Digital transformation and workplace organisation

A global guide to the key HR legal issues

Freshfields Bruckhaus Deringer

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AMERICAS EMEA APAC

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Digital transformation is impacting the workplace in many ways. From the influence the gig economy model is having on the way the employer/worker relationship is structured to the significant role now being given to big data and people analytics tools in supporting HR decision-making. It is making businesses reflect on how they organise themselves and prompting them to make changes to their working structures and practices.

This global guide looks at what HR legal issues might arise when implementing workplace organisational changes and covers 12 jurisdictions across 3 major regions: Americas, EMEA and APAC. It focuses in particular on the following three areas of organisational change.

Innovative new working practices

A recent trend we have seen, in particular in product development, is the introduction of 'scrum work' as a new working practice.

Scrum work refers to the formation of autonomous, flexible teams working without specific instructions and without hierarchy. It often involves the formation of 'squads' which exist independently from the main business as autonomous teams. These squads pursue a given working target but without the business having control over how they achieve that target. Employees can frequently switch between squads at short notice with a resulting change in working conditions and requirements. An employee might be required to work in a different location or remotely, with different working hours and in a different language. One of the HR challenges with scrum work is how to put in place effective employee incentive arrangements. The scrum structure can make it very difficult to assess an individual employee's performance within the squad. In order to operate effectively by reference to this new structure, incentive bonuses would need to be based on team performance rather than individual performance. This may require current incentive arrangements to be amended or new arrangements to be put in place. Another HR challenge is the extent to which frequent changes to working conditions require employee consent or engagement with employee representatives.

New working structures and reporting lines

As part of its digital transformation a business may undertake a reorganisation of its working structures. This could involve replacing a traditional organisation structure with a matrix structure or putting in place a parallel reporting structure (e.g. related to a new working practice such as scrum working) alongside a more traditional reporting structure. In the new structure, an employee may have solid and dotted reporting lines to different parts of the business. This may involve one reporting line to the manager in charge of HR matters (holiday approvals, appraisals, disciplinary matters) and other reporting lines to managers with responsibility for their day to day activities. This may also involve the employee reporting to a different office, country or entity. Businesses need to understand to what extent they need to seek employee consent or engage with employee representatives in relation to this type of reorganisation. They also need to consider whether the analysis is affected by the way in which the reporting lines are structured. Does it make a difference if certain HR related powers are reserved to a manager within a traditional reporting structure whilst only operational management is moved to a parallel structure?

Employee monitoring

The introduction of complex IT systems/tools to be used by employees as an essential part of their work often allows the employer to monitor the activities and performance of individual employees in a way which was not previously possible. This may give rise to data protection issues and could potentially require the employer to seek the consent of the employee and to consult with employee representatives before the introduction of these systems or tools.

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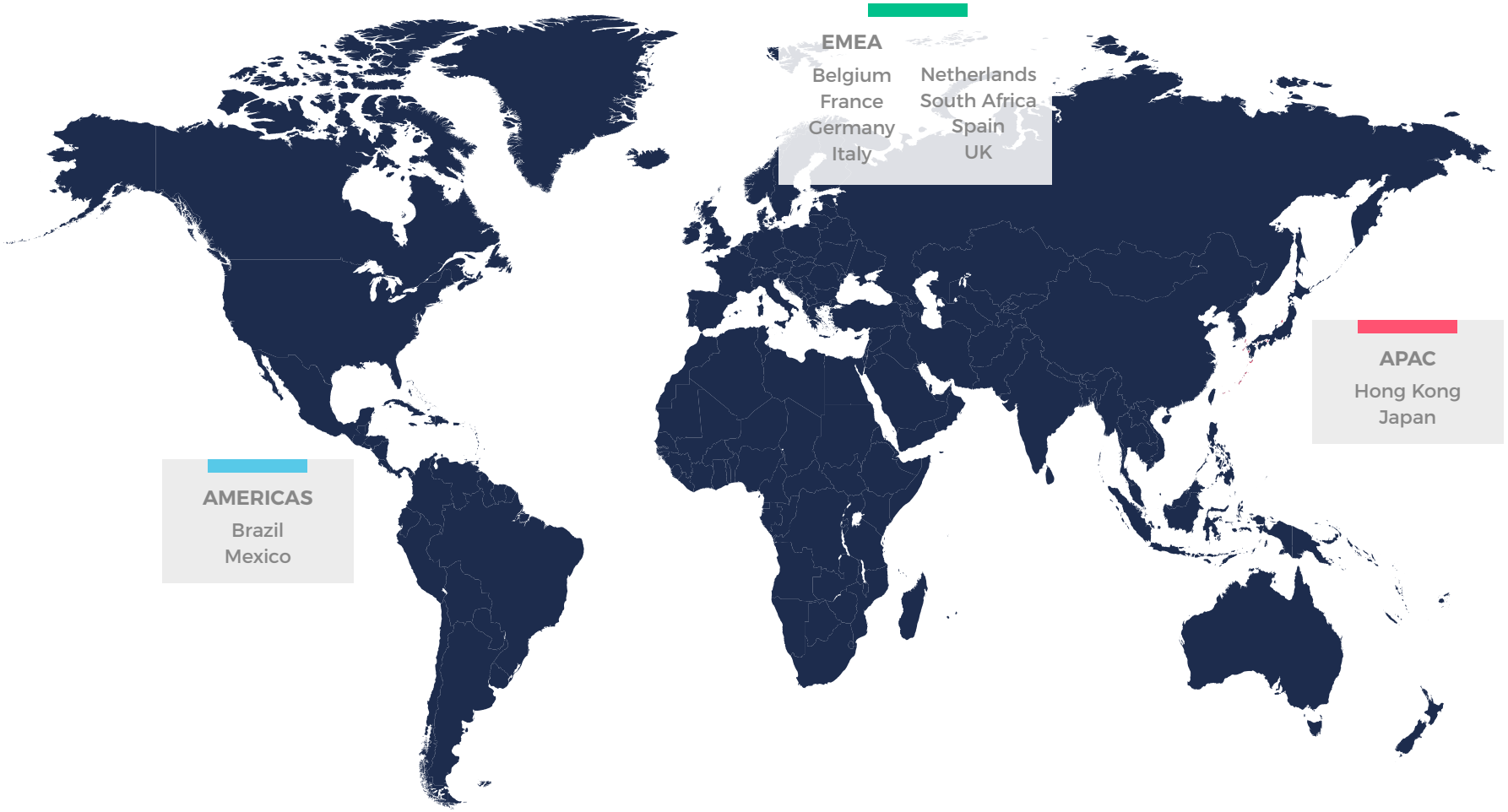
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Brazil

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions requires employee consent?

Any change in employment conditions requires employee consent but, even with consent, the change must not be detrimental to the employee otherwise it can be considered null and void. It is therefore necessary to analyse to what extent the proposed new working practice has an impact on working conditions and whether that impact is detrimental to the employees. If it would have a detrimental impact, employee consent is not sufficient and it will not be possible to introduce the new working practice without negotiating the change with the employees' union.

As an exception to this general rule, as of November 2017 when the Labour Reform came into effect, employees who receive a monthly salary of more than approximately US$3,500 and who have a university degree are considered capable of negotiating their employment conditions. These individuals could therefore agree to the introduction of the new working practice even if it had a detrimental impact on them, as long as the working practice did not violate any of the basic labour conditions established in the Federal Constitution (which are not negotiable), health and safety matters and tax matters.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

If the new conditions are not detrimental to the employees, it is not necessary to involve the employees' union and employee consent would be sufficient. However, if the new working practice is significantly different from the current one and will affect a significant proportion of the workforce, it may nevertheless be advisable to negotiate the new conditions with the employees' union to reduce the risk of it challenging the legality of the change.

For reference, all employees and employers in Brazil are mandatorily represented by a union and any collective negotiation should involve the employees' unions. There is no objective parameter to define how many employees would trigger a collective negotiation so it depends on the specific characteristics of each company, industry, place and the characteristics of the new working practice. As of November 2017 when the Labour Reform came into effect, companies with more than 200 employees are required to have a committee of employee representatives (in addition to the employees' union), which could also take part in the negotiation of the new conditions.

If employee consent is sufficient, the company would inform the employee about the new (non-detrimental) conditions and the employees would sign a document stating that they understand and agree to the new conditions.

However, if the company decides that it would be best to negotiate the change with the union, any negotiation with the union would result in a collective bargaining agreement setting out the terms and conditions applicable to the employees affected by the new working practice. Usually, unions require employers to offer additional benefits to neutralise potentially detrimental changes. The length of the process will depend on how cooperative the union is — it may take weeks or months.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Hierarchy can be changed unilaterally — this is part of the employer´s right of organisation of the business. Changes to day to day activities can be implemented without employee consent if they are compatible with the employee´s original job description or qualification, but, again, the changes cannot have any detrimental impact on the employee.

Brazil

If the change is significant and impacts the employee´s conditions it may be neccessary to negotiate the change. This can be individual negotiation if it will impact only a few employees and they have a monthly salary of more than US$3,500 and a university degree. Collective negotiation will be required if the change will impact a high number of employees or employees with a monthly salary of less than US$3,500 or who do not have university degree.

In particular:

- usually it will be possible to implement a change of location by obtaining employee consent although this will depend on a number of factors such as the position of the employee, their employment contract, business need and whether the change will be permanent or temporary;
- an employee can consent to a change in working hours except that (i) generally working hours cannot change on a regular basis, (ii) the employee cannot consent to working longer hours than the limit prescribed by the Federal Constitution and Labour Code, (iii) any increase in hours will have to be accompanied by an increase in pay, (iv) any reduction in hours must be at the same pay as the unreduced hours, (v) an employee cannot consent to a change in working shift from day to night but can agree to a change from night to day;
- an employer will be able to appoint a manager who speaks a different language to some of their team but it will be necessary to adopt some measures to allow for effective communication between the parties, e.g. the use of a translator, education in the language;
- some employees are classified as exempt employees (e.g. those who work from home or who work outside the office where it is not possible to control their working hours). They do not have fixed working shifts or working hours and do not receive overtime payments. In respect of these employees, there is more scope for an employer to make changes.

Whether consent, consultation or information only will be required will depend on the type of change. Most changes will not require consent or approval of the unions, but of the employees.

If only employee consent is required the process of obtaining that consent may only take one day.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

Incentive/bonus arrangements are considered remuneration and companies in Brazil cannot effect a reduction in remuneration except by means of a collective bargaining agreement. Moreover, there cannot be any detrimental change to the incentive/bonus. If the changes will not reduce the remuneration of the employee or have a detrimental effect, the company just needs to inform the employee about the new conditions. The employee will sign the document stating: "I understand and agree". If the changes will be detrimental and/or represent a reduction in remuneration, as a rule, they should not be implemented even with the employee's consent. It is possible to negotiate a reduction of remuneration with the employees' union, but usually it is only for a short period of time and because the company is in financial difficulties — it would be very difficult/unusual to obtain the union's consent to an indefinite reduction in remuneration.

Brazil

However, profit sharing plans put in place under Law 10,101/200 can be renegotiated in such a way that has a detrimental impact on employees. This is because amounts granted through this profit sharing plan are not considered part of the employees' employment conditions or remuneration.

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

No. Employees are obliged to observe the hierarchy or functional reporting lines set by the employer. Reporting lines may be to persons abroad or even to a manager in a different legal entity provided that it is part of the same group.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

There is no requirement to inform, consult with or obtain the consent of the employee representatives. Employees should be made aware of the monitoring system.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

The Brazilian Federal Constitution broadly guarantees the privacy of all citizens, as well as the protection of confidential and particular individuals' information.

The Brazilian General Data Protection Law, which regulates the treatment of personal data in public and private sectors, was published on 14 August 2018. The text creates a national law inspired by international guidelines, especially those provided by the EU's General Data Protection Regulation. The law provides that processing of personal data is allowed with the data subject's consent and in certain other circumstances such as where there is a legitimate interest of the data controller. Certain further requirements in relation to the handling of sensitive data and the international transfer of data. The new law will come into force 18 months after its publication, in order to allow the public and private sectors time to comply with the new law. It is recommended that employers inform employees when their personal data will be transferred to third-party service providers and that they obtain employee consent to this. The employer should not disclose the employees' information to any other third party, except with prior authorisation.

Mexico

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

Yes, employee consent is required to change certain working conditions (working schedule, activities, reporting line etc). However, there are some working conditions that cannot be changed even with employee consent — this will be the case if the change will reduce the employee's salary or benefits. Where the new working practice will result in an economic benefit for the employee, it may be sufficient simply to issue a simple notice to the employee informing them of the change.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

The engagement of employee representatives such as unions or work councils will be required if there are unionised employees that are represented by such union or work council.

The general rule is that union or works council consent is required for the introduction of new working practices. However, if the new working practice will not affect the employees' fundamental benefits, simple consultation or information of the union or works council could suffice.

How long the process will take will depend on what working conditions will be affected by the new working practice. It can take a few weeks but this will depend on how good relations are with the union.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

It will depend on how significant the changes are. Moreover, where the new working practice substantially changes the activities to be performed by the employees or will result in a negative economic impact for them, it may not be possible to implement the change. Depending on the working conditions that are affected, consent from employee representatives could be required.

The process should not take more than a couple of weeks.

Mexico

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

The incentive/bonus arrangements will have to be amended to reflect the new terms and conditions. If the incentive/bonus arrangements were set out in the applicable collective agreement, then the updated incentive/bonus arrangements must be incorporated into that agreement. The process to update the collective bargaining agreement can be achieved in a couple of weeks. Where there is no collective bargaining agreement, each affected employee will have to accept and wet sign the updated incentive/bonus arrangements.

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

Employers have the right to change employees' reporting lines and to split the management authority across reporting lines. Employee consent will not be required unless it also involves a demotion. However, it is recommended that employees have a reporting line within their employing entity and that this is the one with disciplinary responsibility. It will not usually be necessary to obtain the union's consent.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

It would depend on the type of system being implemented and what exactly is going to be monitored. From a data protection law perspective, the introduction of IT systems for employee monitoring requires employee consent, which in most cases is obtained by the employee executing the company's privacy notice. The process will take a couple of weeks at the most.

Mexico

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

Yes, the employer should ensure that it complies with the provisions of the Data Protection Law (DPL). This is aimed at protecting the privacy of individuals and their right to freely decide how businesses or other individuals should process their personal data, including images of them. The general rule is that the employer must obtain the consent of employees in order to process their personal data.

The employer will be required to deliver a privacy notice to its employees, which must comply with the DPL. Under the DPL, domestic or cross-border transfers of personal data are allowed but any transfer to third parties needs to be set out in the privacy notice and requires the consent of the employee. Intra-group cross-border transfers do not require employee consent provided that the employer ensures that the recipient of the data abides by the principles set out in the privacy notice.

When personal data is collected online and through the use of technology that allows the employer to collect the data automatically when the employee makes contact with that technology, the employee must be informed of the use of that technology, the fact that data is collected through the use of that technology and the way in which the employee may disable this tool.

Belgium

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

Employee consent will be required if the new working practice involves an important change to the essential elements of the employee's terms and conditions of employment. These are work location, working time, remuneration, function, and any other terms and conditions that the parties have agreed are 'essential'.

Less significant changes to terms and conditions of employment, even if these relate to the essential elements of those terms and conditions, can be made unilaterally by the employer to allow the company to adapt to changing economic and business environments.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

If the introduction of the new working practice involves a change in the organisation of work or working conditions (e.g. changes in the organisation of the company and its structural organisation chart, the division of work, the methods of production and work) for a significant number of employees, it will be necessary for the employer to inform and consult with the works council (if there is one in place) before the introduction of the new practice. As part of this consultation the works council has the right to give an opinion and to make suggestions or observations with respect to the proposed new working practice. In general, in the absence of a works council, the health and safety committee or the trade union delegation takes over this role. If the introduction of the new working practice involves a change to the working rules, a specific procedure with the works council is required. This would be the case if there is, for example, a change in working hours or the methods for monitoring working hours.

Conversely, if the modification only affects a limited number of employees, the employer would be required to inform and consult with the employees directly.

There is no requirement to obtain the consent of the works council; it only has the right to be consulted, which means that it has the right to express its views and to make suggestions or observations.

There is no prescribed timetable. The length of the process will depend on the social climate and on the type of new working practice the employer wishes to implement.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Please see our answer to question 2 above.

Belgium

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

Any changes to individual incentive and/or bonus arrangements, as a rule, require employee consent. That being said, employment contracts, as well as bonus/incentive plans, often include clauses in which the employer reserves an absolute discretion regarding the terms and conditions and the grant of a bonus or incentive. If such a clause is in place, it can be argued that the employee cannot assert an acquired right to the grant of any bonus/incentive and that consent is not required to make certain changes. These clauses are, in principle, considered enforceable, save in specific circumstances (e.g. if circumstances reveal a consistent use, or when the bonus represents a considerable part of the remuneration).

In addition, the works council has to be informed about any necessary changes to collective incentive/bonus arrangements that are contemplated by the employer. This information should allow the works council to investigate the contemplated measures.

Specific information and consultation obligations may be triggered, depending on the type of bonus or incentive plan that is implemented or amended.

This will, for example, be the case when implementing or amending a non-recurring results-related bonus plan (pursuant to national CBA no. 90), specific types of employee profit sharing premiums or employee stock option plans.

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

Reporting lines are, to a certain extent, considered to be an essential element of an employee's terms and conditions of employment. If a change in reporting line has an impact on the employee's role, the change can only be implemented with the employee's consent, failing which the employee will have a claim for constructive dismissal.

If changes in reporting lines result in a change to the organisation and conditions of work, the works council must be informed and consulted.

Both disciplinary and operational authority are exercised by the employer or his representative (e.g. a member of the management team), whether in Belgium or abroad, but Belgian law does not prevent the disciplinary and operational authority being split into separate reporting lines.

Belgium

An employer is not permitted to delegate its authority to another employing entity. Employees can only receive instructions from their employer, including in relation to disciplinary action and operational matters. A failure to comply with this requirement constitutes a violation of the principle of prohibited lease of employees, exposing both entities to criminal or administrative fines.

Alternative solutions exist however, such as:

- Grouping of employers: Provided specific conditions are met and prior authorisation from the Minister of Work is obtained, employers can group together to hire employees, share their services and share the costs of employing such employees.
- Tripartite agreements: Employers may exceptionally put their employees at the disposal of another employer belonging to that same economic or financial group, provided that a tripartite agreement between both employers and the employee is entered into and provided notification is made to the Labour Authorities 24 hours in advance.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

Engagement with the works council is required if the introduction of "new technologies facilities" (such as biometric fingerprints, iris scans, geolocation systems) would have important collective consequences for at least 50% of the total workforce and at least 10 employees of a specific professional group in terms of employment organisation and working conditions. Monitoring by surveillance cameras at the workplace is only allowed under strict conditions (proportionality, transparency and purpose limitation) and requires engagement with the works council. The works council has to be informed before the cameras are installed about (i) the purpose of the camera surveillance, (ii) whether image data is to be retained, (iii) the number of cameras and where these are to be located, and (iv) the timeframes during which the cameras will operate. If the camera surveillance entails potential implications for the employees' privacy, the employer will have to consult the work council which will assess which measures can be implemented to reduce such implications.

The monitoring of employees' electronic communications (e.g. email, internet, instant messaging) is allowed under strict conditions (proportionality, transparency and purpose limitation) and also requires engagement with the works council. The employer must also inform each employee of the monitoring. Please note that these rules (that are in addition to the GDPR and telecommunication secrecy regulations) cover private electronic communication data which refers to the subject, the author, the recipient and the duration of the communication.

In relation to the introduction of new technologies, the works council has to be informed and consulted about the nature, the reasons and the social consequences of the introduction of the new technology. This process must take place at least three months before implementation of the new technologies.

If IT tools used by employees will be monitored, the employer is required to provide information to the works council (before installation) on (i) the monitoring strategy and the prerogatives of the employer and the supervising staff, (ii) the purpose of the monitoring, (iii) whether any personal data are retained, and (iv) whether the monitoring is permanent or only temporary.

Belgium

This information must also be provided to the employees individually, together with information on (i) the use of company equipment by the employees, (ii) the employees' rights and obligations regarding the use of information and communication technology within the company, and (iii) the applicable sanctions (which have to be included in the work rules). Once implemented, regular follow up with the works council is required to evaluate the IT system in the light of technological developments.

In the absence of a works council, the employer may have to engage with the trade union delegation (if any) or the health and safety committee (if any) in relation to the matters described above.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

The National Collective Bargaining Agreement No.68 with regard to camera surveillance and National Collective Bargaining Agreement No. 81 with regard to monitoring of employee electronic communication have to be complied with.

In addition, Article 314bis of the Belgian Criminal Code and Article 124 of the Act on electronic communications of 13 June 2005 both prohibit the access to, and the recording and monitoring of telecommunications (content and identification of participants). Article 314bis of the Belgian Criminal Code is however explicitly limited to the interception of communications during their transmission.

France

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

This will depend on the type of changes which will be made to the employee's working conditions and the terms of the employment contract. Normally, employment contracts in France do not refer to specific working practices, so a change of team or way of working should not require there to be any amendment to the employment contract. However, if the working hours or work location changes, it could become necessary to obtain the employee's express consent. This would have to be assessed on a case-by-case basis.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

If the new working practice triggers a reorganisation of the team or has any impact on employment (e.g. if the terms of several employees' employment contracts need to be amended with employee consent), the employer will have to inform and consult with the works council.

If the new working practice may have an impact on the employees' health (increase in working hours or travel for instance), security or working conditions, this may require the employer to inform and consult with the health and safety committee before introducing the new working practice.

Following the recent Macron reforms, French companies have until December 2019 to put in place an employee representative body combining both the works council and the health and safety committee (the so-called social and economic committee).

The relevant employee representatives must be informed and consulted about the changes mentioned above. The employer must provide them with sufficient information to enable them to give an informed opinion. Provided the process is carried out in good faith, a negative opinion will not constitute a veto and the employer will still be able to implement its project. Unless a specific agreement provides otherwise, the information and consultation process will last for one month. The duration of the process will be extended to two months if an expert is appointed, three months in case the health and safety committee is also consulted and four months if a health and safety coordinating body has been set up and needs to be consulted. Provided the information/consultation process has been carried out correctly, if no opinion is given by the end of this deadline, the works council will be deemed to have been consulted and to have delivered a negative opinion.

In companies where a social and economic committee has been put in place, the maximum consultation periods will be one month if no expert is appointed, two months if one expert is appointed and three months if there are several levels of consultation (central and local) and more than one expert is appointed.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Please see our answer to question 2 above.

France

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

At an individual level, this will depend on the terms of the employee's employment contract. If the structure of the bonus is set out in their employment contract, the employee will have to agree expressly to any change to the bonus arrangement. If the contract only provides for the possibility of a bonus or for a target amount, the changes may be made unilaterally at the beginning of the reference year.

At a collective level, if the change in bonus structure applies to several employees and cannot be deemed to be temporary, it will be necessary to inform and consult the works council (or the social and economic committee). In this case the consultation periods set out in the answer to question 2 above would apply.

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

A change in reporting lines will not generally require the individual employee's consent unless the employment contract provides otherwise or if the change will have a significant impact on the employee's working conditions (e.g. the loss of certain privileges or management powers). As explained in the answer to question 2, employee representatives may have to be informed and/or consulted where there is a reorganisation, impact on employment and/or impact on the health, safety or working conditions of the employees concerned.

Under French law, an employee is a person who performs work for an employer in a subordinate relationship. There is a risk that if reporting lines are changed and another group company then has management/disciplinary authority over the employee, that employee might be able to claim to be employed by that group company as well as the original employer. There is also a risk that the change in reporting lines might constitute an illicit loan of personnel, which is a criminal offence in France.

For these reasons it is advisable to keep the employee's direct reporting line and management authority within the employing entity. Functional reporting lines can, however, be put in place to employees within other group entities.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

It will be necessary to inform and consult the works council (or the social and economic committee) prior to the introduction of any IT system which permits the employer to control the activity of the employees.

This will not be required when the employer wishes to set up monitoring procedures in premises where employees do not work (video surveillance in a stock warehouse, for example, provided that it is not also a workplace for employees).

The information/consultation process will be required before the installation of any IT monitoring system and before the installation of any electronic equipment (badges, CCTV, biometrics, software) which controls working time or websites used by the employees.

France

In addition, it is important for the employer to inform the employees directly of the new monitoring system as otherwise any finding by the system would not be admissible in court in the event of litigation.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

The EU General Data Protection Regulation provides that any data processing requires a legitimate interest and has to pass a test of proportionality, i.e. the intrusion into the employee's privacy must not be disproportionate as compared to the (legitimate) goal an employer is trying to achieve with the respective measure.

Germany

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

Whether consent is required depends ultimately on the terms of the employment contracts. Employment contracts in Germany do not usually refer to specific working practices. Therefore, a change in working practice should not generally require the consent of the employee. It is important to check the employment contracts of the affected employees to confirm this is the case.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

If the new practice constitutes 'a fundamental reorganisation of the operational organisation' it will trigger the co-determination right with the competent works council body under the Works Constitution Act (Betriebsverfassungsgesetz). This will depend on the facts and on how many employees would be affected by the new operational structure. Completely new working processes or conditions, such as an entirely different IT system which is essential to the employee's daily work, would most likely constitute 'a fundamental reorganisation of the operational organisation' as would a new working practice which requires significant retraining of employees. The greater the number of employees who would be affected by the implementation of the new working practice the more likely it is to constitute 'a fundamental reorganisation of the operational organisation' — there is a rule of thumb that at least 5% of the workforce needs to be affected for this to be the case.

The employer and the works council need to negotiate in good faith to agree a 'balance of interests' agreement, which will set out what the implementation of the new working practice will entail and its impact on staff. If the implementation of the new working practice will result in any negative economic effects for the employees, the employer and the works council will also need to agree a 'social plan' which will set out what compensation/ arrangements will be offered to employees to compensate for these effects.

The process may take from a few weeks to several months — this will depend on how cooperative the works council is. The employer must not implement the new working practice before the negotiation process has concluded.

Germany

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

There will need to be works council engagement if the change constitutes a 'fundamental reorganisation of the operational organisation' — please see our answer to question 2 above.

In addition, a fundamental change to the working conditions of an individual employee will require the consent of the works council if it constitutes an assignment of the employee to another work area/new role (Versetzung). This requirement is likely to apply where substantial changes are made to the working conditions of the individual employee.

When deciding whether or not the change to working conditions constitutes an assignment of the employee to a new work area, the employment contract of the individual employee is not relevant. The requirement to obtain the consent of the works council applies regardless of the content of the employment contract.

The works council may only withhold its approval on certain grounds — e.g. if the assignment of the employee to the new work area constitutes a breach of any act, safety regulation or collective agreement including guidelines agreed with the works council or if there is reason to assume that the assignment of the employee to a new work area is likely to result in the dismissal of, or other disadvantage to, employees.

An employment court can override the requirement for works council consent at the request of the employer if the approval has been withheld on the wrong grounds.

It is important for the employer to take the works council information and consultation process very seriously as the works council has the ability to delay the implementation of the new working practice, potentially for months, by withholding its consent.

It usually takes about a week to obtain works council consent. If, however, the employer applies to the court to override the requirement for works council consent this can take several months.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

If the employer wishes to make changes to the wage structure, such as changes to the incentive/bonus arrangements, it will need to obtain the consent of the works council to do this. The terms of the schemes may need to be amended to reflect the introduction of new team targets rather than individual targets. In addition, if the relevant schemes are set out in collective agreements with the employee representatives, changes would also be necessary to those collective agreements — this would also require the consent of the works council or trade union.

Germany

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

The right to issue instructions regarding the day to day activities of the employee can be assigned to another group entity. However, the right to impose a disciplinary sanction must be retained by the employing entity or at least it should retain the right to make the final decision on any such sanction. It is usually possible to reassign reporting lines unless the contract of employment provides otherwise (e.g. with respect to employees that report directly to the board of directors).

However, a change in reporting line could be regarded as an assignment of the individual employee to a new area of work if it significantly affects the daily work of that employee (different language, different working hours etc.). In this case, the consent of the works council would be required — please see our answer to question 3 above.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

The introduction of any electronic device that is capable of monitoring employees and/or employee performance triggers a requirement on the employer to obtain the consent of the works council, whether or not the employer intends to use this monitoring capability.

If consent cannot be obtained, the employer and the works council would need to enter into an arbitration procedure before an arbitration board (made up of an equal number of members appointed by the employer and the works council, usually chaired by a labour court judge). This procedure would require implementation of the new IT system to be delayed. It could also potentially result in the arbitration board imposing an agreement regarding the implementation of the new IT system (and its use) on the employer against its will.

The process may take from several weeks up to several months, depending on how cooperative the works council is.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

The Federal Data Protection Act and the EU General Data Protection Regulation. Both legal frameworks provide that any data processing requires a legitimate interest and must pass a test of proportionality. The intrusion into the employee's privacy must not be disproportionate as compared to the (legitimate) goal an employer is trying to achieve with the respective measure. A works council agreement regarding the measure would help to justify that the data processing meets that test of proportionality but the employer would still, in each case, need to undertake an assessment of whether this is the case.

Italy

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

This depends on the terms of the employment contract. If the introduction of a fundamentally new working practice would require an amendment to the employment contract, then the employee's consent would be required.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

Companies employing at least 50 employees are required to engage with the employee representatives in relation to decisions which are likely to lead to substantial changes in work organisation or in contractual relations, in accordance with the applicable collective bargaining agreements.

For companies employing fewer than 50 employees, the applicable collective bargaining agreements should be checked to see if any information and consultation obligations are triggered.

The level of engagement will depend on the applicable collective bargaining agreements. These will determine whether consent of the employee representatives is required or whether it is sufficient to inform/consult the employee representatives. By way of example, the two main collective bargaining agreements in Italy (the one for employees of the trade sector and the one for employees of the industrial sector) both provide for a mere information/consultation procedure with the relevant trade unions and/or works councils.

The timeframe of the information and consultation procedures will be set out in the applicable collective bargaining agreements. By way of example, the collective bargaining agreement for employees of the industrial sector provides that: (i) the employer must provide information in respect of relevant changes to the work organisation and the employment contracts to the works councils and the trade unions; (ii) within 5 days of the receipt of such information the works councils or, if there is no works council, the trade unions may ask the company to start a consultation procedure; (iii) such consultation procedure may last for up to 15 days from the first meeting. Conversely, the collective bargaining agreement for employees of the trade sector does not provide for any specific timeframe.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Please see our answer to question 2 above.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

The steps to be taken would depend on how the relevant incentive/bonus schemes were originally implemented (i.e. whether the incentive/bonus schemes were unilaterally adopted by the employer or whether they were agreed with the employee representatives). If the relevant schemes are set out in collective agreements, changes would be necessary to those collective agreements and the consent of the employee representatives would be required. In such a case, the duration of the process would depend on how cooperative the employee representatives are (in principle, the process could be concluded in just one meeting or it could go on for several weeks/months).

Italy

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

In principle, no issue would arise as long as the management authority is retained by the employing entity. If management authority is exercised by an individual representing/employed by a legal entity other than the employing entity, there is a risk that (i) the employee would claim to be an employee of the legal entity exercising the management authority and (ii) this would constitute a breach of staff-leasing regulation.

The right to impose disciplinary sanctions must, in all cases, be retained by the employing entity.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

If an employer wishes to introduce instruments/tools which allow (or could allow) that employer to monitor the activity of its employees, it will be required to obtain the consent of the employee representatives to this or, in the absence of agreement, to obtain an authorisation from the Labour Office. However, this obligation does not apply if the instruments/tools are used by the employees to carry out their working activity (the **Working Tools**).

According to the Ministry of Labour and the Italian Data Protection Authority, if the Working Tools include IT devices which have specific software/functionality which might not be necessary for the performance of the working activities, but which can record and store information about the employees' activity so allowing for retrospective control, an agreement with the employee representatives or an authorisation from the Labour office will be required as described above.

No specific time frames are provided by the law. Therefore, the duration of the process depends on the circumstances (e.g. how cooperative the employee representatives are).

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

Legislative Decree 196/2003 and the EU General Data Protection Regulation set out the general legal framework in relation to data protection in Italy. Both legal frameworks provide that in order for processing to be lawful certain conditions must be met. These include (i) the employee gives their consent to the processing of their personal data, or (ii) the processing is necessary for the purposes of the legitimate interests pursued by the employer, which must prevail over the employee's privacy based on a test of proportionality. Under Legislative Decree 196/2003, such test of proportionality can only be made by the Italian Data Protection Authority (i.e. not by the employer on its own).

The Italian legal framework in relation to data protection is likely to change soon. The Italian Parliament is currently in the process of passing the legislation to transpose the provisions of the GDPR into the national legal framework.

The Netherlands

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

This depends on which working conditions the employer is proposing to change and whether or not these conditions are dealt with in the employment contract. If the proposal is merely a change to the 'way of working' such as a different team structure, employee consent would most likely not be required. However, if it concerns a change to working location or working times, which are generally addressed in Dutch employment contracts and which are considered primary terms and conditions of employment, employee consent is required. Employment contracts may include a unilateral amendment clause allowing the employer to amend the employment contract without employee consent. However, even where such a clause is included, the employer would need to be able to demonstrate that it has a legitimate business interest to implement the change which outweighs the legitimate interests of the employee.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

If the new working practice constitutes an important change to the organisation of the company, the division of authority within the company and/or the activities of the company, a works council, if established, has the right to be consulted on the proposed change. Whether or not the new working practice would qualify as such will depend on the factual circumstances and on how many employees would be affected by the new operational structure. A completely new working process or working condition which is essential to the employee's daily work or a new working practice which requires significant retraining of employees, would most likely constitute an important change to the organisation. The greater the number of employees affected by the implementation of the new working practice, the more likely it is that a right of advice will arise.

The introduction of or change to important technological facilities triggers a consultation right for the works council. In addition, if the proposed decision regarding the new working practice is itself subject to works council consultation, the engagement of an expert to advise on the implementation of the practice will also be subject to prior consultation of the works council. Finally, if the new working practice entails the introduction of, or a change to (i) a policy on working hours, (ii) a policy on working conditions or (iii) a policy on team work discussions (werkoverleg), a works council would have a right of approval in respect of the introduction of that practice.

If the implementation of the new working practice will result in any negative economic effects for the employees, the employer will also need to demonstrate the measures it intends to take to minimise the impact on employees; the works council will most likely negotiate for terms to minimise the (negative) impact for the employees.

The process may take from a few weeks to several months, depending on the complexity of the matter, the impact on the employees and the relationship with the works council. The employer cannot implement the new working practice before the consultation process has been successfully completed.

The Netherlands

3. Does a change in the working conditions, hierarchy or day to day activities of individual employees require engagement with employee representatives?

If the change constitutes the introduction of, or a change to a policy on working conditions (such as working hours, time off, reward system, team work discussions), impacting all or a certain group of employees, the approval of the works council is required. Changing the day-to-day activities or working conditions of an individual employee will usually require the consent of the employee. If the changes are made to many employees the proposed changes could qualify as an important change to the organisation, thereby (also) triggering a consultation right of the works council.

The process may take from a few weeks to several months, depending on the complexity of the matter, the impact on the employees and the relationship with the works council. The employer cannot implement the new working conditions before the consultation process has been successfully completed.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

Implementing or changing the method of the incentive/bonus arrangements applicable to all or a certain group of employees will generally require the approval of the works council (timing is the same as set out above). In addition, if the bonus/incentive arrangements are included in a collective labour agreement, involvement of the trade union is required. The individual employee's consent may be required if the quantum of bonus would be significantly affected by the new incentive/bonus arrangement.
It may therefore be necessary to implement a transitional arrangement to transition from the previous to the new incentive/bonus arrangement. If this impact on quantum is foreseen, it can be expected that the works council will also try to negotiate on this point.

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

In general, the right to give instructions regarding day-to-day work is allocated to the employing entity. These instructions may be imposed unilaterally by the employer, provided that they are reasonable, are not contrary to the employment agreement or the collective agreement and relate to either the performance of the work and/or maintaining order within the company. This instruction right may be assigned outside of the employing entity. There is no legal requirement that the employee needs a reporting line within the employing entity or within the country of employment.

Disciplinary matters are generally governed by the employer's internal disciplinary procedural guidelines or policies. However, certain specific disciplinary sanctions (e.g. suspension or cancellation of payment of wage) must ultimately be imposed by the employing entity or that entity should at least make the final decision on any such sanction,

The Netherlands

even though there are no statutory rules preventing the employer from having a third party carry out the procedure on its behalf.

A change in reporting line will not generally require employee consent unless the employment contract provides otherwise. However, changing the system of reporting lines may constitute a change to the organisation and/or the division of authority within the company, triggering a consultation right for the works council. Finally, it may also qualify as a change to policies in the area of the process of performance reviews within the company, triggering an approval right for the works council.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

Yes, the introduction of an IT system enabling the employer to monitor the attendance, behaviour or performance of the employees requires the approval of the works council. The introduction of important new technological facilities may also trigger a consultation right for the works council.

The process may take from a few weeks to several months, depending on the complexity of the matter, the impact on the employees and the relationship with the works council. The employer cannot implement the new IT system before the consultation process has been successfully completed.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

The Dutch Data Protection Act and the EU General Data Protection Regulation. Data processing requires a legitimate interest and has to pass a test of proportionality, i.e. the intrusion into the employee's privacy must not be disproportionate as compared to the (legitimate) goal an employer is trying to achieve with the respective measure.

South Africa

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

Employee consent will be required if the new working practice involves changes to the employee's terms and conditions as set out in their employment contract.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

Changes in the workplace that would constitute a change in organisation of work and restructuring of the workplace must be negotiated directly with the trade union (in respect of employees who are members of that union) or with a workplace forum. Any changes agreed upon with the trade union would be recorded in a collective agreement and the employees would be notified of the negotiated changes.

Where an employer wishes to introduce significant changes, the first step is to attempt to reach an agreement with the employees concerned. Where the employer is unable to reach an agreement on the changes with the employees concerned, the employer could lock the employees out of the workplace until they agree to the new terms. The employer also has the option to implement the new terms and conditions of employment unilaterally or potentially, when there is a real operational requirement to do so, to dismiss the employees who do not agree to the changes. However unilateral changes to employment contracts carry certain risks as follows:

- Employees may refer a dispute to the CCMA (South African dispute resolution forum), under section 64(4) of the Labour Relations Act (LRA). This provides that an employee may require that the employer restores the status quo where the employer unilaterally changed terms and conditions of employment. Where the employer does not restore the status quo within 48 hours, employees may embark on a strike without following any of the pre-strike procedures laid down in the LRA and the strike will be protected. In addition, in the event that the employer does not restore the status quo in accordance with the employees' demand, the employees can successfully interdict the employer from implementing the changes to the terms and conditions of employment.
- Employees may continue to render services to the employer but on the previous terms and conditions of employment, rejecting the employer's alteration to the terms and conditions of employment, and sue the employer for specific performance, i.e. payment of what is owed to them contractually.
- In cases where the change goes to the heart of the employment contract, employees may regard the employer as having repudiated the contract of employment which results in their dismissal, in which case the law relating to unfair dismissal will apply. Alternatively, employees may accept the breach, resign from their employment with the company and allege a constructive dismissal. If the employees are successful with a constructive dismissal claim, the employer can be ordered to pay compensation to the employees of up to 12 months' remuneration.
- Employees may allege that the unilateral amendment constitutes conduct falling within the unfair labour practice definition contained in section 186 of the LRA (e.g. unfair conduct relating to the provision of benefits). If an employee is successful with such a claim, the employer can be ordered to restore the status quo, or to pay the employee compensation of up to 12 month's remuneration.

South Africa

How long it will take to implement the changes will depend on how cooperative the employees and/or the trade union are. The process can be expected to take a few weeks or even a few months. If the company offers a "sweetener" to incentivise employees to accept the proposed changes, such as a one-off bonus, consent is usually obtained more quickly, so speeding up the implementation of the changes.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Micro changes can be implemented to day to day activities, especially with regard to matters that are not contractually agreed. However, even those can be argued to have become implied terms and conditions of employment. Changes that may amount to a demotion, change in location (unless it is a short distance) and change to overall responsibility would all be material changes that would require employee engagement, or engagement with employee representatives. Employee consent is required for material changes to terms and conditions of employment.

Changes in the workplace that would constitute a change in organisation of work and restructuring of the workplace must be negotiated directly with the trade union in respect of employees who are trade union members or with a workplace forum. Any changes agreed upon with the trade union would be recorded in a collective agreement and the employees would be notified of the negotiated changes.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (eg a scrum) it is not possible to measure an employee's individual achievement of targets?

If an employer wishes to effect changes to incentive/bonus arrangements, it will have to consult the employees and try to get them to consent to the change. This is because such changes constitute a significant change to the employees' terms and conditions of employment and employee consent is needed for this.

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

Potentially splitting the management authority for disciplinary matters and operational authority into different reporting lines is not prohibited, but would require employee engagement if it amounts to a change to the employee's terms and condition of employment.

Depending on the facts, a change in reporting line may constitute a material variation of the terms and conditions of the employment contract, and may amount to a demotion.

There is no legal requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment. However, ultimate disciplinary and dismissal decisions must be taken by the employing entity.

South Africa

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

Engagement would be required if the employer does not already have a policy or a provision in the employment contract that enables it to monitor employee behaviour or performance.

Under South African labour law, an employer is required to consult the employees or their representatives about proposals relating to restructuring the workplace, including the introduction of new technology or new work methods. Therefore the introduction of new technology which might enable the employer to monitor employee behaviour or performance in the workplace would require consultation with the employee or the representatives.

Before implementing the technology that can enable the employer to monitor employee behaviour or performance, the employer is required to consult with the employee or the trade union and attempt to reach consensus. If consensus is not obtained and the employer chose to introduce the systems unilaterally, the risks described in our answer to question 2 above would apply.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

Data protection in South Africa is currently regulated by the Constitution of the Republic of South Africa, 1996 and the common law. Both of these recognise the right to privacy.

The Protection of Personal Information Act, 2013 (POPIA) has been enacted except for certain provisions. Once the whole Act has been enacted, personal information may not be transferred to foreign countries unless the employee consents to it or receipt of the information is subject to a law, binding corporate rules or a binding agreement which provides an adequate level of protection and upholds principles similar to those of POPIA. Under the Act, employees will have to be notified about their personal information being collected, accessed or acquired by an unauthorised person.

Spain

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

This would not usually require employee consent but it may require information and consultation with employee representatives.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

Whether it is necessary to engage with employee representatives will depend on the actual consequences of the new working practice and how substantially different to prior practice it may be. This will be the case if the new practice will substantially modify working conditions, will apply collectively, will affect the organisation and control systems of work or if it will affect the operation of employee incentive schemes.

Consent would not be required, only information and consultation. As part of the consultation, the employee representatives will be entitled to issue a non-binding report setting out their opinion of the proposed new practice.

Usually the process will take around 15 days but it may take longer if the new working practice is to be applied collectively (i.e. to the whole workforce or a substantial proportion of the workforce).

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Please see our answer to question 2 above.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

Changes to incentive/bonus arrangements is one of the subjects upon which employees' representatives are entitled to issue a non-binding report during the information and consultation process.

If the proposed change could be considered a substantial modification of the remuneration system, a specific procedure must be followed. The employer must inform the employees and their representatives 15 days before the change is implemented and the employer must justify the proposed change. If the employee will be negatively affected by the change they may then resign and claim constructive dismissal. If the substantial modification would affect the employees as a whole or a substantial proportion of them (there are specific thresholds which determine whether this is the case) a more lengthy consultation process would be required which could take up to one month.

Spain

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

Employers are entitled to implement these kinds of changes provided that they do not damage or diminish the employees' rights. There is no legal requirement to have a reporting line within the same employing entity or country, although this would be advisable, in particular in relation to disciplinary process and sanctions.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

The introduction of IT systems which modify the current work control procedures will require the employer to consult with employee representatives. Consultation with employee representatives would be required and should take around 15 days.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

According to Spanish case law, employees must be informed of the use of any IT system used to monitor employees, e.g. video cameras.

It is also necessary, according to case law, to put in place IT policies which inform employees that the use of computers, or other IT systems is restricted to working purposes and that the employer is entitled to monitor those systems (e.g. by reviewing email or internet browsing history) and take disciplinary action based on the results of this monitoring. Case law is evolving quickly in this regard. The more transparent the employer is with employees about how and why they are being monitored, the better chance it will have of defending the use of monitoring systems in any litigation.

United Kingdom

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

This will depend on the nature of the change and the terms of the employment contracts of affected employees. If the change is contemplated under the terms of the relevant employment contracts, consent may not be required.

However, if the change is not contemplated and authorised under the relevant employment contracts, employee consent will most likely be required to vary their terms. In most cases, we would expect a fundamental change to working practices (such as the introduction of scrum work) to require employee consent.

In these circumstances, the employer could:

(i) seek agreement from the employees to amend the terms of their employment contracts. If an employee refuses to agree it would be difficult to impose the change on them and if the employer sought to dismiss the employee there would be a significant risk of an unfair dismissal claim being brought;

(ii) terminate existing contracts of employment and offer re-engagement on new terms. This carries some risk of unfair dismissal and would potentially give rise to collective consultation obligations; or

(iii) impose the amendment without seeking explicit consent and rely on employees continuing to work as a signal of their consent to the change. If an employee did object to the change they may seek to resign and bring a claim for constructive dismissal.

In each of these cases, it would be important for the employer to consider informing employees of the reason for the changes.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

Where an employer recognises a trade union or other employee representative body and has entered into a collective bargaining agreement or other agreement on information and consultation, engagement (and potentially the consent of the representatives) may be required depending on the terms of that agreement. It should be noted that works councils, trade unions and other formal employee representative bodies are less common in the UK than in other parts of Europe.

How long this process will take will depend on how cooperative the union/representative body is and the extent to which the employer is required to engage with it in relation to the planned change. Timings may be governed by the applicable collective bargaining agreement (or other agreement).

Regardless of whether there is a formal obligation to inform and/or consult with employee representative bodies, it would be sensible as a practical matter to conduct an open information exercise with employees so that they understand the rationale for the proposed changes and have an opportunity to voice any concerns (they may, for example, spot issues that the employer has not identified by virtue of their day-to-day work).

Separately, if the employer seeks to impose new working practices through terminating and re-hiring employees on new terms, collective consultation will be required under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) where 20 or more employees are proposed to be dismissed within a period of 90 days or less. This consultation would take place with any relevant trade union or with elected employee representatives.

A TULRCA consultation process must last for at least 30 days where fewer than 100 employees are proposed to be terminated and re-engaged, or at least 45 days if there are 100 or more employees.

United Kingdom

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Please see our answer to question 2 above.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

The employer will need to amend the terms of the documents governing the relevant incentive and bonus arrangements. In order to do this, the employer should check the terms of the current plans in order to understand how and when amendments can be made. These sorts of remuneration arrangements are typically expressed to be discretionary and should be capable of being amended by the employer to reflect the new working practices without employee consent, unless they have been operated on the same basis for a long period of time which may allow employees to claim that they have become contractual by virtue of 'custom and practice' (but this would be a difficult argument for an employee to make successfully).

Care will be needed if the employer seeks to adjust an incentive arrangement that is already part-way through its performance period (e.g. changing the terms of a bonus for the current bonus year). Employee consent may be required, and engagement with employee representatives could also be necessary (if any employee representative bodies exist and any collective bargaining or information and consultation agreements are in place).

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

There should be no significant legal issues with splitting management authority for disciplinary matters and operational authority into different reporting lines (in the UK there is normally joint responsibility for disciplinary matters in any event between operational line managers and HR). In relation to management authority for operational matters, employees can be assigned a manager from a different employing entity or one working in a different country. The terms of the employee's contract should be reviewed to ensure that they do not have a contractual right to be line managed in a particular way (if they do, the issues identified in the answer to question 1 above would apply).

When it comes to disciplinary matters, decision-making is ultimately a matter for the employing entity of the employee in question. Therefore, although it may be possible for managers who are not directly employed by that entity to be involved in the disciplinary process, any decisions must ultimately be taken by someone who has the authority to do so on behalf of the relevant employing entity. The same is true for dismissal.

United Kingdom

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

Please see the answer to question 2 above — the introduction of IT monitoring systems might require engagement with employee representatives if this is a change which requires their involvement under the terms of any applicable collective bargaining or information and consultation agreement. The employer's data protection policy should also be reviewed to confirm whether the employer has agreed that any new monitoring systems will only be introduced following employee engagement.

Regardless of whether there is a strict legal obligation to engage with employees, it would be sensible to conduct an information process so that employees know the way in which their actions are being monitored. This is likely to be a key factor in determining whether the monitoring — or any decision taken on the basis of such monitoring — is lawful if an employee seeks to challenge the employer in the future.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

The Data Protection Act 2018 applies. Employee data processing must be fair and lawful, it must be for one or more specified purposes, and monitoring must be necessary for the legitimate interests pursued by the data controller and pass the test of proportionality. Employees should be informed of the nature and extent of monitoring and the purposes for which their data will be processed.

Hong Kong

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

It depends on whether it requires a change to the terms of employment. As a general rule, any variation to the terms of employment requires the consent of the employee, unless there is an express term in the contract that allows the employer to make changes unilaterally. However, if the proposed changes are disadvantageous to the employees, then even where there is an express clause in the contract which allows for unilateral amendments, the employer should still obtain consent from the employees. When relying on an amendment clause, the employer must take care to exercise this discretion rationally and not capriciously.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

There is no statutory requirement to engage with employee representatives, although there may be collective bargaining or other agreements between the company and employee representative bodies which stipulate that notification and/ or consultation is required. This would, however, be unusual in Hong Kong.

If engagement with employee representatives is required under such an agreement, the length of the engagement process will depend on how cooperative the employee representatives are and the terms of the collective bargaining or other agreement.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Please see our answer to question 2 above.

Hong Kong

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

It depends on whether the incentive/ bonus arrangement forms part of the terms of employment. If it does, then any changes would constitute a variation of the terms of employment requiring the consent of the employee. Please see our answer to question 1 above for more details.

There is no statutory requirement to consult with employee representatives, although it is possible that there are collective bargaining or other agreements between the company and employee representative bodies which stipulate that notification and/ or consultation is required. This would, however, be unusual in Hong Kong.

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

Employers are generally allowed some flexibility in order to conduct their business and reasonable changes can be made to an employee's reporting line and source of instructions. A change in reporting line will generally not require employee consent unless the terms of employment provide otherwise. There is no legal requirement for an employee to have a reporting line within their employing entity or their country.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

There is no statutory requirement to engage with employee representatives, although this may be required by any collective bargaining or other agreement between the company and employee representative bodies. However, the Privacy Guidelines on Monitoring and Personal Data Privacy at Work (Privacy Guidelines) issued by the Privacy Commissioner's Office (i.e. the data privacy regulator in Hong Kong) suggest that it would be good practice for the employer to consult and take into consideration the views expressed by employees in determining the parameters to a reasonable expectation of privacy of work. Although the Privacy Guidelines are not legally binding, they are made with reference to the principles of the Personal Data (Privacy) Ordinance and therefore have substantial reference value.

Hong Kong

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

Yes, the Personal Data (Privacy) Ordinance, the Privacy Guidelines and the relevant guidance notes issued by the Privacy Commissioner's Office will apply. In particular, the employer should conduct a Privacy Impact Assessment and evaluate the need and appropriateness for employee monitoring, alternatives to employee monitoring and how the employer will be accountable for the collection of personal data of employees (it is responsible for implementing a privacy compliant data management practice in the handling of data obtained from employee monitoring).

Employers should inform their employees of any monitoring policy before any monitoring begins. Unless an employer has obtained the express consent of an employee (and the consent is given voluntarily), or unless there is an applicable exemption provided for under the law, an employee's personal data collected by monitoring measures can only be used for the purposes stated in the employee monitoring policy, or for a directly related purpose.

Japan

1. Does the introduction of a fundamentally new working practice (e.g. scrum work) which involves a change to working conditions require employee consent?

This depends on the terms set out in the work rules and employment contracts. Normally, work rules and employment contracts in Japan do not refer to specific working practices. Therefore, a change in working practice should not generally require the consent of the employee — it is important to check the work rules and employment contracts of the affected employees to confirm this is the case.

2. Does the introduction of a fundamentally new working practice require engagement with employee representatives (works council, trade unions, or other representatives)?

This will only apply if any of the employees belong to a trade union, the company has entered into an agreement with the trade union, and under the agreement, the changes trigger grounds for consultation with the trade union. A change in working practice that does not involve changes in the terms and conditions of employment is unlikely to trigger grounds for consultation.

This depends on what is stipulated in the agreement with the trade union.

This will depend on how cooperative the trade union is — the process may take from a few weeks to several months. The employer must not implement the new working practice before the negotiation process has concluded.

3. Does a change in the working conditions, hierarchy or day-to-day activities of individual employees require engagement with employee representatives?

Please see our answer to question 2 above.

4. What HR steps will be required to effect necessary changes to incentive/bonus arrangements to reflect the fact that in a new team working structure (e.g. a scrum) it is not possible to measure an employee's individual achievement of targets?

It is first necessary to check whether the current work rules or employment contract need to be amended to reflect the changes. In Japan, bonus clauses are sometimes drafted very broadly so it may not be necessary to make changes. If an amendment to the work rules or employment contract is necessary, individual consent is required unless (i) the changes can be made by way of amending the work rules (and not individual employment contracts) and (ii) it can be explained that the changes are not disadvantageous to the employees (for example, while there may be potential to receive a lower bonus, there is also the potential to receive a higher one). If there is a trade union, whether consent/consultation with the union is necessary will depend on the terms of the agreement with the union.

Japan

5. Are there any HR legal issues with changing an employee's reporting lines and potentially in splitting the management authority for disciplinary matters and the operational authority into different reporting lines? Is there any requirement for an employee to have a reporting line to a manager within their employing entity and/or in their country of employment?

The right to issue instructions regarding the day-to-day activities of the employee can be assigned to another group entity. However, the right to impose a disciplinary sanction must be retained by the employing entity or at least it should retain the right to make the final decision on any such sanction. It is usually possible to reassign reporting lines unless the contract of employment provides otherwise.

6. Does the introduction of IT systems which might enable the employer to monitor employee behaviour or performance require engagement with employee representatives?

Engagement is unlikely to be required. However, the employer should explain how the monitoring takes place and incorporate it in the work rules or other internal rules.

7. Are there any country-specific provisions for the protection of employee data which should be taken into account when introducing IT systems such as those referred to in Question 6?

The Act on the Protection of Personal Information will apply. The employer must announce the purpose of collecting employee data under the new IT system and employee data must be used only for such purpose.

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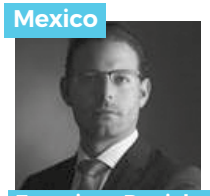

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