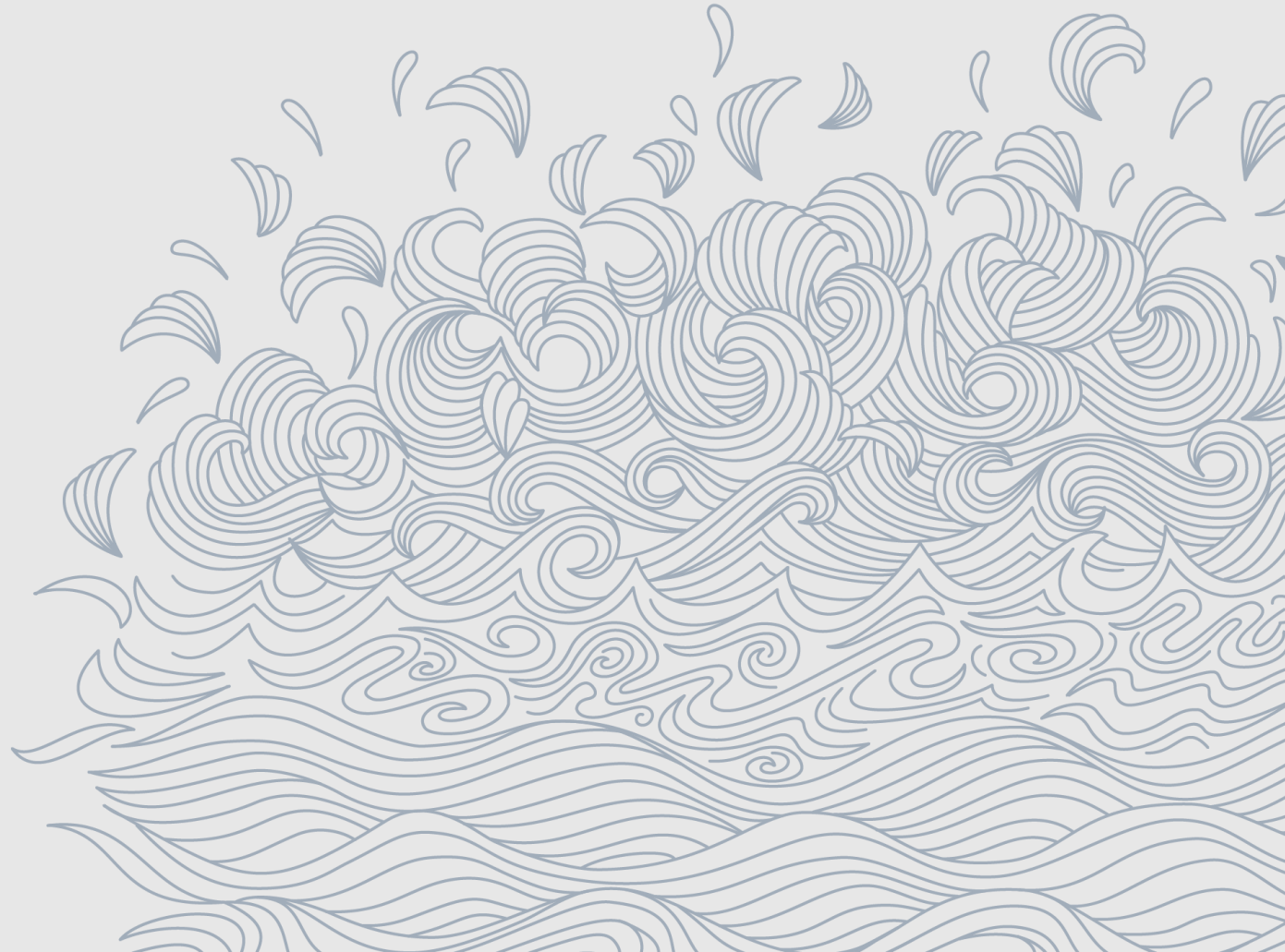


# COMPLIANCE CONUNDRUMS

**a** ADDLESHAW  
**g** GODDARD

MORE IMAGINATION **MORE IMPACT**



# SPEAKERS



**SAJIDA HUSSAIN**  
Legal Director, UK



**ANDREW MOORE**  
Partner, UK



**MICHAEL LEFTLEY**  
Partner, UK

# WHAT ARE WE GOING TO COVER?

**01.** Immigration checks and Sponsorship compliance duties

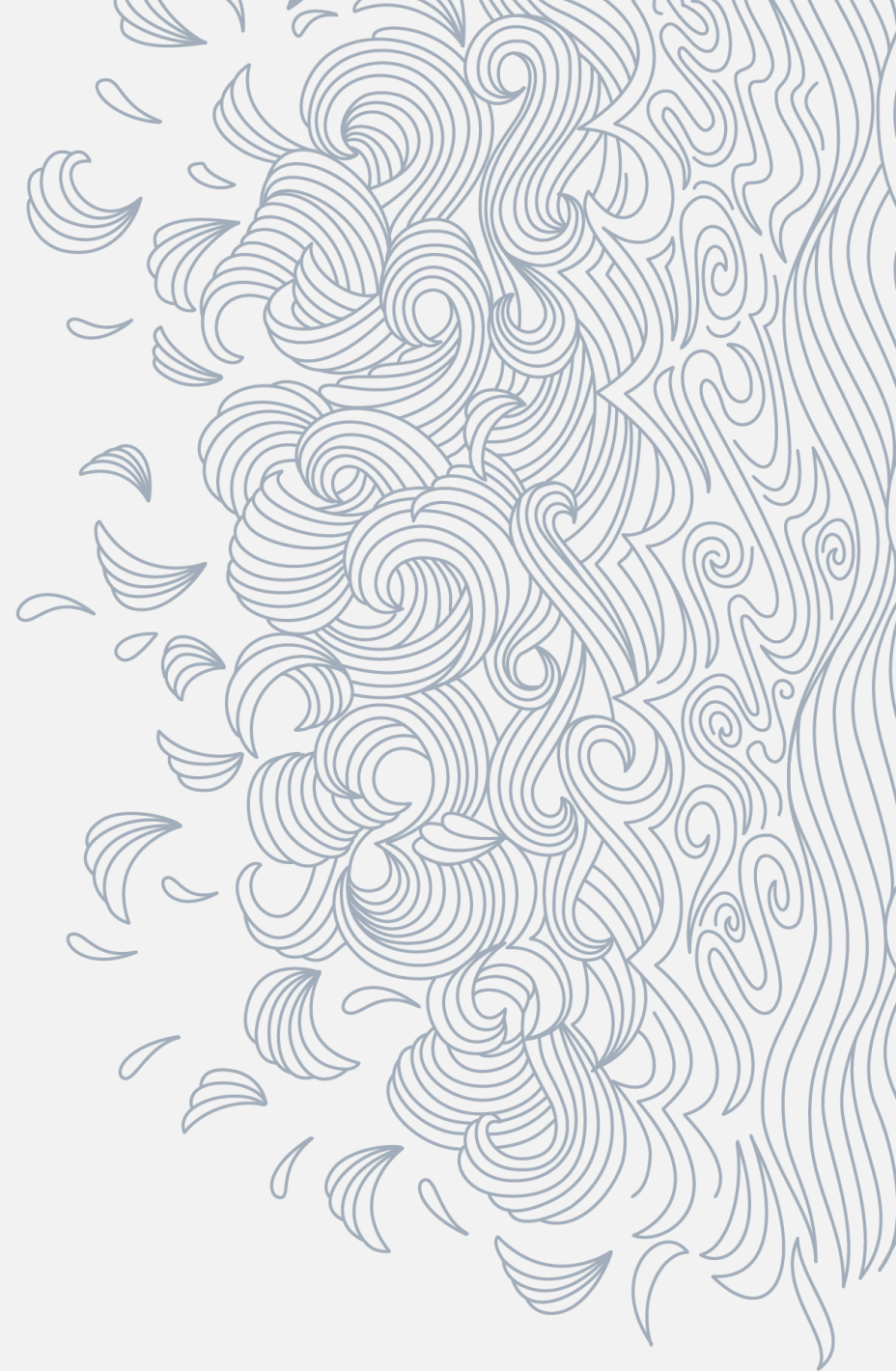
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**02.** National Minimum Wage requirements and enforcement

---

**03.** Competition issues and developments

---



# CASE STUDY



# SCENARIO



# SCENARIO

## SPORTS GALORE



Specialising in the production and sale of sports related confectionery

3 offices  
across  
the UK



## Accessing Right to Work Documentation



**HARD COPIES**  
Retained by Leeds  
office only; not  
shared



**ELECTRONIC  
COPIES**  
All held centrally at  
Head Office in  
London



**ALL OFFICES**  
Have access to  
electronic copies at  
any time

# SCENARIO

## SPORTS GALORE

At the start of 2024, Sports Galore anticipated an increase in the purchase of football related sweets due to Euro 2024 and recruited accordingly



## Characters



**LEAH**  
Legal Counsel



**MARCUS**  
Managing Director



**BETH**  
HRD

# PING!

## AN EMAIL FROM THE HRD LANDS IN **MARCUS'S** INBOX



From: **Beth**

To: **Marcus**

Cc **Leah**

Hi Marcus

Just wanted to give you an update on our new recruits. We've now got 3 additional permanent members of staff (Harry, Jordan and Kieran), an apprentice (Phil) and 1 consultant (Kobbie) who is retained on a self-employed business through his own company.

With the business being so busy, it's great news that they were all able to start on 1 June 2024. It's been manic here, so not yet done the RTW checks, but here's a breakdown of salaries etc.

Hope that's ok with you.

Beth



# NEW RECRUITS



## HARRY

- British national
- Paid £12 ph



## PHIL

- British national
- Paid £6.40 ph



## KOBBIE

- British national
- Paid day rate £500



## JORDAN

- Spanish national
- Skilled Worker visa expiring Jan 2025, with his previous employer
- Not yet applied for a new visa with Sports Galore
- Earns £38,700 per year working a 40-hour week



## KIERAN

- Australian national
- Originally started working for Sports Galore in 2000
- Original role as Business Analyst before moving to a Sales role in June 2024
- Has secured a Skilled Worker visa for his new role
- Earns £29,000 per year



**WHAT ARE YOUR  
IMMEDIATE RED FLAGS?**

# POINTS TO CONSIDER – IMMIGRATION



**Jordan**

- Does not have the right to work with Sports Galore and is therefore an illegal worker
- Potentially up to £60,000 civil penalty and a criminal offence (unlimited fine and potentially up to 5 years in prison)
- Needs to stop working and make a new Skilled Worker visa application
- What points would need to be considered for a new Skilled Worker visa application?
- What would the employer's considerations be if Jordan had pre-settled status under the EU Settlement Scheme, with him being eligible for settled status in June 2024?



**Kieran**

- Has there been a change of SOC Code?
- If a new Skilled Worker visa application needs to be made, what is the eligible salary threshold?

# POINTS TO CONSIDER – IMMIGRATION (CONT’)

01

Storage of a hard copy of the Right to Work documents in Leeds.

What would happen if there was a Home Office compliance audit?

02

Right to work checks need to be undertaken on all employees before they commence employment

03

Do you need to conduct right to work checks on those who are self-employed?

04

Are there any wider compliance obligations which the business needs to be aware of?

05

What could happen if Sports Galore is found to be in breach of its immigration compliance duties?

# SPONSOR COMPLIANCE DUTIES

## REPORTABLE WITHIN 10 WORKING DAYS

Not started role

---

10 consecutive working days' absence from work without permission

---

Employment ends

---

Sponsorship ends – e.g. worker moves to a different visa category

---

Salary changes – usually reductions only now that need reporting

---

Change in job title or duties (but where the role code stays the same)

---

Work location changes

---

Size of organisation or charitable status changes

---

## REPORTABLE WITHIN 20 WORKING DAYS

Change in company name

---

Sale, merger or takeover of all or part of the business

---

Insolvency or ceasing to trade

---

Changes to the nature of the business

---

## DOCUMENTS FOR EACH INDIVIDUAL SPONSORED WORKER

Checklist of documents to be held is contained in Appendix D

# WHAT IF WE DON'T GET COMPLIANCE RIGHT?

01

No issue found and the business is allowed to proceed as normal

02

You are asked to send an e-mail after the visit which should confirm documents that the Home Office was unable to see on the day

03

If there are minor issues, downgrade to a B-rating with a time-limited action plan

04

Suspension of licence

05

Revocation of licence - this will mean that all sponsored workers will lose their sponsorship and their leave may be curtailed unless they can find alternative employment

06

If illegal working is found:  
**Civil penalty** - up to £60,000 per illegal worker  
**Criminal sanctions** - unlimited fines and up to 5 years in prison



Hi Leah,

It's Beth here. Can you call me back when you get this, please? I know that we've been benefitting from having international staff since we got our sponsor licence last year, but Marcus is a bit worried about the cost of sponsorship.

Should we think about using the cost as a reason to refuse sponsorship where we can recruit for roles within the British workforce?

And what about using clawback clauses and loan agreements to support applicants with their visa sponsorship?

If we have a loan agreement, we can pay the applicant's fees to the Home Office on their behalf, and then have a tapered repayment system in place.

**What do you think?**

**WHAT DO YOU NEED TO CONSIDER  
FROM AN IMMIGRATION PERSPECTIVE?**

**WHAT DO YOU NEED TO CONSIDER  
FROM A NATIONAL MINIMUM WAGE  
PERSPECTIVE?**



# IMMIGRATION POINTS TO CONSIDER – DO WE HAVE TO PROVIDE SPONSORSHIP?

## Discrimination considerations

---

- Right to work question should only be asked at the offer stage to reduce the risk of discrimination claims
- Recruitment decisions should not be based on the costs alone but rather on the merits of the application
- If the business does not have a sponsor licence:
  - Could use this as a reason to refuse sponsorship
- If the business does have a sponsor licence:
  - Going to be difficult to refuse sponsorship if the migrant worker is the best candidate and the job is eligible for sponsorship
  - Must be a strong business case not to sponsor OR the job is not eligible for sponsorship OR the candidate is not eligible for sponsorship
- Ensure consistent and fair approach when deciding on visa duration





# CLAWBACK CLAUSES

Employers often like to include a clawback provision in the employment contract where they have covered costs for migrant workers (and any dependents)

**Suggested wording:** If you leave employment for any reason (including by way of resignation) within the first two years following the grant of your visa, you will be required to repay the visa costs in the following proportions:

PERIOD	CLAWBACK PROPORTION	CLAWBACK AMOUNT
0-12 months	100%	£X
12 – 24 months	50%	£X
24 months +	0%	£X

# SPONSORSHIP: THE SPONSOR'S COSTS

ITEM 	AMOUNT 
SPONSOR LICENCE FEE	£536 / £1,476
SPONSOR LICENCE PRIORITY (OPTIONAL)	£500 10 working days
CERTIFICATE OF SPONSORSHIP	£239
IMMIGRATION SKILLS CHARGE	£364 / £1,000 per year of sponsorship

Costs cannot be passed to migrant

Exemption on ISC for EU workers if applying under GBM: SSW and under 3 years

Costs depend on whether business is large or small sponsor

# SPONSORSHIP: THE SPONSOR'S COSTS

ITEM 	AMOUNT 	
IMMIGRATION HEALTH SURCHARGE	£1,035 per year (£776 for children)	
APPLICATION FEE	<b>Outside the UK</b> Under 3 years' sponsorship: £719 More than 3 years' sponsorship: £1,420	<b>Inside the UK</b> Under 3 years' sponsorship: £827 More than 3 years' sponsorship: £1,636
PRIORITY SERVICES (OPTIONAL)	<b>Outside the UK</b> 5 working days: £500 / 24 hours: £1,000	<b>Inside the UK</b> 5 working days: £500 / 24 hours: £1,000

# POINTS TO CONSIDER – NATIONAL MINIMUM WAGE (1)

01

## LOANS

means that money has been paid to the employee to spend how they wish

02

## ANOTHER POSSIBLE EXCEPTION IS WHERE THE DEDUCTION RELATES TO "A PRE-REQUISITE TO ELIGIBILITY FOR EMPLOYMENT"

- Is the requirement a pre-requisite placed on a person to put them in a position to take up employment in a particular type of work or is it imposed by an employer to enable them to perform the duties of the employment?
- Who is responsible for meeting the charge? Are the costs the personal liability of the worker or the liability of the employer?
  - *The example given in HMRC's NMW Manual is the fee that a nurse is required to pay to register with a professional body in order to work as a nurse*
  - *This fee is the nurse's liability as a "pre-requisite to eligibility for employment", and so if the employer pays this fee and recovers it from the nurse this will not amount to a deduction for NMW purposes*

# POINTS TO CONSIDER – NATIONAL MINIMUM WAGE (1)

03

## VISA FEES

- Arguable that the visa application fee and Immigration Health Surcharge are necessary fees which the migrant worker is responsible for and must be paid as a pre-requisite to eligibility for employment
- Less clear that this would be applicable to optional fees, such as priority services, premium appointment fees or professional services fees

04

**ALSO UNCLEAR IN LAW IF THE GUIDANCE IS CORRECT – IN RELATION TO OTHER DEDUCTIONS E.G. CAR SCHEMES IT WOULD BE A DEDUCTION (LES CASE)**

05

## ADVICE

Do not allow the deduction to fall below applicable NMW rate

# **GENERAL ELECTION**

## **WHAT CAN WE EXPECT FOR IMMIGRATION**



# IMMIGRATION

	CONSERVATIVE	LABOUR
Net migration levels	Proposed an annual cap, to be determined by the recommendations of MAC	Seeking to introduce measures to reduce net migration
Work migration	Levels of work migration would be subject to an annual cap (see above), and the Skilled Worker salary threshold would be increased in line with inflation	Reviewing Skilled Worker salary threshold increase, enforcing skills training, reconsidering resident labour market test, and banning law-violating employers from hiring migrants
Student migration and the Graduate route	Restrict remote teaching, and make it possible for universities who accept international students who fail to pass Home Office visa checks to lose their sponsor licences	Retain ban on students' family members
Immigration fees	Increase to application fees by 25%, remove IHS discount for international students, undergo health check before receiving entry visa	No public comment as yet
Youth Mobility Scheme	The party "are not introducing an EU-wide youth mobility scheme"	The party has "no plans for a youth mobility scheme" with the EU
Exploitation of migrant care workers	Since March 2024, care providers must be registered with the Care Quality Commission (CQC) to sponsor migrant care workers	Ban employers who breach employment law from hiring migrant workers



# NATIONAL MINIMUM WAGE





# FEBRUARY 2024

524 businesses named and shamed

£16m to be repaid plus penalties. Largest underpayment £5m

## MAIN CAUSES

a. Deductions from pay – 35% - salary sacrifice a huge issue

b. Missing time – 31%

# CALCULATING NMW

NMW IS ASSESSED BY REFERENCE TO A WORKER'S HOURLY RATE, WHICH IS CALCULATED BY DIVIDING THE TOTAL REMUNERATION IN THE RELEVANT PAY REFERENCE PERIOD BY THE TOTAL NUMBER OF HOURS WORKED OR DEEMED TO HAVE BEEN WORKED OVER THE PAY REFERENCE

*I.E. – R/H*



**EASY!?!**



# WORK TYPES



**SALARIED  
HOURS WORK**



**TIME WORK**



**OUTPUT WORK**



**UNMEASURED  
WORK**

# WORKING TIME



**No actual  
definition**



**Absence**  
Salaried – if paid  
is working time  
Time work –  
time or pay is  
excluded



**Travel**



**Training**



**On call**

# CALCULATING NMW

DEPENDS ON:

01

PRP

02

REMUNERATION  
PAID THAT  
COUNTS  
TOWARDS NMW

03

REMUNERATION  
PAID THAT  
DOESN'T COUNT  
TOWARDS NMW  
IN THAT PRP

04

DEDUCTIONS  
THAT REDUCE  
AND THOSE  
THAT DON'T  
REDUCE NMW

05

THE TYPE  
OF WORK

# COMMON ISSUES



Uniforms



“Hidden” time



Work placements



Records



TOIL



Recruitment  
processes /  
Trial Periods



Salary  
Sacrifice



Goods  
and Services



Additional  
Payments



Owners /  
Directors

# ENFORCEMENT

01

INDIVIDUAL CLAIMS

02

HMRC AUDIT

Arrears of pay

Penalty – up to 200% of arrears

03

NAME AND SHAME

04

CRIMINAL PENALTIES

Provide false records or information

Fail to keep the required records

Keep false records

Refuse or wilfully neglect to pay the NMW

Intentionally obstruct or delay an enforcement officer

Refuse or neglect to answer questions or provide information to an enforcement officer



# COMPLIANCE: COMPETITION ISSUES



# COMPETITION AUTHORITIES AND THE LABOUR MARKET

**02**

THE REGULATORY  
FOCUS

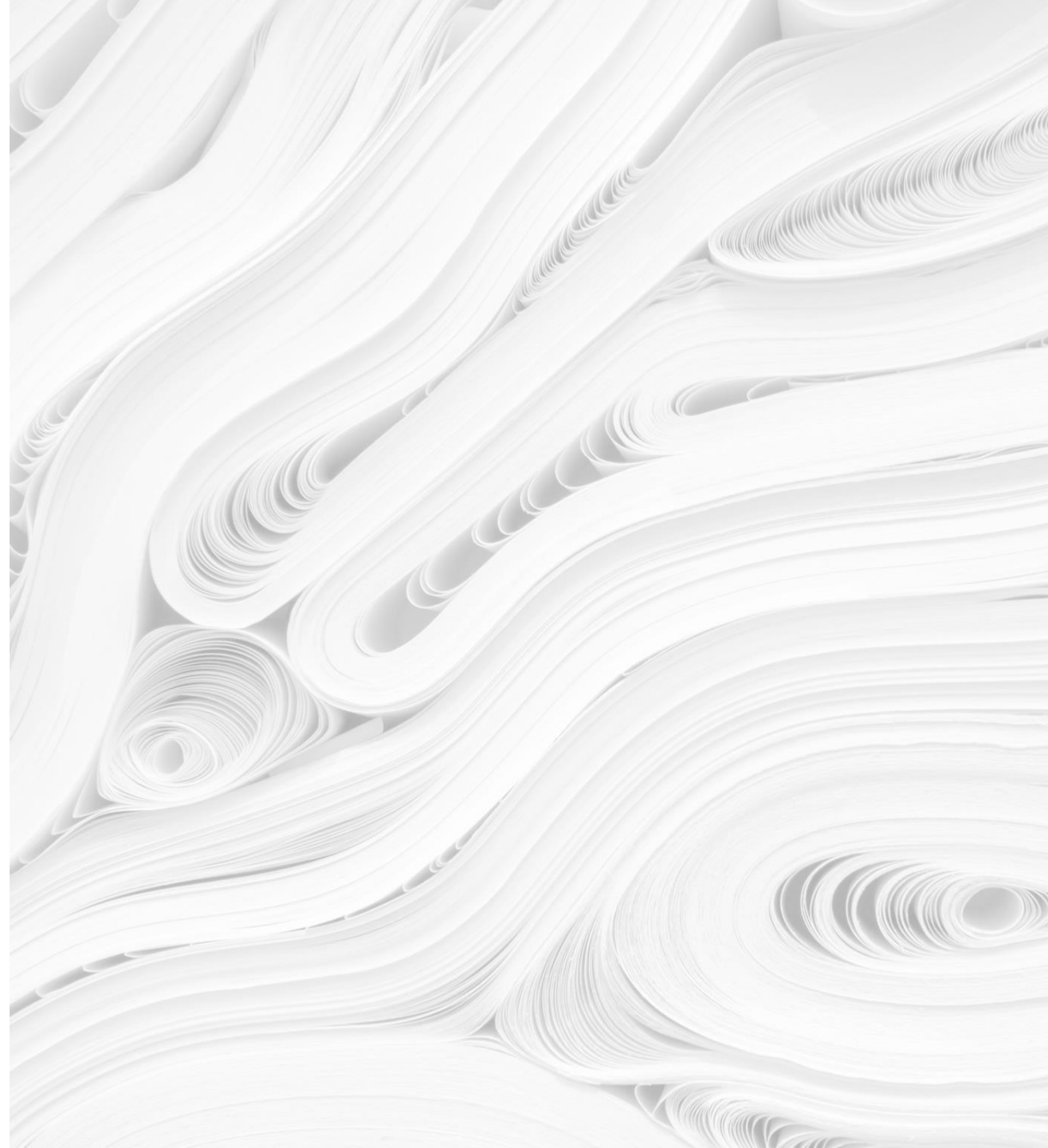
**03**

WHAT SHOULD  
YOU BE DOING?

# COMPETITION AND MARKETS AUTHORITY



- Competition and market power in UK labour markets” – January 2024
  - Widespread use of non-competes
  - Impact of concentrated labour markets
  - New working models
- Enforcement action
- Non-poaching agreements
- Information sharing





# NON-COMPETES

01

UK Government proposal to limit to 3 months

02

Federal Trade Commission ban on non-competes

03

CMA position

04

Europe

# WHAT SHOULD YOU BE DOING?



## NON-COMPETES

- Drafting
- Tailoring
- Garden leave
- Alternative restrictions



## INFORMATION SHARING



## NON-POACHING AGREEMENTS

# QUESTIONS



**MORE IMAGINATION MORE IMPACT**

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