Shoosmiths National Employment Team

On Demand: Employment Law Update

October 2022

SHOOSMITHS

Overview

Developments since March 2022:

- Legislation Update
- What's on the horizon?
- Case Law Update

EMPLOYMENT LAW UPDATE

Legislation Update

Legislation Update

- Changes to fit notes
  - From 1 July 2022 the Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) (No 2) Regulations came into effect
  - Registered nurses, occupational therapists, pharmacists and physiotherapists are now allowed to sign statements of fitness for work or “fit notes”
  - Aim is to make it easier for patients to see GPs by reducing their workloads
  - Department for Work and Pensions has published guidance for healthcare professionals to assist them in issuing fit notes

Legislation Update

- Supply of agency workers during industrial action
  - Previously, employment businesses were restricted from supplying temporary agency workers to fill duties by employees taking part in strikes
  - New regulations introduced for England, Scotland and Wales
  - Businesses impacted by strike action now able to use agency workers to temporarily cover essential roles for the duration of the strike
  - In addition, from 21 July 2022, the limits on the maximum damages award which may be made against a trade union where unlawful industrial action takes place have been increased as follows:

• Less than 5,000 members: £40,000 (previously £10,000)
• 5,000 to 24,999 members: £200,000 (previously £50,000)
• 25,000 to 99,999 members: £500,000 (previously £125,000)
• 100,000 members or more: £1,000,000 (previously £250,000)

Legislation Update

- Ban on exclusivity clauses in employment contracts
  - Draft regulations have now been laid before Parliament
  - They will make unenforceable any contractual term which stops a worker from doing work or performing services under another contract or arrangement or which stops a worker from doing so without the employer's consent
  - Where they breach an exclusivity clause, employees are protected from unfair dismissal (with no qualifying service required) and workers are protected from detriment
  - Applies to contracts of workers whose earnings are on, or less than, the lower earnings limit (currently £123 a week)
  - Regulations will apply to England, Scotland and Wales

Employment Law Update

On the horizon....

What's on the horizon?

- A number of pieces of legislation are due to be brought in "when parliamentary time allows". These include:
  - Employment Bill
  - Creation of a new enforcement body
  - Statutory Code of Practice on dismissal and re-engagement
- A couple of Private Member's Bills have also received support from the government. These include:
  - Neonatal Care (Leave and Pay) Bill
  - Employment (Allocation of Tips) Bill

What's on the horizon?

- Employment Bill
  - Neonatal leave and pay
    - New right to up to 12 weeks' paid leave for parents of babies requiring neonatal care
    - Available from the first day of work
    - On 15 July 2022, the government announced it was backing the Neonatal Care (Leave and Pay) Bill, a Private Members' Bill. The Bill mirrors the rights which were outlined for the Employment Bill
  - Good work plan proposals
    - Measures to address one-sided flexibility, including a right to reasonable notice of work schedules and penalty for non-compliance
    - Requirement for employers to pass on all tips and service charges to workers without deductions and to distribute tips in a fair and transparent way having regard to a statutory Code of Practice on Tipping
    - On 15 July 2022, the government announced it was backing the Employment (Allocation of Tips) Bill, a Private Member's Bill. The Bill mirrors the rights which were outlined for the Employment Bill

What's on the horizon?

- Employment Bill
  - Carers leave
    - Intention is to introduce up to one week (five working days) of unpaid leave per year for carers
    - Carers leave will be a day one right
    - Eligibility will depend on:
      - Employee's relationship with person being cared for (likely to follow the definition of a dependant)
      - That person needing long-term care
    - Leave can be used for providing care or making arrangements for care to be provided
    - Leave can be taken in half days, days or up to a block of one week
    - Required notice of twice the length of the leave plus one day
    - Employers can postpone if taking leave would cause business disruption
  - Extending redundancy protection
    - Covers pregnant women and new parents returning from maternity leave, adoption leave and shared parental leave
    - Would expand entitlement to be offered suitable alternative employment where a vacancy exists

What's on the horizon?

- Creation of a single enforcement body
  - Body will:
    - Support employers to comply with the law
    - Provide detailed technical guidance
    - Have non-compliance and enforcement powers
  - Remit will cover:
    - NMW / NLW
    - Employment agency regulation
    - Modern slavery
    - Holiday pay for vulnerable workers
    - SSP
    - Unpaid Employment Tribunal awards
  - Introduction of compliance notices, civil penalties and naming non-compliant businesses

What's on the horizon?

- Future of Work review
  - Matt Warman MP is leading a review on the Future of Work
  - The review will be conducted in two parts – the first phase will produce a high level assessment of the key strategic issues and the second phase will provide a more detailed assessment of selected areas of focus
  - On 27 May 2022, the BEIS Committee launched a call for evidence into the UK labour market
  - The Committee is keen to understand:
    - Whether current employment law is fit for purpose or requires reform
    - Whether the UK has enough workers with the right skills in the right places to do the jobs required for the economy
  - Responses were required by 8 July 2022

What's on the horizon?

- Statutory Code of Practice on "fire and re-hire" practices
  - The government has promised to publish a draft statutory code of practice on dismissal and re-engagement for consultation
  - Code will set out good practice and is intended to help reach agreement
  - Tribunals will be able to take the code into account when considering relevant cases
  - Tribunals will also have the power to apply an uplift of up to 25% of an employee's compensation where the code applies and an employer has unreasonably failed to follow it

What's on the horizon?

- Call for evidence: Review of hybrid and distance working
  - On 31 August 2022, the Office of Tax Simplification published a call for evidence of emerging trends in hybrid and distance working
  - The information will allow the OTS to consider the income tax, social security, employee//self-employee expenses and allowances and corporate residence and permanent establishment implications arising from changes in working practices
  - In particular, the questions focus on employees working in a different country to their employer as well as hybrid and distance/home working in the UK
  - The call for evidence closes on 31 October and the findings should be published in early 2023

Employment Law Update

Case Law Update

Case Law Update

- Protected beliefs

  Forstater v CGD Europe and others

  - Ms Forstater believes that a person's sex is a material reality and cannot be changed
  - She was engaged as a visiting fellow by CGD Europe
  - During her engagement, she became involved in debates on social media about gender identity issues and made remarks which some trans people found offensive. Some of her colleagues complained and as a result her visiting fellowship was not renewed
  - She claimed that her gender-critical beliefs constituted a protected philosophical belief and that her treatment was therefore discriminatory. The EAT agreed that her beliefs were protected
  - The ET then considered whether she had been discriminated against and concluded that she had suffered direct discrimination and victimisation. They found that she had not manifested her beliefs inappropriately and that the decision not to renew her contract was because of her beliefs

Key Learning:

Employers need to carefully balance the rights of conflicting protected characteristics in the workplace and take action only where the manifestation of beliefs is inappropriate

Case Law Update

- Protected beliefs

  Mackereth v DWP

  - Dr Mackereth adhered to the principles of the Great Reformation including a commitment to the supremacy of the Bible as the word of God and the final authority in all matters
  - He applied to work as a health and disabilities assessor at the Department for Work and Pensions
  - The role required him to access claimants for disability-related benefits, including conducting face-to-face assessments. DWP had a policy that transgender individuals should be given their preferred name and title and always referred to in their presented gender
  - Due to his beliefs, Dr Mackereth objected to using pronouns or titles inconsistent with an individual's birth gender. He issued claims for direct and indirect discrimination and harassment
  - The EAT found that, although Dr Mackereth's beliefs were protected, his claims failed on the basis the alleged acts had not taken place, DWP had not taken a final decision to dismiss him but were still at the information gathering stage when he decided to leave

Key Learning:

Finding the balance between competing interests is not easy but it is important that employers investigate issues carefully and separate beliefs from the way in which they are manifest

Case Law Update

- Whistleblowing

  Kong v Gulf International Bank (UK) Ltd [2022]

  - Ms Kong was employed as Head of Financial Audit reporting to Mr Mohammed
  - Ms Kong made a protected disclosure to Ms Harding, Head of Legal regarding GIB's use of a financial compliance template
  - Ms Harding disagreed with Ms Kong's view and during a discussion Ms Kong questioned Ms Harding's legal awareness. Ms Harding complained to the Head of HR and the CEO
  - The Head of HR, the CEO and Mr Mohammed subsequently dismissed Ms Kong for her behaviour, manner and approach with colleagues. Ms Kong brought various claims including for automatic unfair dismissal
  - The ET, EAT and CA dismissed the automatic unfair dismissal claim on the basis the motivation of the decision-makers was not the content or fact of the protected disclosure but the way in which Ms Kong made personal criticisms to Ms Harding

Key Learning:

Where a worker has made a protected disclosure, it may be possible to dismiss them if their behaviour in making or discussing that disclosure is inappropriate – but tread carefully!

Case Law Update

- Long COVID as a disability

  Burke v Turning Point Scotland

  - Mr Burke was employed as a caretaker
  - He tested positive for COVID-19 in November 2020. Initially his symptoms were mild but he later developed severe headaches and fatigue. He could not undertake household tasks, frequently needed to lie down to recover and struggled standing for long periods. He also experienced joint pain, a loss of appetite, a reduced ability to concentrate and difficulty sleeping. His symptoms were unpredictable, and he suffered frequent relapses
  - He remained off work from November 2020 and was dismissed in August 2021 because of ill health
  - He brought various claims including for disability discrimination
  - The ET agreed that he was disabled within the meaning of the Equality Act 2010

Key Learning:

Employers are increasingly likely to experience employees with long-COVID. On the basis that the condition can be a disability, care will need to be taken to get detailed medical evidence and, where appropriate, to consider reasonable adjustments

Case Law Update

- ACAS Code of Practice

  Rentplus UK Ltd v Coulson

  - Ms Coulson was employed as Director of Partnerships. In early 2018 a reorganisation was started which was described as a redundancy process. Ms Couslon was put at risk
  - In June 2018 she raised a grievance on the basis her role was not redundant and had been contrived by the new CEO who had marginalised her. Her grievance was dismissed, and her employment was subsequently terminated
  - She brought claims for unfair dismissal and direct sex discrimination
  - The ET and EAT upheld her claim for unfair dismissal concluding that the consultation meetings were a sham and the decision to dismiss her had already been taken. Further redundancy was not the reason for her dismissal, but rather the desire to remove her from her role
  - She was awarded a 25% uplift to her compensation for failure to follow the Acas Code

Key Learning:

Employers should be careful of relying on redundancy as the grounds of dismissal unless a genuine redundancy situation exists

Case Law Update

- Holiday pay

  Harpur Trust v Brazel [2022]

  - Ms Brazel was a visiting music teacher at a school run by the Harpur Trust
  - She was employed under a permanent contract on a zero hours basis. She worked mainly during school term-time and was therefore a "part-year" worker
  - She was entitled to 5.6 weeks' paid annual leave which she had to take during school holidays. Harpur Trust calculated her pay for the holiday based on 12.07% of her earnings at the end of each term
  - Ms Brazel believed this approach was incorrect and brought a claim for deductions from wages
  - The EAT, CA and SC agreed with her. The correct approach was to use the "calendar week method" looking back over the previous 12 weeks to calculate the total hours and pay received and then dividing the pay by 12 to produce an average week's pay for the holiday period

Key Learning:

Check your holiday pay calculations and, if the percentage method is used, change your practices to the calendar week method

Case Law Update

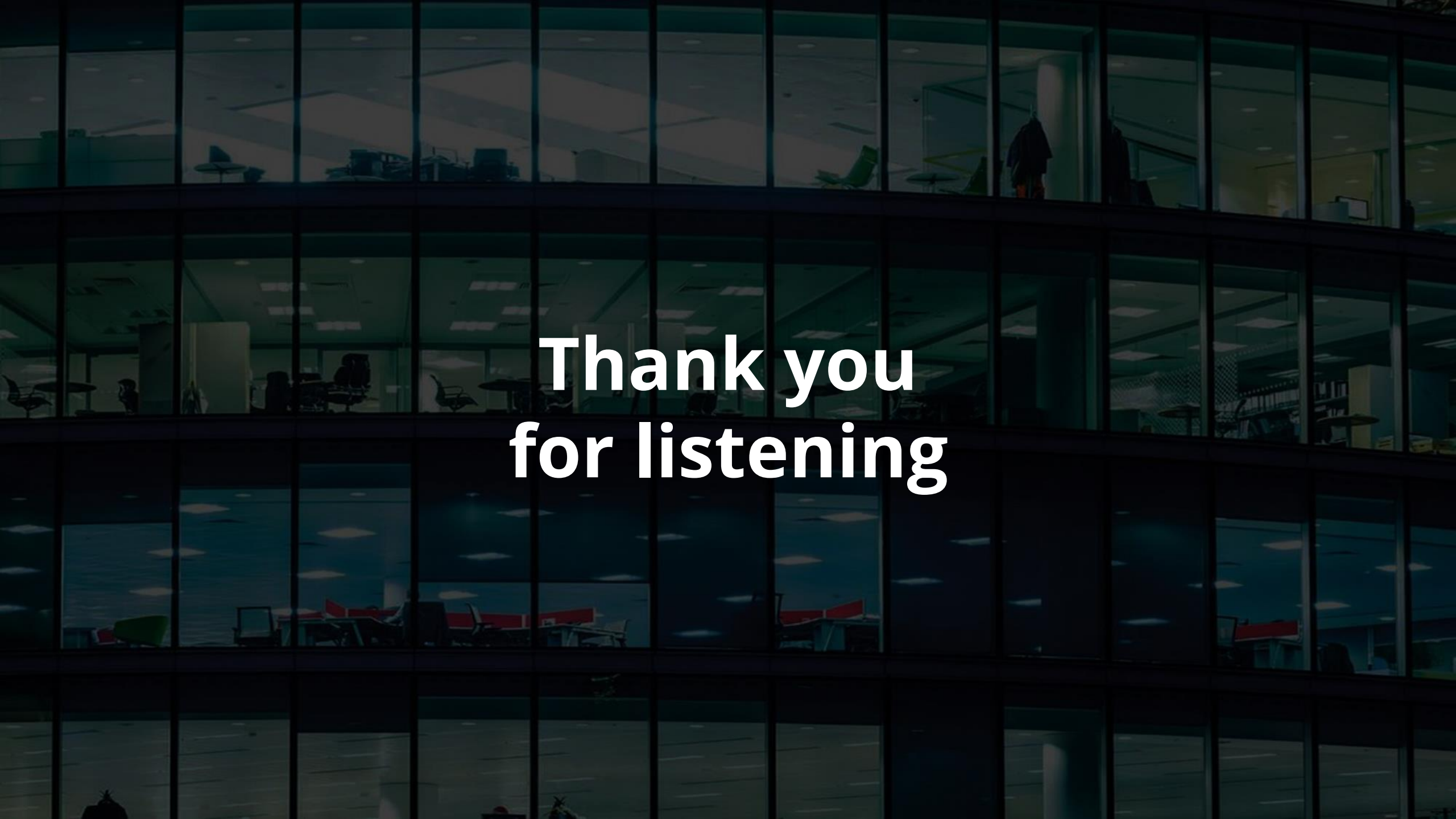
- Fire and re-hire

  Tesco v USDAW & others

  - Between 2007 and 2009, Tesco undertook a reorganisation which involved some site closures and relocations. To retain staff, it agreed to pay an enhancement known as “retained pay”
  - Affected employees were told the retained pay would remain for as long as they were employed in their current role, was guaranteed for life and could not be negotiated away
  - In 2021, Tesco announced its intention to remove retained pay in exchange for a lump sum but if agreement was not reached, they would look to dismiss and re-engage staff on new terms
  - USDAW obtained an injunction to prevent Tesco from terminating the affected contracts
  - Tesco appealed and the CA removed the injunction on the basis that, even with the words used at the time, there was no intention that the contracts would continue for life or until normal retirement age. Further, there was nothing to suggest any intention that the contracts could not be terminated on notice

Key Learning:

The CA’s decision will be welcome relief to employers. However, care always needs to be taken when considering dismissal and re-engagement and regard should be had to ACAS guidance and the statutory code when it comes into force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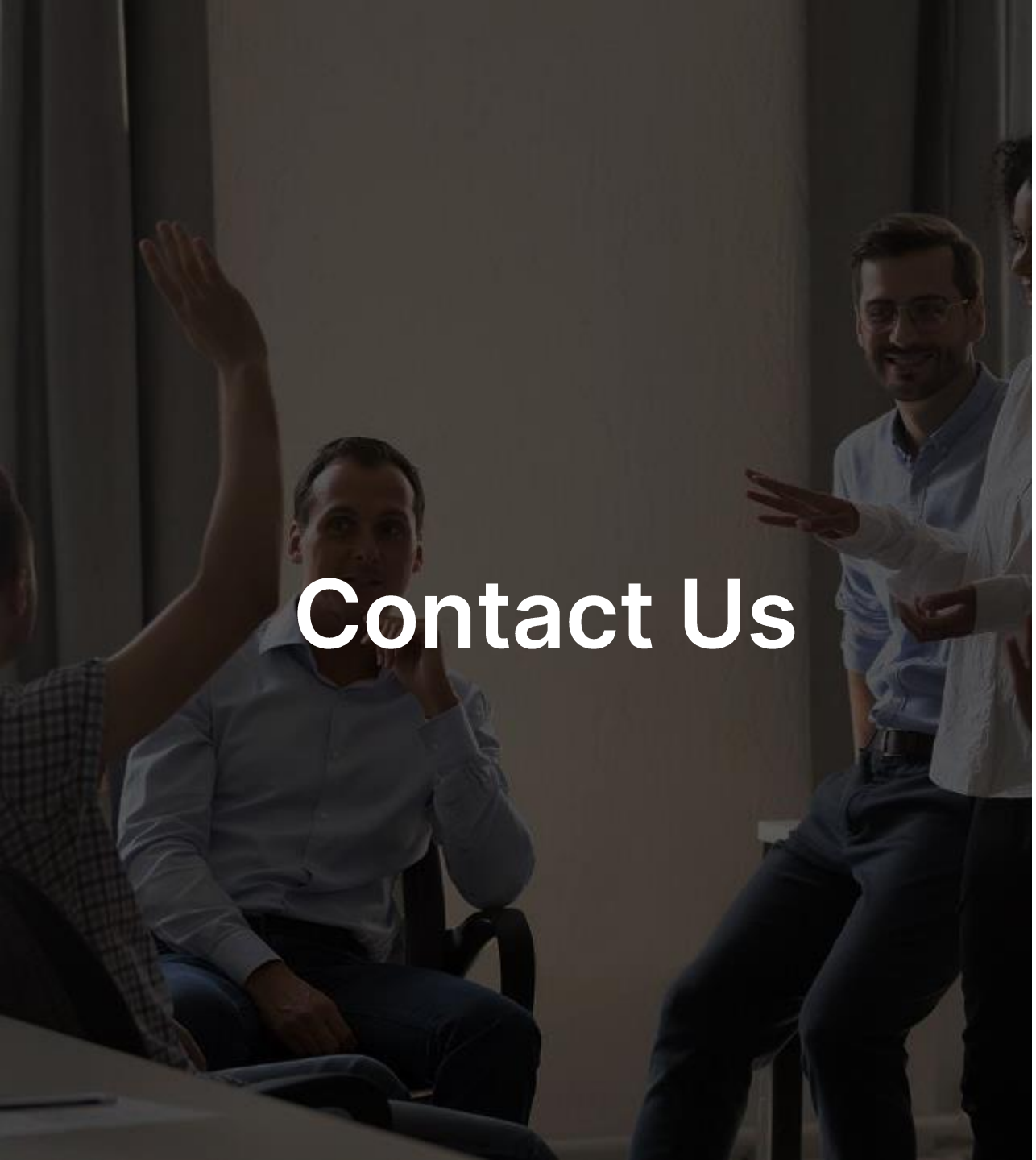

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