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Future of Work: Roaming nomads may be a tax no-go

The [*Wall Street Journal*](#) (\$) estimates that there are 16m “digital nomads” in the US, wandering around working from everywhere and nowhere. Now, I suspect that the figure may be a little on the high side and probably includes people who take the car to the beach from time to time and work from a seaside bistro for a few hours.

But, no doubt, there are a great many people who are digital nomads, forever on the move from place to place. There are obviously none now working at Twitter after Elon Musk ordered what remains of the workforce back into the office for a minimum 40 hours a week. What the *WSJ* article is about are the legal complications involved in digital wandering. Wanderers can be divided into two groups. Those who are employees of a company, and those who are independent contractors.

For companies, whose employees “wander,” the complications can be myriad. Are they entitled to work legally from where they have landed? Are visas and work permits required? What are the tax and social security obligations? What about health and safety regulation governing the workplace in the country concerned? If there is an accident whose rules apply, those of the country in which the accident took place or those of the country in which the employee is based? If an employee bases him/herself in a country for any length of time, the authorities could conclude that the company now has an “establishment” there leaving itself open corporate tax complications.

One of the biggest risks is data management, especially where countries of the European Union are concerned. Cross-border data transfers are a sensitive matter and European fines for break data laws can be eye-watering. During the Covid years, most of these rules were ignored as both companies and employees did what was necessary to keep operation running in the face of lockdowns. But now that Covid is receding, though it will never be gone, regulatory agencies are catching up with the work-from-home/anywhere revolution. They are looking at how laws can be enforced in the new circumstances. Tax and social security agencies are concerned about revenue leakage and will be vigilant that taxpayers do not disappear off the radar.

Genuine self-employed contractors will be responsible for their own business affairs which is why it may be tempting to think that some or all of these issues can be avoided by turning employees into independent contractors. That may well be doable in the US. But many European countries could see such a move as “bogus,” simply an attempt to evade the law. European courts will be quick to strike down what they see as bogus self-employment/contractor status.,

The “wild west” lawless days of working-from-home/anywhere are over. The sheriff is back in town.

- This new [paper](#) from King’s College London says that young people are the most likely to see real career benefits from remote working.
- Check out this [article](#) from our colleagues in HR Policy Global on the same issue.

Ireland: Significant move on remote working



In a significant [announcement](#) on 9 November 2022 the Minister for Enterprise, Trade and Employment outlined that the right to request remote working legislation is to be fast-tracked by way of integrating it into the *Work Life Balance and Miscellaneous Provisions Bill 2022*. This 'Integrated Bill' is expected to be enacted by the end of this year.

This means that requests for flexible and/or remote working will be governed by the same piece of legislation. The announcement also outlines that there will be a new WRC Code of Practice providing guidance to employers and employees on their obligations regarding compliance.

- Under the Integrated Bill, remote working will be defined as one type of flexible working and the right to request it will be available to all employees
- The right to request other types of flexible working, for example reduced working hours or adjusted working patterns, will remain limited to relevant parents and carers
- There will be an obligation on the employer to consider business needs and the needs of the employee when considering a request to work remotely, with employees having a right to bring a complaint to the Workplace Relations Commission in respect of a lack of compliance
- A review of the legislation will take place after two years and will look at whether a right to request flexible working should extend to all employees

The *Work Life Balance and Miscellaneous Provisions Bill 2022* is currently working its way through the early stages of the legislative process. Amendments will be published shortly to update the Bill in light of these announcements.

Belgium: Collective bargaining law breaches ILO Conventions



The International Labour Organisation (ILO) has determined that Belgian labour law, which sets strict limits on private sector wage increases, is incompatible with the right to collective bargaining. In an official report delivered by the organisation's Committee on Freedom of Association (CFA), it was noted that Belgian labour law poses "a significant restriction on the ability of social partners to negotiate autonomously the evolution of the level of wages in the private sector".

The CFA further called on the Belgian Government to implement "necessary measures" to ensure that collective bargaining — a right enshrined in an ILO Convention ratified by Belgium in 1953 — remains protected under Belgian labour law.

EU: AI Liability Directive – new leverage for unions and works councils?



Will unions and works councils be able to use the proposed new EU [AI Liability Directive](#) as leverage in negotiations over the introduction of new technologies and human resource systems? If experience with the GDPR is anything to go by, then the answer is almost certainly. The proposed new Directive, published on 28 September 2022, joins the [Artificial Intelligence Act](#) as the second leg of the EU's strategy to set framework rules for the use of machine learning and artificial intelligence. The Act identifies the use of AI in human resource decision making as "high risk" which must be subject to human oversight.

The proposed Directive applies to non-contractual civil law claims for damages caused by an AI system, where such claims are brought under fault-based liability regimes. Existing national liability rules based on fault are not seen as appropriate for handling liability claims for damage caused by AI-enabled products and services. This is because victims tend to need to prove wrongful action by a person in order to succeed in a claim and the complexity, autonomy and lack of transparency of AI may make it difficult or too expensive for victims to identify the liable person due to the number of parties involved in the design, development, deployment and operation of AI.

The Directive proposes, in certain cases, a rebuttable presumption of a causal link between the fault of the defendant and the output that gave rise to the damage, where all of the following conditions are met:

- *The claimant has demonstrated fault on the part of the AI provider, in the form of non-compliance with an obligation of EU or national law design to protect against such damage (e.g., certain requirements under the AI Act).*
- *It can be considered reasonably likely, based on the circumstances of the case, that the fault demonstrated in a. above, has influenced the output produced by the AI system/the failure of the AI system to produce an output; and*
- *The claimant has demonstrated that such output/failure to produce an output gave rise to the damage.*

The proposed Directive establishes a right for claimants to request from a court, an order for a defendant to disclose relevant evidence about a high-risk AI system (as defined in the AI Act). However, courts are only permitted to order disclosure of evidence where such evidence is necessary and proportionate for supporting the claim and so long as the claimant has made all proportionate attempts at gathering the relevant evidence themselves. It is easy to anticipate unions and works councils been active in this space.

The AI Liability Directive will now be examined and discussed in both the European Council and the European Parliament. It could be well into 2024 before a final text is agreed. Member States will then have 2 years to implement the requirements into national law.

BEERG/HR Policy Global is running a newly created workshop on Artificial Intelligence, Human Resource Management and Employee Information and Consultation next February. Details of the program can be found [HERE](#).

- This new, US paper is worth reading: [The Promise and The Peril: Artificial Intelligence and Employment Discrimination](#) We will look at relevant developments in the US in the February workshop.

EU: European Parliament seeks to cast due diligence net wider



The trade website [Borderlex \(€\)](#) reports that the European Parliament rapporteur on the EU's new corporate sustainability due diligence legislation is looking to greatly expand the list of companies falling into its scope. She also wants to broaden the list of environmental obligations for which companies would be liable. Her draft report contains over 250 amendments and proposes important changes to many elements of the [Corporate Due Diligence Directive](#) the European Commission tabled in February.

MEP Lara Wolters wants the new rules to cover EU-based companies with more than 250 employees and a net worldwide turnover of €40 million. The Commission had wanted to set the bar at 500 employees and the net turnover at €150 million.

The EU Commission's draft Directive would oblige companies within scope, large companies with more than 500 employees, but also smaller enterprises in 'high-risk' fields such as agriculture, mining, and textiles to undertake due diligence on their operations. The due diligence would need to be conducted "with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship".

For businesses operating in "high-risk" sectors, Wolters wants the legislation to apply to organisations listed on the stock exchange with more than 50 employees and with a net worldwide turnover of €8 million, of which 30% comes from these sectors. This is significantly wider than the Commission's proposal which had specified companies with more than 250 employees, making €40 million a year, and for whom 50% of turnover was generated in these sectors.

Wolters wants the concept of "established business relationship," to be redefined as a "business relationship" between on the one hand a company or its subsidiaries, and on the other hand a contractor, subcontractor, franchisee, or any other legal entities ('partner') in its value chain," so considerably widening its potential scope.

In her report Wolters expands on what a company would be liable for under the term "adverse impact". She adds to the commission proposal pollution of air, soil, water, as well as "damage to wildlife, seabed and marine environment, flora, natural habitats and ecosystems", and damage caused to climate, "greenhouse gas emissions", and "the transition to a circular economy".

Wolters further expands the definition of "adverse human rights impact" to include "'any adverse impact on persons resulting from any action or omission which removes or reduces the ability of an individual or group to enjoy the rights or to be protected by prohibitions enshrined in international conventions and instruments". Companies must "identify areas where potential adverse impacts are most likely to occur and where potential impacts are most likely to be severe, including mapping individual higher risk operations, subsidiaries and business relationships which should be prioritised, taking into account relevant risk factors."

In another change to the Commission proposal, Wolters wants companies to not only "neutralise the adverse impact" but also restore "affected stakeholders and/or the environment to a situation equivalent to their situation prior to the impact, or as close as possible to that position in the circumstances". She also lists in a new article the process for remedying "adverse impacts". "Such remedial measures may include, but are not limited to, financial or non-financial compensation, restitution, rehabilitation, public apologies, reinstatement or a contribution to investigations," she says.



[Derek Mooney](#) writes: Understandably, much of the comment and analysis of the Twitter job cuts has focussed on the breaches of EU laws on collective redundancies and employee information and consultation. These concerns have not just been limited to the UK and EU. The job cuts and the manner in which they were executed, probably breach laws in many other jurisdictions, including Korea.

However, back in the EU... and most specifically, Dublin... the focus is now moving to another emerging regulatory concern: GDPR. Many now wonder whether Twitter's main establishment status in Ireland still holds. The mass dismissals triggered several key Twitter resignations, particularly those senior personnel responsible for ensuring security and privacy compliance. CISO Lea Kissner, chief privacy officer Damien Kieran, and chief compliance officer Marianne Fogarty all quit. Kieran has been Twitter's first and only DPO since the role was created in 2018. Under the GDPR, Twitter is obliged to have a data protection officer (DPO) to provide a contact point for regulators.

The departure of Twitter's DPO has caused the Irish Data Protection Commission, Twitter's lead regulatory authority in the EU, to put Twitter on watch. Deputy Commissioner, Graham Doyle, [told TechCrunch](#) last week that Twitter had not informed the DPC of the DPO's departure prior to the media reports and that it was in contact the company about the DPR's departure and the consequences of this for the location of Twitter's main establishment in Ireland. Doyle told TechCrunch

"One of the issues that we want to discuss is the issue around main establishment... They're obliged to have a data protection officer in place and provide us with the details but equally, under the [GDPR] one-stop-shop (OSS) mechanism in order to get a main establishment to engage with one regulator, the decision-making processes — in terms of the processing of EU data — needs to take place in that country. That's one of the principles of main establishment. And what we want to establish is that that is continuing to be the case for Twitter."

As TechCrunch explains in a more detailed [follow-up article](#), this is no mere technical matter.

While Twitter product development has always been led out of the U.S., the company devised a legal framework to empower its Ireland-located Twitter company to be the data controller for EU users by ensuring that it had oversight of and influence on U.S.-led product development. This bottom-up approach, with less senior folks in Dublin conducting mandatory privacy and security reviews and having influence over product development back in the U.S. allowed Twitter to hold its GDPR One-Stop-Shop status and access to Europe.

But where does this delicate balance stand in the new Musk-driven, more top-down approach?

The recent "confusion" over Blue Ticks, subscriptions and user verification systems does suggest that new products in development are not being submitted into review pipelines anymore, never mind getting reviews and feedback from folks in Dublin before launch.

While the Irish DPC has a record of working constructively with those companies it regulates to overcome and address such problems, several other – more activist and - data regulators across the EU are watching carefully. Others may exercise their Art 66 powers and act against Twitter in their own markets as GDPR gives them the power to make emergency interventions if they feel there is a pressing risk to local users' data.

THE BEERG AGENDA:

Note that BEERG events are now 'in person' unless listed as a webinar

Webinar: Global Inflation and its impact on Pay Strategy

Online Nov 17, 9:00am EST

Countries around the world are facing record high inflation and global employers are now pressured by their employees and unions to provide pay raises and bonuses to offset the impact. This webinar will examine these issues with a panel of speakers and will share the results of a BEERG survey conducted by BEERG on pay negotiations around Europe

[Booking Page](#)

Webinar Training for Global Leaders: Fundamentals of Global Labour Relations

Dec 6 - 8

A unique offering designed for CHROs and senior executives who need to understand the basics of strategic global labor and workforce relations management. The course will take place on December 6-8 with three / four sessions each day. Details of Agenda [HERE](#)

[BOOK Dec Training](#)

Training: AI in HR management processes

Feb 14 – 16, 2023, Hotel Estela, Sitges, Barcelona

BEERG/HR Policy Global has created a new program *Artificial Intelligence, Human Resource Management and Employee Information and Consultation*. The program will deep dive into three key pieces of EU legislation: (i) the AI Act, (ii) the AI Liability Directive, and (iii) GDPR which together create complex new challenges for employee relations and human resource executives. [Brochure including draft agenda](#)

[BOOK AI Training](#)

*BEERG/HR Policy Global Members can self-register for these events via the links above. If you get a “No Tickets Available for Purchase” message check that you are logged in online – if the issue persists contact [Derek](#).

BEERG Dates for your Diary:

Date	Event	Booking Links	Venue
Dec 6 - 8	Training Program for Global Leaders: Fundamentals of Global Labour Relations	Book Dec Training	Online
Jan 17	BEERG/CMS Labor Relations Workshop	Email to Register	Hilton Frankfurt Airport, The Squire, Am Flughafen, 60549
Feb 1 & 2	BEERG Members Meeting	Book Feb meeting	Pullman Midi Hotel, Brussels, Belgium
Feb 14 - 16	BEERG Training: AI in European HR processes	Book Ai Training	Hotel Estela, Sitges, Barcelona, Spain
April 18 - 21	BEERG Training: “Managing ER in Europe” Download brochure	Book April Training	Hotel Estela, Sitges, Barcelona, Spain

Other BEERG Dates for your 2023 Diary:

2023 Dates	Event	Venue
June 14 - 16	BEERG Members Annual Summit	Hotel Estela, Sitges, Barcelona, Spain
Sept 27 & 28	BEERG Members Meeting	Brussels, Belgium
Oct 10 - 13	BEERG Training: “Managing ER in Europe”	Hotel Estela, Sitges, Barcelona, Spain

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