

EMPLOYMENT & INCENTIVES

A practical guide for employers on remote working

Covid-19 has led to a substantial increase in remote working. For some businesses, this may lead to more permanent arrangements. Permanent change requires careful consideration of a range of issues. This guide sets out practical tips for employers when working through key issues.

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The employment contract

Hybrid arrangements with limited or informal home-working arrangements may not require wholesale changes to employment contracts. However, for permanent home-workers, more extensive changes may be appropriate. Some key contractual considerations are to:

- > Specify if the normal place of work is the home;
- > Consider whether there should be a trial period and/or a periodic review;
- > Reserve the right to require employees to attend the workplace;
- > Ask the employee to confirm that the terms of their lease, mortgage and/or home insurance policy don't prevent them from working from home;
- > Stipulate that the employee must inform you if they change address;
- > Specify that the employee is responsible for regulating their own working time and taking appropriate breaks, since there will be less employer oversight; and
- > Specify that the place of work needs to be within the UK (see below for potential issues in relation to overseas working).

Employment policies

Employers should consider introducing a home-working policy. They should also review and update other policies to reflect home-working e.g. policies on privacy/data protection, IT security, confidential information, health and safety and expenses. Policies should state that they may be updated/amended from time to time, since this is a developing area. Staff engagement and input from other stakeholders in the business on policy changes can be helpful – this can help in identifying key issues to reflect in the policy and can encourage compliance.

Data privacy and confidential information

Protecting data and confidential information is a key consideration. This is clearly harder for the employer to control outside the office, but General Data Protection Regulation (“GDPR”) and Data Protection Act 2018 (“DPA”) data breaches caused by home-workers could have severe consequences for the employer such as substantial fines. Some tips here are as follows:

- > Train staff periodically on protecting personal data.
- > Spell out in policies specific steps employees must take to protect data and confidential information, such as: encrypting/password protecting data; locking computer terminals when not in use; ensuring wireless networks are secure; being mindful of people viewing screens or hearing work conversations; and storing and disposing of hard copy documents properly, for instance locking them in a cabinet and bringing them back to office confidential waste bins.
- > Ideally, provide employees with employer devices to ensure correct employer security controls are in place. If employees are permitted to use their own device, they should have remote access to employer apps and email systems so that the employer's data is kept separate from their own personal data.
- > Employers should ultimately satisfy themselves that the arrangements they put in place mean the risk of a data breach is low eg by undertaking a data privacy impact assessment.

The Information Commissioner's Office's guidance on home-working is a helpful source of additional information – please see the link below.

Employee monitoring

Some forms of employee monitoring are permitted, but employers need to balance this against employees' right to privacy, bearing in mind the Human Rights Act 1998, the GDPR and the DPA. Some key considerations here are as follows:

- > Employers need a legitimate reason for carrying out monitoring and to have thought through whether their aim could be achieved less intrusively, having carried out a data privacy impact assessment.
- > Employers should be mindful of sending a negative message to employees. If monitoring cuts across values or culture, or appears intrusive, it could affect trust and confidence and also productivity.
- > Employers should be transparent with employees about what monitoring will be carried out. The reason for monitoring should be explained – monitoring for compliance reasons is less risky than monitoring with no clear purpose.
- > Some monitoring of home-workers could help promote values and culture, by keeping in check bullying and harassment and ensuring whistleblowing issues do not get missed.

Again, the Information Commissioner's Office is a good source of additional information – please see the link below.

Health and safety

Employers remain responsible for the health and safety of their employees. Employers must conduct a suitable and sufficient risk assessment of all the work activities carried out by home-workers to identify potential hazards and assess the degree of risk to them or anyone who may be affected by their work. Some issues for employers to be mindful of are as follows:

- > There are specific health and safety duties if the employer provides the home-worker with equipment.
- > Employers should provide home-workers with any necessary health and safety guidelines and ensure they are complied with.
- > For employees with particular needs, for example pregnant women or those with back problems or other physical disorders, it may be appropriate to provide specialised equipment for them or to carry out an in-person assessment of their home workstation.

Employers should also be mindful of mental health considerations. Some home-workers find the distinction between work and home life is blurred and that there is less support from colleagues when they are less visible. Employer initiatives can improve employee wellbeing and present an opportunity to identify individuals who are struggling e.g. introducing a "buddy" system and arranging regular team catch-ups or one-on-one virtual coffees.

The HSE guidance on home-working is a helpful source of additional information.

Management and supervision

Employers should consider how employees will be managed and supervised when working from home. Some key tips:

- > Regular calls with managers could be diarised.
- > Employers should consider whether targets and performance measurement indicators are sufficiently clear that they will be in a position to assess the quality and quantity of an employee's output when they are not under the watchful eye of their manager in the same way as when in the office.
- > Employers should be mindful of denying a promotion opportunity to a home-worker. If there are good reasons why a role cannot be performed from home. Make sure these are clearly thought through and explained so that the employer can seek to objectively justify a discrimination challenge.
- > Train senior staff on how to manage workers who work remotely. ACAS offers general training on this.

The regulatory angle

The FCA have highlighted certain challenges associated with home-working, such as the risks surrounding market abuse compliance given that the difficulties of monitoring who may receive inside information. The FCA has also identified that home-working gives rise to new challenges for conduct risk, given that staff are not working in proximity to their peers and without the usual support infrastructure and oversight in place.

Firms should also assess how regulatory requirements on supervision and training can be adequately discharged for home-workers. Technology can, of course. Assist eg ensuring all training courses are available on the intranet and updating training on risk to deal with new risks posed by home-working. Some roles are not suitable for home-working.

Since this is a developing area, closely following guidance issued by relevant regulators on home-working is essential. HR teams should closely liaise with their compliance teams on this.

The FCA's Director of Market Oversight has spoken about the FCA's expectation that firms will have adequately addressed the risks of home-working – please see the link below. And a further FCA statement in November 2020 recommends that the Chief Executive Officer Senior Management Function (SMF1) should be accountable for ensuring there is an adequate process for following and adhering to government guidance (with firms that do not have an SMF1 appointing the most relevant member of the senior management team instead) – we also include a link to this statement below.

Staff benefits and collaboration

Reimbursement of expenses to set up home offices is the obvious perk to consider rolling out. Employers should consider introducing a policy regarding home-working expenses. But there are also more imaginative ways of encouraging motivation and collaboration. "Neighbourhood hubs" can be set up for employees to collaborate and socialise locally, with social budgets allocated for this (along with appropriate rules about inclusive collaboration and limits on appropriate expenditure).

Insurance

Employers should check their insurance arrangements to ensure they adequately cover home-working arrangements e.g. offsite damage to company property and claims by third parties.

Flexible working requests

Since home-working has been brought to the fore by Covid-19, employers may see more flexible working requests from employees in the future which involve home-working. Since significantly more women than men seek flexible working arrangements, rejection of requests risks indirect sex discrimination claims. Objectively justifying these may be tricky for employers if an employee has been able to demonstrate that the role has been performed well remotely, so employers may need to give more thought to such requests going forward. Home-working for disabled employees could potentially be a reasonable adjustment, so employers should be mindful of their legal obligations.

There may be future change to the law on flexible working. One of the government's proposals outlined in the Queen's Speech in December 2019 was to make flexible working the default, unless employers have a good reason not to. Employers may need to adapt their practices if this proposal is given legislative effect.

Employer requests

Employers who would like employees to work remotely should be aware of potential pitfalls:

- > Consider whether the request is reasonable, bearing in mind the employee's subjective circumstances.
- > This may require contractual consent from the employee, depending on the existing terms of employment regarding work location.
- > If contractual changes are required for 20 or more employees, employers should be mindful of triggering formal collective consultation requirements.
- > Employers should assess if any new policy would have a disproportionate impact on any groups of employees that have a protected characteristic (e.g. young employees or those with caring responsibilities). If so, any change in policy will need to be objectively justifiable to avoid successful discrimination claims.

The international angle

Further considerations arise for employees who work remotely from outside the UK. A few key issues for employers to consider here:

- > Employees may acquire local employment rights so employers should consider the risks and consequences of these upfront. Local employment law advice may be helpful.
- > Take tax advice. Employers with employees who relocate could be considered to have a "permanent establishment" in the country they are working from, potentially exposing the employer and employee to tax in the host country under the relevant local tax regime.
- > Policies and contracts should make it clear if the employee is expected to bear the personal tax liability of working overseas.
- > Local regulatory and compliance considerations should also be thought through. For example, consider whether the presence of employees may require the establishment of a local branch. And UK regulatory implications could be affected by substantial periods abroad – . . . how will adequate supervision of employees working abroad take place?
- > For global businesses, consider whether an international secondment/assignment or permanent employment with a local entity may be more appropriate than remote working for the UK business.

The future – legislative protection?

Various countries are producing new legislation to deal with the rights of remote workers. For instance, when this guide was being prepared, Spain's government had proposed that employers must cover home-working expenses and that employees can request flexible working hours. And Germany's government had proposed to give all employees the right to work from home and to regulate office home-working, including limiting working hours. Employers should therefore watch out for future legislative change in this area.

Further information

- > ICO's guidance on home-working: <https://ico.org.uk/for-organisations/working-from-home/>
- > HSE's guidance on home-working: <https://www.hse.gov.uk/toolbox/workers/home.htm>
- > ACAS guidance on non-emergency home-working: <https://archive.acas.org.uk/media/3905/Homeworking---a-guide-for-employers-and-employees/pdf/Homeworking-a-guide-for-employers-and-employees.pdf>
- > FCA's speech addressing employer duties in respect of home-working: <https://www.fca.org.uk/news/speeches/market-abuse-coronavirus>
- > FCA's statement on process and accountability: <https://www.fca.org.uk/news/statements/workplace-arrangements-work-related-travel>