

Ius Laboris Webinar

Coronavirus: Workforce management in the Americas during COVID-19

Thursday 14 May 2020

10:00 – 10:45 (EDT)

11:00 – 11:45 (BRT)

16:00 – 16:45 (CEST)



SPEAKERS



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WHERE ARE WE NOW?



USA – WHERE ARE WE NOW?

WHERE IS THE US IN TERMS OF RETURNING TO WORK?

- States are addressing return-to-work issues differently (e.g. compare Georgia, where some businesses opened by late April, to New York or New Jersey, which may not see any openings in certain cities until late June or July).
- Some are modifying shelter-in-place orders (e.g. Georgia), with focus on continuing shelter for “vulnerable population.” Shelter-in-place orders, including specific requirements/regulations for certain industries (e.g. restaurant or hospitality industry).
- Some states may require written return-to-work plans (e.g. Indiana) addressing: safety measures (e.g. frequent hand-washing); employee protocols (e.g. social distancing); medical examinations (e.g. thermometer tests); customer protocols (e.g. required glass barriers).

CANADA – WHERE ARE WE NOW?

DIRECTIVES AND REOPENING OF BUSINESS

- List of essential businesses and businesses permitted to operate is growing, allowing more businesses to open using curbside pick-up and delivery.
- Permitted construction activities are expanding.
- Provincial parks and conservation reserves are re-opening.
- Financial relief is available to struggling businesses at Federal and Provincial levels.
- Provinces and Territories are individually responsible for determining which businesses are permitted to open.

BRAZIL – WHERE ARE WE NOW?

IMPACT OF COVID-19

- 163,000+ cases and 11,200+ fatalities, affecting the poor more severely. Public hospitals can provide only a basic service, with old equipment. Thus:
 - while large cities like Rio and São Paulo have the highest numbers
 - the top-20 case-fatality ratios per 100k are all in the poorest regions.
- Federal Government: Presidential Decree sets out essential activities that States and Municipalities must observe and recommends mitigating action, but does not decide on lockdown.
- State Governors: Operational restrictions such as closures (of e.g., malls and theatres) or partial operation (e.g. delivery/takeaway shops and restaurants) and the prohibition of gatherings (e.g. sports events).
- Mayors: Lockdown or less severe restrictions on travel and business operations.

ARGENTINA – WHERE ARE WE NOW?

CURRENT AND PLANNED MEASURES

- **PREVENTIVE AND COMPULSORY SOCIAL ISOLATION UNTIL MAY 24**
 - **State of Public health Emergency (Act 27541/ Decree 260/2020 – for 1 year)**
 - General “Stay at home” order with exceptions determined by local authorities, with essential and nonessential activities
 - No cultural, recreational, sporting, religious or any other public event can be held. No touristic or educational activities
 - Avoiding going to the workplace
 - Activities exempted (up to 60 activities)
- **NEW MEASURES TO ADJUST THE SOCIAL ISOLATION PERIOD**
 - Local authorities are empowered to authorize progressive resumption of industrial and commercial activities under strict health and safety protocols
 - Meeting the requirements of Decree 459/2020 and the authorization of the local Ministry of Health
 - Buenos Aires and its metropolitan area will continue with the current lockdown, but their authorities can request exemptions to allow certain activities to restart
 - Controls are being monitored and analyzed every 14 days

REOPENING



USA – REOPENING

WILL THERE BE RESISTANCE BY EMPLOYEES TO RETURNING?

- Employers are facing a conundrum in recalling furloughed employees. Those who have been furloughed or had their hours reduced may be receiving state unemployment benefits as well as the USD 600/wk federal supplement under the CARES Act and receiving more than they would if they returned to work full-time at their previous compensation. For example, in Georgia, the maximum weekly state benefit is USD 365/week. With the additional USD 600 CARES weekly benefit through July 31, 2020, an employee will be receiving USD 965/wk in unemployment benefits (annualized to USD 50,180/year). In Massachusetts, the state maximum is USD 823/wk. With USD 600 CARES, that's USD 1,423/wk (USD 74,000 annualized).
- Employers have a right to recall workers. Generally, if a worker refuses to return to work after reasonable notice, the worker can be separated and likely disqualified from receiving further unemployment benefits. Carrot (pay worker more through July 31 2020) vs. stick (unequivocal offer and if rejected, terminate).
- Employees who have been working remotely or furloughed may be concerned about returning for protected, related medical concerns. An employer is not required to permit these employees to continue working from home. However, if an employee requests an accommodation to work from home or take leave due to a disability or medical condition, you should engage in the interactive process under the Americans With Disabilities Act (“ADA”) to determine if such an accommodation can be made.
- Temperature checks, COVID-19 testing, return to work questionnaires.

USA – REOPENING

WILL THERE BE RESISTANCE BY THE EMPLOYER TO RETURNING THE EMPLOYEE?

- Need for fewer workers than prior to COVID-19.
- Paycheck Protection Program (PPP). Have to bring back certain a number of employees and at certain pay.
- Reduced hours and/or reduced pay.

CANADA – REOPENING

WHAT ARE THE INITIAL CONSIDERATIONS FOR THE OPENING OF BUSINESS?

- Physical distancing requirements remain in effect (employees must be 6ft apart wherever possible) and as a result employees may not all be able to return to work at once.
- Employers are required to provide personal protective equipment (PPE) where physical distancing cannot be guaranteed (e.g. masks, gloves and face shields).
- Appropriate sanitation precautions must be implemented (i.e. handwashing spaces and hand sanitizer); some sector specific guidelines may be provided by provincial governments.
- Employers can benefit from the Canada Emergency Wage Subsidy to cover up to 75% of their employees' wages (for up to 12 weeks, retroactive from March 15, 2020 to June 6, 2020).
- Employees may face Canada Emergency Response Benefit repayment obligations.

BRAZIL – REOPENING

MEASURES AND OPTIONS

- **PROVISIONAL MEASURES 927 & 936:**

- PM 927: telework; holidays (collective & individual); special rules for the ‘hour account’ (by which overtime is set off against time off work).
- PM 936: suspension (60 days) and reduced work hours & salaries (90 days):
 - CBA, but individual agreements permitted in some cases
 - reduction milestones: 25%, 50% and 70%
 - unemployment insurance (partially) + voluntary allowance
 - protection against involuntary dismissal.

- **REDUNDANCY & OPTIONS:**

- Dismissals are not forbidden, but some argue that during the state of emergency companies must first attempt mitigation using PM 927 & 936.
- The Labour Code contains all-time crisis remedies:
 - part-time work: 30 hours, 26-hours + 6 overtime, weekly; CBA & individual enrolment
 - suspension: 2-5 months to follow training session; CBA & individual enrolment
 - reduced work hours & salaries of up to 25%: for “force majeure”; CBA.

ARGENTINA – REOPENING

INITIAL RESPONSES

- **THE ECONOMIC CONTEXT**

- Long-lasting economic recession that will only deepen
- Activities exempted with reduced staff and market contraction
- Over 60% of companies under full stoppage

- **THE LEGAL CONTEXT**

- Prohibition against unfair dismissals; dismissals or suspensions on economic grounds; or claims of *force majeure* (in force until the May 31)
- Aggravated severance payments in cases of unfair dismissals or dismissals without just cause (medium term measure: in force until June 30)

ARGENTINA – REOPENING

INITIAL RESPONSES

- **CRISIS PROCEDURE – SCOPE OF ACT 24013 FOR COLLECTIVE DISMISSALS AND THE RESTRUCTURING OF ENTERPRISES**
 - Companies with more than 400 employees, with 15% of the payroll to be laid off
 - Companies with fewer than 400 employees, with 10% of the payroll to be laid off
- **CHARACTERISTICS OF THE PROCEDURE**
 - Lasts up to 5 working days
 - Before the Ministry of Labour
 - Involves a consultation and negotiation with employee representatives
 - Economic and financial information of the business must be disclosed, along with planned measures to mitigate the crisis
 - Possibility of mass dismissals after compliance with the procedure - payment of 50% of severance for dismissal without just cause

KEY ISSUES GOING FORWARD



USA – KEY ISSUES

WHAT ARE THE KEY ISSUES FOR A RETURN TO WORK?

- Selection decisions about which employees will be asked to return could form the basis of discrimination/retaliation claims. Developing selection guidelines if returning less than all employees.
- Consider whether you should conduct a disparate impact analysis.
- Be careful of age claims or “regarded as” disabled claims under the ADA when determining whether to recall employees who may be members of a population that is more vulnerable due to age or exposure to COVID-19.
- Retaliation claims (Families First Coronavirus Response Act, the FFCRA; Family Medical Leave Act, the FMLA; Americans with Disabilities Act, the ADA; Occupational Health Safety Act, the OSHA, etc.)
- Following new state requirements (e.g. masks required in certain states, such as New York, New Jersey and Illinois).
- If providing severance and laying off two or more employees permanently, consider: appropriate release with schedules in compliance with the Age Discrimination in Employment Act, the ADEA, identifying by age and position those selected for termination and those within the same class or job unit retaining their position.

CANADA – KEY ISSUES

MAIN CONSIDERATIONS

SAFETY OF EMPLOYEES SHOULD BE CONSIDERED OF UTMOST IMPORTANCE, AND POLICIES SHOULD BE IMPLEMENTED INCLUDING:

- Access to workplaces should be restricted to employees only (sign-in should be required for tracking in the event of an outbreak).
- Employees may be screened for symptoms and asked to complete screening questionnaires.
- Physical distancing should be maintained, including by reducing in-person meetings, and staggering start and end times, as well as lunch breaks.
- Contractors or visitors attending the workplace should also be screened and informed of policies in place to maintain safety in the workplace.

BRAZIL – KEY ISSUES

SAFETY IS KEY

- **DUTY TO LOOK AFTER WORKERS' HEALTH:**

- orientation & education
- keeping work stations apart; alternative work shifts & lunch breaks
- physical barriers, masks, sanitizing materials & other protection
- transportation often provided to industrial sites is a challenge
- only the occupational doctor may determine examinations
- disciplinary action against employees who are non-compliant.

- **PRIVACY ISSUES:**

- temperature scanning & risk groups: voluntary disclosure.

- **OCCUPATIONAL DISEASE?**

- Supreme Court ruled out that proof of causation was necessary under PM 936, so circumstantial evidence may be enough to determine causation.

ARGENTINA – KEY ISSUES

HEALTH AND SAFETY

There are Protocols, recommendations and guidelines from national and local authorities on health and safety. The main provisions are:

- An obligation to provide employees with disinfecting products (e.g. alcohol gel and tissues) and promote regular handwashing by employees and customers.
- Training for employees on symptoms and preventative measures to avoid contagion.
- Reduction of the number of people in the workplace (by home working) and if it is essential to be at work, reduction of the number of people in common areas.
- Avoidance of meetings and travel.
- Social distancing between employees.
- A duty of information as regards contamination and infection.
- Mobile apps.

ARGENTINA – KEY ISSUES

WORKFORCE MANAGEMENT


- Broaden teleworking
- Reorganize and readjust the work schedule
- Health payments:
 - Insurance company if contagion at work
 - Paid by the employer's medical leave, if non-work-related COVID-19 infection.


QUESTIONS?




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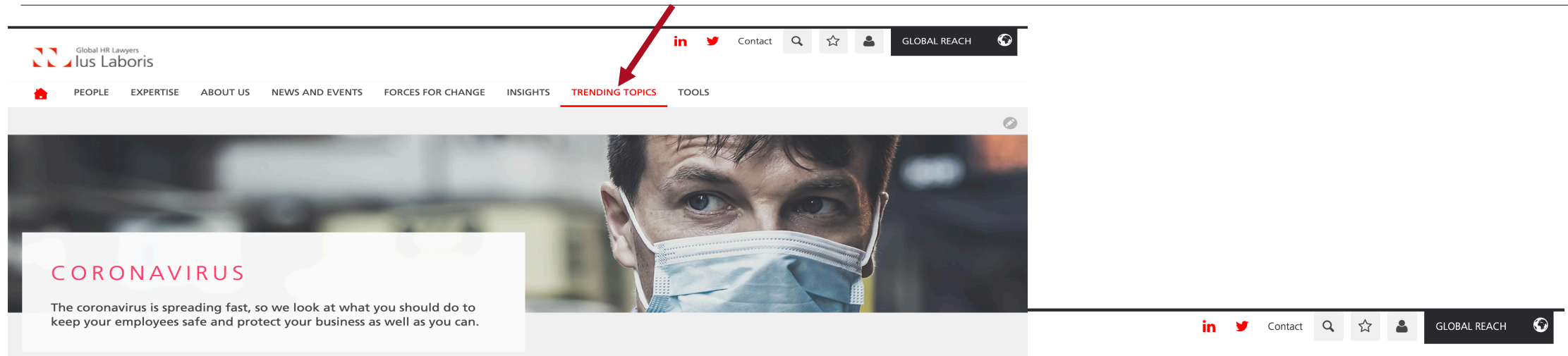
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