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REMOTE WORKING 2022

Global interview panel led by Lindsay F Ditlow of McDermott Will & Emery LLP

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About the editor



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Lindsay F Ditlow is an employment adviser on a variety of domestic employment law matters. She is one of the leaders of McDermott's COVID-19 Employment Task Force and advises employers on a wide range of covid-19 measures, including federal, state and local leave obligations, furloughs and layoffs, cost-cutting measures, accommodations, health and safety obligations, return-to-work procedures and policy review and implementation.

Lindsay provides trusted counsel to US and multinational companies on all aspects of the employment relationship. She regularly advises on employment structures, onboarding requirements, employment agreements, non-competes, international assignments, handbooks and policies, employee leave, workplace accommodations, furloughs and individual and collective dismissals. She assists employers with these matters in the US and when they are expanding abroad. She partners with clients in a wide range of industries, including healthcare, life sciences, technology, energy, manufacturing and communications.

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Global trends

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Lindsay has extensive experience handling employment issues in the US market involving mergers and acquisitions, compliance, divestitures, carve-outs, spin-offs, corporate reorganisations, post-acquisition integrations and outsourcings. She provides strategic advice to clients on HR-related deal issues, coordinates due diligence teams, negotiates transaction agreements and supports implementation and post-acquisition integration.



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Remote work is likely here to stay. While having the ability to work from outside a corporate office has been feasible for a few decades – and available to a few – working remotely during the covid-19 pandemic became mainstream.

There are a variety of ways in which employees can work remotely and employers may look to institute policies to take advantage of this. For example, some people can work remotely for the majority of the working week, but must commute to in-person meetings once a week. Others may offer full remote opportunities that permit employees never to step foot in a commercial building again. It is unsurprising that remote work is here to stay given its benefits to both employers and employees. For employees, it may be a more flexible lifestyle, such as the ability to rid themselves of an hour commute and spend that time with children or partners, pursue continuing education at night because they can start their day earlier, or even more easily run errands such as a grocery trip or a doctor's appointment. Additionally, employees may find a renewed passion for their job and can become more inspired by their surroundings or avail themselves of a new perspective given they can curate their workspace how they see fit instead of staying in the classic commercial grade office.

For employers, remote work can lead to (and has shown) higher employee productivity. In fact, it is shown that remote employees are often more likely to put in extra effort in their jobs than in-office employees. According to Forbes, 25 per cent of all professional jobs in North America will be remote by the end of 2022, and remote opportunities will continue to increase through 2023. Additionally, remote employees may be great for a company's bottom line. If a team is fully remote (or partially) employers may see decreased overhead from money saved on costs such as rent and office furniture.

Given the benefits of remote work, it may appear a no-brainer. However, it is critical that employers fully understand the legal implications of allowing employees to work remotely. Remote employees are generally

subject to the laws of the city and state where they are physically located and perform work. Depending on state law and conflict of law principles, there may be exceptions for employees who are temporarily located in a state or not considered 'based' within a state. With employees working remotely outside their usual office locations, employers may need to familiarise themselves with the state and local employment laws of other jurisdictions. Failure to comply with state and local posting requirements, leave entitlements, wage and hour laws, can result in employee disputes that may lead to employer liability for lost wages, penalties, non-economic damages and attorneys' fees.

For best practices, employers should audit the location of their remote employees, assess how long the current telecommuting arrangements may remain in place and what steps may need to be taken. This questionnaire is intended to help guide what legal considerations an employer should evaluate when preparing for a more permanent or expansive remote workforce. Companies that envision a long-term remote workforce may consider modifying their practices and policies to comply with state and local requirements. This can be achieved by creating state-specific employee handbook addenda or stand-alone state policies. Internal human resources staff should be trained to identify that the company's obligations (eg, leave or pay) to remote workers may be different and coordinate closely with employment counsel to ensure compliance.

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INSIDE TRACK

Germany

Dr Michael Beer has a special knowledge of all aspects of the unbounded working environment. Michael not only regularly advises on the topics of mobile working, foreign assignments and the break-up of traditional working time systems, but also on all relevant questions of flexible personnel deployment (fixed-term employment, temporary employment, contracts for work and services including issues of artists' social insurance). In addition, his portfolio includes the support and implementation of necessary operational restructuring measures.

Janine Krupta-Soltane is a specialist in employment law and advises national and international clients in the entire field of individual and collective employment law. Her practice focuses in particular on HR employee data protection, drafting and negotiation of (IT) works agreements and issues in the area of HR data protection compliance. In addition, she advises on works constitution matters, especially with regard to restructuring and personnel adjustments. Furthermore, she negotiates with works councils and trade unions and regularly represents clients in court disputes, both in collective employment law and individual employment law matters.



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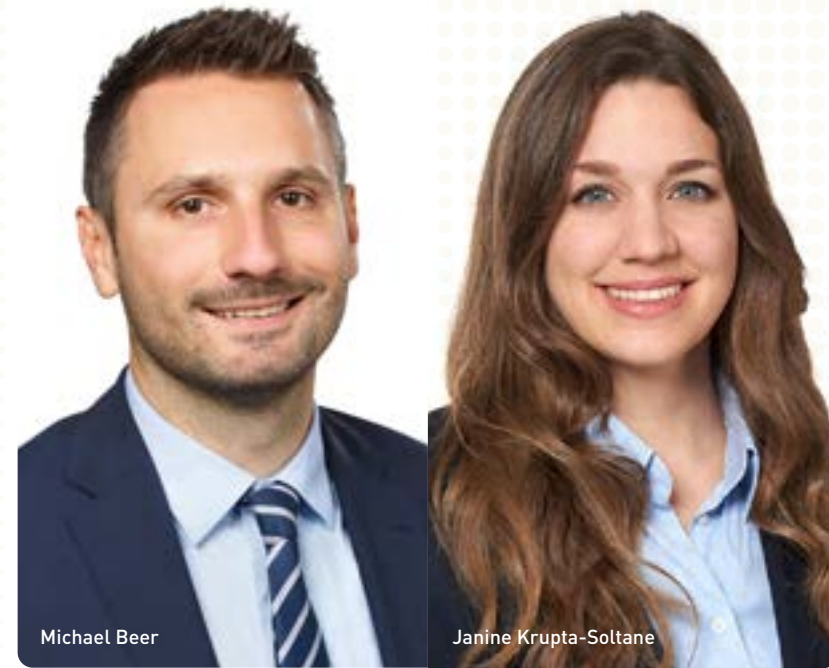


1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

The biggest challenge for all employers is that the sudden need for remote work will have to resolve the tension that exists between the employees' newborn interest in flexibility on the one hand and a very outdated legal situation on the other hand. Compared to other legal systems, German labour law enjoys the reputation of having everything regulated down to the smallest detail. Curiously enough, the exact opposite is the case when it comes to remote work. Most of the legal provisions that regulate the questions of 'how' and 'where' work is to be delivered are still designed assuming the traditional concept of employees coming to work at the employer's business premises. This is especially challenging as remote work is breaking down these classic work systems.

When implementing remote work policies, it is therefore first of all incredibly important to know which legal areas are affected by remote work. We often find that many employers are not even aware that remote work affects occupational health and safety obligations just as much as questions about the necessary data protection, accident insurance or possible participation rights of a works council. In addition, remote work becomes particularly exciting and conflictual when employees are not only working in their respective home office but are also allowed to work remotely abroad. In these cases, further problems arise with regard to the applicable labour law, the relevant social security obligations and necessary work permits. For these reasons and to safeguard the employer's legal position, the priority is not to allow remote work without a clear legal basis for this.

The war currently being waged in Ukraine and the associated rising energy costs are bringing an often little-noticed detail of remote work to the fore: employees who perform their work in a home office with



the knowledge and will of their employer generally have a legal claim to reimbursement of the associated (pro rata) electricity and heating costs, unless this claim is expressly excluded in a corresponding agreement. Employers are therefore well advised in 2022 to review their agreements to determine whether and how this reimbursement of costs is regulated.

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

In principle, a distinction must be made as to whether the employee works remotely in Germany or abroad.



“Companies need no longer look only at local markets with a limited pool of candidates, but can (theoretically) tap into the global labour market.”

Insofar as the employee works remotely within Germany, remote work provisions apply from the first day on. In this case, it is important to know that German labour law recognises three different manifestations (pure telework, alternating telework or remote work) of working outside the employers' business premises, which in turn are subject to different legal frameworks. In case of pure remote work the employee is basically allowed to work from anywhere and, thus, is not tied to a specific workplace and can perform his or her work from anywhere in the world. In contrast, if the employee decides to use a fixed workplace outside of the employers' business premises (eg, his or her home office), this is considered 'telework'. Whereas with telework the workplace must meet certain legal specifications (eg, specific equipment of the workplace, etc) from the first day of work, with mobile work the employee is still somewhat freer and can choose his or her workplace more flexibly. Employers must be careful: if the employee always chooses the same workplace over a longer period of time, initial remote work can very quickly turn into telework. The workplace must then meet the requirements applicable.

If the employee works remotely abroad, German labour law remains applicable. However, things may change if the employee spends more than 2 per cent of his or her working time abroad. In this case, it must be checked very carefully whether foreign tax, social security law and (at least selectively) foreign labour law provisions apply. This is always conceivable if the usual place of work shifts as a result of working abroad for several weeks or even months. In this case, it is often necessary to examine in detail whether the local regulations have been superseded by the specific norms of the country from which the employee is working.



3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

In Germany, employers cannot unilaterally impose different compensation packages if an employee voluntarily relocates. Instead, an employment contract is to be fulfilled just the way it has been originally concluded, regardless of any external circumstances. That is a core principle of German labour law. As a consequence, the employer cannot unilaterally reduce remuneration if the employee decides to move to a region with low living costs. Conversely, employees moving to a region with a higher cost of living cannot claim higher remuneration either.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

The pandemic has increased and accelerated the debate about flexible work from the office or from home/remotely in the case of office work. We observe that employers prefer to offer a hybrid-working model (eg, a mixture of presence in the office and certain days that the employee can work remotely). This often corresponds with employees' interests as the pandemic has also showed how important social interaction and events are for the team spirit and identification with the company.

The trend to limit possibilities for home workers has been growing in the past 12 months. Employers are increasingly moving to reduce the flexibility granted to employees. Large numbers of presence days in the office are being introduced again and the right to 'work from anywhere' is increasingly being restricted in the interest of bringing



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more and more employees back into the office. This trend continues to form part of public discussions. One prominent example is Elon Musk and his expectations of a 40-hour presence in the office each week or that Apple's former director of machine learning quit his job due to the obligation to return to office for three days a week.

Other companies, however, are more open to hiring remote workers or granting certain budgets for home-office equipment or well-being activities. These offers are used as part of the marketing and employer branding strategy and aim to increase employee satisfaction.



“The challenging question is always how to reconcile our clients’ wishes to adapt their working lives to the realities of the 21st century with local labour law. Creative and international solutions are often required.”

5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

Statutory vacation law and general provisions on PTO (such as sick leave) do not distinguish between employees working remotely or on the employer’s premises. Instead, the statutory minimum standard applies regardless of the specific place of work.

However, something different applies with regard to public holidays and possible claims to paid educational leave. Both are governed by the law of the federal state in which the employee actually works. Thus, if an employee decides to move his or her place of work, permanently, to another federal state, the public holiday and educational leave regulations of his or her new place of work apply to him or her. Employers should therefore always make sure of the applicable public holiday and educational leave policies when employees move their home office to another federal state.

6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

Principally, employers remain responsible for protecting confidential and proprietary information, irrespective of whether the employee works in the office or from home/remotely. Employers should inform, educate and instruct employees to keep business secrets as well as business data confidential. It is also necessary to implement technical measures and control mechanisms to secure business systems and data. Offering remote work also requires an update of data privacy notices, a review of processes and informing the employees correspondingly.



7 How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

Insofar as the employee only works remotely in Germany, no tax consequences arise from remote work. In particular, the remote work does not change anything about the employee's basic income tax liability, nor does it establish another taxable establishment of the employer at the employees' private residences, because the employer lacks the power of disposal over these residences. German tax authorities consider the power of disposal to be a constitutive feature for the establishment of a taxable presence.

However, things may become difficult if employees remotely work abroad with the employer's approval. In this case, it must be examined particularly closely whether the employees become liable to foreign income tax (this could be the case if the employee worked in Germany for less than 183 days) and whether a taxable permanent establishment is unintentionally established at the employer's expense in the foreign country. The danger of such a taxable permanent establishment under foreign law is particularly great if any form of economic success is achieved through the employee's work abroad. This can be the case in particular whenever the employee initiates, negotiates or concludes contracts abroad. In these cases, a tax adviser should always carefully examine any tax law implications.

8 What are some best practices for tracking remote work arrangements?

Employers have a legitimate interest in monitoring work performance and compliance with company or legal requirements like working time regulations. However, there are limits to the format and intensity of the checks. Total surveillance of employees is generally not permitted. Employers should also be careful using software to track employee's activities or in using GPS tracker, which may also affect the employee's private lives.

Employees can be obliged to record their working time or report work results and the status of projects. Employers can implement spot checks, for example to control compliance with working time regulations. If a works council exists, co-determination rights must be observed.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

Remote working opens up new opportunities, especially for employers in highly competitive markets to fulfil their need for bright minds. Companies need no longer look only at local markets with a limited pool of candidates, but can (theoretically) tap into the global labour market. We will therefore see an increasing internationalisation of work in the coming years. Teams will regularly be made up not only of many different nationalities, but also spread all over the world.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

The positive impact of flexibility often results in additional organisational processes, for example, employers must provide technical support to their employees working from home. New working models therefore need support by internal organisational measures.

Onboarding new staff may be more complicated if employees are not working at the same place of work. Knowledge transfer and use of internal resources as well of collaboration between different teams may be more difficult and, therefore, require specific coordination and tools to bring people together.

If employees are working 100 per cent remotely, it may lead to a loss of identification with the company and therefore a higher

staff turnover. The creation of a good working environment with development opportunities as well as company events are only a few examples of binding staff.

In the past 12 months, one problem has also proved to be a constant topic of legal advice: how to deal with (suspected) qualitative or quantitative underperformance of remote worker. In the coming years, Employers will, therefore, increasingly be thinking about how to manage the performance of remote workers sensibly and what measures can be implemented if performance targets are not met.

What do you enjoy most about practising and advising in this area?

Advising companies on all aspects of remote work is particularly exciting for us because we support our clients in disrupting traditional forms of work. The challenging question is always how to reconcile our clients' wishes to adapt their working lives to the realities of the 21st century with local labour law. Creative and international solutions are often required. We are already noticing that our clients are no longer only asking for labour law in one jurisdiction, but are relying on us to provide quick solutions in these cross-border cases.



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INSIDE TRACK

Italy

Angelo Zambelli is founding and managing partner of Zambelli & Partners.

With an outstanding reputation in employment and labour law, industrial relations agency contracts and labour litigation, he has in-depth knowledge in the planning and implementation of extraordinary finance operations and restructuring plans, including reorganisation and downsizing of companies.

Angelo is the author of several books, among them *Employment and Labour Law Handbook* – Il Sole 24 Ore, 2019; *Company Crisis and Employment Relationship* – Il Sole 24 Ore, 2018; *International Labour and Employment Compliance Handbook* – IBA and Wolters Kluwer (2013–2021).

He was awarded Best Lawyer of the Year at the Legalcommunity Labour Awards (2017, 2015 and 2014), Best Lawyer of the Year for Industrial Relations and Trade Unions (2021, 2013 and 2012) and Best Lawyer of the Year for Restructuring (2020). He was awarded Employment Lawyer of the Year at *Le Fonti* (2021 and 2018).

He is ranked among the top 30 leading lawyers in Italy by *Legalcommunity* and *GQ* magazine and included among the four 'Most Highly Regarded' Italian employment lawyers by *Who's Who Legal* (2018, 2019, 2020 and 2021) and *The Legal 500* in its 'Hall of Fame'. He is classified as a 'star' in the Italian labour market by *Legalcommunity*.



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1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

Remote working, also defined under Italian law as ‘smart working’ or ‘agile work’, was conceived by the Italian legislature as a way of working characterised by the absence of time or space constraints and organised by phases, cycles and objectives. It was envisioned to achieve a level of work-life balance and increase productivity. Although many Italian employers have always been rather reluctant to embrace the idea that their employees would not come to the office to perform their tasks, in the past years we have seen a considerable recourse to remote working as one of the main instruments in containing the spread of the covid-19 pandemic. Despite the circulation restrictions imposed by the government in the wake of the lockdowns caused by the pandemic, companies were able to operate and continue providing their services through remote working without interruption. Beyond the fact that it seems that remote working may still represent a useful remedy to cope with the pandemic, it is clear that working remotely will not be only an answer to a transitory emergency, but will contribute to a real transformation of the traditional work. To this end, it is fundamental for employers to identify the key issues connected to such change in the labour market, in which employees would not get paid by being in the workplace for their working hours, but for achieving goals and performing well. While the possibility of determining ‘where and when’ for working can be more functional and would potentially allow employees to work endlessly, such accessibility must be properly regulated so that this new working procedure will not endanger the employees or the employers. Employers remain responsible for the health and safety of their employees and, therefore, they must protect the psycho-physical integrity of the worker regardless of the place where the work is performed. Employees must receive adequate information



on the health and safety measures applicable to the workplace. Moreover, as remote working would expose employees to constant work-related communications such as email and messages, this circumstance shall be monitored by proper tools that would effectively allow workers to disconnect from work. Working time shall not exceed its legal and contractual duration. The right of disconnection is expressly acknowledged under the law. It is also stated that those who exercise the right to disconnect shall not be subject to any negative consequences on employment relationship, also in terms of economic treatment. Employers are not prohibited from sending their employees email outside of working hours, but the law recognises the employee’s right not to open it during the hours of disconnection, without thereby incurring disciplinary sanctions or other retaliatory measures. Some national collective bargaining agreements and some corporate policies have already included specific regulation



“When people talk about remote working, they may imagine themselves on the beach of a Pacific island typing on their keyboard and sipping a freshly squeezed juice..”

of the ‘right to disconnect’ from work. However, there are still many companies that have not taken any material action to enable the exercise of the right of disconnection, and this is one of the matters that company policies must address. In addition, considering that employees may access work material from anywhere through any work device or even through personal tools, it is fundamental that they are informed about the correct use of the work tools they are assigned and made aware of the privacy and security policy in force to avoid sensitive information falling into ‘insecure environment’. The obligations that remote workers shall comply with, however, shall be expressly stated under the policy or the individual agreements governing remote working, and employees must be made aware of any disciplinary consequences of their actions (or omissions).

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

There is no minimum threshold to determine when remote working (or smart working) rules shall apply. Once the employee and the employer agree that the employee may render part of the working activities outside the company premises – even for half day a month – the relevant remote working rules shall apply. Moreover, the remote working we have seen during lockdowns was just an emergency adaptation of office work at home better known in Italy as teleworking. Teleworking (ie, working remotely during the entire working hours) was conceived more than 20 years ago as a mere relocation of the workplace: from office to home. However, because of the difficulties employers might have had in trusting their employees to work from home, teleworking did not have a great impact on the Italian work environment scene. Conversely, remote working as envisaged by the Italian legislature in 2017 would include some days in the office, fixed or as needed, and the possibility to work from workplaces other than the company premises or home. As we can see, remote working (or smart working) differs from teleworking in its flexibility and the possibility for an employee to establish the time and the place of work within the contractual and legal limitation of the employment relationship. Unlike teleworking, remote working rules do not determine how many days shall be rendered remotely and any arrangements are regulated under the individual agreement between the employer and the employee, to the extent allowed under the law. The parties are substantially free to agree on the days the employee may remotely work.



3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

When people talk about remote working, they may imagine themselves on the beach of a Pacific island typing on their keyboard and sipping a freshly squeezed juice. After all, getting rid of the stress of commuting and working from idyllic places would seem to be a great perk for many employees. Let us say that this dream comes true and the employer might reasonably be minded to reduce the salary of the employee, assuming that his or her new worklife would not warrant the same remuneration as previously. Theoretically, this might make sense. However, under the Italian labour law, should the employee and the employer agree that the employee may work remotely and, subsequently, the employee decides to move away, the employer may not unilaterally change the economic treatment of the employee. In general, the employer may not worsen the economic treatment contractually agreed with the employee. Such an amendment may be enforceable only through agreements between the employer and the employee that are executed by following specific procedures. Caution is required to safeguard the employee's position and any decision that would worsen their treatment shall be taken under precise and definite conditions. In the past years of the covid-19 pandemic, many workers decided to leave big cities such as Milan or Rome to stay in their hometowns or in the countryside where the cost of living is much lower. However, this did not allow the companies to lower the salaries of the employees. In addition, the Italian rules on remote working provide that the employees who work remotely have the right to economic and regulatory treatment that cannot be worse than those applied to employees who perform the same duties on company premises only. In other words, the application of remote working by itself may not justify a reduction of salary even if the employee decided to relocate to a place where the cost of living



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is much lower. This, obviously, would not apply for indemnities or compensation granted in connection with how working activities are performed. For instance, if a worker who receives a cashier's allowance starts to work remotely and stops doing cashiers-related duties, he or she would no longer be entitled to receive the cashier's allowance.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

In the current covid-19 context where working in the office remains discouraged, companies are tending to hire new employees and allowing them to work remotely. This trend will remain appealing when the emergency is over. Many employers are already implementing flexible working initiatives consistent with the corporate



“It is necessary to combine individualism and team working by creating a work environment that will reduce the physical distance, motivate collaboration and encourage participation in teamwork activity and company productivity.”

culture oriented to work-life balance and employee well-being. The pandemic triggered several measures that supported employees with children when the schools were closed and, very recently, the government has approved a new regulation transposing the Directive (EU) 2019/1158 on work-life balance for parents and carers who will have priority when they will request to work remotely. Besides the benefit deriving from remote working, such as having a flexible working schedule, saving commuting time, cost of petrol or food, there are also some good reasons for companies to shift to more remote work: employers can benefit just as much from remote work agreements as their employees do. Remote working can offer companies cost savings, and many established businesses have already managed to reduce expenses. With most employees working remotely, companies can considerably reduce real estate costs. It is possible to pay for smaller premises and lower maintenance and support costs for electricity, heating, air conditioning and all the other little necessities that keep an office operating. With reduced staff on-site, refreshment and cleaning services are also likely to decline. Beyond the direct costs savings deriving from remote working, there are also other benefits that can save money in the long term. Offering remote working can be a good reason for employees not to leave a company. The remote working experience incentivises people to stay loyal and could help to reduce employee turnover. Flexible work arrangements may have positive effects on the company organisation, so once the pandemic is over many companies will be prepared for employees wanting to continue working remotely. Working from home is an advantage but it is appropriate for people to stay in touch with the company. Remote working shall be managed within the subordinate structure of the employment relationship by a clear arrangement that provides for both rights and obligations. While the idea of moving away and working from places other than the employer's premises may sound like the future of normal working life, employers shall be enabled to exercise their directive powers and request – for instance – that remote workers come to office at any



time and giving them proper advance notice. From this perspective, it is clear that flexibility afforded by remote working shall be based upon an arrangement between the employee and the employer that sets boundaries both parties shall take into account.

5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

Among the benefits that may arise from remote working there is also the possibility for the employee to choose the place of work without being necessarily bound to the national territory (although, in such a case, issues may arise whenever taxes and social security charges are paid to those authorities of the country in which the employee is formally employed, despite him or her regularly performing the work performance from a different country). This means that, in theory, remote working might be practicable even abroad, both within EU and outside the EU, if not otherwise arranged with the employer. The idea that with a good connection it is possible to work from anywhere gave rise to the prevailing vision of a covid-19-reformed work world made up of a large group of travelling remote workers. The concept of digital nomadism is still increasing, and it seems to have overshadowed the potential inconveniences from transnational issues associated with working abroad. Working remotely under an employment contract regulated by a foreign legal system may lead to difficulties that would make it very unrealistic for employees to work abroad on daily basis. One of the issues linked to working abroad concerns sick leave. In Italy, this matter is usually covered by the applicable national collective bargaining agreements or, if not expressly regulated thereunder, by the law. The Italian social security protection system grants employees a maximum of 180 days of paid sick leave a year. However, the length of this period varies

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considerably depending on the applicable collective agreement, as well as on any further period of unpaid sickness leave. Employees on sick leave are entitled to receive the relevant sickness allowance according to the provisions of the law or the applicable collective agreement and they cannot be dismissed unless for specific causes (eg, dismissal for severe misconduct by the employee). If employees hired under an Italian employment contract fall ill while staying abroad, as they are granted the very same leave entitlements as employees stationed at the employer's premises, they will have access to the Italian social security treatment upon submission of the relevant documentation collected in the remote work location. Absent such documentation, the employee may not benefit from the Italian sickness protection system. For this reason, before changing the work location, it is important that both employee and employer be aware of the correct procedure to follow to understand each other's rights and obligations should any problems arise while abroad.



“I am excited to see first-hand the evolution that innovation in technologies will bring in developing new models of work.”

6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

Most remote employees seem to enjoy the benefits of working from home thanks to the possibility of working from anywhere and any time, without being forced to follow a time schedule or to be stuck in traffic congestion in rush hours. Although this possibility to work from anywhere and around the clock added a huge shift towards remote working, such accessibility is currently a cause of concern for some people. Accessible company information will inevitably make this information vulnerable to attack from third parties. Along with the spread of remote working, cybercrime seems to have increased. There are many methods to avoid external attacks, and remote employees will need to be properly informed and trained on how to keep networks and systems secure and to ensure company data and business information security. For instance, IT professionals would recommend using a VPN system that would enable remote workers to prevent intruders from accessing data, and they discourage the use of public Wi-Fi. Companies should adopt IT security systems that use an encryption process to scramble data text so that hackers cannot read it. Another risk connected with remote workspaces is the likeliness of losing devices containing confidential or sensitive information. To reduce the risk of access to this information, it is possible to use an encryption system that makes company data inaccessible. To this end, it would be helpful to adopt more than one authentication method to secure computer network. Those are useful tools the company should bear in mind when it allows employees to work remotely. The implementation of a security system is essential, but it is more important that the people using it are properly instructed and trained. Companies need to implement policies that employees must abide by when they work remotely. It is imperative to establish rules regarding the correct and proper use of the technological devices and which behaviour should be avoided to mitigate any risk arising from



working outside company premises. To make these rules effective and discourage employees from behaving, company policies shall state clearly that failing to comply with the policies will bring disciplinary consequences. However, according to current market practice, employers – rather than implementing such policies – seem to simply preventing remote employees from working from certain locations – such as public places or those open to the public – where a disclosure of confidential information may take place. Thus, they are clearly setting out a specific prohibition under the individual agreement governing remote working.

7 How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

The possibilities of working in Italy for foreign employer are significantly increasing. One of the recurrent cases now regards Italian or even foreign workers who decide to move to Italy while having an employment contract with a foreign company. However, this may imply significant risks from both a tax and social security standpoint. First of all, according to rules governing this issue, both taxes and social security charges are to be paid to the authorities of the country where the work is performed by the relevant employee (as far as taxes are concerned, a 183-day per year threshold applies). Therefore, whenever taxes and social security charges continue to be paid to those authorities of the country in which the employee is formally employed. Despite the person working from a different country, the risk exists that the one of the countries in which the work is remotely performed may claim for payment of the omitted taxes and social security charges. This claim would be addressed to the employer if – as happens in Italy – the latter acts

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as withholding agent with respect to both taxes and social security charges due by its employees. Moreover, the risk that such conduct may lead to a permanent establishment (PE) of the employee exists and is concrete. The Organisation for Economic Cooperation and Development considers a PE to be a fixed place of business through which the operations are wholly or partly carried out continuously. Based on the assumption that the remote worker would not conduct any business on behalf of the overseas employer by simply working from home, for tax purposes the engagement of the remote worker should not be considered as a PE. However, this does not exclude the fact that an employee working from a home-town overseas or a holiday home for quite a long period could not create a PE for the organisation. As an example, for a remote employee acting as a sales manager who sends products descriptions to potential clients without needing to negotiate a contract, it would be quite unlikely that such circumstance would be considered a PE. Conversely, if the activity of the sales employee included negotiation and execution of contracts in Italy on behalf of the foreign entity, it cannot be excluded that the



tax authority may consider such activity a PE. If the activity performed in Italy by the employee hired overseas triggers the existence of a PE of the company in accordance with Italian tax law and the tax treaty it shall be evaluated based on the actual activities carried out by the employee in Italy. Any time a foreign entity agree that an employee would work remotely and abroad it should evaluate whether such a situation would constitute a risk to be subject to the local taxation law.

8 What are some best practices for tracking remote work arrangements?

According to the Italian law on 'ordinary' remote working, employers and employees shall agree upon remote working by executing a written individual agreement whereby terms of working outside the employer's premises are defined. This agreement establishes the rules the workers shall abide by while performing their working activities remotely. Given the fact that Italian law provides for remote work arrangements to be executed in writing, including for probative purposes, companies have been forced to somehow track all remote work agreements. However, to allow recourse to remote working during the pandemic emergency, the employer was enabled to activate remote working by submitting the relevant communication to the competent Italian authority without the need to sign an individual agreement. The possibility to implement remote work by such simplified procedure did not blow over even after the Italian government declared the end of state of emergency. Remote working is still widely used as an effective instrument to avoid physical contact and helps to mitigate the risk of contagion. Many Italian organisations are allowing their employees to work remotely. The recourse to remote working, however, shall be coordinated rather than randomly used or granted by the company. For this purpose, companies must keep abreast of all remote working arrangements and know precisely how productive remote working is within the organisation. It is

essential to monitor how many remote working arrangements are in place. This is also useful to ensure a proper balance between work at the office and remote working. For efficiency reasons, organisations should keep abreast of whether their offices are overcrowded or completely abandoned.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

Remote working may allow employees to work from anywhere without being in the office. I believe that the biggest challenge of the future work may consist in finding the right balance between presence in the office and remote work, shifting to a more hybrid working. It is necessary to combine individualism and team working by creating a work environment that will reduce the physical distance, motivate collaboration and encourage participation in teamwork activity and company productivity. It is unlikely that remote work will function in an environment characterised by a high rate of absenteeism, low participation and poor communication.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

A cultural shift is required. Remote working allows us to change the paradigm of work by evaluating results and not time, but it also requires a transformation of front-line managers who must learn to think and work differently. Companies will invest in training and development of managerial leadership to adopt methods that are aimed at improving delegation skills, setting work by objectives, specific goals and deadlines. Managers should be aware that measuring productivity should be more important than monitoring employees.

What do you enjoy most about practising and advising in this area?

Remote working is definitely a new challenge for the new world of work. Employment law has changed rapidly in the past 20 years, trying to find a compromise between the rigid structure of the subordinate employment relationship and the flexibility that characterises rather an autonomous and independent work relationship. As an advisor in this field, I am excited to see first-hand the evolution that innovation in technologies will bring in developing new models of work and the subsequent transition from the traditional work regime to the new uncharted territories of rather more flexible employment relationship.



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INSIDE TRACK

Japan

Yukiko Imazu, a partner, focuses her practice in the area of labour and employment and acts on behalf of both Japanese and non-Japanese companies in advising on labour and employment issues. She is also an experienced labour and employment litigator, having successfully defended many cases. She also gives seminars and training sessions regarding labour and employment matters tailored to clients' needs, both in Japanese and English. In particular, she gives a lot of harassment prevention seminars to non-Japanese companies, Japanese companies, Japanese governmental bodies and universities. She has been ranked in *Chambers Asia-Pacific*, *Best Lawyers* and *The Legal 500 Asia Pacific*.

Tomohiko Hamazaki, an associate, has provided advice to both Japanese and non-Japanese companies focused on employment and labour-related law, such as human resources and labour management, labour litigation, labour tribunal and other employment/labour disputes. He has written articles on recent labour issues such as covid-19, remote work and social media. He has also engaged in practices related to mergers and acquisitions, general corporate, and litigation and dispute resolutions.



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1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

The most consequential issue is whether a particular type of role is suitable for remote work. According to a survey carried out by various government agencies, the most common reason for abandoning remote work is the lack of jobs suitable for remote work. This is because there is a tendency in Japan to place importance on face-to-face communication, and thus the push to go paperless is not progressing quickly due to an emphasis in many sectors on physical stamps and original paper documents. Hence, even employers that have introduced remote work because of the covid-19 pandemic, such as those that require face-to-face communication to build customer relationships and those that have departments that handle original paper documents, will be phasing out remote working after the covid-19 pandemic is over. In fact, according to surveys conducted by several organisations, the number of companies that have introduced remote work increased in the first half of 2020, but the number gradually decreased between the second half of 2020 and 2021. According to that survey, the current percentage of companies in Japan that offer remote work options is around 20 per cent. However, the implementation rate has remained flat since then without any further decrease (as of 2022), indicating that remote work has taken root to some extent in Japan. In fact, one of Japan's largest companies made headlines when it announced a new policy that enables all its employees to work remotely.

The practical issues with remote work in Japan would be protecting sensitive information and managing employee performance. For these matters, please see our responses to questions 6 and 8.



Yukiko Imazu

Tomohiko
Hamazaki

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

In Japan, there is no such threshold and this determination is made by each individual employer based on its own needs and definitions.

3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

Under Japanese Labour Law, essentially, employers cannot unilaterally reduce wages without an employee's consent. Therefore,



“As remote work advances further, we expect that employers will be able to recruit workers from all over the country.”

even if an employee voluntarily moves away from their main work location, employers may not unilaterally impose lower locally appropriate compensation packages on them (for example, the employer may not unilaterally impose a lower base salary that is commensurate with the employee's experience in the local market) without the employee's consent. If the employer wants to do so without the employee's consent, the employer will need to introduce a new compensation system that includes payment of a special allowance called a regional allowance, which is tied to the place of residence, in addition to the employee's base salary. As the employer may establish the terms of the regional allowance at its discretion, the employer may set different amounts of regional allowances depending on the place of residence. Therefore, the employer may change the amount according to the relevant internal regulations when an employee relocates to an area where the cost of living is low (and conversely, if an employee relocates to a region where the cost of living is high, the employer will need to pay the higher regional allowance). What matters is that the amount of the regional allowance for each area and the terms of the regional allowance, including the

possibility of changing the amount as mentioned above, must be stipulated in the employer's salary regulations. According to a survey carried out by government agencies, about 10 per cent or more of companies, and about 30 per cent or more of companies with 1,000 or more employees, pay regional allowances. The average amount of such allowances is about ¥20,000 per month.

In addition, the Japanese government sets the minimum wage, which varies from region to region, and reviews it annually. Therefore, employers are always obliged to check whether employees' wages meet the minimum wage applicable to the area where the employee is relocated.

Furthermore, many Japanese companies provide a commuting allowance to compensate employees for the transportation expenses incurred by them when they commute to an office. Hence, an employer may decline to pay a commuting allowance if an employee has stopped commuting due to remote work. As a side note, instead of paying a commuting allowance, some companies provide special allowances to compensate employees for the costs incurred by them due to the use of utilities and internet facilities for remote work.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

We anticipate that the hiring of remote workers will increase. Remote workers can be recruited from anywhere in the country and remote work also reduces office space requirements. In addition, in Japan, transfers that require relocation are common, especially in the case of career-track employees. Such transfers that require relocation have a significant impact on employees' work-life balance and are one of the factors that hinder women's advancement in society. However, with



remote work, employees are able to undergo transfers without having to physically relocate. Because of these advantages, some companies have declared full remote work for all employees in Japan. In fact, one of Japan's largest companies made headlines when it announced a new policy that enables all its employees to work remotely.

The key practical issue to bear in mind when using remote employment is whether the work can be effectively done remotely, while complying with Japanese labour-related laws (including the Labour Standards Act). As we discussed in question 1, Japanese business culture and practices have traditionally emphasised face-to-face communication, and the transition to paperless work environments is not progressing quickly. Therefore, if an employer wants to hire remote workers, it may have to confront these practical issues at some point.

5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

For the former, no such leave is specifically given. For the latter, employees are able to use leave at both types of work locations.

As a side note, under Japanese Labour Law, an employer is not required to grant employees sick leave for personal reasons. However, this leave system is generally established voluntarily by each employer. It is therefore possible for employers to grant remote workers special leave rights.



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6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

It would be prudent to refer to the Telework Security Guidelines (https://www.soumu.go.jp/main_sosiki/cybersecurity/telework/) published by the Ministry of Internal Affairs and Communications and take measures in accordance with the characteristics and circumstances of each employer. The main contents of these guidelines are as follows:

- formulate and review security policies in light of environmental changes occurring in the implementation of remote work, and after that review, notify remote workers of the contents of the policies and share the policies with them;
- establish organisations and human resources necessary for implementing security measures and secure budgets as necessary;



“The widespread adoption of remote work requires a change in perceptions not only among employers but also among the general public.”

- select services with sufficient operating results and security functions when selecting services necessary for remote work;
- organise how such information will be used in remote work in accordance with the level of importance of such information. For example, prohibiting the removal of physical information from offices;
- develop an incident response plan to enable prompt response in the event of a security incident; and
- implement security training involving remote workers to improve the understanding and awareness of security throughout the organisation.

Of the above, practical measures to be taken at an early stage are those in the first point, third and fourth point from the list above.

7 How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

Practically, a remote employee is not expected to affect the tax obligations of the employer. Under the Corporate Tax Act, corporate enterprise tax and corporate inhabitant tax are levied by the municipality in which a corporation's office or place of business ('Office') is located. The authorities have explained that each municipality that wishes to tax an employer determines whether that remote worker's home is their employer's Office or not. Furthermore, this determination must comprehensively consider the definition of an Office (the three key requirements are the existence of human presence, physical equipment, and business continuity), though they did not provide any specific criteria. Therefore, in theory, if a municipality determines that an employee's home is also their office under the Corporate Tax Act, the employee will be subject to



corporate enterprise tax and corporate inhabitant tax, even at the employee's home. However, since there is no physical equipment (such as a company signboard) in their home, it is not likely that an employee's home will fall under the category of an Office just because the employee is working remotely.

8 What are some best practices for tracking remote work arrangements?

Regarding the management of working hours, it is necessary to take measures such as ex post facto checks to see if there are any mistakes or errors in the working hours declared by employees, in accordance with the Guidelines for the Promotion of Appropriate Introduction and Implementation of Telework (www.mhlw.go.jp/content/000759469.pdf) prepared by the Ministry of Health, Labour and Welfare. Under Japanese Labour Law, employers are obliged to keep track of their employees' working hours. However, in the case of remote work, it is generally impossible to objectively assess working hours by using time cards, and workers typically report their daily starting and end times by themselves through email (or other appropriate systems). Unfortunately, some employees may understate or overstate their working hours through the above-mentioned self-reporting system. Therefore, the above guidelines stipulate that the following points should be considered:

- Employees should be provided with sufficient explanation regarding the importance of appropriate declarations, and those who handle the management of working hours should be provided with sufficient explanations regarding the operation of the self-reporting system.
- If there is a significant discrepancy between the hours reported by an employee and objective facts relating to the actual hours worked, such as evidence that emails were sent outside reported

hours, or that the relevant work computer was active for a lengthy period of time outside of reported hours, then the employer should investigate the facts and, if necessary, make adjustments to the working hours based on those actual facts.

- The system should not be operated in such a way that impedes the proper reporting of working hours, such as by setting an upper limit on the number of hours of self-reportable overtime.

In addition, there is a risk of improper use of work-issued laptops because individual work situations cannot be accurately ascertained in the case of remote work. Therefore, to prevent improper use, it is useful to establish internal rules for monitoring information devices and servers. However, because employers need to be sensitive to employees' personal privacy, they cannot perform unnecessary monitoring, for example, by checking an employee's work status with a laptop camera or constantly monitoring the contents of emails.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

The biggest benefit of remote work is that it saves employees commuting time because employees do not have to commute every day. In the future, workers will not have to consider commuting time, so more people will live farther away from the city centre where their office is located. As remote work advances further, we expect that employers will be able to recruit workers from all over the country. In Japan, transfers that require relocation are common, especially in the case of career-track employees. However, employers that promote remote work are now moving to abolish these types of transfers. In Japan, it is not uncommon for employees to move away from their families in order to avoid frequent changes of residence and school for their children, but the advance of remote work may lead to a review of the existing transfer system.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

The problem in Japan is that there are many jobs where remote work cannot be introduced. The widespread adoption of remote work requires a change in perceptions not only among employers but also among the general public. In this regard, remote work is becoming more prevalent in Japanese society than we had imagined prior to the covid-19 pandemic. Several

large companies have announced their intention to make remote work a principle and to abolish transfers.

What do you enjoy most about practising and advising in this area?

What is interesting about this practice is that it provides insight into the state of remote work in different regions and industries. Until last year, we believed that the adoption of remote work was still not progressing quickly in Japan. However, the situation is changing by the minute, and we have come to realise that remote work is gradually gaining a foothold in Japan.



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INSIDE TRACK

United Kingdom

Katie Clark at McDermott Will & Emery LLP has significant experience advising on all aspects of contentious and non-contentious employment matters. Katie's client base spans multiple business sectors and includes global corporations, financial institutions, FTSE 100 companies, manufacturing companies, service providers and start-ups.

Katie is noted for her commercial approach to assisting clients to deal with employment issues ranging from day-to-day employee relations, to negotiating public limited company (PLC) board director contracts and significant business restructuring. Katie has particular experience litigating complex employment disputes, including those relating to team moves, restrictive covenants, discrimination and whistle-blowing. Katie also advises on the employment aspects of corporate transactions.

Paul McGrath advises clients across a broad range of industry sectors in all areas of contentious and non-contentious UK employment law. His practice covers all aspects of UK employment legislation and day-to-day employment matters, including appointments and terminations, employment status and worker classification issues, employment policies, employee data privacy, disciplinary and grievance issues, and restructuring and redundancy exercises.

Paul regularly advises on contentious claims for unfair dismissal, discrimination, whistle-blowing and breach of contract. As part of his non-contentious work, Paul advises on the employment aspects of all types of corporate transactions. Paul also has particular experience advising on the handling of employee-related privacy and data protection issues.



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1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

The immediate issues to consider are primarily non-legal ones.

At its core, what does the business actually need from its workforce to meet the needs of its customers and produce the operational outputs required to grow? To what extent is in-person attendance by staff undertaking particular roles essential (noting that organisations in some sectors have actually experienced increased productivity during extended periods of homeworking)? To what extent is it simply desirable for a certain reason? And to what extent might it actually be undesirable?

Aligned with that, forward-thinking employers will want to consider where they see their particular market heading over the next decade, the sort of culture they want to develop and, ultimately, what impact that is likely to have on their ability to attract and retain top talent.

Against that backdrop, the potential legal issues that employers have been considering include:

- Acting reasonably and consistently (as opposed to reasonably consistently!) – UK employment contracts contain an implied term that an employer will not do anything calculated or likely to destroy the mutual trust and confidence necessary to maintain the employment relationship. It will be important for employers to properly explain the rationale for any post-covid-19 working arrangements proposals, to consult with employees in some meaningful way about them and engage with any concerns raised.
- Avoiding unlawful discrimination and continuing promoting diversity and inclusion – this will include ensuring that any policies do not unjustifiably disadvantage groups of a particular characteristic (eg, disability or sex), ensuring that remote working



Katie Clark

Paul McGrath

policies are applied consistently to the extent possible and considering any reasonable adjustments. Many organisations have landed on some form of hybrid working arrangement, with many more employees splitting time between the office and working remotely. It has therefore become increasingly the norm for interactions to involve people participating remotely and others together in person. It would be advisable to train employees in the sorts of behaviours (often subconscious or unintentional) that could be problematic, for example, asking colleagues when they are next planning to work from the office rather than when they are coming back to work.

- Health and safety – employers are required to take steps that are reasonably necessary to ensure the health, safety and welfare of all employees, and to provide and maintain a safe system of work. This duty, including the obligation to undertake an individual risk



“Employment law is multifaceted, fast-paced and ever-evolving. No two days are ever the same.”

assessment, applies equally to employees working from home. Both the UK Health & Safety Executive and Acas have produced guidance to help employers in this regard.

- Confidentiality, proprietary information and cybersecurity – what additional risks does a remote working environment pose? And how can these sensibly be mitigated?
- Tax – depending on the precisely where an employee is working relative to their employer’s place of business (notably, if they are in different jurisdictions), there could be income tax, social security and corporation tax or permanent establishment-related risks to consider.
- Property law considerations – is the individual subject to any restrictions (for example, restrictive covenants in title or mortgage deeds that restrict an employee’s ability to undertake certain work activities from their home)?
- Regulatory considerations – if a firm is regulated by the Financial Conduct Authority (FCA) or the Prudential Regulatory Authority (PRA), employers should consider any applicable financial services regulatory requirements that may be impacted by its employees working from home and put in place measures to mitigate any risks. For instance, if an employee is working from home in another jurisdiction, depending on their role, this may trigger local regulatory or licensing requirements. Alternatively, can an employees’ trading activities be monitored in accordance with the firm’s market abuse policy and procedures when working from home?

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

In the UK there are no specific additional employment laws that apply just to remote workers and so there is no threshold by which to



determine whether a worker is to be classed as 'working remotely' for UK employment law purposes. However, existing rules and obligations must be applied to remote workers in the usual way.

As we mentioned earlier, one employer obligation that relates to work environment, and that an employer should not forget about, even if the worker is only working remotely one day a week, is the obligation to safeguard worker health and safety.

An employer is responsible for an employee's welfare, health and safety, so far as is reasonably practicable and must carry out a risk assessment of their employees' workplace. The assessment should identify any potential risks so the employer can then seek to remove or mitigate the risk. If an employee's workplace for one day a week is their home, then, strictly speaking, the risk assessment should be carried out. However, the assessment does not require a home visit and does not have to be burdensome.

There are certain threshold considerations to bear in mind when it comes to taxation matters, which will be discussed in more detail below.

3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

There are a couple of aspects to consider here; the mechanics of validly implementing a contractual change, and the legal sense in doing so.

Generally, employers in the UK cannot unilaterally impose changes to an employee's compensation package. Ultimately, it will depend on what individual contracts of employment (and, where relevant, collective bargaining agreements) say and how those terms apply to the particular circumstances. But it would be uncommon in

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our experience for a contract of employment to contain language specific enough to justify a unilateral pay reduction. So, any such proposal is likely to require agreement from the employee. In some circumstances, there could potentially be a redundancy situation (although this is more likely to be where a proposal is initiated by the employer).

There is, of course, a bigger practical question to consider here, which is what would the employer's rationale be for reducing the compensation package and is that coherent? For example, an employer might be tempted to say that it is because the employee will have cheaper living costs. That may be so, but that will typically be too simplistic an argument. For instance, any cost saving may be offset for the employee by higher commuting and overnight costs. Alternatively, a 'London weighting' may not only reflect the cost of living in London, but also the value and requirements of the job and the clients they service.



“An employer is responsible for an employee’s welfare, health and safety, so far as is reasonably practicable and must carry out a risk assessment of their employees’ workplace.”

The focus should remain on the required outputs of the role in question and what the rate that role commands (including relative to other employees undertaking work of an equal value). Otherwise, even if the employee agrees to the lesser compensation package, an employer may be unwittingly opening itself up to discrimination or equal pay type issues. At the least, depending on the profile of the particular workforce, any disparity could potentially have an adverse impact on an organisation’s gender pay gap.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

Many employers have had their eyes opened to the efficacy of remote working. It gives them the potential to save on real estate costs while maintaining productivity and giving employees the flexibility many want. Therefore, it seems almost certain that there will be a significant increase in employers hiring new staff on the basis of increased flexibility, allowing employees to work from home for at least some, if not most, of the time.

Having workers based overseas is a step beyond allowing staff to work from home periodically and has its challenges. However, it is a model that has worked during the pandemic, and it also significantly expands the pool of talent available to the business. Therefore, it does seem likely that there will be an increase in employers at least considering the concept of overseas remote working for the right candidate. There are some issues to bear in mind.

- Immigration – If the worker is based in their country of domicile, then immigration should not be a concern. However, if a worker intends to travel between countries, then care should be taken to ensure that they will not breach local immigration laws by working

in a particular jurisdiction. The term 'working' means different things in different countries and so assumptions should not be made about what is permissible.

- Tax issues – A UK national who elects to work abroad for an extended period may cease to be a UK tax resident. An individual is no longer automatically a UK tax resident if they spend fewer than 183 days in the UK in a tax year, although they may remain UK-resident depending on how many days they spend in the UK in any given tax year and how many connecting factors they retain with the UK. They can become liable to income tax in the country in which they are working, and employer and employee could also be liable to pay social security contributions in that country – though if the individual is still tax resident or performing the duties of their employment in the UK, he or she may still be liable for UK tax or national insurance contributions on some or all of their earnings. Perhaps significantly, the presence of a worker in another jurisdiction could create a taxable permanent establishment for an UK employer in that jurisdiction. It is, therefore, important for the employer to understand where the worker will be based, and what the relevant tax rules are.
- Insurance and benefits – the employer should consider whether the rules of its company provided benefit and insurance schemes cover workers who are based overseas. Private health insurance schemes in particular might not. The employer will need to consider whether it is appropriate to purchase extended international health cover for the individual, together with any National Insurance or social security-related implications.
- Health and safety – the employer's health and safety obligation explained in question 2 applies equally to workers based overseas. Therefore, the individual should complete a homeworking risk assessment. Local health and safety rules may also apply.
- Time difference – the employer should consider how any time difference between the UK and where the worker intends to be based might impact their ability to work as part of the team or

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productivity. The employer may require the individual to work during normal UK hours. If that is the case, it should be clearly communicated and agreed in writing.

- Trial period – the employer may wish to include a trial or probationary period that will allow both parties to see how the arrangement works in practice.
- Employment rights – depending on the jurisdiction in question and applicable local rules, it is conceivable that an overseas employment relationship will be governed by the laws of the local jurisdiction. These may differ (sometimes considerably) from the laws in that employers in the UK will be familiar with.





5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

UK employers with workers based overseas

UK employers need to be aware that an employee who is based abroad could be entitled to the benefit of mandatory employment rights and protections applicable in the country in which they are based. These often include minimum rates of pay, holiday entitlement and rights on termination. This is the case even if the employee has signed a contract that provides that the employment relationship is governed by English laws. The worker and employer cannot generally contract out of local mandatory employment laws.

The protections that apply will depend on the country in question. For example, French employment law provides that if workers carry out the majority of their work in France, they are entitled to five weeks' paid holiday plus 11 bank holidays, regardless of whether or not they are employed by a French entity or where the employer is based. This is more than the UK statutory entitlement of 5.6 weeks (which includes bank holidays).

Therefore, before taking on the remote worker, it will be important for the UK employer to satisfy itself that it knows what those entitlements might be.

However, as is often the case, an employee who has managed to secure an employer's agreement that he or she may work abroad is unlikely to raise these matters until the time comes for the relationship to end. If the UK employer is considering terminating the employment of a worker who is based abroad, it will be important to get local advice on whether there are any procedural steps to follow or additional entitlements on termination.

“[Remote working] can lead to a happier (and potentially more loyal) workforce, better focus on work and higher productivity and efficiency.”



Non-UK employers with employees based in the UK

In line with the principles set out above, workers based in the UK will benefit from UK mandatory laws. This includes the right for employees with at least two years' service not to be unfairly dismissed, which requires certain processes and procedures to be followed prior to dismissal.

6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

The initial step is to assess the particular or additional risks that might apply in respect of confidential information when an employee is working remotely. For instance, what devices will the employee use to carry out their work? Who else could have access to their workspace? What hardcopy material could or will they be handling? The risk profile will differ slightly from organisation to organisation, role to role.

Having identified those key risks, the next step ought then to be to develop suitable policies and procedures to address them. In many instances, the core principles are likely to already be enshrined in existing policies that may simply need tweaking. In other instances, new procedures, facilities or equipment may be required. For instance, permitting access to employer-provided technology to avoid company business being handled on personal devices (potentially shared by others in the same property), providing a facility for the safe disposal of confidential waste and setting clear expectations of expected behaviours.

The third aspect of this is promoting awareness of the employer's expectations in this regard and providing training where appropriate.

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The thrust of this will be reminding employees that risks to the business apply equally, and may even be greater, when working remotely and of the need to maintain their guard and comply with company policies at all times. While the primary focus of this will necessarily be on protecting confidential and proprietary information, it would also be advisable to ensure that clear expectations are set of what steps employees should take in the event of a breach of confidentiality.

Longer term, employers may wish to review their contracts of employment and consider introducing additional homeworking provisions, certainly for new hires. For instance, incorporating some core requirements and best practices mentioned above as contractual obligations. Conceivably, this could also include a right to access the home workplace at reasonable times to maintain any company property and, if not returned voluntary, recover company property and confidential and proprietary information on or after termination of employment. Employers may also wish to ensure that employees have opted out of the 48-hour average weekly limit obligation under the



“Remote working also opens up the job market to those for whom working away from the home would have been a challenge. Parents and those with disabilities are particularly likely to benefit.”

Working Time Regulations when the employment contract is entered into as an employee's working hours may not be monitored in the same way when working remotely, as compared with office working.

It is worth bearing in mind too that this is not simply a question of an employer protecting its confidential and proprietary information for its own purposes. Any information that contains personal data is likely to trigger compliance obligations under the Data Protection Act 2018, UK General Data Protection Regulation and potentially other applicable privacy legislation. This will include the obligation to take appropriate technological and organisational steps to ensure the protection of personal data, and to report data breaches promptly. In this regard, there is some additional best practice guidance provided for employers and employees alike in guidance issued by the Information Commissioner's Office.

7 How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

We have alluded to this a few times already. It is a really important issue for employers to consider.

The biggest issue for employers generally is that an employee working remotely in another jurisdiction may create a taxable presence in that jurisdiction for the employer. The threshold for creating a taxable presence will depend on the domestic tax law provisions of the jurisdiction in which the employee is working.

However, where there is a double tax treaty in place between the two jurisdictions, a taxable presence will normally only arise where the employee's activities give rise to a 'permanent establishment' in the



relevant jurisdiction. In most tax treaties, a 'permanent establishment' is defined as a fixed place of business or an agent (other than one of independent status) who has and habitually exercises authority to conclude contracts on behalf of the enterprise, although some tax treaties (particularly those to which developing countries are party) use a broader definition to catch the provision of services within the jurisdiction. Some jurisdictions introduced temporary changes to law or guidance during the pandemic to accommodate individuals working remotely during lockdowns, but one should proceed on the basis that these relaxations have now ceased.

The precise analysis will generally depend on the nature of the activities being performed by the employee and the manner in which they are being performed. The longer the individual works remotely, the greater the risk of creating a taxable presence. The exposure is, broadly, likely to be greater for individuals engaged in revenue-generating roles or those engaging directly with the employer's customers than it is for individuals working purely in internal, administrative or back-office roles. Separately, and regardless of whether it has a taxable presence in respect of the employee's activities, an employer may also be subject to an obligation to withhold income taxes from salary payments made to the employee in the jurisdiction in which he or she is working, and be obliged to make social security or similar contributions.

The terms of any applicable double tax treaty or social security contribution agreement will need to be considered in this regard too.

So, in short, any proposed arrangement that involves an employee working in a different jurisdiction needs to be considered particularly carefully at the outset.

8 What are some best practices for tracking remote work arrangements?

The worker needs to understand the potential liability that could arise from them working from a location the employer does not know about. It must be a written term of the engagement that:

- the worker must inform the employer at the outset where he or she will be based throughout the engagement;
- the worker must tell the employer in advance, in writing, if he or she intends to change location;
- the employer reserves the right to refuse consent for the individual to work from any location, other than those disclosed at the outset of the arrangement; and
- the worker agrees to indemnify the employer against any liability incurred by the employer as a result of his or her non-compliance.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

Not having to spend considerable time commuting is a significant benefit for remote workers. They are able to use the extra time with family, friends or in rest and relaxation. This can prevent workers feeling as though they are on a treadmill and increase satisfaction with work-life balance. That can lead to a happier (and potentially more loyal) workforce, better focus on work and higher productivity and efficiency.

That, combined with the potential for lower business infrastructure costs, means a potential win-win for employer and employee. Remote working also opens up the job market to those for whom working away from the home would have been a challenge. Parents and those with disabilities are particularly likely to benefit.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

In some organisations, junior team members will keenly feel the absence of experienced senior managers in the office daily. They will miss out on the opportunities to learn 'by osmosis', which may negatively impact their learning curve. Employers should ensure that line managers are trained in the different ways of managing remotely and understand that

the development of junior staff members is a key performance target that they need to meet if they want to continue working remotely.

What do you enjoy most about practising and advising in this area?

Employment law is multifaceted, fast-paced and ever-evolving. No two days are ever the same. Ultimately, for us it's about using our knowledge of the law to help our clients recruit and maintain a happy, motivated and productive workforce that allows them to achieve their commercial objectives. Remote working practices are clearly high up the corporate agenda currently and they provide a real opportunity for employers to distinguish themselves – for better or worse – in the sector in which they operate.



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INSIDE TRACK

United States

Lindsay F Ditlow is an employment adviser on a variety of domestic employment law matters. She is one of the leaders of McDermott's COVID-19 Employment Task Force and advises employers on a wide range of covid-19 measures, including federal, state and local leave obligations, furloughs and layoffs, cost-cutting measures, accommodations, health and safety obligations, return-to-work procedures and policy review and implementation.

Lindsay provides trusted counsel to US and multinational companies on all aspects of the employment relationship. She regularly advises on employment structures, onboarding requirements, employment agreements, non-competes, international assignments, handbooks and policies, employee leave, workplace accommodations, furloughs and individual and collective dismissals. She assists employers with these matters in the US and when they are expanding abroad. She partners with clients in a wide range of industries, including healthcare, life sciences, technology, energy, manufacturing and communications.

Lindsay has extensive experience handling employment issues in the US market involving mergers and acquisitions, compliance, divestitures, carve-outs, spin-offs, corporate reorganisations, post-acquisition integrations and outsourcings. She provides strategic advice to clients on HR-related deal issues, coordinates due diligence teams, negotiates transaction agreements and supports implementation and post-acquisition integration.



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1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

A critical issue for employers to consider when evaluating post-covid policies generally is how the viability of the new 'remote' workplace will impact business operations, including competition for top talent, going forward. Throughout the pandemic, many employers have learned that their prior assumptions on the viability of remote work were not necessarily correct. Assuming the tight job market trend in the United States continues post-pandemic, employers will need to be ready for continued remote work requests. One of the more difficult legal challenges remote work arrangements raise for employers is compliance with a myriad number of federal, state and local leave of absence laws, such as the Family Medical Leave Act and any similar local sick leave or medical leave laws. These can not only differ from state to state, but also from state to city. Another aspect that can unfortunately catch employers in a tough situation is ensuring compliance with wage and hour laws for each given state. For example, if an employer has an exempt remote worker earning the minimum allotted salary in Illinois, but then moves to California to begin remote work, the employee's salary may no longer meet the minimum threshold for a correct exempt classification. In the same vein, for non-exempt employees it is critical to make clear off-the-clock work policies so as not to expose the employer to unpaid overtime issues.



Lindsay F Ditlow

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

Not surprisingly, it depends. In the context of wage and hour laws, an employee avails themselves of those protections almost immediately. Using our example in question 1, if the employee now working in California is no longer properly exempt because of a salary threshold issue, the employee could pretty quickly bring a dispute under wage and hour laws. Alternatively, the threshold for tax implications (such as income withholding) may be longer as discussed in question 7. Finally, with leave laws, the threshold could be amount of money earned from the employer in a state, or an amount of time working in that state (ie, 12 months).



“What we have seen throughout the pandemic (in a positive light) is that employees are getting to see more of their families, travel more and have the flexibility to run to the grocery store on a lunch break rather than rush after an exhausting work day. ”

3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

Probably, yes. The employer can likely unilaterally change an employee's compensation package, provided they are employed at-will and not on a contractual basis. For example, living in San Francisco has a higher cost of living than living in St Louis.

Historically, part of salaries are based on cost of living. So, where an employee has unilaterally determined where they will live, the employer will have the opportunity (at the appropriate time, say annual reviews) to make a change in compensation. If an employer is contemplating a compensation change, it should also consider non-legal factors, such as the job market. As mentioned above, the US is currently experiencing a war for talent, and therefore this may influence an employer's decision to change (or not change) an employee's compensation due to work location changes.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

Practically speaking, it depends on whether the hiring employer is allowing the potential employee to fully work remote or whether it will expect some amount of face-time in the office. However, we have seen a trend in some industries, such as tech, where employers are allowing employees to voluntarily work remotely. Additionally, in these same industries, we are seeing initial job offers with an opportunity to work fully remote without ever stepping foot in an office. But we do not expect a trend to complete cessation of in-person office work,



which is why the hybrid model has been alluring to many employers during the pandemic. Despite whether an employee is fully remote or in a hybrid office setting, the laws apply evenly. That is to say, even if a hybrid employee spends Monday, Thursday and Friday at their lake house in Wisconsin, but commutes into a commercial office into Chicago Tuesday and Wednesday, the laws do not discriminate based on days in the office versus remote.

5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

An employee's mere status as 'remote' does not per se entitle them to more generous leave entitlements. However, if an employee is performing services in a location that provides more generous leave entitlements, then similarly situated remote workers may be entitled to different local leave benefits based on the location where they are performing work. It is likely remote employees can only avail themselves of the leave laws of the jurisdiction they are currently occupying, and not both the primary work location and remote work location. Thus, it is critical that in an employer's remote work policies there are mechanisms in place for employees to frequently report the location, including city and state, they are performing work in at any given time so the employer may track whether they are entitled to statutory leave of absence under the laws of the location where they are working. For example, if an employee is remotely working in Illinois for two months and then travels to Massachusetts for two months (but earns more than \$5,400), and during that time was injured or became ill, the employee would be entitled to leave under Massachusetts rules, and therefore the employer must be aware of and in compliance with those local laws.

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Critically, under the federal Family Medical Leave Act, however, an employee's residence (the most likely remote work location) is not a worksite. Rather, the work-site is the office to which he or she reports and from which assignments are made.

6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

The first thing an employer will want to do is implement a fulsome telework or remote work policy that outlines exactly what is expected of the employee as it relates to protecting confidential and proprietary information. This policy should include the standard instructions such: as working in a private area within the home where third parties cannot view the work (one could provide screen privacy protectors that shield the view of the screen unless directly in front of it), locking the workstation when not in use, implementing a VPN log-in, consistently updating computer software, providing shredders to



employees at their remote location, and (if available under the law) having employees sign confidential and proprietary non-disclosure agreements. It is also important to have a specific and readily available list of what the employer deems confidential information so that the employee has a full understanding of where their duties and obligations lie for nondisclosure of the same.

7 How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

One tax obligation that remote work affects is income tax withholdings. For Illinois, tax withholding is based on where the employee is working. In 2020, Illinois adopted a rule that employers must withhold Illinois income tax for out-of-state employees who work in the state for more than 30 days. Importantly, employers with remote workers need to track these local requirements. For example, in Illinois, an employer may need to register with the Department of Revenue and withhold Illinois income taxes for a resident employee that spends more than 30 days working from home in Illinois. Finally, Illinois has what are known as reciprocity agreements for income tax, which means that two states allow its residents to only pay tax on where they live – instead of where they work. In Illinois, if an employee is working in Iowa, Kentucky, Michigan or Wisconsin, the employer can, but is not required to, withhold income tax for both states. However, if the employee is working in Massachusetts but is paid in Illinois, the law may require the employer to withhold under both state laws.

Given these complexities with tax compliance, employers should have robust systems in place for tracking remote employees, including their physical work locations and times spent in all work locations.

8 What are some best practices for tracking remote work arrangements?

Track, track, track your remote workers, and when in doubt, write it out. In addition to having robust systems in place for tracking remote employees, employers should implement comprehensive remote work programmes, including best practice policies, remote work agreements or policy acknowledgements. Finally, employees (including managers and supervisors) should be trained on the remote work policies and arrangements, including how these policies are the same or different from the organisation's normal workplace protocols.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

The availability of remote work offers employers many benefits. Some that come to mind are curbing the classic burnout. What we have seen throughout the pandemic (in a positive light) is that employees are getting to see more of their families, travel more and have the flexibility to run to the grocery store on a lunch break rather than rush after an exhausting work day. These small factors can play a big role in an employee's ability to remain positive and continue to produce excellent work product. It also allows employees to learn and engage with coworkers or supervisors they may not have otherwise been exposed to, which is critical for creativity, strategy and company growth. Sometimes, the same team in a conference room may not generate as many ideas over the years. When you mix up the groups (which is easier via a platform like Zoom) an employer not only allows employees to re-engage with others, but it allows diversity of thought where it may not have otherwise occurred.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

Some of the more difficult challenges include the speed at which we are seeing so many changes in laws and guidance (which also can be refreshing). When there are varying work locations with different laws and guidance, it becomes crucial

to track compliance with the state and local laws for each work location, physical and remote. It is also important not just to know about the laws, but consistently and promptly implement policies and procedures to remain in compliance, whether that be making sure an employer's human resources and payroll department is on top of payroll withholdings or accrued leave under specific laws. These changes can occur month to month, so it is critical that an employer has mechanisms in place to quickly adapt, and engaging employment counsel can relieve such a heavy burden.

What do you enjoy most about practising and advising in this area?

Being at the forefront of emerging advice and counsel for our clients and developing new strategies relating to the ongoing, and ever evolving, covid-19 pandemic.



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