

Opening the Doors: Return-to-Workplace Considerations During COVID-19

Part Five: International Employment Considerations

April 27, 2020

Employment

Whether a company is an essential business or is expecting to reopen in the coming weeks, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations. Generally speaking, employees can be required to come to the workplace, but this general rule must be considered against the backdrop of an unprecedented national health crisis that gives rise to a novel legal landscape.

This five-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

1. Navigating the Legal Risk of Return ([Part One](#))
2. Potential Screening Measures for Employees Returning to the Workplace ([Part Two](#))
3. General Workplace Safety Precautions ([Part Three](#))
4. Accommodating Special Circumstances ([Part Four](#))
5. **International Employment Considerations (Part Five)**

International Considerations

As governments internationally face growing pressure to identify the milestones leading to the reopening of markets and economies, and an increasing number of large companies announce plans to restart work imminently, employers are thinking creatively about ways to balance legal/compliance risk against commercial imperatives.

In some countries, such as South Korea, business has remained open, albeit subject to social distancing measures. In others, notably Germany, steps are being taken to reopen certain businesses and to ease lockdown measures implemented weeks ago. President Trump's White House has issued a three-phased plan for reopening the U.S. economy, entitled Opening Up America Again. Otherwise, governments around the globe are generally demonstrating reluctance to produce guidance suggesting that a return to "business as usual" will be happening any time soon. The UK government, for example, appears to feel that any such messaging would undermine clear public pronouncements concerning the need to isolate.



As addressed in [Part One](#) of this series, a threshold issue for many employers contemplating the resumption of business is the risk of claims by employees who may be exposed to COVID-19 in the workplace. Such claims could theoretically arise no matter when operations resume, if a vaccine is not yet available. Most employers cannot afford to wait until that time to recall employees to the worksite, however.

Employers will therefore want to consider preparatory steps carefully. Certain of the issues addressed below are already addressed from a U.S. perspective in previous briefings in this series, linked above. In this briefing, we highlight some of the international employment legal considerations that will need to be taken into account by multinationals with operations outside of the U.S. as they plan for the resumption of operations.

Guidance and Benchmarking

Employers operating in multiple jurisdictions should think carefully about the following questions as they formulate a plan for resuming on-site operations:

- What governmental or other health and safety guidance is available and relevant locally?
- How are employment agencies and contract workers engaged by the business thinking about these issues?
- Have industry associations or relevant employee representative bodies published any thinking on return to work protocols/measures?
- Is it necessary or appropriate to liaise with works councils, health and safety committees, or local health authorities before making concrete return to work plans?

Flexible Working Practices

Social distancing can be promoted by working on strategies to address:

- **Technology.** Employers should consider whether any technological improvements may be necessary to facilitate better remote working.
- **Flexible Work.** Increased teleworking and greater flexibility as to working hours and shift patterns will limit the number of employees travelling to and from work, and on site at any one time, so employers should consider these measures. Requests for flexible work should be addressed in a non-discriminatory fashion. Indirect discrimination occurs, for example, where a protected class of employees suffers a disadvantage as a consequence of the application of policies and procedures, and such disadvantage cannot be justified as a proportionate means of achieving a legitimate goal. Employers should also note that local laws may entitle employees to take time off work, paid or unpaid, to care for dependents.
- **Travel and Non-essential Meetings.** Employers should consider how to avoid non-essential meetings and travel, at least at the outset. Companies may need to consider investment in new technology and equipment in order to promote new ways of working.



- **Sabbaticals/Unpaid Leave.** It may suit some employers, from a cost-management perspective, to encourage those wishing to do so to take sabbaticals or unpaid leave until the reopening of the office is more settled.
- **Key Roles and Functions.** Some employers are taking this opportunity to review their operations generally, to optimise current organisational structures and reporting lines, and reduce some headcount. At-will employment is not a concept recognised in most ex-U.S. locations, so decisions on selection for termination will generally need to be justified legally if unfair or abusive dismissal claims are to be avoided. Employers will also need to consider applicable notice periods, the enforceability of any post-termination restrictions, and other relevant contractual rights and obligations before finalising concrete plans.
- **Employee Waivers.** As in the U.S., it is unlikely in most countries that employees who may be infected with COVID-19 as a consequence of a return to work will be able lawfully to waive prospective personal injury claims against employers. Suitable preparation and planning, however, will significantly reduce, or even eliminate, the risk of negligence findings against employers.
- **Employee Engagement.** Employers operating internationally may need to include employees, or their representatives, in planning for a return to work. Open and clear communication will be central to securing the necessary confidence from employees to make the return to the office a success. In France, for example, health and safety committees will have a central role to play in implementing return to work programmes. In other countries across Asia and Europe, trade unions will have a right to consultation, and potentially co-determination, in connection with employee safety measures.
- **Sick Leave, Pay, and Benefits.** Employers should consider whether relevant company policies can be temporarily amended, or supplemented, to secure employee buy-in on the measures being considered to facilitate a return to work.



Further thoughts on social distancing arrangements are provided in [Part Three](#) of our briefings in this series.

Employee Screening

Employers recognise that medical checks and other testing and screening programmes will be critical to any successful return to the workplace. In the U.S., as addressed in [Part Two](#) of this series, the CDC, the EEOC and others have provided guidance to employers wishing to conduct body temperature checks and other limited medical inquiries of their employees during the COVID-19 pandemic without violating anti-discrimination rules. Similar considerations will apply internationally, particularly in relation to those with secondary health issues who may have protections under applicable law as disabled workers.



In addition, data privacy compliance will be a sharp issue in Europe and other countries with similar privacy regimes (such as Argentina, Australia, Singapore and Canada), though many national regulators have suggested that data privacy laws should not stand in the way of efforts to combat and overcome the COVID-19 pandemic. Health data constitute sensitive or “special

category” data for the purposes of the General Data Protection Regulation (GDPR). Enhanced levels of protection therefore apply to the collection, storage, and processing of such medical data, and numerous data protection regulators around the globe have now published guidance on COVID-19 privacy considerations. Even across the European Union, where member states are governed by the GDPR, there is a significant degree of variance between countries in terms of the data that employers will be permitted to collect from employees and visitors—including whether body temperature screening is allowed—so this guidance should be reviewed carefully by employers before implementing any screening program. In particular, employers should ensure they are complying with any consent or privacy impact assessment requirements in relevant jurisdictions.

Diagnostic testing will engage a range of other relevant regulatory considerations regarding use of approved medical tests, and reporting of notifiable diseases to local health authorities (a duty generally imposed on any third party medical professional retained by employers to conduct tests). Once possessed of relevant health data, employers may wish to develop procedures for workforce contact-tracing if an employee tests positive for COVID-19 and has been in contact with others in the workplace, and this, too, will impact privacy regulations. Employers should review relevant regulatory requirements in any jurisdiction where diagnostic testing will occur.



Any screening or tracking initiatives should be implemented in coordination with any internal privacy officers, HR, and compliance teams. Employers should consider adopting a separate COVID-19 influenced health and safety policy, with employees from these teams appointed to oversee the implementation of health and safety measures, share management thinking with employees, and pass employee feedback to management. Again, employee representatives might need to be informed/consulted with respect to any new policies impacting working practices—particularly in the Netherlands or Germany, where works councils have express authority to engage on such issues.

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