



Hull & East Yorkshire Local Enterprise Partnership Talent Forum

Hybrid Working Employment Law Considerations

Caroline Neadley

Employment Law Partner

Rollits LLP

18 April 2023

What does “hybrid worker” mean?

- Covid-19 pandemic has led to significant increase in number of hybrid workers
- Not defined in Employment Rights Act 1996
- An individual dividing their working time between home (or another remote location) and their employer’s premises
- Differentiated from home workers who work exclusively at home



Rollits

Legal Developments

– April 2021

- House of Lords Select Committee on Covid-19 published a report: Beyond Digital Planning for a Hybrid World - call for Government to consult on ways to strengthen employment rights/legislative framework to support digitalisation at work to catch up with hybrid reality of workplace

– May 2021

- Working Task Force recommended flexible working should be default position for all workers post pandemic

– May 2021

- Employers in certain industries stated they did not expect employees to return to workplace full time

– November 2021

- House of Commons library published a briefing paper on what remote and hybrid working might mean for the future of working



Legal issues to consider

- Tailoring employment contracts for hybrid working
- Introducing new policies/renewing existing policies on arrangements for hybrid working
- Taking appropriate measures to protect confidential information and personal data
- Reviewing health and safety implications
- Considering whether any special equipment should be provided
- Considering whether any special insurance arrangements are required
- Considering arrangements for management/supervision of hybrid workers



Benefits of Hybrid Working

Reduce overhead costs

Increase productivity

Better motivation

Skills retention

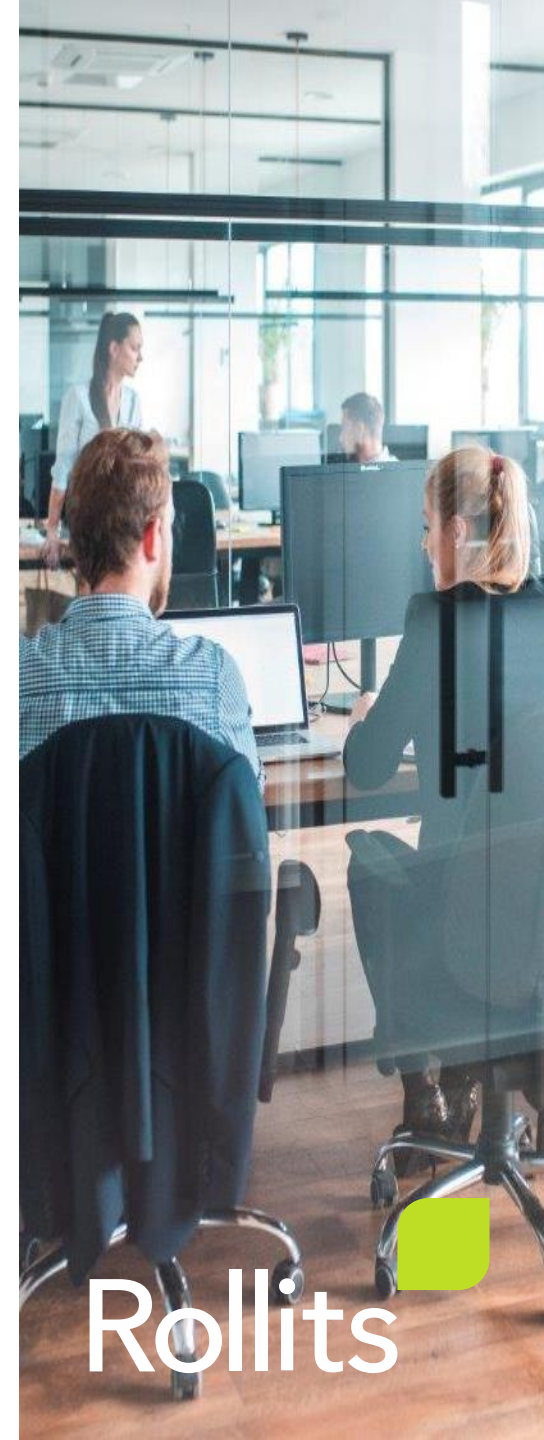
Recruitment allowing access to a wider geographical talent pool

Flexibility - geography and travel time less of an impediment

Technological competence - hybrid workers likely to have increased IT and technological skills

Resilience - organisations with hybrid working better able to withstand external disruptions i.e. transport problems, adverse weather.

Forms an important part of disaster management planning



Rollits

Drawbacks

Potential to create two-tier workforce (those present and those remote)

Culture - damage to team working and company culture

Collaboration and innovation reduced if limited face-to-face contact

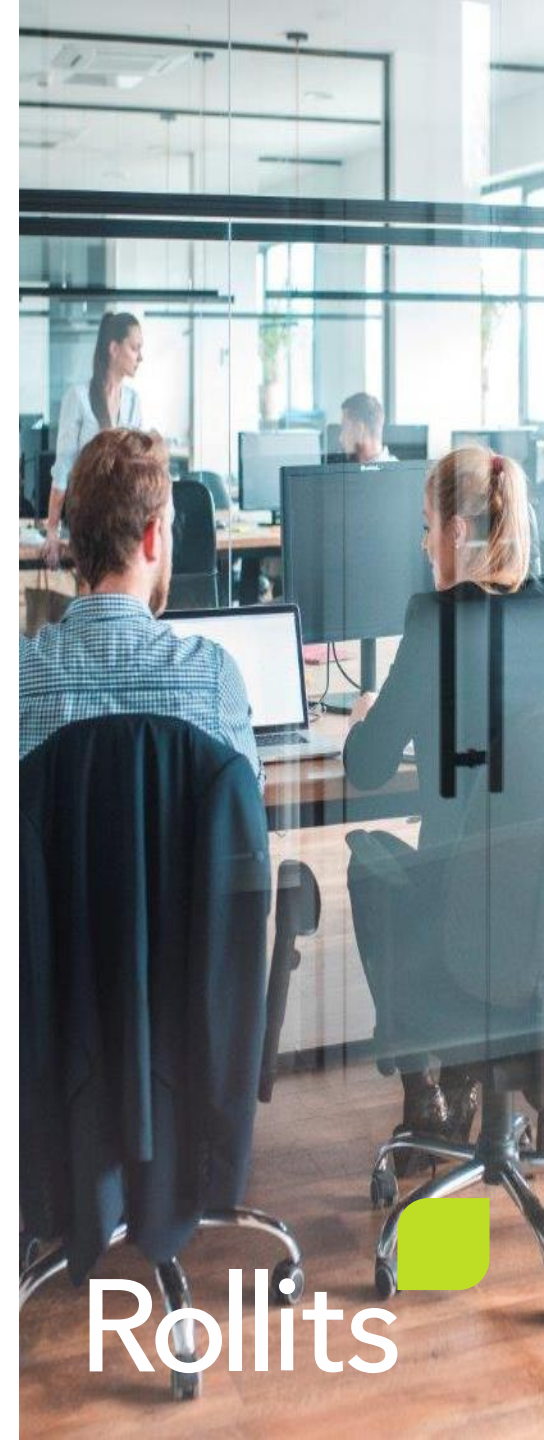
Management and oversight - can manager's support hybrid workers to the same degree?

Learning and development - reduces mentor and training opportunities for junior/less experienced workers

Productivity (data to suggest this is often misplaced)

Data security

Mental health. Employees working from home may experience loneliness and boredom



Rollits

Contracts of Employment

- Employers are required to provide employees with a “written statement of particulars of employment” including key terms relating to hours and place of work
- Particulars must include an indication if employee permitted to work at various places – hybrid working
- Does the contract include reserve a right to enter employee’s home?
- Any changes require written statement containing particulars of change (section 4 statement)
- Change to hybrid working likely to trigger section 4 statement



Rollits

Hours of Work

- Critical to establish boundaries of working time
- Will employee be completely flexible?
- Will they observe strict working hours?
- Will there be a “core time” when they are available?
- Can the employee be required to work outside of these hours?
- Contract/Policies must be clear on this issue



Rollits

Working Time Regulations 1998

- Employers should have mechanisms in place to ensure employees working from home comply with working time
- Employer must have adequate records of working time
- Failure to take reasonable steps to comply with the limits or record keeping could render employer guilty of criminal offence
- Contract or policies should make it clear employees working from home are responsible for regulating working time and taking breaks as appropriate
- It is important to have a clear distinction between working time and personal time



Salary and Benefits

- Employers should ensure salary and benefits of those working from home is not less favourable
- Any changes to salary and benefits must be agreed
- Ensure employees working from home have access to benefits or facilities



Rollits

Expenses

- No legal obligation to reimburse expenses incurred by an employee working from home
- Employer may contribute a sum towards hybrid working expenses
- Can include:
 - telephone;
 - broadband;
 - heating;
 - lighting costs; and
 - any increased insurance premiums
- Contract or policy should set out employer's position
- Employment tribunals have awarded household expenses in claims by implying contractual terms for expenses



Confidentiality

- Employees have implied duty not to disclose confidential information
- Practically more difficult to police when employee is working from home. More so if employee is permitted to work from remote locations such as cafes
- Employers should consider where employees are permitted to work from and reflect this in policy
- Should have an express confidentiality clause in contract dealing with employee's obligations



Confidentiality

- Employees working from home should be required to keep confidential information secure
- Consider the following:
 - Prohibiting access by household members;
 - Passwords and encryption;
 - A secure filing cabinet;
 - Facilities for confidential disposal i.e. shredder; and
 - Training on data protection and confidentiality



Rollits

Data Protection and Home Working

- Specific training should be provided - CRUCIAL
- Information Commissioner's Office has produced guidance to aid compliance with data protection law and working from home
- See ICO: Data Protection and Working from Home)
- Employers should carry out data privacy impact assessment
- Employers should consider steps to mitigate data security risks
- ICO can issue significant fines for breach of data security



Whitehead Nursing Group, August 2016

- Gave unencrypted laptop to employee for business use
- Laptop contained personal data regarding 29 residents and 46 employees (including sensitive personal data)
- Laptop left in living room overnight and later stolen
- Nursing home failed to:
 - Have policies governing encryption, home working or storage of portable devices
 - Provide adequate data security training to staff

Fined £15,000



Interserve Group, October 2022

- Employee forwarded a phishing email to a colleague, who opened it and inadvertently downloaded malware to Interserve’s systems
- 113,000 current/former employees’ data was encrypted by the attacker and rendered unavailable (including NI number, bank details, health information and sexual orientation)
- Interserve’s anti-virus software flagged the issue but it wasn’t investigated until over a month later (by which point it was too late)
- Interserve used an unsupported operating system, didn’t operate an appropriate firewall, failed to conduct regular system penetration and did not have sufficient staff data protection training in place
- ICO press releases cite “complacency” as a bigger risk than hackers (Interserve in this case had appropriate policies in place but didn’t follow them)



Equipment

- Consider what equipment is required?
- Who will provide and pay for it?
- Who will have access to it?
- No legal obligation to provide equipment necessary for hybrid working
- Expectation that it will be!



Rollits

Insurance

- Equipment provided by employer needs to be covered by employer's insurance policy if possible
- If, not employee should take out insurance and maintain satisfactory cover
- Parties to agree the issue on costs



Rollits

Health and Safety

- Employers have a common law and statutory duty relating to health and safety of their employees
- Includes both mental and physical health
- Employer's duties arise as an implied term of employment contract



Rollits

Health and Safety

- Employers must conduct a suitable and sufficient risk assessment of all work activities carried out by employees, including hybrid workers
- Must identify hazards and assess degree of risk
- If risk assessment cannot be carried out, provide employees with information and guidance on work and safety at home
- Consider requiring employees to carry out self-assessment of their work space and equipment



Rollits

Health and Safety

- More scrutiny of employer compliance by health and safety executive with increase in hybrid working
- Revisit health and safety assessments
- Review and update existing health and safety policies



Rollits

Health and Safety Issues to Consider

- Stress and mental health
- Equipment if supplied by employer must be suitable for its purpose, maintained in good working order and inspected regularly
- Electricity at work, employer responsible for the equipment it supplies
- Employees domestic supply including electrical sockets are their responsibility - should be reminded of this



Rollits

Health and Safety Issues to Consider

- First aid - homeworking likely to be low risk but consider providing simple first aid kit
- Accidents - employers to establish a proper procedure to allow hybrid workers to report accidents when working at home
- ACAS highlight the risk of domestic abuse of employees working from home
- Employers should look out for signs of domestic abuse and respond appropriately



Discipline and Grievances

- Employer's normal discipline and grievance procedures applies to hybrid workers
- Consider whether existing procedures are fit for purpose
- Communication - confirm expected standards of conduct when working in the workplace or from home
- Review disciplinary rules and policies for hybrid workers
- Consider prohibiting those working from home running another business or looking after children at the same time
- Consider setting expectations for those working from home



Rollits

Reporting and Appraisals

- Hybrid workers must be appraised like all other employees
- Employers should consider how to measure quality and quantity of employee output
- Suitable reporting and appraisal system should be in place
- Building sufficient opportunity for reviews of work progress



Rollits

The Right to Revert

- An employer may wish to end hybrid working arrangements
- A contractual term should deal with the termination of hybrid working arrangement and circumstances in which it may be reasonably exercised
- In practice may still be difficult to force employee to revert to permanent workplace working
- Contractual right is subject to implied term of trust and confidence
- To terminate an arrangement working satisfactorily without good reason may be in breach of this implied term
- Consider discrimination claim i.e. female employee may be able to bring a direct sex discrimination claim



How can these issues be dealt with?

- Most issues can be expressly dealt with in a non-contractual policy
- Employment contracts should be reviewed
- Consider annual workplace surveys on issues including health and wellbeing, risk and health and safety



Rollits

Discrimination Risks

- Employers with hybrid employees needs to be aware of discrimination risks
- ACAS guide example of direct discrimination: ***“An employer accepts a hybrid working request from a male employee who has children. The employer refuses a similar request from a female employee because they think she will be distracted by her children.”*** This is **“direct discrimination”**
- There is a risk of direct sex discrimination by male employees where the employer allows women to work from home but refuses a male employees request to work in a similar manner



Discrimination Risks

- ACAS gives the following example of indirect discrimination:

“an employer does not allow hybrid working from anyone in a particular role. This disadvantages an employee who is disabled and finds it difficult to travel to the workplace every day. The employer does not have a good business reason for its decision. This is “indirect discrimination”.



Helpful Guidance

- The ACAS guide to hybrid working
- Chartered Institute of Personnel and Development: Guide to hybrid working
- Provides practical guidance where covers people management, recruitment and induction, inclusion and fairness, health and safety and wellbeing. Includes links to case studies



Rollits

Questions and Answers

**Can an employee be made
to work from home?**

Yes - if working from home is a clear requirement of the contract at the outset

At a later date would constitute a variation of contract requiring a sound business reason.



Must an employer permit hybrid working?

Employees do not have a right to work at home, however, an employer must consider requests in certain circumstances. For example, the flexible working legislation and reasonable adjustments if an employee is disabled.

Can an employer suggest a trial period?

If no certainty proposed arrangement will work, wise to agree a trial period and reject at outset.

Parties should agree the length of trial and conditions by which success or failure will be judged.

Practical reality is employer seeking to end hybrid working may encounter difficulties unless they establish the arrangement has not worked or has a business reason to insist on the change.



**Thank you for
listening**

Rollits 



Rollits

Caroline Neadley

Partner, Employment

DD: 01482 337314

M: 07944 988397

E: caroline.neadley@rollits.com