

CORONAVIRUS: EMPLOYMENT AND LABOUR IMPACTS

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WHAT DUTIES DO COMPANIES HAVE?

Employers have a legal obligation to ensure that workers have proper conditions of health and safety at work.

Therefore, they must adopt appropriate measures to address the risks arising from the spread of the COVID-19 virus.

First, we recommend that, in conjunction with their occupational health professionals, companies should define a plan to react to the various scenarios they may face.

This plan should address issues such as:

- The different risk scenarios;
- The actions to be taken in each of these scenarios;
- The measures to be applied to groups of workers who, because of their situation or condition, are particularly exposed to serious health risks in the event of infection;
- The people in the company responsible for each scenario;
- Involvement of the authorities.

CAN WORKERS BE SENT HOME FROM THE COMPANY WHEN THERE IS A RISK OF INFECTION? WHAT ARE THE CONSEQUENCES FOR THE SALARY?

We need to distinguish between the reaction to a worker with symptoms of COVID-19 and a worker who has been exposed to the risk of infection.

Any worker who has symptoms should be placed in an isolation area that is properly equipped with essential items, gloves and masks. That person must then contact the health authorities, which will decide what to do next in light of the instructions issued by the Ministry of Health.

When a worker has been exposed to the risk of infection, the company may, in conjunction with the occupational health professionals, remove that person from the place of work and from any contact with other workers. The company must also advise that person to go into preventative self-isolation.

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Once the worker in question has been removed and until the diagnosis is confirmed, two scenarios can arise:

- If the worker's job is compatible with remote working and an agreement is reached between the parties (because remote working is not regulated in the employment legislation), they will be able to work from home. In that case, the company should provide whatever is necessary to do so and continue to pay the salary;
- If the worker cannot work from home because of the nature of their duties, the company must continue to pay their salary during the period of exclusion. It must also monitor the state of the worker's health and arrange for their return to work as soon as they meet the conditions to do so. This situation amounts to a justified absence authorised in advance by the employer.

CAN AN EMPLOYEE REFUSE TO WORK IF THERE IS A SPECIFIC RISK OR A CASE OF INFECTION IN THE COMPANY?

No. Under the existing legal subordination, it is the employer that controls all aspects of the employment relationship, including management, supervision, regulations and discipline.

However, the employer is subject to article 85(2) of the constitution, which provides that "the worker has the right to protection, safety and hygiene at work". Under article 216(2) of the Employment Law ("EL") the employer is required to "provide its employees with good physical, environmental and moral working conditions, to inform them about the risks of their workplace, and to instruct them on how to comply properly with the rules on hygiene and safety in the workplace." This article also provides that employers have to "adopt all appropriate precautions to ensure that all workplaces and their entrances and exits are safe and free from risks to the health and safety of the workers." - article 216(5) of the EL.

In the event of a failure to comply the rules on hygiene, health and safety at work – especially those relating to COVID-19, and particularly those decreed by the Government – the worker may terminate the contract of employment for just cause, citing behaviour by the employer that culpably violates the worker's legal and contractual rights and guarantees (article 127(5)(b) of the EL).

WHAT IS THE EFFECT ON SALARY OF A WORKER'S ABSENCE DUE TO A POSITIVE COVID-19 DIAGNOSIS FOR THEM OR FOR CHILDREN AND/OR MINORS IN THEIR CARE?

Under article 216(3) of the EL, "Workers must ensure their own safety and health and that of other people who could be affected by their acts and omissions at work, and they must cooperate with their employer in matters of hygiene and safety at work [...]".

Aligning the interests of the company and the workers can solve many problems. Good communication and definition of solutions by consensus can make the difference.

Therefore, any absences by an employee who has a positive COVID-19 diagnosis, or has children and/or minors in their care with COVID-19, are considered justified under article 103(d) and (e) of the EL, and imply the non-payment of any remuneration (article 105(3) of the EL).

However, under article 17 of the Compulsory Social Security Regulations ("CSSR") approved by Decree 51/2017 of 9 October "The worker has the right to the sickness benefit and hospitalisation allowance." However, the benefit is not generally paid to workers who are certified sick until they have been unable to work for three days – article 20(1) of the CSSR. However, in cases of contagious disease, such as COVID-19, the benefit is paid without the requirement for the waiting period – article 20(b) of the CSSR.

The sickness benefit is paid for up to a maximum of 365 consecutive days – article 22(1) of the CSSR.

WHAT OTHER SOLUTIONS ARE AVAILABLE TO COMPANIES TO DEAL WITH A SUBSTANTIAL SLOWDOWN IN ACTIVITY DUE TO THE COVID-19 PANDEMIC?

First of all, it is important to involve the workers in the problem and in the solutions. Aligning the interests of the company and the workers can solve many problems. Good communication and definition of solutions by consensus can make the difference.

In cases in which the worker is temporarily unable to work due to COVID-19 and this situation lasts for more than fifteen days or becomes definitive, or if it expected to last for more than 15 days – in which case the suspension starts before the end of the 15 days – the parties can suspend the contract for reasons relating to the worker.

During the period of suspension of the contract, the rights, duties and guarantees of the parties inherent to actually working cease. However, the duties of loyalty and mutual respect remain in place (article 122(4) of the EL). As already mentioned, the absences justified by reason of COVID-19 imply the non-payment of any remuneration.

The employer can also make use of the suspension of employment contracts if COVID-19 affects its normal operations.

However, “The employer must communicate, in writing, to each worker affected, the reasons for the suspension, and its start date and duration, and it must send copies of these communications simultaneously to the ministry responsible for the area of employment and the union body of the company or, in the absence of this, the trade union representative.” - article 123(2) of the EL.

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Unlike the suspension of the contract of employment for reasons relating to the worker, in cases where the reason relates to the employer, particularly if it has workers whose job does not allow them to work from home, “[...] the worker has the right to 75 percent, 50 percent and 25 per cent of their pay, in the first, second and third month, and this must not, in any event, be below the national minimum wage.” - article 123(5) of the EL.

Another possible (drastic) measure is to terminate the employment relationship with some workers, although compensation will be payable.

For both these measures, the employer must follow the process and the formalities imposed for the termination of the contract with notice with the trade union, the works council, or a representative union association, and the ministry responsible for the area of employment.

Finally, the authorities could take more serious measures to require the reduction in size or the closure of some companies. If this occurs, there will be a suspension of work that is not attributable to the employer or to the worker. At this time, the legal rule that determines the suspension and/or closure will also determine the legal nature of the suspension and/or closure. This legal instrument will be the basis for establishing the rights and duties of the company and the workers, in particular the maintenance, suspension or termination of the employment contracts.