

## **What's next for hybrid working?**

Risks and  
opportunities



# Introduction

Hybrid working (where staff typically work both at home and the workplace) and fully remote working transformed the employment relationship during the pandemic.

A recent YouGov/Acas survey found that the majority of employers have seen an increase in hybrid working for staff compared to before the pandemic. It also found that half of employers have seen an increase in staff working from home full-time.

Hybrid working appears here to stay. According to the ONS, hybrid working in May 2020, at the height of the pandemic, was **45%**. In spring 2022, it was **38%**. Before the pandemic, **12%** of workers did any work from home. Furthermore, **63%** of 18-24-year-olds would consider looking for a new job if their employer insisted on a full-time return to the workplace (from an ADP Research Institute poll). However, attitudes to hybrid working are far from settled and its scope continues to evolve.

For all hybrid working employers, there is an ongoing challenge of consolidating and improving current arrangements. For example, understanding how it affects organisational issues (such as learning, development, culture and productivity) and addressing any employment law risks (including contractual disputes and potential discrimination claims).

In this briefing, we highlight some emerging legal risks associated with hybrid working and consider how employers should plan going forwards. For further information, please do not hesitate to contact your usual Eversheds Sutherland adviser, or the individuals named below, to discuss your employer's particular circumstances.



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# Hybrid working strategies: risks and opportunities

Hybrid working was introduced by many employers as a temporary and rapid response to COVID-19 health and safety constraints.

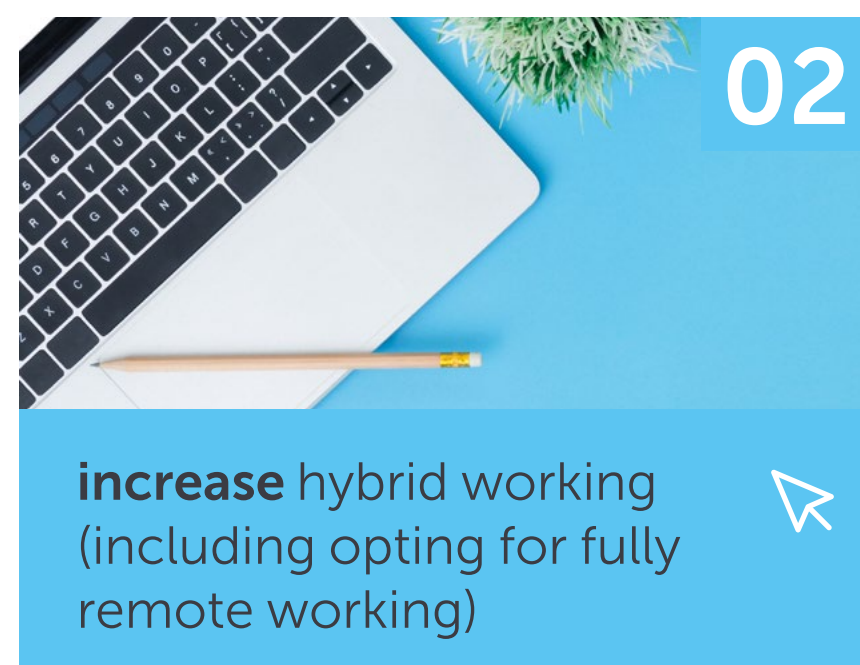
Some months later, employers are in a better position to identify its advantages and disadvantages and to decide their future hybrid working strategy. For example, its role in recruitment and retention, its impact on employees and line managers and whether hybrid working supports collaboration and innovation.

A significant factor for employers, when deciding the way forward, is employee sentiment. Employee polls consistently suggest that the majority of employees favour retaining hybrid working. The ability to save commuting and childcare costs, to improve work life balance and to manage health conditions are some of the reasons cited.

As part of planning the next phase of hybrid working, employers should review their risks depending on whether they decide to:



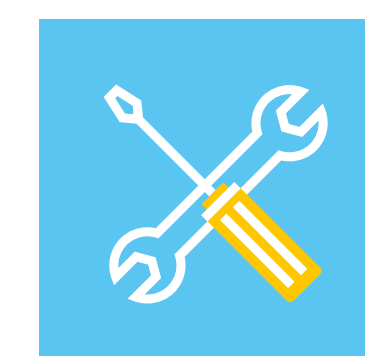
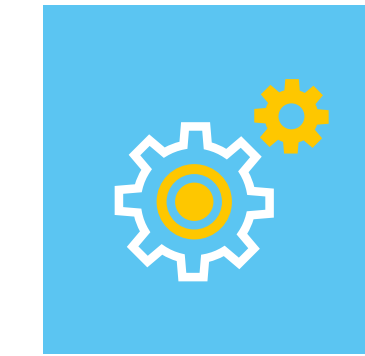
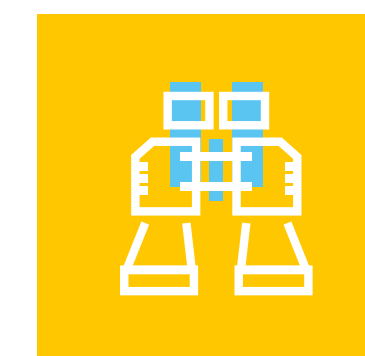
**01**  
**reduce** hybrid working  
(more, or all, days in  
the workplace)



**02**  
**increase** hybrid working  
(including opting for fully  
remote working)



**03**  
**maintain**  
hybrid working



Where hybrid working is retained, employers should consider implementing a **hybrid working policy** (discussed further below).



# 01. Reduce hybrid working

Some employers are deciding to reduce hybrid working, or remove it altogether. Factors influencing this change include concerns over productivity, innovation and employee induction and development.

Employers taking this approach may encounter employee resistance and should risk-assess their plans, including for the following:



**Review the contractual place of work:** many contracts will identify the office or other workplace as the permanent place of work, supporting the instruction to return. However, employers should check that this has not been varied by any pandemic communications and be aware that enforcing the contract unreasonably may risk constructive/unfair dismissal, discrimination and other claims. Check any trade union collective bargaining agreements (in case they are engaged by the change) and involve employee representatives, as appropriate.



**Anticipate flexible working requests (FWR):** employees have the right, after 26 weeks' continuous employment, to make one formal FWR in any 12 month period if they wish to have a formal arrangement in respect of working from home (the Government has currently dropped plans to reform the FWR legislation, although the Labour Party has proposed the right to flexible working for all workers as a default from day one of employment and an accompanying duty on employers to accommodate this where there is no reason a job cannot be done flexibly and remotely). Reducing or removing hybrid working might trigger multiple FWRs in response. Each one will need to be considered on an individual basis (group requests are not part of the statutory regime), reasonably and in line with the statutory guidance. Employers should train managers involved and review their flexible working policy to support fair and consistent treatment of FWRs as mishandling them risks up to eight weeks' pay, discrimination and constructive/unfair dismissal claims.



**Address discrimination risks:** including, potential claims where FWRs are rejected or if the employee refuses to return to the workplace in certain situations. Indirect discrimination is a key risk where the employer's actions disadvantages people of a particular protected discrimination characteristic (for example females, who bear the greater burden of childcare responsibilities than men). To defend such claims, an employer must evidence a justifiable reason for its decision, showing that it acted proportionately to achieve a legitimate aim. Employers must also consider their duty to make reasonable adjustments for disabled employees, which may include remote or flexible working.

## 02. Increase hybrid (or adopt fully remote) working

Deciding to extend hybrid working, or to move employees to remote working with little or no office attendance, may reduce employer costs and, potentially, support diversity, work-life balance, recruitment and retention.

However, this might not meet the needs of some employees, such as where they do not have appropriate working space at home or they want, or need, to be in an office environment. Employers should prepare in advance, for example:



**Consider any contractual implications:** is the change a lawful instruction if the employee's contractual place of work is the office? Is the change subject to a trial period? If the employee refuses to consent, will the employer make exceptions and, if not, would any resulting dismissal be fair and on what grounds? It will differ according to the particular circumstances, such as whether there are contractual mobility and flexibility clauses, whether there is a potential redundancy (such as where the workplace is closing), employees' reasons for refusing, their qualifying service and the reasonableness of the employer's procedure and business case for acting. Is collective consultation triggered? Are affected employees subject to collective bargaining by a trade union?



**Risk assess for discrimination complaints:** including whether attendance at a workplace is a reasonable adjustment (such as for a mental health disability) and whether managers are alert to the risk of domestic violence for those working remotely.



**Review and improve measures to support homeworking:** including safeguarding employee health and safety, protecting confidentiality and privacy, the provision of equipment and whether expenses will be reimbursed, access to training and development, maintaining employee engagement, making reasonable adjustments for those new to hybrid or remote working and more. A home working or hybrid working policy is recommended to clearly communicate expectations and arrangements (for further information, see below).

# 03. Maintain hybrid working

Employers seeking to maintain hybrid working arrangements will benefit from reviewing existing practices for legal risks and making improvements, consolidating experience over recent months. In particular, where hybrid working was initially adopted as a short-term reaction to COVID-19 measures. For example:



**Contractual and policy provisions:** what is the current contractual status of hybrid working and are there sufficient legal safeguards for the employer in place (data security, health and safety, trial periods, right to terminate the arrangement etc)? Has the employer implemented a hybrid working policy setting out key requirements and expectations? For further information on a policy, see below.



**Discipline and performance:** have managers the skills and the support to supervise dispersed and online teams? Do workers understand hybrid working standards (such as digital meeting attendance and behaviour, any core working hours and being contactable)?



**Pay, benefits and expenses:** some employers are considering reducing location-based pay and benefits for hybrid and remote workers. Take advice to avoid discrimination, breach of contract and unfair dismissal claims.



**Mental health:** are processes in place to support employees working at home with their mental health? Hybrid workers may experience loneliness and burnout, exposing the employer to associated H&S, discrimination and other legal risks.





## 03. Maintain hybrid working (continued)

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**Inclusivity and discrimination:** is there equality of experience between hybrid workers and those based in the workplace (including access to training, development and promotion)? Is there a risk of 'proximity bias', where managers tend to favour those close at hand? Do hybrid workers feel fully included in the organisation's culture? There may be a risk of indirect discrimination claims if people with certain protected characteristics are working on a hybrid basis (including female, disabled and older workers) and they are unjustifiably disadvantaged by the employer's hybrid working model in practice. Similarly, beware discrimination claims arising from mishandled hybrid working requests. Are managers aware of these risks?



**Working abroad:** are hybrid workers based wholly or partly abroad? If so, employers should be aware of the tax, social security and legal complications (for further details, [read our guide here](#)).



**Monitoring:** are hybrid workers subjected to additional monitoring (such as by tracking log-in and log-off times and additional monitoring of internet/emails), when compared to office workers? If so, take advice on data protection, discrimination and other potential claims.



# Hybrid and home working policies

**A policy will support safe, fair, lawful and consistent home working arrangements and will set out the employer's guidance, conditions and standards for hybrid (or home) working.**

Where hybrid working is a temporary arrangement, the policy should reflect that position by confirming its status and that the place of work remains the employee's workplace (subject to employees changing their contract further to a flexible working request). It can also provide clarification on other issues, such as the division of costs and expenses and how confidentiality and health and safety must be safeguarded.

Typically, a hybrid working policy will include:

- a statement that the policy does not form part of the contract of employment and that it is subject to meeting the needs of the employer
- a definition of hybrid working and the scope of the policy
- minimum conditions for hybrid working (such as how to request, any requirement to attend the office, location parameters for the home office and more)
- homeworking arrangements (such as setting out key conduct, absence and performance expectations and any trial period)
- the provision of equipment

- how data security and confidentiality is protected
- health and safety (employers' health and safety responsibilities in relation to their employees are the same whether they are working in an office or remotely from home)
- insurance
- costs and expenses
- employee support (how employees may raise concerns and problems)
- how hybrid working may be terminated

Both the **HSE** and **Acas** have produced guidance for homeworking and on the specific risks lone workers face.

*Employment law is a devolved matter in Northern Ireland and the issues set out above may not all apply in NI. For NI specific advice contact our **Belfast office**.*







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