



Coronavirus: Employee furloughs, reductions-in-force and similar temporary cost-saving measures (Part 2 – Employment issues outside the US)

Employment Alert

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The coronavirus 2019 disease (COVID-19) outbreak has created significant disruption and volatility in global markets and, in turn, financial uncertainties for businesses around the world. As the economic impact continues to unfold, employers globally are having to consider remedial steps such as furloughs, short-term closures / layoffs and reductions in force (RIFs). For most employers, the hope is that these will be temporary, rather than permanent measures. However, given the fluidity of this pandemic, it remains unclear how longstanding such solutions will need to be.

In our previous article, we looked at employment issues raised by furloughs, reductions and similar temporary cost-saving measures implemented in response to COVID-19 in the US. In this article, we will widen the lens and provide a general overview of key employment issues to consider outside of the US in this context. Country-specific advice should be taken, bearing in mind the local position may change during this rapidly evolving public health event. Given this state of flux, we

are producing a daily update on developments relevant to global employers here. For other support globally or in any of the countries in which you operate, contact your DLA Piper relationship attorney or email us at CoronavirusEmployment@dlapiper.com.

Furloughs, short-term closures / layoffs and RIFs may be allowed in certain circumstances in some countries, but local laws vary greatly. Implementing them will therefore require local advice, careful planning and implementation. In any single jurisdiction, RIFs in particular can be expensive and time-consuming. Add the complexity of a multi-country RIF, and the situation can become daunting. However, all of these global issues are manageable if you plan ahead, bearing in mind country-specific requirements.

Temporary furloughs, short-term closures / layoffs

In terms of temporary furloughs and short-term closures / layoffs outside of the US, this extraordinary pandemic situation may trigger an employer’s right (under local law or an applicable collective bargaining agreement (CBA)) to put employees on reduced hours or for an employer to suspend operations temporarily while the employee remains bound under the employment contract. The ability to do this, and the pay (if any) that is due as a result, will depend on local rules and may require a statutory process to be followed, which can take time.

Therefore, as a threshold issue, it is important to determine whether the concept of temporary furloughs and short-term closures / layoffs is lawful locally, as well as any parameters. In particular, the following issues will be key:

- **Notification or consultation requirements.** First, companies will need to determine if any information and consultation obligations with collective employee groups (such as works councils, unions, employee forums) may apply. Such collective groups will, in most cases, have information and consultation requirements and, in some countries, like Germany, co-determination (i.e., consent) rights. For example, in Spain, an employer may suspend employment contracts on a temporary basis when there are justified grounds, but this process requires collective consultation with employee representatives. Companies may also need to determine if individual employee information and consultation (and potentially individual consent) is required and factor in any additional associated timing requirements.
- **Communication methods.** During this COVID-19 outbreak, from an employment relations standpoint, employers may consider how best to communicate with employees when they are working remotely, both collectively and individually. For example, softer practical issues such as whether consultation meetings may be held by phone or video conference, whether e-signatures will be valid on local documentation, whether employees may communicate by email, etc. will all be relevant for an employer’s unique workforce, alongside legal considerations.
- **Remuneration.** Companies may be required under some local laws to maintain employees’ pay (or a proportion of such pay) during any temporary furloughs or short-term closures / layoffs. Absent a government order to the contrary due to any country-specific virus concerns, as a general rule, many non-US jurisdictions do not allow for mandatory unpaid furloughs or short-term closures / layoffs. Country-specific obligations in this regard, however, differ greatly. In some countries, continuing the example of Spain above, employees may not need to be paid their salary (unless otherwise agreed), but may receive state unemployment benefits. However, in other jurisdictions, including China, France and Italy, employees may be entitled to a prescribed minimum statutory salary payment. Any unpaid furloughs will typically either require individual employee consent (which is often not very practicable, although companies are increasingly looking into this option) or will need to follow some specific procedure (for example, the consultation procedure for Spain). Certain jurisdictions which have been hardest hit by the virus so far, such as China, Italy, France, Spain and the UK, are starting to issue government orders addressing this topic and providing guidance, but this is still in flux. To help navigate some of these issues we have set out below a table with local rules in a sample set of countries:

Country	In what circumstances, if at all, would an employer be justified in furloughs / short-term closure of business / temporary layoffs?
Brazil	Unilateral (forced) unpaid leave and reduction of salary and working hours are generally not possible except if negotiated with the Union. However, the government has issued two Provisionary Measures with some alternatives for employers during the pandemic. Specifically, MP 927-2020 allows Companies

	to: (i) grant vacations with less formalities; (ii) postpone the payment of FGTS deposits; (iii) implement Bank of hours of 18 months; (iv) ask employees to work from home. The second, MP 936-2020, allows Companies to: (i) reduce employee's work time and salary for up to 90 days and (ii) suspend the employment agreement for up to 60 days (paying an allowance). In both cases, depending on the salary of the employee, it may not be necessary to involve the Union and the employee may be entitled to a benefit to be paid by the government. It is also important to highlight that formal agreements are required for most of the alternatives listed herein.
China	If furloughing amounts to unilateral (forced) unpaid leave, it is not available. However, where an employer has encountered difficulties in business operations due to COVID-19, it may close its business on a short-term basis. Where an employer suspends its operations during a wage payment period, it must pay employee wages according to the employment contract. Where the suspension continues for longer than the wage payment period (so typically longer than one month), employees will receive the minimum wage (if they continue to work) or minimum living expenses (if they do not work).
France	If furloughing amounts to unilateral (forced) unpaid leave, it is available as a last resort. A decree is expected shortly to introduce new provisions on short-term layoffs, whereby companies in these exceptional COVID-19 circumstances will be able to either reduce employees' working time or close temporarily. This "partial activity scheme decree" is expected to provide that the government will bear the cost of 70% of the employee's salary while on partial activity. In addition, while the works council (CSE) must be informed and consulted, this can be done after the fact (within two months after the application, as opposed to a prior consultation, which is normally required).
Hong Kong	If furloughing amounts to unilateral (forced) unpaid leave, it is not available. However, it can be mutually agreed with employees and, if unpaid leave is agreed, the employer is not obliged to continue to pay remuneration other than statutory benefits. The Hong Kong government also just announced a HK\$30bn relief package, aimed predominantly at industries such as retail, food and drink, transport, arts and culture and tourism and at COVID-19 combat measures (such as mask production and support for hospitals).
Italy	If furloughing amounts to unilateral (forced) unpaid leave, it is generally not available. However, exceptionally, the government has issued a new Decree "Cura Italia," providing for measures for employers who suspend or reduce activities due to COVID-19. Companies may request an Ordinary Wages Guarantee Fund (Cassa Integrazione Ordinaria – CIGO) and Ordinary Allowance for a maximum period of nine weeks between 23 February and August 2020. The normal procedure under Italian law does not need to be followed, but trade union information and consultation must still be carried out within three days from the application.
Spain	If furloughing amounts to unilateral (forced) unpaid leave, it is only available if a legal process is followed. This requires collective consultation. Employees normally have seven days to elect representatives and then a 15-day consultation period. While the employment contracts are suspended, the employees would not get salary, but they receive unemployment benefits from the government. A new Royal Decree of 17 March issued new measures as a consequence of COVID-19. Under this Decree the procedure to suspend employment contracts and reduce working hours will remain but with differences. For example, the consultation period now lasts a maximum of seven days (instead of 15 days). The Labor Ministry has just issued guidelines for employers to follow.
UK	If furloughing amounts to unilateral (forced) unpaid leave, it is generally not available. However, it can be mutually agreed with employees. Exceptionally, the UK Chancellor has announced a "Coronavirus job-retention scheme" under which the Government will issue grants to employers to cover the wages of employees placed on furlough and kept on the payroll as a result of the COVID-19 crisis. The funding will cover 80% of an employee's salary up to £2,500 per month.

If ultimately positions are made redundant during or after a furloughs or short-term closures / layoffs, the normal local laws that apply to redundancies / RIFs must be followed, with some exceptions where countries are implementing new restrictions on dismissals in light of COVID-19. For example, in Italy the new Decree above provides that collective dismissals cannot be carried out for 60 days, and pending dismissals which started after February 23, 2020, are suspended. Though local rules merit close consideration, a general overview of some practical points to consider are below.

RIFs

In terms of RIFs, what can be achieved in a day (or a couple of months if WARN applies) in the US can sometimes take months (and sometimes years) once taken global, plus can be far more expensive. The key to protect the organization is to plan ahead, while bearing in mind the requirements of each jurisdiction involved.

- **Business justification.** At the outset, it is important to decide on the business rationale for the RIF. Local definitions vary, but typically the closure of part or whole of the business would be a redundancy. If the economic rationale is the impact of the COVID-19 pandemic, and that is properly evidenced, it may suffice in many jurisdictions. However, local rules do vary. For example, a reduced need for individuals due to financial constraints may provide a legal ground to downsize in some locations, while others (e.g., Japan) may require that the company is in more serious financial difficulties.
- **Gather necessary information.** At the initial planning stages, it is also important to gather headcount (total and impacted) per country and state or province, information on any works councils, employee representatives or CBAs, type of employees (for example, level of employees in jurisdictions with CBAs), employment agreements, copies of policies and procedures, and information on prior practices. If the redundancy is a collective exercise, employers might determine the mass layoff threshold for each jurisdiction and obligations if triggered, as typically information and consultation exercises with employees or their representative are required within certain timescales. However, as mentioned above, governments are also issuing provisional orders to suspend some formalities to give flexibility during this state of uncertainty, so keeping abreast of such developments is crucial.
- **Realistic timeline and costing tool.** Based on the information gathered above, employers might then prepare termination timelines and costing tools for each jurisdiction. As the requirements in one or more of the affected countries may be particularly time-consuming, preparing an overall timeline at an early stage may be helpful to mitigating the extent to which any such outliers hold up the wider global project. Employees outside the US generally will be entitled by law to notice (given or paid in lieu). They may also be entitled to receive severance based on local statutory formulas or company contractual entitlements. Other mandatory payouts may include non-compete payments, accrued vacation entitlement, commissions and bonuses. In addition, employees may receive an “ex gratia” (non-mandatory) severance package in exchange for a release of claims. Although ex gratia payments are in normal circumstances relatively common for global RIFs (given the complications of implementing redundancies globally or as part of a negotiated social plan), it remains to be seen if companies may be less able to provide generous payments in this unique pandemic situation.
- **Lawful selection of employees.** In situations where the selection of employees is relevant, it is important to determine local statutory selection criteria (for example, social selection in Germany, last-in first-out in Sweden). If there is no local statutory selection criteria, employers are reminded to use fair, objective and consistent criteria. It is also important to confirm local rules and determine risks for protected employees. Employee representatives and employees on certain types of leave are frequently afforded protection from dismissal in some jurisdictions.
- **Government and collective group notification and consultation requirements.** Some jurisdictions may require governmental filings or notifications, such as when the threshold for a mass dismissal is triggered but may also be a factor in certain individual redundancies, such as Singapore’s requirement for tax clearance before issuing a final paycheck for certain foreign employees. At an early stage, employers are encouraged to determine the triggers, scope and timing requirements for information and consultation exercises with each collective group or individual. During this COVID-19 outbreak, as mentioned above, employers might consider how best to communicate with employees who may be working from home, including whether consultations may be held remotely, whether documents may be e-signed, etc.
- **Draft and deliver country-specific termination documentation and releases.** When a decision has been made, employers might then determine when notice of termination and any releases can be issued, plus the required method for delivery. This generally may be by post or e-mail (where permissible) if the individual is working from home. It is important to confirm rules on releases to ensure they are enforceable locally. For example, is the employee’s legal representative’s sign-off required (like in the UK), and is that feasible to obtain during this pandemic? Is agency or court approval or a filing mandatory (like in Mexico), and are the courts open during the pandemic? Are translations required (like in Belgium and France)?

- **Post-termination obligations.** Finally, employers may consider post-termination obligations, such as timing of payments and any filings with authorities. There may be specific time frames within which termination payments must be made and/or authorities notified (such as the tax or immigration authorities). During this health crisis, such authorities may have limited hours or even be closed, so it will be important to check that any such requirements logistically can be met.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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