



POST-COVID-19 | MANAGING A SAFE RETURN TO WORK IN MALTA

GUIDANCE FOR EMPLOYERS



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As the country makes its way through the transition period and COVID-19 restrictions are gradually relaxed, part of the success in the transition lies in employers and employees working together to promote and ensure safe work practices in line with guidance from Public Health authorities.

What are the most important issues employers should be thinking about during this period?

In this publication the Employment Law Department at **Fenech & Fenech Advocates** identifies some of the principal issues for managing employees, health and safety, conditions of employment, data protection and other risks post COVID-19.



For more guidance on COVID-19 measures,
financial aid and other measures check out the
Fenech & Fenech Advocates COVID-19 WEBPAGE
[HERE](#)

1. Health and Safety

Employers have a general **duty of care** as well as a legal obligation under Maltese law to ensure the health and safety of their employees.



They have a duty to protect the health, as well as safety, of their employees, a duty to protect others who may be exposed to health risks as a result of the employer's activities, including members of the public, service users

and contractors and a duty to manage safety risks at workplaces under their control.

Health and safety laws do not cater specifically for COVID-19. However, on the basis of an employer's general duty of care as well as the obligation at law to protect employees, a failure on the part of the employer to implement the necessary health and safety measures could, potentially amount to a breach of health and safety obligations at law and could potentially open the door for employees to file claims against the employer on the basis of such.

Therefore, even though the message has been that employees can start

returning to work because the COVID risk has subsided, **an employer must still act with utmost caution** to evaluate risks and mitigate against them, in accordance with the general principles of health and safety legislation.

With the airport soon to re-open there remains a chance that the pandemic numbers will rise again and therefore, employers must continue to mitigate that risk and prepare ahead in case there will be the need to return to more stringent measures.

Such obligations include that of carrying out **risk assessments** to evaluate risk for the various categories of workers, this

depending on the nature of their work and the premises at which such work will be carried out.

The measures to be taken and the protective equipment required to mitigate the risk will not be the same for every workplace – rather it will vary depending on the specific circumstances. Hence the need for risk assessments.

Similarly, if employers had employees that were identified by the Health Authorities as being “**vulnerable persons**” it is advisable for the employer not to ignore the existence of that vulnerability, even though their return to work is now legally permitted.

The decision to allow these persons to return to work should not be taken

solely on the basis of the fact that they are legally permitted to return to work, but more so on an understanding of the health risks, based on the assessment of a qualified medic and health and safety advisor.



Again, there is no one-size-fits all position on this subject. Where possible, teleworking should be facilitated.

What is certain is that in case of claim, the employer will have to demonstrate

the efforts it made towards assessing and mitigating risk.

In order to aid and guide employers with returning to the place of work, the government has issued a number of obligatory conditions and guidelines for different sectors.

Employers should comply with the obligatory conditions and keep a record of its compliance, as well as have a record of its efforts to implement guidelines together with the reasons for which it could not or chose not to apply the guidelines.

With regards to offices and workspaces, the authorities have continued to encourage remote working where possible particularly for vulnerable people, in order to reduce face-to-face

contact and possible transmission. The authorities, however, have also underlined key guiding principles that

are to be implemented by employers when returning to work on-site. The

authorities have highlighted amongst others that :

- ▶ A physical distance of 2m between persons and 4 square meters per person must be ensured. Should this not be possible, acrylic or tempered glass are to be installed or masks/visors must be worn at all times, shift patterns and part-remote working should also be considered in order to mitigate a number of individuals in one place at any one time;
- ▶ Employees must have their temperature checked before entering the workplace, individuals displaying fever (37.2 degrees Celsius) should not be allowed to enter;
- ▶ All staff members must have a personal working space;
- ▶ The number of staff in the office at any one time should be kept to the minimum required;
- ▶ Hand and respiratory hygiene should be encouraged at all times;
- ▶ An eye out ought to be kept for any employees developing symptoms;
- ▶ The workplace is to be regularly cleaned and disinfected;
- ▶ Signage in order to remind employees and others of the risks of COVID-19 ought to be installed;
- ▶ Absorbent furniture and fabrics should be removed;
- ▶ Businesses must designate someone responsible for health and safety at work whom the employees may contact;
- ▶ Businesses must provide employees with the required information and guidelines;
- ▶ Businesses must develop a contingency and continuity plan for an outbreak;
- ▶ Non-essential visits by third parties should not be permitted;

Having written protocols is not enough. Employers are to communicate clearly and early with employees on their plans to return and on new policies to be introduced. Managers and HR staff are to be well briefed on company policy, ensure that there is a consistent message to all employees on processes and policies.

2. Conditions of employment

Over the last months, many employers have made use of the proviso to Article 42 within Chapter 452 in order to reduce employees' conditions of employment with the aim of avoiding **redundancies**.

Employers who have availed themselves of this proviso, must necessarily remember to review such temporary measures every four weeks.

Similarly, where employers relied on **Government COVID grants**, employers must remain abreast with updates as these grants will be phased out.

Employers should consider whether employment contracts, policies, HR practices and other productivity incentives are providing the right tools needed to respond to the business needs post COVID.



It may well be that employers will need to implement change, possibly entailing negotiations with staff or unions to improve workplace flexibility, drive efficiencies and incentivise output.

In so doing employers must take into account any statutory obligation to **inform and consult** with unions or employee representatives, particularly but not only if actions post-COVID will entail redundancies, restructuring or transfers of the business (or parts of it).

3. Telework

In a bid to try curb the outbreak of the pandemic, many employers implemented teleworking and required employees to sign teleworking agreements.

Maltese Law regulates the concept of telework by means of the **Telework National Standard Order** (S.L 452.104) which delineates conditions which must be adhered to in the case of teleworking.

The Law stipulates that a telework agreement shall, first and foremost, be in writing and must also necessarily contain certain requisites including notice of termination of the agreement.

The law stipulates that unless a different period is agreed in the written agreement on telework, where both parties agree to a telework arrangement each party shall have the right to terminate that telework agreement and the employee shall revert to his pre-telework post:

- (i) in the first two months of the telework arrangement, by giving three days' notice in writing to the other party, and
- (ii) after the first two months, by giving two weeks' notice in writing.

Employers must consider these requirements when requesting their employees to return to work on-site.

If Employers rushed to set up teleworking arrangements as a rapid response to COVID, it is now the time to revisit written policies and contractual arrangements to **ensure compliance**, particularly if teleworking might take on as a norm going forward.



4. Data Protection

In order to minimise the spread of COVID-19, Public Health Authorities have indicated that temperature measurements must be taken upon entry into work premises. Moreover, in order to protect the health and safety of employees, many employers are also asking employees to disclose whether they are, or share a household with someone who is, showing symptoms of COVID-19.

Employees' medical information is considered as **special category data** under the GDPR, and therefore should only be processed if a ground under Article 6 and an additional ground under Article 9 are satisfied.

With regards to **temperature measurements**, employers should not be keeping logs linking employees to specific temperature readings.



In so far as no records are kept, in hard or soft copy, by the devices used to measure temperature or in manual form by the employer, such temperature measurement would not fall within the scope of the GDPR.

With regards to questions in relation to symptoms and other health related data, should an employer need to process employee health data, the employer must ensure that the processing of such data is both **necessary** and **relevant** for the intended purpose. Employers must also ensure that the processing of such data is secure, limited in access, protected by security measures and must also contemplate any duty of confidentiality owed to employees.

The processing of such data must be:

- (i) **adequate**, in that the processing suffices to fulfil the stated purpose;

- (ii) **relevant**, in that the processing has a rational link to that purpose; and
- (iii) limited to what is **necessary**, in that no data further than that which is required for that purpose is processed.

Privacy law requires that any personal data processed is accurate. Relevant data linked to health data ought to be

processed as the health status of individuals may change over time and such data may no longer remain valid.

In line with the principle of transparency, employers are to explain the rationale behind the screening being carried out on employees and provide clarity at the outset to employees as to what decisions will be taken on the basis of the results of such

screening. A policy detailing the screening protocol and the confidentiality and security measures implemented is recommended.

Employers should have a clear and accessible **privacy policy** in place for employees, before any health data processing begins.



Conclusion



Employers must realise that rushing a return to work without implementing safeguards and without taking preventive measures risks a resurgence of the pandemic, an impact to the business and potential liability.

Therefore, a cautious approach is recommended, making clear that any return to work measures will continue to be reviewed and adapted in accordance with **evolving guidance** and **best practice**, thus avoiding long-term commitments to employees.

CHECKLIST

- Consult with workers and safety representatives on safety measures to be implemented;
- Remain up to date with latest public health guidance;
- Assess persons formerly defined as “vulnerable”;
- Assess the risks with third parties entering the workplace;
- Assess the risks with off-premises work;
- Appoint a lead person to ensure that Covid-19 measures are strictly adhered to;
- Provide Covid-19 training or guidance for all employees;
- Develop or update your Covid-19 response plan;
- Log meetings and group work in order to facilitate contact tracing;
- Communicate and implement workplace changes or policies with workers to include a response plan to deal with suspected cases of Covid-19 in the workplace;
- Implement Covid-19 prevention and control measures to minimise risk to workers including controls such as staggered breaks, social distancing and physical barriers, and temperature testing in line with public health advice.



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