

# COVID-19:

How to facilitate a safe return to the workplace

28 April 2020

LEXOLOGY®

Webinars



Freshfields Bruckhaus Deringer

# Today's Speakers

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# Today's agenda

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How to facilitate a safe return to the workplace

**When and how?**

**Who?**

**Under what terms?**

**Implementation issues**

**Sanctions**

**Towards a new normal?**



**Please ask your questions  
anytime using the chatbox**

# How to facilitate a safe return to the workplace

When and how ?  
An overview of issues

**A consistency challenge for global employers as timelines and conditions will differ across countries/regions**

But there will be a few common issues:

Return to the workplace will be gradual, special considerations for employees belonging to risk groups

General measures will be replaced by targeted ones

Will social distancing on site be the new norm? How about assembly lines?

Team split, where possible, helps maintaining social distancing AND ensures business continuity in case of a second wave

Team shift as an alternative to team split

Employee, contractor and visitor screening, with variations due to local data privacy laws (which are likely to be more flexible than at the start of the crisis):

- Temperature checks
- Questionnaires (prior travel, contact with infected persons and/or personal health history, etc)
- medical checks (can they be imposed) and/or COVID-19 test (if available)

Will employers have to provide employees with protective gear and ensure more frequent workplace cleaning?

In practice, return to the workplace is likely to be optional wherever/ whenever WFH is possible

# How to facilitate a safe return to the workplace

Asia	Exit start date	Type of exit (gradual/phased vs immediate)	WFH extended ?	Social distancing on site ?	Team split /shifts	On site screening (temp checks, questionnaires, medical checks)	On site protection material (face masks, sanitizers, etc)
China	Restrictions have been lifted on most industries	Encouraged to be gradual and phased	Depends on the employer	1m, as may be required by local authorities	Encouraged but not required	Yes to temp checks and questionnaire / no to medical checks	Employers should provide face masks to employee who return to the workplace, and prepare sanitizers at the workplace
HK	Some industry-specific restrictions are expected to be lifted by 7 May	Depends on the employer	Depends on the employer	No	Not mandatory but adopted by many companies as a matter of practice	Not mandatory but in practice most buildings now require temperature checks before entry	Not mandatory but recommended to wear masks on in public spaces and some private spaces (building halls, lifts etc)
Singapore	1 June	Likely to be gradual	Likely to be encouraged for a period of time	1m	Unlikely to be mandatory but in practice will be adopted in many companies	Likely to be explored by a number of companies, but does come with challenges	Likely to be encouraged

# How to facilitate a safe return to the workplace

Europe	Exit start date	Type of exit (gradual/phased vs immediate)	WFH extended?	Social distancing on site?	Team split /shifts	On site screening (temp checks, questionnaires, medical checks)	On site protection material (face masks, sanitizers, etc)
EU (Exit roadmap by the EU Commission and Council dated 15 April 2020)	Left at member states' discretion	Gradual – ' <i>less endangered groups and sectors that are essential to facilitate economic activity (eg transport) first</i> '	<i>'Teleworking should continue to be encouraged'</i>	<i>'Social distancing guidelines should continue to apply.'</i>	<i>'Not all the population should go back to the workplace at the same time'</i>	EDPB: ' <i>European data protection law allows for the responsible use of personal data for health management purposes, while also ensuring that individual rights and freedoms are not eroded in the process.</i> '	Recommendations from the European Agency for Safety and Health at Work (EU-OSHA) (24 April)
Austria	4/5	Gradual	Regular teleworking encouraged	Yes, at least 1m	Yes , if possible	Questionnaires about whether an employee was in a risk area or was in contact with a positive tested person are allowed. Temperature checks are generally not permissible.	Equipment to enable frequent hand washing; provision of face masks only in critical areas obligatory
Belgium	4/5	Phased (4/5, 11/5, 18/5, 8/6 and 31/8) and conditional upon situation	Where possible, teleworking remains the rule for industry and B2B	Yes, if possible (1m50). If not, alternative measure must be taken, e.g. masks	Yes, if possible	No requirement to do so. Hence, only possible under strict conditions (GDPR) and under the responsibility of the occupational physician. Potential conflict between employment rules (duty of care) and GDPR, but can be solved in practice.	Basis protection measures remains applicable (distance, sanitizers, only necessary contacts). Employers must provide protection equipment to employees, if necessary.

# How to facilitate a safe return to the workplace

Europe	Exit start date	Type of exit (gradual/phased vs immediate)	WFH extended?	Social distancing on site?	Team split /shifts	On site screening (temp checks, questionnaires, medical checks)	On site protection material (face masks, sanitizers, etc)
France	11/05 Exit plan will be presented during the week of 27/04	Not yet defined but likely to be gradual	Regular teleworking encouraged	Yes, 1m	To the discretion of the employer but recommended	Possible under certain conditions, but many data protection related restrictions. Strong incentive for self-diagnosis and -declaration	Face masks and hand sanitizers must be put at the disposal of employees. Further measures might be announced next week
Germany	4/5	Gradual	Regular teleworking encouraged where possible	Yes, 1.5m, where feasible single rooms	Yes	Yes, scope under discussion, but general rule that no person with fever or respiratory systems allowed on business premises	Yes, depending on individual situation (eg masks or shields where social distancing cannot be ensured)
Italy	4 May 2020	Likely to be gradual	Working from home should continue to be encouraged	Yes, 1m	It is recommended to avoid all the population back to the workplace at the same time	Temperature screening and questionnaires to employees may be carried out before employees' access to the company premises, provided that the relevant data protection provisions are complied with	Yes

# How to facilitate a safe return to the workplace

Europe	Exit start date	Type of exit (gradual/phased vs immediate)	WFH extended?	Social distancing on site?	Team split /shifts	On site screening (temp checks, questionnaires, medical checks)	On site protection material (face masks, sanitizers, etc)
Netherlands	Until 19/5 working from home recommended	Currently no hard and fixed rules, only recommendations	Teleworking encouraged	1.5m	At the discretion of the employer but recommended	Extremely difficult to implement	Such measures should be taken and offered to provide a safe working environment. (e.g. clear instructions when not to come to work, facilitate social distancing, hand sanitizer, etc). No instructions on face masks.
Russia	Lockdown is in full force, no end date has been determined	Not clear	Likely yes	Currently 1,5 m	Unlikely	Likely to follow	Most likely will be introduced as recommendation
Spain	State of emergency meant to end on 10 May	Likely to be gradual	Teleworking should be the preferred way for a 3-month period after the end of the S of E	Recommended distance is 2m		Temp checks and questionnaire are possible but with the only and exclusive aim of guaranteeing health and safety and full GDPR compliance.	Employees should be provided with the necessary protection material. A protocol on breathing etiquette has to be established. The company must put in place the necessary means to guarantee the hygiene of the work place, which must be intensified vis-à-vis ordinary hygiene.

# How to facilitate a safe return to the workplace

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<b>Europe</b>	<b>Exit start date</b>	<b>Type of exit (gradual/phased vs immediate)</b>	<b>WFH extended?</b>	<b>Social distancing on site?</b>	<b>Team split /shifts</b>	<b>On site screening (temp checks, questionnaires, medical checks)</b>	<b>On site protection material (face masks, sanitizers, etc)</b>
UK	8 May (perhaps)	Likely to be gradual	WFH likely to be encouraged for a period of time	Recommended distance is 2m	Unlikely to be mandatory but in practice will be adopted in many companies	Likely to be explored by a number of companies, but does come with challenges	Hand washing facilities likely but face masks is likely to depend on Government's position

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# How to facilitate a safe return to the workplace

USA



- The President has released federal guidelines for states to follow generally as to when and how they can begin the process of opening up.
- Most governors have been forming pacts between states so as to coordinate action.
- Eventually, once each state opens, it will announce guidance on the topics covered for the other countries- social distancing, temperature checks, masks etc.
- 1 May is being referred to although many states are looking at extending restrictions beyond this date.
- 43 states and DC have ordered or recommended school closures through end of the academic year.

**[Click here](#) for a state by state update.**

# How to facilitate a safe return to the workplace

Who?

## Do employees have the right to refuse to return to the workplace:

- For health and safety reasons:
  - Allowed in some countries (eg French “droit de retrait”)
  - Can the right be challenged if the employer demonstrates that all reasonable protection measures have been implemented?
- For family reasons (children/parents to take care of):
  - May be able to rely on any existing parental rights
  - Often: right not to work but loss of compensation claims

## Can you encourage employees to come back to work using financial incentives?

- Any limit on the type of roles/functions to whom offers can be made (eg essential functions)?
- Can you call it a risk premium?
- Works council consultation

## What about employees with underlying health conditions/ who are at risk?:

- COVID-19 related symptoms
- Other conditions

## What about elderly employees?

## How much notice needs to be given about a return to work?

**Beware of possible discrimination!**

# How to facilitate a safe return to the workplace

Under what terms?

## **Paid leave:**

- Dealing with accrued holidays
- Can employer require employees to use accrued or future leave?
  - Statutory leave vs. contractual leave
  - Any limit
- Whether to defer holidays

## **Post return health and safety measures**

- Restrictions on personal travel and other potentially risky non business related activities
  - Self reporting systems?
  - Additional self-isolation and quarantine measures?
- Post return employee tracing?  
By governments or private stakeholders?

## **Reassessing compensation and benefits**

### **New joiners**

- Extending probation periods?

### **Business travel:**

- Reassessing travel policies and the related risks
- Checking the self-reporting and quarantine measures
- Making employee fully informed
  - What if the employee refuses to travel

# How to facilitate a safe return to the workplace

## Implementation issues – Data privacy

Complying with data protection laws – How to mitigate risks when screening



Inform employees and visitors in advance



Avoid recording actual health data as much as possible



Where possible, use non-health-related questions (eg are you aware of any reason circumstances that would put you or others at risk)



If possible, destroy data at the end of each day



Use a tool that measures if the temperature is fine or not, rather than one that indicates the specific body temperature



Ensure data safety and confidentiality

# How to facilitate a safe return to the workplace

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Implementing issues – other issues to consider



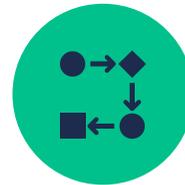
Variation to contractual terms and conditions of employment



Employee consent



Information and consultation requirements



Statutory or contractual processes / notice



Discrimination

# How to facilitate a safe return to the workplace

## Sanctions

**Breaches of health and safety legislation can be a criminal offence (Spain, UK, Germany if personal damage is caused)**

**Beware of non-employment criminal sanctions (and how these may conflict with other laws, eg data privacy):**

- German prosecutors have initiated criminal proceedings for violations of the social distancing rules
- The same are prosecuting mass infections (eg in health care facilities) as negligent homicide cases

**Accidents at work legislation may apply:**

- In Italy, new emergency legislation appears to equate a COVID-19 infection in the workplace with an accident at work, potentially leading to companies' quasi-criminal liability if employees die or suffer severe personal injury

# How to facilitate a safe return to the workplace

Towards a new normal

## Extended concept of the employer's duty of care going forward?

### COVID-19 as an accelerator to workplace changes:

- WFH is here to stay
- Technology is changing the way we work
- Leading to a need to re assess existing policies and contract templates
  - Home working and cyber risks
  - Increase flexibility where possible
  - Use of E-signature in HR documentation
- Financial compensation for on going home working days/teleworking – already in place in a number of countries

### COVID-19 business reorganisation as certain support functions are at risk in the long term:

- Beware of restrictions on redundancies linked to gov support programmes
- Think about re training/skilling people whose function is at risk

### Contingency planning for a possible resurgence/second wave or new crisis

# Question time

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# More on the impact of COVID-19 on the workplace

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## CORONAVIRUS ALERT HUB



Please visit the Freshfields coronavirus alert centre



Link to our first webinar on initial workforce issues arising from the COVID-19 outbreak (9 March)



Link to our second webinar on Covid-19: managing employment costs (26 March)

# Get in touch

If you would like to discuss these issues in more detail, please speak to your usual Freshfields contact or one of the lawyers listed below who can direct your query, including to local counsel in other countries/regions than those listed below



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# Appendix I

Implementation issues – data privacy

# Implementation issues – data privacy

	Temperature checks	Filling in questionnaires	Tracing
<b>Asia</b>			
China	Yes	Yes	Yes
Hong Kong	Yes	Yes	Yes
Singapore	Yes	Yes	Yes
<b>Europe</b>			
Austria	No	Maybe	<p>At EU level, EDPB Guidance of 21 April 2020, allows data tracing, upon certain conditions:</p> <ul style="list-style-type: none"> <li>- Voluntary adoption by users</li> <li>- Accountability (eg the controller of any contact tracing application should be clearly defined – national health authorities suggested and other controllers allowed)</li> <li>- Prioritize anonymized data over personal data</li> <li>- Carry our DPIA</li> <li>- Limited use (only for Covid-19 related purposes,, ensure that the use of personal data is adequate, necessary and proportionate.)</li> </ul>
Belgium	Maybe	Maybe	
France	Maybe	Maybe	
Germany	Maybe	Maybe	
Italy	Yes	Yes	
The Netherlands	No	No	
Spain	Yes	Yes	
UK	Maybe	Maybe	

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## Webinars

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