

How do you control the risks of an employee bringing a claim because of either lack of opportunity and recognition or intrusive use of monitoring tools in a hybrid working model?

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Today's Speaker



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Overview

Hybrid and remote working models

Legal Risks & Considerations

Lack of Opportunity – the law, potential claims and controlling the risks

Intrusive monitoring - the law, potential claims and controlling the risks



What is Hybrid Working Model?

- “Blended working”
- Form of flexible working
- Split of time between workplace and remote/home
- No legal requirement to introduce hybrid working
- There will be a legal right to request remote working

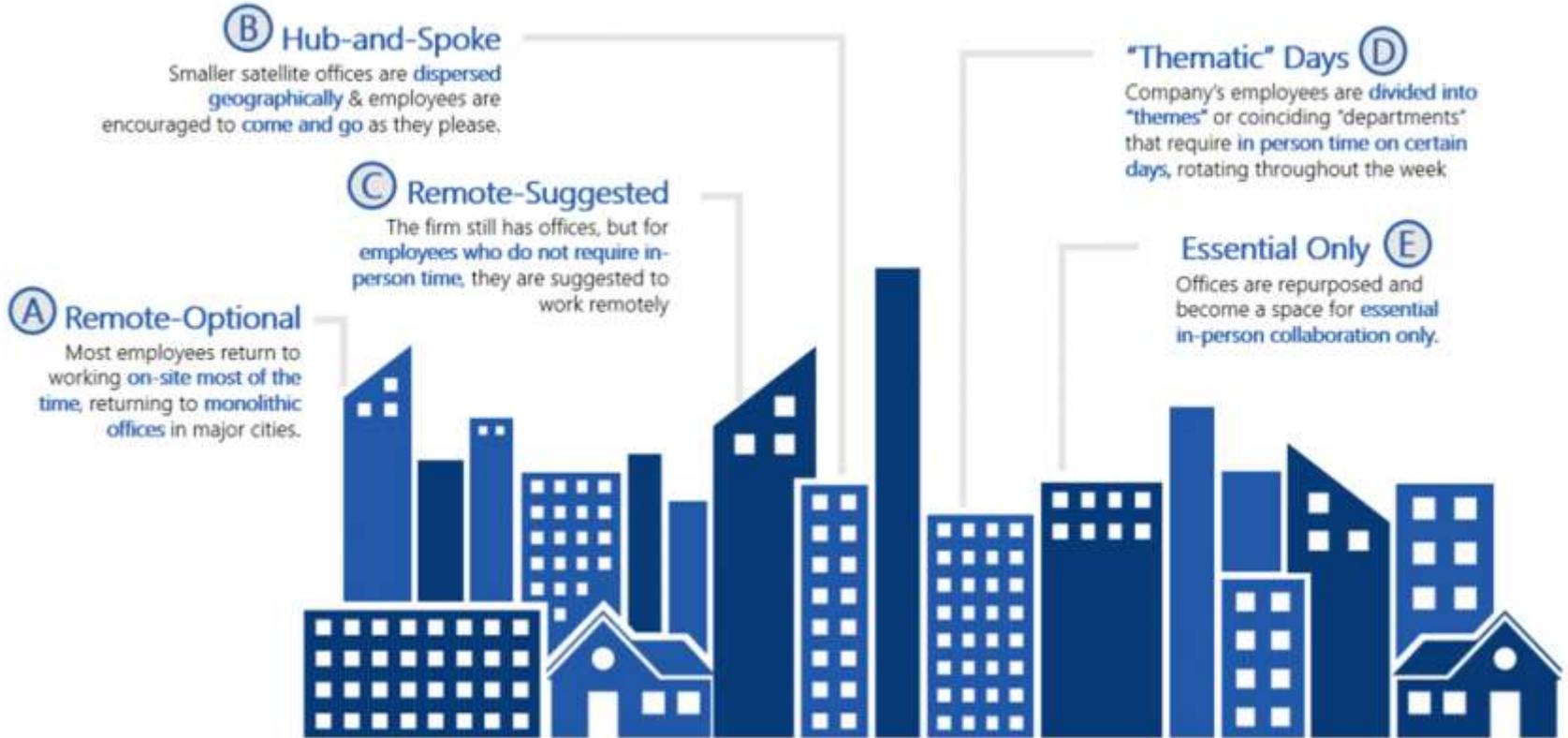


.....we will provide a legal framework around which requesting, approving or refusing a request for remote work can be based. This legislation has provoked much debate and I'm committed to strengthening it in the coming months on the basis of further input from stakeholders.”

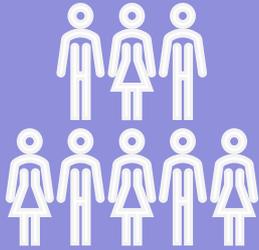
Lecture presented by the Tánaiste and Minister for Enterprise, Trade and Employment Leo Varadkar: 'The Future of Work in a Post-COVID World' - April 2022



Different Approaches to the Hybrid Model



Third Remote Working in Ireland 2022 National Survey Findings – May 2022



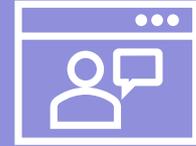
8,400 employees nationwide – 58% never worked remotely before the pandemic



8% RTO fulltime



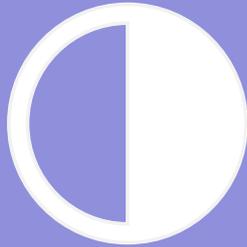
52% hybrid



40% fully remote

<http://whitakerinstitute.ie/project/remote-working-during-covid-19-irelands-national-survey/>

Third Remote Working in Ireland 2022 National Survey Findings – May 2022



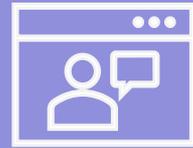
***50% of employees –
employer has
confirmed long-term
working
arrangements***



9% fully on site



61% hybrid



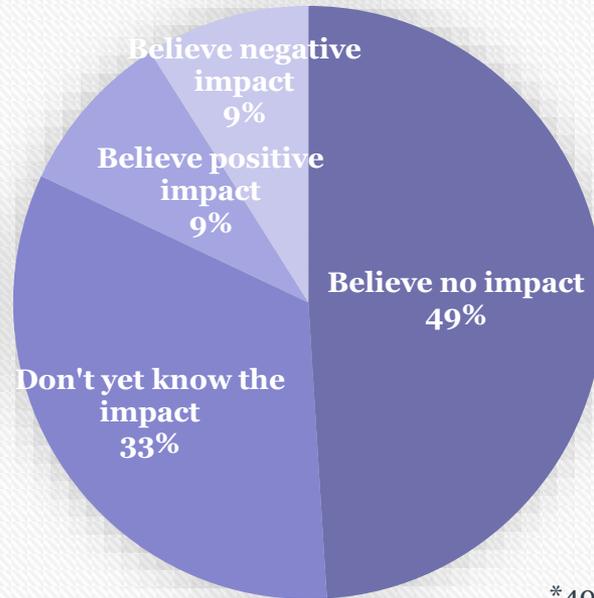
30% fully remote



22% - trial phase

<http://whitakerinstitute.ie/project/remote-working-during-covid-19-irelands-national-survey/>

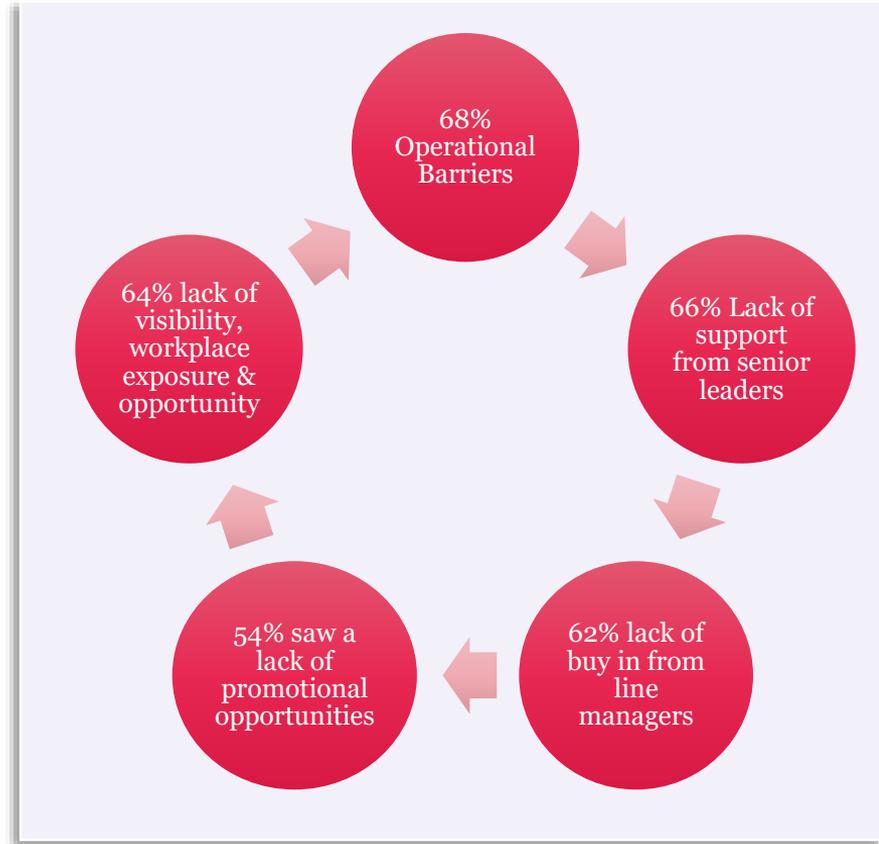
Impact on opportunities for promotion



*49% indicated they work more hours

■ Believe no impact ■ Don't yet know the impact ■ Believe positive impact ■ Believe negative impact

Issues being experienced by employees – CIPD 2021



Legal risk considerations

Terms and
Conditions &
Handbook

Training/
Management

Health &
Safety –
Insurance

Data
Protection/
Cybersecurity

OWTA- Rest
Periods and
Breaks

Claims due to lack of opportunity and recognition
Claims due to intrusive use of monitoring tools

Lack of opportunity and recognition

October 2021 – Evolution of the Workplace Report

- 7,261 hybrid workers from the UK, France, Germany, Spain, Sweden, Poland and the United Arab Emirates
- *52% think hybrid or home workers could be discriminated against or treated differently to employees in the office full-time*
- Nearly half (47%) said they worried about missing out on learning from peers and seniors when working from home
- 52% of workers aged 16-24 were concerned that working remotely would have a negative impact on their development and career progression, compared to the average of 43%



Lack of opportunity and recognition

What is the Law?

- Employees must be treated fairly and consistently without discrimination
- Employment Equality Legislation – direct and indirect discrimination
- If there are differences in treatment, can they be justified on non-discriminatory grounds?
- Direct discrimination – unlawful
- Indirect discrimination – objective justification
- Contractual provisions – bonuses
- Express and implied terms



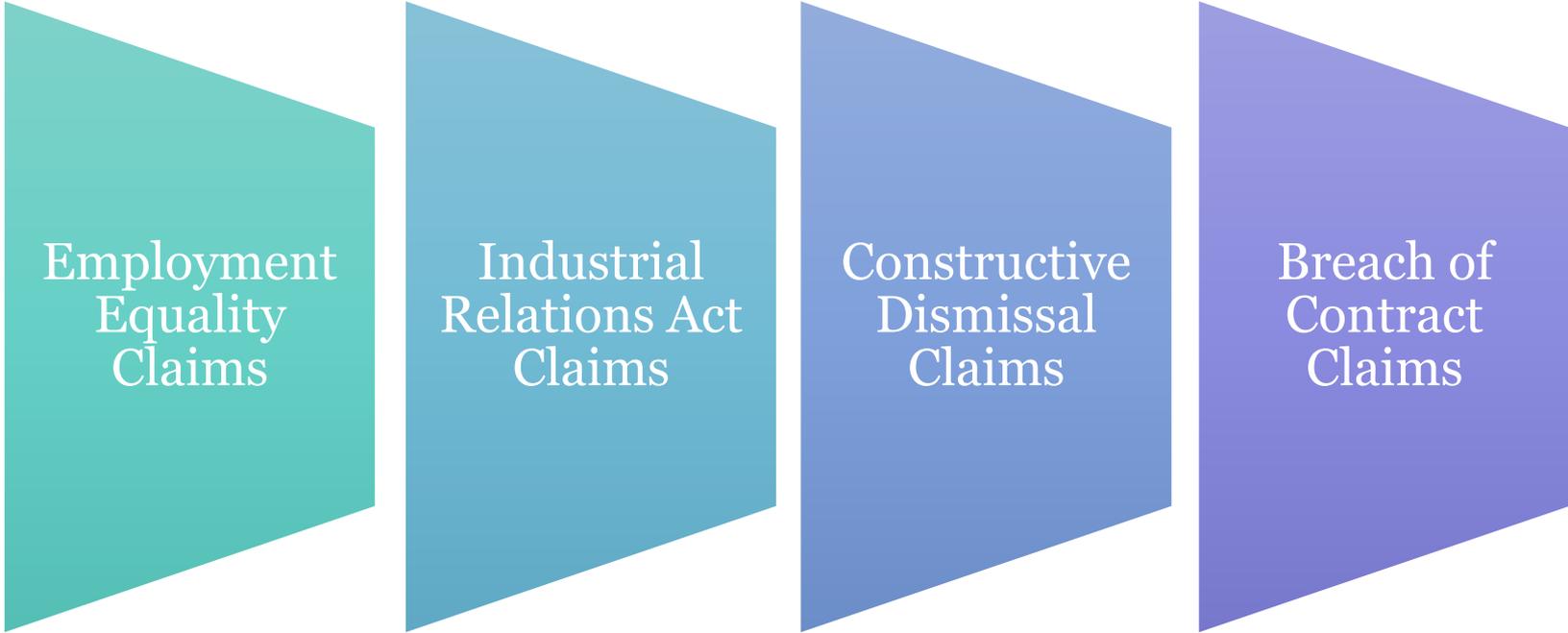
Lack of opportunity and recognition

What is the Law?

- “Proximity bias” – does the employer favour those close at hand?
- Female, disabled and older workers
- Mishandled hybrid and remote working requests



Lack of opportunity and recognition



Employment
Equality
Claims

Industrial
Relations Act
Claims

Constructive
Dismissal
Claims

Breach of
Contract
Claims

Controlling the Risks

- Establish clear hybrid working processes
- Training for line managers
- Defined roles and responsibilities for employees
- On-going access to development and career conversations
- Review employment contracts and policies and procedures
- Establish a culture of effective communication and informal resolution of disputes
- Document, document, document!!



Ensuring employee inclusion in a hybrid working system

- A hybrid working system will impact the whole organisation
- As new working arrangements are implemented, employees will observe how they are treated relative to other employees either working from home or in office
- Requirement for fair treatment is critical



Guidance for line managers dealing with employees at home

01

Be clear on objectives

02

Be clear with employees about how performance will be assessed in the hybrid system

03

Provide regular feedback

04

Focus on desired results and outcomes as main measure of performance

Intrusive use of monitoring tools

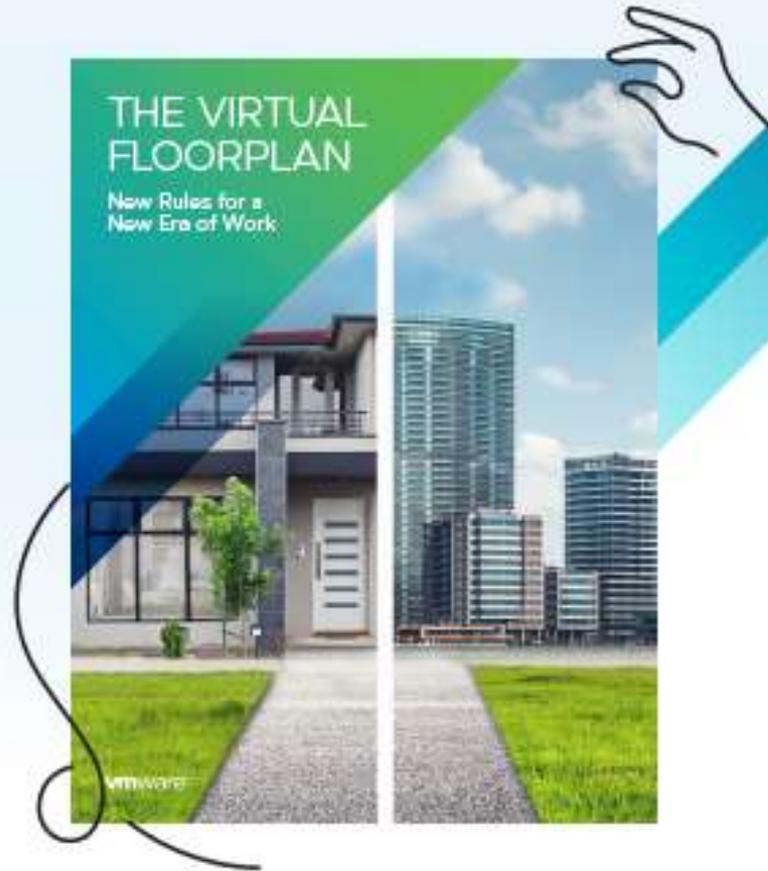
What are Employee Monitoring Tools?

- Technologies that count hourly mouse clicks
- Technologies that measure keystrokes and emails
- Monitoring time spent on social media websites
- Veriato, gives workers a daily “risk score” which indicates the likelihood they pose a security threat to their employer



VMware Research

- 70% of companies surveyed implemented/planned to implement employee surveillance measures to monitor performance
- 44% - monitoring of emails
- 41% - web browsing
- 43% - collaboration tools
- 29% - video surveillance
- 28% - attention tracking via webcams
- 26% - keylogger software



Intrusive use of monitoring tools

What is the Law?

- Data protection
- Employees must be treated fairly and consistently without discrimination
- Employment Equality Legislation – direct and indirect discrimination
- If there are differences in treatment, can they be justified on non-discriminatory grounds?
- Direct discrimination – unlawful
- Indirect discrimination – objective justification
- Article 8(1) of the European Convention on Human Rights
- Contractual provisions and policies and procedures
- Express and implied terms

Intrusive use of monitoring tools

What is the Law?

- **GDPR and Data Protection Act, 2018**
- **GDPR Requirements;**
 - Process personal data in a lawful, transparent and fair way;
 - For a specified, explicit and legitimate purpose; and
 - Data collected should be limited to what is necessary in relation to the purposes for which it is processed
 - Accurate and up to date
 - Only retain for as long as necessary
 - Use appropriate security measures
- **Is there a lawful basis for the processing?**



Intrusive use of monitoring tools

What is the Law?

GDPR permits processing of personal data if one of the following applies;

- Consent;
- Necessary to perform the employment contract;
- Necessary to comply with a legal obligation;
- To protect the employee or another's vital interests;
- To perform a task carried out in the public interest; or
- Employer's or a 3rd party's legitimate interests (except where the employee's interests or fundamental rights override these)

Intrusive use of monitoring tools

What is the Law?

- The fairness of the processing was to be assessed by reference to whether the complainant and fellow employees had been made aware of the employer's use of the data for that purpose, whether that processing was compatible with the purpose for which the data was collected, and whether the employer had a legal basis for that processing

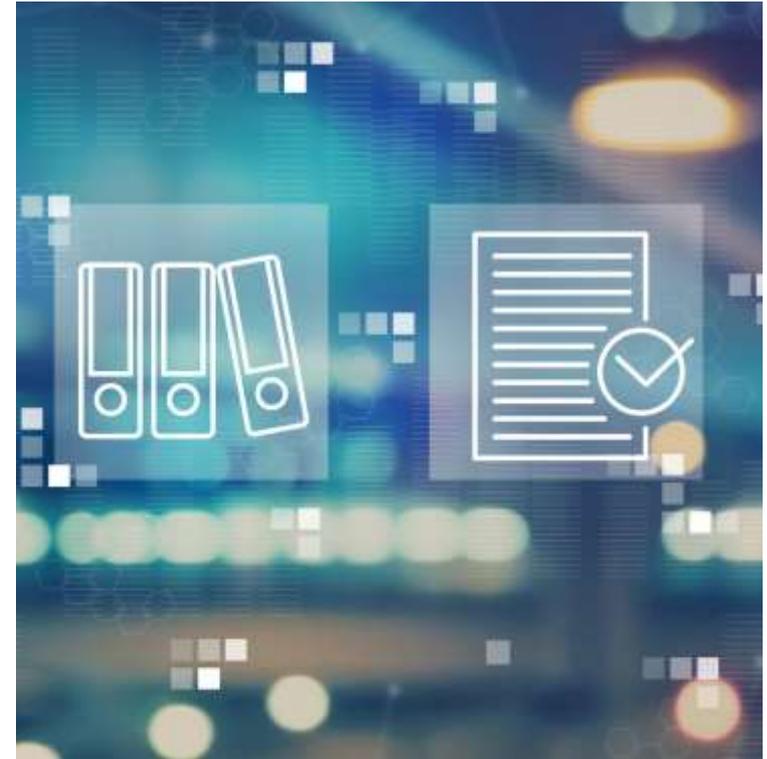


Intrusive use of monitoring tools

What is the Law?

Employee Rights;

- Prior Notice;
- Opportunities to object in certain circumstances;
- Opportunities to restrict the processing of their personal data in certain circumstances;
- Access to monitoring records and the opportunity to request corrections and deletions



Intrusive use of monitoring tools

Data
Protection
Claims

Employment
Equality
Claims

Industrial
Relations
Act Claims

Constructive
Dismissal
Claims

Breach of
Contract
Claims

Controlling the Risks

- Employers monitoring activities must comply with GDPR and the Data Protection Act, 2018
- Employers must identify and document a lawful basis for processing personal data and special categories of data before processing
- Employers typically rely on the condition that permits data processing necessary to pursue the employer's legitimate interests
- Must not override employee privacy rights
- Regulated industries may rely on statutory compliance justification as an alternative

Controlling the Risks

- Target monitoring towards a specific risk
- Consider the data protection principles
- Balance the need to monitor against employees' expectation of a certain degree of privacy in the workplace
- Data Protection Impact Assessment may be required in specific circumstances
- Generally speaking, consent should not be relied upon by employers

Controlling the Risks

- **Carry out monitoring in the least intrusive manner possible**
- **Consider;**
 - Geographical – bathrooms
 - Data Oriented – no personal files or messages
 - Time related – sampling methods
 - Vehicle tracking systems – more intrusive than other types



Case Study

2021 DPC Case Study

Employee of statutory service provider – driving to locations assigned by employer

Claims for overtime/subsistence – forms completed by employee giving details;

Dispatch system in use – intended to ensure most efficient use of drivers & vehicles, particularly in emergency situations

Case Study

Inconsistencies between claim form and dispatch system

Employee objected to use of data from dispatch system and made complaint to DPC

DPC considered whether use of data from dispatch system was in line with fair processing requirements;

Employees made aware of use of data for that purpose; use of data compatible with purpose and legal basis for that processing?

Inclusion of dispatch details in overtime and subsistence claims indicated employees were aware of use for verification of claims

Case Study

Even if major use was to aid logistics, use to verify overtime was not incompatible with that purpose – data was the only means to verify

Financial regulations required the employer to verify overtime & subsistence

Processing to verify overtime and subsistence was necessary to comply with legal obligation; perform the employment contract and reasons of legitimate interests of employer

Data collected for one purpose may be appropriately processed for another purpose

Employee monitoring in a hybrid model – the benefits for an employer

- Monitoring staff is permitted as long as it can be justified lawfully
- Employers may wish to monitor business efficiency, for example, by looking at whether staff are using resources appropriately
- An employer may wish to protect staff by making sure they can work safely in their chosen environment



How to ensure monitoring is carried out correctly

An employer;



should tell people in advance of the oversight tools being used, including the potential for covert monitoring



Should ensure any information recorded is available only to people who need to see it



Should think of any other less intrusive ways to achieve the same result

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**Thank you for your time.
Any questions?**

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**Legal Insight
Human Intelligence
Business Impact**