

Managing employment litigation risk:

Designing a litigation strategy

WorkLife 2.0



Freshfields Bruckhaus Deringer

A lot of change has happened in the past couple of months, and much of it at speed. Employers have had to make significant and often business-critical decisions under intense time pressure and these steps will sometimes have created greater legal risk than employers might have ordinarily been prepared to accept. The return to work, and the transition to new ways of working (which we are calling WorkLife 2.0), may lead to some additional employment law risk. In this briefing we have set out some top tips for setting a strategy for minimising, defending and settling employment litigation.

Many employers will find it useful to put together a high-level litigation strategy document. This document would serve to identify the key areas of legal risk for the business in light of Covid-19 and set out a strategy to mitigate those risks. The sort of areas that a litigation strategy might cover include:

- Identifying the key areas of legal risk – in the current environment likely areas will include furloughing; the return to work (eg health and safety); temporary or permanent changes to the workforce and terms and conditions; and executive pay. A bespoke litigation strategy could address the detailed nuances of the particular facts of a given business.
- Identifying the key steps to ‘minimise and mitigate’ legal risks. Employers may find it useful to design a protocol or process for decision making and implementation. This might include:
 - Documenting clearly the reasons for decisions being taken. This would include materials such as risk assessments for the return to work; board minutes; specific assessments on vulnerable groups; decision trees.
 - Communicating clearly, frequently and openly with employees. Ensure that they are aware of the channels for raising concerns – some employers are using existing whistleblowing hotlines as a means for individuals to raise anonymous concerns over the return to work for example. In our experience, employees are often prepared to be flexible and accommodating in exceptional circumstances, provided matters are explained to them clearly.
 - Dealing with complaints or concerns quickly and transparently.
 - Where decisions are being made that will negatively affect the workforce, consider whether senior management can lead by example to demonstrate that everyone is ‘in this together’. In many cases, litigation arises because the ‘hearts and minds’ exercise has been overlooked and employees feel disproportionately affected.
- Calculating the potential legal cost – employers may identify a long list of potential claims, but it is only when the costs of those claims are assessed that informed decisions can be taken on how significant the risks are and what the next steps should be. A small number of high value claims may require a different strategy from a high number of low value claims.
- Considering the reputational impact of any claims. Is the employer in a sector that has experienced a high degree of scrutiny? For example, those in regulated sectors (like financial services), listed companies or those who engage in employment practices that attract attention (eg the gig economy). ‘Darlings’ of the crisis, like those in the medical or food sectors, may be able to implement changes with less scrutiny, although there may be less public understanding of the need to do so.
- Are there aggravating factors that could affect the seriousness of legal claims, for example high numbers of vulnerable or extremely vulnerable employees, trade unions, a litigiously-minded workforce?
- Beginning to develop a strategy for whether you will settle claims or fight them. The sort of factors that will be relevant will include:
 - The strength of any legal defence the employer may have – ie the prospects of success;
 - The expected costs of the claim – both in terms of compensation that could be payable and legal fees;
 - The availability of relevant evidence or witnesses – if the employer has not documented its decision making and any relevant witnesses have left the business it will be very difficult to mount a successful defence;
 - The expected press interest in any claim;
 - The terms of relevant insurance policies; and
 - How likely it is that settling a claim will encourage others to bring claims – the ‘floodgates’ argument.
- And, finally, take advice and soundings from experts – this may of course include your internal and external lawyers but ensure you are also speaking with internal and external communications teams, ER specialists and line managers as appropriate.

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