Cost-cutting considerations in the time of COVID-19 (Part 3 – employment issues outside the US)

Employment Alert

COVID-19 Alert

7 April 2020
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As coronavirus disease 2019 (COVID-19) continues to impact the global economy in unprecedented ways, companies worldwide are facing difficult decisions with respect to their personnel. In Parts 1 and 2 of our COVID-19 employment series, we explored the use of furloughs, layoffs and similar reductions for US workforces and global workforces.

In Part 3 of our series, we dive deeper on various cost-saving measures and their viability for employers outside the US. This alert contains information which is current as of April 3, 2020. We are also actively monitoring activities in this rapidly changing area across the globe and posting updates regularly; for additional information on these and other government initiatives, please visit our Coronavirus COVID-19 Daily Update for Employers or email us at CoronavirusEmployment@dlapiper.com.

Government Cost-Saving Measures
As expected, over the last few weeks, many governments have introduced initiatives to provide financial stop gaps to companies so that they will retain employees on their payroll during the COVID-19 crisis. These measures could provide a workaround to employers who would otherwise be forced to engage in more extreme cost-cutting measures. Below is a non-exhaustive list of some of these new proposals and laws:

- **France:** The French government will provide a partial unemployment allowance of up to 70% of an employee’s gross remuneration (absent more favorable provisions in the applicable CBA) where an employer can demonstrate financial difficulties as a result of COVID-19. This benefit applies to employees who are paid hourly, and the allowance is intended to compensate a reduction in hours below a 35-hour workweek. Companies must consult with employee representatives (if any) or inform individual employees prior to applying for the benefit (though consent is not required). The benefit is available for up to 6 months, with the possibility of renewal.

- **The Netherlands:** The previous working time reduction scheme has been replaced by a temporary emergency measure for the preservation of jobs known as “NOW.” Employers who receive a NOW allowance agree not to dismiss employees due to economic reasons during the time in which they receive such allowance (i.e., 3 months with the possibility of a 3-month extension). The amount of the allowance depends on the percentage of business the company has lost, with employers who experience a 100% downturn in business receiving a reimbursement of up to 90% of salary costs. The NOW scheme is expected to be available in the next few weeks.

- **Canada:** The Government of Canada has a “work-sharing program” to assist eligible employers in avoiding layoffs where there is a temporary reduction in business activity. In essence, participating employees (who must be “core” to the business) will receive income support (i.e., unemployment benefits) in exchange for agreeing to work a reduced schedule and “share” available work with co-workers over a set period of time. While the program is not new, the duration of the program has been extended from 38 to 76 weeks in light of COVID-19. In addition, the federal government has introduced the Canada Emergency Response Benefit, a taxable benefit of up to $2,000 a month for up to 4 months for workers (including self-employed individuals and contractors) who lose their income as a result of the COVID-19 pandemic. Workers who are still employed but are not receiving income because of disruptions to their work situation due to COVID-19 would also qualify for the Canada Emergency Response Benefit.

- **United Kingdom:** On March 20, 2020, the UK announced sweeping measures to reimburse companies for up to 80% of employee wages where companies agree to furlough employees rather than dismiss them. Under the Job Retention Scheme eligible employers will receive a reimbursement of up to £2,500 per month per employee that covers all wages from March 1, 2020. The scheme will remain open for 3 months, at which time it will be reviewed.

- **Japan:** Japan has implemented what are known as “Special Rules to the Employment Adjustment Subsidies.” Under these new Rules, if a company must reduce its business operations due to economic reasons due to COVID-19, and provided it meets certain conditions (including creating a labor-management agreement and submitting a “plan” to the authorities), the company may be eligible for reimbursement of 1/2 or 2/3 of an employee’s salary (i.e., at least 60% of salary) up to JPY8,330 per day per person up to 100 days per year. There are discussions for the government to increase this subsidy by even more, though details on the enhanced subsidy have not yet been published.

And in perhaps the largest financial assistance initiative to date outside of the US, the European Commission recently proposed a scheme called Support to mitigate Unemployment Risks in an Emergency (SURE), which, if approved, would provide financial assistance of up to €100 billion in the form of loans on favorable terms granted from the EU to member states. The loans would help member states to stay afloat as they attempt to keep their workforce employed, and specifically, to cover costs related to short-time working schemes (i.e., schemes to reduce working hours / pay) and other similar measures implemented as a result of COVID-19. It appears that SURE would be in addition to and not in lieu of other financial assistance schemes implemented or contemplated by the member states.

It is anticipated that many more countries will enact similar measures in the coming weeks.
Reductions in Salary and Salary Freezes

Even in light of government subsidies, loans and payroll tax credits, some employers may need to take additional steps to control costs, such as compensation reductions or deferrals.

Generally speaking, detrimental changes to key terms and conditions of employment, including changes in compensation, are not permitted outside of the US without employee consent (and, if there are collective groups, without union or works council consultations). Being transparent about the company’s current financial position might aid in obtaining employee consent in some instances. Ultimately, however, such employees can reject a detrimental change in compensation and, depending on the circumstances, could potentially bring a claim for breach of contract and/or constructive dismissal if their employer implements this change without their consent.

In lieu of reducing compensation, employers may consider seeking a temporary freeze on salary or merit increases. Where employees have a contractual right to a salary increase, however, this right generally cannot be modified without employee consent either. And in jurisdictions where salary increases are often mandated by bargaining agreement or CBA—e.g., Brazil—it can be difficult if not impossible in many instances to obtain employee and union consent to a salary freeze. Accordingly, employers are encouraged to tread lightly when it comes to reducing pay or freezing or revoking regular salary increases and to request for employee consent to any such changes where feasible.

In light of COVID-19, some exceptions to this general rule are emerging. For instance, Italy generally does not permit salary reductions or freezes even with employee consent and, historically, unions rarely if ever agreed to such changes. However, as a result of the Italian government’s recent decree that all but non-essential businesses must suspend operations through April 3, 2020, employers are permitted to reduce working hours (and pay) for up to 9 weeks through August 2020. During such reduction, the government will provide employees with up to 80% of the salary for the number of hours reduced up to €1,200. Works councils and unions still must be informed and consulted about this change, but it is anticipated that they will work with companies to come to an agreement in many cases.

Finally, employees in many countries may be more willing to accept reductions or other changes to compensation where the employer agrees to gross them up for the lost amount at a future date. This type of salary deferral, generally speaking, may be permissible as long as the employee consents to the change. While deferring salary would not reduce personnel costs, such action might provide some immediate relief and therefore may be an attractive option to certain employers.

Mandating Use of Paid and Unpaid Leave

Given the challenges of reducing or freezing employee compensation, forcing employees to take paid leave potentially might be a more successful strategy in many jurisdictions. By way of example, in general:

- In Hong Kong, employers are generally free to determine the dates on which employees must use their statutory paid leave provided they have consulted with them in advance (which is a fairly informal process) and provided employees with at least 14 days' written notice.

- In Singapore, employers have discretion to determine when employees can take statutory paid leave as long as employees take such leave within 12 months of the applicable leave year.

- In Australia, employers can require employees to take statutory paid leave at specific times if the requirement is considered reasonable. While there have been no test cases to date, requiring employees to take paid leave due to the financial impact of COVID-19 could potentially be deemed reasonable.

By contrast, in many EU jurisdictions, employers historically could not unilaterally mandate that employees take leave at a certain time. Yet recent COVID-19 laws have eased some of these restrictions across the EU:

- In France, statutory leave generally must be taken during a specified period of the leave year. Unilaterally changing either the leave year or the main leave period is not permissible without employee consent and informing and consulting the works council/CSE, where applicable. However, based on the Government Order of March 26, and provided it is permitted by the applicable CBA, French employers can now require employees to (i) take a certain amount of annual leave or change the dates of such leave and/or (ii) take or
amend the dates of their accrued resting days (RTT).

- Similarly, in Germany, employers generally cannot unilaterally require employees to use annual leave. But at present, employers may be able to instruct employees to take accrued statutory leave from 2019 and may also be able to require employees to take their 2020 leave (or at a minimum, to inform the employer of their plans for such leave).

- In Italy, employers normally must come to an agreement with employees as to when annual leave will be taken. Under the government’s decree, however, the consensus is that employers may be able to require employees to take accrued statutory leave at specific times. Employers are encouraged to informally consult the works council of any unilaterally change to leave periods (though information only is likely sufficient).

In lieu of mandating paid leave, some employers may consider asking employees to take voluntary unpaid leave for a period of time. As expected, this generally requires employee consent in many jurisdictions outside of the US. We urge employers to consider that any agreement to take unpaid leave be carefully drafted to minimize the risk of any future claim.

**Hiring Freezes and Revoking Offers**

While many cost-cutting measures understandably focus on existing employees, many employers are also looking carefully at applicants and individuals who have accepted offers of employment.

One increasingly common way to manage personnel costs is to implement a hiring freeze. Companies who opt to do so are encouraged to communicate with HR, recruiters and others who make hiring decisions to ensure the organization is aligned on current hiring practices.

Revoking or delaying an offer of employment may be less straightforward in many jurisdictions where an individual already has accepted an offer of employment. Accordingly, in any such situations, we strongly encourage employers to seek counsel on how to communicate changes to offers with impacted individuals, including whether and how best to seek the individuals’ consent.

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If your company has specific concerns about a particular jurisdiction, please contact the DLA Piper Employment Group or your DLA Piper relationship attorney or email us at CoronavirusEmployment@dlapiper.com. And please continue to visit our Coronavirus Resource Center and our Coronavirus COVID-19 Daily Update for Employers for the latest legal developments and analysis on this evolving topic.

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