

Ius Laboris Webinar

Navigating the pandemic: vaccination, home working and working from abroad

Thursday 25 February 2021

15:00 (CET) / 9:00 (EST)



SPEAKERS



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COVID – ONE YEAR ON

COVID – ONE YEAR ON

MEASURES EMPLOYERS CAN TAKE

- **A COVID-19 protocol** on health & safety regulating:
 - the rules for preventing infection in the workplace (social-distancing, masks etc.)
 - the role of the company doctor and their duties
 - special procedures to adopt in the workplace during the pandemic
- **A Smartworking policy**
- An **Internal committee** with the unions and health and safety representatives to monitor how well the measures are adopted
- An **Internal committee** to guarantee the business-continuity and flexibility

US

VACCINATION

- FFCRA, providing paid leave to certain employees, expired by its terms on 31 December 2020.
 - Employers may provide leave under FFCRA voluntarily and still receive tax credit through 30 March 2021
- On 29 January 2021, OSHA issued new guidance on mitigating and preventing the spread of COVID-19 in the workplace
 - Encourages employers to implement a COVID-19 prevention program
- Continued uncertainty given new administration
 - Employers can expect more employee-friendly laws, guidance and regulations under President Biden
- Employers push state laws to limit liability for COVID related illnesses in workplace

FRANCE

WORK FROM HOME

- Employer ensures compliance with the employee's right to disconnect
 - If no company policy, CBA or contractual terms on the right to disconnect or remote working, employer should tell employees how they can exercise their right to disconnect (including hours when the employee must be available to take calls)
- Managers should:
 - Ensure that health & safety requirements are met on any days worked in the office (based on an employee request to work up to once a week in the office, as permitted under the current curfew)
 - Regularly follow up with employees to check their working conditions are good, their workload is reasonable, their work/life balance is good and to ensure that they are not too isolated, etc. (managers should take notes on these meetings/discussions)
 - Schedule regular team meetings by video call, even if brief
 - Consider organising remote social events: lunch, happy hours, etc.
- Employers should consider how to manage work from home post-COVID

Vaccination

- Employer should inform employees that they can have the company doctor administer the vaccine
- Employer should consider whether to encourage employees to be vaccinated

SPAIN

ONE YEAR ON

- Furloughs: most popular labour measure for employers for facing the COVID-19 crisis, consisting in suspension of employment contracts or working time reductions
 - COVID-19 at the start: **(i)** *force majeure* furloughs; and **(ii)** ETOP furloughs based on economic, technical, organisational or production reasons. Specific legislation was approved for flexibility (procedure, exemptions for employer social security contributions) and to avoid loss of employment (a guarantee to keep employment)
 - COVID-19 current legislation: extension of *force majeure* furloughs until 31 May 2021. New types of furlough. Exemptions on employer's social security contributions only in specific cases
- COVID-19 Care Plan (Plan "Me Cuida"): employee can adapt or reduce working time to take care of specific relatives due to exceptional circumstances to avoid COVID-19 infection
- 'Restriction' on dismissal for COVID-19-related issues: enforceable until 31 May 2021. Pending Resolution from the Supreme Court of Justice on legal consequences of breach of the restriction (unfair/void)
- New Labour Reform: expected. Among other topics, the government intends to eliminate the legal priority of 'company-wide CBAs' over 'sector-wide CBAs' to avoid salary reductions; extend CBA provisions even after expiry of their term and until a new CBA is negotiated; regulation of the outsourcing process



VACCINATION

US – VACCINATION

MANDATORY VACCINATION? YES, BUT LEGAL REALITIES COMPLEX

- Vaccination itself is NOT a medical examination under THE ADA but prescreening questions are
- Employer mandates vaccines/administers vaccine - pre-screening questions must be “job related and consistent with business necessity.”
 - Employer cannot take adverse action against an employee who refuses unless it can demonstrate employee poses a DIRECT THREAT
- Employer administers vaccine but it is voluntary – the employer may not retaliate, intimidate or threaten
- Mandate vaccinations/third party – OK subject to accommodations
- Employers can require proof of vaccination – confidentiality
 - But what if employee refuses to be vaccinated?
- Religious Accommodations – sincerely held religious belief/undue hardship
- Disability Accommodations – interactive process/direct threat/undue hardship
- Incentives?

ITALY

VACCINATION

- As a general rule, the employer is responsible for the health & safety of employees at the workplace, together with the medical advice of the company doctor
- Should the company doctor indicate the vaccination is a necessary measure, the employer may require the employees to be vaccinated before performing work
- All data concerning employee vaccination should be processed by the doctor, who will report to the employer on the employees' ability or otherwise to work, in compliance with the organisation's health and safety protocol
- Vaccines are, at the moment, public, free of charge and not mandatory
- The vaccination programme is based on a set of priority groups (such as doctors, older people, disabled people, teachers etc.)
- For this reason, it is not currently possible for employers to buy or pay for vaccinations for employees

FRANCE

VACCINATION

- Employers cannot require employees to be vaccinated against COVID-19
- Incentives promoting employee vaccination:
 - Employers can encourage vaccinations, but only in close collaboration with the CSE (works council) and the company's occupational health service
 - No direct or indirect financial incentives or disincentives
 - Beware of potential discrimination or unequal treatment
- Employers may not collect or process information on whether employees are vaccinated

SPAIN

VACCINATION

- Vaccination programmes are based on priority for different groups (i.e. health staff, employees working at nurseries/care homes, elderly people etc.). Not mandatory. Consent is required
- Once a vaccine becomes widely available:
 - Employers can request - not oblige - employees to be vaccinated. Personal decision
 - If an employee refuses to be vaccinated: no legal consequences and no justification needed for refusal
 - Companies can encourage employees to be vaccinated. Specific terms and conditions
 - Companies can request – not oblige - employees who have been vaccinated to say so. Vaccination proof could be required by employers, as long as they pay the vaccination cost.



LONGER TERM HOME WORKING

SPAIN – LONGER TERM HOME WORKING

NEW REMOTE WORK ACT – IN FORCE SINCE 13 OCTOBER 2020

- Scope of application: (i) applies where at least 30% of the working time is provided on a remote working basis within a 90-day reference period; and (ii) does not apply to remote work schemes implemented as a health & safety measure to avoid COVID-19 infection
- Voluntary for both parties. Reversible for both parties if a remote work scheme is introduced after office work scheme implementation (CBA/contract prior notice)
- Main obligations:
 - written remote working agreement regulating different items listed by law (term, tools, expense list and compensation, timetable - availability hours -, office work and remote work mix, reversibility notice, business control measures on labour activity, data protection/information security measures, technical problems). Transitional provisions
 - To provide all tools/equipment needed for remote work
 - To assume all expenses related to remote work. Economic compensation
 - To guarantee health & safety compliance (labour risk assessment, limited space, methodology, inspections and written reports – employee's consent is required.)
- Main remote employee rights: training, promotion, health & safety, working time recording system, digital disconnection, data privacy – BYOD?

US

POLICIES, PROCEDURES & BENEFITS

- Do they address working from home issues?
 - discrimination/harassment/retaliation
 - email and social media policies
 - confidential information/trade secrets
 - safety
 - job descriptions
- Compliance with state law regarding expense reimbursement
- Benefits
- Wage and hour Issues
- Review your workers' compensation, general liability and employment practices (EPLI) coverage

ASSESS PRODUCTIVITY

- Is a hybrid model more appropriate?

ITALY

LONGER TERM HOME WORKING

- Smart working is governed by a 2017 law that requires an individual agreement between the employer and employee
- From March 2020 until 31 March 2021 a 'simplified' form of smart working is in place which:
 - does not need individual agreement
 - needs a simple communication from the employer to the Ministry of Labour with the employees on smart working
 - allows the employer to unilaterally choose (in compliance with health & safety rules) which employees can work from home
- Some categories of employees have the right to smartwork: disabled individuals, those who are particularly vulnerable, due to previous certified sickness

FRANCE

HOME WORKING DUE SOLELY TO THE COVID-19 PANDEMIC

- Employer can unilaterally require employees to start or stop home working
 - in accordance with government regulations and recommendations
 - being careful not to extend remote working beyond what is required or recommended by the government and the specific facts
- Employer ensures compliance with the employee's right to disconnect
 - if no company policy, CBA or contractual terms on the right to disconnect or remote working, the employer should inform employees of the means by which they can exercise their right to disconnect (including hours during which the employee must be available to take calls)
- No home working allowance ('indemnité d'occupation') is owed
- Legal uncertainty on obligation to reimburse employee expenses related to home working
- Employees continue to benefit from their usual rights, including to restaurant vouchers
- Accidents while home working are covered by the usual laws on occupational accidents



WORKING FROM ABROAD

FRANCE – WORKING FROM ABROAD

EMPLOYEES BASED ABROAD TEMPORARILY WORKING IN FRANCE DUE TO COVID-19

Employment law:

- employee should be properly posted to France
- applicable law: 'core' employment law (first 12 months), nearly all employment law (as of 13th month), the provisions of French law that cannot be derogated from by agreement (if situation not temporary), overriding mandatory provisions of French law

Social security law:

- EU and EFTA (Iceland, Liechtenstein, Norway and Switzerland): A1 (maximum 24 months)
- rest of world: depends (treaty or no treaty)

Income tax:

- special application of tax residency rules to situations related to the pandemic and its effects

Corporate tax:

- depends on the existence of a permanent establishment in France, as may be defined by a treaty between France and the country in question

US

WORK VISA

- If the foreign worker is on a work visa in the US and returns to his/her foreign home to work during the pandemic, this doesn't raise immigration issues, but could raise employment or tax issues. Check with tax counsel on any tax issues under tax treaties between the US and the specific foreign country. Check with employment counsel in the foreign jurisdiction if it raises any employment issues under their employment laws
- **Best Practice** – Because the USCIS has a Fraud Detection Unit which can conduct unannounced site visits at the recorded worksite, file an L-1 intracompany transfer visa which will explain the worker's absence.

BUT H1-B

- If the worker's home is outside the certified MSA (metropolitan statistical area), this would be considered a material change to the approved terms of the H-1B sponsoring and require the employer to file an H-1B amendment petition with USCIS, unless the working-from-home period has a limited duration that satisfies the 'short term placement' exception.

ITALY

NOT EXPRESSLY REGULATED

- It is advisable to have a clause in smart working policies that requires **written approval** from the employer, should the employee want to work in a different country
- This is in order to avoid 'unpredictable' problems related to this issue
- Main problems that may rise:
 - health and safety: insurance coverage
 - double taxation and social security payments
 - application of the law of the 'new' country
 - data privacy issues (when the 'new' country is outside the EU)

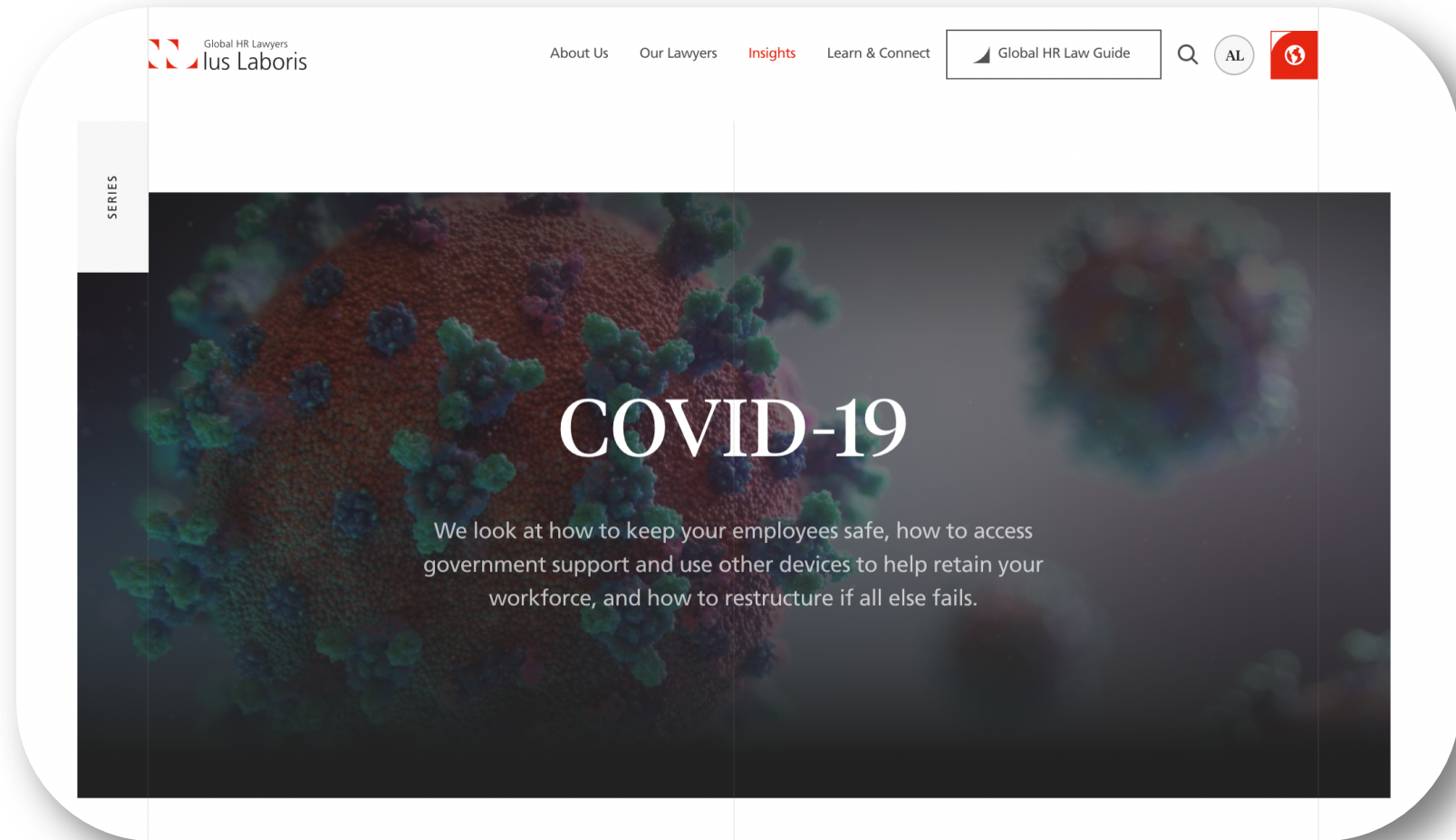
SPAIN

EMPLOYEES BASED ABROAD, BUT TEMPORARILY WORKING IN SPAIN DUE TO COVID-19

- If temporary work in Spain is performed in a work centre of the foreign employer/group company in Spain or within the framework of a contract between the foreign employer and a third party for whom the services are intended: this is **regulated as secondment**. All obligations associated with secondment must be complied with (secondment communication to Labour Authority, specific documents to be made available at the work centre during secondment, Spanish minimum employment rights, tax and social security)
- International remote work (employee's home in Spain): this is **not regulated as secondment**. But it is advisable to grant Spanish minimum employment rights, particularly those on the prevention of labour risks
 - **Issues with applicable law:** if provision of services in Spain is longer than in home country, there are stronger ties with Spain
 - **Social security issues:** territoriality principle. Exception requires A1 form – even if does not qualify as secondment?
 - **Tax issues:** permanent/non-permanent establishment. Tax withholdings if the employee obtains Spanish tax resident status
 - **Safest solution:** treat it as secondment (tax issues for permanent/non-permanent establishment)

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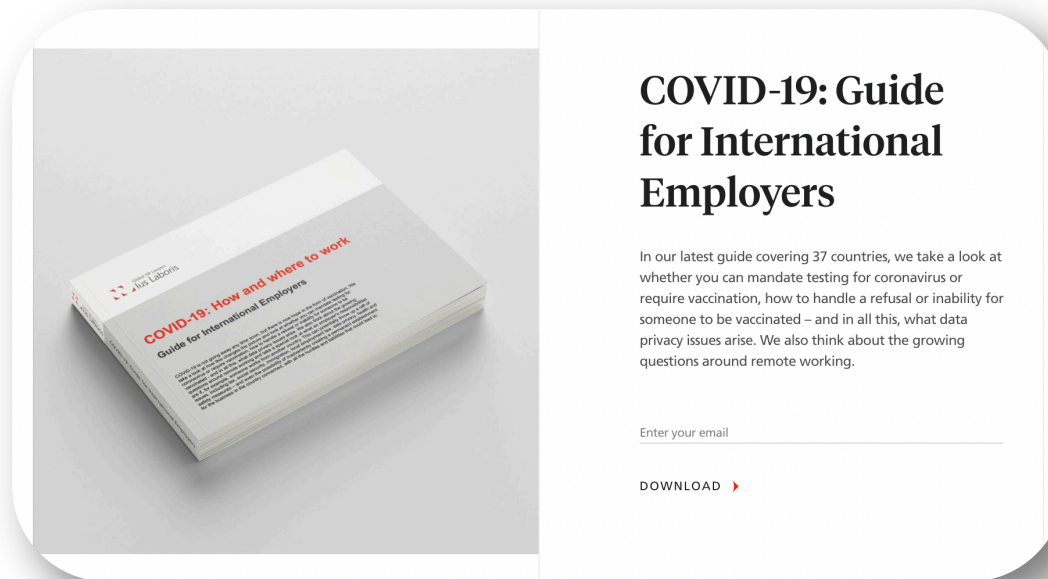
Website: <https://iuslaboris.com/serie/coronavirus/>



MORE ON VACCINATION & HOME WORKING

Report: COVID-19: How and where to work

<https://iuslaboris.com/serie/coronavirus/>



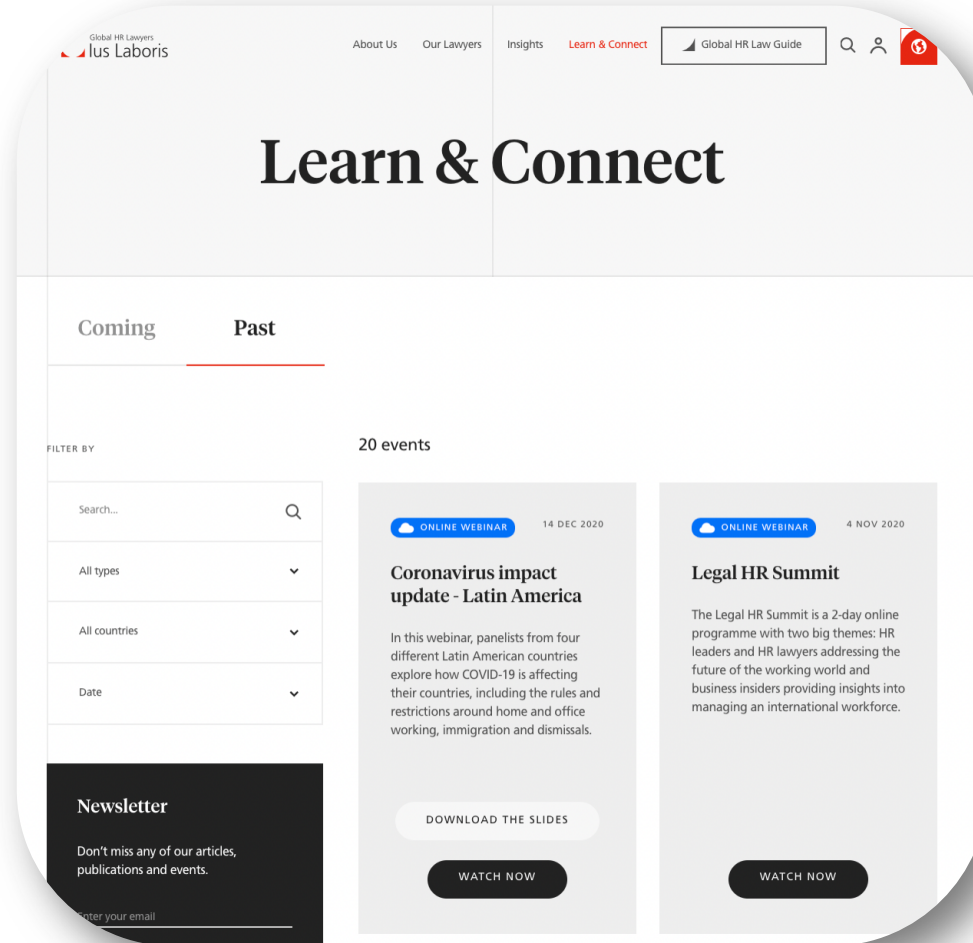
Podcast: Everything from COVID-19 vaccination to remote working

https://open.spotify.com/episode/2r66XqrJyhANvGE9sWjxgh?si=A_SnEaoLS1yKY4cTzHW5vQ



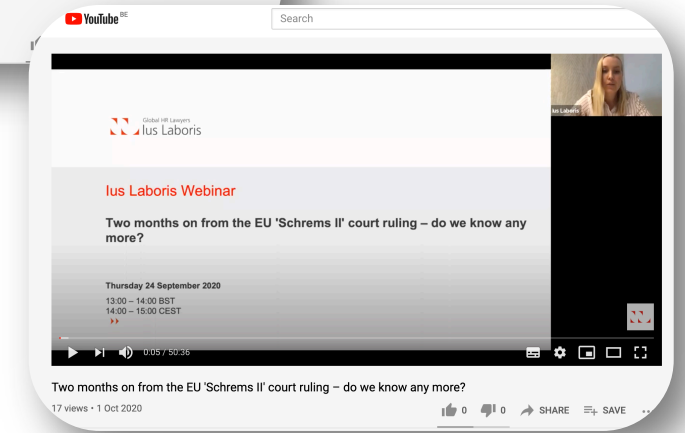
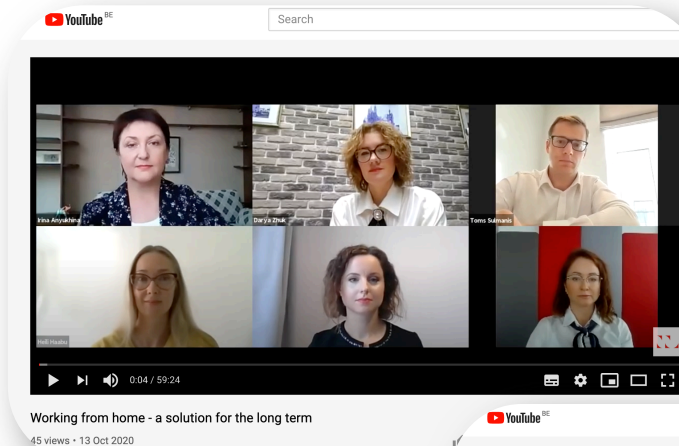
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