegari@klgates.com

Amelia J. MacHugh

Associate
London
+44.20.7360.6470
amelia.machugh@klgates.com

Claude-Étienne Armingaud

Partner
Paris
+33.1.58.44.15.16
claude.armingaud@klgates.com

Camille J. Scarparo

Associate
Paris
+33.1.58.44.15.11
camille.scarparo@klgates.com

K&L Gates is a fully integrated global law firm with lawyers and policy professionals located across five continents. For more information about K&L Gates or its locations, practices, and registrations, visit klgates.com.

This publication is for informational purposes only and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2024 K&L Gates LLP. All Rights Reserved.