



The legal considerations for returning to work

RECOVER – A COVID-19 response series for general counsel

Companies all over the world reacted swiftly and empathetically to the COVID-19 crisis, altering their working practices to facilitate their employees working from home and maintaining operations. Many companies took aid from their governments to retain as many jobs as possible through furlough schemes, while others had to make difficult decisions to preserve their businesses, including layoffs/redundancies, reduced working hours, pay cuts and pay freezes.

As many governments start to lift restrictions, and encourage businesses to re-open in order to reverse the economic decline caused by the pandemic, employers are facing a new set of considerations. From the physical considerations of how to maintain productivity while also ensuring a safe working environment, to how to limit workplace exposure, and the employment law considerations of whether what they need from employees is actually lawful.

Employers will need to consider the short-term implications, and also what the long-term impact will be. This article explores the immediate, short-term implications of returning to work.

Regardless of the outcome of vaccine and treatment development, or the success of social distancing measures, employers need to prepare for their employees' return to work by considering their obligations to protect their employees' rights, safety, and well-being, while also safeguarding their business.

What will the immediate "new normal" look like?

There are a number of scenarios that companies are planning for. In the best case, the pandemic disappears and employers only need to consider whether they need to write (or adapt) policies and procedures for potential future pandemics. In a worst case, a "second wave" appears, or even a recurring "wave" of COVID-19 outbreaks.

Questions employers may now be asking include:

- Should they change their workforce structure to a higher proportion of temporary or contingent workers that can be hired, let go, and re-hired more easily?
- Should they ask some of their workforce to work from home permanently?
- What long-term provisions need to be made to deal with sudden out-breaks of contagion?



Employment Law

The employment law considerations for returning to work

Laws will vary between countries, but the following are questions to consider when planning a return to work for your employees:

Can you introduce rotations in order to reduce the number of employees in your premises at any one time?

Some employers may be considering staggered working hours to reduce exposure to the virus on rush-hour public transport, while some are thinking about rotating working weeks to reduce the need for deep sanitization of the office. Consider whether your policy alters the employee's existing terms and conditions for employment, and whether you will need trade union agreement, collective consultation or individual agreement.

If you have reduced your employee base through lay-offs/redundancy, can you gradually re-hire ex-employees, and again let them go should the government impose a further lockdown?

It is generally not recommended to re-employ staff you made redundant, because of the extra complexity it brings, but you may be able to bring back ex-employees on a freelance basis for projects. Before embarking on a lay-off program, consider the potential future requirement for skills, and decide whether alternatives such as furlough or reduced working hours may be more appropriate.

Should you change the make-up of your workforce to make employment more agile and therefore easier to respond to various government restrictions?

Employing a contingent workforce or temporary workers may make it easier to reduce or increase the size of your workforce in response to changes in government policies or the economy, but if these workers also support other companies and they are required to be present in your workplace, the risk of spreading COVID-19 may increase. New policies will need careful consideration, as will the availability of testing, tracking and tracing programs in your country.

Can you introduce or extend a "reduced working week" if you need to?

In many jurisdictions, it is unlikely that you can impose a forced reduction in hours, but you would be able to request voluntary reductions in hours with commensurate wage reductions; however, laws in your jurisdiction would guide you on whether you need individual consent, collective consultation, and union involvement.

Do you need special policies for seasonal/migrant workers?

With many countries starting to open borders, it may be worth considering whether to amend your existing policies for testing, monitoring and communicating infection in the workplace, or whether reducing your use of foreign workers would breach policies.

Do you need new policies for ongoing testing or health screening?

Consider the legal implication of forcing testing/health screening on your employees, as well as the data privacy implications of processing and storing the personal information on a database. How frequently would you need to test? Is measuring temperature effective? And what facilities do you need to put in place for employees that start to feel unwell at work?



Employment Law

Can you force employees to use personal protective equipment (e.g., facemasks) at work?

While many governments are encouraging the use of facemasks rather than making it mandatory, it is generally accepted that employers are allowed to stipulate the use of PPE for the safety of the workforce.

What other policies need consideration?

Many companies have put new policies in place since the start of the COVID-19 pandemic. While there is still no cure or vaccine, it would be prudent to extend policies, but also revisit your policies on discrimination or inclusion (in case suffering from COVID-19 attaches a stigma to your employees at work), and considering your sick leave/absence policy and whether limits on time off should be altered.

RECOMMENDED ACTIONS

1. Review your workforce needs in relation to business strategy

Map out your workforce and compare it to your likely workforce needs for the immediate future. Identify all the types of workers you use or employ, and identify the employment law implications of any changes necessary.

2. Review your policies

Review all your policies, not just those directly affected by the pandemic (e.g., sick leave or remote working policies). Decide on proposed changes and consult with your workforce or their representatives as necessary, before implementing the new policies.

3. Create a return to work strategy

Set out all the considerations, alternations and potential phases.

4. Communicate the strategy

Communicate the return to work strategy with your employers and suppliers (such as facilities, cleaning and catering suppliers) with enough notice.

5. Implement your strategy

Implement the strategy and monitor continuously for any future considerations.

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