FUTUREOFWORKHUB

The changing world of work: future-proofing businesses

A report for the Future of Work Hub

by Lewis Silkin LLP

a **Lewis Silkin** initiative

Ius Laboris UK Global HR Lawyers

LEWIS SILKIN

INTRODUCTION

Technological progress and automation have not yet delivered John Maynard Keynes' 15-hour working week, but there is no doubt the landscape of the world of work is changing. Globalisation, technological advances, shifting demographics and changing societal values are redefining work as we traditionally know it, creating new opportunities and challenges for businesses.

In such a period of rapid and dramatic change, it is more important than ever to keep a weather eye on the longer-term perspective, to ensure that business models and strategies are developed to survive and thrive in the future.

While the future is notoriously difficult to predict, anticipated changes to the world of work are in many ways already part of today's working reality. For example:

> Rapidly ageing workforce

> Falling fertility rate

> Increasing female participation and diversity in the workplace

> Increasing number of employees with caring responsibilities (child and elder care)

> Changing individual attitudes to careers with increasing focus on purpose and meaningful work

> Changing migration patterns and Brexit

> Global market and consumer expectations driving an increasingly 24/7 culture

> Expansion of the services sector and evolving labour markets

> Educational achievement and skills gap

> Up to five generations in work with differing social habits and behaviours

> Increasing automation, digital and technological innovation

> Sustainability pressures

With these developments in mind, we have produced this report to look at some of the current "megatrends" affecting the world of work and identify practical steps that employment functions can take now to address key issues facing them.

This report has two sections.

Part 1 looks at three megatrends – globalisation, technology and changing demographics – and charts their current impact on the world of work.

Part 2 looks at the impact of these megatrends in the following areas and the key implications for business.

- How to deal with an ageing workforce
- Harnessing flexibility
- Social media: benefits and dangers
- Embracing religious diversity
- Facilitating remote working
- Handling the stress epidemic
- Managing technology, personal data and privacy
- Working across borders

Each section ends with a checklist of actions for organisations to consider implementing now, to put them in an optimum position to meet the significant challenges ahead.

OVERVIEW OF MEGATRENDS

GLOBALISATION

The past 40 years have seen radical shifts in government policies, in contrast to the insular post-war years, including the dismantling of the Soviet Bloc and the relaxation of trade restrictions in traditionally isolationist economies such as China. The result has been enormous growth in emerging markets and profitable investment opportunities for the world's established economies.

The shift in consumer power towards the BRIC (Brazil, Russia, India and China) economies has driven increased global demand for new products and services, requiring businesses to turn their focus towards developing markets to harness consumer potential.

Many businesses have taken advantage of the exponential growth in international trade by "going global" - opening branches in new territories, courting international clients or setting up complex cross-border resource chains. Educational advances in emerging economies such as Africa, Asia, Eastern Europe and Latin America have created a progressively well-educated global talent market. This has given businesses the ability to recruit - increasingly via online platforms and crowdsourcing hubs fuelled by digital technology - from a global pool of highly skilled, competitive workers. It has also enabled businesses to look abroad for access to cheaper labour resources.

Globalisation has been a powerful driver of workplace change. Conventional "nuclear" businesses, operating from a single base with a traditional "9 to 5" workforce consisting of permanent employees, are increasingly less common with the rise of international collaboration. Many businesses have adopted more varied ways of working to stay competitive in the face of the ever more international and dynamic footprint of the world of work. At the same time, organisations are realising the strategic benefits that an agile workforce can offer. Forward-thinking organisations are creating competitive advantages by adopting digital innovations, trialling flexible working models and embracing global, blended workforces.

However, in the wake of the financial crisis and the recession, the populist view of globalisation is changing. Throughout Europe and beyond, the breakdown in the established political order – away from centre-right and centre-left regimes - heralds the advent of a more complicated and fragmented politics involving the emergence of so-called Populist parties and movements, together with the rise of Green political parties in many countries, with the potential for this to have a meaningful impact in the area of employment rights.

Furthermore, trust once placed in political institutions and global big business is under pressure. As a result, employers are increasingly being held accountable for the welfare of their employees and the wider communities in which they operate.

In the UK, no-one knows what the longer-term shape of its relationship with the EU will be, but there is no question the UK will need to establish a new position in the world. Migration will become increasingly controlled, reducing the ability of individuals to move freely in search of work and impacting on employers' ability to engage them. The implications of Brexit on employment rights in the UK will vary depending on what kind of Brexit deal the UK and the EU agree. However, constraints on implementing future legislative reform will likely be significantly relaxed, with future governments either deciding to replicate or add to EU labour rights or deciding to depart from established and evolving EU standards.

TECHNOLOGY

The ever-advancing capabilities of technology and the scale and speed at which it is disrupting the world of work pose both challenges and opportunities for businesses. The march of technology means that the "workplace" can now, for many people, exist anywhere or anytime. Smart devices are becoming ubiquitous, while the availability of high-speed broadband, remote access and digital platforms are increasingly widespread. These technological developments will continue to shape workplace relations and have a huge impact on how businesses organise themselves and the ways that employees work (with increasing calls from some quarters for a shorter working week). The line between work and home life is, perhaps inevitably, becoming increasingly blurred. Developments in automation, machine learning and artificial intelligence will transform businesses and redefine jobs in the future. Commentators suggest that jobs in which routine tasks can be replaced by technology will be the most vulnerable, although new jobs will emerge as well. For many people, innovation will transform the nature of the work they do and necessitate working ever more closely with technology. Increasing digitisation of the working environment, together with 24/7 connectivity, the pervasive take up of social media platforms and growing demands for personal freedom, are driving corporates to rethink their business models and how and where work can be done. Many are focusing on becoming less hierarchical and more collaborative. For example, a business might engage increasing numbers of temporary, part-time and freelance workers around permanent "core" staff, enabling it to respond swiftly to fluctuations in workload and evolving needs for particular skills.

This model presents opportunities for skilled workers willing to embrace a "portfolio" mode of working. People can harness social media and digital platforms to create value through collaboration, without the need for a traditional business enterprise. For some, this is leading to a rebalancing of power between work givers and providers. But for more vulnerable sections of the labour market, the model can be challenging - as debates around zero-hours contracts and "gig" economy working have highlighted.

Developments in technology over the past decade or so have made it possible for employers to track their employees even more closely than before - in particular, the advent of wearable technology and tracking apps, pervasive social media use and the dawn of the "internet of things". The types and quality of monitoring undertaken by employers are likely to become more complex and invasive. Effectively analysing "big data" will become increasingly important for organisations seeking to reduce risk and boost productivity, but this brings fresh challenges concerning employee privacy and data protection compliance.

DEMOGRAPHICS

Social values are evolving and the make-up of the global population is changing, with significant and direct impacts on the demographics of the workforce.

The growing focus on ethical behaviours, people's individual needs and 'good work' mean the traditional employment relationship based on job security and financial stability in return for loyalty is increasingly outdated. The #MeToo movement is one example of how social issues are permeating the workplace and requiring employers to work ever harder to match societies and employees changing expectations.

In the UK, the population is set to age sharply. People are living and keeping fit for longer and outliving the estimations of pension schemes, meaning many must stay in work for longer. As a result, many workplaces have four (or even five) generations working side by side. These groups have grown and matured with different influences on their lives. As such, values, skills and attitudes to work can vary considerably across groups, creating challenges for employers. The past 70 years have also seen a dramatic increase in the participation of women in the labour market leading to increasing diversity in the workplace.

Working from home or from "anywhere" may be an attractive prospect for each of these workforce groups. For different reasons, they may have other commitments around which they need to structure their work and a desire to have more flexibility and control over where and when work is done. With an increasingly diverse labour market, providing alternative ways of working can deliver tangible advantages for employers.

At the same time, it can be challenging for businesses to support the contrasting health and wellbeing needs of a workplace staffed by different generations concurrently. Although research suggests that a person's state of health may be determined by lifestyle and environmental risk factors more than chronological age alone, older people are generally more prone to chronic conditions. It has also been found that health problems in older workers can be directly linked to the fact that they are more likely to feel the effects of stress in the workplace.

Yet stress is not just an issue for older workers in the current economic climate. With the labour market becoming increasingly flexible, many people are experiencing high levels of job insecurity. The pressure of beginning a career in challenging economic times is likely to take its toll on the "millennial" generation entering the workforce. The challenges of balancing work with caring responsibilities for those employees with young children or elderly relatives are also significant contributors to stress.

The fast pace of globalisation is also changing the face of the workforce through greater cross-border collaboration, virtual team-working and distributed workforces. Businesses can gain competitive advantages from their ability to source talent from a wide talent pool, leading to increased engagement, innovation and productivity.

Workforce demographics at a local level are changing too. Global mobility over recent years has enabled businesses to engage migrant workers to augment the workforce and meet skills shortages. In the face of continuing de-industrialisation in the UK, businesses are continuing to look abroad to tap into a global supply of labour – particularly for low-skilled jobs. There is no doubt that the terms of the UK's withdrawal from the EU will shape the face of the workforce and potentially impact on businesses' ability to access this wider labour market.

SECTION 1

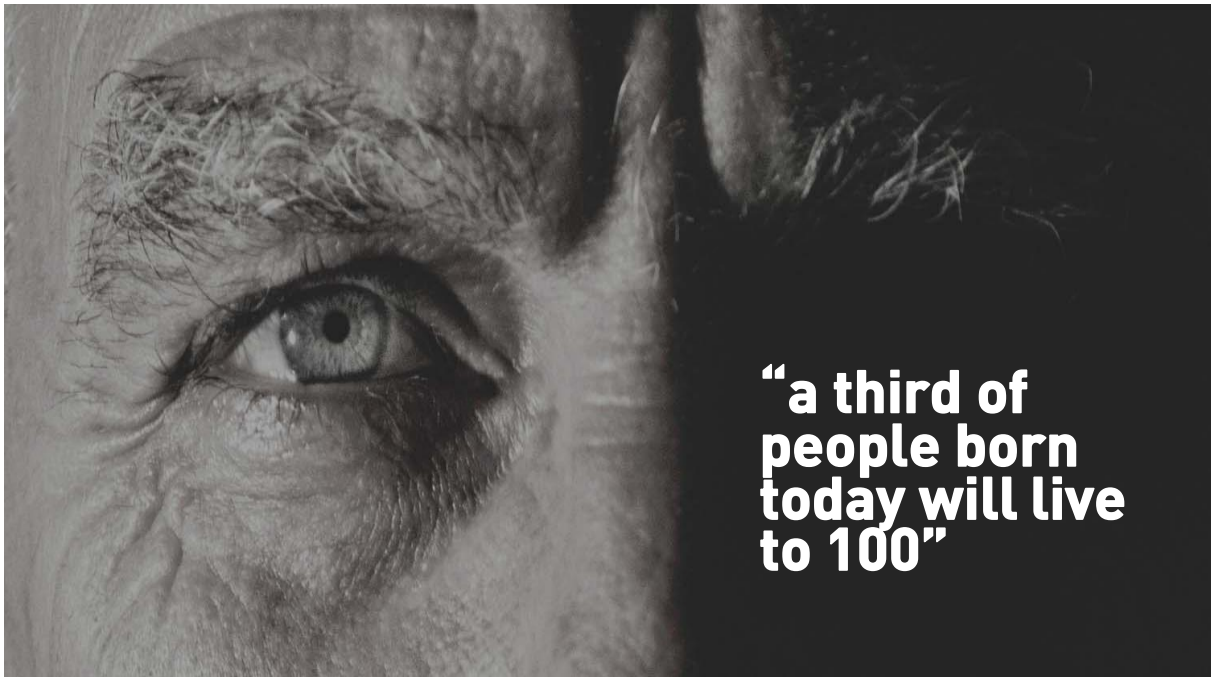
HOW TO DEAL WITH AN AGEING WORKFORCE

The age diversity of the UK workforce has shifted dramatically over the past 30 years. Government statistics[1] show that the employment rate for individuals aged 50-64 increased by 14.2% to 69.6% in this period. Over the same timeframe, the employment rate for the 65+ age group doubled to 10.2%[2].

According to the Resolution Foundation[3], a third of people born today will live to 100. With people living and staying fitter for longer and with the abolition of the default retirement age in the UK in 2011, which allowed employers to force staff to retire upon reaching 65 years of age, older workers have the option to retire later (and pension changes make continued work a financial necessity for many). Indeed, there are 185% more people above the age of 65 in the workforce now, compared to 1992[4].

An age diverse workforce can ensure that employers have the full range of skills and experience to enable the business to flourish in an increasingly competitive and global market. Knowledge-sharing, different perspectives and enhanced customer experience are all additional benefits identified in the CIPD's report[5] on Managing an Age Diverse Workforce. Moreover, because many older workers reportedly retain a greater sense of loyalty, employers can often expect more years of work from someone in their fifties than from someone in their twenties, who may be more likely to seek promotion elsewhere. (This is notwithstanding the reported decline in the proportion of young people moving jobs over recent years.)

There is, however, the potential for conflict where businesses are made up of different groups of people with different outlooks and attitudes. Many organisations are structured around a predictable turnover and, with no compulsory retirement age and fewer opting to retire at the age of 65, this can create employee relations issues. Older workers who choose not to retire could be seen as blocking positions, so preventing younger workers from progressing their careers. This potential for conflict can also arise in situations where younger employees manage older workers, who may believe they have "seen it all before" and be resistant to instruction.



Life expectancies have reportedly been rising by up to three months a year since 1840 and there is no sign of that trend levelling out. With people living longer, more employees will have caring needs to fit in around their working commitments. For younger employees, it will generally be to care for children, while those a bit older will more likely be looking after parents. If a request for time off for childcare reasons can be complied with, a similar request in order to care for elderly relatives should be treated in the same way. See Section 2 for further discussion on potential discrimination risks arising from dealing with flexible working requests.

A recent Institute for Employment Studies ("IES") report[6] highlighted that the factors which make work fulfilling for older workers (over 50) are similar to those for younger workers, but there are certain ones that are more important. Older workers are likely to appreciate flexibility, particularly those who may wish to transition into their eventual retirement by reducing their days or hours of work, rather than the traditional "cliff edge" retirement arrangement. Older workers are also likely to value being part of an organisation with values they identify with and work that gives them autonomy and the ability to pass on knowledge to others.

Millennials are also likely to appreciate flexible working opportunities – they may be happy to work hard but less willing to stick to rigid timetables. This cross-generational desire for flexibility will be a key feature of the evolving work environment. Employers who adopt more flexible working practices are likely to improve productivity and reduce absenteeism and stress in the workplace. Again, employers will need to deal with competing requests carefully so as not to fall foul of anti-discrimination legislation.

While longer life expectancy necessitates extended working lives for many people in order to afford retirement, healthy life expectancy is not rising at the same rate. Physical health inevitably declines with age, meaning that employers will bear additional costs - both directly from the cost of providing healthcare benefits and indirectly from lost working days. Employers play an important role in this area: the IES report[7] mentioned above noted that health has the biggest effect on an older worker's decision to work. According to an Acas report[8] on Managing Older Workers, the available evidence suggests that designing jobs to meet the capabilities and aspirations of older workers tends to decrease turnover and sickness absence while increasing commitment and productivity.

Increasingly, many organisations are implementing mental and physical wellbeing strategies to minimise sickness absences in their workplace. Employers should also be mindful of the obligation to make reasonable adjustments for those with disabilities, again ensuring that this is done in a non-discriminatory manner and consistently for all age groups.

Inevitably performance will deteriorate at some point, but when and why this happens is not predictable or universal and employers should not make generalised age-related decisions about their older workforce. In the past, employers tended not to address performance issues with older workers on the basis that compulsory retirement provided a more "dignified" exit from the workplace. Following the abolition of the default retirement age, this is no longer a viable option for most employers. Where underperformance arises for an older worker, it must be dealt with in the same way as anyone else. Employers should have robust performance management systems and policies that work for all levels of seniority within a business and equip managers with the confidence and ability to challenge senior members of staff who are no longer performing satisfactorily.

Employers will also need to be readier to tackle "difficult" conversations about employees' future plans, which will often be of critical importance for business-planning purposes. It is crucial to make such conversations a regular feature of line management discussions for *all* employees. While these discussions may be of particular relevance for older workers who might be considering retirement, employers can glean useful insights about the rest of their workforce's plans. To avoid potential discrimination claims, it is important to avoid singling out older workers and ensure that any such conversations are broader than relating just to an individual's "retirement plans".

As employees live and work longer, 50-year careers will become the norm rather than the exception. In what some have termed the "multi-stage" life, it is likely that many employees may choose to make radical career choices or change direction as they seek new challenges. Skills will therefore need to be frequently updated. In the future, trainees and apprentices may be of any age, rather than such positions being the sole preserve of school leavers.

The Office for National Statistics[9] predicted that while the proportion of the UK population who are of traditional working age (16-64) has remained relatively stable, it will decline in the future. Many employers currently reporting difficulties in replacing lost skills will find that the "skills gap" will become even more challenging. Research by the CIPD[10] on Managing an Age Diverse Workforce has shown that there are three times as many unemployed older workers as there are young people not in education, employment or training and that employers tend to retain and retrain existing employees rather than recruit older workers. The Acas report[11] mentioned above reinforces this, noting that the recruitment of older workers is less common and unemployed older workers still struggle to re-enter work. In the future, employers who recruit from an increasing pool of older workers as part of their workforce planning are likely to benefit not only from being able to manage the skills gap better but also from the specific experience that older workers and an age diverse workforce have to offer.

FUTURE DEVELOPMENTS

The impact of the ageing workforce on employers will largely depend on how proactively they are able to support and manage different generations at work. While taking account of age-related differences is necessary and unavoidable, employers should be mindful of making assumptions and adopting stereotypes.

When the default retirement age was abolished, many employers chose to have no retirement age at all, but the Acas report[12] on Managing Older Workers notes how employers' responses have tended to be reactive and piecemeal rather than embedded into strategic goals. We may see a shift in approach in the future and potentially the return of retirement ages, if employers decide they need additional tools to manage their workforces. These may be objectively justified retirement ages within particular workplaces, or possibly even the re-introduction of a general default retirement age. Given the latter would negatively affect older people, who tend to be the most enfranchised, there would clearly need to be significant advantages in adopting such a potentially politically damaging policy.

The UK's withdrawal from the EU could also lead to major changes in due course, although the implications for discrimination law are as yet far from clear. Age discrimination itself was only introduced in the UK because of EU legislation. Although the UK might theoretically be free to remove this form of discrimination after leaving the EU, at which point EU law will be converted into UK law, this is extremely unlikely. Not only would it be a controversial move, but also incompatible with other international human rights standards such as the European Convention on Human Rights.

It remains to be seen to what extent the UK courts could row back from the more expansive approach to discrimination law in European case law following the UK's withdrawal from the EU.

CHECKLIST

- Embed a flexible employment environment and treat requests for flexible working in the same way, irrespective of the reason behind the request.
- Ensure performance management procedures are robust and applied consistently to all ages.
- Equip managers with the confidence and skills to manage conflict and different age groups effectively.
- Introduce a mental and physical wellbeing strategy to support workforce health and minimise sickness absences.
- Develop well-designed jobs and work, with clear career options for older workers.
- Train staff regularly on age diversity to help break down age stereotypes and treat different age groups fairly.
- Hold regular conversations with all employees about their future, providing an opportunity for older workers to discuss their plans while avoiding discrimination.
- Integrate collaboration and knowledge transfer as a fundamental requirement of every job to prevent losing valuable knowledge and expertise from the business as staff leave.
- Conduct a skills audit and identify potential skills shortages.
- Identify roles for workers (of any age) who may want to reduce their schedules and hours and still contribute.
- Ensure training (and retraining) opportunities are open to all and facilitate options to change roles within the organisation.
- Consider creating older "ambassadors" to highlight successful transitions to flexible work and provide role models for other staff.

SECTION 2

HARNESSING FLEXIBILITY

Changing workforce and societal expectations, compounded by the financial crisis and recession, have resulted in a growing emphasis on flexibility. New forms of employment have spread rapidly over recent years, driven by profound underlying changes in technology. Digital forces are increasingly disrupting and transforming long-established norms of employment, leading to far greater levels of self-employment and/or "as and when required" working. Organisations increasingly need be able to adapt their workforces quickly to changing circumstances in order to survive and thrive.

In light of this, many businesses are responding to changing attitudes and the shifting labour market by radically rethinking their existing organisational structure and traditional approaches to engaging staff. In a recent report[13] by Deloitte, 84% of respondents said that they need to rethink their workforce experience to improve productivity, while CEO's rated "impact on society, including income inequality, diversity and the environment" as the most important measure of success. Organisations are shifting away from hierarchical, post-industrial era, business models to a flatter and more "porous" organisation in an effort to become more agile.

Technological advances have not only given organisations opportunities to operate more flexibly in response to globalisation and rapidly changing market conditions, but they have also allowed employees more control over when and where they work and how they balance work, family and outside interests. Managed properly, flexible arrangements can benefit both organisations and individuals by improving performance and wellbeing.

The UK has one of the most flexible labour markets in the world. It can, however, be challenging for businesses to navigate the variety of diverse and developing employment models in the context of the existing legal framework, both nationally and abroad where countries vary considerably in their approach. Regulation often lags behind actual practice in the labour market, so employers need to be aware of the constraints and consider the most effective approaches to embracing new working methods.

Another seismic trend over the past few years has been the growth of the "gig economy" – the move away from traditional "9 to 5" jobs towards technology-enabled "gigging" for a multiplicity of work providers at any one time. Related to this is the increasingly widespread use of zero hours contracts. While the flexibility such arrangements can offer works well for many workers, the relative lack of security in some cases may leave some feeling vulnerable, with the flexibility benefitting the employer coming at the unreasonable expense of the individual.

A study published by McKinsey[14] in 2016 found that 162 million people in Europe and the US, some20-30% of the working population, engage in some form of independent work. It further found that about 70% of them did so through choice, while 30% did so out of necessity. The issue of choice and the tension between "flexibility" versus "insecurity" were also reflected in the CIPD's report[15] on the use of zero hours contracts and the Good Work review[16] of modern employment practices, commissioned by the UK government and led by Matthew Taylor, both of which illustrated how shifting patterns of work have resulted in more insecurity for some. In response, the government has proposed new rights for workers to request a more predictable and stable contract, although this does not go so far as to impose an obligation on the employer to accept that request.

The recent litigation and publicity generated by gig economy business models illustrates the tension between the traditional employment law framework and more novel modes of work provision. A relationship that a business treats as a self-employed or "worker" relationship can subsequently be categorised by an Employment Tribunal or HM Revenue & Customs as an employment relationship, with greater statutory protection and rights for the individual in question and obligations to operate PAYE for the company (with potential penalties for failing to do so). Government proposals in response to the Good Work review indicate it will bring forward detailed proposals on how the employment status framework for tax and employment rights should be aligned, and suggest new legislation to improve the clarity of the law on employment status.

There is no doubt that technology and digitisation have opened up new possibilities for working patterns and arrangements, but this has generated tensions around working time. Home-based and "on-call" working arrangements are already generating litigation around issues such as whether travel time or on-call hours constitute rest time or working time that attracts the national minimum wage. This is likely to be an on-going area of focus as technology continues to enable different ways of working.

Over recent years, legislative changes have supported increased flexibility in the labour market. Following changes in the law in June 2014, the legal right to request flexible working now extends to all employees (not just those with caring responsibilities). While this legal framework can help facilitate flexibility in the workplace, employers should tread carefully when dealing with competing requests from different segments of the workforce so as not to fall foul of anti-discrimination legislation. Line managers need to be able to deal with difficult conversations about turning down a request and make decisions objectively without any (conscious or unconscious) bias. Certain areas or functions in the workplaces may reach a "saturation" point where no further flexibility requests can feasibly be accommodated. Employers should therefore ensure that any flexible working patterns agreed with employees are open to periodic review.

From an employee perspective, being "always on" and having work spill over into holiday and leisure time can present serious challenges for health and wellbeing. As non-traditional working arrangements increase, these types of issues will fall increasingly under the spotlight and line managers will need to be equipped with the skills to manage them.

Many UK employers will have five distinct generations in the workplace by 2020. Offering flexibility will be crucial in responding to their different needs and expectations, thereby helping organisations in the

battle to attract and retain top talent. The increasing numbers of millennials in the workforce, embracing a much more fluid approach to work and life, will no doubt drive changes in the way that employers interact with employees. As highlighted in Section 1, for older generations, the concept of retirement has in many ways been retired and there is often no longer a stark choice between being in or out of work. With generous workplace pensions becoming much rarer, many will seek - and financially require - something of both worlds. Increasingly, partial "retirements" will be funded by working part-time, and flexible working requests, traditionally the preserve of new parents, will become a normal aspect of the transition to retirement.

Employers are recognising the need to revise their contractual framework to support more diverse and flexible working models, increasingly driven by digitisation. Perhaps the term "employer" will itself gradually become obsolete. Either way, important considerations will include evaluating the need for core working hours, base working location and exclusivity of working arrangements, and considering how best to protect business interests.

Employers that embrace "portfolio" workers and scrap "exclusivity" clauses could gain a march on the competition by actively encouraging and facilitating employees' outside interests and gaining access to a broad and flexible on-demand talent pool. One challenging issue is how to balance such an approach against concerns about confidentiality and competition. The more traditional, contractual means of protection may not provide an adequate solution in a more networked and collaborative business environment.

FUTURE DEVELOPMENTS

Non-standard forms of work will clearly have a big part to play in the future labour market, but the good news is that flexibility allows companies to meet new challenges. As the working relationships evolve and the shape of the employment "deal" comes under increasing pressure, employers need to be ready to adapt.

While the traditional model of employment remains the norm for the time being, digitisation and the rapid rise of the gig economy is spawning new species of work relationships with which employment laws and tax regimes have struggled to keep pace. The media and political furore surrounding zero hours contracts and gig economy workers illustrates how these issues can draw the attention of government and trigger regulatory intervention. Resulting government consultations on one sided flexibility address the issue of unfair flexible working practices, and canvass views on proposals to create a new right to reasonable notice of work schedules.

Legislators and judges will continue to grapple with the tension between flexibility and security, with the past year or so having seen moves at EU level and within the UK to find a legislative solution. In the EU, a new European Pillar of Social Rights[17] seeks to guarantee basic rights for workers, regardless of the basis on which they are engaged. In the UK, the Good Work review[18] made a number of proposals for legislative changes to the employment law landscape to address these issues. The Good Work review took place alongside a number of related parliamentary inquiries into matters such as the status and rights of the self-employed[19], agency and "gig" economy workers[20] and the adequacy of the UK's welfare and tax system[21] in this context. The government's various responses to the Good Work review indicate that this will be a continued area of focus with potential for reform. As flexible working becomes more prevalent, and technology continues to re-shape workplace relations, we can expect trade unions to continue mobilising to protect workers engaged in new modes of work, and an increasing number of legal claims concerning employment status.

The UK's vote to leave the EU will no doubt lead to changes in the employment landscape over the next few years. Economic uncertainty following the vote is leading many employers to turn to short-term staffing options, rather than permanent recruitment. Another major issue is the extent to which EU-derived employment laws will be repealed or reformed after Brexit[22]. With what some regard as a creeping "casualisation" of the UK labour market and with developing concerns about an increasingly flexible (and possibly more insecure) labour market, businesses would be prudent to expect further scrutiny and regulatory intervention in the future.

In order to support diversity in the workplace, we may see further moves by the government - beyond the new shared parental regime - to encourage gender balance in undertaking childcare responsibilities. The new gender pay gap reporting obligations and the government's proposals for grandparental leave are recent examples of regulatory intervention.

CHECKLIST

- Assess the organisation's strategic workforce needs and identify which mix of work models best aligns with those requirements.
- Review and/or introduce appropriate contracts for different segments of the workforce.
- Review contractual provisions for staff on hours and place of work, exclusivity, confidentiality, post-termination restrictions etc to ensure proper "fit" with organisational strategy.
- Implement and/or review policies and procedures to support alternative working arrangements in line with the organisation's strategy, such as home/remote working, IT, health and safety/well-being, and flexible working.
- Audit hours of work and continually assess compliance with working time, national minimum wage and health and safety obligations.
- Audit the workforce to identify discrepancies between status and contractual arrangements. The relevant documentation should not only reflect the reality of the working relationship at its commencement but should subsequently be reviewed periodically.
- Review the current approach to dealing with flexible working requests and how flexible working patterns are documented.
- Review line manager capabilities to ensure appropriate skills to manage a flexible, more fragmented, workforce.
- Keep an eye on legislative proposals and developments impacting on this area.

SECTION 3

SOCIAL MEDIA: BENEFITS AND DANGERS

The ways in which we connect, communicate and share information and opinions have radically changed, with technology and globalisation driving wider and wider networks and connections. There are now over 3 billion[23] active social media users worldwide across a range of networks. The variety and pervasive uptake of social media platforms and digital networks are driving societal and cultural shifts – an upheaval from which the world of work has not been immune. Social media is increasingly being used as a business tool, bringing with it fresh opportunities for employers but new risks as well.

Millennials, who have grown up with social media, are entering the workforce in greater numbers with an expectation of information sharing, communication and collaboration. This is a significant driver for businesses to engage effectively with social business and networking tools. As mentioned in Section 2, forward thinking organisations that are moving away from traditional, hierarchical management systems and embracing more agile, collaborative and flatter organisational models are using digital and social media platforms to support this strategy.

"Social first" business strategies – focusing on the ability for customers to interact with all levels of an organisation's staff - are increasingly common and no doubt will continue to grow in light of changing customer demands. In these business models, staff are strongly encouraged - even required - to have a large and active social media presence, helping to transform the corporation from a faceless monolith into a collection of knowledgeable and engaging human beings.

A McKinsey survey[24] of 20,000 consumers in Europe found that social media recommendations were behind more than a quarter of all purchases made. For many organisations, employees are their greatest asset and harnessing their digital power and connections can create unprecedented opportunities. Inviting employees to share brand messages on their own social media accounts brings a range of benefits for organisations when done correctly. Reportedly, content shared by employees attracts eight times more engagement than content shared by an organisation's traditional brand channels. An employer with a clear organisational vision and a culture that encourages widespread collaboration and communication of its values is more likely to harness the support of its workforce and reap the benefits of a social media strategy.

However, with every member of staff acting as spokesperson, there is always the potential for things to turn sour. The method of communication on social media is easy, direct and usually informal, but small actions are capable of having big impacts. In a business environment, how can you harness individuality and encourage sharing of views and opinions, while preventing it from getting out of control and damaging your brand? Even if employees are not asked to use social media for work purposes, many will access their personal accounts outside work. There are multiple platforms from which employees can – and do – share their views about their work, their colleagues, their manager and their employer's products and services. For some, complaining on social media is now as normal as moaning about your employer down the pub - but a lot more public!

Over recent years, the courts have seen several cases about dismissal for misconduct arising from social media use, both inside and outside of work. As yet, however, there is little judicial guidance for employers on how to deal with this developing area of risk. Employers should think carefully about appropriate rules and guidance for social media use and keep these under review as technology evolves.

Many social media accounts are public, giving organisations the opportunity to access an unprecedented level of private information about individuals (for example, in the context of recruitment or disciplinary proceedings). Managers and employees should be given training to ensure this type of activity does not impinge on an individual's right to privacy or breach data protection laws. (See Section 7 for further discussion in relation to data and privacy risks.) Conversely, many job candidates will be well aware of a company via its online presence before even applying for a job. An effective social media strategy is clearly an important means of communicating the organisation's brand in recruitment campaigns.

For employers needing to protect their confidential information, business connections and goodwill, the current environment of internet-based communication makes this significantly more challenging. Where social media forms a key part of the job, the distinction between personal and professional personas is becoming increasingly blurred. Who owns the social media accounts? Should a departing employee be required to close their account? Can employees exploit contacts made on social media in the course of employment after they have left? Employees can communicate the fact of their departure and the identity of their new employer to a large number of connections by merely updating their LinkedIn profile. These types of issues concerning ownership of social media accounts and protecting the business have been the subject of litigation in only a small number of cases, but it is a trend which is likely to continue. Employers would be wise to consider these matters in advance and identify in contracts and policies who owns what and what should happen when someone leaves the organisation.

FUTURE DEVELOPMENTS

Use of "enterprise" social networks among colleagues at work can have many advantages beyond helping employers communicate more effectively with their staff and facilitating collaboration. It can also disrupt formal hierarchies and knowledge silos, promote employee engagement and productivity and remove organisational barriers, thereby improving relationships across geographical locations. Embracing the benefits of this type of social media technology will enable organisations to behave more nimbly in the face of an increasingly fast-moving and competitive business environment.

But social media use will also bring new problems to the workplace. Scientific studies[25] have shown it to be addictive, reducing an individual's ability to concentrate on a single task. With people constantly seeking external stimulation, it can be increasingly difficult to sustain the concentration needed for difficult tasks. Will "social-media-free" times or places at work become more common? How can personal social media use at work be managed most effectively in practice?

We can expect the sophistication of social media tools to continue to evolve at speed. With future technological developments, new jobs will be created and people will increasingly be able to create value through social collaboration, without the need for a traditional business enterprise. Widespread adoption of social media has the potential to radically rebalance the power and control between work givers and providers, presenting significant challenges for organisations in attracting and retaining talent in the future.

CHECKLIST

- Audit the organisation's current use of social media and its purpose.
- Draft/review the social media policy in light of evolving technological developments.
- Review the disciplinary procedure, harassment and bullying policy and any other relevant policies to ensure they "line up" with the social media policy.
- Publicise the grievance procedure and encourage workers to communicate discontent internally rather than via social media.
- Offer training on social media use to workers and provide guidelines.
- Consider how to maximise employee engagement and encourage staff to become the organisation's ambassadors on social media. Provide suitable content to be shared by staff on social media.
- Review recruitment policies and manager training. Ensure managers know what monitoring of employee social media accounts is appropriate and lawful, so they do not act inappropriately.
- Consider what level of personal social media use is permitted during working hours. Is it monitored and, if so, is the level of monitoring appropriate? Ensure any policy on this is properly communicated to staff.
- Consider "social media free" times and places and whether this is compatible with people's jobs.
- Review contracts and policies and consider what provisions are needed to ensure the business is adequately protected when people leave.

SECTION 4

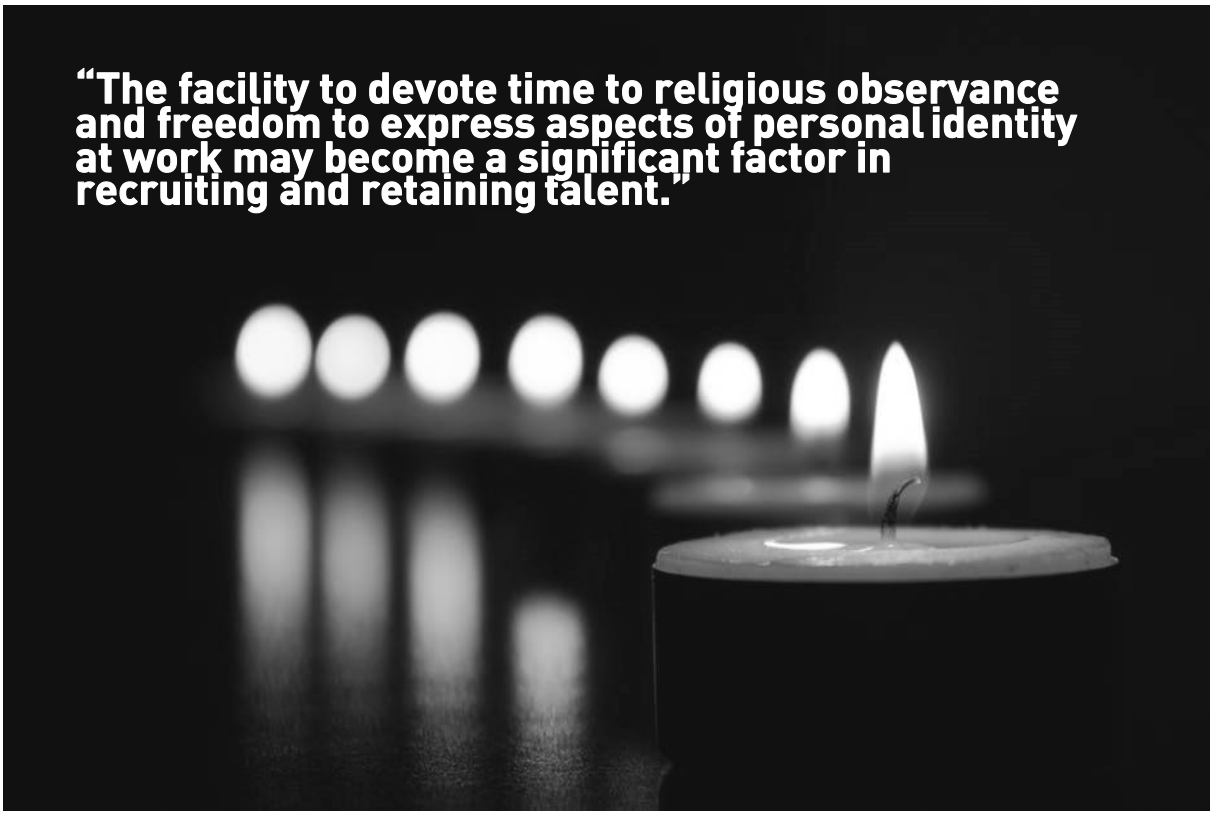
RELIGIOUS DIVERSITY

Diversity gives organisations a competitive advantage, a proposition which is as true for religious diversity as for other areas. At the same time, the need for sensitivity towards religious and cultural differences in the workplace is essential. As emerging markets become more economically influential, such sensitivity will become increasingly important in day-to-day business life. For example, rapidly-growing Asia is a region generally acknowledged to have the highest levels of religious diversity in the world. With greater diversity comes an increased risk of conflict, whether between religions or between religious workers and other groups.

New generations entering employment are placing a premium on work-life integration and living out their personal values in the workplace, which will inevitably bring the issue of religious diversity to the fore. The facility to devote time to religious observance and freedom to express aspects of personal identity at work may become a significant factor in recruiting and retaining talent.

Cultural awareness will be essential in the global marketplace of the future. Managers need to develop multicultural social and communication skills, while initiatives to support religious diversity awareness and inclusion will benefit the entire workforce. This is particularly important in a business environment in which same-time communication and use of social media are the norm. As highlighted in Section 3, with instant communication it can be easy for comments to be made "off the cuff" that are ill-advised or could be taken the wrong way.

A person who is subjected to unwanted conduct related to religion or belief may have a claim for harassment, covering both single acts and more general behaviour that creates an inappropriate



environment. A claim of this type could be brought against both the individual perpetrator and the employer. In order to defend successfully such a claim, the employer would need to show that it had taken all reasonable steps to prevent employees from discriminating against or harassing others.

Alongside these developments, there have been several cases dealing with the clash between religious beliefs and the rights of other protected groups, particularly relating to sexual orientation. In general terms, the approach of tribunals and courts in these cases has been to confirm that religious beliefs cannot be used to justify discrimination against others, even where those beliefs are genuinely and sincerely held. Where, for example, a religious employee expresses homophobic views in the workplace, this can create immediate practical problems. The key to resolving such sensitive issues is to have a policy emphasising the need for mutual respect, making it clear that the expression of any views that discriminate against others (whether or not motivated by religious belief) will not be tolerated.

It is important to remember that the legal protection against "religion or belief" discrimination covers philosophical as well as religious beliefs. Courts have ruled that a broad range of beliefs can potentially qualify for protection, including belief in climate change, opposition to fox hunting and even a strong commitment to the ethos of public sector broadcasting. While this does not mean that *any* strongly held belief is capable of being covered by discrimination law, clearly there are both religious and philosophical beliefs which may appear rather obscure or esoteric and yet still attract protection. The European Court of Human Rights has had an influence in this area, ruling[26] in 2012 that the UK needed to introduce protection against dismissal on grounds of political opinion or affiliation (in this case, membership of the British National Party). This led directly to unfair dismissal law being amended to provide that the normal two-year qualifying period does not apply in such cases.

In a globalised and technologically advanced business world, working hours and associated work demands are increasing, which can create difficulties for employees with requirements related to religious observance. An unwillingness to accommodate reasonable requests for time off could trigger complaints of direct or indirect religious discrimination. Various practical arrangements at work give rise to concerns or grievances - for example, the availability of prayer facilities, social work events based around alcohol, days off for religious festivals, dress codes and canteen facilities.

As mentioned in Section 2, as flexible working practices become increasingly widespread, careful thought is needed on how to decide which flexible working requests are accepted and which are refused. Given the increasing variety of religious diversity in the workplace, HR professionals will need to be increasingly sophisticated in the way they handle issues of this type.

FUTURE DEVELOPMENTS

Under a post-Brexit immigration system, the skill level required for migrant workers is likely to be lower than it is currently. This is because the government will need to avoid labour shortages being created due to the flexible pool of EU migrants no longer being available.

Migrant labour will need to be drawn across the globe, with preference no longer being given to EU migrants. Whilst the religious composition of the future workforce is not yet known, it is possible the changes to the immigration system could broaden the range of religions represented in the UK workforce.

Some commentators also believe that ideological tensions within workforces are likely to increase as political faith groups become more prolific – an obvious recent example being the rise of radical political Islam.

Continuing with the theme of the UK's relationship with the EU, it is significant that religion and belief discrimination was only introduced in this country in 2003 to comply with the EU Equal Treatment Framework Directive. Following the UK's departure from the EU, it may theoretically be possible to repeal this legislation altogether. As highlighted in Section 1, that is an extremely unlikely scenario given the widely acknowledged importance of such rights within society (among other factors).

As mentioned above, in addition to EU law, the European Convention on Human Rights has also been influential in the development of UK law on religion and belief discrimination. The government has, however, previously expressed an intention to repeal the UK Human Rights Act which could mean the courts would no longer be bound to take account of decisions of the European Court of Human Rights. This could potentially limit the further development of legal protection for religious, philosophical and political beliefs.

CHECKLIST

- Ensure the HR function has the requisite knowledge and skills to deal with potential issues arising from religious diversity in the workplace.
- Review diversity/equal opportunities and anti-harassment policies to ensure that they clearly and appropriately cover religion and belief discrimination.
- Train managers and the wider workforce in religious diversity and inclusion.
- Review IT and social media policies to ensure suitable guidance is given about unacceptable conduct, including from a multicultural and religious perspective.
- Review disciplinary and grievance procedures to ensure effective mechanisms and communication channels are in place to handle conflict between different groups.
- With growing religious diversity in mind, review current approaches to issues such as:
    - flexible working requests
    - time off for religious observance
    - opting out of work duties on account of conscientious objection
    - dress code
    - freedom of expression in the workplace.

SECTION 5

REMOTE WORKING

Over recent years, technological developments such as e-mail, high-speed broadband, mobile devices and document-sharing platforms have made it possible to do certain jobs remotely that would previously have to be performed in an office. Governments across the world, in order to support increased labour participation and productivity, have facilitated opportunities for remote working by implementing legislation allowing greater flexibility.

Soaring house prices in many big cities, combined with commuting costs, have left many employers finding it difficult to attract and retain talent locally. This has prompted some businesses to reassess where and how work can best be performed, with remote working - whether from home or otherwise - offering a strategic solution for some job roles.

Evidence shows[27] that remote working presents various benefits to employees and employers, such as reducing the costs and environmental impact of commuting, producing higher rates of job satisfaction (thereby attracting and retaining staff) and demonstrating the trust that employers have in their staff. It can also increase productivity, reduce the cost of office space and help create a better work-life balance.

Despite all these advantages, the "working from anywhere" trend brings new challenges for businesses. Remote working can generate tensions and issues around "working time", which are likely to be scrutinised by both government and the courts as the traditional workplace (which has been the model for most employment legislation) changes to embrace more flexible working patterns.

Businesses that are reluctant to embrace remote working tend to be those with concerns about effectively managing employees remotely, the potential costs of IT and technology support and the possible negative impact on trust, collaboration and team culture. Remote workers can also face particular challenges in

terms of managing their own work, putting them at greater risk of feeling isolated and removed from the rest of the business. In addition, some can be confronted with scepticism from office-based colleagues about whether they are genuinely "working from home" (notwithstanding studies showing that homeworkers are often more productive). A useful approach for employers is to conduct a thorough review of the technology they currently deploy in the business and seek to identify new devices/software that may help with some of the issues identified above.

Related to the IT requirements for facilitating remote working has been an increasing trend for employers to allow employees to use their own personal technologies in the workplace or when working from home. This is known as "Bring Your Own Device". By using their own device (e.g. smartphone, tablet or laptop), workers can connect to their employers' network for professional purposes, whether at work, home or anywhere else. Notwithstanding the obvious cost-saving benefits to employers and potential improvement to engagement and productivity, BYOD does bring some associated risks for businesses, such as possible data protection breaches, confidential information leaks, loss of control, and issues regarding regulatory compliance and privacy.

Many of these issues can be overcome or mitigated by effective use of technology combined with robust policies relating to IT and data. Health and safety is also important, as employers should ensure they comply with their duty of care to remote workers in circumstances where they are less able to oversee their health and welfare (particularly their stress levels – see Section 6 for further discussion).

Unstructured and informal approaches to remote working requests may expose businesses to allegations or claims of discrimination. Employers should implement a consistent, transparent and structured approach to remote working to mitigate such risks. Managers should be provided with appropriate training on how to manage people remotely and contractual terms should be reviewed to consider what changes are needed.

FUTURE DEVELOPMENTS

There will inevitably be further technological developments facilitating remote working, resulting in a steady increase in opportunities to work in this way. The growth of this practice will, of course, depend on employers' willingness to move away from the traditional "9 to 5" in the office to a more flexible model. The nature of the employer's business is likely to be decisive, with the technology sector probably continuing to lead the way in the shorter term. We can, however, increasingly expect to see more traditional businesses adopting flexible business models as they recognise the competitive advantages.

CHECKLIST

- Consider whether the IT infrastructure supports remote working and, if not, identify what technology and software will best assist with remote working and what the likely costs will be. Conduct a cost-benefit analysis, assessing the advantages that remote working may bring.
- Review employment terms and conditions to ensure they reflect the realities of remote-working arrangements.

- Review policies and procedures to ensure that they are fit for purpose - for example, travel, health and wellbeing, BYOD, data protection, confidentiality, IT and communications policies. Consider whether to develop and implement a discrete policy on home/remote working.
- Assess the organisation's approach to BYOD and identify the risks in relation to data protection, confidential information and privacy. Consider what steps can be taken to mitigate these risks.
- Consider how to meet legal and regulatory requirements where employee visibility is greatly reduced (for example, health and safety, data protection and working time obligations).
- Evaluate how to deal with management issues on a day-to-day basis - for example, disciplinary and grievance processes, sickness absence, performance issues and general supervision. Ensure managers are trained on how to manage people remotely.
- Devise ways to communicate effectively with employees working remotely and maintain the organisation's culture.
- Keep an eye on any changes to the law on flexible working and other relevant legislative reforms and developing case law (for example, in relation to working time and the minimum wage).

SECTION 6

THE STRESS EPIDEMIC

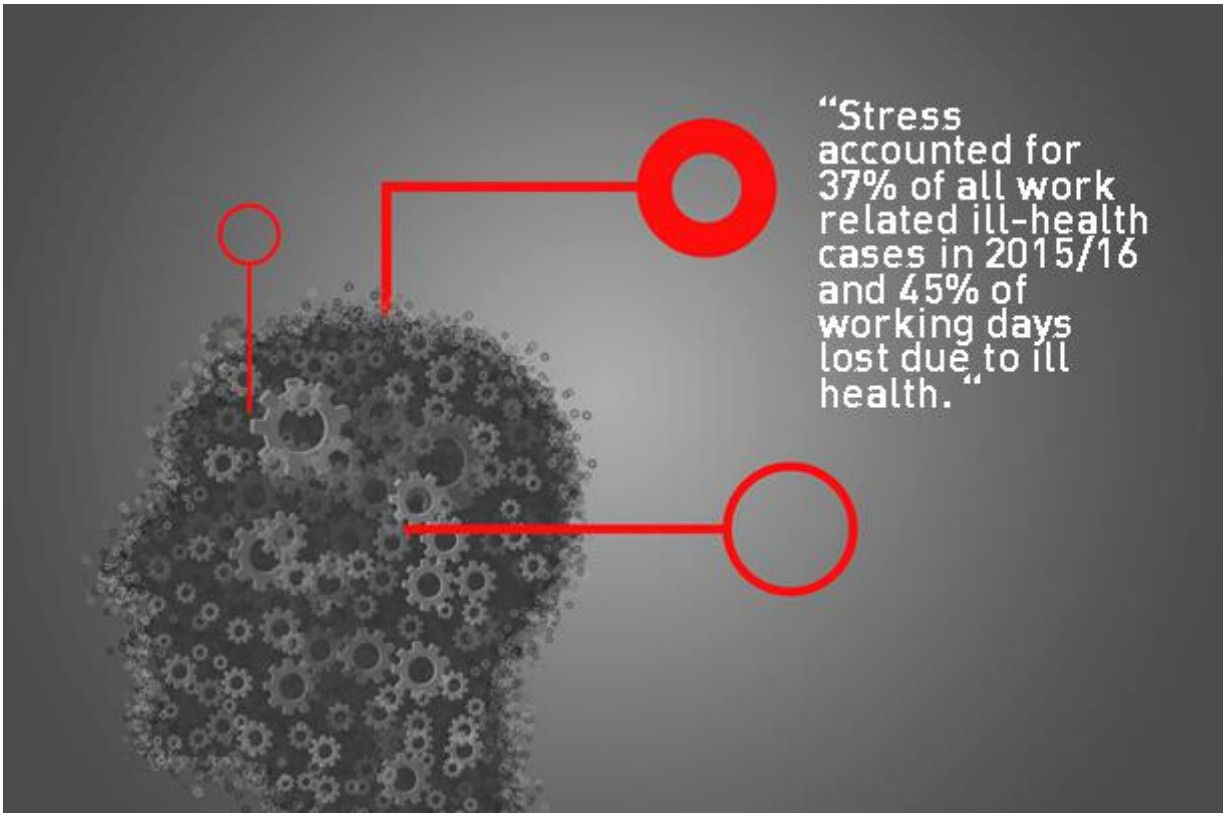
Workplace stress is hardly a new phenomenon, but there are strong indications that 21st century changes in the world of work are exacerbating employee stress levels in a variety of different ways.

A survey[28] published by the CIPD in 2018 found that 37% of respondents reported an increase in stress related absences in the previous year, with just 8% reporting a decrease.

Official government statistics[29] support this alarming picture. According to latest estimates from the UK's labour force survey, the total number of cases of work-related stress, depression or anxiety in 2017/18 was 602,000. Stress accounted for 44% of all work related ill-health cases in 2017/18 and 57% of working days lost due to ill health.

Evidently this is a global trend, despite a lack of empirical data about the scope and nature of the problem in most countries. A report[30] in 2016 by the International Bar Association's Global Employment Institute, based on responses from 58 nations, revealed that many of them had recorded increasing absenteeism from work due to workplace stress and mental health issues.

Employers are increasingly at risk of facing legal actions from employees based on workplace stress. In the UK, these might range from employment tribunal claims for disability discrimination or unfair dismissal, to claims in the civil courts for stress-related psychiatric injury.



So far as the causes of stress are concerned, there has always been a range of contributing factors, including: the way work is designed and organised; job insecurity; excessive workloads; poor pay and conditions; management failings; workplace culture, including bullying; and lack of autonomy. But what "new" reasons can we identify in the modern world of work to account for the apparent escalation of the problem?

One perhaps obvious factor is that working hours are getting longer, with international businesses increasingly adopting a 24/7 culture and demanding that workers are on duty to deal with time differences and customer expectations. The TUC reported[31] in 2015 that the number of people in the UK working more than 48 hours a week had increased by 15% in the previous five years, with 3.4 million employees working excessive hours. This is, of course, in the context of the ability for employers to ask employees to "opt out" of the 48-hour working week being widely regarded as a key element of labour market flexibility and economic competitiveness.

A 2015 report[32] by the EU agency Eurofound – the European Foundation for the Improvement of Living and Working Conditions – found that changes in the content and organisation of work in recent decades had resulted in an "intensification" of work. The report highlighted the significant proportion of workers who are confronted with a very high level of work demands, such as working to tight deadlines, needing to work faster, frequent interruptions or simply having too much work to do. These types of behaviours can have a detrimental impact on mental health, absenteeism and productivity.

Related to this is the "always on" working culture that technological developments such as email and smartphones have created. According to recent research[33] by the CIPD, 40% of people check work emails at least five times a day outside of working hours, while almost a third say remote access to work means they can never fully switch off.

Another common issue, particularly in organisations with a culture of long working hours, is "presenteeism" – turning up for work when unwell. A recent Work Foundation report found that presenteeism could account for as much, if not more, of a loss in productivity than sickness absence, while the 2016 CIPD survey[34] mentioned above found evidence that presenteeism is associated with stress-related absences and mental health problems.

As mentioned in Section 5, the shift towards more extensive remote working and distanced employee relations is another contributing factor. Homeworkers become isolated and suffer stress and anxiety through lack of regular support – something that can be difficult for managers to be aware of remotely.

A further reason accounting for rising levels of stress might be the highly publicised rise of zero hours contracts and the "gig economy". As highlighted in Section 2, these working arrangements have been associated with job insecurity and growing demands on workers. The unpredictable way in which these arrangements are managed by some employers can also contribute to unhealthy levels of stress.

The Good Work review[35], published in July 2017, noted that if individuals "have no guarantee of work from week to week or even day to day, this not only affects their immediate ability to pay the bills but can have further, long-lasting effects, increasing stress levels and putting a strain on family life".

FUTURE DEVELOPMENTS

As the world of work evolves, the harmful effects of workplace stress will continue to be a developing issue and businesses need to think creatively and adapt in order to mitigate its impact.

This is, of course, one aspect of a broader picture in which changing demographics and technological advances will continue to put pressure on traditional "9 to 5" working arrangements, challenging employers to think differently about how and where their employees work. Organisations that promote policies and behaviours which support good work and engagement are likely to be able to maintain a healthy and productive workforce, putting them in a better position to attract sought after talent.

This reflects one of the main themes of the aforementioned Good Work review, which places great emphasis on the importance of "quality work". It makes the point that, while quality jobs increase participation rates and economic performance, low quality work reduces well-being and productivity and may also detrimentally affect worker health.

There is indeed growing research demonstrating that positive work cultures are more productive. It has been shown, for example, that there is a correlation between poor leadership behaviour and heart disease in employees. While some might assume that stress and high-pressure push employees to perform better, that fails to take into account the costs incurred, in terms of work days lost, workplace accidents and healthcare expenditure. High-stress environments can also result in employee disengagement, which leads to absenteeism, costly errors and lower productivity and profitability.

As stress becomes more widely recognised as a major problem for employers and their bottom line, an increasing number of organisations will be investing in wellness initiatives for their staff. These range from training programmes for managers and staff on topics such as managing time, conflict and stress, to advice on lifestyle and diet. Some employers arrange exercise initiatives, such as yoga classes or discounted gym membership, or offer healthy eating options in a staff canteen.

More crucially, it is becoming far more commonplace for organisations to have robust, formal policies on stress management alongside training for line managers and HR personnel on identifying and handling issues concerning workplace stress. An important aspect of this is the availability of clear routes for employees to raise any concerns - for example, through a confidential health/wellbeing hotline operating in tandem with the employer's grievance procedure.

As noted in Section 2, flexible working will continue to become more widespread. In any event, employers increasingly appreciate the benefits of supporting alternative ways of working as a means of helping staff balance their work and home lives, thereby reducing stress. Official data[36] suggests that businesses adopting more flexible working practices have seen an improvement in relationships with employees, with 40% reporting a boost in productivity and 38% seeing a drop in staff absences.

Finally, there is likely to be government intervention in relation to workplace stress over time, given the demonstrable impacts that it has on absence rates and economic productivity. Following the scrapping of the 'Fit for Work' scheme in 2017 due to lower than expected referral rates, we are likely to see further policy initiatives, or even legal reforms, designed to improve the way health and wellbeing is managed for those in work.

This might involve consideration of legislative interventions adopted in other countries. In Japan, for example, there has been a new requirement since 2015 for employers to conduct "stress checks" as a way of mitigating against work-related mental illnesses. France introduced a "right to disconnect" from January 2017, requiring employers with 50 or more staff to reach a collective bargaining agreement under which employees can disconnect from digital work tools (emails, intranet etc) during rest time and holidays. If no such agreement is concluded, the employer must draw up a "charter", after consulting the works council or staff delegates, defining how to exercise the right to disconnect and implementing training for management and employees on the reasonable use of digital tools. Germany does not have such legislation, but some companies (e.g. Volkswagen) and government departments have banned telephone calls and emails outside working hours.

CHECKLIST

- Devise and implement a formal policy on stress at work, incorporating practical guidance for employees on coping with stress and how they can raise concerns or grievances.
- Investigate whether there are any stress-related reasons for under-performance or absenteeism, for example through staff appraisals, return-to-work interviews after sick leave or an employee survey.
- Ensure managers receive appropriate training on recognising symptoms of stress and how to deal with employees struggling with pressure of work and/or mental health problems.
- Assess organisational compliance with health and safety and working time obligations, in particular the use of the 48-hour week "opt-out".
- Review the use of technology and associated employee behaviours; consider whether these are creating or contributing to excessive stress and whether organisational changes are required.
- Introduce a policy on flexible working and train managers in how to deal with requests for flexible working arrangements.
- Consider how best to encourage a healthy lifestyle and whether to introduce internal or external support for employees suffering from stress, such as a health/wellbeing hotline, availability of counselling services or use of an Employee Assistance Programme.

SECTION 7

MANAGING TECHNOLOGY, PERSONAL DATA AND PRIVACY

The role of data in the workplace has changed dramatically since the early days of computers and basic databases in the 1970s. Even with the advent of the internet and email, while employers held basic information about their employees (names, addresses, dates of birth and so on), this was generally used for the administration of the business. The need to monitor sickness absence, administer sick pay and comply with obligations under disability discrimination legislation has meant that in the past 20 years it has become more common for employers to hold more detailed information about employees, sometimes of a sensitive nature. Again, until relatively recently, such data was retained mainly for record-keeping purposes, rather than being seen as having a specific business value.

The explosion of social media and the "internet of things" has, however, created enormous quantities of data that will continue to grow in the future. New technologies have improved our ability to track and collate vast amounts of information. With the "quantified self" movement entering the mainstream, a growing number of people are using wearable technology to monitor everything they do. It has not taken long for employers to identify the benefits of introducing this type of technology in their workplace, with the potential to access large amounts of detailed information on their employees. Purposefully collecting and investigating this data to identify patterns and behaviours could be used to help improve overall workforce wellbeing and productivity. Employers' health insurance premiums could be reduced by having a healthier workforce. Monitoring stress levels and the causes of stress could enable employers to make positive changes to the workplace.

Many predict that consumer concerns about privacy and the security of personal data are likely to decline as they come to perceive the benefits of transparency as outweighing the risks. But it remains to be seen how far employees will be willing to trade their privacy so employers can track their location and activity or assess their performance. So far, there have been a number of well publicised negative reactions from employees and unions where employers have introduced, for example, workplace motion detectors (to monitor desk usage) and wristbands for warehouse workers (to measure productivity and location in real-time).

The possibility for employers to collect and analyse huge amounts of detailed information on their staff inevitably raises legal and ethical issues about data protection and privacy, for which they will need to prepare. With predictions of a future in which managers have dashboards displaying real-time employee biometrics, we can expect to see complaints from employees and unions about unnecessary or intrusive monitoring. Employers should be wary of creating a "surveillance culture" in the workplace, which could lead to increased stress, sickness absence and staff turnover.

People are more likely to be open to the idea of monitoring if they can be persuaded of a clear personal or workplace benefit - particularly if the data is anonymised and shared at an aggregate level rather than being personalised. Trust is likely to be the main stumbling block, so transparent rules and communications about how data is acquired, used and shared will be essential. Employers will also need to obtain employees' explicit, informed consent before gathering personal data from wearables, then further consent to correlate it with other data such as performance metrics.

Employers need to meet the requirements of the General Data Protection Regulation (GDPR), which came into force in May 2018 and balance the interests of the data subject (employee) and the employer's interests in investing in new data-driven technologies within the workplace.

The GDPR tightens up the use of "consent" as a basis for processing personal data – it must be freely given, informed and unambiguous and there must be genuine choice for the employee. Sanctions for non-compliance with data protection obligations have become much fiercer, with the maximum penalty set at €20m or 4% of an undertaking's worldwide turnover, if higher. The GDPR also introduces more stringent enforcement practices, requiring employers to give more thought to issues such as storage and security of potentially vast quantities of data - the more data that employers control, the greater the likelihood of a security breach. Dealing with data subject access requests is likely to become even more onerous.

Once an organisation is able to collect enough of the right sort of data, it can be possible to use it to automate decision-making. This is already being used with increasing effectiveness and intelligence in recruitment, but has the potential to pervade the whole life cycle of the employment relationship. Although this presents opportunities for organisations to improve their decision-making processes, care should be taken to eliminate any conscious or unconscious bias that could give rise to potential discrimination claims.

Although an employer may have a legitimate interest in monitoring a personal device used for business purposes, this should be balanced against the employee's right to the protection of his or her private life. Employers should put in place appropriate security measures to protect personal data against misuse, loss or damage. It will become more important in the future for organisations to adopt appropriate policies related to privacy, security and intellectual property, in order to ensure that all processing of personal data on workers' personal devices complies with data protection legislation and current ICO guidance.

Advances in technology mean that data can now be easily transferred around the world. Data protection laws restrict the transfer of personal data to a country or territory outside the EEA unless it ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of their personal data. Ensuring an adequate level of protection can be a real challenge, as illustrated by the recent European Court of Justice judgment outlawing the "safe harbor" arrangements for the transfer of personal data outside of the EU to the United States. The complexity and uncertainty of the rules on international transfers of personal data will continue to create significant risks for employers in the future.

FUTURE DEVELOPMENTS

Legal regulation of monitoring and surveillance will continue to limit the use of data for the foreseeable future. Employers will need to consider carefully their rationale for obtaining and using personal data and put in place clear policies to ensure compliance with legal obligations.

Ethical issues come into play if an organisation's decisions about its workforce are increasingly based on data collected outside the workplace. At what point do concerns over "wellbeing" stray into an infringement of privacy? Would it be legitimate to use such data in the context of performance management? To what extent might it be permissible for using a wearable to become, in practice, a condition of employment in the future? As things stand, employers experimenting with wearables and tracking apps are struggling to find efficient ways in which to analyse the vast quantities of data collected and draw useful insights from it. But this is certain to improve over time and we can expect the use of this type of technology to flourish. As the trend continues and develops, employees are likely to become more receptive and accepting of these sorts of practices. In the same way that data is shared on social media to an extent that would have been unimaginable only a generation ago, the tracking of employees' daily lives and habits may gradually come to be regarded as a natural aspect of their working lives.

CHECKLIST

- Assess the organisation's data protection compliance mechanisms. Consider what data is collected, how it is processed and for what purposes. Review procedures for obtaining consent to processing.
- Review what security measures are in place in relation to personal data and identify risks and appropriate mitigation action.
- Take steps to ensure the organisation is compliant with the GDPR.
- Review current arrangements for transferring data outside the EU.
- Review the organisation's technical capability to collect and analyse data and consider whether it meets business requirements.

SECTION 8

WORKING ACROSS BORDERS

With business increasingly conducted internationally and many organisations deploying staff across the world, issues arising from the management of a global workforce are becoming more complex. For companies confronted with disparate national regulations, there are significant legal challenges. The law has not kept pace with the increasingly global business footprint and employers need to understand and comply with a plethora of issues in order to protect their business against risk when working in different regulatory environments. These range from immigration, tax and social security/pension regimes, to local mandatory laws and systems for dispute resolution.

Since the financial crisis, the "expat" model of overseas staffing has dwindled, with organisations increasingly using secondments or engaging peripatetic employees to spend time working abroad for them. Employers need to consider not only how to manage these arrangements in practice, but also how best to reflect them contractually. The challenges of catering for different legal systems that may apply means that a "one size fits all" solution can rarely be applied across a variety of local jurisdictions and it is usually advisable to use contracts specifically adapted for the relevant jurisdiction(s).

A particularly problematic area for multinational employers is how to ensure robust protection of the business by means of restrictive covenants for internationally mobile workers. Approaches to these types of business protections differ significantly between countries, with post-termination restrictions being completely unenforceable in some jurisdictions. At the outset of any international posting, the employer

should consider where, in the event of a breach, it will want to enforce any restrictions and ensure that local employment laws are considered at that time.

It is also essential to assess the impact on an international secondment of the host country's laws, which may grant minimum levels of statutory protection. At the same time, the territorial reach of domestic UK legislation has become increasingly expansive. While neither the Equality Act 2010 nor the Employment Rights Act 1996 - both cornerstones of the UK's employment law regime - have express jurisdiction provisions, the "substantial connection" test developed by case law can sometimes seem like a relatively low hurdle to overcome for some overseas workers seeking the protection of UK employment law. To avoid creating undue risk, organisations need to ensure a strong understanding of both the mandatory laws of the host country and the application of UK legislation to their peripatetic or internationally mobile employees.

With many organisations operating across international borders, culture and language, the emphasis on greater cross-border understanding has intensified. A sense of shared purpose and culture will become ever more important in bringing together an increasingly flexible and geographically disparate workforce. Managers need to support and develop cross-border cohesion to attract and retain talent, and be equipped with the necessary skills to manage an increasingly fluid and global workforce. Multinational employers seeking to implement global diversity initiatives and policies straddling national boundaries face considerable challenges in striking the right balance. They should reflect the cultural sensitivities and local discrimination laws, which vary in each jurisdiction, while at the same time strive to achieve a consistent global position. Effective communication and training are essential to ensure successful adoption of the initiatives that are decided upon.

Companies operating in numerous international locations also need to consider how to deal with the differing rights of its workforce in the relevant jurisdictions. Family leave rights and entitlements, for example, vary extensively across the globe. Treating employees differently in different countries poses tricky employment relations issues. To address this, some multinational companies have made strategic moves to introduce mandatory minimum global family leave entitlements which they essentially "level up" for their global workforce. While these types of arrangements are far from the norm, more employers managing complex cross-border workforces are likely to follow suit in order to help attract and retain talented staff.

In light of the global competition for talent, it is essential for organisations to be able to deploy their workforce across borders in order to respond to changing demands. For many employers, immigration has a fundamental role to play in meeting challenges of low productivity, underemployment and widening skills gaps, but the UK's withdrawal from the EU will change the UK's migration landscape significantly. The UK needs high levels of immigration in many sectors – such as retail, agriculture, construction, retail and hospitality – due to an insufficient number of UKworkers who are prepared to accept those jobs at their current pay rates.
Although raising salaries might attract more UK workers, this would make goods and services more expensive and exports less competitive.

The government has stated that the free movement of people between the EU and the UK will end after the UK exits the EU and a new immigration system has been put in place from 1 January 2021. From that date, EU workers moving to the UK will be required to meet the UK's post-Brexit immigration policy. In light of this, organisations should review their workforce from a number of perspectives. Where functions have been outsourced to EU countries, Brexit may make operating in those locations more difficult and expensive in the future. Organisations currently relying

heavily on non-UK EU nationals may find that post-Brexit immigration restrictions make their current model more challenging, requiring them to reconsider how best to meet current and future skills gaps. Although a significant number of current EU workers in the UK are likely to be able to apply for indefinite leave to remain and stay permanently, there is considerable uncertainty. EU workers and their employers will need to understand the limitations of their new status in the UK. Organisations will also have to ensure they are employing EU workers lawfully in a post-Brexit world, in order to avoid illegal worker penalties.

The darker sides of globalisation have included the exploitation of labour and a growing gap between rich and poor. Fiercer competition has led many businesses to subcontract foreign labour pools, offering access to cheaper and more flexible work. Practically, it is almost impossible for many businesses to maintain oversight of their geographically diverse and increasingly complex supply chains. This has had catastrophic effects on the rights of many workers, reflected in the many labour tragedies of recent years. These include, to name just a few examples, the death of over a thousand workers at the Rana Plaza garment factory in Bangladesh, widespread wage bondage in the South East Asian electronics trade and the exploitation of African and Asian migrant workers in fishing trawlers. In the UK, following intensive efforts this year, the National Crime Agency reported that modern slavery and human trafficking are more prevalent in the UK than previously thought.

The response to this has been a slowly growing trend towards formal and informal measures to protect global labour rights. We are beginning to see the development of national legislative frameworks that aim to address the exploitation of foreign workers. For example, the UK's Modern Slavery Act - Europe's first law against modern slavery – was introduced in 2015. It requires commercial organisations with a global annual turnover of at least £36 million to produce a slavery and human trafficking statement for each financial year.

Companies are also increasingly taking matters into their own hands by applying national policies at a global level to ensure good practice in the treatment of foreign workers and implementing commercial measures to protect foreign labour in their supply chains. Such initiatives have come about partly because of the growing importance of a business's ethical brand power in an expanding marketplace that is becoming ever more competitive in terms of attracting and retaining both talent and consumers. Millennials, actively engaged by ethical concerns, are driving corporate social responsibility up the business agenda.

Non-legislative bodies are also doing what they can to implement enhanced cross-border rules and protections. Over recent years, both the British Standards Institute and the Society of Human Resource Management in the US have been working on international global HR standards.

FUTURE DEVELOPMENTS

There is no doubt that the relationship between globalisation, migration and skills will continue to develop, requiring organisations to face up to operational and strategic challenges when working across borders.

Research by Goldman Sachs predicts[37] that BRIC economies may become as big as the G7 by 2032 and the Chinese economy will match the US economy by 2027. Asia is likely to account for about 60% of middle-class consumption by 2030 and PwC predicts[38] that within 30 years the majority of the world's largest industrial clusters will be located in markets that we currently regard as "emerging".

Commentators seem divided over whether cross-border business barriers will continue to disintegrate, or whether nations will become increasingly isolationist to protect national business interests. The UK's vote to leave the EU and the Trump presidency in the US are arguably straws in the wind suggesting the latter. Further significant moves towards de-globalisation would most likely lead to laws and legal systems drifting further apart rather than coming together, creating a challenging environment for employers working across borders in the coming years.

The changing nature of the UK's relationship with the EU will impact on the available talent pool and organisations' ability to recruit and move employees between countries to meet business needs. As part of workforce planning, employers should review how Brexit (and potential new free trade deals with the US, Australia and others) will affect their workforce.

CHECKLIST

- For international secondments and other postings abroad, consider the implications of mandatory host country laws and the reach of UK domestic laws on the employment relationship.
- Take into account the impact of differing tax, employment and social security regimes.
- Ensure appropriate HR capability and train managers to support the implementation of global diversity initiatives.
- Make sure managers are suitably equipped to support cross-border working and to effectively oversee and direct a fluid and global workforce.
- Audit the workforce to identify the number of non-UK EU nationals employed in the UK business and the extent to which outsourced services are supplied from other EU countries.
- Keep an eye on the changing immigration landscape in the UK in the run up to Brexit - and also the progress of new trade deals - in order to identify potential immigration issues and skills gaps.
- Keep abreast of the implications of the post-Brexit immigration policy as it develops and foster an understanding of what checks and documentation will be needed.
- Review the organisation's approach to modern slavery and what measures are appropriate to ensure best practice in the treatment of foreign workers.

REFERENCES

[1] Department for Work & Pensions (2016). *Economic Labour Market Status of Individuals Aged 50 and over Since 1984*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546643/economic-labour-market-status-of-individuals-aged-50-and-over-since-1984.pdf

[2] See above

[3] Resolution Foundation (2017). *Live long and prosper? Demographic trends and their implications for living standards*. Available at: http://www.resolutionfoundation.org/app/uploads/2017/01/Live-long-and-prosper.pdf

[4] CIPD (2019). *Ageing Gracefully: The opportunities of an older workforce*. CIPD Report. Available at: https://www.cipd.co.uk/Images/managing-an-age-diverse-workforce_2014_tcm18-10838.PDF

[5] CIPD (2014). *Managing an age-diverse workforce: Employer and employee views.* CIPD Survey Report. Available at: https://www.cipd.co.uk/Images/managing-an-age-diverse-workforce_2014_tcm18-10838.PDF

[6] Institute for Employment Studies (2017). *Fulfilling work: What do older workers value about work and why?* Available at: https://16881-presscdn-0-15-pagely.netdna-ssl.com/wp-content/uploads/2017/02/IES-Fulfilling-Work-Evidence-Briefing.pdf

[7] See above

[8] Vanessa Beck and Glynn Williams (2016). *Managing Older Workers: A report for Acas.* ACAS research paper. Available at: http://m.acas.org.uk/media/pdf/f/i/Managing-older-workers-a-report-for-acas.pdf

[9] Office for National Statistics (2017). *Overview of the UK population: March 2017*. Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/mar2017

[10] See 5 above

[11] See 8 above

[12] See 8 above

[13] Deloitte (2019). *2019 Deloitte Global Human Capital Trends.* Deloitte University Press. Available at: https://www2.deloitte.com/content/dam/insights/us/articles/5136_HC-Trends-2019/DI_HC-Trends-2019.pdf

[14] McKinsey (2016). *Independent work: Choice, necessity, and the gig economy.* McKinsey Global Institute. Available at: http://www.mckinsey.com/global-themes/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy

[15] CIPD (2013). *Zero hours contracts – myth and reality*. CIPD. Available at: https://www.cipd.co.uk/Images/zero-hours-contracts_2013-myth-reality_tcm18-10710.pdf

[16] Department for Business, Energy & Industrial Strategy (2017). *Good Work: The Taylor Review of modern working practices.* London: Matthew Taylor. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

[17] European Commission. *European Pillar of Social Rights*. Available at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en

[18] See 16 above

[19] Commons Select Committee (2016). *Future world of work and rights of workers inquiry launched*. Available at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-industrial-strategy/news-parliament-2015/the-future-world-of-work-and-rights-of-workers-launch-16-17/

[20] Work and Pensions Committee (2016). *Self-employment and the gig economy inquiry.* Available at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2015/self-employment-gig-economy-16-17/

[21] See above

[22] HM Government (2017). *The United Kingdom's exit from and new partnership with the European Union*. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

[23] Simon Kemp. *Number of social media users passes 3 billion with no signs of slowing*. The Next Web (2017). Available at: https://thenextweb.com/contributors/2017/08/07/number-social-media-users-passes-3-billion-no-signs-slowing/#.tnw_JLGOTus5

[24] McKinsey & Company (2015). *Getting a sharper picture of social media's influence.* McKinsey & Company article. Available at: http://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/getting-a-sharper-picture-of-social-medias-influence

[25] Adam Alter (2017). *Irresistible: Why we can't stop checking, scrolling, clicking and watching.* London: Penguin, Bodley Head.

[26] Redfearn v the United Kingdom [2012] ECHR 1878

[27] CIPD (2016). *Employee outlook: Employee views on working life.* CIPD. Available at: https://www.cipd.co.uk/Images/employee-outlook-focus-on-commuting-and-flexible-working_tcm18-10886.pdf

[28] CIPD (2018). Health and Well-being at Work. London: CIPD, Simply Health. Available at: https://www.cipd.co.uk/Images/health-and-well-being-at-work_tcm18-40863.pdf

[29] Health and Safety Executive (2016). *Work related stress, anxiety and depression statistics in Great Britain 2019.* Available at: http://www.hse.gov.uk/statistics/causdis/stress.pdf

[30] International Bar Association Global Employment Institute (2016). *National regulatory trends on Human Resources law* (5th IBA GEI annual global report). Available at: www.ibanet.org/LPD/Human_Resources_Section/Global_Employment_Institute/Projects.aspx

[31] Trades Union Congress (2015). *15 per cent increase in people working more than 48 hours a week risks a return to 'Burnout Britain'.* Available at: www.tuc.org.uk/news/15-cent-increase-people-working-more-48-hours-week-risks-return-%E2%80%98burnout-britain%E2%80%99-warns-tuc

[32] Eurofound (2015). *Developments in working life in Europe: EurWORK annual review 2014.* Available at: www.eurofound.europa.eu/sites/default/files/ef_comparative_analytical_report/field_ef_documents/ef1551en_1.pdf

[33] CIPD (2017). *Employee Outlook: employee views on working life.* London: CIPD, Halogen Software. Available at: www.cipd.co.uk/Images/employee-outlook_2017-spring_tcm18-21163.pdf

[34] See 28 above

[35] See 16 above

[36] Department for Business, Innovation & Skills (2014). *Flexible working rights extended to more than 20 million* (press release). Available at: www.gov.uk/government/news/flexible-working-rights-extended-to-more-than-20-million

[37] Jim O'Neill and Anna Stupnytska (2009). *Global Economics Paper No 192: The long-term outlook for the BRICs and N-11 post crisis.* Goldman Sachs Global Economics. Available at: http://www.goldmansachs.com/our-thinking/archive/brics-at-8/brics-the-long-term-outlook.pdf

[38] PwC (2010). *See the future: Top Industry clusters in 2040 revealed*. PwC. Available at: https://www.pwc.com/jp/ja/japan-knowledge/archive/assets/pdf/archive_seethefuture_en.pdf

This publication provides general guidance only: expert advice should be sought in relation to particular circumstances. Please let us know by email (info@lewissilkin.com) if you would prefer not to receive this type of information or wish to alter the contact details we hold for you.

© November 2019 Lewis Silkin LLP