

UK EMPLOYMENT LAW 2023 YEAR IN REVIEW

AND A LOOK FORWARD TO 2024

17 January 2024

Presenters



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Today's Topics

- ✓ **Retained EU Law and the Current Political Landscape**
- ✓ **Employment Law Related Reform**
- ✓ **Pay Transparency and Gender Pay Gap Reporting in the UK and EU**
- ✓ **Developments in DE&I**
- ✓ **Duty to Prevent Sexual Harassment**
- ✓ **Lifting of Bankers' Bonus Cap**
- ✓ **Digital Solutions and AI in Employment Decision-Making**
- ✓ **Employee Data Protection Updates**





Retained EU Law and The Political Landscape

Retained EU Law

Retained EU Law (Revocation and Reform) Act 2023



1

- Controversial “sunset clause” replaced by “sunset schedule”.

2

- 600 pieces of retained EU law will be repealed.

3

- However, the schedule contains very little of any significance.

Retained EU Law

1

- Legislation in Schedule 1 of the Act repealed as well as directly effective retained EU rights and obligations.

2

- Supremacy of retained EU law abolished.

3

- General principles of EU law in UK law abolished.

4

- Broad powers for ministers to restate, revoke and replace secondary retained EU law and assimilated law. Future departure from retained case law by domestic courts will be facilitated.

Key Points From The Act



Political Landscape



Labour Party Proposals

- New day 1 rights (unfair dismissal, sick pay and parental leave)
 - Ban zero hours contracts
- New work/home life rights (right to disconnect, flexible working as a day 1 right, reform to parental leave rights and protections)
 - Employment status reform (single “worker” status)
 - Expansion of trade union rights
 - Prohibition of fire and rehire practices
 - Review of health and safety at work legislation
- Ethnicity pay reporting for companies with more than 250 staff



Employment Law Related Reform



Key Employment Law Reforms

Working Time Regulations

Obligation for daily working hours records will be removed as they are considered by the UK Government to be disproportionately burdensome. The requirement was derived from a 2019 ECJ judgment (*CCOO v Deutsche Bank*).

TUPE

Removal of requirement to elect employee representatives for employers with fewer than 50 employees and employers of any size involved in a transfer of fewer than 10 employees.

Non-competes

Governmental proposal to limit duration of non-competes to three months “when parliamentary time allows”.

Holiday Entitlement & Pay

Irregular hours workers and part-year workers subject to new regulations from 1 April 2024. Holiday accrues based on 12.07% of the hours worked in the previous pay period or rolled-up holiday pay can be implemented.

Holiday Carry-Over

Right of carry-over in certain situations derived from ECJ case law will be preserved in UK law. These situations currently have to be “read into” the Working Time Regulations.

Redundancy & Pregnant Employees

Right for pregnant employees to be offered suitable alternative employment in a redundancy situation has been extended.

Right to Request Predictable Work Patterns

Right to request predictable work patterns given to certain workers and agency workers. Employers will be able to refuse requests for statutory reasons. ACAS is consulting on a draft code of practice on handling requests.



Pay Transparency and Reporting in The UK and EU

Pay Equity in the United Kingdom

Ethnicity Pay Reporting in the United Kingdom?

N.B. In December 2020, Lloyds Banking Group became the first major UK bank to disclose its Black pay gap

Ethnicity pay reporting not currently mandatory in the United Kingdom

The current government's view is that there are "significant obstacles" with an ethnicity pay-gap reporting mechanism and that it does not want to impose additional burdens on employers "as they recover from the pandemic."

Some employers are choosing to make ethnicity pay disclosures on a voluntary basis.

N.B. Labour continues to propose a Race Equality Act, including mandatory ethnicity pay reporting for employers with more than 250 staff.

Pay Equity in the United Kingdom and European Union

ESG Considerations For Responsible Employers

Growing focus placed on the “social” element of ESG, which concerns a business’s impact on its employees, workers, contractors, and the wider community

Diversity and inclusion (D&I), and equal pay, are key metrics within the “S” of ESG

Important for (1) reputation and value, (2) productivity, and (3) legal compliance

Beyond legally required reporting, many businesses offer voluntary disclosures and set goals related to social issues

Internal audits are also common and provide organizational leadership with reliable assurance on the effectiveness of ESG management

EU Pay Transparency Directive

Introduction to the Directive

- **7 June 2026.** EU Member States have three years to transpose the Directive into domestic law (i.e. 7 June 2026). Most obligations under the Directive will kick-in from that date (or potentially earlier if a particular country implements the Directive ahead of the deadline) and will generally apply to all employers regardless of headcount. However, the gender pay reporting deadline will be a year following implementation and will only apply initially to employers with 150 or more employees in a particular EU country.
- **Key Points.** The Directive introduces a wide range of pay transparency measures (including, but not limited to, gender pay reporting obligations), extensive enforcement mechanisms, including fines and uncapped compensation for workers who suffer damage as a result of an employer infringing the Directive, as well as obligations for employers with pay gaps of 5% or more to remedy those differences.
- **Challenges for Employers.** Compliance costs and an increased administrative burden, and higher chances of pay equity related litigation.

EU Pay Transparency Directive (Key Points, pt. 1)

Measure	Summary of Requirements
EQUAL WORK AND WORK OF EQUAL VALUE	<ul style="list-style-type: none">Member States will be required to take the necessary measures to ensure that employers have pay structures ensuring equal pay for equal work or work of equal value.Pay structures should be such as to enable the assessment of whether workers are in a comparable situation in regard to the value of work on the basis of objective, gender-neutral criteria agreed with workers' representatives where such representatives exist. These criteria should not be based directly or indirectly on workers' sex.
JOB APPLICANTS	<ul style="list-style-type: none">Job applicants will have the right to receive information about initial pay or the job's pay range, which shall be based on objective, gender-neutral criteria attributable to the relevant position.Employers shall not ask applicants about their pay history during their current or previous employment relationships.
PAY LEVELS AND CAREER PROGRESSION	<ul style="list-style-type: none">Employers should make easily accessible to their workers the criteria that are used to determine workers' pay, pay levels and pay progression.The criteria will need to be objective and gender neutral.
RIGHTS TO INFORMATION	<ul style="list-style-type: none">Workers will have the right to request and receive written information on their individual pay level and on the average pay levels, broken down by sex, for categories of workers performing the same work as them or work of equal value to theirs. If the information received is inaccurate or incomplete, workers should have the right to request reasonable additional details and clarification and to receive a substantiated response.Employers will need to inform all workers annually of their right to receive such information and of the steps that the worker is to undertake to exercise that right.Employers will need to provide the information on request within a reasonable period of time but in any event within two months from the date on which the request is made.

EU Pay Transparency Directive (Key Points, pt. 2)

Measure	Summary of Requirements
PAY SECRECY CLAUSES	<ul style="list-style-type: none"> Contractual terms that restrict workers from disclosing their pay, or from seeking information about the same or other categories of workers' pay, will be prohibited.
GENDER PAY REPORTING	<ul style="list-style-type: none"> Employers with 250 or more employees: Publish the report by 7 June 2027 and every year thereafter. Employers with between 150 and 249 employees: Publish the report by 7 June 2027 and every three years thereafter. Employers with between 100 and 149 employees: Publish the report by 7 June 2031 and every three years thereafter.
JOINT PAY ASSESSMENTS	<ul style="list-style-type: none"> Employers that are subject to the reporting obligation will need to carry out a joint pay assessment where all of the following circumstances apply: <ol style="list-style-type: none"> the pay reporting demonstrates a difference in the average pay level between female and male workers of at least 5% in any category of workers; the employer has not justified such a difference in the average pay level on the basis of objective, gender-neutral criteria; and the employer has not remedied such an unjustified difference in the average pay level within six months of the date of submission of the pay reporting.
REMEDIES, ENFORCEMENT AND SANCTIONS	<ul style="list-style-type: none"> Workers will have the right to claim compensation if they have sustained damage because of an infringement of an equal pay right or obligation. Compensation shall include full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities, non-material damage, any damage caused by other relevant factors (including intersectional discrimination), as well as interest on arrears. There will be no cap on compensation. Member States must establish penalties applicable to infringements of equal pay rights and obligations. Specific penalties will apply in cases of repeat infringements.



Developments in Diversity, Equity, and Inclusion

Developments in DE&I: Transgender Rights

Transgender Rights

- Hugely topical in the UK right now.
- Lots of interest in gender dysphoria, transitioning, appropriate language, and related legal rights.
- We're finding an increasing number of employers are putting in place gender identity/transition policies and re-examining anti-harassment and bullying policies to set expectations in this space.
- From a UK perspective, gender reassignment is a protected characteristic, so those going through gender reassignment are protected from discrimination. In certain circumstances, depending on the impact on the individual, gender dysphoria could also constitute a disability, again protecting from discrimination.

Developments in DE&I: Gender Identity & Gender Critical Beliefs

Gender Identity & Gender Critical Beliefs

- “Gender critical” beliefs are capable of protection under the Equality Act 2010 as a philosophical belief. Potential conflict with other protected characteristics (e.g. gender reassignment).
- How can employers balance conflicting rights?
 - Make clear that individuals can hold conflicting beliefs, but employees must still comply with expected behaviours in the workplace
 - Be careful to be *fully* inclusive (*Fahmy v Arts Council England*)
 - Policies, procedures and regular training are important for an employer relying on the “all reasonable steps” defence
 - Social media policies in particular can be useful given that this is a common way for employee views to be manifested
- Religion or belief vs. sexual orientation and gender reassignment likely to be the most common areas of tension.

Developments in DE&I: Menopause

Menopause

- Over the past few years, the topic of menopause and its effects on employees, has risen up the social agenda. It is also featuring more internal disputes with employees – particularly where there are concerns about performance or conduct.
- In 2017, the Government Equalities Office published a report detailing the increased rates of employment among women over 50 meaning more working women than ever before will experience menopause transition during their working lives.
- In 2019, ACAS published guidance on how best to handle menopause-related issues in the workplace. One of its recommendations is to put in place a specific menopause policy setting out how staff can raise issues relating to menopause and how the employer will handle them.
- In 2021, the Women and Equalities Committee announced an inquiry into workplace issues surrounding menopause. The inquiry examined existing discrimination legislation and workplace practices, including consideration of whether legislation is required to mandate a workplace menopause policy.

Developments in DE&I: Menopause

Menopause

- The Committee published a report in summer last year:
 - While not supportive of mandatory menopause policies, the report suggested solutions including practical adjustments, additional flexibility, and fostering greater respect and understanding of the menopause for employers to help employees.
 - It called on the government to appoint a Menopause Ambassador to champion good practice, produce model menopause policies and trial specific menopause leave with a large public sector employer.
 - The model menopause policies should include as a minimum: how to request reasonable adjustments and other support, advice on flexible working, sick leave for menopause symptoms, and provisions for education, training and building a supportive culture.
 - It urged the government to bring forward legislation to make the right to request flexible working a day-one right.
 - It called on the Health and Safety Executive and the Equality and Human Rights Commission to provide guidance on menopause within six months of the report.
 - It called on the government to "immediately" commence section 14 of the EqA 2010 which would allow dual discrimination claims, and to consult within six months of the report on making menopause a protected characteristic, including a duty to provide reasonable adjustments for menopausal employees.
- In January, the government confirmed that it would not be making menopause a protected characteristic or commencing the combined discrimination provision in section 14 of the EqA 2010.

Duty to Prevent Sexual Harassment



Duty to Prevent Sexual Harassment

Positive Duty to Prevent Sexual Harassment

Worker Protection
(Amendment of Equality
Act 2010) Act 2024
(enters into force in
October 2024)

01

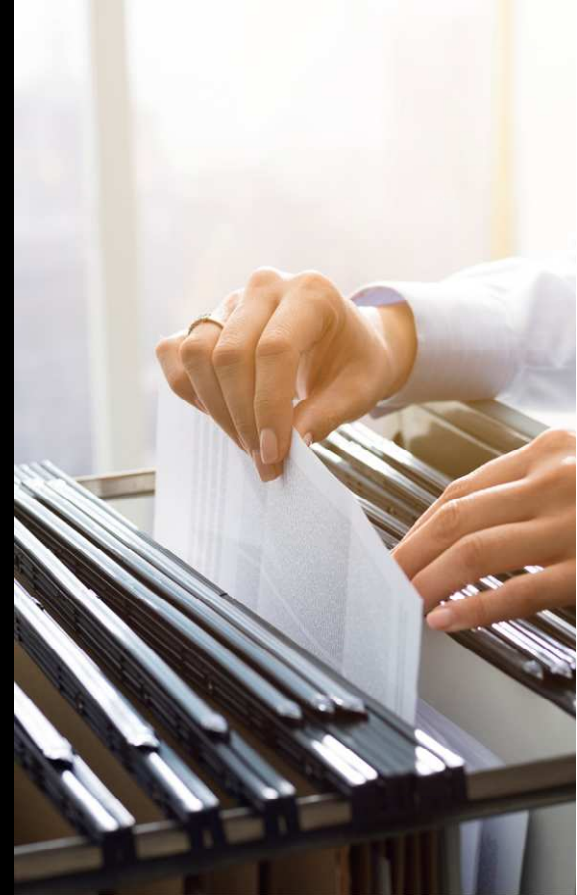
Employers to take “reasonable steps” to prevent sexual harassment of employees during their employment, rather than “all reasonable steps” (as the Bill was originally drafted).

02

Only applies to sexual harassment rather than other forms of harassment based on other protected characteristics.

03

Possible 25% award uplift if an employee succeeds in a claim for sexual harassment and an employer is found to have breached this duty.



Lifting of Bankers' Bonus Cap



Lifting of Bankers' Bonus Cap



Bankers' bonus cap lifted

- PRA and FCA recently announced the removal of the cap on bonuses that can be paid to material risk takers at banks, building societies, and PRA-designated investment firms.
- Banks, building societies, and PRA-designated investment firms were required to limit an individual's variable remuneration to a maximum of 100% of their fixed pay, or 200% with the approval of shareholders. Technically, it did not limit the total remuneration that could be paid—it simply fixed the relevant ratio between fixed and variable pay.
- In the regulators' view, removal of the cap will:
 - allow banks, building societies, and PRA-designated investment firms to restructure pay more quickly;
 - give those firms additional flexibility over their cost base to deal with downturns;
 - give those firms more flexibility to share risk with employees;
 - allow for a greater proportion of total pay to be subject to the "incentive setting tools within the remuneration framework sooner," which "could contribute to a better alignment of incentives and financial rewards with principles of effective risk management, good conduct and the long-term interests of the firm";
 - improve the competitiveness of the United Kingdom internationally through attracting talent and competing against jurisdictions where there is no bonus cap; and
 - remove "undesired consequences of the cap", such as 'upward pressure on salaries and allowances that may not be linked to longer-term performance and cannot be reduced or clawed back in the event of later failure and/or previous misconduct coming to light."



Digital Solutions and AI in Employment Decision-Making

How AI Can Be Used in Recruiting

Writing job descriptions

Deciding where to post/advertise jobs

Screening

Assessments and psychometric tests

Interviewing candidates

Following up with candidates

Selecting candidates

How AI Can Be Used in Employment

Shift
scheduling

Performance
evaluation

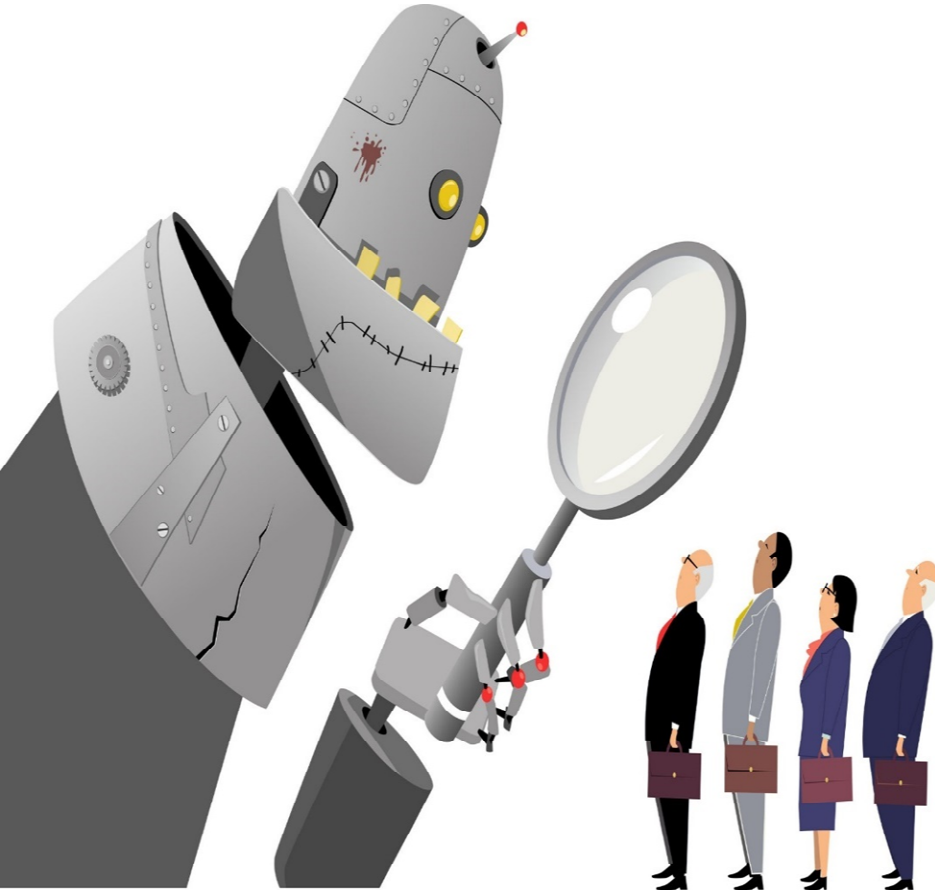
Workplace
safety

Monitoring
and
surveillance

Productivity
monitoring

Biometric
monitoring

Legal Risks & Obligations



What legal risks and obligations apply?

1. Equality Act 2010
2. Data Protection Laws (e.g. Art. 22 UK GDPR)
3. Unfair dismissal
4. Common law (e.g. mutual trust and confidence)
5. Privacy laws (e.g. European Convention on Human Rights/Human Rights Act 1998)

Managing Risk

Transparency

Human review
where dismissals
are involved

Policies (e.g.
Generative AI Use
Policies)

Consider whether
adjustments are
needed for
disabilities

Comply with data
protection
requirements



Employee Data Protection



Employee Data Protection

Data Protection and Digital Information Bill 2023-24

- Amendments to lawful processing grounds. New concept of “recognised legitimate interests”. Removes need for a legitimate interest assessment in relation to this processing ground.
- Removes general prohibition of automated decision making but introduces more specific safeguards and rights for data subjects.
- Changes to DSARs (e.g. controllers will be able to charge a reasonable fee or refuse to act on a request which is “vexatious or excessive”, rather than in relation to “manifestly unfounded or excessive” requests).
- DPIAs renamed “assessment of high-risk processing”. Components remain broadly similar.
- Requirement to designate a DPO is removed but replaced with a requirement to appoint a “senior responsible individual”.

Employee Data Protection

Updated ICO Guidance Re: Workplace Monitoring

- Data protection law does not prevent organisations from monitoring staff, but they must do so in accordance with data protection requirements.
- Identify a lawful basis for doing so (i.e. one of the bases in Article 6 GDPR) and a special category processing condition in addition if special category personal data is collected.
- Be clear with staff about how and why you process their information. Covert monitoring is not usually permissible from a privacy perspective.
- Involve Data Protection Officer in any plans to monitor workers.
- Consider undertaking a Data Protection Impact Assessment before monitoring starts.

Employee Data Protection

Updated ICO Guidance Re: Access Requests

- Employers do not need to respond to an access request if the request is manifestly unfounded or excessive. An example provided in the ICO's guidance indicates that a request will be manifestly unfounded if the individual states that the request will be withdrawn for a sum of money.
- A settlement agreement or NDA does not override a right of access under the GDPR.
- Certain factors must be considered to decide whether it is reasonable to disclose witness statements as part of a DSAR, as they will likely contain personal data about other persons: (1) other person's reasonable expectations and duties of confidentiality owed to them; (2) any express refusal of consent by the other person; (3) the type of information that would be disclosed; and (4) factors including a person's seniority and role.
- Confidential employment references are typically exempt from the right of access.
- Employers who have installed CCTV cameras should note that if there is footage that contains an individual's personal information then that individual has the right to receive that information under data protection legislation if they request it. Such employers should make sure that their systems allow for personal information to be easily located and extracted in response to requests.

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 noncontentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

As part of Morgan Lewis's cross-practice Global Workforce team, Matthew helps provide integrated cross-border advice, counseling, and strategic planning across a spectrum of labor, employment, benefits, and immigration issues.

A member of the International Association of Privacy Professionals (IAPP), Matthew provides data protection compliance advice, reviews data protection and employee monitoring policies, and advises clients on freedom of information and confidentiality law. He also both advises and represents companies on other privacy law issues.

Matthew regularly lectures on employment law at conferences and is a member of the HR & Employment Forum of BritishAmerican Business. His articles on age discrimination and paternity rights have appeared in leading UK employment publications such as The HR Director and the Employment Law Journal.

Biography



Louise Skinner

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Louise Skinner provides sophisticated, strategic advice on all aspects of employment law, with particular focus on regulatory employment matters. Louise advises on issues including investigations, contractual disputes, whistleblowing, discrimination, and restraint of trade. Louise has a particular focus on the financial services, life sciences, sports, media, and entertainment industries. Louise has been described in Legal 500 as “truly exceptional and insightful,” “sensible, pragmatic, [and] responsive” and someone who views client relationships “as a collaboration where we can learn from each other.”

Louise has a significant interest in matters concerning equality and diversity in the workplace, offering clients strategic and specific advice on issues relating to the gender pay gap, including equal pay, parental rights, quotas, and positive action in both recruitment and promotion. In addition, Louise advises on #MeToo issues including conducting investigations into work place culture and advising on harassment prevention, crisis management and remedial action.

Louise has experience in the financial services sector, advising clients including investment banks, hedge funds and asset management firms on the employment aspects of cross-border regulatory investigations and connected litigation. Additionally, she provides counsel on regulatory personnel issues, including disciplinary proceedings, complex issues of privilege, and a variety of employee compensation issues, including withholding and forfeiture of bonus payments and deferred compensation. Louise works closely with clients in relation to the Senior Managers and Certification Regime, in particular with regard to the on-going assessment of fitness and propriety, regulatory references and the impact on in-house compliance and HR practices and people management. In a global environment of heightened regulatory accountability and scrutiny, Louise’s grasp of and experience in the multi-dimensional issues present in matters which bridge the employment and regulatory framework have made her a go-to person for cases of this kind.

Louise also has experience in advising life sciences clients, including many of the world’s leading pharmaceutical companies, on the full ambit of employment legal issues, including ethical and regulatory concerns. Louise is an active member of the firm’s sports industry practice, advising clients in the sports and entertainment sector on a wide range of employment issues, including equality and harassment, global mobility and contractual documentation. Louise advises a wide range of clients on employee competition matters, including in relation to restrictive covenants, confidentiality and garden leave, and has experience in applications for injunctive relief in the High Court and Court of Appeal. Louise also advises on the employment aspects of corporate transactions and restructuring projects, supporting clients on many acquisitions, outsourcing, takeovers and reorganisations. She has additional experience counselling clients on the automatic transfer of employment requirements and associated information and consultation obligations.

Louise makes it a priority to develop close relationships with her clients obtaining an in-depth understanding of their unique challenges and ensuring that her advice is at all times strategic and pragmatic.

Louise frequently speaks on employment and regulatory-related topics, is regularly quoted in the press and publishes articles in publications including PLC online, IFLR, and PLC Magazine.

Biography



William Mallin

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Will Mallin advises clients on a range of contentious and non-contentious employment matters in addition to employment aspects of corporate transactions. He has experience in dismissals, redundancies, discrimination, internal investigations, grievances, disciplinaries, and employment tribunal proceedings. He has advised clients on employment law-related aspects of the COVID-19 pandemic.

As a member of the firm's global privacy and cybersecurity practice, Will also advises on data privacy matters. Will advises companies, in both advisory and M&A contexts, on compliance with the EU Global Data Protection Regulation (GDPR) and other UK and EU privacy-related regulations and on cybersecurity risks. In particular, Will handles privacy matters concerning intra-group personal data transfer agreements, international transfers of personal data, cross-border data breach investigations and related regulatory reporting, data processing agreements, data subject access requests and other GDPR-related documentation, and policy requirements.

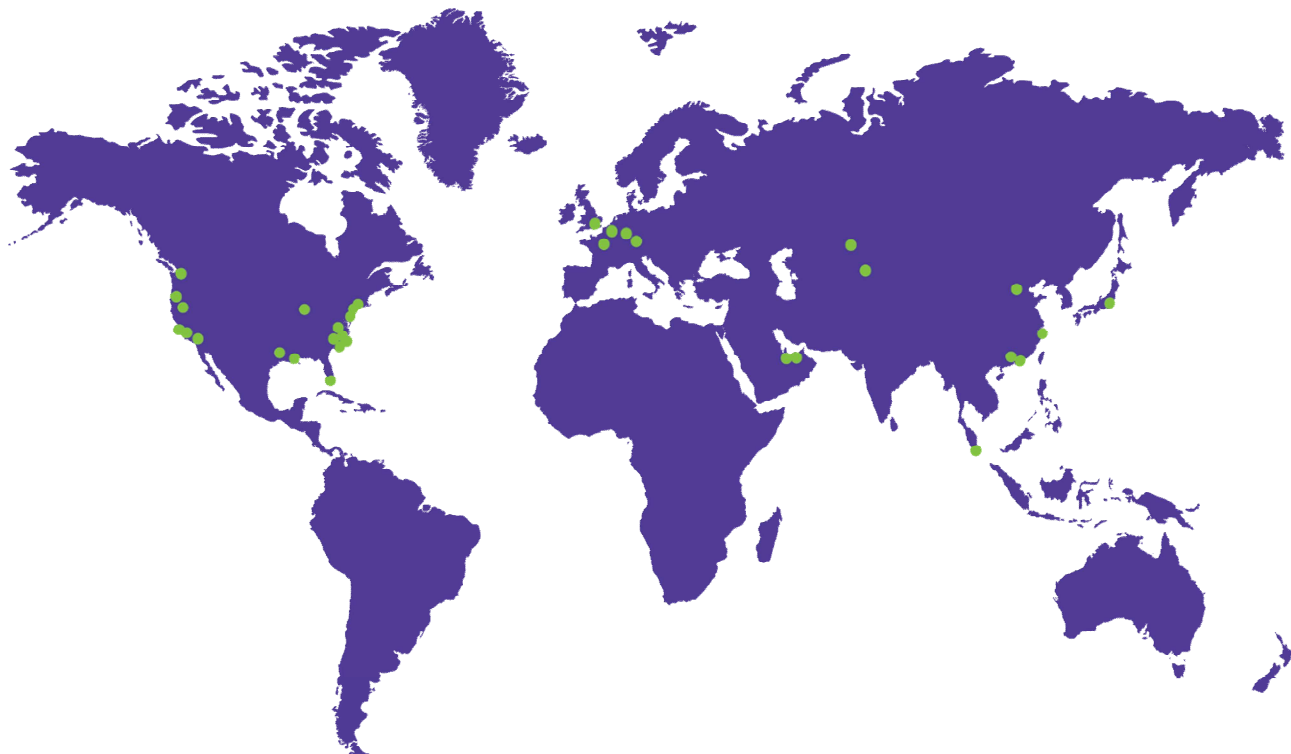
Will completed his training contract at Morgan Lewis, gaining experience across the firm's labor and employment, corporate, antitrust, and litigation departments.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
Munich
New York
Orange County
Paris
Philadelphia
Pittsburgh
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