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On Your Radar

Lifting lockdowns – emerging trends

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Introduction

In this edition of On Your Radar we look at international responses to lifting lockdown and returning to the workplace. Pandemics press fast forward on change, and we wanted to understand the global response, even at this relatively early stage.

Our report covers a variety of return to work issues, from whether employees have a legal right to refuse to come to work because of concerns over COVID-19, to monitoring of homeworkers. 27 CMS jurisdictions from around the world took part in our survey in June 2020. The full list of participants is included in the appendix to this report.

As with all COVID-19 issues the situation will no doubt evolve, but we wanted to identify and share early indications of how the return to work process was developing and how this might shape workplaces and practices.

Key findings

- 70% of countries have seen a move to a four-day working week
- 70% of respondents had not seen clients take steps to monitor homeworkers by digital surveillance
- 78% of respondents said employers in their country had a duty of care for their staff while travelling to work (and not just when at work)
- 44% of the countries surveyed do not offer employees a right to request flexible working

Flexible working and homeworking

Is flexible working the future? As lockdown measures were imposed throughout the world, homeworking became the new normal for most office-based workers. The question now is whether the pandemic will lead to a significant shift in homeworking in the longer term.

Will we see change at a structural level? Some businesses have made the conscious decision to embrace this, and to reduce their property footprint and move parts of their business to homeworking. However, our research suggests the vast majority of employers are either back in their workplace or making plans to do so.

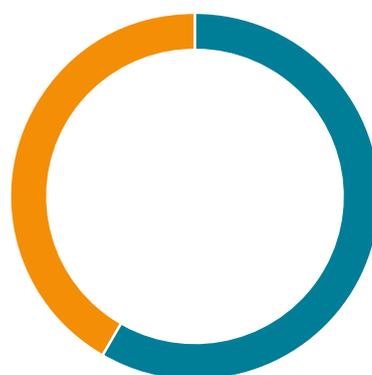
Against that background, there is a growing sense that many employees have valued the increased flexibility of working from home, and may not easily give this up. While some organisations might look to manage this quite informally, this may not give employees the assurance (or outcome) they want. Will these organisations face a litany of permanent flexible working requests from their employees? And if so, are employers obliged to say yes? Recent research¹ in the UK reported that 13% of employees polled do not want to go back to work full time, and 48% are thinking of asking for more remote working when they return to work.

Of course, while there are many benefits to homeworking, including the lack of a daily commute, there have also been challenges during lockdown. One expert, the academic Nicholas Bloom² has pointed to four key differences between “normal” homeworking and the global Covid homeworking trial: children, space, privacy and choice. This move to homeworking did not come about through individual choice, and was exacerbated by a number of additional factors. A lack of decent homeworking space and privacy in their homes have affected some of the younger employees in the workforce. Parents have also struggled with home schooling or childcare while trying to work.

We asked if an employee wants to stay at home on a long-term basis – what are their legal rights?

Does your country provide a legal right to request (a) flexible working (b) homeworking?

No 12



Yes 15

¹ www.hrreview.co.uk/hr-news/strategy-news/loyalty-and-appreciation-of-line-managers-has-increased-during-covid-19

² news.stanford.edu/2020/03/30/productivity-pitfalls-working-home-age-covid-19



Now, as many countries move away from Government emergency measures imposing homeworking, we wanted to know whether legal rights would enable employees to make a request to move to flexible working.

Over half of respondents said their country provided a right to request either flexible or homeworking. In some countries, changes have been made to the legislation because of COVID-19, with the law in Romania and Ukraine providing the employer with the ability to introduce flexible or homeworking where there has been a force majeure, such as COVID-19.

However, it was surprising that 44% of the countries do not offer a right to request flexible working.

In Austria, as a temporary measure, those employees who have been part of a high-risk group have been given the right to work from home, if possible, or to additional protective measures at the workplace. Similarly, in Slovakia during COVID-19 and for two months after the restrictions ends the employer and the employee can request to work from home and the other party is obliged to comply with such a request if the employee's work allows working from home. After this time, the only way it will be possible is by agreement between the employer and employee.

France and Spain provide a right to request flexible working, where an employer is only able to refuse the request if they can objectively justify their decision.

In Colombia the Government has encouraged employers to consider continuing business operations and with employees working from home through teleworking or flexible working hours. Unlike many countries an employer can unilaterally order workers to work from home.

And although there are huge benefits to working from home, there are a range of legal issues employers need to consider, especially if they are moving towards a long term arrangement, or expecting more homeworking requests from employees. Health and safety, data protection and mental wellbeing of remote workers were at the forefront of employers' concerns at the start of lockdown. What we may see is employees asking to do one or two days a week as they want to gain a balance between home and office. As the situation moves to a longer-term situation new issues are emerging. One of those was digital monitoring and surveillance of staff.

Monitoring of staff working remotely

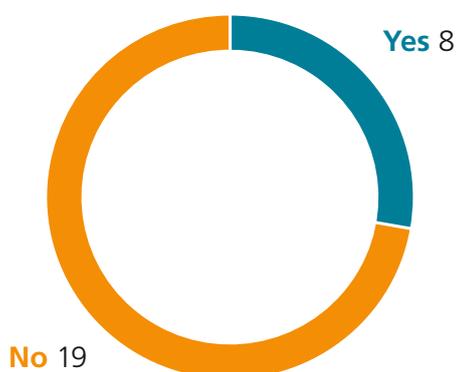
As employers look to the longer term, should they be worried about the productivity of their homeworkers? Is monitoring the answer?

It has been widely reported that PWC has developed facial recognition software aimed at certain employees, for example traders who operate in a highly regulated environment. This type of software tracks whether an employee is online or has taken a long break away from their computer.

We wanted to know whether employers were monitoring homeworkers.

We asked which offices were aware of whether employers that are monitoring or conducting digital surveillance of homeworkers. 30% responded that they were aware that some employers had introduced some form of monitoring exercise, ranging from time logs to digital software surveillance.

Have you seen employers introduce increased digital monitoring of staff in response to homeworking as a result of COVID-19 e.g. using technology to check on hours spent working etc?



In some countries, including Germany, electronic employee monitoring is subject to works council codetermination and therefore effectively cannot be introduced in most companies. Our Singapore colleagues reported some changes in practice, for example companies introducing digital “time sheets” for in-house counsel, to track work done over the course of the day.

In Ukraine there have been some cases where employers have installed software which can either trace when an employee is online or make a screenshot of their screen periodically before sending a report to a designated person within the company.



Monitoring of home workers has not been adopted in the Netherlands as this would be a violation of the GDPR. At the same time it may be possible for employers to monitor the log-in details of the total group of employees to determine how often all employees use the company systems without this being considered a breach of data protection. An employer is not allowed to explore the details of online behaviour of individual employees unless there are serious reasons to do so. In these situations an employer is required to follow a protocol and amongst others limit their search terms and inform the employee that such a search has taken place.

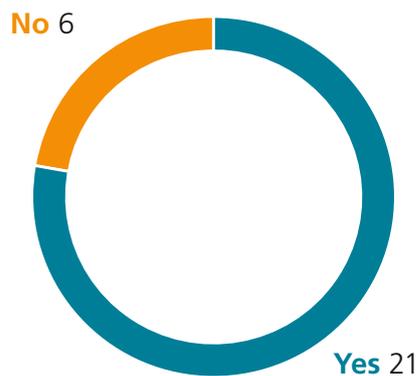
Monitoring gives rise to very real data protection considerations. For companies operating in countries where the GDPR is in force, the measure will need to be a necessary and proportionate response, and employers will need to be transparent about its use. In some countries, the general view is that monitoring is not likely to be used for this reason; and this may prove a blocker to any international business who wish to implement a standard approach across their business. In all cases where GDPR is relevant, consideration of monitoring is going to involve carrying out a data privacy impact assessment.

Travel to work

One major concern of employees returning to work is the journey to the workplace, particularly if they must use public transport. In the UK, travel to work was an issue that employers previously did not need to unduly concern themselves with. However, in Scotland for example, the Government has said that travel to and from work should feature as part of the COVID-19 risk assessments carried out in determining who should be returning to work.

We wanted to know if employers had a duty of care for their staff when they were travelling to work.

In your country do employers have a duty of care towards the safety of staff when travelling to work, as well as when at work?



In 78% of cases employers do have a duty of care for travel to work. In just over half of these countries this was a new requirement as a result of COVID-19.

Has the position changed or become more of an issue as a result of COVID-19?³



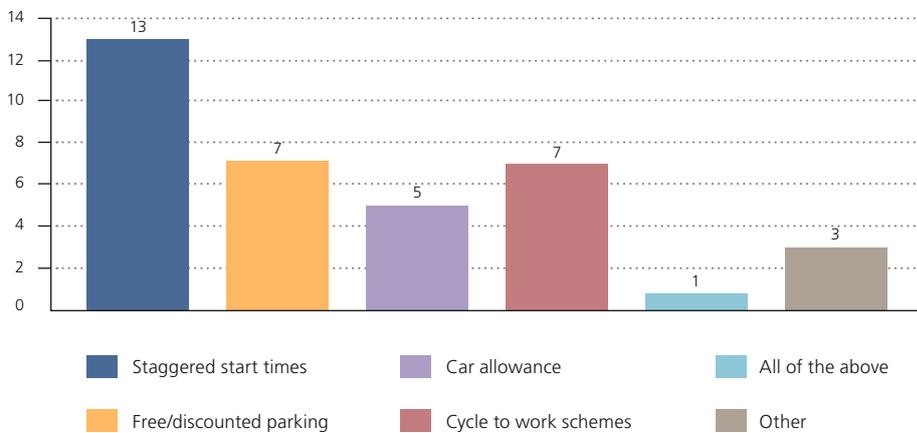
³ 26 replies received for this question



Employers who previously might legitimately not have had any concern for where an employee lived or how they travelled, are now having to consider these matters under a wider umbrella of employee protection.

When asked how employers are seen to be addressing this in practice, we saw that by far the most common measure is staggered start times. Free or discounted parking, car allowance and cycle to work schemes have also been popular.

If so, could you describe what these are?

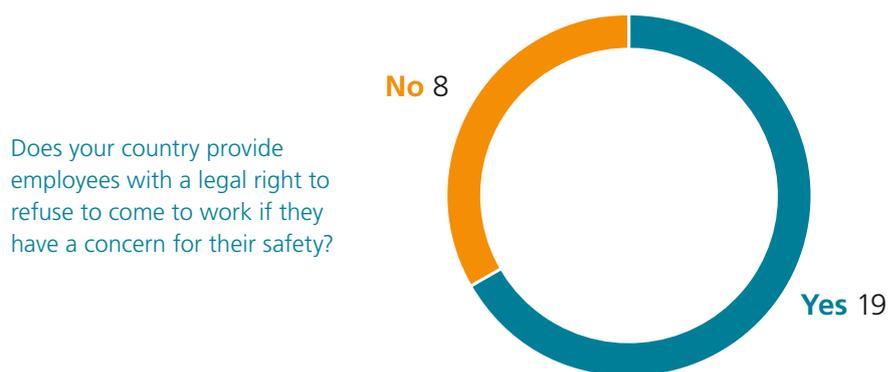


Can employees refuse to return to work because of COVID-19 concerns?

Workplace health and safety is now front and centre of every organisation's COVID-19 recovery plans. Employers in, for example, the manufacturing and construction sectors, are well versed in risk assessments and health and safety compliance. It may be fair to say that, in the past, office environments have tended to adopt a lighter touch – or at least less visible – approach to risk assessment, understandably given the different environment. That of course has all changed. The virus has redefined safety at work.

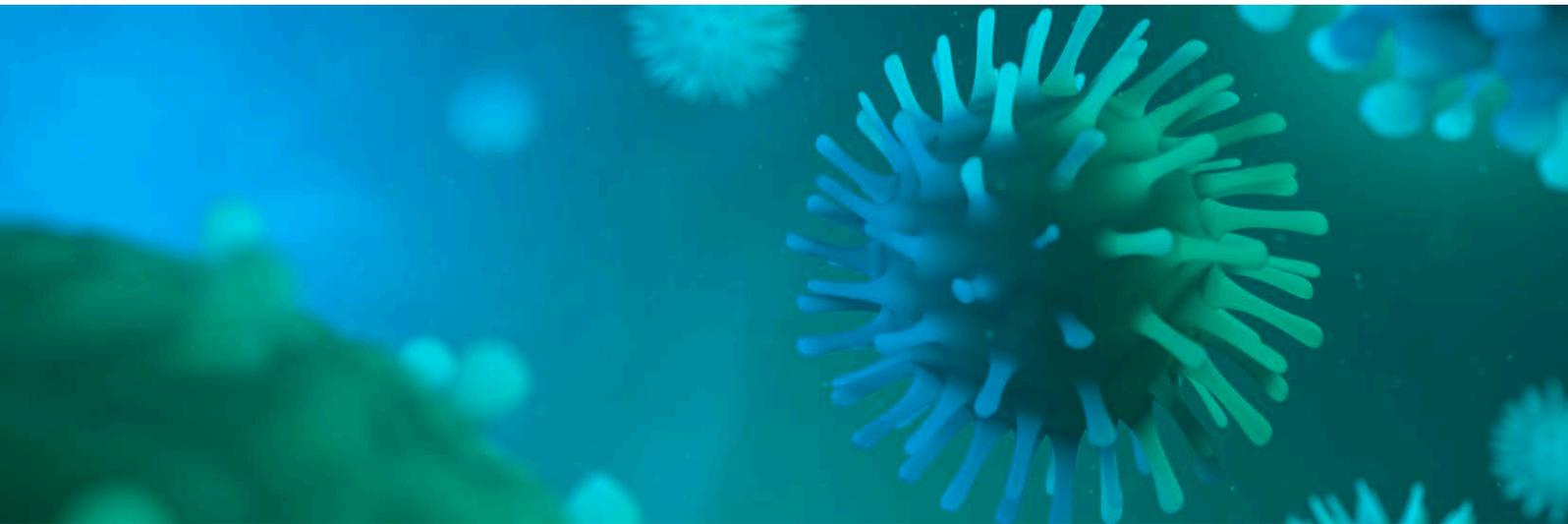
We wanted to know whether employees in different jurisdictions were able to refuse to come to work because of COVID safety concerns.

There was a real mix in responses to whether an employee has a legal right to refuse to return to work. Over two thirds of the countries surveyed explained that there was a right to refuse. Where the right to refuse existed in several cases this was limited to those individuals who could not return to work because of health concerns.



In France, when the pandemic started, some clients had to deal with this issue, but report that this is less the case now. Instead, some staff representatives are lodging claims if they consider their employer is not taking enough measures to ensure employee safety. The representatives are asking the courts to impose additional safety measures as a condition for resuming the business.

In the Netherlands an employee who because of possible health related issues is unwilling to work because of fear of being infected with COVID-19, can only refuse to come to work following an assessment by the company doctor, who then advises the employer to allow the employee not to return to work because of a risk to their health. Otherwise an employee cannot refuse to come to work.



Employees in Portugal can only refuse to come to work if they are in a risk group which means that they need to have a medical condition which will be affected by COVID-19.

In Italy employees can bring a claim against their employer and ask the Inspectorate of Labour to conduct an inspection to check compliance with the COVID-19 safety rules.

Our Croatian colleagues report that a refusal to return to work has been largely unheard of. This may be because the virus controls in Croatia were good from the start, with a low number of cases, so there were no major concerns around employee safety.

In the UK, if an employee has a reasonable belief that they face serious and imminent danger at work, then they may refuse to attend work and may depending on the employer's response bring an employment tribunal claim. These claims require no service threshold and compensation is not capped. Until now, these rights have rarely been used. However, we wonder whether this will change as employees start to raise concerns about returning to work, which could lead to litigation.

Employees in Turkey have a similar right to refuse to perform work if there is a serious and present threat to their wellbeing. An employee can request that the employer assesses the risks and takes necessary measures to protect employees. If the employer does not do this, the employee can discontinue work but still retains all rights under the employment contract.

Finally, the Czech Labour Code states that employees are entitled to refuse to work in circumstances they justifiably believe will directly and seriously endanger their life or health. A refusal of this nature will not amount to non-fulfilment of the employees' obligations.

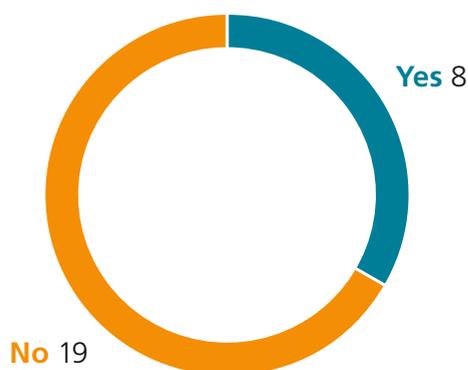
Complaints relating to the return to work process

Businesses are seeing that the return to the workplace process is not just about safety in itself. It is increasingly about flexibility, communication and reassuring staff.

We wanted to know whether the return to work process was generating concerns for employees, and what sorts of concerns were being raised.

Over two thirds of countries reported that they have not seen an increase in complaints around the return to work process. Many businesses have been phasing the return slowly, which no doubt assists, and there are still large numbers of office workers who are working from home. An interesting question is how this response would change in time were there to become more pressure to return to the office, and/or where we see an upswing in reported COVID-19 cases. This will continue to be a difficult balancing act for all employers.

Have your clients experienced an increase in internal concerns, grievances or litigation around the return to work process?



We also asked whether clients were seeing or hearing of employees raising concerns with their employers about their colleagues' health or social distancing not being complied with in workplaces? Just under half of the countries reported that this was an issue.

In Mexico, there has been some concern from employees who are concerned for their safety, when they are required to attend workplaces which are deemed essential businesses. It was explained this has been particularly prevalent in factories that form part of key supply chains with the USA.



In Singapore, there has been a general increase in concerns about whether employees are allowed to return to work under the Safe Management Measures introduced by the Government. There have also been cases of employees' whistleblowing on employers who have compelled them to return to work in spite of these measures. If caught, these employers face financial penalties and stop-work orders.

In the UK, by 7 May 2020 more than 4,500 complaints had been made to the external regulator (the Health and Safety Executive) since the first UK case of coronavirus was confirmed.

In France, concerns were raised by parents who considered they could not come back to work while schools remain closed. This is something that has been repeated elsewhere, and highlights the need, in any return plans, to acknowledge the many different personal circumstances people have been facing.

The impact of testing

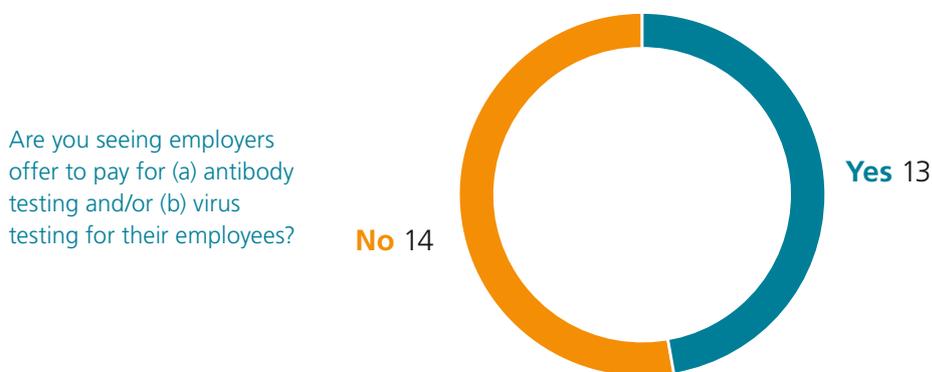
We have seen in professional sport that regular testing of players has been an essential requirement of enabling competition to restart. We have not seen any jurisdiction (from those asked) where this has been mandatory for employers as part of reopening workplaces, however some businesses have considered the option.

Amazon, for example, announced in April that they planned to test their US based staff. It was also reported that Credit Suisse offered free antibody tests to the first wave of employees returning to their head office. This continues to be a live question for some larger businesses, albeit the introduction of public testing in many locations might have held this back.

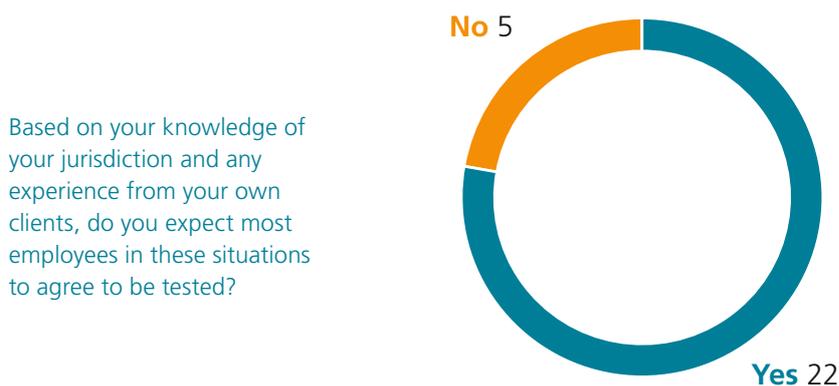
Private testing by employers is expensive, and comes with data protection risks (given it involves processing sensitive or – using GDPR language – “special category” data), which may outweigh the health and safety benefits in some cases, and at a minimum need careful consideration.

We asked whether employers were offering to pay for virus testing at work.

There was a split in responses here with just under half saying they have seen employers pay for testing.



We also asked whether there was an impression that employees in each location would be willing to agree to be tested.





81% said they thought employees would agree to be tested, highlighting that employees are perhaps more relaxed around the use of their data where they trust it is for a wider public health purpose that they clearly understand.

96% of those who responded said their clients were asking employees to self-report if they were experiencing COVID-19 symptoms.

Temperature testing for employees entering work premises is another issue which is starting to generate interest by employers, and this is being seen across many jurisdictions. On 7 May 2020, the French Supervisory Authority the CNIL (National Commission on Informatics and Liberty) updated its guidance for employers relating to the processing of employee data. It makes it clear that employers are not able to conduct temperature checks of employees if the results are recorded. They are permitted to use manual thermometers at the entrance to a workplace if the result is not recorded anywhere. The same applies in Belgium and the Netherlands. Employers should be aware that electronically (meaning without the interference of a human) checking of a temperature can be a breach of GDPR, and the processing of employee data if an employee is required to return home after their temperature has been checked at the entrance of their workplace can be seen as a breach of GDPR.

In the UK employers must also comply with the GDPR if they decide to carry out temperature testing. The UK's supervisory authority, the ICO (Information Commissioner's Office) says that testing should only take place if it is necessary and proportionate to do so.

As of 1 June 2020, everyone in the Netherlands who has (mild) COVID-19 related symptoms is very much encouraged to get tested. The test is free and the outcome is shared by phone with the individual only. The individual is not obliged to share the outcome with the employer but should, if tested positive, remain at home for at least 14 days. If tested positive, the health authorities also ask whether the individual has been to work and if so, the employer will be informed as more employees will then need to be tested. The employer is not allowed to ask employees to get tested. Nor is the employer allowed to ask employees for their test result. Normally the company doctor should advise the employer in case an employee is to remain at home.

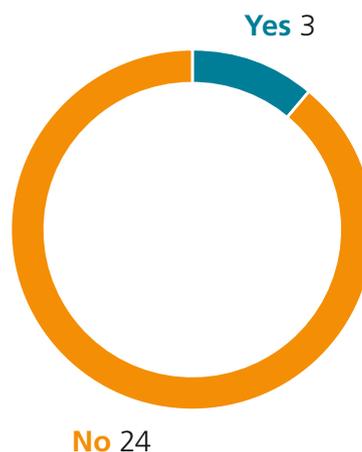
Gender balance of employees returning to the workplace

We are starting to understand that women have been disproportionately affected by the fallout from the pandemic (if not the virus itself) across a range of issues. For example, studies are highlighting that women are more likely to have lost their job or been placed on temporary measures schemes in different countries. Female dominated workplaces have been the hardest hit during the crisis; cleaning, catering, retail, hairdressing to name but a few. The ILO⁴ recently reported that the COVID-19 crisis is disproportionately affecting women workers in many ways; there is a risk of losing some of the gains made in recent decades and exacerbating gender inequalities in the labour market.

We wanted to know if employers were monitoring the gender balance of those employees returning to work.

Almost 90% of respondents said that they had not yet seen this issue raised by clients in their country. In the UK, some clients have raised concerns that more men are coming back to the office than women, and that this may create diversity issues in the future.

Are you seeing clients assess or consider the gender balance of those employees returning to the office (as compared to those who are continuing to work from home longer)?



Could there be a long-term impact, in relation to the gender balance of who returns to the office, on the future of the workplace, on progression decisions and more widely? Where there are longer term impacts of the virus e.g. on the availability of childcare (including through older relatives who continue to distance themselves from exposure to the virus), businesses we have spoken to acknowledge that the future could see larger numbers of women with caring responsibilities working from home, with more men returning to the office.

⁴www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_749399.pdf

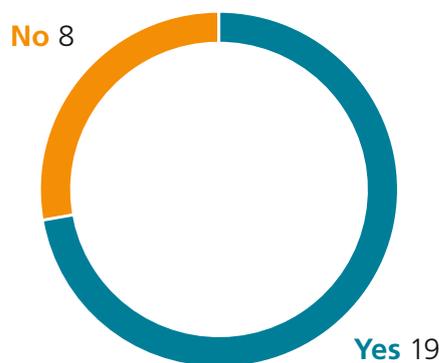
Reduced working week as a result of COVID-19

As lockdown took effect, many businesses adopted a shorter working week as a cost cutting measure. We have yet to see how long these arrangements will stay in place, or whether this will become a permanent fixture.

We wanted to see how many countries were seeing a move to a four-day working week.

A majority (70%) of countries said they were seeing clients in their country move to a reduced working week following the economic effects of COVID-19.

Are you seeing clients move to a reduced (e.g. four-day or similar) working week on a (a) temporary or (b) permanent basis?



There are other reasons beyond cost cutting to move to a four-day week. In May New Zealand Prime Minister Jacinda Arden suggested businesses should adopt a four-day working week to boost tourism and improve work life balance as they came out of lockdown. In June in the UK several politicians called on the UK Government to move to a shorter working week to provide greater working opportunities to tackle unemployment.

While much of the law underpinning all of these issues has already existed in some form prior to this pandemic, the landscape in which it is being applied and considered has changed dramatically and will consider to do so. Across CMS our employment team continues to advise on these and many other issues arising out of COVID-19.

Participating countries

1. Austria
2. Belgium
3. Bulgaria
4. China
5. Colombia
6. Croatia
7. Czech Republic
8. France
9. Germany
10. Italy
11. Mexico
12. Monaco
13. Montenegro
14. Poland
15. Portugal
16. Republic of North Macedonia
17. Romania
18. Russia
19. Serbia
20. Singapore
21. Slovakia
22. Spain
23. The Netherlands
24. Turkey
25. Ukraine
26. United Arab Emirates
27. United Kingdom



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