

# Covid-19

## *Employment Law*

### Dear Clients,

The coronavirus epidemic is now present in Hungary and the number of people who have contracted the virus is on the rise, and therefore we have compiled the most important things that companies should know about employment law matters associated with the epidemic emergency. Our newsletter answers the most frequently asked questions. The special situation and special status of certain employees (in particular: pregnancy, age, job, term of employment contract) will require additional review before a particular situation can be assessed and an adequate response can be given. Please keep this in mind while you read this newsletter.

#### **Summary:**

An employer may only be exempted from its obligation to provide work to its employees in exceptional cases that the regulations call unavoidable external causes. In the current situation, an absolute lockdown has not been implemented and therefore employees are not exempted from this obligation. Another key obligation for employers is the creation of a healthy and safe work environment, where they have to ensure that sanitizers are available at the workplace, that employees are isolated as much as possible, that working from a home office is an available option, and that employees are regularly given updates about the situation. Employees also have obligations when it comes to a healthy and safe work environment: they must report if they notice symptoms of a disease and must visit a doctor or a hospital. The organisation and cancellation of private and business travel by employees are subject to different treatment. Employers are responsible for ensuring that the conditions for homeworking are in place. Employees are free to dispose over only a limited number of annual leave days, and employers are entitled to grant the majority of the annual leave unilaterally, subject to consultation with employees and to compliance with the statutory restrictions. Employees may not be furloughed without pay unilaterally; this can only be done with their consent. When an employee goes into voluntary isolation, the most important aspect is the careful assessment of circumstances that merit special considerations (e.g. single parent raising several children). In the case of workplaces that must close at 3 pm, employers must comply with their obligation to provide work by the reassignment of tasks and responsibilities, with

the exception of cases where this is not possible by definition (e.g. actors, orchestra members, etc.). In the case of terminating employees, employers must proceed with extra caution in the current situation. We recommend that the parties should use extra efforts to cooperate in order to find a solution that is acceptable for the employer and the employees alike and in which the maintenance of jobs and employment is the priority.

## **1. Employer's obligation to provide work in the case of unavoidable external cause**

Under Hungary's Act I of 2012 (hereinafter: "Labour Code"), employers have an obligation to provide work to their employees; one of the key elements of an employment relationship is that the risks associated with the employment are borne by the employer. One of the manifestations of this principle is that an employer must pay salary to its employees even when it does not comply with this obligation and therefore the employees do not perform any work. Under Section 146(1) of the Labour Code, if an employer does not comply with this obligation, its employees will be entitled to their base salary; whereas Section 147 states that employees will also receive extra pay if they would have been entitled to it on the basis of their work schedule. An exception to this rule is the case where an employer is unable to comply with the obligation due to an unavoidable external cause: if such external cause clearly exists, the employer will be exempted from the obligation to provide work (as it is impossible to carry out work) and it will not be required to pay salaries to its employees.

Unavoidable external causes are circumstances that are beyond the employer's control, such as vis maior events (e.g. fire, flood or earthquake) and the effect of other external forces. In other words, these are causes that the employer has no direct or indirect way of controlling or influencing, and that cannot be avoided or averted at the current level of scientific or technological advancement. An external cause is objective and exists irrespective of whether the employer acts in good or bad faith, but in the determination of whether the external cause was indeed unavoidable will be based on the employer's actions before the cause first existed as well as on all factors that led to the creation of the situation in which the relevant event occurred. Consequently, a situation where work cannot be carried out due to an external cause can exist in very limited circumstances.

In the current situation, an employer can argue that work has been rendered impossible by an unavoidable external cause if a complete lockdown is introduced (as is the case in some European countries, where violators can be prosecuted for a misdemeanour or even a crime in more serious cases), employees are unable to perform work due to the nature of their job and the employer is unable to ensure that its employees work from a home office. Such cases include in particular if the employer is a shipping company or provides passenger transport services.

Therefore, external causes that an employer could avoid or avert by exercising reasonable due care will not exempt it from the obligation to pay base salary for the period when no work is performed. Causes that are associated with the employer's operation generally fall into this category as the employer has control or influence over such matters (e.g. be reorganising and modifying work processes). A frequent solution is the introduction of home office arrangements, which allow employers to reorganise work processes in a such way that they are able to provide work to their employees that can be performed at home.

## **2. Safe and healthy work conditions**

Section 97(1) of the Labour Code states that employers must organise work schedules in the light of the requirements for a healthy and safe work environment. The meaning of these terms has been interpreted by courts in a variety of different ways. In the current epidemic emergency, it means that employers must guarantee a healthy and safe work environment in such a way that matches the effective measures that should be implemented anyway to prevent the spread of the virus: e.g. the placement of sanitizer devices in the workplace (or, in extreme cases, the provision of protective

gear; employees of MÁV, the national railway company receive surgical masks and gloves on international trains). Such measures can include the limitation of the number of people (clients) who can enter the workplace or the prohibition of entry altogether, or the revision of whether company events and business trips are necessary, and limiting or cancelling them. An employer's obligation to provide up-to-date information to its employees about the rules of new ways of working (such the conditions of home office work, protocols for meeting clients, etc.) are also part of these requirements.

Employees' personal health condition is also associated with the matter of health and safety in the workplace. In this respect, the Labour Code imposes an obligation of cooperation in various provisions [e.g. in Section 52/1(e)]. Employees have an obligation to report if they do not have the capacity to work, but an employer may also request an employee to visit a physician for a check-up if it identifies symptoms of a disease or sickness in the employee. Government Decree No. 47/2020 complements this rule when it states that employees may introduce preventive measures, such as measuring body temperature before the start of work, requiring face masks during work, etc. The purpose of this provision is to fill a regulatory gap due to which the only way for employers to determine whether their employees had the capacity to work (e.g. whether or not they had a fever) was to send them for a fast-tracked medical examination. Now employers are allowed to take some of these measures, obviously in keeping with the requirements of necessity and proportionality, and the principle of protecting human dignity (e.g. body temperature measurements must be taken on the forehead without physical contact).

If a physician determines that an employee is incapacitated, they will be on sick leave for a maximum period of fifteen days. If the employee does not recover within this period, statutory sick pay will replace sick leave. Employees are entitled to 70% of the absence fee [Section 146(5)] during sick leave. If an employee is suspected to have contracted the coronavirus, they should call 06 80 277 455 or 06 80 277 456, or send a message to the [koronavirus@bm.gov.hu](mailto:koronavirus@bm.gov.hu) e-mail address. In that case the employee will have to be isolated and transported to hospital. Such an employee will be prohibited from working and will be placed under official quarantine. The rules applicable to this scenario are included in Government Decree No. 41/2020. Unlike in the case of incapacity due to other diseases, the employee will receive statutory sick pay from the first day of being incapacitated, pursuant to Section 44g) of Act LXXXIII of 1997. An employee who is quarantined in a hospital will receive statutory sick pay at the rate that is applicable to patients treated in hospital.

The possibility of private travel by employees can also be viewed as being a part of healthy and safe work conditions. Employers do not have the power to give instructions with regard to private travel; all they can do is to make recommendations and inform employees that road and railway border crossings have been closed for the majority of civil traffic. On the other hand, employees do have the power to give instructions in connection with business travel, but employees can refuse to travel if this would directly and gravely endanger their life, limb or health [Section 54(1)]. Such cases can include for example when an employer wants to send lorry driver to a region where there is high probability that they would be infected.

There is no general procedure for travel that has been paid in advance. It will depend on the terms of each particular booking whether it can be cancelled with a full refund or some form of penalty is payable. Travel insurance contracts generally insure travellers against accidents or sickness and not against statutory travel bans in specific regions or a person's unwillingness to travel due to health concerns.

### **3. Ensuring that the conditions for homeworking are in place**

Under normal circumstances, employers could instruct employees to work from home subject to the following rules: the period of employment in an arrangement other than that specified in the

employment contract (such as home office in the current situation) could not exceed 44 workdays or 352 hours in calendar year under Section 53(2) of the Labour Code. These periods are pro-rated if the employment contract is concluded mid-year or if it is for a part-time job. Under the terminology used in the Labour Code, such an arrangement did not qualify as teleworking. It is important to note that after the above periods expired, a modification of the employment contract with mutual agreement was necessary. Government Decree No. 47/2020 has modified these provisions so that the 44-workday or 352-hour limit has been eliminated and employers can now instruct their employees to work from a home office or a teleworking arrangement for a longer period.

Section 51(1) of the Labour Code states that employers are required to ensure that the conditions for work are in place. In exceptional cases [Section 51(2)], employers are required to reimburse employees for costs that they reasonably incur in connection with the performance of their work. Guideline No. 7001/2006 of the Ministry of Labour and the Ministry of Finance, which has been revoked but is still applied by courts and therefore should be followed in practice, states that one of the attributes of an employment relationship is that the employee uses the employer's resources. This means that in a home office arrangement, the employer must provide a "home" laptop for the employee, and that every software that is indispensable for the employee to perform their duties must be installed on the laptop so that the employee can perform such duties in the normal manner as if they worked on their desktop computer at the office.

#### **4. Annual leave and payment in lieu of annual leave**

Annual leaves are granted by employers after consultation with employees [Labour Code, Section 122(1)]. It is important to note that employees can freely dispose over only seven days of annual leave [Section 122(2)], because in each year, employers have an obligation to grant seven days at the time requested by an employee. The employer has the right to make a decision on the rest of the annual leave, subject to advance consultation with the employee. This means that if an employee wants to take annual leave citing the epidemic as a reason, they can only do so unilaterally for a maximum of seven days and they have to notify the employer about this fifteen days in advance [third sentence of Section 122(2)]. The rest of the annual leave is granted by the employer at its own discretion, and it also has to notify the employee about its decision fifteen days in advance [Section 122(4)]. Under Section 146(3)a, employees are entitled to an absence fee during their annual leave. An employer and an employee may agree to deviate from these rules, including the rule concerning the length of the advance notice period.

#### **5. Furlough without pay**

Employees may not be furloughed from work without pay unilaterally: the regulations do not include any rules that employers could use as grounds for furloughing employees on the basis of an epidemic emergency. Furlough without pay is obviously disadvantageous for employees, and therefore it must be based on their express consent. Consequently, an agreement on furlough without pay (i.e. justified and unpaid leave of absence) must be a bilateral agreement in all cases.

#### **6. Voluntary self-isolation without work**

A mandatory and complete lockdown has not (yet) been ordered by the authorities, but in certain cases a two-week quarantine at home can be mandatory. An employee may decide to go into voluntary isolation to protect themselves and their family, with the employer exempting them from the obligation to work for the period of such isolation. Cases such as these may include single parents who cannot otherwise supervise their children who are at home (because schools are closed). In this case the employer and the employee should agree on what grounds the employee is entitled to the benefit. It is important to note that due to the asymmetric nature of employment

relationships, the employer should go a long way to accommodate the employee's circumstances that merit special considerations.

## **7. Modification of tasks, responsibilities and work schedules (store closures at 3 pm)**

It is important to note that work is not rendered impossible if employees can only work until 3 pm, for example in a restaurant under the relevant Government Decrees, because it is possible to work and only the period while the restaurant can be open is limited. An employer can give tasks to its employees after the mandatory closure at 3 pm, such as taking stocks, loading goods, cleaning, or checking orders and deliveries, etc. We would note once again that employers and employees both have an obligation to cooperate and they must have a constructive approach to the new labour situations created by the epidemic emergency, and must try to keep their employment relationship in place.

As far as the obligation that the parties to an employment relationship have in terms of cooperating with each other, the most advisable solution is one that is acceptable for both parties. For example, the parties could agree that the employee is temporarily employed in a part-time arrangement [Labour Code, Section 92(5)] or in a time-averaging arrangement, where, during the first phase of such arrangement, the employer assigns the employee to work for as long as it can legally keep its establishment open, and then the employee works for longer to raise their average time to the agreed level in the second phase (when the epidemic is hopefully over).

In addition to part-time and time-averaging arrangements, the rules included in Government Decree No. 47/2020 can provide novel solutions for employers in terms of scheduling work.

Under Section 97(4) of the Labour Code, employees must be informed about their work schedule at least 168 hours in advance. Section 97(5) describes an exception to this rule: if an employer announced a work schedule, it may modify it until 96 hours before work on a given day covered by that work schedule starts, if an unforeseeable circumstance affects its business operations. Under the existing rules, a modification made after the 96-hour deadline qualified as overtime. With a view to the emergency, the new regulations now allow employers to modify work schedules even after this deadline expires. Therefore, employers have more flexibility if there is a need to modify work schedules without such modification qualifying as overtime under Section 107a). Obviously, employers must, as always, proceed in compliance with the requirements of exercising their rights in good faith and for the purpose intended, and the parties must cooperate with each other. In other words, employers may not take advantage of this rule and must schedule work in a manner that allows employees time to prepare for the new schedule.

However, if the employer cannot give any tasks to its employees after the mandatory closure at 3 pm because this is objectively not possible in a given job, the rule described in Section 1 above will apply, i.e. the employer will be exempted from the obligation to pay salaries due to an unavoidable external cause. But this will also be applicable only for as long as the restrictions are in place.

## **8. Termination**

The termination of employment can also be a final "solution" to the situation resulting from the epidemic. The simplest and most flexible way to do this is with mutual agreement. If this is not possible, the termination of indefinite-term employment contracts will have to be based on causes associated with the employer's operations, which is regulated in Section 66(2) of the Labour Code. Naturally, the normal prohibitions [e.g. in the case of pregnancy – Section 65(3)a)] and restrictions [e.g. protected age groups – Section 66(4)] will continue to apply. A fixed-term employment contracts may only be terminated if maintaining the employment relationship is impossible due to an unavoidable external cause resulting from the epidemic. For example such a case can be one where an symphonic orchestra cannot have performances or hold practices.

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In the light of the introduction to this extra newsletter, we would note that proper legal advice on specific situations can only be provided in full knowledge of the relevant circumstances, and the terms of the relevant employment contracts or, as the case may be, collective bargaining agreement or works agreement. If you have any questions or would like engage our services, please contact us, because we continue to offer our services without any disruptions.

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