COVID-19: Employment Law. Implications

Introductory aspects

The COVID-19 pandemic has taken the Romanian employers by surprise, catching them widely unprepared for what needs to be done in relation with the employees – both in terms of health & safety precautions, but also in terms of safeguarding the employment relationships (let us not forget that Romania was fraught with a severe labor shortage when the COVID-19 situation occurred) whilst attempting to save their business.

Seeing the rapid development of the situation, including the recent declaration of a state of emergency for a 30-day period by the Romanian President, on 16 March 2020 and the announced series of Government measures intended to protect the national economy and the employees, the current circumstances seem to be characterized by uncertainty, turmoil and depressing forecasts for many employers, with some notable exceptions such as the online stores, retail, delivery or pharma activities where reports of a sudden recruitment spike are beginning to appear.

Against this backdrop, the rigid and formalistic employment legislation, relatively ill adapted to such difficult circumstances, is undergoing a real life stress test. Here is a summary of the main legal provisions that may come to play in these complicated times.

Summary of relevant topics

1. Are the employees obliged to inform the employer in case they suspect infection with COVID-19?

YES, this is a general obligation under the health and safety at work legislation (art. 23 (1) let. g) of Law no. 319/2006) which requires the employees to notify the employer immediately about any circumstances which they believe to be a danger for health and safety. After the conclusion of the labour agreement and before commencing work, the employer is compelled to inform and instruct all employees about the health and safety legislation and the employee's obligations as per this legislation (art. 7 (1) let. c) corroborated with art. 20 (1) of Law no. 319/2006).

2. Does the employer have an obligation to notify the authorities of any case of COVID-19 infection among my employees?

YES, as soon as the event occurs, employers are required to notify: (i) the territorial work inspectorate (art. 27 (1) let. a) of Law no. 319/2006) and (ii) the medical authorities, namely the Public Health Directorate – DSP (art. 27

(2) and (3) of Law no. 319/2006). Infringing this obligation is considered contravention and is sanctioned with contraventional fine between RON 3,500 and RON 7,000 (approx. EUR 717 – 1.430)

3. What happens in case of quarantine or confirmed COVID-19 infection of one of the employees?

As per art. 50 let. c) of the Labour Code, throughout the quarantine, the employment contract of any such employee is suspended by law; since the employee's obligation to perform work is suspended, no salary rights shall be due throughout the suspension.

The quarantine period is established through a certificate issued by the Public Health Directorate (DSP).

As per art. 20 of EGO no. 158/2005 regarding the leaves and social security indemnities, the employee receives a medical leave certificate from the medical authorities, entitling him/her to a related indemnity. The gross amount of the indemnity is 75% of the average of the last 6 months gross income, but maximum 12 minimum wages.

As per art. 8 of the Military Ordinance no. 1/21.03.2020, throughout the emergency state, it is strictly forbidden for the employees under quarantine to leave, without the previous approval of the competent authorities, the place where they are quarantined.

Since the period and degree of spreading of COVID-19 is not accurately confirmed by the WHO, if an employee is COVID-19 positive, the question that arises is whether the employer has any other obligations as concerns the health and safety of the other employees.

As per art. 39 (1) let. f) of the Labour Code, the employee is entitled to health and safety at work (the same principle is reflected also in art. 6 (1) and the following of Law no. 319/2006, pursuant to which the employer is compelled to ensure the health and safety of its employees in all work related aspects).

Also, as per art. 11 of Law 319/2006, the employer has the following obligations:

- to inform as soon as possible all employees that are exposed or can be exposed to a serious and imminent danger of the risks and the precaution measure that were taken or should be taken;
- to take measures for the employees to stop working and/or to immediately leave the workplace and head to a safe zone;
- to not require the employees to restart work where the serious and imminent danger still exists (except for exceptional cases and justified motives).

Thus, pursuant to art. 11 of Law 319/2006, and taking into consideration the need to protect the identity of the employee infected with COVID-19, the employer shall have the following minimal obligation:

- to ensure a safe place of work for the rest of the employees (which shall include, but is not limited to, thorough disinfection of the workplace);
- informing the employees an employee was tested positive for COVID-19.

Failing to comply with these obligations constitutes a contravention for which a fine of RON 3,500 – 7,000 (approx. EUR 717 – 1,430) is applicable.

As per art. 11 (2) of Law no. 319/2006, employees that in case of a serious and imminent danger leave the workplace shall be protected against all negative consequences. Failing to do so constitutes a contravention, applicable to the employer, for which a fine of RON 2,500 – 5,000 (approx. EUR 510 – 1,000) is applicable.

As per art. 1 (3) let. c) of the Health Ministry Order no. 414/2020, the employees that have entered into direct contact with the employee confirmed with COVID-19 shall enter into home isolation for a period of 14 days.

According to art. 5 (1) of the Health Ministry Order no. 414/2020, the employees under home isolation shall be entitled, like the employees under quarantine, to an indemnity. The gross amount of the indemnity is 75% of the average of the last 6 months gross income, but maximum 12 minimum wages.

4. What happens during closure of kindergartens and schools, if the employees need to stay home?

The newly passed Law no. 19/2020 allows the following categories of employees to request paid days off during temporary closure of kindergartens and schools:

- parents to children of up to 12 years old and;
- having work places that are not compatible with teleworking or with working from home.

The employees that opt for this benefit also receive an allowance of 75% of the salary for one day of work (capped at RON 5,429 per month), paid by the employer but incurred from a state-owned salaries' guarantee fund.

In certain critical business sectors, such as electricity providers, health institutions, railways transportation, granting of the above entitlement requires employer consent.

The labour agreement is not suspended while, in such conditions, the employee opted to request paid days off.

5. Can the employer ask the employees to work from home? What does the employer need to do?

YES, provided that the work may be done from outside the company's premises.

Pursuant to art. 33 of the Presidential Decree dated 16.03.2020, companies are actually required to implement work from home or telework solutions throughout the emergency state, provided that the work may be performed from outside the company's premises.

This would be suitable, for instance, for office-based work, IT or services, but not for manufacturing, retail, transportation, etc.

When the work is done using a computer, the solution to be used is **teleworking**. According to the simplification measures introduced by the Presidential Decree declaring the state of emergency, this can be done on the basis of an employer decision, no longer requiring the conclusion of addenda to the employees' contracts.

When the work is not done via computer, the solution to be used is **work from home**. According to the same simplification measures introduced by the Presidential Decree declaring the state of emergency, this can also be done on the basis of an employer decision, there being no further need of addenda to the employees' contracts.

The decisions on the implementation of both telework and work from home should also indicate the methods based on which the employer may verify the employees' activity.

It is advisable that these decisions include also a list of health and safety instructions to the employees.

Plus, to be noted that any of the above-mentioned measures must be implemented in a non-discriminatory fashion, being made to apply to all employees that share similar circumstances – basically, wherever the type of work and the nature of the work place allow it, all the employees should be equally considered by such employer decisions.

6. Can the employer oblige its employees to take their annual leave now?

NO. The employer may not impose such decision; however it may encourage to employees to apply for annual leave in this context, especially if there are cases of unused holiday entitlements where a reduction of the balance of unused days can benefit both the employer (who can use this opportunity to write off some provisions) and the employees (who can stay at home whilst receiving pay that is virtually identical to their salary rights).

7. Can the employer oblige its employees to go on unpaid leave now?

NO. This is not allowed by the applicable law. Unpaid leave may be granted only in case of employee request.

8. Can the employee refuse to show up for work in the context created by COVID-19?

As per the general rules set forth in the Labour Code, the employee is compelled to perform his work as per the labour agreement; should the employee breach this obligation, the employer can take disciplinary measures against such employee, including terminating the labour agreement.

If an employee's refusal to come to work occurs in the context created by COVID-19, the current state of emergency such as declared by the Presidential Decree, the background/reasons of the employee's refusal should be carefully assessed so as to conclude whether the refusal may be justified/not fall within the scope of disciplinary liability – e.g. has the employer taken all precautions so that the employee does not risk to be infected while at work? did the employee request to be allowed to work from home? Etc.

To be noted in this context that as per art. 39 (1) let. f) of the Labour Code, the employee is entitled to health and safety at work (the same principle is reflected also in art. 6 (1) and the following of Law no. 319/2006, pursuant to which the employer is compelled to ensure the health and safety of its employees in all work related aspects).

Also, as per art. 11 of Law 319/2006, the employer has the following obligations:

- to inform as soon as possible all employees that are exposed or can be exposed to a serious and imminent danger of the risks and the precaution measure that were taken or should be taken;
- to take measures for the employees to stop working and/or to immediately leave the workplace and head to a safe zone;
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Failing to comply with these obligations constitutes a contravention for which a fine of RON 3,500 – 7,000 (approx. EUR 717 – 1,430) is applicable.

As per art. 11 (2) of Law no. 319/2006, employees that in case of a serious and imminent danger leave the workplace shall be protected against all negative consequences. Failing to do so constitutes a contravention,

applicable to the employer, for which a fine of RON 2,500 – 5,000 (approx. EUR 510 – 1,000) is applicable.

9. Are there any other types of flexible working arrangements that would allow the employer to keep the employees at home or change their work schedules?

YES, please see below some examples in this regard:

- **granting in advance paid days off** that will be subsequently off-set against overtime work to be rendered within the next 12 months (art. 122 (3) of the Labour Code);
- **introducing flexible working times**, allowing employees to vary the times when they come/leave the office (art. 118 of the Labour Code) – of course, this type of arrangement would only be able to change the work schedules (for instance with the potential to help limit the number of employees that are simultaneously present in the work place – with obvious benefits from a health and safety perspective).

10. What can the employer do in case of economic problems, if it is no longer able to pay the employees?

There are various possibilities in this regard, depending on the severity and of the estimated duration/persistency of the economic problems:

- **temporary decrease of the employees' working time from 5 days/week to 4 days/week** in case of temporary decrease of the business activity lasting more than 30 working days (art. 52 (3) of the Labour Code).

The procedure requires trade union consultations or, if there is no trade union in place, the consultation of the employees' representatives (no consultation may take place, however, if there are neither trade union, nor employees' representatives). In this case, the employees' working time is reduced with a corresponding decrease of the salaries.

The law does not set thresholds per se as regards the extent of the decrease of business activity which enables the employer to apply this mechanism, however it may be presumed that this should be in the region of 20% (to account for the decrease of the working week from 5 to 4 days).

- **temporary suspension of employment contracts** in case of temporary decrease or interruption of the business activity (art. 52 (1) let. c) of the Labour Code).

The law does not set thresholds as regards the extent of the decrease of business activity which enables the employer to apply this mechanism.

The procedure is of low complexity and does not require consultations (of trade union or of the employees' representatives). In this case, the employees are sent home, where they remain available to be recalled to work and are granted a monthly indemnity of at least 75% of their base salary. There are no time limits for this measure.

NB: As a general rule, such indemnities are paid and incurred by the employers. However, by way of exception, pursuant to art. XI and XII of the Emergency Government Ordinance no. 30/2020, the employers that are in one

the following situations may recuperate from the State, via the local Unemployment Agencies, the amounts paid to the employees during the state of emergency – capped at 4,071.75 RON per employee:

1. they interrupt their activity in full or in part as a consequence of the decisions issued by the authorities during the state of emergency and they hold an *emergency situation certificate* such as issued by the Ministry of Economy, Energy and the Business Environment (the methodology for issuing such certificates is to be approved via a subsequent Ministerial Order);
2. they reduce the activity as a result of the COVID-19 epidemic and do not have the financial capacity to pay the salaries of all their employees; in this case the employers may claim from the State the repayment of indemnities for up to 75% of all employees with active employment contracts. The employers that find themselves in this situation (let. b) must prove (i) that their revenues in the month when indemnities are paid diminish by at least 25% compared to the average revenues for the months January-February 2020 and (ii) they lack the financial capacity to pay all employees. It is also worth highlighting that the manner in which the employers will be expected to prove that they lack the financial capacity to pay all employees is yet unknown, there being no indication as to potential secondary normative acts intended to be passed by the authorities.

Both these measures (temporary decrease of the employees' working time from 5 days/week to 4 days/week and the suspension of employment contracts):

1. shall be taken and enforced through a Decision of the employer in this regard; any such decision shall be communicated to the employees;
2. shall be registered within the General Registry of Employees the latest the day before the decrease/suspension operates (arts. 3 and 4 of GD no. 905/2017).

- **redundancies** in case of severe, persistent economic reasons for which the employer does not foresee remedies

Depending on the extent of these economic reasons, the redundancies may affect either parts of the business (certain teams/departments/divisions) or the entire business.

Depending on the number of positions/employees to be affected, you may need to apply either an individual or a collective redundancies procedure. Compared to the individual redundancy procedure, which is relatively straightforward, collective redundancies require consultations with the trade unions and the conveying of notices to various state authorities and usually take at least 6 weeks to be completed.

The law does not mandate the payment of any severance in case of redundancies, however in the case of collective redundancies there is an obligation to include this topic on the agenda of the consultation sessions with the employees' representatives or trade union.

11. Can the employer invoke force majeure to limit its employer obligations? What are the effects of force majeure in the employment context?

Force majeure can generate two distinct types of consequences in employment relationships, with relevance for

the COVID-19 context:

- **change of the employee's place of work** when the force majeure only affects the employee's possibility to work from his/her regular work place and not also the possibility to work in general

Basically this is something that may be implemented in case, let's say, the employer is forced to close down/prevent access to its premises due to health and safety reasons (e.g. in case of disinfection).

- **automatic suspension of the employment contract** when the force majeure affects/precludes entirely employee's possibility to work, in general (not just the possibility to work in a particular work place)

This is, of course, one of the most drastic solutions available in the array of employment law measures, as it would completely deprive the employees of all sources of revenue – they would neither receive their salary, nor some other type of indemnity or allowance.

The suspension of the employment contract shall be registered within the General Registry of Employees the latest the day before the suspension operates (arts. 3 and 4 of GD no. 905/2017).

In both cases, it is debatable what are the exact prerequisites for invoking force majeure seeing that this does not enjoy a specific regulatory regime in employment law. The assessment of whether or not suspension by reason of force majeure may be applied in a given situation is to be carried out on a case by case basis.

12. What specific obligations does the employer have from health and safety at work perspective in the COVID-19 context?

Employers have the following main obligations from health and safety at work perspective in this context:

- to review the biological risks assessment for all work places and activities in light of the COVID-19 virus;
- to update the prevention and protection plans to take account of the revised biological risk assessment;
- to create instructions for the employees as to how to prevent the risk of COVID-19 infection, settling also sanctions in case of failure to comply with such instructions;
- to increase health & safety protection measures in the work places (including, provided that the work may be performed outside the company's premises through work from home or telework, limiting or eliminating the meetings/replace them with audio or videoconferencing, limiting business travel, etc.).

At a practical level, depending on the type and place of work, where the employees work in closed spaces, the employer should provide face masks, hand gloves and/or other equipment (e.g. disinfectant etc.) in order to ensure the protection of the employees against COVID-19 at the workplace.

As per art. 3 of Decision no. 9/10.03.2020 of the Group of technical-scientific support for managing highly contagious diseases in Romania it is recommended for the private employers with a number of employees above 99 to delay the working schedule for the employees using public transportation either for all employees, in order to avoid rush-hours or through splitting the employees using public transportation into 2-3 groups that shall commence and finish the working schedule on different times, allowing the delay of these periods by at least one

hour/one hour and a half as opposed to the normal schedule.

This recommendation shall be applied in Bucharest and the cities – county residence between 12.03.2020 – 31.03.2020.As per art. 4 of Decision no. 10/14.03.2020 (concerning the proposal of instituting the emergency state within Romania and approval of certain supplementary measures in order to manage the Coronavirus SARS-CoV-2 epidemic) issued by the National Committee for Special Emergency Situations, the territorial labor authorities are the competent bodies to verify the implementation of such measure.

13. What happens with the collective labor agreements that shall expire within the emergency state?

As per art. 35 of the Presidential Decree, during the state of emergency, the collective labor agreements currently in place shall be applicable until the end of such period.

If the expiry of the collective labor agreements should have taken place during such emergency period, the obligation to negotiate a new collective labor agreement shall be enforceable only after the expiry of the emergency state.

14. What happens with the collective labor disputes?

As per art. 36 of the Presidential Decree, during the state of emergency, it is forbidden to declare, pursue or perform collective labor disputes within the employers that perform activity in the following sectors: national energy, sanitary and social assistance units, telecom, radio and public television, railway transportation, public transportation and public sanitation, as well as within the units that provide the population with gas and electric energy, heath and water.

15. What happens with the employment agreements where the public authorities have forbidden the employers to offer their services to customer?

As per art. 1 and 2 of the Military Ordinances no. 1/17.03.2020, no. 2/21.03.2020 and no. 3/24.03.2020 certain activities have been (partially) suspended throughout the emergency state (e.g. the activity to serve food and alcoholic and non-alcoholic drinks in the premises of restaurants, hotels, cafes and other public places, the activity of dental clinics, the activities of retail sale of products and services that take place in the premises where many professionals operate – malls except the sale of food, veterinary, pharmaceutical, optical, household electronic products and cleaning services.).

16. Is it possible that the employer is visited by labour inspectors during this time/state of emergency related to COVID-19?

NO, the Presidential Decree no. 195/2020 instituting the emergency state in Romania expressly suspends, during the state of emergency period, the possibility of any regular investigations by the Territorial Labour Inspectorates (of course, with the exception of potential matters related to the COVID-19 situation).