The 'new normal': the scope for adapting the ways we work as the Covid-19 pandemic continues

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The Covid-19 pandemic has presented numerous new challenges to companies across the world, including in Norway. A number of new issues and problems had – and still have – to be assessed and addressed at a very short notice. The large volume of new temporary legislation has targeted some of the immediate issues companies were faced with. Apart from this, we have seen that many companies have had a sudden need to make changes affecting employees in response to the pandemic. The boundaries of the employers' right to manage have thus been at the heart of many legal issues within employment law this year. Below, we will give an overview of the general principles of the right to manage and highlight some of the issues that have been raised during the Covid-19 pandemic.

The employer's right to manage – general principles

When an employment agreement is entered into, the employer is given a right to organise, lead, control and distribute the work of the employee. This right is described as the employer's right to manage. Although it has not been inscribed in the Norwegian Working Environment Act or other legislation, it has been recognised and developed through case law as a legal standard.

The employer is however not completely free to manage the work as it sees fit. The right to manage is limited by statutory legislation, applicable collective wage agreements, whether the employer has renounced the right to the particular change through wording in the individual employment agreement or other binding agreements, whether the change entails a significant change of the employment relationship and, finally, whether the principle of objective justification has been fulfilled. The latter entails a requirement of objective justification of both the reasons behind the measure, as well as the forms of procedure for the introduction of the measure. We would thus advise to ensure written documentation on the need for the introduction of the measure, as well as ensuring that the measure has been consulted upon with employee representatives before adoption at the correct level of the company.

If the individual employment agreement bars the change, or the change does not pass the test of 'significant change', the employer may enter into a dialogue with the employee and attempt to obtain the employee's consent to the change. Alternatively, the employer may be entitled to terminate the current employment agreement and offer the employee a new agreement where the change is effectuated. A termination must however be objectively justified in accordance with the Working Environment Act s15-7 and all ordinary rules of termination apply. As many companies have been faced with a 'new normal', we have seen an increase in the number of such terminations and offers of new agreements as the Covid-19 pandemic has progressed.

As a main rule, the employee has to comply with any changes the employer imposes based on the right to manage. This falls within the employee's duty of obedience. If the employee refuses to comply, this may be seen as a refusal

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to follow orders. Such a refusal may give grounds for dismissal with or without notice, depending on the severity of the case. This may however be different if the order is outside the boundaries of the right to manage. As always, it is of vital importance to ensure the legality of any changes that are to be made.

Limitations on travels

The employer has an obligation to secure a safe and secure working environment. In light of this, the employer may impose a (temporary) prohibition on work-related travels, in order to reduce the risk of coronavirus infection. If an employee has been permitted to travel for work, with the employee consequently being quarantined at the time of return in accordance with the current legislation, the employer would be obliged to pay the employee's wages as per usual. This applies irrespectively of whether the employee is able to work from home or not. If the statutory legislation does not impose a quarantine, the employer may still instruct the employee to stay away from the workplace upon return from work-related travels, in order to reduce the risk of coronavirus infection for other employees. Again, the employer would be obliged to pay the employee's wages for the duration of such an imposition.

For travels during employees' time off work, the legal picture is more complex. As a main rule, the employer's right to manage does not extend to the employees' spare time. Hence, as a starting point, the employer may not impose a ban on private travels to countries or areas marked as 'red' by the public health authorities. 'Red' in this context refers to countries or areas that triggers a quarantine after the date of return to Norway.

However, if the succeeding quarantine would imply that the employee would not be able to perform their duties at work for any time following the holiday, the employer would be entitled to order the employee not to travel, in accordance with the employer's right to manage.

Mandatory use of face masks

The Norwegian authorities have not (yet) issued guidelines whereby people are advised to wear face masks in general. However, as Norwegian society came to a temporary halt in March 2020, some companies obliged employees to wear face masks while at work. In particular, this was enforced in companies that were a part of a group of international companies. Whether this is objectively justified and thus within the right to manage must as always be assessed on a case-by-case basis. The employer is required to balance the needs of the company with the inconveniences for the employees. The risk of infection and the consequences of infected employees for the company will be important components of this assessment.

Where employees work close to each other in a confined space indoors, the risk of infection may be significant. If employees cannot work from a remote office (ie their home) it may have a great impact on the company's economy if one or several of its employees are infected. This rings particularly true for manufacturing enterprises which may not be able to uphold production if several of its employees are quarantined. In such instances, it is our opinion that it would be within the employer's right to manage to enforce mandatory use of face masks for employees while at work.

The risk of infection and the consequence of infected employees for the company may also lead to the same conclusion in respect of mandatory use of face masks for employees travelling to and from work on public transportation. There is however one significant difference between these two situations: travels to and from work are conducted in the employee's spare time and is, generally, not encompassed by the employer's right to manage.

However, as we see it, the Covid-19 pandemic widens the employer's right to manage based on considerations related to infection control, as long as the measures are objectively justified and enforced without discrimination. If the risk of infection is significant and the consequences for the company of infected employees are substantial, it is our opinion that it would be within the employer's right to manage to enforce a mandatory duty to wear a face mask while commuting by public transportation.

This would particularly apply if the duty was confined to travel during rush hours, and/or to areas where Norwegian authorities have recommended face masks on public transportation, due to an increase in coronavirus infections.

Remote (home) office

At the stages of the pandemic where the number of infected persons was at its

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highest, Norwegian authorities advised employers to facilitate the use of remote offices where possible. In general, this means that employees would be working from home. A number of employers have adhered to this, albeit on different levels. Many companies have adopted a system of rotation where groups of employees take turns to work from home and the workplace respectively. Some public authorities have had all employees operating from home offices from March 2020, while others have ordered all employees that are commuting using public transport to work from home.

If working from home is set as a mandatory temporary measure, this needs to be objectively justified based on the specific situation of the enterprise in question. However, in general, if the decision is based on considerations related to infection control, it is difficult to see how this should not be objectively justified.

The justification of the measure would however need to be reviewed at regular intervals considering the infection situation. Less intrusive measures that could achieve the same objective – ie reducing the risk of infection – should always be considered. For example, the infection situation may indicate that a company may be able to move from a full remote office situation for all employees to more differentiated measures where the employees are put on a rotation, or where only the ones using public transportation for commuting are required to work from home, or shifting working hours for those employees that are able to do so in order to avoid commuting in rush hour, or restricting the use of various physical zones in the workplace to set groups of employees etc. Often, two or more of these measures are used in combination.

Furthermore, some employees may have a home situation that complicates or makes working from home difficult. Others may be at risk if infected by the coronavirus and developing Covid-19 or have close family that may be at risk. Such circumstances should be taken into account.

Testing employees for coronavirus infection

In order to reduce the risk of infecting employees, some companies have expressed a wish to test employees that have been travelling to countries or areas which do not trigger quarantine restrictions upon return to Norway. Other employers have raised the question of whether it is possible to test employees that experience respiratory symptoms, even if they stay at home in accordance with the authorities' guidelines. Still others have tested employees before enrolling for shifts on board ships and rigs, where they remain on board for long periods of time.

The legal framework for requiring such tests is quite strict. As set out in the Working Environment Act s9-4, employers may only require employees to undergo medical examinations, including tests, where this is required by law, the employee holds a position that entails a particular risk or where the employer finds testing necessary in order to preserve life and health. Presumably, it is the latter alternative that in rare cases may give grounds for testing, depending on the specific circumstances of the company and employees in question. The assessment of 'necessity' should however be subject to a strict interpretation, and the danger should appear as specific, probable and likely.

In our opinion, this would not be the case for most workplaces. However, where employees are working side by side in confined locations, eg on ships, rigs etc, it is our assessment that a coronavirus test could be required in order to preserve life and health, depending on the specific situation at issue. In such confined areas, the risk of infecting others is particularly large, consequently also increasing the risk of one or more of the employees developing serious illness through Covid-19. In such circumstances, the employer may be entitled to require employees to undergo a coronavirus test before entering the ship or rig. The forms of procedure required by the Working Environment Act should be followed.

The issue of coronavirus testing mandated by the employer is an example where statutory legislation reduces the scope of the employer's right to manage. The issue of testing is regulated exhaustively by statutory legislation. The preparatory works explicitly state that the employees cannot agree to testing where the legal requirements are not fulfilled. The only way to mandating a coronavirus test is thus through fulfilling the criteria set out in the Working Environment Act. ■

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