

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Equality and Diversity in the Post-Lockdown Return to the Workplace

Mark Bell (Trinity College Dublin, the University of Dublin) · Friday, July 3rd, 2020

During the lockdown, many workers unexpectedly found their normal place of work closed and they were required to start working from home (WFH). As [lockdown restrictions are eased](#), a new scenario arises where employers and workers have to navigate the gradual resumption of activities in the workplace. This blog explores the need for employers to take into account their obligations in EU anti-discrimination law during this process.

[EU Anti-Discrimination Directives](#) principally prohibit discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. The Directives do not specifically address the question of WFH, but this is a common type of [workplace adjustment](#) that can further the inclusion of certain workers, eg those with caring responsibilities may find the option of WFH a helpful way to juggle work and family life. Some workers with disabilities also value the possibility of WFH, such as those with an impairment that causes fatigue. In respect of those with caring responsibilities, an employer's refusal to permit any form of WFH raises potential issues of indirect discrimination on grounds of sex (Art 2(1)(b), [Directive 2006/54](#)) insofar as this could put women a particular disadvantage compared to men (discussed further [here](#)). In relation to workers with disabilities, a refusal to permit WFH might be contrary to the duty on employers to provide reasonable accommodation (Art 5, [Directive 2000/78](#)). Of course, both the prohibition of indirect discrimination and the duty to provide reasonable accommodation are qualified by the possibility for the employer to raise sufficient reasons that justify refusing to permit WFH.

How does this landscape look in the light of the pandemic? The experience of recent months has demonstrated that many jobs can be effectively performed remotely and this seems likely to change employers' attitudes towards permitting WFH. In Ireland, a recent [survey](#) suggested that 70% of employers were now open to facilitating WFH, compared to 10% before the pandemic. Nevertheless, as employers reopen their workplaces, there will be a growing range of circumstances in which employers want their workers to return to the workplace (at least some of the time). In making decisions about which workers are required to return to the workplace, it is important that employers take into account their obligations under anti-discrimination law. Some workers with disabilities will be at a higher risk of becoming seriously ill if they develop COVID-19, so WFH could be a reasonable accommodation in order to reduce this risk. If workers have been able to perform effectively their job during the lockdown when WFH, an employer would need very strong evidence to demonstrate that such an accommodation is no longer reasonable to provide. The [ECDC](#) advises that those over the age of 70 'are considered to be more

at risk of developing severe symptoms' of COVID-19. While EU Directives do not include a specific legal obligation to provide reasonable accommodation for workers on grounds of age, employers need to consider whether refusing to permit workers over the age of 70 to continue WFH might constitute indirect discrimination. Arguably this could put such workers at a particular disadvantage because of their heightened risk of becoming seriously ill, so employers will need to have evidence to sustain that requiring their attendance at the workplace is an appropriate and necessary means of pursuing a legitimate aim. Finally, in many states, childcare is not available to the extent that it was prior to the pandemic and the hours in which school attendance is required may be reduced. This means that some workers may encounter obstacles to returning to the workplace because of caring responsibilities. Given that this will impact more heavily on women, then employers need to be alert also to the possibility that a rigid requirement to be present in the workplace could give rise to potential indirect discrimination on grounds of sex.

The discussion above does not mean that employers can never find a reasonable basis for requiring workers to cease WFH and to return to the workplace. There may be essential job functions that can only be effectively performed at the physical premises of the employer. In practice, many employers are likely to show flexibility in the coming months. Indeed, given employers' need to ensure social distancing at the workplace, often employers might insist that workers continue WFH (at least some of the time). Upending the normal scenario, we might see situations where it is *workers* who want to be permitted to attend their workplace, eg because caring responsibilities make it difficult to find a quiet space to work at home.

As we head into a new period where working life co-exists with the presence of COVID-19, employers and workers face new dilemmas in negotiating the balance between WFH and working at the workplace. The obligations found in the EU Anti-Discrimination Directives provide a helpful framework for weighing up the competing considerations and seeking to avoid further forms of [inequality arising from COVID-19](#). Looking ahead, the EU's [Work-Life Balance Directive](#), which must be implemented in national law by 2 August 2022, will be a timely contribution. As I have previously discussed in this [blog](#), it provides a right for parents (of at least children up to the age of 8) and carers to request flexible working arrangements for caring purposes. Presciently, the Directive defines such arrangements as including 'remote working arrangements'. We hope that the pandemic is behind us by 2022, but the Directive offers a structure for future dialogue between employers and workers on whether and how to continue this experience of working from home.

To make sure you do not miss out on regular updates from the Kluwer Regulating for Globalization Blog, please subscribe [here](#).

This entry was posted on Friday, July 3rd, 2020 at 1:37 pm and is filed under [Covid-19](#), [EU](#)
You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.

