NEWSLETTER

COVID-19 virus

Which consequences on HR-level?

The outbreak of the COVID-19 virus raises many HR-related questions.

On March 13th, 2020, the government has taken measures in order to limit the spread of the virus, such as the general compulsory closing of cultural institutions, sports centers, bars and restaurants and a compulsory closing on Saturdays and Sundays of shopping centers and non-food shops. These measures will remain applicable until April 3rd, 2020.

In this newsletter, we will give you an overview of the most frequent asked questions.

1° Can an employer ask information about potential risk of coronavirus to the workers (have you been in contact with people tested positive? Have you been travelling in a country at risk?)?

1.
Asking the employees about whom they have been in contact with and where they have travelled to relates to their private life. Based on this, at first sight, it might be challenged whether the employer is entitled to submit them such question.

However, the employer can (and must) take any measure in the interest of a good organization of the company. This also means that the employer must take all necessary measures to protect the health and wellbeing of all his/her employees.

Additionally, the Belgian legislation on the wellbeing of workers states that the employer must take all necessary measures in order to promote the wellbeing of the workers during the performance of their employment contract. In that regard, the law provides that the employer must take any measure in order to prevent, avoid and evaluate health risks.

Based on these principles, the employer is entitled to ask his/her employees certain information in order to assess whether they represent a risk with regard to the COVID-19 virus, on the condition that such information is asked in order to protect the interests of the company and the health and safety of the other employees.

2.
However, the question arises whether the employee has to answer such question.

According to the Belgian law on employment contracts, the employee must perform the employment contract “in good faith”. Additionally, according to the law, the employee must:

- act in accordance with orders and instructions given by the employer and,
- avoid any behavior that could prejudice the security of himself/herself, the colleagues, the company and third persons.

Besides, the law on the wellbeing of workers states that the employee is obliged, according to his/her abilities, to take the necessary measures and to cooperate with the employer in order to protect his own security and the security of his colleagues.

Based on these principles and on the possible impact for the company and their colleagues, the employees, to whom the aforementioned question is asked, should answer in good faith and thus communicate whether they represent a risk with regard to the COVID-19 virus. If it appears that the answer given by an employee is not in line with reality, this would constitute a breach of the aforementioned principles.

2° Can an employer question workers with regard to their medical condition (have you been tested positive?) or impose medical actions to them (take the workers' temperature every morning?)

As said before, an employer has the duty to take all necessary measures to ensure safe and healthy work conditions to the workers.

Besides, workers must perform their work agreement in good faith and execute the employer's instructions.

However, all measures taken by an employer must been reasonable and proportionate. The interest of both parties must be balanced.

A worker cannot be obliged to communicate the reason of his/her inability to work. This is part of the medical secrecy and belongs to his/her very private life.

As a consequence, an employer is not allowed to ask a worker if he/she has been tested positive.

With regard to medical actions, for example taking the temperature of a worker, the answer is even more restrictive.

A medical action taken within the frame of employment can only be performed by an occupational doctor. The law prohibits an employer to perform such examination.

Furthermore, the question arises whether such a measure would constitute a breach of the General Data Protection Regulation (RGDP) since it could processes data concerning the employee's health, which are considered as sensitive personal data.

Such data may only be processed under a (very) limited number of circumstances, which do not apply in the case at hand.

3° What if a worker cannot come to work because his flight has been cancelled or because he has been placed in quarantine?

The law provides that, in case of *force majeure* ("overmacht") the employment contract is suspended. In such case, the obligations of both parties are suspended as long as the force majeure persists. This means that the employee will not be required to work and the employer will not be required to pay salary.

Depending on the specific circumstances (was the quarantine imposed by the government, did the employee undertake actions in order to find a solution for the cancellation of his flight,…), such circumstances can be considered as *force majeure*, which suspends the contract of employment as long as the force majeure persists. During the suspension, the worker will be released from his obligation to perform his work and the employer will be released from his obligation to pay the salary.

In other words, during such suspension, the worker will not be entitled to any financial compensation from the employer.

However, the Belgian National Employment Office has mentioned on their website that, under the circumstances mentioned above, the employee may be placed on temporary unemployment due to force majeure. Such decision, however, must be taken by the employer.

4° Can an employer oblige a worker to stay home, if he suspects that that the worker is infected ?

Workers have the duty to perform the work agreed in the employment contract. At the same time, the employer must allow them to perform the work agreed, unless the workers have been recognized by a doctor as being in incapacity to work and that the incapacity is covered by a medical certificate..

As a consequence, the employer cannot unilaterally put a worker on "garden leave", even with continued payment of his salary.

Nevertheless, parties can always agree that the worker will take outstanding days of holidays or would be released from work with continued payment of salary. Parties can also agree that the worker will perform his duties from home (home working).

This agreement must always be based on an explicit agreement from parties (and include the practical & financial considerations).

However, in case of obvious exhibitions of symptoms, it is admitted (among others by the Federal Ministry of Work) that an employer can ask the worker to go home.

Additionally, should the health conditions of a worker possibly increase the risks related to his/her function, the employer can take contact with the occupational doctor ("conseiller en prevention–médecin contrôle" / "preventieadviseur-arbeidsgeneesheer") who can decide to proceed to a medical examination. Based on the results of this examination, the occupational doctor will decide if the worker is in incapacity to work or not.

5° What can an employer do if he cannot provide work due to the COVID-19 virus?

This question relates more specifically to the employers who face a decrease of their activity due to the COVID-19 virus or who are impacted by the measures taken by the government (mandatory closing of the business).

Temporary unemployment can be a solution.

Two types of temporary unemployment's schemes exist: temporary unemployment for economic causes and temporary unemployment for *force majeure*.

The first type of temporary unemployment applies when the employer is affected by a drop in clients and cannot provide work. Different conditions apply for blue-collar and white-collar workers. For white-collar employees, this type of temporary unemployment can only be invoked by the employer if the latter has already fulfilled certain preliminary conditions. According to the legislation, such measure must have been provided by a collective bargaining agreement on the level of the industry or on the level of the company or via an approved business plan on the level of the company. In addition, the company must be in difficulty due to either a 10% decrease in return, production or orders, or a degree of temporary unemployment of at least 10%. Companies that do not meet these conditions, but are recognized by the Belgian Minister of Work as a company in difficulty, are also eligible.

The second type of temporary unemployment provides for identical conditions for white-collar and blue-collar workers and can only be invoked by the employer in case of proven force majeure (a situation in which a sudden & unpredictable event, independent from the will of the parties, renders the execution of the employment's agreement temporary but totally impossible).

The employer must submit a substantiate request for recognition to the Director of the regional bureau of the National Employment Office.

If recognized, the National Employment Office will pay unemployment allowances to the concerned employees (which must not be all of the employer's workers).

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MVVP
www.mvvp.be

Emmanuel Wauters
Partner
+32(0)476/789984
emmanuel.wauters@mvvp.be
http://www.mvvp.be/lawyers/emmanuel-wauters/

Anne Laure Brocorens
Attorney
+32(0)479/563492
annelaure.brocorens@mvvp.be
http://www.mvvp.be/lawyers/anne-laure-brocorens/