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Restructuring and Reintegrating Your Global Workforce in a Post-Pandemic World

Matthew Howse, Lee Harding, and Sabine Smith-Vidal

May 28, 2020

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Today's Presenters



Matthew Howse



Lee Harding



Sabine Smith-Vidal

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Today's Agenda:

- 1. Global Trends in Government Responses to COVID-19**
- 2. Issues Raised by Trade Unions Globally**
- 3. A Closer Look at the Issues in the UK and France**



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Global Trends in Government Responses to COVID-19

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Global Trends in Government Responses to COVID-19

Have Governments Adopted the Carrot or the Stick?

Spain	<ul style="list-style-type: none">• Prohibition on dismissals related to COVID-19
China	<ul style="list-style-type: none">• Employers cannot terminate employees who are on sick leave/mandatory quarantine due to COVID-19 or cannot return to work because their cities are locked down
India	<ul style="list-style-type: none">• Employers of all public and private establishments should not terminate their employees (particularly casual or contractual workers) or reduce their wages
Turkey	<ul style="list-style-type: none">• Employment contracts may not be terminated by employers for a period of three months (from 17 April), excluding cases where termination is made due to actions contradictory to the ethics and goodwill rules applicable to the workplace



Global Trends in Government Responses to COVID-19

Have Governments Adopted the Carrot or the Stick?

UK

- Job Retention Scheme, Coronavirus Business Interruption Loan Scheme, and Bounce Back Scheme

Canada

- The Canada Emergency Wage Subsidy, extension of Canada Summer Jobs Program, and the Canada Emergency Commercial Rent Assistance

Japan

- Financial support for SMEs to help facilitate remote working, subsidies for partial paid leave, and increased flexibility for employers to require overtime or a reduced amount of work as a result of COVID-19

Brazil

- Employers can (i) require employees to work from home without amending employment contract, (ii) require employees to use their vacation and holidays during the time they cannot work due to the pandemic, and (iii) implement layoff measures for up to four months



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Issues Raised by Trade Unions Globally

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Issues Raised by Trade Unions Globally



No restrictions should be lifted until it is 100% safe to do so
Enforce strict limits on store opening times following government decision to relax restrictions on retailers



Demanding more stringent measures for factories and for bank employees, who reportedly do not have enough masks, gloves, or disinfectant



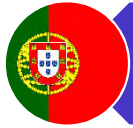
Concerns regarding under-reporting the death toll

Issues Raised by Trade Unions Globally

European Trade Union Confederation Concerns – European-Wide



Concerns regarding government's decision to unilaterally change Labour Code without consulting unions



Concerns over suspension of right to strike and suspension of drafting new labour legislation



Concerned that government is allowed to govern by emergency laws without properly involving Parliament or trade unions

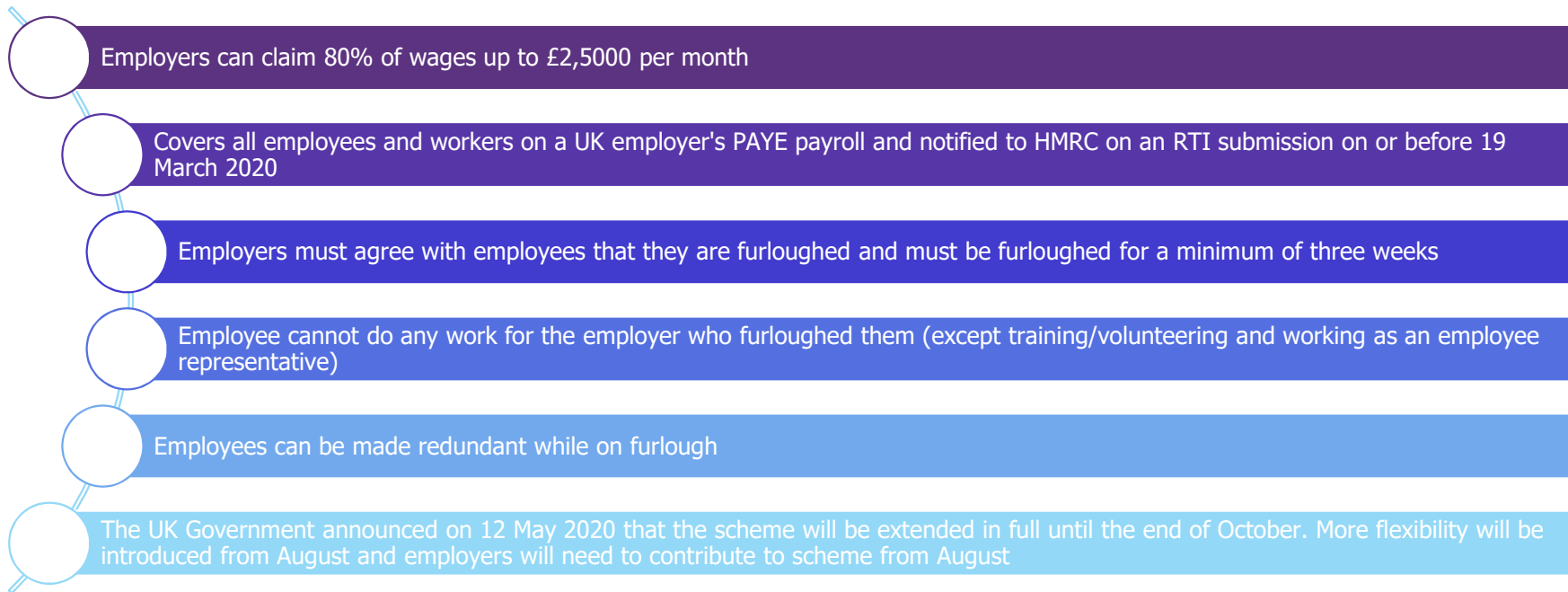


Government drafted (at least in part) new legislation that changed important fundamental rights without informing or consulting unions



Issues Relevant to the UK

The Coronavirus Job Retention Scheme



Issues Relevant to the UK

Risk of changing individual terms and conditions

Can changes be unilaterally imposed?

- Unilaterally reducing a worker's hours, work day, or pay is unlikely to 'immediately' be lawful and binding (subject to an express agreement)
- The change may be lawful and binding after a period whereby the worker without protest continues to work under the new terms

What are the risks if changes are made without agreement?

- Constructive dismissal
- Employee would be entitled to notice pay (wrongful dismissal)
- Potential unfair dismissal claims
- Possible direct and indirect discrimination risks
- Equal pay claims

What if there is a recognized trade union?

- Liaise and seek agreement with the relevant union pursuant to collective bargaining agreement
- Exhaust dispute resolution procedures first – helps promote positive industrial relations and harmonise the employer, employee, and union relationship
- Employers can approach employees directly with individual offers, without risking potential claims of unlawful inducement

N.B. See next slide for tips on virtual bargaining

Issues Relevant to the UK

- Collective bargaining has been replaced by “virtual” bargaining due to remote working
- Tips for virtual bargaining:

Determine whether bargaining is actually required at this time

Select the appropriate platform

Open a concurrent platform for your internal team to discuss issues in real time

Control who talks (create rules and signals)

Conduct roll calls

Implement checks and balances when submitting/passing documents electronically

Take your time

Be professional

Issues Relevant to the UK

Role of trade unions from a health and safety perspective and return-to-work issues

Key role: managing worker-employer relationship by challenging measures put in place by the government and/or employers to mitigate effects of COVID-19

N.B. See
next slide for
examples

Trade union representatives also have various statutory duties and rights

N.B. See
slide 20

Employer must also consult with trade union representatives regarding various health and safety issues

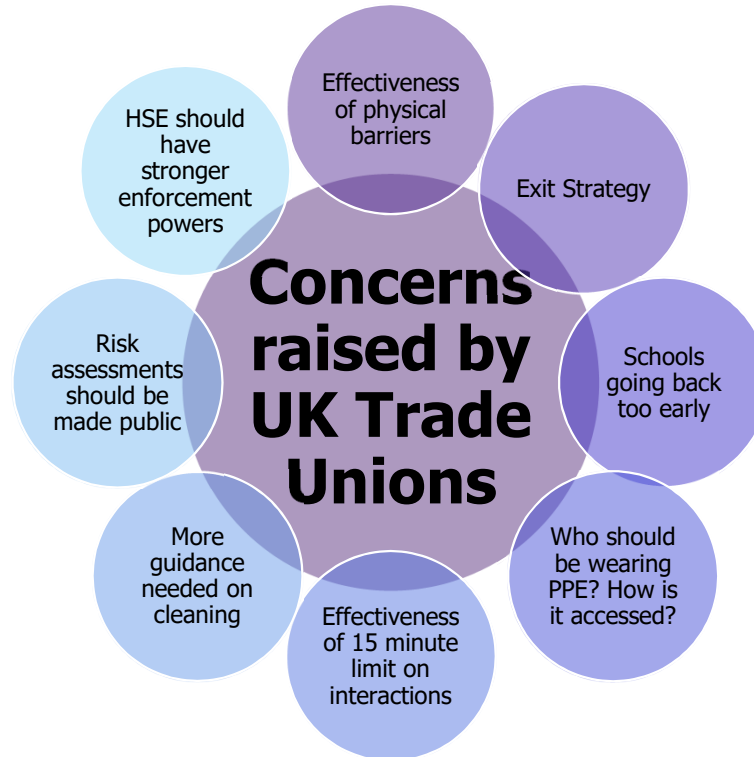
N.B. See
slides 24 and
25

Employer engagement with union (or other representative body):

- Agreeing on social distancing plans to provide input on proposals
- Collective redundancy consultation
- Changes to terms and conditions
- Helping to communicate guidance to employees and providing a route to raise questions/concerns

Issues Relevant to the UK

Role of trade unions from a health and safety perspective and return to work issues



Issues Relevant to the UK

Trade union representatives have statutory duties and rights to:

Investigate potential hazards in the workplace



Investigate complaints raised by employees



Make representations to the employer on general matters affecting the health, safety, or welfare of employees at work



Carry out inspections of the workplace and of documents



Represent employees in workplace consultations with inspectors of the HSE



Receive information from inspectors relating to the premises at which the employees that he or she represents are employed



Attend meetings of safety committees



Issues Relevant to the UK

Industrial action in the UK



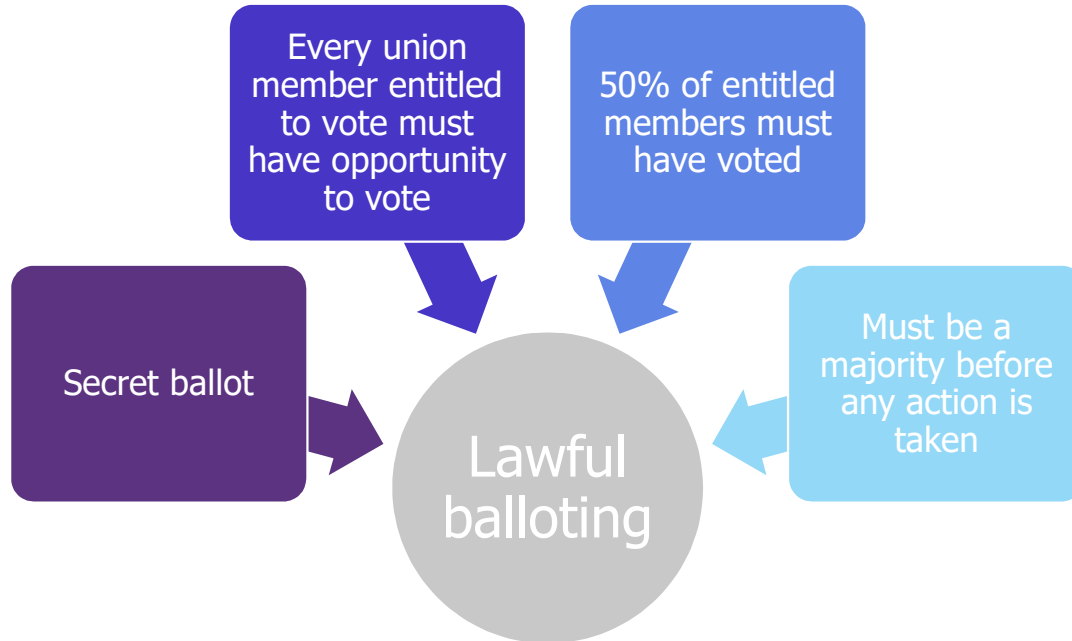
Typically, it is a strike.

Unions must follow rules and steps in order for strikes/protests to be lawful (e.g. notice to employer). Action must be peaceful without intimidating or threatening behavior.

Unless action meets criteria, union could be liable to an employer for encouraging employees to breach employment contracts.

Issues Relevant to the UK

Industrial action in the UK - Balloting



Issues Relevant to the UK

Prospects for Industrial Action

- 1 Rail, Maritime, and Transport union have warned of industrial action to protect transport workers
- 2 Low risk in general? Restrictions on mass gatherings have led several unions to advise against industrial action at this time
- 3 Some unions have also thought it inappropriate to strike at this time, e.g. TSSA relaxed TfL Industrial Action as a gesture of goodwill

Issues Relevant to the UK

Employer consultation obligations with trade unions

Recognised independent trade unions **must appoint safety representatives** from among the employees to consult with the employer



Employer has a duty to consult representatives with a view to:

- making arrangements that allow employer and employees to **develop measures** ensuring health and safety of employees and **to check effectiveness** of such measures

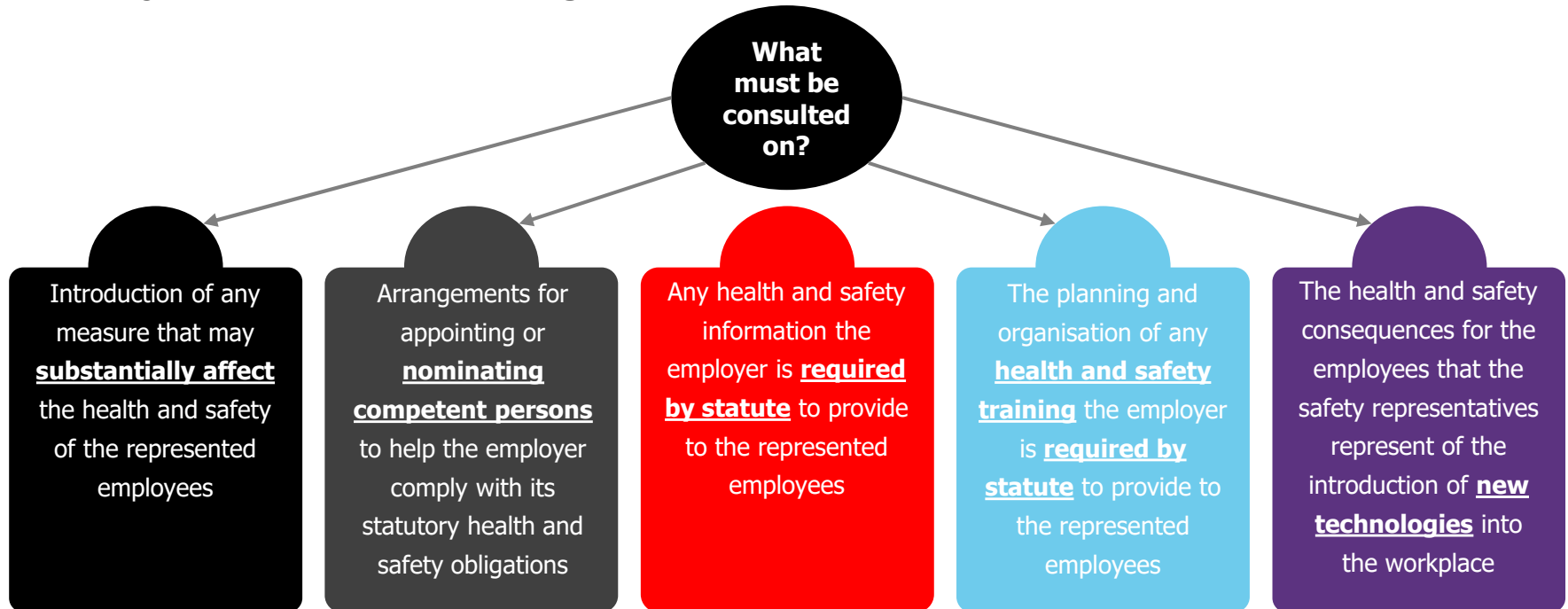


Employer must consult in "**good time**". Employer should allow time to:

- provide representatives with information about what it proposes to do,
- give the health and safety representatives an opportunity to express their views, and
- take account of any response.

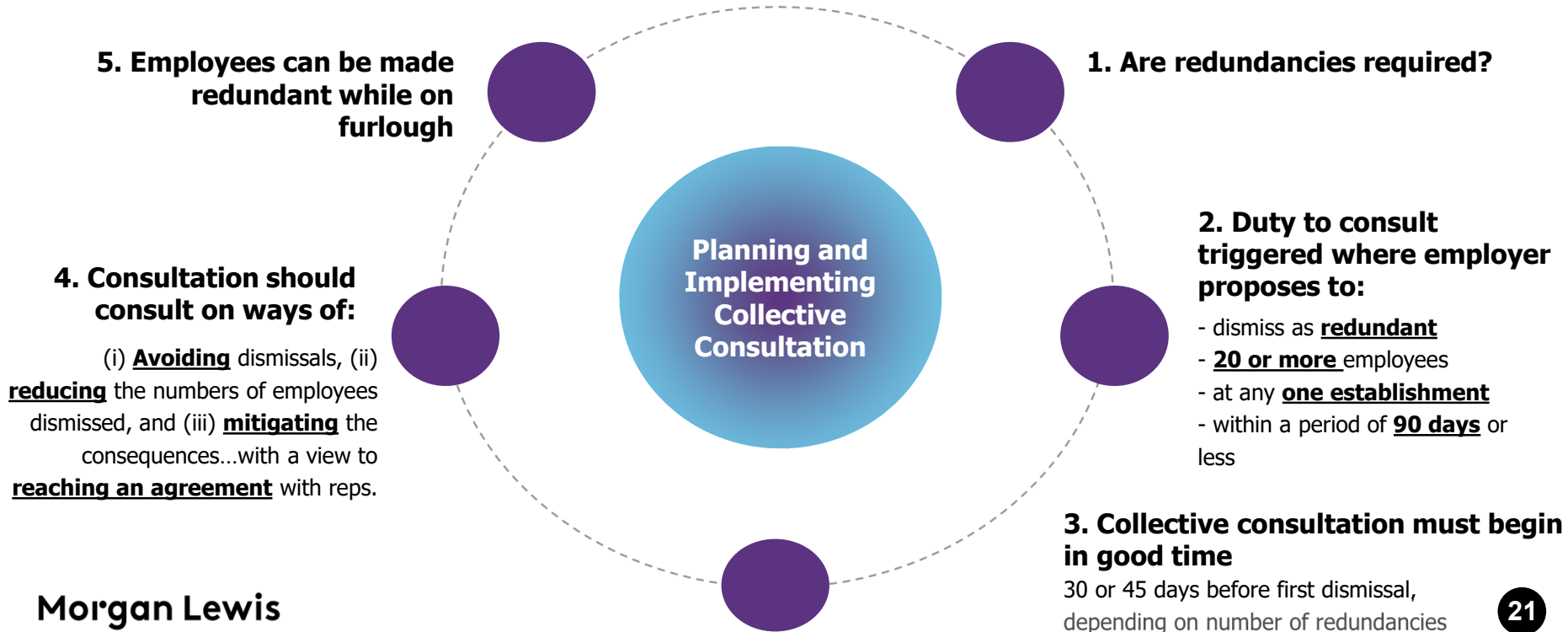
Issues Relevant to the UK

Employer consultation obligations with trade unions



Issues Relevant to the UK

Large Scale Restructuring Exercises - Collective Consultation



Issues Relevant to the UK

The role of trade unions in large-scale restructuring exercises

20 or more redundancies proposed at one establishment

Employer has collective consultation obligations

Where a recognised independent trade union exists, the employer must **consult with representatives of that union**, as opposed to other employee representatives

Information rights of trade union representatives

The **statutory information** contained in s. 188(4) TULRCA

Entitled to copy of **HR1** form

Access to employees and facilities

Employer must allow the representatives with whom it is consulting **access** to the affected employees

Employer must also afford those representatives such **accommodation and other facilities** as may be appropriate

Issues Relevant to the UK

Litigation: Trade Unions Will Support Whistleblowing Claims

Employers may receive complaints regarding failures to abide by health and safety guidance or to properly assess and address risk.

Concerns may qualify as protected disclosures. If so, individual is protected from detriment and dismissal.

Ensure workers are **trained** on how to respond to whistleblowing complaints. Review whistleblowing policy and ensure it is accessible to all staff.

Employers who follow government guidance are likely to have an adequate defence to allegations. **No financial cap** on compensation in whistleblowing claims

N.B. TUC have set up a whistleblowing hotline for COVID-19 concerns

Issues Relevant to the UK

Litigation: Existing COVID-19 Disputes

8 May 2020

IWGB and two Uber drivers have brought a claim against the UK Government arguing that the (i) Self-Employed Income Support Scheme **discriminates against self-employed workers and BAME workers and women**; and (ii) £95.85 per week Statutory Sick Pay **discriminates against women, BAME workers, and gig-economy workers.**

12 May
2020

IWGB sent a pre-action protocol letter as part of its **judicial review** application. It will argue that the government **failed in its obligation to transpose health and safety directives from EU law into UK law.**



Issues Relevant to the UK

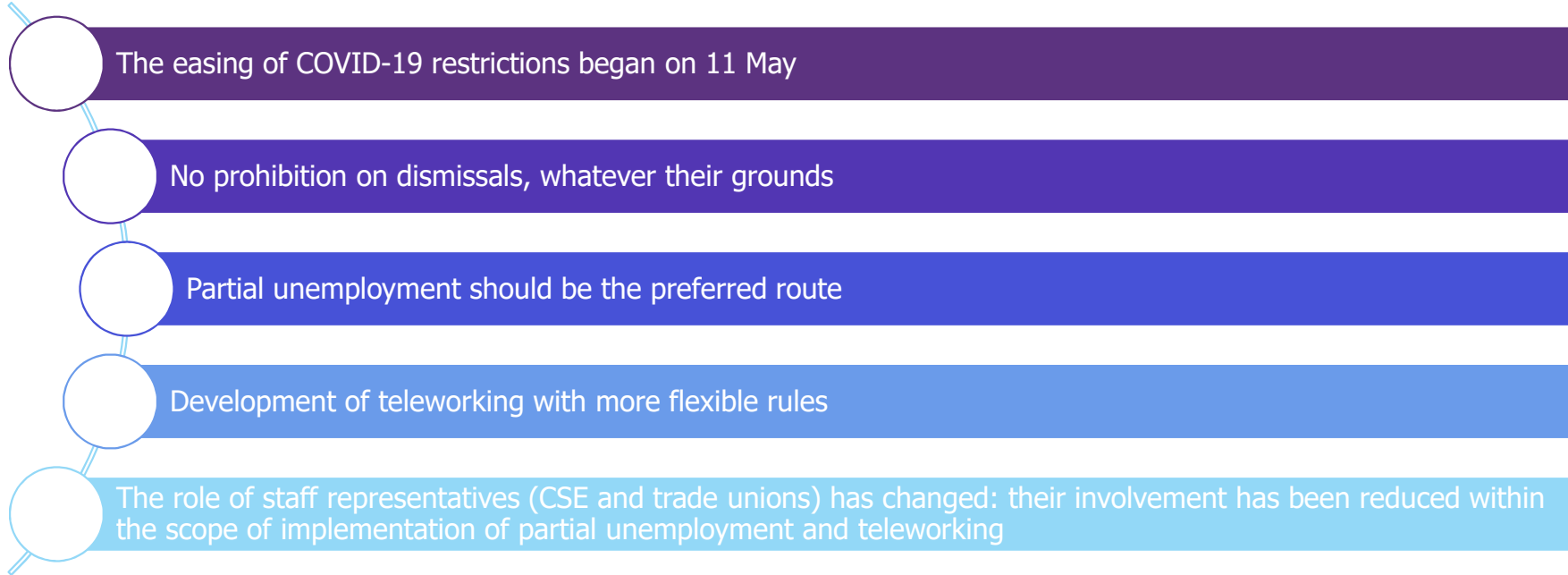
Other Potential Areas of Dispute Between Trade Unions and Government/Employers

Potential areas of future dispute	
Union	Potential Dispute
National Education Union	<ul style="list-style-type: none">• Reopening schools too early
GMB	<ul style="list-style-type: none">• Lack of PPE• Companies using furlough scheme while making employees redundant (e.g., Ovo and Rolls Royce)• "Opportunism": companies using pandemic to change employee terms and conditions (e.g. SPS Technologies)
Trade Union Congress	<ul style="list-style-type: none">• Encouraging workers to return to work without adequate time for employers to consider government guidance



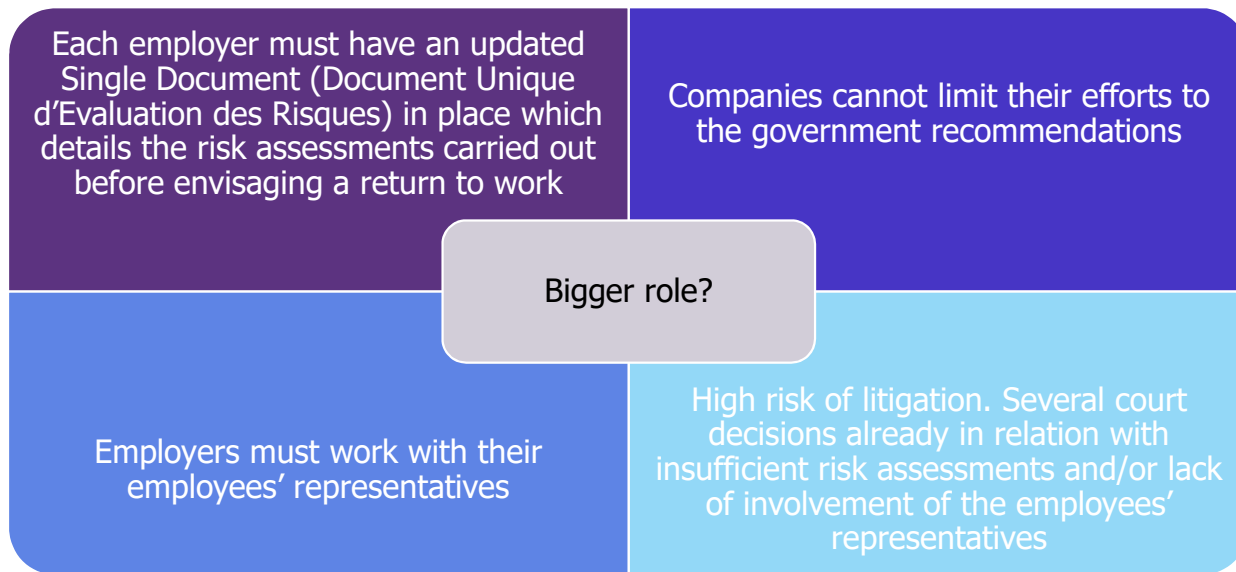
Issues Relevant to France

Global Trends



Issues Relevant to France

Role of staff representatives from a health and safety perspective and return-to-work issues



Issues Relevant to France

Large-scale restructuring exercises

The law provides for two different methods of carrying out a collective dismissal (10 or more employees dismissed in a company of 50 or more employees):

- negotiating a collective agreement; or
- drawing up a 'unilateral document'

The collective agreement must be negotiated and signed with one or several trade unions

The collective agreement is sent to the labour authorities at the end of the social and economic committee consultation period for checking

The "unilateral document" is drafted by the employer and sent to the labour authorities at the end of the social and economic committee consultation period for approval

N.B. In both cases, the labor authorities will look carefully at the proposed mass redundancies and could stop them.

Biography – Matthew Howse



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As practice group leader for Morgan Lewis's labor and employment practice in London, Matthew Howse represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and non contentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

Biography – Lee Harding



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Lee Harding has a broad and versatile practice that goes beyond the provision of traditional legal services. Lee's practice is focused on the myriad legal implications arising out of a rapidly changing workplace: flexible working, five generations in the workplace, giving workers a voice, and the crossover between employment and the regulatory environment, to name but a few. The nontraditional legal services that Lee offers require a proactive approach to managing workplace issues before they escalate. He engages with a wide range of stakeholders to deliver sophisticated and actionable solutions that resonate across the entire business.

Biography – Sabine Smith-Vidal



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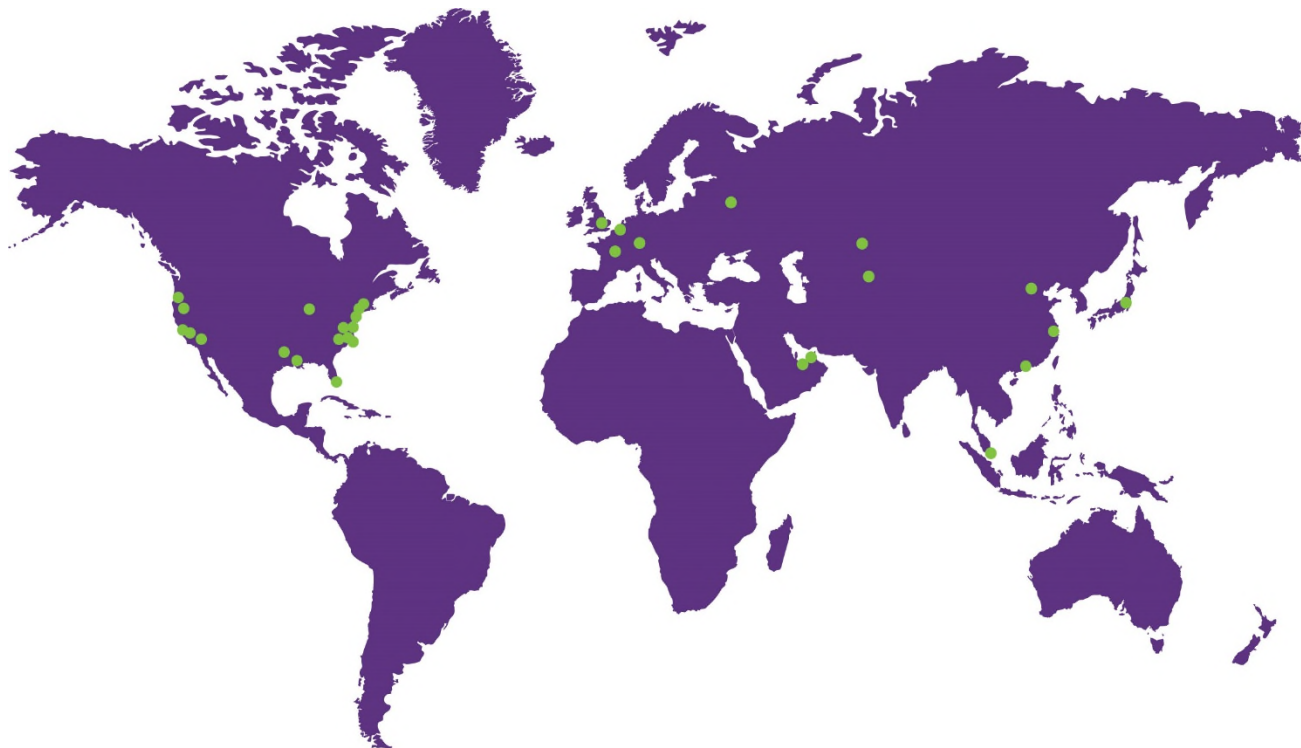
Sabine Smith-Vidal advises French and international companies on labor and employment issues associated with cross-border transactions, mergers, acquisitions, and corporate restructurings. Working closely with her clients, Sabine assists with the establishment of pension plans, employee savings plans, and social plans. She advises corporations on multijurisdictional employment issues, including trade union law, outsourcing, and individual and collective dismissals. In addition, Sabine provides guidance and legal representation in labor dispute litigation. Sabine is the managing partner of Morgan Lewis's Paris office.

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