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BUSINESS AND HUMAN RIGHTS IN THE TIME OF COVID-19

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Introduction

The current COVID-19 crisis is putting businesses under unprecedented levels of pressure, in terms of time, finances and operations. Meanwhile, human rights within businesses and their value chains are at risk, particularly in countries where labour laws and social systems offer limited protection.

Businesses have a responsibility to respect human rights, deriving from international standards, domestic legislation and from their own human rights commitments (including through codes of conduct, human rights policies and related documents). Far from being a lower priority, this responsibility should be a key factor in a business' response to the COVID-19 crisis. This imperative has also been recently underlined by the [United Nations Working Group on Business and Human Rights](#).

This post summarises the main human rights impacts that can affect stakeholders within businesses' activities and value chains as a result of the COVID-19 crisis. It also details some of the challenges that businesses may encounter and provides an overview of key recommendations for them to navigate this crisis and prepare for its aftermath.

Vulnerable individuals and groups

Businesses first need to identify the individuals and groups, across both their activities and value chains that are most exposed to adverse human rights impacts during this crisis.

The table below sets out four groups of vulnerable stakeholders and explains how the COVID-19 crisis could have a particularly negative impact on their human rights.

| EXAMPLES OF VULNERABLE GROUPS | POSSIBLE IMPACTS OF COVID-19 ON VULNERABLE GROUPS | |
|--|---|---|
| | GENERAL IMPACTS | GROUP-SPECIFIC IMPACTS |
| Women and girls | <ul style="list-style-type: none"> Greater mortality rates Heightened job insecurity and higher rate of job losses Greater reliance on employer Direct or indirect discrimination Limited access to remediation mechanisms | <ul style="list-style-type: none"> High risk of COVID-19 transmission and contamination because of traditional caregiving role and overrepresentation in care / healthcare occupations Inability or difficulties to work remotely bearing disproportionately large workloads at home Additional unpaid responsibilities Increased risk of gender-based violence and abuses Overrepresented in non-core areas of a business which may be first affected by lay-offs or unemployment |
| Migrants | <ul style="list-style-type: none"> Absent or insufficient health coverage, access to health services, and unemployment benefits Poor access to COVID-19 related information due to lack of literacy or lack of access to information channels | <ul style="list-style-type: none"> More at risk of losing their jobs / inability to return to work Inability to return home / quarantined in places of work or high costs or health risks associated with attempts to return home Fear of being infected / fear of starvation / fear of arrest due to increased police controls Recruitment debts Possible changes to immigration status |
| Precarious workers (temporary, gig economy, seasonal, self-employed, informal etc.) | | <ul style="list-style-type: none"> More at risk of losing their jobs Less likely to benefit from protective labour law provisions |
| Elderly people / people with underlying health condition / people with disabilities | | <ul style="list-style-type: none"> Higher vulnerability to COVID-19 infection More vulnerable to illness Current working arrangements, including on-site and remotely may not be adequate for them or may increase risks of additional health issues |

Other vulnerable individuals and group include: minorities, indigenous peoples, refugees, asylum seekers, inmates, people living in extreme poverty, and homeless people.

COVID-19 adverse impacts on human rights

In addition to identifying any particularly vulnerable group(s) amongst its stakeholders, a business should also be aware of the human rights that are most likely to be adversely impacted by COVID-19 when preparing their risk mapping in response.

The table below sets out examples of adverse impacts on human rights resulting from the COVID-19 crisis. The specific sector or geographic focus of a business can heighten the likelihood of impacts on these (or potentially other) human rights. It is important for each business to evaluate which human rights risks are most salient in its activities and value chain so that it can identify and respond to these risks and work to minimise or mitigate any adverse impacts.

Human rights are often interdependent, with the fulfilment of one, being dependent on the fulfilment of another (or an adverse impact on one, leading to a consequential adverse impact on another). In addition, a decision taken at the highest level of a company can affect individuals, groups and other businesses along its entire value chain. A business should therefore consider not only how it can avoid causing adverse impacts on human rights, but also how its decisions could contribute or lead to adverse impacts on human rights further down the value chain and how to prevent and mitigate such situations.

| HUMAN RIGHTS IMPACTED | SELECTED EXAMPLES |
|--|--|
| Right to health (physical and mental health) | <p>Physical health: on-site workers more exposed to contamination and transmission of COVID-19. Absence or inadequacy of guarantees for the health and safety of workers (social distancing, provision of protective equipment etc.)</p> <p>Mental health issues caused by reorganisation of work (due to remote working, on-site work, adjusted working hours, multitasking, partial or temporary unemployment, loss of income, etc.)</p> <p>Lack of social security coverage or insufficient access to health care systems, especially in the event of dismissal</p> |
| Workers' rights | <p>Non-compliance with international labour standards (deteriorating working conditions, overtime, work overload linked to businesses' reorganisations, accelerated pace of work, reduced freedom of association and expression)</p> <p>Lack of access to information regarding health conditions and risks on-site</p> |
| Right to an adequate standard of living | <p>Partial or total loss of income for workers linked to the reduction of certain activities</p> <p>Dismissal (with or without financial compensation / unemployment benefits and social security cover)</p> <p>Increased risks of precariousness or even extreme poverty</p> |
| Non-discrimination principle | <p>Some workers are more vulnerable to job loss, loss of income, and are more likely to be subjected to working-time arrangements (especially if part of a more vulnerable group)</p> <p>Risk of stigmatisation of workers with COVID-19 or whose relatives have been infected</p> <p>Risk of racism and xenophobia against persons originating, or considered to originate from, clusters of contamination</p> |
| Prohibition of modern slavery and forced labour | <p>Amplification of the main causes of modern slavery (increased poverty / more vulnerable workers, large orders within short deadlines, accelerated production rates, etc.)</p> <p>Some workers forced to continue working regardless of health conditions and confinement rules (recruitment debts, fear of reprisals, various forms of coercion, etc.)</p> |
| Right to privacy | <p>Collection of data by companies (via websites and apps), including health data, at the expense of employees' / users' / clients' privacy</p> <p>Increasing requests from governments for companies to provide data in the context of the response to the COVID-19 and to trace the virus (monitoring telecom traffic, requests to telecom companies that can help mapping individuals, determining heat maps, facial recognition technology, machine-readable codes)</p> |
| Right to information / Freedom of expression | <p>Reduction or cut-off of internet speed impacting access to information and freedom of expression</p> <p>Increased risks for human rights defenders</p> |

Key recommendations for businesses

The responsibility of businesses to respect human rights (and the expectation on a business pursuant to that responsibility) is clearly set out in international standards and increasingly in domestic legislation. These include the [United Nations Guiding Principles for Business and Human Rights](#) ("UNGPs"), the [OECD Guidelines for Multinational Enterprises](#) and increasing pieces of national legislation, including in [France](#), [the UK](#), and [Australia](#) and potentially also in [the US](#), [Germany](#) and beyond. Such standards and legislation require companies to conduct a number of processes such as initial and on-going human rights due diligence, stakeholders consultations, resulting adapted actions, tracking responses and communicating on actions taken, including through formal reporting.

The UNGPs provide that the way in which a company discharges its responsibility to respect human rights may vary according to its operational context. The COVID-19 crisis forms part of the current operational context of all companies and therefore can justify a company adjusting the steps that it takes. For example:

- Some actions ordinarily require time, travel, consultation, meetings and inspections of the type that it is difficult to undertake under present lockdown conditions. A business should not simply stop taking those steps. Instead, it needs to think creatively as to how to adapt such actions in the current context and the months ahead.
- Because of the increased risks for human rights and increased vulnerability of some individuals and groups, businesses also have to pay attention to new risks which may require new and potentially enhanced steps.

The table below sets out a summary of the key requirements on businesses in relation to the respect for human rights, together with recommendations for how they can seek to fulfil those requirements during the COVID-19 crisis.

| | |
|---|---|
|  Collaborate internally and externally | <p>Collaborate with Governments, international organisations and civil society, business partners and other companies (including from the same sector) in light of the systemic and globalised impacts of the crisis</p> <p>Pursue dialogue with internal and external stakeholders (including representative of workers and unions)</p> <p>Address human rights as an internal cross-sectorial issue: ensure coordination and cooperation between departments (procurement, audit, risks, legal, corporate social responsibility, human resources, etc.) and employee organisations. Consider creating a dedicated task force or using an existing one (such as possible task forces created to implement the French law on the duty of vigilance)</p> |
|  Assess risks | <p>Identify, analyse and prioritise risks in a rapidly changing context (where new risks appear and existing ones are exacerbated)</p> <p>Conduct preliminary human rights assessments in the company's value chain through desktop review</p> |
|  Pay attention to the most vulnerable ones | <p>Identify risks according to the people whose vulnerability is accentuated by the crisis</p> <p>Focus on the most precarious workers, including those in the informal sectors, minorities, women, migrant workers, single parents, elderly people, people with underlying health condition or disabilities, etc.</p> <p>Note that vulnerable groups are not only within the company but throughout across the whole entire value chain</p> |
|  Anticipate and adapt actions | <p>Seek to prevent and mitigate risks on an ongoing basis taking into account the current constraints</p> <p>Make major efforts to anticipate risks arising from business decisions that could harm business partners, especially those most vulnerable economically and which might exacerbate risks and adverse impacts down to the last link of the value chain (especially when adjusting payment conditions, volume of products and timing of delivery)</p> <p>Keep this in mind especially when considering amending, suspending or terminating contracts, including through force majeure clauses, when signing new contracts with employees and business partners</p> <p>Seek as much as possible to pursue contracts, honour orders, protect business partners</p> <p>Seek to reinforce and adjust remediation mechanisms (including operational grievance mechanisms)</p> |
|  Track and report | <p>Document actions and consider how to track them during and after the COVID-19</p> <p>Act with transparency: report internally and also externally on actions taken</p> |

For a selected set of guidance offering further recommendations see at the end of this post.

Potential consequences

In a context where the actions of business actions are closely scrutinised by civil society, and where social media is providing increasing channels for negative stories to be published, the reputational risks for a company that fails properly to address human rights risks are significant. With the COVID-19 crisis seeming to [increase our use of social media](#), the potential audience for those stories is only growing.

However, the consequences of poor human rights performance are far greater than only reputational. For example:

- **Finance:** Increasingly, access to equity finance (responsible and social investors) and debt finance depends on human rights and ESG performance (including respect of the Equator Principles, the IFC Performance Standards, and similar standards from development banks). This has been [emphasised by investors](#) during the COVID-19 crisis. An investor's decision to divest of an asset can also depend on the human rights record of that asset.
- **Legal:** There is a global trend towards legal actions (including class actions) resulting from companies' involvement in adverse human rights impacts and from related reporting. The COVID-19 crisis brings human rights into sharper focus and companies are at risk of being held accountable for any adverse impacts that they cause or contribute to during this time.
- **Operational:** A failure by a business to support workers, both in its own operations and in its value chain, during the COVID-19 crisis could damage that workforce and hinder the business' attempts to recover after the crisis. This is particularly so in the context of [increasing calls](#) for people and planet to be at centre of the COVID-19 recovery.

More resources (as of 28 april 2020)

The selected resources below offer further information for companies in relation to human rights in the current context (as of 28 April 2020). These resources have been prepared by third parties and Herbert Smith Freehills does not endorse or approve and makes no warranties, representations or undertakings relating to them.

General guidance

- [COVID-19 and Responsible Business Conduct, Tackling Coronavirus, Contributing to a global effort](#) by the OECD (April 2020). Practical guidance referring to existing policies such as the OECD Guidelines for Multinational Enterprises and related OECD due diligence guidance and making recommendations in relation to social dialogue, stakeholder engagement, value chain management, disclosure, etc.
- [Human Rights Due Diligence and COVID-19: Rapid Self-Assessment for Business](#) by the United Nations Development Program (10 April 2020). Very practical self-assessment tool divided by categories: occupational health and safety, labour rights, environment and community impacts, safeguarding privacy, preventing stigma, etc.
- [Interim Advice for IFC Clients on Supporting Workers in the Context of COVID-19](#) by the International Finance Corporation ("IFC") (6 April 2020). Useful tool titled "client job protection and employment security checklist" which includes key questions and recommendations in relation to national legal developments, workers consultation and increased communication.
- [Respecting Human Rights in the Time of the COVID-19 Pandemic, Examining Companies' Responsibilities for Workers and Affected Communities](#) by the Institute of Human Rights and Business (16 April 2020). Good practices and recommendations in line with the processes recommended by the UNGPs, to prevent, mitigate and remediate adverse impacts related to the COVID-19 crisis.
- [Protecting Workers During and After the Global Pandemic](#) by the Fair Labour Association (6 April 2020). Recommendations in relation to workers' welfare based on principles including participation of workers at the highest levels of management and governance, responsible purchasing practices, effective grievance mechanisms, etc.
- [Guidelines for "Better" Purchasing Practices Amidst the Coronavirus Crisis and Recovery](#) by Better Buying (2 April 2020). Guidelines in order to collaborate in good faith with suppliers, secure cash flow, pay current orders, be flexible on payments, and recommendations for post-crisis recovery. Also includes best practices from various companies.
- [How Responsible Investors should Respond to the Coronavirus Crisis](#) by Principles for Responsible Investment (27 March 2020). Seven immediate actions to be taken by investors (including engaging with companies facing crisis management difficulties, maintaining a long-term focus in investment decisions making).
- [COVID-19 and Business and Human Rights: Adopting a Responsible Business Response](#) by the Global Business Initiative on Human Rights (11 March 2020). A tool identifying several actions for businesses to take in order to protect workers, help vulnerable groups, take into account implications of business decisions on suppliers, etc. Recommendations include how to communicate, setting up alerts, and improving human rights risks management on a long-term basis.

Sectorial guidance

- [How can Fashion Brands Mitigate the Negative Impacts of the COVID-19 Pandemic on Garment Workers?](#) by the OECD (15 April 2020). A reminder that the [Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector](#), provides immediate actions such as adopting responsible purchasing practices, ending supplier relationships responsibly and prospecting for mid to long-term recovery.
- [COVID-19 Fact-sheets for Cleaning Procurers, Cleaning Contractors and Cleaners](#) by the Cleaning Accountability Framework ("CAF") (26 March 2020). Three different factsheets applicable throughout the value chain for procurers, cleaning contractors and cleaners to deal with COVID-19.

Guidance related to Modern Slavery Acts

- [Modern Slavery Act: Information for Reporting Entities about the Impacts of Coronavirus](#) by the Australian Government, Department of Home Affairs (last updated 21 April 2020). Information sheet providing key steps to protect and support workers including in relation to maintaining supplier relationships and fostering open communication with suppliers, collaborating with stakeholders and reviewing key international resources.
- [Modern Slavery Reporting during the Coronavirus \(COVID-19\) Pandemic](#) by the British Home Office (20 April 2020). Guidance to comply with the UK Modern Slavery Act in the current context