Hogan Lovells

Employment Horizons 2023

Open document

Contents

1 Welcome

2 Responses to the cost of living crisis

3 Remote working post-pandemic

4 Regulating platform/contract work

5 The "social" aspect of ESG

6 Regulating AI in the employment context

7 Sexual harassment – a continuing issue

8 Authors and contacts

Welcome

At the start of 2022, employers were focussing on returning to something more akin to "business as usual". Many parts of the world began to recover from the effects of the COVID-19 pandemic and restrictions on travel and workplace attendance eased. We anticipated that the key challenge would be balancing employer expectations about workplace attendance with employee demands for greater flexibility.

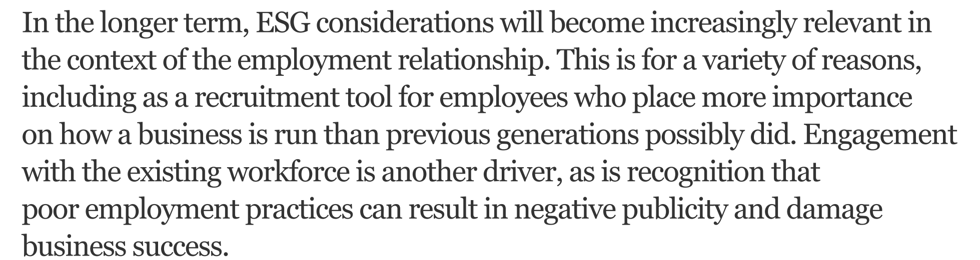
Twelve months later, the challenges facing employers in 2023 look somewhat different. The cost of living crisis and related high energy costs, particularly in Europe, are having a major impact. Employees are typically demanding pay increases that reflect current inflation rates. In some countries, although by no means everywhere, this is resulting in significant levels of industrial action, especially in essential public services.

Government action to shield workers from the full impact of the current economic situation will inevitably impact on employer costs. This includes substantial increases in minimum wage levels in many countries, or more frequent increases to the minimum wage than would otherwise be the case. There is also a move to relax social security rules to enable employers to make "one-off" cost of living payments to employees to mitigate the effects of inflation without permanently increasing an employer's wage bill.

A related issue for many governments is how to protect vulnerable workers and minimise potential abuse of the distinction between employees and independent contractors. Although the issue is not new, it is an area where there are clear variations in how different countries are addressing the concern. If the EU's Platform Work Directive is agreed during 2023, we will see a more harmonised approach, at least in Europe.

Meanwhile, employers are preparing for a recession. Many regions have already experienced large numbers of redundancies, particularly in the tech sector, and there is a general expectation that there will be further redundancies across other sectors in the coming year. As yet, there is little sign that governments are planning to take steps of the sort commonly adopted during the pandemic to prevent or mitigate the effects of reductions in force. Rising energy and staff costs are typically seen as an ordinary business risk to which employers will have to adapt in line with the constraints of existing law.

The shift from office-based to hybrid or fully remote working remains a key issue for employers. In some regions, that shift is happening organically, with few specific legal formalities or employee rights. In others, governments are legislating to give employees greater rights to work flexibly, including in some cases a right to demand remote working. It is also relatively common for employers in Europe especially to be required to compensate employees for additional costs they incur when working from home. In some cases this is a matter of law, in others a matter of practice, particularly in countries with strong union or works council rights.



In the longer term, ESG considerations will become increasingly relevant in the context of the employment relationship. This is for a variety of reasons, including as a recruitment tool for employees who place more importance on how a business is run than previous generations possibly did. Engagement with the existing workforce is another driver, as is recognition that poor employment practices can result in negative publicity and damage business success.

It can be difficult to pinpoint exactly what the "social" element of ESG means for employers. In regions that have regulated in the area, legal requirements tend to focus on diversity and inclusion initiatives that go beyond a simple prohibition on discrimination. These may encompass pay reporting requirements, gender or other quotas for senior employees or board members, or obligations to formulate equality plans and notify these to government bodies.

Another key longer term consideration is how AI is going to affect employees and the employment relationship. Relatively few countries have legislated on the use of AI in the employment context to date. In many regions the focus of the debate is still on whether automation will result in fewer employment opportunities. However, in regions where equalities regulators have taken an interest, the issue is seen through a discrimination lens. Regulators stress the risk that the use of AI results in inadvertent discrimination and there is a move towards formal guidance on the steps employers should take to minimise that risk. More onerous transparency requirements have been introduced in some places to ensure employees and prospective employees understand how AI is being used to make employment-related decisions.

Our Employment Horizons document ends with a look at an issue that gives rise to difficulties for employers in practice and where there have been significant cultural and legal changes in recent years. Since the launch of the #MeToo movement, dealing appropriately with sexual harassment claims has been a concern for employers almost everywhere. Although such conduct was already prohibited under anti-discrimination and harassment legislation in all the countries covered by our survey, this remains an area in which governments are acting to enhance employee protection.

Responses to the cost of living crisis

The cost of living crisis is having a significant effect on employers and employees globally, although the situation is particularly severe in Europe because of the impact of high energy prices. While other regions, notably North America, have also experienced inflation and will not be immune from an expected global recession, employment policy has not been as influenced by the cost of living and energy crisis there as has been the case elsewhere.

Most European countries have either already increased or announced future increases to their minimum wage rates to reflect higher inflation, often in the region of 10%. In Poland there will be two increases to the minimum wage rate during 2023, in January and July, instead of the usual annual increase. Large pay rises are also being agreed in countries where wages are governed by national or sectoral collective bargaining agreements, although this is subject to some variation by sector. Particularly where a sector is highly energy dependent, employers are typically able to agree slightly lower pay increases.

It is interesting to note that in many countries where collective bargaining is the norm, industrial action by way of strikes has largely been avoided, at least in part because of concern about the industrial outlook for 2023. In contrast, the UK in particular has seen high levels of industrial action in an attempt to obtain improved pay deals, notably but not exclusively in the public sector. In response, the government is proposing to impose further restrictions on a trade union's ability to take industrial action in core public services. It plans to impose minimum service levels in sectors such as transport, the health service, education and border security. Although other countries have seen industrial action in some sectors, this does not generally relate directly to the cost of living crisis. For example, strikes in the transport sector in France are related to proposals to increase the normal retirement age.

Some governments are introducing special measures to make it easier and less expensive for employers to support staff financially. Germany has introduced a law allowing employers to make payments of up to €3,000 to employees on a tax free basis as an inflation allowance. This can be paid either as a lump sum or a monthly allowance subject to agreement with a works council. A similar provision has recently been introduced in Italy, where employers are entitled as an exceptional measure to make tax-free payments of up to

€3,000 to employees to reflect higher domestic utility bills for items such as water, electricity and gas during 2022. Employers in other countries such as the UK and the Netherlands are making one off "cost of living" payments to staff even without tax incentives for doing so. Such payments are often aimed at employees on lower incomes, with those on higher incomes sometimes not being eligible.

Different approaches to supporting employees with the cost of living have been introduced in France and Spain. In France, reforms in August allowed employees to work more by giving up rest days in return for a payment in lieu. However, given that the reforms only apply to those on hourly paid contracts, their impact has been limited. Spain's 2022 labour market reforms restrict the circumstances in which an employer can hire an employee on a temporary contract. This is designed to promote permanent employment relationships in preference to temporary ones and give employees greater job security.

Although regions outside Europe have introduced reforms that will benefit workers, these are typically in response to other factors, not the cost of living crisis. In Singapore, the qualifying salary for local workers that determines the number of local employees who can be used to calculate a firm's quota for low to mid-level skilled foreign workers has been increased, as has the minimum qualifying salary for foreign professionals, managers and executives, in order to promote the recruitment of local staff over expatriates. Mexico has already introduced reforms to reduce the use of subcontracted/ outsourced workers and significantly greater trade union rights, such as greater transparency around collective bargaining arrangements to discourage sweetheart unions, will come into force in May 2023. However, these reforms are largely driven by labour standard requirements in the United States-Mexico-Canada Agreement.

Most regions expect redundancies during 2023 as a result of the worsening economic outlook, the removal of government energy subsidies, particularly in countries such as Hungary, which was heavily dependent on Russia for energy, and the expiry of remaining COVID-related business protections against bankruptcy. However, we are not currently expecting governments to introduce schemes to encourage employers to retain staff or to subsidise employee wages for a period to help preserve employment. None of our contributors reported proposed changes to existing redundancy procedures that would make it harder for employers to dismiss staff for redundancy.

More Resources

For more detail about the processes employers need to follow when dismissing staff in various countries, please see the sections on individual dismissals and restructurings in our Global employment law guide, a look at the key legal issues arising from the employment relationship and how these may differ from country to country.

Remote working post-pandemic

Hybrid working is increasingly the norm for office-based roles across all regions, although this varies from sector to sector. Financial services employers typically expect employees to return to the office on a more regular basis. However, in general, many employers have welcomed hybrid or fully remote working as a way of saving costs, promoting employee wellbeing and potentially improving productivity. Employees have largely embraced the additional flexibility that hybrid working brings.

Over 2022 many governments have legislated to formalise the rules relating to hybrid and remote working and this will continue in 2023. This is often the case in Europe but less common in North America or Asia. It is also less common in European countries with strong work council and/ or trade union rights, where hybrid working arrangements must be negotiated and agreed with employee representatives before they can be implemented.

Governments that are legislating on the issue have different reasons for doing so. During the pandemic, employers were largely able to require employees to work from home for some or all of the time without their consent, often in response to government restrictions designed to quash the spread of COVID. In some locations, including Poland and Spain, new laws make it clear that employers cannot impose remote or hybrid working, but can do so only by agreement with employees. In Italy, relaxations on the rules for accessing smart working introduced at beginning of the pandemic expired at the end of 2022.

Alongside limits on an employer's ability to require employees to work from home, in many countries there are moves to give employees a greater ability to ask for home working or other flexible working arrangements. In EU member states this is happening not only in response to changes in employee expectations about their working arrangements since 2020, but to reflect the requirements of the Work Life Balance Directive.

Member states had to implement the Work Life Balance Directive by 2 August 2022. This gives carers and parents of children aged up to eight the right to request reduced working hours, flexible working hours and flexibility in where they work. In some countries, such as Italy, certain categories of employees, such as those who are disabled or who have caring responsibilities, including for children under 12 years of age or disabled children of any age, have priority if they request flexible working.

Many countries are expecting to see cases during 2023 testing the limits of an employer's ability to refuse such requests, particularly where the underlying law is not clear on the point.

Some European governments have gone further than required under the Work Life Balance Directive. During 2022, the Dutch government proposed the Work Where You Want Act that would give employees the right to ask to work from anywhere within the EU. The new law is likely to come into force during 2023. However, it is clear that the right is to request, not to demand. Although under the original proposal the employer would only have been able to refuse for "serious business reasons", that has been changed to a less strict test, allowing employers to refuse a request based on reasonableness and fairness criteria. In the UK, which has had a right to request flexible working for many years, the government is intending to extend the right during 2023 by removing the existing 26 week service requirement for making a request and allowing employees to make more than one request a year.

Another area where practice varies significantly from country to country is whether employers are required to pay employees who are working from home an allowance to reflect the additional costs that they incur by doing so. This is a formal legal requirement in countries such as Mexico, France and Poland. In most countries that require payment, the amount is not prescribed but a matter for employer discretion or agreement with a union. It is relatively common for allowances to be exempt from social security contributions up to a specific threshold. In some cases, employees must work from home for a specified proportion of their time to be eligible for the allowance. In Spain and Mexico the relevant percentages are 30% and 40% respectively. Even in European countries where there is no requirement to pay an allowance, it is relatively common for this to be agreed through collective bargaining agreements or as part of works council negotiations, particularly where hybrid working policies are a matter for co-determination as they are in Germany, for example.

In the US, the concerns surrounding hybrid and remote working are slightly different from those occupying European legislators, although some states do require employers to provide office equipment or subsidise internet services for employees who are required to work remotely. During the pandemic it was reasonably common for employees who were working from home to be doing so from a state different from that in which their employer was based, sometimes without the employer's knowledge. This gives rise to challenges where some states are more "employee friendly" than others and additional compliance burdens if employers are having to manage employees in multiple different states.

Employers are developing policies that balance the risks and costs of managing employees in different locations with the fact that remote working has become a recruitment tool in many sectors. This is a concern in Europe as well, and the UK Office for Tax Simplification recently issued a "Review of hybrid and distance working" to identify tax challenges caused by changes in working practices, particularly a growth in the number of employees working in one country for an employer in another.

More Resources

For more detail about the rules relating to remote working in different countries, including whether there are specific statutory provisions dealing with remote working and when employees are entitled to additional compensation if they are working from home see our Global remote working guide.

For information on remote working in the UK, please see our Engage items on expanding the right to request flexible working and an employer's guide to flexible working requests.

Click here for a recording of our recent UK webinar on the issues arising from flexible and hybrid working.

Information about the new right to request flexible working in Poland can be found here and in the Netherlands here.

Regulating platform/ contract work

Issues relating to platform/contract work and the gig economy are recognised in all regions. Most countries retain a distinction between someone who is employed and someone who is self-employed, with employees enjoying a wide range of rights and those who are self-employed having either no or very limited rights. However, the historic distinction between the two categories does not always apply easily to the rise of new and more flexible business models. The approach to the distinction and the extent to which platform workers are regarded as employees or self-employed varies widely from country to country.

In the longer term it is likely that there will be a more uniform approach to the issue, at least in the EU. The EU Commission has proposed the Platform Work Directive to improve working conditions in platform work. If the Platform Work Directive is finalised and reflects the current proposals, a list of criteria would be used to determine whether a platform was really an employer. The criteria include factors such as who determines remuneration, rules relating to appearance, conduct or performance, restrictions on someone's ability to choose their own working hours or accept or refuse tasks, and requirements to undertake tasks personally. If at least three of the criteria apply, the platform will be deemed to be an employer unless they can prove that they are not.

However, as things currently stand, in some jurisdictions, the law tends to accept a platform's categorisation of gig economy workers as self-employed, individual challenges from workers are relatively uncommon and governments do not regard the issue as a political priority. This has been the case to date in countries such as Poland and Mexico. It is also true in Singapore, which has however legislated to give those who are self-employed a statutory right to maternity leave.

Elsewhere, particularly in countries such as Germany, France and the Netherlands, workers have launched several legal challenges arguing that they are employees not self-employed. In Germany, the Federal Labour Court has applied existing rules on status determination to the gig economy, which means that if the worker is in a dependent relationship and integrated into the platform's operation, they are likely to be an employee. The picture is more mixed in the Netherlands. The tests courts apply to determine whether someone is employed or self-employed are similar to those in Germany. They relate to whether an employee's role and the activities they perform are embedded or integrated within an organisation and whether the platform has control over matters such as hours, workplace, replacements and a worker's ability to negotiate applicable terms and conditions. However, there are conflicting decisions from lower courts about whether these tests mean that platform workers should be treated as employees. The Supreme Court in the Hague is expected to rule on the issue in February 2023 and its decision may provide more clarity.

Other countries, notably Spain and Italy, have legislated specifically on the issue. The so-called "Rider's Law" adopted in Spain in 2021 introduced a presumption of employment status for workers in the delivery sector, including food delivery. This means that higher social security costs, minimum wage entitlements and relevant collective bargaining provisions apply, so the model of treating platform workers as self-employed effectively no longer works in Spain. Some platforms have withdrawn from the Spanish market as a result.

Italy has taken a similar although not identical approach, introducing the concept of organised collaborators as a third type of employment status. This is similar to the position in the UK, which recognises three categories: employees, workers and the self-employed. Different rights attach to each status. In Italy, organised collaborators benefit from substantially the same rights and benefits as employees and court decisions have tended to treat platform workers as organised collaborators. Even where riders are genuinely autonomous workers (i.e., self-employed) the law provides them with certain minimum protections. In the UK, platform workers are often regarded as "workers", meaning that they are entitled to the national minimum wage and statutory holiday.

In the US, action to address the employment status of platform/contract workers is largely being taken at state level, although the possibility of action at a federal level is being discussed. Where states have legislated on the issue, this has often involved introducing a default position that platform workers are regarded as employees unless various relatively stringent tests are met to displace that presumption. This is similar to the approach adopted in the Platform Work Directive. The nature of these tests varies from state to state. An alternative approach is to extend certain minimum benefits, such as the right not to be discriminated against, to independent contractors, although this results in a slightly piecemeal approach to the issue depending on the state where work is being carried out.

In most regions the issue of worker status is relevant not just to employment rights but also has significant tax and social security consequences. In Germany, there is an administrative procedure for ascertaining someone's status for social security purposes. The process was reformed in 2022 to improve legal certainty. Although a social security determination is not binding from an employment perspective, it would be highly persuasive. In Mexico, social security authorities have strict criteria to determine whether an independent contractor should be regarded as an employee for social security purposes, with potentially high fines and arrears payable if an employee is misclassified.

Hungary has taken a different approach from other countries to the question of employee status and tackled it primarily as one of tax liability. It has abolished a favourable tax regime for the self-employed across the board, not simply in relation to platform workers. Although this has resulted in platforms paying workers more because of their increased tax liability, it has also had an impact on those who are genuinely self-employed, without providing employment-related benefits in return.

More Resources

Information about the status determination procedure in German social security law can be found here.

Click here to access our German Self-Employment status tool.

The "social" aspect of ESG

The "social" element of environmental, social and governance (ESG) initiatives can be difficult to define. For present purposes we regard them as obligations relating to workplace culture that apply to an employer in its capacity as an employer. Such obligations frequently relate to concerns about diversity and inclusion, including gender and ethnicity pay gaps.

There are few clear regional themes in this area. The extent to which ESG is seen as a political priority varies widely from country to country. All the countries in our report have had anti-discrimination and equal pay rules in place for some time. Some jurisdictions go no further than those rules, while others have introduced additional requirements with the aim of either encouraging or forcing employers to take active steps to address the causes of inequality in the workplace.

In an effort to support the principle of equal pay for equal work, Germany introduced the Remuneration Transparency Act in 2017. This allows women in companies with more than 200 employees to ask for information about the median pay levels of colleagues performing comparable jobs. In practice the law has not been used extensively.

The focus on ESG in Germany and Italy tends to be on compliance with labour laws more generally, especially during due diligence conducted as part of M&A transactions. In Germany there is a particular emphasis on minimum wage and working time requirements and there is significant uncertainty about the steps employers must take to record employees' working time. This reflects a recent ruling confirming that employers are already required to record working time as a matter of German and EU law, even though German law does not currently provide any express guidelines on how to do this properly.

Other countries have introduced reporting requirements aimed at increasing transparency around equality in the workplace. France requires employers with 50 or more employees to publish an "equality index" based on various factors concerning gender equality and gender pay. Depending on an employer's score, it may have to implement measures to correct gender pay disparities. Additional requirements to report on senior staff will come into force in 2023.

Similar requirements apply in Spain, with employers with 50 or more staff now required to prepare an equality plan and negotiate this with relevant trade unions. Plans must cover issues such as avoiding discrimination in connection with recruitment, training and promotion, reducing the gender pay gap and preventing sexual and gender based harassment. Finalised plans must be notified to the labour inspectorate and Labour Ministry. The labour inspectorate can fine employers who do not comply with their plan.

Equal pay and diversity (at an organisation's senior levels) is also a hot topic in the Netherlands. A new law came into force in 2022 introducing diversity quotas requiring that men and women should hold at least one third of seats on a listed company's Supervisory Board. We will see similar legislation elsewhere in the EU in the medium term. After ten years of discussion, in December 2022 the EU adopted the Gender Balance on Boards Directive. This requires members of the under-represented sex (typically women) to hold either 40% of non-executive director positions, or 33% of all director positions, on listed company boards by 30 June 2026. EU member states that do not already have mandatory quotas will now need to introduce them. In addition, several countries, including Spain and Italy, have quotas employers must observe for the proportion of disabled employees they employ.

The Dutch government has also introduced new reporting requirements designed to influence employer and employee behaviour in order to reduce the carbon footprint of their work-related travel. From 1 July 2023, Dutch employers with 100 or more employees will have to report emissions from work-related travel. This is already having an impact on employer behaviour, with travel policies being introduced to require employees to travel by train instead of air wherever possible, for example.

In the UK and the US, ESG initiatives focus largely on pay transparency, workplace diversity and workplace culture. The UK introduced gender pay gap reporting requirements in 2017 and had been expected to introduce ethnicity pay gap reporting after consulting on the issue in 2019. However, it appears that this is not a political priority for the current government, so mandatory reporting is unlikely to be introduced in the short term, despite calls for it from both unions and business organisations. The government continues to encourage employers to report ethnicity pay gaps on a voluntary basis. Clauses in contracts of employment that are designed to prevent employees from discussing their pay to establish whether there has been a breach of equal pay requirements are unenforceable.

Pay transparency is also a key trend at state level in the US. These requirements tend to be more granular than they are in the UK, which only require employers to provide mean and median figures for male and female pay calculated across the workforce. By contrast, state governments in the US increasingly require employers to publish a salary or pay range for the job in job advertisements. New York City introduced pay transparency requirements effective November 2022, while New York State adopted similar obligations that will come into effect in September 2023. In California, pay transparency requirements include listing a position's pay scale in job postings and allow current employees to request pay scale information for their positions. Employers in California may also have to provide annual pay data reports, including information broken down by gender, race and ethnicity, to the state's Civil Rights Department. Many states have introduced protective measures to ensure that employees are not treated detrimentally for discussing their pay or requesting information about pay from their employer.

More Resources

Information about emissions reporting in the Netherlands can be found here, pay transparency requirements in New York State here and in New York City here.

You can find a copy of our guide to UK gender pay gap reporting obligations here.

Click here for details about obligations to record working time in Germany.

Regulating AI in the employment context

Although AI is recognised as a hot topic in most of the countries we surveyed, this is not always for the same reasons. Many jurisdictions regard AI primarily as an issue of a threat to jobs from automation. If that is the main concern, the political focus tends to be on initiatives such as additional training to give workers enhanced skills and minimum income levels to minimise the impact of potential redundancies for affected workers.

Other countries are more focussed on the risks created by employers' use of AI in areas such as recruitment or employee monitoring. Some governments address those risks through a prism of data privacy and emphasise the need for transparency around the arrangements in place. Others see the key issue as a risk of inadvertent discrimination if algorithms behave in unintended or unexpected ways.

At EU level, the Platform Workers Directive, if adopted, will require platform based operators to give workers information about the use of automated monitoring systems or decision-making systems that affect matters such as access to work assignments or the restriction, suspension or termination of their ability to work.

The Italian government has already gone further than that. The Transparency Decree came into force in August 2022. It requires employers to provide employees, trade unions and works councils with detailed information about the use of automated decision making or monitoring systems used for a range of purposes, including recruitment, termination decisions, the assignment of tasks and duties and performance evaluation. The information that employers must provide includes the aspects of the employment relationship impacted by the use of systems, their purpose, scope, logic and functioning, data categories and parameters used to programme the system, control measures and the system's accuracy, robustness and potentially discriminatory impacts.

In Spain, a new law on equal treatment and non-discrimination was enacted during 2022 that requires public administrations to promote mechanisms to ensure that algorithms used to make decisions minimise bias, are transparent and embed principles of accountability. In line with that obligation, in June 2022 the Spanish Minister of Labour issued non-binding guidance on the use of AI by employers. This indicates that employers should inform employees' representatives about the parameters, rules and instructions on which algorithms and AI systems used to take decisions about employees are based.

In countries that view the issue primarily through the prism of discrimination, there is an on-going debate about whether existing equalities legislation is fit for purpose for regulating algorithmic discrimination or whether new laws are required.

Regulators in both the US and the UK recognise algorithmic bias as potentially problematic. In May 2022 the US Equal Employment Opportunity Commission issued technical guidance about the risks of discrimination against employees with disabilities posed by using algorithmic decision making in the context of recruitment, monitoring employee performance or pay and promotion decisions. There is also a trend towards regulating the use of AI at state level, although such protection is not yet comprehensive. New York City led the way with a law that took effect on 1 January 2023, although enforcement of the law was recently deferred until April 15, 2023. Under the New York City law, employers and employment agencies will only be able to use automated tools to screen candidates for employment or assess employees for promotion if the tool has been subject to an independent bias audit in the previous year. Candidates for employment and employees must be told in advance that automated tools will be used and how they operate.

The Equality and Human Rights Commission in the UK is also concerned about the risk that using AI as a recruitment tool perpetuates biased decision-making about which candidates to select for employment. It identifies addressing the impact of digital services and artificial intelligence as one of its strategic priority areas for the 2022–25 period and intends to work with employers to minimise the risk of such discrimination. It will recommend changes to the current equality legislation if it identifies gaps created by the use of new technologies. It has also published guidance on the use of AI in public services, which private sector employers may find also useful if they are implementing systems that make use of AI.

More Resources

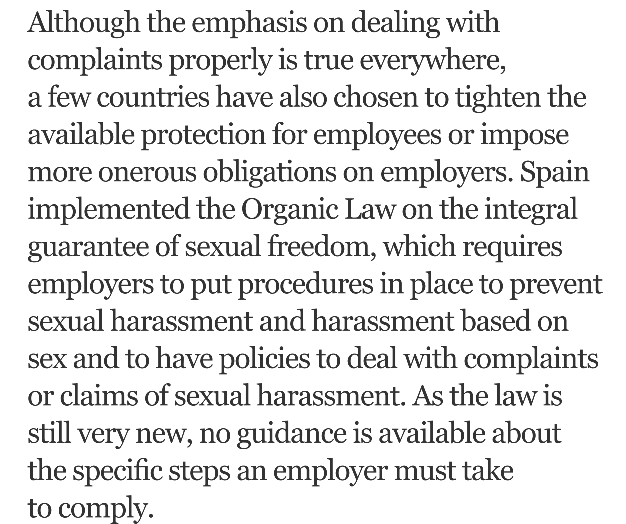
Information about the EEOC guidance can be found here and information about New York City's regulation of tech-enabled employment decisions here, here and here.

Sexual harassment – a continuing issue

Five years after the start of the #MeToo movement, sexual harassment remains a hot topic in most of the countries included in our survey. In many cases this reflects a cultural rather than a legal shift. In most countries, sexual harassment is covered by existing anti-discrimination and harassment laws, which have not been amended. A relatively small number of jurisdictions, including the UK and the US, have either already legislated to deal specifically with sexual harassment or are planning to do so. Even where laws have not changed, those who have experienced sexual harassment continue to be more prepared to speak out about it, including in relation to complaints about historic harassment. Employers in all regions remain concerned about the reputational implications of not treating complaints seriously or dealing with them appropriately.

There has been a marked shift in the sort of behaviour that employers are prepared to tolerate over the last five years and a greater awareness of internal steps an employer could take to ensure that expectations surrounding employee behaviour are clear. Many employers are carrying out regular reviews of their harassment policies and ensuring that employees attend mandatory training on the topic. It is also common to use internal or external hotlines to allow employees to report allegations of sexual harassment confidentially. New York City introduced a confidential hotline in July 2022, which employees can call to seek counsel and assistance. Employers are required to signpost the hotline in any materials they issue to employees regarding harassment. A legislative proposal in the Netherlands would amend the Dutch Working Conditions Act to introduce a mandatory requirement for employers to have a confidential advisor/ counsellor to assist employees. The adviser could be internal or external.

Although the emphasis on dealing with complaints properly is true everywhere, a few countries have also chosen to tighten the available protection for employees or impose more onerous obligations on employers. Spain implemented the Organic Law on the integral guarantee of sexual freedom, which requires employers to put procedures in place to prevent sexual harassment and harassment based on sex and to have policies to deal with complaints or claims of sexual harassment. As the law is still very new, no guidance is available about the specific steps an employer must take to comply.



It is likely that we will see similar legal provisions introduced in the UK during 2023. The government is supporting a Bill in Parliament that will introduce a specific duty on employers to take all reasonable steps to prevent sexual harassment in the workplace. The Equality and Human Rights Commission will have powers to enforce the new duty. An employer may also be liable for additional compensation if an employee brings a successful sexual harassment complaint and the employment tribunal concludes that it failed to comply with its preventative duty. The Equality and Human Rights Commission will publish a statutory Code of Practice outlining what steps an employer will have to take to comply with the duty, but the existing technical guidance on which the Code will be based indicates that these are relatively onerous, particularly for large employers.

The Bill will also introduce protection for workers if they are harassed by third parties who are not employed by the employer, such as customers or clients. This recognises that third party harassment is a particular problem in certain industry sectors, such as hospitality. If the Bill passes, employers will be liable for third party harassment of any type, including sexual harassment, unless they have taken all reasonable steps to prevent it.

In the US, the legislative focus has generally been on making it easier for employees to pursue harassment claims. At state level, this has generally been either by widening the definition of what amounts to sexual harassment or by making it easier to prove that harassment has occurred.

There has also been an emphasis on transparency at both federal and state levels in the US. The federal Speak Out Act was signed into law on 7 December 2022 and makes non-disclosure agreements relating to allegations of sexual harassment unenforceable if they were entered into before a dispute arose. Some states have enacted broader protections, prohibiting non-disclosure provisions in post-dispute settlement agreements and/ or extending protections to claims involving other forms of harassment and discrimination, and/or wage and hour violations.

In addition, the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act was signed into law in March 2022, making pre-dispute arbitration agreements unenforceable by the employer in relation to allegations of sexual assault or sexual harassment. Complainants will be able to pursue such claims through a court and cannot be required to arbitrate them. They remain able to elect to arbitrate if they wish, for example because that will better protect their privacy or allow a dispute to be adjudicated more quickly.

More Resources

Details of New York City's sexual harassment hotline can be found here, information about the Ending Forced Arbitration Act here and about the Speak Out Act here.

The recording of the UK Law Developments in 2023 webinar, which covered the duty to prevent sexual harassment, can be found here.

Authors and contacts

Our Global Employment Practice

Authors and contacts

Americas

United States

Michael DeLarco Head of Employment in the Americas, New York

Dave Baron Partner, New York

Kenneth Kirschner Partner, New York

Stanley Brown Senior Counsel, New York

Patricia Ambrose Senior Counsel, Washington, D.C.

Bill Flanagan Senior Counsel, Washington, D.C.

Cristina Rodriguez Partner, Houston

George Ingham Partner, Northern Virginia

Tao Leung Partner, Los Angeles

Amy Kett Senior Associate, Northern Virginia

Mexico

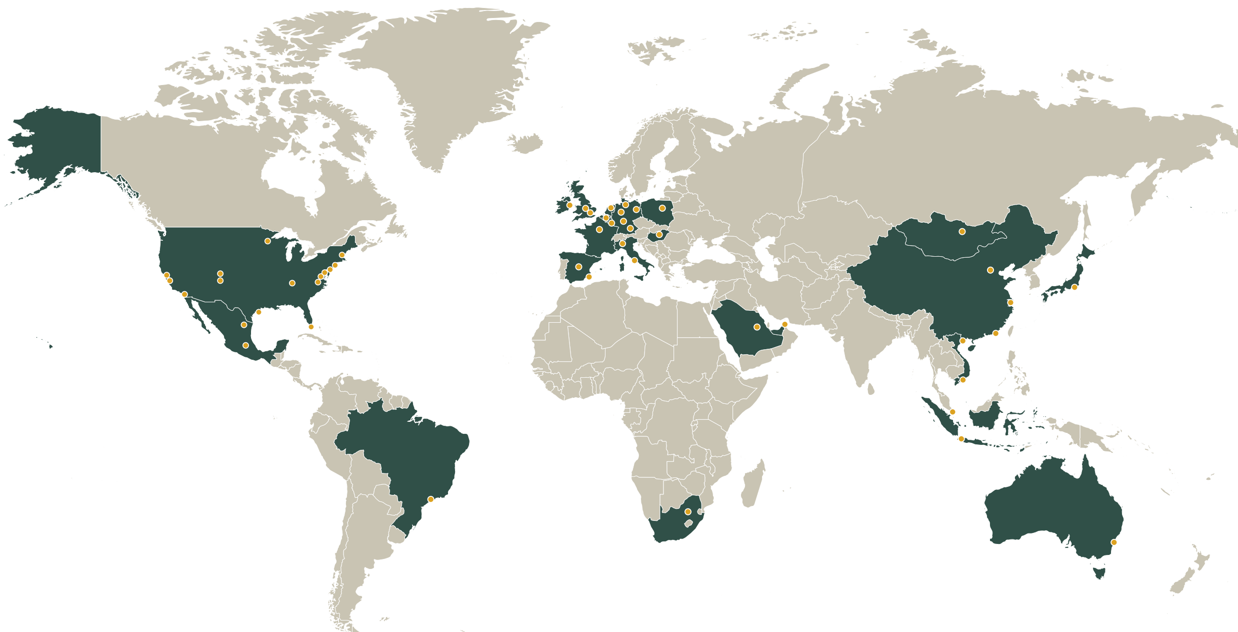
Hugo Hernández-Ojeda Alvírez Partner, Mexico City

Mary Carmen Fuertes Abascal Partner, Mexico City

Luis Ricardo Ruiz Gutiérrez Partner, Mexico City

Luis Rosas Counsel, Mexico City

Maria Regina Torrero O. Senior Associate, Mexico City



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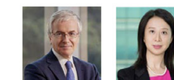

Andrew McGinty Partner, Shanghai

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Kerstin Neighbour Global Head of Employment, Frankfurt

Sabrina Gäbeler Counsel, Frankfurt

Matthes Schroeder Partner, Hamburg

Eckard Schwarz Partner, Hamburg

Tobias Darm-Tobaben Senior Associate, Hamburg

Hendrik Kornbichler Partner, Munich

Lars Mohnke Partner, Munich

Ingrid Ohmann-Sauer Partner, Munich

Moritz Langemann Counsel, Munich

Silva Tomassone Counsel, Munich

Tim Joppich Partner, Düsseldorf

Justus Frank Counsel, Düsseldorf

Stefan Richter Counsel, Düsseldorf

Stefan Martin Partner, London

Ed Bowyer Partner, London

Jo Broadbent Counsel Knowledge Lawyer, London

Marion Guertault Partner, Paris

Thierry Meillat Partner, Paris

Dominique Mendy Partner, Paris

Faustine Lefèvre Counsel, Paris

Alexandra Tuil Counsel, Paris

Hélène De Nazelle Senior Associate, Paris

Vittorio Moresco Partner, Rome and Milan

Francesca Lauro Counsel, Rome

Giuseppe Magaddino Counsel, Rome

Luis Enrique de la Villa Partner, Madrid

Lucia Garcia Intern, Madrid

Olga Albalá Soria Associate, Madrid

Maria Benbrahim Partner, Amsterdam

Anita de Jong Senior Counsel, Amsterdam

Imane Azdad Associate, Amsterdam

Daan Koenrades Associate, Amsterdam

Agnieszka Szczodra-Hajduk Head of Employment Warsaw

Paulina Przewoznik-Lewinski Associate, Warsaw

Karolina Debiec Associate, Warsaw

Aleksandra Sudak-Przybyla Associate, Warsaw

András Multas Associate, Budapest

Imtiaz Shah Partner, Dubai

Saad Alrashed Associated Partner, Riyadh

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