



March 2022 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

In this month's edition, we report on:

- What rights do agency workers have to apply for employee vacancies with the hirer company?
 - How business can make flexible working truly successful
 - The legalities of monitoring workers
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What rights do agency workers have to apply for employee vacancies with the hirer company?

There has been some uncertainty regarding whether an agency worker has the right, under the Agency Workers Regulations 2010, to apply for a directly employed vacancy with the hirer business.

The Court of Appeal clarified this in the case of *Kocur v Angard Staffing Solution Ltd*.

In this case, the Claimant was employed by Angard and was supplied to Royal Mail Group Ltd as an "Operational Post Grade" ('OPG'). Angard is a wholly owned subsidiary of Royal Mail and only supplies its workers to Royal Mail. When Royal Mail had vacancies at this OPG level, employees who were already in different permanent roles, or were in other less secure but employed) roles, were allowed to apply before the agency workers.

The agency workers argued that the right under the Agency Workers Regulations 2010 to be notified of any vacancies at the hirer company, included the right to apply for those jobs.

However, the Court rejected that argument and found the Regulations did not give agency workers the right to apply for vacancies. This confirms that temporary workers are not, in all respects, comparable with permanent workers in this respect.

Employers: The Agency Workers Regulations do confer a number of rights on workers but at least not the right to apply for vacancies

Contact us: We can assist with self-employed and contractor agreements

How business can make flexible working truly successful

Recent government consultation on flexible working is looking at bringing the right for employees to ask for flexible working from day one, it will still give employers the right of refusal. So, it will be left to organisations to ultimately decide what is right for them.

The pandemic has shown that a more flexible way of working allows businesses to adapt at speed when needed. This also makes good business sense. It allows business to tap into a larger pool of talent, while promoting wellbeing and a better work-life balance for employees that sustains high performance. The key is to ensure that flexible working creates the right outcomes for the business, customers and employees.

The conversation around flexible working has so far focused heavily on where people work. When and how they work are equally important and companies need to consider different working patterns, be that part-time, compressed hours or job share.

It seems the power balance has shifted towards job seekers. They are now asking for what they want and flexible working is high on their list. For hybrid working to be effective, there must be a clear focus on outcomes and trust between managers and their teams. Those that continue to monitor employees on a more traditional basis may not be successful in this new way of working.

Some businesses are creating flexible hybrid frameworks, within which teams decide the specific ways of working that will best support them to deliver for customers and the business. This is often built around the key principle of the customer-centric performance being paramount.

In this model each team is empowered to build a hybrid team agreement, guided by the principles of a flexible working framework, which sets out a way of working to deliver great outcomes for customers. The framework is based upon collaboration and innovation either in the office or at home. Another key principle in this framework is the 'human connection' and the importance of building relationships and trust.

It is not just large companies that are reviewing their working practices. Small and medium businesses are committed to reviewing their flexible working policies and diversifying their workforce.

In a recent survey, 45% of SMEs said that employee health and wellbeing was now a top priority. This highlights a greater focus on supporting employees and ensuring their welfare is sustained – something that must remain front of mind as companies evolve their flexible working policies.

Two years after the start of the pandemic, businesses must now decide what the future of work looks like for them.

Employers: It's the businesses, both large and small, that adopt the most progressive flexible work strategies who will be in the best position to grow their business and thrive going forwards.

Contact us: We can assist with remote working policies.

The legalities of monitoring workers

Employers have always used methods to monitor employees' hours, such as timesheets and clocking in software. But with working from home becoming the norm in the pandemic and an increasingly remote workforce as we come out of it, some employers have put in software to monitor their hours or their performance.

The starter is that under the Working Time Regulations 1998 (WTR) there is a 48-hour limit on average weekly working time unless an opt out is signed. Employers do have a legal duty to monitor working time to ensure these limits are kept to, particularly if no opt out is signed and keep records for two years.

In a modern disparate workforce in some businesses an electronic way of clocking in and out have emerged as well as introducing software programmes to keep a check on employees work activity when remote working. There is no law that specifically governs this type of monitoring, although it can breed distrust with employees who feel they are constantly being checked on.

Under the Human Rights Act 1998 (HRA), the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (UK GDPR), monitoring of employees and processing of personal data is regulated. In line with these principles, an employer should be clear to employees if their working hours and work undertaken is being monitored, as well as what personal data is being processed.

The same principles apply to monitoring the productivity of your workforce. Electronic monitoring is seen as a more intrusive nature of monitoring and employees must have a clear understanding of what is being monitored, why it is being monitored and how the information will be used.

There is a balancing exercise as to how intrusive this monitoring should be to achieve the desired aim of managing productivity. Different categories of employees may need lesser monitoring and it will impact on the trust level with your workforce. The key consideration is ensuring the right work outcome at the correct standard. This will vary across industries, where minute-by-minute monitoring may be required for safety reasons. However, in office-based work, there may be a downside to intrusive monitoring, affecting trust levels.

As long as employers have a legitimate interest to carry out monitoring and have informed consent then apps and monitoring software are perfectly legal. In the current climate, where employees are seeking more freedom to work in ways that fit in with their lifestyle, any monitoring must balance the legitimate needs of the business with the reality of recruitment and retention of the best talent.

Employers: The key question is the culture you wish to build in the business and whether monitoring is an effective tool.

Contact us: We can advise on Data Protection and monitoring of systems

For more information or assistance Email: caroline@employmentlawsupport.co.uk



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Employment Law Support Principal: Caroline Robertson
Solicitor Non-Practising