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Trade, Labor and EU Law Perspectives

The coronavirus and the world of work: renewed labour law questions

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We all can see the impact of the coronavirus on labour markets in our daily lives: people stay at home, workers work remotely, if possible we keep social distance, businesses close (some temporarily and others definitively), travel is limited or impossible, there are quarantine measures. The reality of today gives an outlook of the labour market that goes beyond what we have known so far. Does it tell us something about the labour market of the future?

The impact on employment rates is significant. Employment suffers and will suffer in the future from the coronavirus and the accompanying necessary measures. Economies all over the world receive an immense setback. The prognosis is rather pessimistic. The International Labour Organization has given a first analysis of the impact of the COVID-19 on global employment. Estimations indicate a rise of global unemployment between 5.3 million (the 'low' scenario) and 24.7 million (the 'high' scenario). (www.ilo.org)

We will, however, also need to reflect about the impact of the coronavirus on our ways of working and broader, on working conditions. Let us limit this, for reasons of argument, to four areas where further thought may be needed.

In light of the pressure on employment, the coronavirus pays renewed attention to employment protection. Knowing (at least hoping) that the current situation is limited in time, temporary unemployment schemes can be seen as a strength of a legal system. For example, in Belgium, about 25% of the active working population is found to be in such a scheme: workers keep their jobs and receive an income guarantee borne by the social security system, while the employment contract is suspended and maintained. The old idea of job security becomes relevant once more, with also employers having an interest in keeping their staff on board, though under specific circumstances supported by a broader system. The crucial interaction between labour law and broader social welfare policies also becomes very striking.

Furthermore, labour law systems are now invited to fully reflect about the meaning and contours of workplace health and safety (or OSH, occupational health and safety). There are obvious measures of hygiene at the workplace. One of the main questions is how the obligations of employers and employees have to be understood. According the European standards (Directive 89/391/EEC), an employer bears the main and ultimate responsibility over health and safety at work. However, he also needs to call on the advice and assistance of the occupational health physician. The obligation of employers to make risk assessments with regard to health and safety and to take measures to

adapt the work or the workplace, may give a legal ground to oblige workers to work from home. It also implies that workers have a duty to cooperate, based on their duty of loyalty, a good-faith-principle or an obligation to respect the health and safety of others, obligations that now seem to become more relevant than before. Practice shows that this also a difficult legal issue, since adapting the way of working also has an impact on established and agreed working conditions, at least temporarily. Labour law systems thus have to deal with the relationship between health and safety obligations and contractual obligations and responsibilities.

Another important area in the employment context is privacy and data protection. The right to privacy is often the first thing that is getting lost in a crisis-moment. However, it is a fundamental right that also workers must enjoy. There are many questions about medical testing and quarantine obligations of workers. Practice shows that there is an interest in knowing about whether workers have been exposed to the coronavirus, whether they live with exposed or ill family members, or whether they have been in places where health risks or exposure may have occurred. Employers have a responsibility over health and safety and the interest in certain information has to be recognized. However, in a European context, the GDPR (the general data protection regulation) is relevant. It includes the legal grounds of legitimate data processing, both generally as well as in the context of health data. It seems that there are quite broad legal possibilities under the GDPR to collect and process data of workers related to measures in a pandemic context. At the same time, the GDPR has also limits. It does not seem to completely respond, for example, to the question how to assess employers that ask workers to measure their body temperature before they start to work. This does not necessarily involve a processing of data, as required in order to make the GDPR applicable. It is rather something that would need to be answered through the lens of the right to privacy more generally, general employment law principles and occupational health and safety law.

A final remark concerns new ways of working. A large part of the working population is working from home. Since many years, smart working or digital working, including telework, is being discussed and analyzed. We always have learned that such work schemes need specific rules and a proper legal framework. In Europe, the social partners concluded a framework agreement on telework in 2002. It has been implemented in many European jurisdictions. The premise, according to this European agreement, that telework is always voluntary for both the worker and the employer concerned, is clearly not realistic during a pandemic. But the telework agreement shows the challenges with which both employers and workers are now faced. To name a few items covered in the European agreement: health and safety while working at home, work-life-balance problems, organization of the work and working time, monitoring and privacy. It is clear that working remotely is something that, in principle, needs to be well prepared, both legally and in terms of human resources. However, the pace of the pandemic shows that this is not always possible. Parties are now rather forced in this way of working. Legal issues will therefore continue to arise. But perhaps more important is a rather fundamental, underlying question. We have been discussing for years the rise of the digital or virtual workplace. Today, reality pushes many of us at high pace in this direction. The question is thus whether the digital workplace now really has received its momentum on the labour market, as there remain few other options.

The Regulating for Globalization Blog is closely following the impact of COVID-19 on the labour, trade and European law communities, both practically and substantively. We wish our global readers continued health and success during this difficult time. All relevant coverage can

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