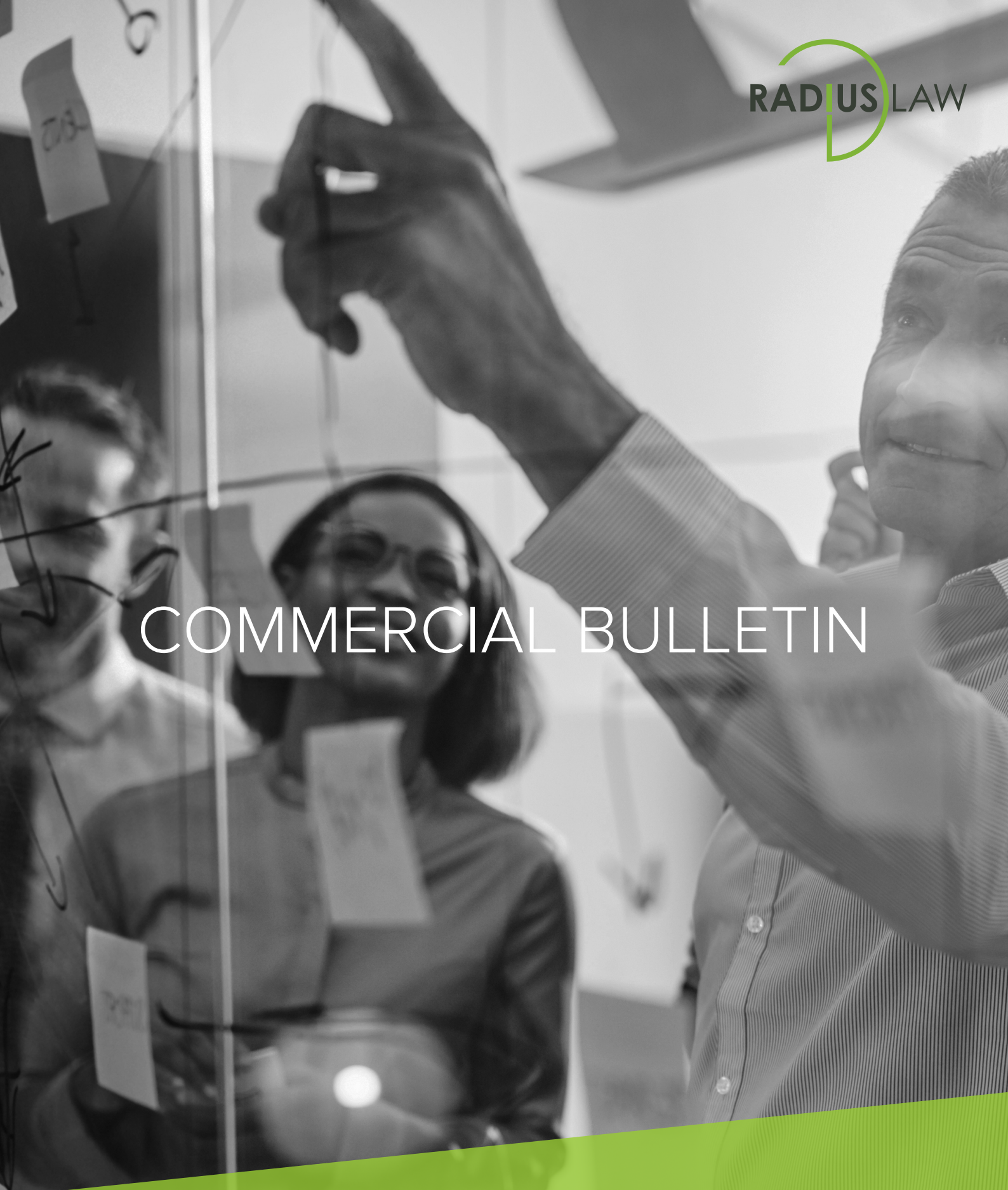

RADIUS LAW

COMMERCIAL BULLETIN

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RADIUS LAW

Corporate & Commercial

New Block Exemption

The UK's new Vertical Agreement Block Exemption Order ('VABEO') became law on the 1st June replacing the EU Vertical Block Exemption Regulation ('VBER') - which had been retained in the UK under domestic law post-Brexit.

Here's a quick summary:

- VABEO exempts certain competition law rules from supply chain agreements – such as franchise agreements.
- There is a 1-year transition period.
- In parallel the EU has replaced the VBER. The VABEO and VBER are similar but there is some divergence.
- There is an allowance for differentiated wholesale prices to help with the additional investments needed for physical stores. The new VBER has made similar changes albeit with more strict conditions.
- Wide parity clauses whereby a product or service may not be advertised on better terms on any other channels will not be permitted under the VABEO although the VBER does not have the same absolute prohibition.
- The accompanying Guidance provides more information about agency agreements and there are some small differences between the EU and UK guidance.
- The VABEO will be reviewed in six years, whereas the VBER has been set for twelve years.

Model Articles deemed unsuitable for sole director companies

A recent decision of the High Court[1] has suggested that the Model Articles for private companies are ***not suitable for sole director companies.***

Model Articles are the standard default articles a company can use.

Article 11(2) of the Model Articles states: 'The quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two'.

Accordingly, for sole director companies we recommend that:

- the Model Articles are amended as otherwise decisions taken by that director may be invalid;
- passing a shareholder resolution to ratify any past decisions taken by the sole director.

Data Security

New Data Protection regime.

The Government has unveiled its new proposals for the UK's post-Brexit data protection regime.

Whilst a few proposals are still under consideration by the Government, the following have been identified as forming part of the Data Reform Bill:

- removing the requirement in certain instances to conduct a 'balancing test' when using 'legitimate interests' as your lawful basis to process personal data;
- imposing requirements on companies to conduct a privacy management programme to evidence how they process and safeguard personal data;
- substituting the obligation on some organisations to appoint a Data Protection Officer with an obligation to identify an individual within the organisations responsible for overseeing data protection compliance;
- the removal of Data Protection Impact Assessments;
- a relaxation of the requirements relating to consent for cookies;
- extending greater powers of enforcement to the Information Commissioner's Office ('ICO').

The European Commission clarifies its own Standard Contractual Clauses

On 25 May, the European Commission released guidance for the Standard Contractual Clauses (SCCs) that it implemented in June last year.

Subject to meeting other requirements, SCCs can be used to lawfully transfer personal data to a country that has not yet been approved by the EU or ICO as having adequate data protection controls.

As you may recall from our previous vlogs SCCs are still relevant to UK data exporters (post Brexit) provided the UK Parliament approved addendum is used.

Key points in the Q&As include:

- that the SCCs can be supplemented with additional clauses and/or incorporated into a broader commercial contract provided it does not contradict the SCCs;
- if organisations use SCCs this should be stated in their privacy policies together with information on how individuals can obtain a copy of the clauses.

ICO launches an AI and data protection risk toolkit

The ICO has launched its AI and data protection risk toolkit. The toolkit is a risk assessment tool to help organisations using AI (artificial intelligence) to manage the risks to individuals' information rights caused by such processing.

Employment

Changes to fit notes

Since the 1st July, fit notes certifying sickness absence for employees **can be written by a wider group of healthcare professionals**, including pharmacists and nurses.

A 'Statement of Fitness For Work', known as a 'fit note', is an official written statement that provides a medical opinion on an individual's fitness for work and is a requirement to obtain statutory sick pay following seven days of absence.

Harassment

Three recent cases have given reminders to employers of their duties to prevent harassment in the workplace.

In one case[2] a tribunal has held that a claimant who was called an expletive in relation to his baldness at work was subjected to harassment. ***The tribunal agreed that such banter was unwanted conduct*** that related to his sex (because baldness is more prevalent in men).

In another case[3] a 69-year-old employee has been ***awarded £13,000 for injury to feelings for being referred to as 'half dead Dave'*** by his team mates and his supervisor. The Tribunal agreed that the name calling in this case was age discrimination. The Tribunal dismissed the employer's argument that it was just work-place banter and that it should not be liable as the employee had not objected.

Finally, a woman has succeeded with a claim[4] of harassment when her ***employer failed to provide somewhere private for her to express breastmilk at work***, requiring her to use her car or the toilets instead.

It's worth noting that employers won't be liable where they have taken all reasonable steps to prevent harassment from happening by making reasonable adaptions and having robust policies and training in place.

New review of the future of work

There was surprise and disappointment that the long-awaited Employment Bill (which had been expected to contain measures in relation to tips, additional rights for zero hours workers and pregnant women, neonatal and paid carers' leave and default flexible working as well as bringing in a single enforcement body for employment rights) was not included as part of the Government's legislative agenda in the Queen's Speech.

The Government has however now announced a new review of the 'Future of Work'. The review will be led by Matt Warman MP and will be conducted over the spring and summer this year.

Matt Warman MP

Enforcing a non-compete

Employers often seek to protect their business by including post termination non-compete clauses in the contracts of their key employees.

If a key employee then leaves and joins a competitor, the obvious next step is for the employer to issue an interim injunction – i.e. an injunction to immediately stop the employment with the competitor until there is time for a full hearing.

The Court of Appeal has recently considered[5] such an interim injunction. The following points are worth noting:

- Unless the former employee is very wealthy or if the ex-employer is willing to pay the former employee during the period between the interim injunction and full hearing – the Court may refuse the injunction.
- Don't delay – whilst there was disagreement amongst the Court of Appeal Judges about whether the seven-week delay before issuing the injunction in the current case was fatal to it – it's clear that the longer the delay the more risk there is to the success of the interim injunction application.
- If the non-compete acts as a total bar to other appropriate employment the clauses are unlikely to be justified as reasonable.

On this last point a recent High Court case[6] has provided some useful guidance stating that where the non-compete is restricted to 12 months and to the parts of the businesses where the employee had material involvement, rather than all the business then the non-compete provision is more likely to be enforceable.

Cases, laws, decisions referred to in this Bulletin

1	Hashmi v Lorimer-Wing [2022] EWHC 191 (Ch)
2	Mr A Finn v The British Bung Manufacturing Company Limited Case Number: 1803764/2021
3	Robson v Clarke's Mechanical Ltd Case No: 1401315/2020
4	Mellor v. MFG Academies Trust Case No.1802133/2021
5	Planon Ltd v Gilligan [2022] EWCA Civ 642.
6	Law By Design Limited V Saira Ali [2021] EWHC 3010 (QB)