

# Managing the employment compliance curve: what to focus on in 2022

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**Kim Sartin, Partner, and Rachel Farr, Knowledge Lawyer, at Baker McKenzie LLP discuss the tricky course employers have to navigate in a shifting compliance landscape and explain what to focus on in 2022**

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2021 was challenging for everyone. For employers in particular, Covid-19 continued to disrupt, with the shifting sands of stay at home orders and health and safety rules to negotiate whilst seeking to retain staff in the face of burn out and the Great Resignation.

Alongside this, high profile campaigns such as #MeToo, BLM and the recent COP26 conference have ensured that environmental, social and governance (ESG) factors are the subject of greater than ever focus by not only employees and unions but investors, customers, regulators and the media. Businesses have to balance the needs and demands of these stakeholders, while facing increasing scrutiny and enforcement action by regulators as well as greater employee activism.

This article considers the key challenges for UK employers over the next 12 months and beyond as they navigate this increasingly complex landscape before addressing a number of areas where there is likely to be increased enforcement focus in 2022.

## Employers' key challenges for 2022 and beyond

As we move through 2022, there are several major areas on which employers should focus, as considered below.

### The impact of Covid-19

The effects of the pandemic continue to shape workplace policies and practices, with national measures varying widely, and frequently changing at short notice, making it tricky for employers to operate consistent organisation-wide policies whilst managing local compliance.

Whilst the practice of hybrid and remote working remains the norm for some, employees at many organisations have been attending the workplace throughout. Although a lot of focus has been on the move to hybrid/remote work, employers with those attending the workplace will need to continue to grapple with health and safety rules, managing reluctant returners as well as more nuanced

issues such as maintaining workforce engagement for those in less flexible roles and handling tensions between vaccinated and unvaccinated staff.

Challenges also exist for those managing a hybrid or remote workforce. As well as seeking to ensure proper supervision of staff and productivity monitoring (whilst not falling foul of data privacy rules), there are reports of reduced workforce engagement and less scrutiny of the impact of working arrangements on inclusion and diversity issues (I&D). As we move into 2022 and these arrangements start to bed down, organisations will need to monitor their impact to ensure there are no unintended consequences.

At the time of writing, mandatory vaccinations for healthcare workers in the UK are still due to go ahead despite opposition in some quarters. There is also an increasing move towards mandatory vaccination in other markets, with the Austrian Parliament approving legislation in January 2022 mandating vaccinations for all adults. Whichever approach the UK ultimately adopts, employers are going to need to manage the ongoing health and safety of their staff.

### Health and safety

Health and safety compliance is not new. However, the pandemic has brought health and safety issues into greater focus, especially in traditionally "lower-risk" workplaces.

As a general rule, most countries have rules placing employers under a duty to do whatever is reasonably practicable to protect the health, safety and welfare of their workforce and others who may be affected by their business. In the UK, employers must carry out a risk assessment to address all risks (including those from Covid-19) in the workplace, and must consult workers on health and safety issues either directly or through health and safety representatives.

In the 12 months to 31 March 2021, there was an 156% increase in health and safety related claims lodged with the employment tribunals in the UK. We expect those figures to increase in 2022 with claims from employees dismissed for refusing to work for

Covid-19 related reasons, or who claim constructive dismissal for resigning due to allegedly unsafe working environments.

Unions in the UK and elsewhere have also been supporting employees' rights in the area of health and safety with, for example, the International Workers Union of Great Britain bringing a successful claim that health and safety laws should extend to "workers" as well as employees, off the back of concerns by gig economy workers that (amongst other things) they were not provided with PPE. As we move into 2022, this will remain an ongoing area of focus for employees and unions.

## Equality, diversity and inclusion

The #MeToo and Black Lives Matters movements put diversity issues at the top of the news, boardroom and legislative agendas, and stakeholders including employees and shareholders are pushing organisations to go further. Creating an inclusive culture in which employees feel able to speak up is a business imperative.

Regulators' growing interest in this area - as demonstrated by the 2021 letter from the New York Department of Financial Services to New York State regulated financial institutions, and the UK regulators' joint discussion paper on diversity and inclusion in financial services - is based on a recognition of research that diverse teams perform better, are more innovative and effectively manage risk. Baker McKenzie's 2021 Mind the Gap survey showed that employers are investing heavily in policies and training, but these have not always yet translated into a fully inclusive global culture.

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Employers are taking action in new areas, such as support for domestic abuse survivors, menopause awareness and support, and fertility and pregnancy loss policies, along with a focus on mental health and wellbeing heightened by the challenges of remote working during the pandemic.

Pay transparency is gaining traction in the US, and an EU Pay Transparency Directive is on the horizon. In the UK, after two years of disrupted gender pay reporting deadlines, this year returns to pre-pandemic reporting. Private employers must publish their gender pay report by 4 April 2022.

The UK government is also due to respond to its consultation on mandatory ethnicity pay gap reporting, while it has recently published another consultation on the introduction of disability workforce reporting. This focus on data and transparency recognises the value of the collection and strategic use of data, allowing businesses to develop their I&D strategies, identify blocks to progress, and direct resources to the areas of greatest need as well as measuring the progress made.

## Digital transformation

While robotics, machine learning, and AI are becoming more common in the workplace, the use of AI in recruitment, selection and promotion gives rise to, in particular, discrimination related risks under employment laws.

There is no doubt that technological advances enable further data collection on employees and candidates allowing employers to assess issues from suitability to performance and productivity. But there is increasing awareness, regulation and enforcement action around the world as individuals, non-governmental

organisations and unions seek to challenge what data are collected about individuals in the work context and how they are used.

As we look ahead to 2022 and beyond, organisations can expect the focus on AI technologies to increase and should look out for further regulation in this area. For example, in April 2021, the European Commission proposed new legislation to regulate the use of AI technology, seeking to address fundamental rights of individuals and safety risks specific to AI systems. The UK Trades Union Congress also published a report in March 2021 calling for new legal protections to regulate the use of AI in UK workplaces.

## Worker status

The rise of new working models continues, and the use of standard employment arrangements continues to decline, replaced by more flexible options. Flexibility can of course benefit both parties, but the potential for abuse of financially vulnerable workers has led to growing pressure on governments to legislate to protect individuals' rights.

Many countries already have rules restricting use of - perhaps more traditional - flexible labour options. France and Italy, for example, have previously adopted limits on the percentage of interns or agency workers an employer can use, while jurisdictions such as Spain, Germany, the Middle East, Korea, Japan and China all have long-standing restrictions on labour-leasing arrangements.

Governments and courts are continuing to see challenges to innovative engagement models, particularly in the gig economy. Cases are brought by individuals, sometimes with the support of trade unions, questioning their status in order to benefit from additional employment protections. In the UK, for example, the Supreme Court ruled in 2021 that Uber drivers are workers, entitled to some, but not all, of the employment law protections enjoyed by employees. As more cases continue through the courts, this is an area of law that will continue

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to evolve as will - no doubt - the creation of different engagement models supported by tech such as crowdsourcing.

## **A single enforcement body: a new approach to UK compliance enforcement**

Up until now, compliance issues in the UK have been policed by a patchwork of regulators, meaning that it is more often employees or unions who shine a light on non-compliant policies or practices. This fact was recognised in the Taylor Review of Modern Working Practices which, in 2017, recommended that UK employment law should move away from a reliance on direct enforcement of rights by individuals towards a greater role for the state in enforcement. To do this, it recommended the remit of existing employment rights enforcement bodies be expanded, in order to protect vulnerable workers and those in precarious employment.

After conducting a consultation on the topic in 2019, the Government has now confirmed that this new single enforcement body (SEB) will be created.

The SEB will have broad powers to investigate and enforce breaches in relation to national minimum wage, modern slavery, agency workers, statutory sick pay and holiday pay for vulnerable workers. As a result, it will take over the enforcement duties

of bodies such as HMRC, the Gangmasters and Labour Abuse Authority and the Employment Agency Standards Inspectorate.

The SEB will have the power to investigate and enforce multiple breaches discovered in the course of investiga-

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tion into another allegation, and has indicated it intends to take a more data-driven approach to identifying breaches by relying on data from other agencies such as HMRC. It will have new powers to tackle non-compliance, including ordering civil penalties of up to £20,000 per worker for some breaches as well as “naming and shaming” powers.

As yet, the Government has not committed to specific timing to establish the body but, in the face of a Government commitment to more targeted and effective enforcement of employment rights, now is the time for employers

to focus on ensuring their practices are compliant.

## **Holiday pay**

Holiday pay will be firmly back on the agenda this year, after a few years of relative calm. Not only will the SEB include holiday pay enforcement in its remit, but the appeal courts are expected to hand down judgments this year in three key cases which could materially change the law on holiday pay.

Calculation of holiday pay became a hot topic following the decision of *Williams v British Airways*, when the ECJ held that any elements of pay

which constitute “normal remuneration” should be included in holiday pay calculations. Following that decision, a number of cases confirmed that almost any element of pay that was regularly paid (such as contractual overtime, regular voluntary overtime, commission and shift allowances) should be taken into account when calculating pay for the 4 weeks of leave set out in the Working Time Directive. While expenses, meal allowances and one off payments are not included, there remains a grey area for some other types of payment, such as annual bonuses based on performance, which may be affected by taking time off work.

Many employers have adopted a ‘wait and see’ approach before changing their holiday pay practices, but that may not be an option for much longer with the SEB keen to scrutinise the solutions that employers put in place to deal with the complicated calculations required. This is particularly the case in sectors that do not historically have much or any trade union representation (and therefore are less likely to have been challenged over their arrangements previously).

The Supreme Court is due to give its judgment in *Harpur v Brazel* (a case which challenges the assumptions of those employers who use rolled up holiday pay arrangements, or calculate holiday pay at 12.07% of earnings) imminently. Depending on the outcome of that case, many employers may want to review these types of arrangement and consider other options.

Other issues up for decision in 2022 relate to how long an individual has to claim underpayments of holiday pay, and whether a worker who has been misclassified as self-employed, and has not therefore been granted paid leave, can claim back holiday pay for the entire period of employment.

## **National minimum wage**

Until the SEB is created, national minimum wage (NMW) compliance will continue to be enforced by HMRC, which released its latest “name and shame” list in December 2021.

“Naming and shaming” has been a government tactic since 2011, and although it was paused for a review, the practice restarted in January 2021. The companies named range from multinational employers and familiar retailers to SMEs and small businesses: 37% of those named had made deductions that reduce minimum wage pay (for example, deducting clothing costs) while 29% had not paid workers for mandatory training, trial shifts or in-work travel time. 16% had underpaid their apprentices and 11% had failed to increase pay in line with annual NMW raises.

In April 2022, the National Living Wage will increase to £9.50 per hour for those aged 23 or more. The recent Employment Appeal Tribunal case of *Augustine v Data Cars* held that even discretionary costs incurred by the employee “in connection with their employment” (in this case, the purchase of an optional uniform for a driver) may reduce NMW pay.

For employers it is worthwhile knowing that HMRC's enforcement budget has significantly increased and it can investigate up to six years of payments. Given the annual rises in NMW rates, employers who previously were paying above NMW rates should audit their practices to check that they are still compliant and to avoid investigation. Particular areas to focus on include working time, salary sacrifice schemes, discounted travel schemes, uniforms, and record-keeping.

No employer wants the reputational and employee relations damage of being named as an underpaying employer, let alone the financial costs: arrears payments are increased to current payment rates and a percentage of the arrears can be ordered as an additional penalty.

### Statutory sick pay

Perhaps not historically a hot topic, but the Government consulted on plans to reform statutory sick pay (SSP) as part of the Health is Everyone's Business consultation. The majority of respondents agreed that the Government should take a more robust approach to employers who fail

to meet their obligations. This will also fall within the remit of the new SEB and so is another area where employers should check their processes.

### Transparency in supply chains

Human rights are under greater scrutiny by employees, customers, the media, and investors, and it is clear that any breach can damage an organisation's brand, as can be seen by recent revelations about low-paid factory workers in Leicester, or the use of Xinjiang cotton by western clothing brands.

There is renewed focus on strengthening transparency in supply chains both in the UK and internationally, with the Home Office recently publishing the response to its consultation on the provisions of the Modern Slavery Act 2015. This included a commitment to require organisations to publish their modern slavery statements on a new government-run registry, along with the introduction of certain financial penalties for those who fail to meet their obligations.

### Where next?

The challenge for employers is to remain ahead of changing regulation, against a backdrop of continued uncertainty and an unprecedented rate of technological change. The areas above are those where we expect to see the most scrutiny over 2022 - whether from regulators, the media or employees and unions - and therefore the greatest risk, whether that is from a legal, financial, reputational, regulatory, or employee relations perspective.

Amongst all this uncertainty, what is clear is that those who remain agile and prepared to stay ahead of the regulatory rules will reap the benefits of an engaged, diverse and flexible workforce, and employers should be considering whether now is the right time to audit their practices to make sure they remain ahead of that compliance curve.

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