Thinking Business

Issue 11

Contents

What does levelling up mean for regional economies? 4

Cyber risks and fraud: preparing for the inevitable 6

Managing ongoing supply chain disruption 8

Attracting and retaining talent in a post-pandemic world 12

IR35: Challenges remain a year on 16

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Introduction

Welcome to Issue 11 of Thinking Business, a Trowers & Hamlins bi-annual publication in which we share our latest insights and commercial thinking to help business adapt, grow and be successful in a rapidly changing world.

In this edition, we explore the following:

What does levelling up mean for regional economies? – In February 2022, the UK published its Levelling Up White Paper aimed at shifting government focus and equalising opportunities for all. What impact will this have on regional economies and how will the ambitous objectives benefit the private sector outside of London?

Cyber risks and fraud: preparing for the inevitable – With the increasing cyber threats organisations are facing, what steps can you take to plan and be ready to deal with an attack?

Managing ongoing supply chain disruption – Supply chain issues are once again hitting the headlines, how to mitigate the impacts and how you can strengthen contracts.

Attracting and retaining talent in a post-pandemic world – The war for talent is unlike anytime before, but what can businesses and employers do to finds ways to meaningfully engage with their workforce to become an employer of choice and remain competitive in a fast-evolving world of work?

IR35: Challenges remain a year on – Businesses are still dealing with the changes to the off-payroll working rules (known as IR35) after the legislation finally came into force for medium and large private companies last year. What can businesses do to navigate IR35 compliance burdens?

Should you wish to discuss anything in more detail, or ask any questions, please do get in touch with your usual Trowers & Hamlins contact, or feel free to email any of us directly at thinkingbusiness@trowers.com. You can also follow us on Twitter @Trowers.

Levelling up
What does it mean for regional economies?

In February 2022, the UK published its Levelling Up White Paper aimed at shifting government focus and equalising opportunities for all and rebalancing the economy. With 12 bold missions put into law, the white paper advocates the biggest shift in power from Whitehall to local leaders in modern times and kicks off a decade-long project to transform the country by spreading out opportunity and prosperity.

One of the principle aims of the programme is to boost productivity, pay, jobs and living standards by growing the private sector in the regions, an ever more pressing desire given the cost of living crisis This ambition is hoped to be achieved in every area of the UK by 2030, and significantly increase the number of people completing high quality skills training in every area in the same time period. In England, this will equate to an extra 200,000 taking training every year.

"The challenge of levelling up is very real,"

says Amardeep Gill, a partner at Trowers & Hamlins who advises government, public bodies and SMEs on business critical projects. "There are clear geographic disparities around economic wellbeing across the UK, with generally greater levels of economic wealth in the Southeast and not so much outside of that. This has been intensified by the reduction of manufacturing in historic northern industrial towns and the Midlands, and a movement to a services driven economy over previous decades."

He adds: "While the paper is very ambitious in its intent, it does recognise that in order to achieve a greater degree of parity there needs to be an emphasis not only on the role of the public sector, but also on the private sector.

"Both have a part to play to improve wellbeing and deliver strong local economies by providing training and employment opportunities."

The idea is to empower local decision makers by giving leaders and businesses the tools they need, so local devolution will be extended, deepened and simplified. Every part of England will get London-style powers and a mayor if they wish, and support for existing pan-regional partnerships like the Northern Powerhouse and the Midlands Engine will be extended.

The government recognises that the private sector is the real engine of wealth creation in the country and needs to be encouraged to invest more, grow more and take more risks. The white paper talks of an emancipation for business that will see more flexible and progressive regulatory models being developed. Those will, among other things, allow more capital to flow into long-term assets thanks to the removal of certain restrictions on pension fund investments.

The skills gap will be a particular focus, according to Mike McMahon, senior associate in the Trowers corporate team, working out of the Birmingham office: "When you talk to SMEs in the Midlands, the skills gap and the skills shortage in manufacturing are particularly challenging," he says. "Lots of businesses have been crying out for assistance in that regard for the best part of a decade."

Recognising that, the government will target £100 million of investment into three new innovation accelerators, creating public-private academic partnerships in Greater Manchester, the West Midlands and the Glasgow City region. These will aim to replicate the Stanford-Silicon Valley and MIT Greater Boston models of clustering research excellence and its direct adoption by allied industries, and will be championed as Fourth Industrial Revolution foundries to leverage the UK's global lead in scientific research.

In regions where the historic decline of manufacturing industries has been a challenge, there will be a focus on high-growth businesses, and particularly green manufacturing innovation, to attract high-skill, high-wage jobs back to those areas. There are several examples of green manufacturing driving economic growth in struggling regions already, including the new Britishvolt gigafactory in Blyth, Northumberland; the investment by GE to establish a new wind turbine blade manufacturing centre in Redcar on the Yorkshire coast; the renewed commitment by Nissan and Envision to building electric vehicles in Sunderland in Northern England; and the new hydrogen buses being built in Ballymena, Northern Ireland.

“It’s a particularly exciting time for companies working in technology, tech applications and computing,”

says Gill. “Those all play into this concept of the Fourth Industrial Revolution, which will not be about traditional manufacturing but the exploitation of technological advances in both software and hardware.”

The ambitious policy agenda includes significant financial capital, with £3 billion earmarked for investment in the next generation of British Business Bank regional investment funds and the new Global Britain Investment Fund. Both aim to improve access to finance for SMEs and to increase globally mobile investment across the UK.

The pan-regional investment funds that are already up and running, like Northern Powerhouse and Midlands Engine, provide a good model for the way forward, says McMahon. “The fund managers and lenders that have been nominated to manage those funds have been very successful in putting capital out there that prior to 2017 was not necessarily as readily available,” he says.

The tax system will also be used to incentivise private sector investment, through freeports, enterprise zones and super-deduction, and the government will work with local government pension funds to increase local investment, setting a target for five per cent of assets to be invested in projects that support local areas.

On the skills front, efforts will be stepped up to give students the skills that employers really need, so local employers will be put at the heart of skills provision plans and there will be lifetime access to training for all individuals. As well as continuing to drive up the National Living Wage, the introduction of a new In-Work Progression offer will help people on low incomes to address barriers to better employment opportunities. That policy goes hand in hand with the National Disability Strategy, the Health & Disability Green Paper and the Health is Everyone’s Business consultation.

McMahon argues the white paper includes many strong incentives for the private sector that small and medium-sized business owners may not be aware of, and that it is ambitious in terms of both political will and promise.

“In addition to all the commitment coming from government to address the skills gap, since the pandemic has changed working practices and allowed people to work remotely, the Midlands has been benefitting from an outflow of human capital from London,” he says. “That is a huge benefit to the local market too.”

Gill concludes: “It is great to see the levelling up agenda going beyond a political slogan and translating into a real programme of policy initiatives that needs to happen as indicated by the publication of the recent Levelling-up and Regeneration Bill .”

CYBER RISKS AND FRAUD: PREPARING FOR THE INEVITABLE

The risk of cyber attacks against UK businesses has significantly increased since the start of Russia's offensive in Ukraine, with the threat of spill over attacks becoming more widespread. The current conflict is amplifying an already broad trend of an increased volume, size and sophistication of cybercrime and has driven the UK's National Cyber Security Centre (NCSC) to warn businesses that they could be targeted.

In March, the NCSC – which is part of GCHQ – called on organisations in the UK to bolster their online defences, saying: "There has been a historical pattern of cyber attacks against Ukraine with international consequences. HermeticWiper, a wiper malware used against Ukrainian organisations, also has the potential to impact organisations outside of Ukraine and can erase data from the hard drive of an infected computer."

As the UK has strengthened sanctions against Russia, business leaders and public sector entities in sectors like power, oil, gas, telecoms and financial services have been warned to prepare for retaliatory attacks.

"Cyber warfare is becoming a growing threat," says Helen Briant, partner in the Towers & Hamlins commercial litigation practice.

"Part of that will mean increased cyber incidents as a result of our engagement in support of Ukraine's position. The escalating risks that companies face in relation to cyber breaches and fraud mean it is no longer a case of if but when it will happen to you."

The annual Cyber Security Breaches Survey published by the government in the Spring found that 39 per cent of UK businesses had experienced a cyber attack in the previous 12 months. Around one in five of those were the victim of a sophisticated attack such as a denial of service, malware or ransomware attack, while the most common threat came from phishing attempts. Of those reporting incidents, 31 per cent said they were being attacked at least once a week.

"It is impossible to look at the papers without reading about another organisation that has fallen victim to cybercrime or hearing about a new and more sophisticated type of fraud," says Briant.

"Organisations need to focus on being prepared and making sure their internal controls and response plans are ready and in good shape to deal with an incident."

Putting in place proper cyber protections requires a commitment of resources that not every business is ready to make, argues Liz Mulley, a senior associate in the same team at the firm. "While organisations are seeing these attacks and frauds taking place, the cost of some of these protections can put these out of reach for some organisations," she says, pointing to the expenses associated with preventative software and embedding cyber hygiene measures.

“Surveys continue to suggest that a lot of organisations still don’t have adequate procedures in place.”

Meanwhile, cyber criminals and fraudsters are getting cleverer in their methods of attack. There are reports of hackers using fake videos of company bosses to give workers instructions that, if undertaken, will lead to fraudulent activity.

Earlier this year, food manufacturer KP Snacks was hit by a ransomware attack that severely impacted its supply chain and prevented it from processing orders or dispatching goods for several weeks. Car manufacturer Toyota also had to suspend production at 14 plants in Japan for at least a day in response to a cyber attack causing a system failure at a key supplier. It was estimated the outage could cause a five per cent drop in its monthly production.

The growing use of ransomware is a particular threat, whereby cyber criminals infiltrate a company’s systems and threaten to either publish sensitive data or block access to systems unless a ransom is paid.

Briant says: “The majority of businesses have policies that say they will not pay ransoms, but if a company falls victim to an incident where someone is effectively holding access to their system hostage, many understandably pay up. In part, people are doing that because they hope to keep the incident out of the public domain, but it is a false economy. It is very hard to keep these things under wraps and the incident may not be a one off.”

She adds: “Realistically, if you don’t do the necessary work to effectively lock the doors, it is highly likely to happen again. All of these risks are exacerbated by a slow response that does not shut down vulnerabilities quickly enough.”

So what should companies be doing to protect themselves? Risk mitigation falls into two categories: focusing on people and then on technology.

Briant says: “The human part of any kind of interaction with technology means your humans are both your worst line of defence and your best protection. A busy or careless employee might miss the fact that an email asking them to transfer £5 million has not actually come from the finance director, while a diligent employee will stop that transfer happening. So training, training and more training is the answer.”

The goal is to increase awareness among employees in terms of what to look out for, and create a zero tolerance culture by, for example, creating comprehensive cyber policies and procedures, implementing those through frequent staff training and running regular simulations to identify gaps in security.

“Those elements are relatively low cost,” says Mulley. “The IT side and the investment in software is potentially more costly, but the majority of key preventative measures are not expensive.”

Briant adds: “When we have dealt with clients that have had breaches, often we hear IT managers saying they have been asking the Board for the budget to upgrade systems for ages. So, to the extent your organisation can, you want to make sure you are making appropriate budget available to the IT team and make the decision-making a boardroom issue, not an IT team issue.”

Outdated systems and controls are going to throw up more weaknesses than the most up-to-date software, so, for some organisations, significant investment may be required.

A response plan that will allow a company to react quickly in the event of a breach is also important. Frequently, a breach occurs and teams from IT, commercial, legal, PR and HR start falling over each other trying to figure out how to react.

“As soon as a data breach happens, you have 72 hours to get an initial response to the Information Commissioner’s Office,” says Briant. “You are going to need legal help, PR help, and – depending on your internal capabilities – you will likely need cyber specialists to come in and tell you what happened and fix it. Then there is the communications piece around messaging to customers, employees and suppliers. Having a clear plan in place beforehand, setting out who will take what roles and responsibilities, makes that crisis management much easier because you don’t have to spend time figuring it out.”

Through a combined effort involving key elements of the business in risk management and cyber response planning, it is possible to identify vulnerabilities early and deal with incidents quickly.

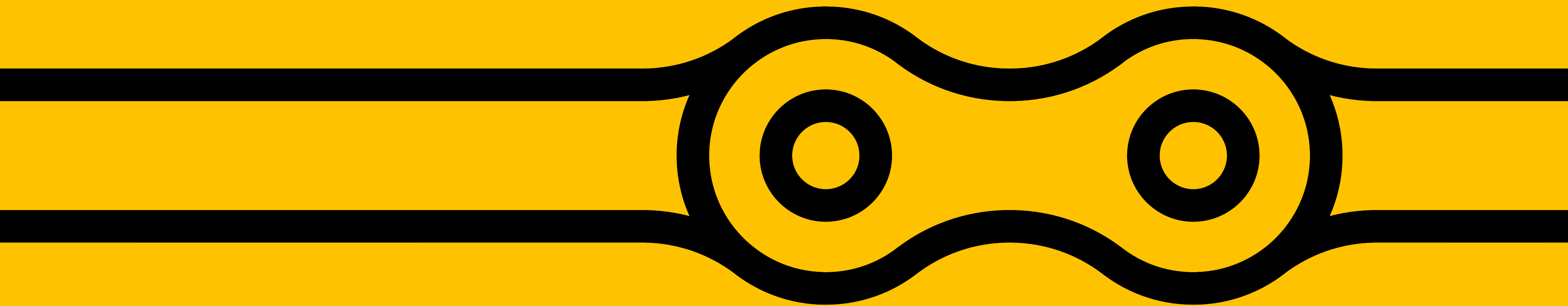
“One area where people fall down is failing to look at supply chains and supplier relationships in a cyber context,” says Mulley. “They can be an organisation’s biggest vulnerability. If you are not regularly reviewing your approved list of suppliers, you could open yourself up to a potential attack by an opportunistic supplier or by a third party finding a way into your systems via a supplier.”

The message for business leaders is that this threat only continues to increase, so taking steps to protect your company must be prioritised.

“Cyber criminals are sophisticated global organisations, not just a bunch of people sitting in their bedrooms hacking into random computer systems,” says Briant. “It is very easy to hack an organisation, if you know what you’re doing, particularly if that system is compromised in some way. These people take the most advanced technology out there and use it against us. You no longer have to put on a balaclava and head to the high street if you want to rob a bank.”

SUPPLY CHAIN

Managing ongoing disruption



Supply chain issues are once again hitting the headlines.

At the start of the year, the Swedish homeware giant IKEA complained of ongoing supply and transportation disruptions caused by post-pandemic shortages and global shipping challenges. Bakery business Greggs – alongside a host of other food retailers including McDonald's, KFC and Nando's – blamed interruptions to the supply of some of its ingredients a few months earlier on a combination of lorry driver shortages, Brexit and Covid. Meanwhile in the US, a national shortage of baby milk formula has been blamed on overseas supply issues compounded by a shutdown of a domestic production facility.

While some of the issues impacting shoppers are temporary, such as the fuel shortages experienced in spring 2022, others will be much more difficult to resolve and will require proactive steps to be taken to manage supply chains.

"The shortage of haulage drivers has caused huge issues across supply chains,"

says Victoria Robertson, a commercial partner in the corporate practice at Trowers & Hamlins. "It is estimated that the sector needs as many as 100,000 more drivers, and as the average age of an HGV driver is 55, with only one per cent under 25, unless there is a serious and successful recruitment drive this need will only increase as the current workforce reaches retirement age. This together with the additional difficulties for UK companies seeking to recruit EU drivers means that this is a shortage that has no obvious end in sight."

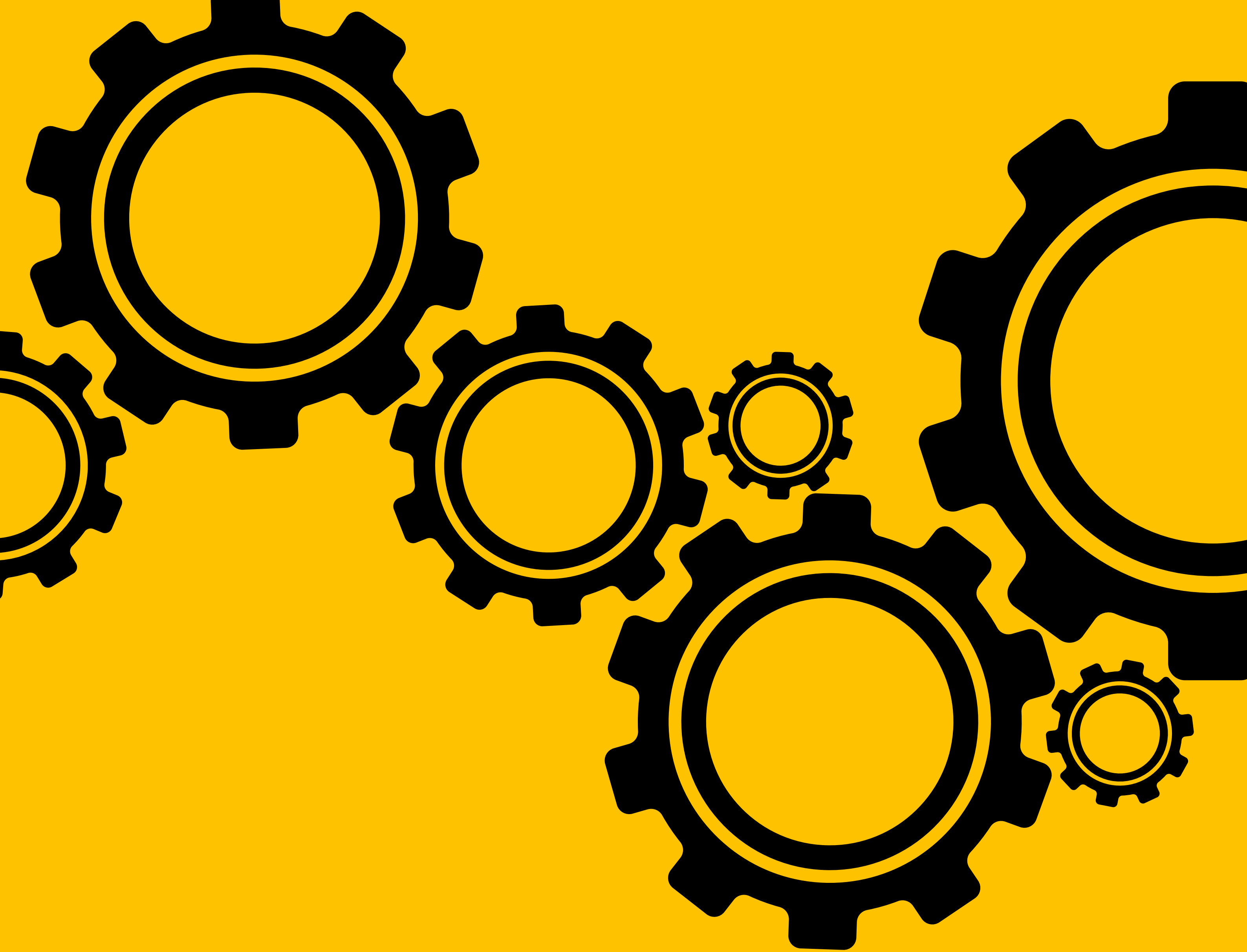
"Many EU nationals returned to their country of origin when the pandemic began and didn't return," says Robertson. "Plus, the pandemic disrupted vocational training in various sectors, with the DVLA suspending tests for new lorry drivers, for example. Historic low wages in some sectors, and changes to IR35 rules, haven't helped."

Supply chains have been further challenged by Brexit creating new customs and regulatory checks that add cost and complexity to cross-border movement, and the UK becoming a less attractive destination for EU drivers because most are paid based on the distance they travel and border delays waste time.

It is not just the transport sector where there are staff shortages. In May there were more job vacancies in the UK than unemployed people for the first time since records began, as the unemployment rate fell to its lowest level for 50 years. Around half a million people have left the labour market since the start of the pandemic but job vacancies keep rising, creating unprecedented staff shortages.

Last year, the chief executive of the Food and Drink Federation said the sector was short about half a million staff, while shortages of butchers and abattoir workers have led to hundreds of pigs being culled as animals get backed up on farms. Amazon has had problems recruiting drivers and warehouse staff, with some of these issues being down to Covid.

Meanwhile, gas prices have risen as a result of the curbs on supply from Russia, there is a backlog of electrical components caused by the closure of factories and ports in Asia during Covid, and global shipping costs have quadrupled thanks to capacity shortages and temporary port closures.



“The ability of companies to source and take delivery of the components they need to run their businesses has become a significant issue,”

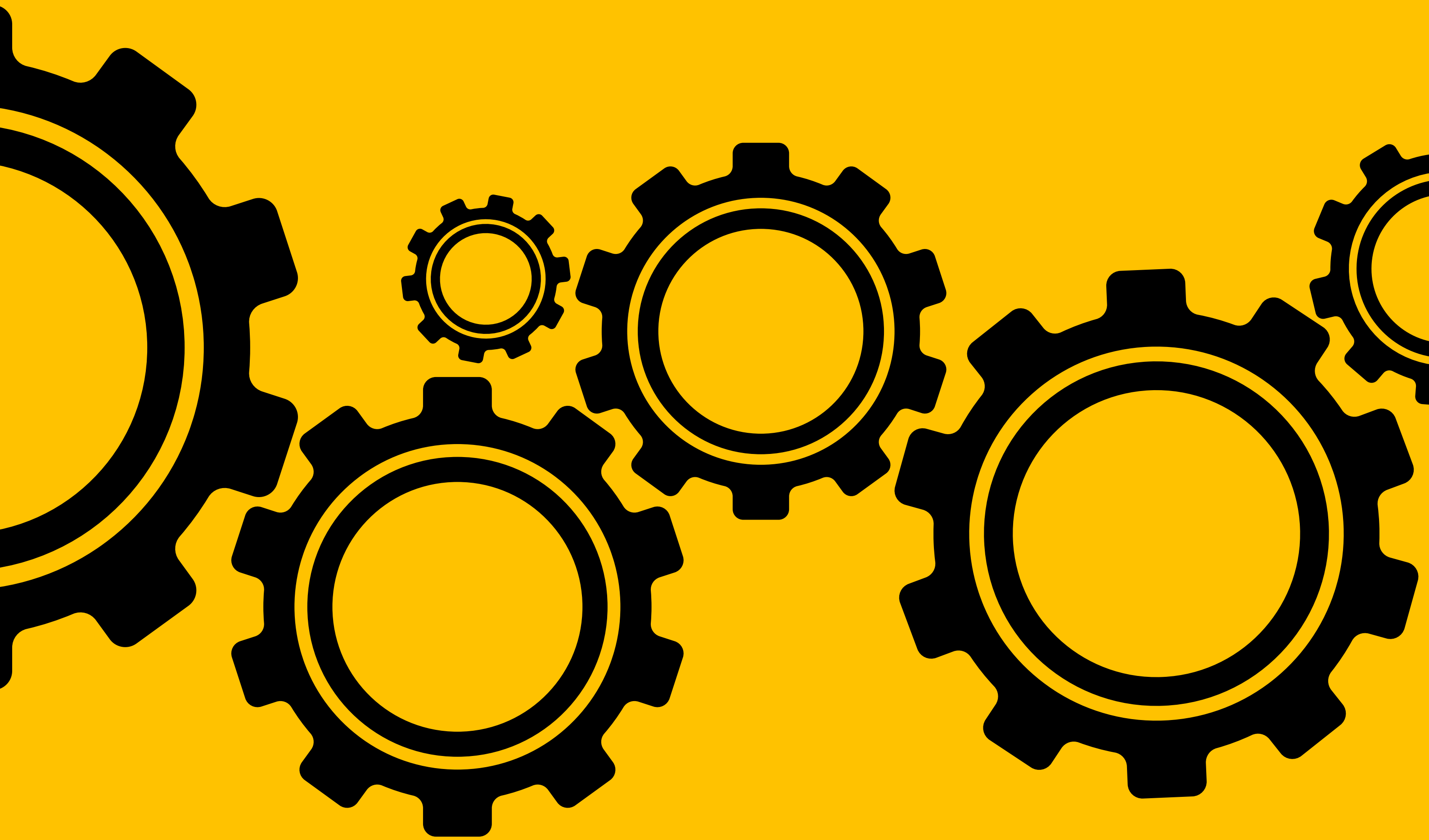
says Adrian Jones a corporate commercial partner at Trowers. “The private sector is good at adapting to cope with change and we are seeing that now in terms of both diversifying sources of supply and also deeper investigation into supply chains.”

With shortages currently top of purchasing managers’ agenda, it is easy to ignore ESG and the increasing importance that will have for all businesses, whatever their sector or size. Pressure from regulators, lenders, investors and consumers is increasing the scrutiny of the supply chain at just the moment that shortages are diverting attention elsewhere.

It is no longer sufficient to simply ask questions about the financial viability of key suppliers or look at specific issues such as sanctions – businesses are advised to carry out pre-contractual due diligence on supply chain partners as if they were investing into them, particularly with an eye to their ESG compliance. “That due diligence is not a one-off thing,” adds Jones. “It needs to be done when entering into a contract and then reviewed on a regular basis. There are quite a few examples of high street retailers being caught out by discovery of child labour or modern slavery in their supply chain which could arguably have been prevented had they taken a more active approach in monitoring their suppliers.”

When entering into contracts, having multiple sources of key components is one way of building supply chain resilience, but it is also key to ensure agreements include clear and well drafted contract management and governance structures to enable proactive management. A careful review of force majeure clauses can help strengthen protections, while audit rights should similarly be prioritised.

Robertson says: “Ensuring that you are working together with your suppliers in a collaborative way is important, so regular meetings, a clear project board and stated roles and responsibilities are often useful. It should be agreed how often you are going to meet to review the contract, and also what will happen if things go wrong and how you will deal with a breach or any external factors that result in delays.”



She suggests companies consider drafting delivery obligations and setting out what flexibility is allowed, as well as specifying that sub-contractors are subject to approval and requiring insurance at appropriate levels.

If things do go wrong, there should be an ability to claim for reputational damage and consequential losses if delivery delays result in refunds to and complaints by end consumers. “In a rising market, when everybody is doing well, things like limitation and exclusion clauses don’t get looked at particularly hard,” says Jones. “When the music stops and things start going wrong, people start scrutinising those terms. The current challenges being experienced in supply chains should serve as a timely reminder to revisit your terms and conditions and make sure you are not exposed.”

With the UK annual inflation rate also hitting its highest level for 30 years in April, and supply chain challenges pushing up prices globally, more and more companies are adding pricing clauses to agreements.

Robertson says: “That is a big theme for manufacturing contracts right now – putting in basic drafting setting out the circumstances in which prices can be increased.

“That might be as simple as a fuel escalator clause that just passes on fuel price rises, or a clause that allows the supplier to increase the price of the delivered goods in line with the consumer price index. If you’re a customer, you want a clause saying the supplier can offer to supply at a higher price but you retain an option to terminate and source elsewhere.”

With supply chains so heavily in the spotlight, now is the time to get those contracts in order.

Attracting and retaining talent

in a post-pandemic world

In May 2022, the number of job vacancies in the UK was higher than the number of people out of work for the first time since records began.

Yet just as companies cry out for more workers, employees have been spurred on to change roles, sectors or even careers, in a trend that has become known as the Great Resignation. The result is a war for talent quite unlike anything that has gone before. Adding to this, around half a million people have completely disengaged from the labour market since the start of the pandemic. The upheaval caused by Covid over the last two years drove many employees to step back from work in favour of early retirement, more time with family, or taking sabbaticals.

"The Great Resignation is having a different impact in different sectors," says Nicola Ihnatowicz, partner in the employment and pensions team at Trowers & Hamlins. "It means most employers are having to work harder and think more creatively about recruiting people, retaining people and planning for the future."

A number of other macro themes are playing into the creation of a new world of work and shifting the relationship between workers and bosses. Today's employees are more likely to look for flexibility, values and wellbeing when choosing a new job, and workplaces are now home to more generations – each with different priorities – than ever.

Danielle Ingham, partner in employment and pensions at Trowers, says:

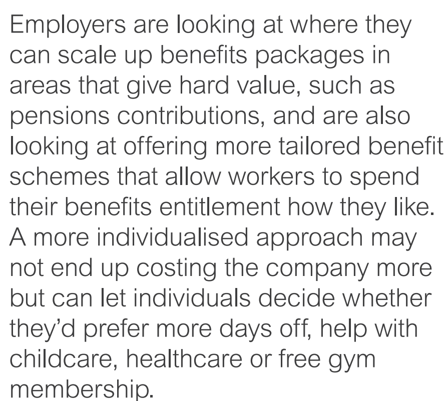
"With the increase in working from home and less face to face contact, the emotional connection between an employee and their employer may not be as strong as it once was, meaning people are more inclined to move jobs.

"What's more, now that employees in certain roles or sectors can work from anywhere, many are moving away from big cities and are able to take jobs with employers based a long way from where they are living."

In such a buoyant recruitment landscape, attracting and retaining talent is tough. At a recent Trowers & Hamlins event, clients were asked the reasons why they felt they were struggling to recruit. While salary and benefits were the number one challenge, skills shortages in their sector were a key factor for nearly six out of 10 respondents, followed by location and the need for specialist skills and qualifications.

"In some sectors it is just about a pay war," says Ihnatowicz, "but we also act for charities and public sector organisations who just cannot keep adding zeros to the pay cheques. They need to stand out by making the most of their ability to offer flexible working arrangements and a positive culture, but that can be difficult to sell."

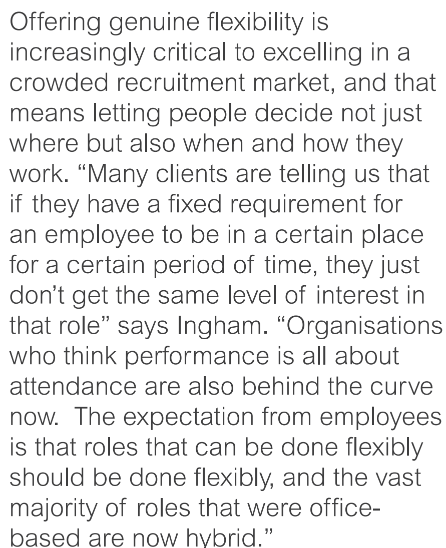
One area of real employer innovation right now is in relation to benefits and incentives, where forward-thinking businesses are seeking to attract people by offering performance-related bonuses, often tied to the success of the company as a whole and rewarding with equity in the business.



Employers are looking at where they can scale up benefits packages in areas that give hard value, such as pensions contributions, and are also looking at offering more tailored benefit schemes that allow workers to spend their benefits entitlement how they like. A more individualised approach may not end up costing the company more but can let individuals decide whether they'd prefer more days off, help with childcare, healthcare or free gym membership.

Ihnatowicz says: "Non-financial benefits are a big focus at the moment, including increased holiday allowances and perks like half-day Fridays. We see companies offering benefits that include the opportunity to finish at lunchtime on Friday if they've met their weekly targets by then, monthly 'no meeting' days, shorter working hours in the summer and days off on their birthdays.

"What works will be different for every organisation, but there is a lot that can be done on the benefits side to help your business stand out."



Offering genuine flexibility is increasingly critical to excelling in a crowded recruitment market, and that means letting people decide not just where but also when and how they work. “Many clients are telling us that if they have a fixed requirement for an employee to be in a certain place for a certain period of time, they just don’t get the same level of interest in that role” says Ingham. “Organisations who think performance is all about attendance are also behind the curve now. The expectation from employees is that roles that can be done flexibly should be done flexibly, and the vast majority of roles that were office-based are now hybrid.”

Employees also increasingly expect their employers to be willing to tailor their working arrangements to their individual needs, whether that means more days in the office one week than another, or flexing the work day around school pick-ups. “It’s not enough to just set up a hybrid working policy and stick to it rigidly,” says Ingham. “It’s about having an ongoing dialogue about what’s working and what isn’t, and what each person needs right now. Not all employers can offer everything, but it is important for the conversations to happen so that employees understand the limitations and feel seen and valued as individuals.”

The upside of such a dialogue is not just better connections and more engaged employees, but also the creation of a more inclusive and diverse working environment that can accommodate everyone.

There are undoubtedly challenges, especially where there are roles that cannot accommodate flexible working or where office staff and frontline workers in the same organisation are allowed to work in different ways.

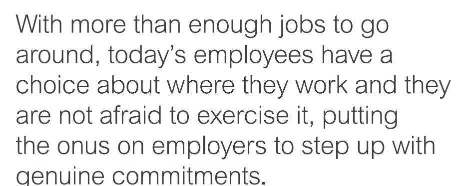
“In those situations, again, it comes back to dialogue,” says Ingham. “People are more accepting of limitations and differences if they feel they have been consulted and listened to.”

She adds: “One challenge we are also seeing is around the split between junior members of the team and their more senior colleagues. The learning opportunity created by being in the office can be really important for those starting out in their careers, so balancing that face time with a hybrid or remote working policy can be tricky and does not affect everyone in the same way.”

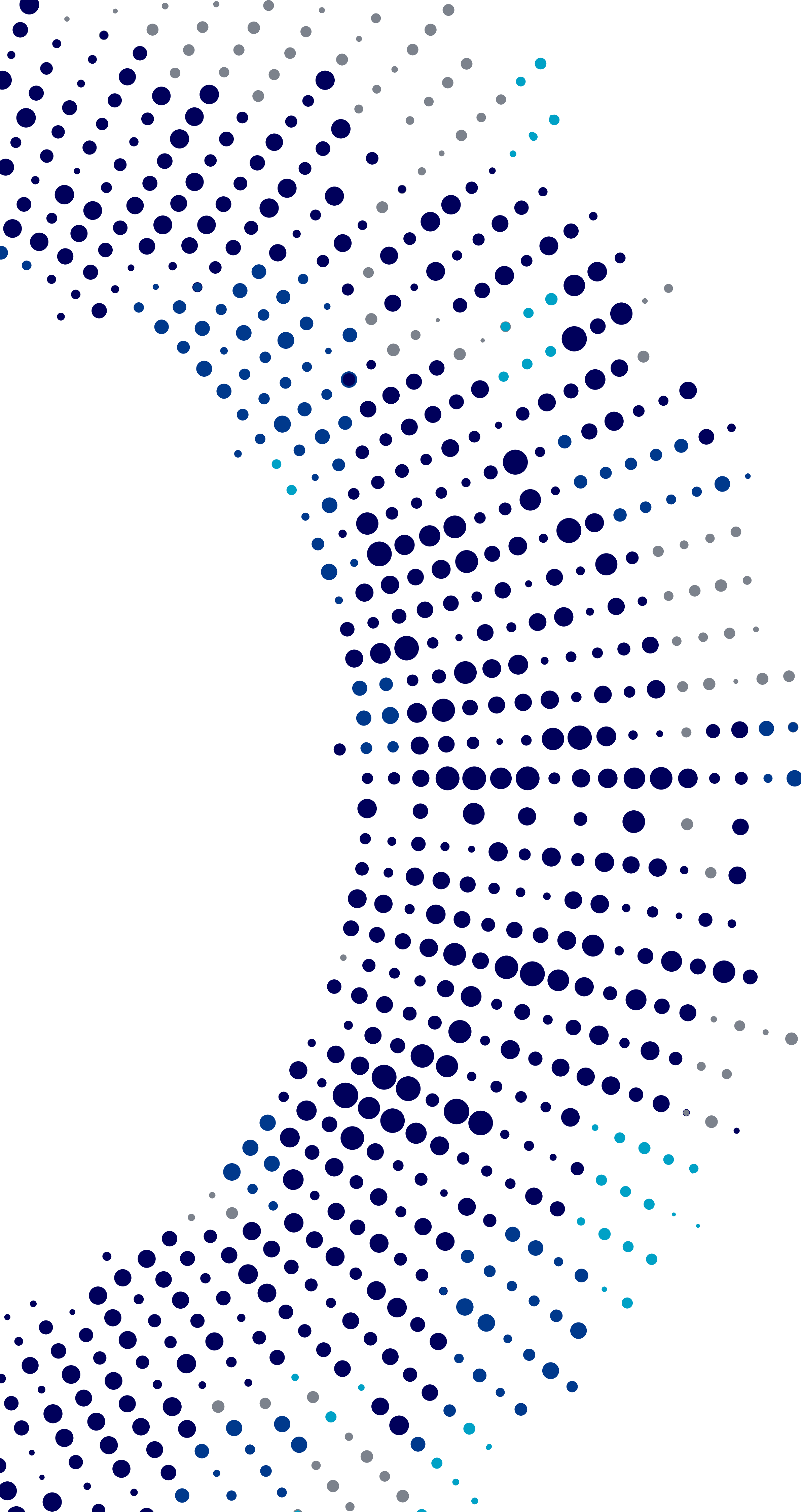
With jobseekers increasingly focused on looking for roles with employers that share their ethics, companies can really stand out on the back of highly developed ESG policies that allow employees to feel proud of where they work.

“People now expect to join an employer that has the same values as them and speaks on some of the issues that they are passionate about,” says Ihnatowicz.

“Having an ESG strategy that addresses that, with measurable targets and regular reporting, and taking actions that match up to the words, has real business benefits.”



With more than enough jobs to go around, today’s employees have a choice about where they work and they are not afraid to exercise it, putting the onus on employers to step up with genuine commitments.



IR35

Challenges remain a year on

It is now more than 12 months since changes to the off-payroll working rules known as IR35 finally came into force for medium and large private sector businesses in the UK.

Designed to crack down on so-called 'disguised employees', the new rules shift the onus from individuals onto end client businesses to determine the employment tax status of their contract workers and decide whether IR35 applies to an engagement, where such an individual provides a personal service via an intermediary. If it does, the individual will be treated as a deemed employee for tax purposes and income tax and national insurance contributions must be deducted through PAYE.

The rule changes were delayed by a year and finally came into effect on 6 April 2021, so end client businesses should have been complying for the past year. HMRC acknowledged that it would take a light touch approach to enforcement and penalties during the inaugural year of the changes unless there was deliberate non-compliance.

This light touch approach could now be about to change. Nathan Williams, a corporate tax partner at Towers & Hamlins, says:

"Historically, HMRC does like to litigate on this, so organisations cannot afford to be ambivalent.

"We are aware that HMRC has already raised IR35 non-compliance issues with end clients operating in certain sectors and given the continued stream of tax tribunal cases being heard (albeit under the 'old' IR35 rules), we anticipate HMRC will continue to enforce and will be stricter on any non-compliance, even if it is accidental."

One of the biggest challenges of IR35 compliance is the lack of a clear test to establish whether an engagement falls within the rules or not.

Imogen Reseigh, a senior associate in the Employment & Pensions team at Towers, says: "There is no precise or simple test to ascertain if someone is a deemed employee for tax purposes, even though there are a number of indicators that will point towards that and these are reflected in the HMRC's online 'Check Employment Status for Tax' tool, known as CEST."

As a minimum, for someone to be inside IR35, there needs to be a personal service being provided by the individual who is working via an intermediary. Control by the client organisation and mutuality of obligation are also key indicators. If the individual providing the services is subject to supervision, direction or control in how they carry out the work, and there is mutuality of obligation, they are less likely to be self-employed and more likely to fall within IR35.

Reseigh says: "Even a year on, many organisations are finding the rules difficult to navigate, either because they are not confident in applying them or they are simply confused about when they apply and whether they should be doing an IR35 assessment.

"Anecdotally, there is still quite a lot of criticism of the CEST tool, which often gives inconclusive results that cannot be relied on and some of the questions are ambiguous and open to interpretation. CEST is a tool to be used as part of the assessment rather than a definitive answer."

Other factors that should be considered when assessing if an individual is a deemed employee for tax purposes or self-employed include the number of engagements the individual has with other businesses, the extent to which they are integrated within the client organisation, how they are paid for their services and whether they provide their own equipment and materials.

Williams says: "CEST is really only as good as the information you put into it and how you interpret that. IR35 is placing a massive administrative burden on end client businesses, who are being expected to do assessments that are at times very complex from a legal perspective and where it is not always easy to apply particular facts of a specific contractual and operational arrangement to the blunt tool that can be CEST."

This is borne out by the recent report of the Public Accounts Committee which has identified high levels of non-compliance with the rules by the Government's own departments and the poor implementation of the new rules by HMRC and states that "despite years of reforming the IR35 rules, there are still structural problems with how they work in practice".

The administrative burden and non-compliance risks become even greater where there are multiple operators in the labour supply chain. It is common for end clients to engage contractors via multiple agencies who themselves may engage with other agencies, umbrella companies, PSCs and others operating in the labour supply chain.

Williams says: "You have got to know who you are dealing with and how you are contracting with them to properly understand your employment law risks and your tax risks. It is about underlining that importance at every stage of the supply chain ensuring visibility of the right information and having the contractual ability to obtain what you need to make a status determination on an ongoing basis. Arguably, this also applies to employment agencies who will have to ensure that they can comply with the requests of the end client and effectively pass on certain of the obligations down the chain."

A further challenge arises where umbrella companies are used in labour supply chains, either as payroll operators, employers of staff, or as agencies. The role of these companies can be difficult to define and the opaqueness of some arrangements has prompted HMRC to issue a 'call for evidence' on their use in labour supply chains. While there are plenty of legitimate and compliant businesses operating as umbrella companies, HMRC fears this is an area ripe for employment tax avoidance and which is clearly a new area of focus and one to watch for the potential for further regulation.

For now, an ongoing area of confusion for businesses relates to the interplay between what it means to be employed or self-employed for tax purposes, and what that means for employment status under employment law principles.

A recent poll conducted by Towers found only 48 percent of those asked felt confident that they could assess if someone was providing services to their organisation as an employee, a worker or a self-employed individual.

"IR35 assessment is about considering if someone working via an intermediary is deemed to be an employee for tax purposes, and not for the purposes of employment rights,"

says Reseigh. "For tax purposes, there are only two categories of

status: self-employed or employed. For employment purposes, there are three categories of status: the self-employed, who have no employment rights; workers, who have some employment rights such as the right to the National Minimum Wage and holiday; and employees, who have the whole host of employment rights. Therefore, whilst the tests for tax and employment purposes are similar, they are not exactly the same, unfortunately, and there is recognition from Government that this causes confusion and needs addressing in the future."

In practical terms, it is often useful for end client organisations to take a step back from the particular arrangements and to sense check the needs of the business. Given that the IR35 rules are predicated on there being a personal service, often it is the right of substitution that is critical to the determination of any deemed employment status, meaning whether a contractor can realistically send someone else to do the work in their place. If the individual can sub-contract the work and the client organisation will accept that and only cares that the work is done rather than by whom it is done, then the engagement will usually fall outside of IR35. It is also worth looking at the contract and services supplied and whether they amount to a fully contracted out service to be outside IR35 entirely. In some cases, the needs of the parties may have changed so that it is acceptable and appropriate for the business make a direct offer of employment to a particular contractor.

Particular circumstances may also allow for parties in the supply chain to help each other with the administrative burdens of IR35 compliance, such as creating policies and operating systems (including apps and software) to deal with the flow of information and assessments and/or the potential delegation of status determinations. In this regard, whilst it may in theory be possible for end user organisations to make bulk determinations and/or outsource the status determination process, care will need to be taken by the end user organisation to ensure it remains compliant and that it continues to act with the necessary level of reasonable care in undertaking the determinations, particularly as it cannot contract out of its statutory obligations and reliance on the enforcement of contractual indemnities can be expensive in itself. Unfortunately, there are no easy work arounds to the IR35 compliance burdens but client organisations and those operating in the labour supply chains can help each other with the aim to streamline processes and information gathering.

Williams says: "HMRC likes to litigate over IR35, albeit with varying success, and there is nothing to suggest that appetite will diminish.

"Aside from the tax costs, there are real reputational risks to consider regarding tax non-compliance and avoidance. Businesses need to undertake proper risk assessments to understand how their contractors are engaged, have people within the organisation responsible for IR35 assessments both at the outset of engagements and on an ongoing basis, and make sure there is proper record-keeping in place. Where relationships allow, working collaboratively with agencies and others in the labour supply chain may also help to alleviate some of the administrative burdens."

He concludes: "This remains a difficult area for businesses to navigate particularly when they are also trying to juggle other regulatory pressures, as well as dealing with staffing and supply issues themselves, but it is one that they cannot afford to overlook."

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