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Climate change and the workplace

What do global employers need to know?

People across the world are exposed to climate change to different extents, and the same is true for the workplace. The 26th UN Climate Change Conference of the Parties (***COP26***) that recently took place in Glasgow brought parties together to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change. While governments, NGOs, institutions and businesses are debriefing from the conference, we wanted to take a closer look at the impact of climate change on the workplace both now and in the future.

Workers in some jurisidictions are already seriously impacted by the direct consequences of climate change. Their work lives are becoming increasingly difficult as their jobs expose them to significant health and safety risks, such as heatwaves and flooding. But the climate emergency won't stop there. Most, if not all, workplaces around the world will be impacted in the near future.

Global employers, like all other stakeholders, have a responsibility to address the climate emergency head on, particularly when it comes to their workforce. This briefing identifies the many HR legal issues employers might face in relation to climate change, and how they can tackle them.

1. Preparing for the crisis

The Covid-19 pandemic has largely been viewed as an accelerator for change. It might also be viewed as a 'practice run' for the next crisis, climate change. Many of the challenges global employers were confronted with when forced to deal with the consequences of the pandemic are similar to those arising from the climate emergency.

Employers were frontline in dealing with the pandemic as many Governments played catch-up. They were required to be quick, proactive, and creative in implementing protective measures from February 2020 onwards and were forced to deal with the myriad legal issues that came alongside those. 18 months on, the situation has slightly improved and initiatives such as the EU Covid pass have helped, but employers continue to face these issues. The same is likely to happen with the climate crisis.

Development of HR policies

This time round, employers will be better at developing their own policies, building on their experience of managing the pandemic.

These policies should include adjustments to indoor workplaces (cooling, additional breaks, supply of refreshments, adjusted dress code etc) and to outdoor workplaces (adapted working times to avoid high heat for those in the construction and agriculture industries etc).

Where relevant, employers may also want to take another look at their remote and flexible working policies. While it might be tempting to look at climate change as another reason to favour home-working, the pandemic confirmed that not all workers thrive in remote working environments in the long-term. Communication with workers in this regard will be paramount.

In some sectors, employers may also look to a more decentralised model where they operate through a network of smaller office spaces rather than huge campuses, potentially also moving production facilities to cooler areas.

Decisions around vaccination

Just like during the pandemic, the vaccination of employees might become topical, as we expect immunisation against widespread diseases arising from the climate emergency to become more common. In this context, employers will have to revisit discussions on whether they can impose or encourage vaccination (or treat non-vaccinated workers differently), by analysing their duty of care, core human rights (like privacy and the right to life) and jurisdiction-specific employment rights (like discrimination).

The right to withdraw

Next to the discussions around the employer's duty of care, the pandemic was also an opportunity to redefine the so called "right to withdraw" which exists in some jurisdictions (ie the right for a worker not to attend the workplace because of serious health and safety concerns). There is no doubt that this concept will give rise to more challenges in the context of the climate crisis.

Wage subsidy schemes

Many employers benefited from wage subsidy schemes during the pandemic. These schemes are, in most places, now coming to an end. Another question in light of the climate crisis is whether the pre-pandemic regimes will resume - if any - and whether they will apply to climate-related circumstances going forwards. There is certainly work for businesses and other associations to do here in raising the issue with Governments when the time is right.

Climate-induced migration

Finally, climate-induced migration will be high on the agenda of global employers, with people moving away from high-risk zones. Recruitment and retention policies may need to be adjusted to reflect these challenges, otherwise talent could become increasingly concentrated in certain jurisdictions or business sectors.

2. Managing the green transition

Next to managing the crisis, the second responsibility for employers is to take proactive steps to make their businesses more sustainable.

Again, this will be a matter for HR policies, introducing climate-friendly changes such as reducing business travel, considering home-working arrangements and rewarding workers with financial and non-financial climate-friendly benefits.

These issues were discussed during COP26 and a number of countries (the US, the UK, 27 EU member states, Norway, Canada and New Zealand) signed a Just Transition Declaration on 4 November, with the support of the International Labour Organisation. The Declaration promotes social dialogue and engagement between governments, employers' and workers' representatives, and other groups affected by the transition to green economies. It aims to ensure that existing and new supply chains create decent work for all, as well as providing a just transition environment for workers.

Alongside this, a proactive approach to the green transition has also been supported by the European Commission's recent climate transition consultation. The consultation aims to collect feedback for the initiative "Fit for 55", which intends to provide guidance to Member States on dealing with the social and labour aspects of the climate transition, including policy packages to support quality employment, involvement of social partners and stakeholders in the climate transition, and the idea of a Climate Social Fund.

Adjustment of behaviours

Workers too will have a role to play. They will need to adjust their own behaviours, which may potentially lead to difficult discussions (eg if they refuse to go on certain business trips for environmental reasons). The issue of international secondments and assignments may become a tricky one too, especially in climate-risky zones. How far will workers be able to go? Will fighting against climate change become a protected belief triggering protection against discrimination? In 2010, the UK Employment Appeal Tribunal ruled that belief in climate change is capable of being protected under UK equality laws, but ultimately each case will turn on its own facts.

Workers may end up challenging what their employer is doing (or not doing) in relation to the environment, joining forces across the company or at industry level, possibly calling on trade unions and NGOs. Pro-actively engaging with the workforce and having open conversations about these issues should help.

Business restructurings

The green transition will likely lead to more than just adjustments to HR policies. Significant business restructurings arising from a shift to the green economy are already taking place in certain industries and regions, leading to questions around changes to employment terms and conditions, re-skilling, employee transfers and even redundancies.

As with any restructuring, the respective positions of employers, workers and their representatives, including trade unions, may well differ, making the fight against climate change more challenging than expected, despite an obvious shared interest. Compliance with existing information and consultation requirements will of course be critical, perhaps even more so than in the past.

3. Green incentivisation

Similar issues arise when looking at director and employee incentivisation, which is designed to attract, engage and retain talent. Incentivisation comes in many different forms and is an increasingly sensitive area in today's highly scrutinised global corporate environment. It is therefore no surprise that 'green incentivisation' is at the forefront of the minds of many global employers.

ESG metrics in incentive plans

Following the growing trend in environmental, social and governance (***ESG***) investing, incentive plans are increasingly being designed to consider ESG metrics. This, combined with the continued growth of environmental stewardship, means that many variable remuneration arrangements are now linked to climate-driven objectives.

In the UK, according to research from Alvarez & Marsal, 61% of FTSE 100 bonus plans now have some form of ESG component. The research also found that the number of firms using an ESG measure in a long-term incentive plan increased from 15% last year to 32% in 2021. In Germany, 34% of 160 companies in Dax30, MDax und SDax have key performance indicators for their managing directors that relate to sustainability and ESG, according to research from BDO and Kirchhoff Consult. In France, research from PwC shows that the number of CAC 40 companies integrating ESG goals into their top executives' compensation has increased from 10% to 70%.

A movement towards linkage between climate and reward is likely to be partly due to investor pressure. Data from Minerva Analytics, a proxy voting service, suggests that a number of the highest dissent resolutions for remuneration proposals in the UK were connected to ESG issues. But pressure is also likely to come from employees themselves. The Amazon Employees for Climate Justice, who led a walkout at the company's headquarters in Seattle in 2019, are just one of many examples of employee activism in response to the climate emergency.

A fundamental problem with climate-friendly metrics is that many environmental impacts are difficult to measure and quantify. Another challenge for employers is ensuring that climate targets closely align with the overall objectives of their business, and then deciding how much weight to give to those metrics. Employers will also need to consider how to report on their efforts, taking into account any disclosure requirements to which they are subject (for example, the Task Force on Climate-related Financial Disclosures (***TCFD***) in the UK, the EU's Sustainable Finance Disclosure Regulation (the *SFDR*) or the recently proposed Directive on Corporate Sustainability Reporting).

Other climate-friendly benefits

Of course, using climate-friendly metrics in incentive plans is not the only way. Employers are also looking to other incentives to direct the behaviour of their employees towards sustainability and lowering carbon emissions. For example, many businesses already operate cycle-to-work, car-pooling, electric vehicle and other commute-related schemes, but these may become more prevalent in the coming months and years.

As mentioned above, the Covid-19 pandemic has generally led to an increased acceptance of and support for remote working, which reduces the commute altogether. But for those businesses seeing more individuals returning to the office, ensuring that staff canteens serve locally sourced or meat-free food and providing rewards to team members who reduce printing levels or recycle the most are also viable options. In addition, vouchers to purchase eco-friendly goods is another idea to push employees towards sustainable choices. In countries like Belgium, this is an employee benefit agreed by way of a collective agreement.

And we can't forget about the topic of business travel. The past 18 months have proven that meetings can be conducted virtually, but there is something to be said for meeting colleagues and clients in-person. So, in circumstances where an in-person meeting is considered essential, employers may wish to opt for ground rather than air travel to be more sustainable.

4. Sustainable pension investments

Very few remuneration packages are complete without pension provision. A fast-evolving legislative and regulatory environment and a significant shift in attitudes towards climate change have seen climate-conscious investment and disclosure become a very high priority for pension schemes, their managers or trustees and their members across the globe.

Climate-conscious investment

There is clearly appetite in the global financial markets to move towards greener investment strategies and this is particularly important in the pensions sphere. According to the OECD, worldwide pension fund assets exceeded USD 35 trillion at the end of 2020, giving them significant influence over the flow of investments in the economy.

In the US, some retirement benefit plans are taking significant steps in that direction. The country's second-largest pension fund, the California State Teachers' Retirement System, is expanding its low-carbon investment strategies and the third-largest fund, the New York State Common Retirement Fund, has already divested of numerous coal companies. However, the ten largest US public pension funds still have major investments in the biggest corporate polluters.

The United Nations has called on US leaders to set a national goal of achieving net-zero greenhouse gas emissions by 2050. Regulatory developments are now moving in the direction of enabling more decisive action. The "ESG rule" previously introduced by the Trump administration, which imposed tests for investment which expressly subordinated ESG factors to pecuniary considerations, has already been effectively suspended with the March 2021 announcement by the Department of Labor (***DOL***) that it will not enforce the rule. In October 2021, the DOL published for consultation a proposed modification of the US regime which is expected to give greater leeway for plan fiduciaries to take ESG considerations into account in plan investments. The proposed change is expected to be made in early 2022.

In the UK, new regulations have been introduced which are intended to secure effective pension scheme governance and decision-making with respect to the impact of climate change. They impose new obligations on pension scheme trustees to, among other things:

- identify on an on-going basis climate-related risks and opportunities and their impact on the scheme's investment or funding strategy;
- select metrics for determining the greenhouse gas emissions attributable to scheme investments;
- design strategies to mitigate exposure to risks and establish measurable targets in managing these risks; and
- undertake scenario analyses which consider the impact of global rises in temperature on the resilience of the scheme's investment or funding strategy as well as the scheme's assets and liabilities.

Likewise, the Australian Prudential Regulation Authority recently released draft guidance to assist regulated entities, including superannuation trustees, in managing climate-related risks and opportunities as part of their risk management and governance frameworks.

The challenges for fiduciaries and trustees will be to ensure that sustainability concerns align with their long-term investment objectives and legal duties to achieve appropriate returns on investments. This is made more difficult by the immature infrastructure around climate-conscious investment, such as inconsistent language and definitions, and limited or poor-quality data and expertise across the investment chain.

Climate-related disclosure

Progress towards an orderly transition to net-zero greenhouse gas emissions can only be monitored if pension schemes are subject to disclosure requirements.

The new UK regulations require larger pension schemes to make climate-related disclosures in line with recommendations made by the TCFD. This will make the UK the first economy to mandate TCFD reporting for its pension sector, and we expect this to become a global trend in the months and years to come.

UK regulators are mandating climate-related disclosure too. Rules published by the UK Financial Conduct Authority (***FCA***) for the most prominent listed commercial companies are intended to ensure that adequate information on climate change risks and opportunities is made available, to allow investors to make better informed decisions. Alongside the FCA, the UK Pensions Regulator plans to issue guidance about what it will look for from pension schemes as they assess, manage and prepare to report on climate-related risks and opportunities.

There have been similar developments in other jurisdictions, including the EU. The SFDR took effect in March, and requires financial market participants, including pension schemes, to disclose information regarding their approaches to the integration of sustainability risks and the consideration of adverse sustainability impacts. The SFDR is part of EU's "Green Deal", which is intended to achieve carbon neutrality for the EU by 2050.

Member activism

Change is not just being driven by regulators and new legislation. With increasing numbers of savers concerned about climate change and looking for sustainable and environmentally friendly investments, pension scheme members are also turning up the heat on trustees and fiduciaries.

Last year, a settlement was reached in a major test case that was brought in Australia by a scheme member against the trustee of a large industry-wide superannuation fund, Retail Employees Superannuation Trust (***REST***). The claim was based on alleged inadequate disclosure of the risks of climate change and breaches by the trustee of its duties to invest with reasonable care and skill in relation to climate change factors. While there were no final court findings on the claim, the settlement was significant in itself in that the REST trustee published a statement undertaking to, among other things, achieve a net-zero carbon footprint by 2050 and measure and report in line with TCFD recommendations.

More recently, UK university academics launched a legal action in the High Court against the Universities Superannuation Scheme, the UK's largest funded pension plan, to try to halt proposed cuts to their pensions and speed up their scheme's divestment of shares in fossil fuel companies.

This issue will be increasingly difficult for trustees, fiduciaries and employer sponsors to ignore as green investments become a more prominent feature for pension schemes and members across the globe choose to align their money with their values.

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