



WORK IN THE METAVERSE

VENTURING INTO THE VIRTUAL

Kim Sartin, Sam Rayner and Zelandar Gray of Baker McKenzie look at how employers that are considering venturing into the metaverse will need to address new challenges that arise out of employees working in a virtual environment.

The metaverse offers many new and exciting opportunities for employers and the world of work, ranging from new ways of facilitating employee collaboration to additional commercial opportunities. While the metaverse will enable new ways of working, many of the employment issues that are likely to arise in the virtual realm are not so different than those that employers face today.

Employers that are considering venturing into the metaverse will, however, need to consider how to address new challenges that arise out of employees operating in a virtual environment, such as how to police employee avatars and how to deal with virtual harassment. Employers should seek to address many of these issues before a metaverse roll-out by emphasising that existing workplace standards apply to the virtual workplace and ensuring that their policies and procedures are updated accordingly. They will also need to

give broader thought as to how to proactively address the potential for virtual activism, and the health and safety issues associated with the use of equipment that facilitates metaverse access.

This article sets out what the metaverse is, how employers can make use of it, and explores the various ways that employment laws apply, or will have to adapt in order to apply, to actions in the metaverse.

WHAT IS A METAVERSE?

A metaverse is an immersive digital world where users can virtually live, socialise, work and play; all without leaving their physical seat. Metaverses usually operate:

- Constantly, in the sense that they continue to operate in real time even where a user is not present on the platform.

- Through some form of extended reality technology, whether this is based on an augmented form of the physical world or an alternate immersive reality which is accessed through a user's virtual avatar (see feature article *"The metaverse: far from the wild west"*, www.practicallaw.com/w-036-5862).

There are currently various metaverses in operation. Many of the most well-known ones have evolved from the gaming sphere, such as Minecraft, Roblox and Fortnite. But as virtual worlds and their users have become more sophisticated, the focus has shifted towards these platforms for commercialisation as well as collaboration.

The majority of business leaders now seem to agree, as reflected by the words of Julie Sweet, CEO of the global IT services and consulting firm Accenture: "the metaverse

will not only change how people work, but it will also profoundly change every part of every business" (www.computerweekly.com/news/252525628/Three-quarters-of-business-professionals-want-to-embrace-the-metaverse). Employers are therefore increasingly asking themselves how they can leverage work in a virtual world and how they might navigate any new legal risks that come with that.

Metaverse and employers

The metaverse opens up many new ways of engagement for employers and employees, ranging from employees working partly or exclusively within the metaverse as part of their role whether to engage with customers or potential recruits, to the ability to conduct highly interactive and immersive training sessions or facilitating cross-border collaboration in a time of increased focus on reducing the environmental impact of travel.

Employers, particularly in the retail sector, are beginning to commercialise their presence within the metaverse by setting up virtual stores from which consumers can visit and buy items. To replicate the in-store experience of these businesses, employers may decide to staff their virtual metaverse stores with brand representatives wearing virtual representations of their products. There have also been virtual fashion shows and gigs within the metaverse, offering brands additional commercial opportunities and scope for their personnel to engage with the wider public. As consumers increasingly move from the traditional online store to a virtual store, it is likely that a growing number of employees will be instructed to spend all or part of their working time within the metaverse.

Employers that decide not to set up a commercial presence within the metaverse are likely to consider using the metaverse for training or to facilitate meetings. The training benefits that virtual reality (VR) can bring range from allowing employees to develop their technical skills in a safe virtual environment, such as allowing surgeons to operate on a virtual patient, to immersing managers in virtual disciplinary hearings to allow them to gain disciplinary management experience.

Holding meetings in the metaverse offers employers the opportunity to foster bonds and encourage closer collaboration between colleagues in an increasingly hybrid and

international work environment by allowing them to feel more present in meetings. As the technology develops, users may even be able to access and work on documents within metaverse meetings. This is something that Meta and Microsoft have announced that they are hoping to develop as part of their Meta Quest/Microsoft Teams tie in. Metaverse meetings also offer employers the chance to cut their carbon footprint by reducing international business travel.

APPLICATION OF EMPLOYMENT LAWS

The metaverse will change how employees interact, but it will not change the fact that individuals will still be physically present in the real world, as is the case when using virtual conferencing software like Microsoft Teams and Zoom.

The application of existing employment laws will need to evolve to accommodate this new environment, but significant underlying changes or the widespread implementation of new, metaverse-specific rules will likely not be required as the default position will be that laws will apply depending primarily on an employee's physical location.

This means there may be multiple sets of applicable laws where relevant individuals are spread across various physical jurisdictions (see box "Jurisdiction scenario").

There are potential areas in which applicable legal principles may become less clear, including in respect of industrial action in the metaverse, payments and benefits based on cryptocurrency and non-fungible tokens (NFTs), health and safety, and the creation of virtual intellectual property. But in the absence of a set of metaverse-specific rules that are recognised and applied across multiple jurisdictions, the starting point for applicable laws in the employment sphere is likely to relate back to the connection an employee has with a physical location.

Virtual misconduct and harassment

One of the main issues on the minds of employers currently when it comes to the metaverse is whether they may see an increase in harassment incidents. When the metaverse was launched in the gaming context, there were numerous reports of users with female avatars being harassed by other users with the evidence suggesting that users' inhibitions and behaviour standards were lower in a virtual world. Evidence has also

suggested that employees who are subject to virtual harassment can often feel as though they have actually been physically harassed in the real-world. Organisations are rightly focused on ensuring that this does not happen if use of the metaverse is rolled out in a work setting.

Employers can take steps at the outset of a metaverse launch to reduce incidents of harassment within the metaverse, including:

- Switching on functionality within the metaverse to create physical barriers between avatars. This functionality currently varies between metaverses, but options currently include all avatars being placed within a bubble that other avatars cannot enter, to avatars becoming transparent if another avatar tries to physically interact with them.
- Updating anti-harassment policies and procedures to make it clear that these apply equally to interactions within the metaverse. Employers can consider including metaverse-based scenarios of harassment and misconduct within their policies and training sessions to emphasise this message.
- Giving clear messaging on the roll-out of the metaverse that any misconduct or harassment within the metaverse will be taken seriously and that the same standards of behaviour expected within the physical workplace setting apply to the virtual world.
- Working with metaverse providers to build "just in time" behavioural reminders into the platform which might, for instance, flash up when an employee first logs in or enters a particular area.

If misconduct or harassment occurs within the metaverse, employers will need to investigate it in line with their usual policies and procedures as with any physical misconduct or harassment. Organisations should also work with metaverse providers at the outset of establishing a virtual presence to understand the extent to which virtual behaviour may be monitored and recorded on an ongoing basis and how they might access relevant recordings or logs. These records may provide important evidence in the context of any investigation and data protection compliance steps will need to be implemented to ensure that they can be lawfully used.

Metaverse-specific issues that employers may face in this context include the need to identify who is behind the avatar that was seen to commit the misconduct or harassment, as employees may seek to argue that they were not in control of their avatar at the time of the incident. To counter this, employers will need to ensure that there are strong access controls to the technology that is provided to employees to enter the metaverse and be clear that employees should not allow anyone else to use that technology.

There will also be questions around what respectful communication between employees looks like in the metaverse. There are many avatar and “home space” customisation options available to employees within the metaverse that can lead to conflicts. For example, one employee may choose to make a political statement through their avatar’s clothing, which other employees may find offensive, or decorate their virtual meeting room with particular slogans or flags. Employers need to ensure that there is a clear line between what they consider to be respectful speech and what they consider to be harassment or other inappropriate behaviour at the outset of metaverse adoption. This should be made clear to all employees and managers before they enter the metaverse to set expectations at the outset.

Use of employee avatars

Just as many already do in respect of standards of communication, conduct and appearance at the office, employers should also set boundaries around the use of employee avatars.

Most metaverses require users to interact and express themselves through a virtual representation, known as an avatar. The potential customisation options, and possible anonymity, associated with virtual avatars gives rise to employment law risks which employers that are considering a metaverse presence should proactively address through clear policies and training.

Standards could be crystallised as part of standalone metaverse-focused rules or incorporated into broader existing policies, including codes of conduct and policies on acceptable IT use and respectful communications. As an initial consideration, an employer will need to decide how much control it is going to seek to exert over how employees create and customise their avatars.

Jurisdiction scenario

The following is a practical example of what jurisdiction might apply if an international allegation of harassment in the metaverse is raised.

Fatemah, Robin and Jermaine are collaborating in a virtual meeting space. Fatemah is based in the UK, Robin in the US and Jermaine in France. Robin and Jermaine make comments about Fatemah’s avatar and her decision to wear a hijab in the metaverse. Fatemah raises a complaint with the employer about their conduct.

In those circumstances, Fatemah’s physical location means that she would benefit from employment protections in the UK. The employer would need to treat this as a grievance, in line with UK-centric processes and non-discrimination laws. Investigations and potential disciplinary action against Robin and Jermaine would likely need to follow the rules applicable in their physical jurisdictions: the US and France, respectively.

There are competing pressures at play here and the extent to which an organisation may wish to provide rules around this may depend on how the metaverse will be used: companies establishing a presence in the metaverse to engage externally with consumers or to attract talent may want more control than an organisation that is creating a virtual workplace to facilitate internal team collaboration.

Giving employees free rein on avatar customisation could facilitate potentially offensive behaviour, which may breach local laws relating to discrimination, bullying and harassment. Employees may, for example, customise avatars through names, characteristics or clothing to promote offensive, sexualised, political or anti-employer messaging. Customisation options may also be used to impersonate others, or use protected characteristics, such as race and sex, that an employee does not possess in the physical world.

On the other hand, an overly restrictive approach raises discrimination risks, particularly where employees do not believe that the customisation options reflect their own identity. For example, employees may not feel that the available skin tones are appropriate; they may not think that virtual characteristics properly reflect their gender identity and avatars may not be able to accurately reflect physical disabilities or impairments. Conversely, those with disabilities may not want that to be reflected in their virtual self.

A further factor to take into account when considering policy in this area is that many discrimination laws, including those in the

UK, are likely to be capable of protecting an individual against discrimination, harassment and victimisation based on acts related to a virtual avatar’s characteristics, regardless of whether an employee possesses those characteristics in reality or whether the offending employee knows that. This is because the Equality Act 2010 protections are generally triggered based on whether conduct relates to a particular protected characteristic, not whether the complainant possesses them in the physical world; perceptions and inferences based on virtual avatars will likely be sufficient.

Ultimately, there is a balance to be struck when drafting policies in this area. Metaverses are, broadly speaking, still in their formative stages and our understanding of how organisations and employees will approach them is evolving. Employment-related avatar standards are likely to remain high level for now, setting out customisation parameters based on broad principles of respect, neutrality and professionalism. But employers will, of course, be justified in being more prescriptive in certain metaverse settings, such as in a virtual shopfront or in client meetings.

Cross-border employee activism or industrial action

As we head into uncertain economic times, businesses often see a rise in employee activism (*see feature article “Employee activism: rising to the challenge”, www.practicallaw.com/w-036-6038*). Strikes following industrial disputes across various sectors, including healthcare, transport and other public services have been widely publicised (*see feature article “Industrial action: within striking distance”, www.practicallaw.com/w-036-6038*).

practicallaw.com/w-036-2626). But there has been less publicity in respect of the emerging phenomenon of virtual employee activism, with employees beginning to project their collective voices through demonstrations and protests in virtual spaces.

Disgruntled employees and their representatives, particularly those working within or on behalf of technology companies that are pioneering the use of metaverses at work, are beginning to recognise the ways in which virtual spaces can facilitate collective action and PR campaigns across physical borders, both with other colleagues and third parties who might be in the metaverse for other reasons, such as gaming, shopping or socialising. The metaverse campus of a tech giant was recently flooded with thousands of avatars holding placards, in response to planned pay cuts.

Employers have traditionally taken some refuge in the patchwork of varying international approaches to the laws around employee activism, which has historically inhibited truly co-ordinated global industrial action. International bodies such as global employer federations and local works councils have typically found it difficult to facilitate international support, as permissible action is largely dependent on physical location:

- In some countries, such as Italy and France, the right to strike is enshrined in the national constitutions and employers are broadly prohibited from taking any action to prevent action such as sit-ins, working to rule or picketing.
- In other countries, collective rights are much more curtailed. In the UK, for example, the default position is that strike action is a breach of contract and a potential disciplinary offence unless particular substantive and procedural conditions are fulfilled.

In metaverses, however, employees will have a virtual space where they will feel collectively empowered and in which applicable laws become blurred. Industrial relations strategies will therefore need to evolve to encompass virtual and technical cross-border solutions too. Where an organisation participates in a metaverse it will need to think about the legality and technical possibility of remedial steps like removing system access, locking avatars out of certain spaces, and deleting or blurring messages on clothing or placards.

Considerations for employers

The following steps are likely to represent a sensible starting point for employers looking at work in the metaverse.

Think about how the organisation might use a metaverse

This is likely to drive the virtual priorities for the business. Is the focus likely to be on commercialisation, with employees interacting virtually with potential customers, or a more basic space to enable internal collaboration? A higher degree of virtual interaction between employees and third parties is likely to justify more stringent limits on avatar creation and require a greater focus on the potential impact of virtual employee activism.

Consider what legal risks this might raise and how existing policies might need to evolve

Employers should think about which employee-facing documents might need to be updated to address risks associated with virtual work, such as acceptable use, harassment, and health and safety policies, as well as data privacy policies depending on what data is captured. Employers should also consider where there may be gaps in respect of which new, bespoke standards may be required, such as in respect of limits on avatar creation or health and safety.

Plan how employees may be educated and encouraged to use metaverses

Employees will not only need to understand how the use of new technologies adds value to the business, but also how the initiatives have been designed to ensure fairness and accessibility, including in respect of individual expression (that is, the extent to which avatars can be customised) and accommodations (that is, where health issues may affect use of equipment). All of the above will require buy-in from various stakeholders within the business, from communications teams to learning and development functions, so it would be good practice to start conversations in these areas as soon as possible.

When considering this, employers will need to grapple with applicable laws, which are likely to align primarily with the individual's physical location, and the fact that technology flows both ways. Technology-savvy employees are likely to fight back with technological measures of their own, such as the use of virtual private networks (VPNs), which hide their identity and location, and potential forms of malware that inhibit activities in the metaverse. So a holistic approach, factoring in legal, industrial relations, PR and technology solutions, will be required.

Working time

Most EU member states place default limits on employee working time. These flow from baseline standards set out in the Working Time Directive (93/104/EC), including an average total weekly working time limit of 48 hours and minimum periods of daily or weekly rest. Implementation and enforcement levels vary in practice between member states; but issues are most common in countries where employers have well-established and proactive

obligations to record and report on working time, including Germany and Spain.

Metaverse use at work is likely to raise interesting questions around what time is included as working time for relevant national legislation, particularly in the case of "on call" work. Will the trigger be when an individual puts their headset on or only once they have logged in and started interacting with others; for example, if they need to navigate to a particular virtual space or go through security measures? Much will likely depend on the relevant role and how the virtual space is configured.

Work carried out virtually is also likely to be affected by local laws that set out "rights to disconnect", like those that exist in France and require employers to negotiate with trade unions to set limits on employers' ability to require employees to check and use work technology after working hours. While rules in this area across Europe (for example, in Italy and Belgium) differ in their specifics, they all pursue the same broad aim of encouraging

employers to refrain from encroaching further into their employees' personal and family lives, particularly with the use of intrusive technologies. The use of headsets, devices and metaverses to facilitate work will likely fall within the remit of local rules in these areas. The European Commission is also discussing the potential for legislation setting out a harmonised right to disconnect that would apply across Europe (www.europarl.europa.eu/news/en/press-room/20210114IPR95618/right-to-disconnect-should-be-an-eu-wide-fundamental-right-meps-say). The potential around metaverses at work will likely play a part in framing policy discussions as this issue begins its journey through the EU's legislative process.

Health and safety

At a broader level, employers have general obligations to take steps to protect the health and safety of their personnel, including in respect of workplaces and equipment. Where headsets or other wearable technology are required to access a metaverse, employers will need to update or draft policies that help to set minimum standards of safety. These will likely cover the need for maximum use times and the need for regular breaks, but will also need to address more practical considerations, such as how the risk of accidents can be minimised; for example, the use of a clear, dedicated space when engaging in metaverse use.

Expert guidance in this area will likely evolve as the relevant technology does, but it is already on the regulatory agenda. In a 2020 research paper entitled "The safety of domestic virtual reality systems", the government discussed the issue of "cybersickness", a form of motion sickness induced through immersion in virtual realities, and suggested that breaks should be taken after every 15 to 30 minutes of use of VR equipment (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/923616/safety-domestic-vr-systems.pdf). Ironically, it is thought that the more realistic the experience is, the more likely an individual will suffer cybersickness.

Employees with existing health conditions may be more susceptible to the types of cybersickness, including nausea and vertigo, that VR technologies seem to be able to cause. While research into this area is ongoing, it is clear that employers that may require the use of this kind of technology

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will need to think about how they will comply with their legal obligation to make reasonable adjustments, while ensuring that employees are not disadvantaged by any inability to engage in metaverse use on health grounds.

There are more obvious disability discrimination risks surrounding those with visual impairments. But there are also increasing suggestions that women may be more likely to encounter VR-related issues from both:

- A health perspective, including on the basis that sensitivity to cybersickness may fluctuate with reference to variable hormone levels during the menstrual cycle.

- A technological angle, as much early research and production of equipment has taken place based on the physical features of men.

As a result, potential indirect sex discrimination risks will likely need to be built into metaverse strategy too.

Compensation

There has been some suggestion that individuals who work in the metaverse could be paid in cryptocurrency rather than in their local fiat currency. While this is an intriguing prospect, the authors anticipate that many employees will currently be reluctant to accept payment in any cryptocurrency given the instability of the crypto market. Any employer that paid employees entirely

in cryptocurrency would also still need to comply with applicable minimum wage requirements, which will likely mean having to link payment in cryptocurrency to a more stable currency in order to ensure compliance.

Employers, particularly those in the luxury goods sector, may start to offer NFTs to employees as part of incentive schemes. These NFTs could be made up of, for example, an NFT designer handbag or a limited edition artwork. Employers offering these incentives will need to carefully consider how applicable tax rules will apply to any such awards.

KEY TAKEAWAYS

Existing employment laws are likely to remain relevant and applicable to virtual metaverse activity, hinging primarily on an individual's physical location, with some tweaks and developments. This means that, while the technology is novel, employers will largely have a set of familiar baseline rules, as well as existing internal policies, to work from when formulating approaches to virtual work.

However, the shift to a virtual working environment will give rise to some potentially complex legal and practical issues that

employers that wish to engage with these new technologies will need to navigate (see box "*Considerations for employers*").

For most organisations, metaverse use is either a formative or future issue. But momentum is gathering and uptake is increasing across various sectors; for those that have not already looked into it, it is therefore worth starting to think about potential strategies for when the inevitable questions start to arise.

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