INTERNATIONAL RESPONSE TO COVID-19 IN THE WORKPLACE

A Legalign Global White Paper | As of 12 May 2020

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INTRODUCTION

As COVID-19 virus has raged across borders, governments have responded with varying actions designed to protect their citizens' health and livelihoods, as well as their economies. The impact of the pandemic and associated government responses at local, state and national levels has been profound for employers and their insurers.

Legalign Global is an integrated alliance of world class insurance law specialists operating across all major markets. We are assessing the rapidly evolving insurance implications of COVID-19 on the European, US, Canadian and Australasian markets.

This white paper provides a summary of the national responses of the United States, the United Kingdom, Canada, New Zealand and Australia, as well as some of the issues they raise for employers.

Legalign Global is a closely integrated alliance of the world's leading insurance law firms. The alliance was founded on the principle of offering clients uniform and unrivalled levels of legal excellence and service across all major commercial insurance lines. Each member firm has built a significant reputation for delivering high-quality legal services through decades of investment in the global insurance industry. Legalign Global offers the distinct advantage of independent advice from established lawyers in more than 60 offices worldwide throughout Europe, Latin America, Australasia, Asia Pacific, the United States and Canada. It is the largest team of specialists of its kind, understanding the risks and complexities of the global market, responding with world class service quality and efficiency.

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Wilson Elser, a US firm with offices across the United States and another in London.
Wotton + Kearney, an Australian firm operating in the Asia Pacific region with a focus on Australasia.

THE UNITED STATES

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For American employers, a patchwork of federal, state and local directives has created a complex, myriad of issues.

Amid a political frenzy of federal versus state authority, the US Government declined to issue national stay-at-home and business closure orders in response to the pandemic. State and local governments responded to the federal silence by issuing a myriad of directives and mandates, including ordering citizens to remain at home, closing non-essential business, or promoting and encouraging telework and remote work options.

The US Government has, however, passed two primary laws to address worker welfare and safety (the FFCRA) and to provide some economic security to employers (the CARES Act). Federal departments and agencies, including OSHA, the CDC, the EEOC, the U.S. Department of Labor, IRS and the Treasury Department, have issued numerous guidance documents.

With considerable pushback from the states, the US Government has now issued guidelines and criteria for "reopening America" – subject to local conditions.

The FFCRA

In an unprecedented action, the House of Representatives passed the *Families First Coronavirus Response Act* (H.R. 6201) (the FFCRA) on March 14, 2020. On March 18, 2020, the Senate passed the bill and President Trump signed it into law the same day.

The *Emergency Family and Medical Leave Expansion Act* amends the *Family and Medical Leave Act* (FMLA) to require all private employers of fewer than 500 workers to provide leave to workers who need to care for children without schooling or day care because of COVID-19. The first 10 days of the leave is unpaid, and employees can apply accrued paid time off benefits to that window. After this 10-day period, employers must provide paid family leave up to $200/day or $10,000 in the aggregate using a formula announced in the Act. These FMLA provisions became effective April 2, 2020.

The new law also rolls out an *Emergency Paid Sick Leave Act* that requires all private employers of fewer than 500 employees to pay emergency sick leave to employees who cannot work (or telework) because of government quarantine or isolation orders, because they are under medical care for COVID-19 symptoms or diagnosis, because they are caring for someone in quarantine or

isolation under governmental or medical provider orders, or because they need to care for children whose schools or day care centers closed due to COVID-19 precautions. The emergency paid sick leave benefit caps at 80 hours for full-time workers or the average number of hours across a two-week period for part-time employees.

Employers calculate emergency paid sick leave using an employee's minimum or regular hourly rate across their normal or average hours for a day. Employees who are themselves subject to governmental quarantine, isolation orders or medical care for COVID-19 symptoms or diagnosis max out at $511 per day or $5,110 in the aggregate. Employees caring for family members subject to government or medical provider quarantine, isolation orders or who have children whose schools or day care centers closed due to COVID-19 precautions are paid out at two thirds their regular rate and max out at $200 per day or $2,000 in the aggregate. These provisions became effective on April 2, 2020 and sunset on December 31, 2020.

The Act also provides:

- New tax credits equal to 100% of the emergency paid family medical leave or emergency paid sick leave paid by employers each quarter. Self-employed individuals can take advantage of similar tax credits.
- One billion dollars to supplement and stabilize state unemployment insurance benefit programs, and for education for employers on short-time compensation programs as possible ways to avert layoffs. It also provides full federal funding for certain extended unemployment compensation for a limited time.
- Rules that prohibit insurance carriers and other health care plans or programs from requiring any cost sharing on approved testing for SARS-CoV-e or the virus that causes COVID-19.
- Appropriation of several billion dollars for emergency food and nutritional assistance and health services.

The Act comprises eight distinct divisions, which are summarized here.

The CARES Act

On March 27, 2020, the House of Representatives passed the Coronavirus Aid, Relief and Economic Security (CARES) Act and President Trump quickly signed it into law. The Act provides $2 trillion in relief to address the expected economic impacts of the COVID-19 pandemic.

These funds are earmarked for distribution in a myriad of ways. Several of the programs announced or expanded through the Act will impact American employers' thinking about how they structure their workforce in the coming weeks.

- The Act launches the Paycheck Protection Program, which makes $349 billion in loans available to small businesses to cover payroll, mortgage, rent and utility payments. With the aim of encouraging employers to stay open and keep workers employed, these loans are forgivable to the extent borrowers use the funds for payroll, mortgage, rent or utility payments during the eight weeks following loan origination. Conversely, loan forgiveness is reduced proportionally based on any reduction in employee head count or pay. Borrowers who had already laid off workers or reduced wages due to COVID-19-related economic pressures still can participate in loan forgiveness if they reverse those decisions by June 30, 2020.
- The Act makes $10 billion available for Economic Injury Disaster Loans (EIDLs) for small businesses. While the loans have favorable terms, they are not forgivable. That said, applicants can obtain an advance of up to $10,000 to use for providing paid sick leave to employees, maintaining payroll, and making rent/mortgage payments and other business expenses. The advance need not be repaid.
- The Act provides substantial expansions on unemployment benefits. The Pandemic Unemployment Assistance program extends up to 39 weeks of unemployment benefits to individuals unable to work because of COVID-19, even if they would not otherwise qualify for state unemployment benefits.
- The Act lays out federal Pandemic Unemployment Compensation, which provides American workers an additional $600 per week to the unemployment benefits they receive through state programs. The benefits provide states with an ability to waive the "waiting week" requirements under their own programs, with the federal government fully reimbursing them for payment of such immediate benefits. The benefits also provide an additional 13 weeks of unemployment benefits over and above those already available through state programs.

- The Act provides financial support for states to operate short-time compensation or Work Share programs, which allow employers to cut employee hours in lieu of laying them off entirely.
- The Act rolls out much-publicized stimulus payments, or rebates, directly to individual employees.
- Beyond payments made directly to Americans, the Act allows employees to make early withdrawals or increased loans from their 401(k) accounts, IRA accounts and qualified retirement plans.
- The Act announces an employment tax credit for employers negatively impacted by COVID-19, and it allows employers to defer up to two years' payment of their share of Social Security taxes on employee wages.
- Finally, the Act provides an expedited approach for employers to obtain advance refunds of the payroll tax credit for payments of emergency paid sick and family leave under the recently passed *Families First Coronavirus Response Act* (FFCRA).

The Act is more than 800 pages long and contains programs beyond those outlined above. Some of the Act's most important provisions for employers are detailed below.

Keeping American workers paid and employed

The Paycheck Protection Program

The Act provides up to $349 billion in SBA '7(a)' loans. The loans, which are 100% guaranteed by the federal government, are available between February 15, 2020 and June 30, 2020. Applications can be made through any third-party lender authorized to make 7(a) loans, as well as any other additional lenders the SBA or Secretary of Treasury authorizes to make these loans, including federally insured depository institutions, federally insured credit unions and Farm Credit System institutions.

Businesses could begin applying on April 3, 2020 and self-employed and independent contractors could start applying on April 10, 2020. There is a Paycheck Protection Program loan application already available online through the Department of the Treasury.

The loans are available to small businesses and 501(c)(3)s with fewer than 500 employees, as well as businesses otherwise deemed a 'small business' by the SBA's size standards for a particular industry. Accommodation and food service businesses with 500 or fewer employees in any one location and certain franchises also are eligible. In addition, the loans are available to sole proprietors, independent contractors and self-employed individuals. Organizations must have been in business by February 15, 2020.

Applicants must certify:

- the loan is necessitated by current economic pressures
- the funds will be used to retain workers, maintain payroll or make mortgage/lease/utility payments, and
- the organization has not previously received an SBA 7(a) loan for the same purposes.

Available loan amounts are 2.5 times an applicant's defined monthly payroll costs up to $10 million. For going concerns, the payroll costs are the average monthly payroll costs during the prior year. For newer businesses, the payroll costs are measured as the average payroll in January and February 2020. Payroll costs include most forms of employee compensation, employee benefits and state or local payroll taxes; they do not include any individual employee's compensation beyond $100,000, income taxes, compensation to employees outside the United States, or sums paid for sick and family leave programs under the newly announced FFCRA.

In addition to making mortgage/rent/utility payments or interest payments on existing debt obligations, the loans can be used to pay payroll costs. Such payroll costs can include traditional salaries, wages and commissions as well as payment of paid-time-off benefits, payment required for the provisions of group health benefits and payments of state or local payroll taxes. Compensation to any one individual is limited to $100,000. Payments to employees residing outside the United States, or for emergency paid sick and family leave under the FFCRA, are outside the program.

The Paycheck Protection Program provides for loan forgiveness equal to the amount spent by the borrower during the eight weeks following loan origination on payroll costs and certain mortgage, rent or utility payments. Current Department of the Treasury guidance suggests at least 75% of the forgiven amount must have been used for payroll given the anticipated high subscription to the program. The loan forgiveness will be reduced proportionally based on any reduction in the employee head count compared with the previous year and reduction in pay of employees beyond 25% of their prior-year compensation. Borrowers who already laid off workers or reduced wages due to COVID-19-related economic pressures still can participate in loan forgiveness. Specifically, reductions between February 15,

2020 and April 30, 2020 do not count if they are reversed by June 30, 2020. Canceled indebtedness will not be included in a borrower's taxable income. Loan forgiveness will be requested through the lender servicing the loan.

In addition, the loans are eligible for complete deferment of principal, interest and fees for six months to a year. The interest rate on the loans is 4%.

Emergency EIDL grants

The Act authorized up to $10 billion for emergency Economic Injury Disaster Loans (EIDLs) to businesses impacted by COVID-19. Applications can be made directly to the SBA.

The EIDL grants are available to businesses with 500 or fewer employees and a number of other types of organizations.

The EIDL grants are capped at $2 million, subject to a waiver if the business is a 'major source of employment.' The amount is tied to the amount of the 'substantial economic injury', which factors in business interruption insurance or other recoveries. The interest rates on the loans maxes out at 4% but could be lower depending on SBA rates.

These EIDL grants can be used for traditional EIDL uses (e.g. working capital to carry the business during the emergency), as well as an expanded list of uses, including providing paid sick leave to workers, maintaining payroll, making mortgage/rent payments and meeting increased costs to obtain materials through a disrupted supply chain.

Notably, applicants can seek an advance of up to $10,000 (that must be paid within three days), which can be used for providing paid sick leave to employees, maintaining payroll, making rent/mortgage payments and other business expenses. The advance need not be repaid, even if the applicant is denied the EIDL loan. If the applicant moves to obtaining a 7(a) loan under the Paycheck Protection Program, the $10,000 advance is reduced from the amount of the available loan.

Assistance for American workers, families and businesses

Unemployment insurance provisions

There are a range of provisions for unemployment, including:

- **Pandemic unemployment assistance** – The Act extends up to 39 weeks of unemployment benefits to individuals who are not otherwise eligible for or have exhausted all rights to unemployment benefits who are otherwise able and available to work but are unemployed, partially unemployed or unable to work because the worker:
  - has COVID-19 or symptoms and is seeking a diagnosis
  - has a family member diagnosed with COVID-19
  - is providing care to a family member or member of the household who has COVID-19
  - has a child whose school or day care is closed due to the COVID-19 public health emergency, and the school or day care is necessary for the person to work
  - cannot get to work because of a quarantine
  - is ordered by a health care provider to self-quarantine
  - was scheduled to start a job but cannot because of COVID-19 restrictions
  - has become the head of household because a spouse died from COVID-19
  - had to quit a job because of COVID-19, or
  - cannot go to work because the workplace is closed due to COVID-19.

  These benefits are available to self-employed individuals, independent contractors, people without a sufficient work history or people who otherwise would not be eligible for unemployment benefits. These benefits track state-calculated benefits for workers, plus an additional $600. Payments can apply retroactively from January 27, 2020 and run through to December 31, 2020. People who telework with pay or are receiving emergency paid or family leave through the FFCRA cannot participate in these benefits while they telework or receive leave benefits.
- **Federal pandemic unemployment compensation** – Individuals receiving unemployment insurance through existing state programs are eligible for an additional $600 per week through to July 31, 2020.
- **Temporary full federal funding for first week of compensable regular unemployment without a waiting week** – States may waive their 'waiting week' and pay unemployment benefits immediately for an individuals' first week of unemployment. States receive full reimbursement for the unemployment benefits paid.

- **Pandemic emergency unemployment compensation** – Individuals who exhaust a state's maximum benefits are entitled to an additional 13 weeks of benefits through to December 31, 2020, payable through the state's unemployment program. The additional benefits are available to those who are "able to work, available to work, and actively seeking work." The benefits are calculated similarly to the expanded benefits on existing benefits, with individuals earning their state's calculated benefits plus $600.
- **Temporary financing of short-time compensation payments in states with programs** – Through to December 31, 2020, states with short-time compensation programs or 'Work Share Programs' (through which employers reduce employee hours as an alternative to layoffs and unemployment makes up part of the wage loss) may obtain federal funding for 50% of the costs the state incurs, with employers being fully reimbursed for the costs associated with retaining employees at reduced hours.

Rebates and individual provisions

There are a range of rebates and individual provisions available, including:

- **Recovery rebates for individuals** – Individual taxpayers will receive a stimulus check, couched as rebates or credits against 2020 taxes, based on their adjusted gross income reported on their 2019 tax returns. If returns have not yet been filed, 2018 returns will be used. Individuals with an adjusted gross income below $75,000, or $112,500 for head of household filers, will receive $1,200. Married couples filing jointly with an adjusted gross income below $150,000 are entitled to $2,400. Certain parents of children under 17 will receive $500 per child. These payments are reduced $5 for each $100 an individual exceeds these thresholds. The payments completely phase out for single filers with incomes exceeding $99,000, head of household filers with one child at $146,500 and joint filers with no children at $198,000. Individuals must have a valid Social Security number to receive payments.
- **Special rules for use of retirement funds and increased participant loan limits and repayments** – 401(k) plan participants and IRA account holders may take distributions for qualifying reasons up to $100,000 without incurring the 10% penalty tax for in-service distributions. Such a person, their spouse or their dependent must be diagnosed with SARS-CoV-2 or COVID-19 or otherwise experience financial consequences of being quarantined, furloughed or laid off due to COVID-19, or be unable to work because of a work closure or a closure of a child's school/day care. Individuals may pay the tax on the distribution over a three-year period ending in 2022 or repay it by that date and avoid the taxation. People also may draw increased loan amounts from qualified retirement plans through to December 31, 2020, up to the lesser of $100,000 of their account balance or $100,000. Loans may be repaid over a six-year period, and the repayment period for an outstanding loan is tolled through to December 31, 2020.
- **Employer payments of student loans** – Employers can pay up to $5,250 during 2020 for an employee's outstanding student loans, and such payment is tax free to the employee.

Business provisions

The two key business provisions available are:

- **Employee retention credit:** The Act provides an employee retention tax credit to businesses negatively impacted by the COVID-19 pandemic. Eligible employers are those who were carrying on a business in 2020 that fully or partially suspended operations due to governmental orders limiting commerce, travel or group meetings or whose gross receipts are less than 50% of their gross receipts for the same quarter in the prior year (and continuing until those gross receipts reach 80% of gross receipts for the same quarter in the prior year). The tax credit applies against employment taxes and equals 50% of the qualified wages paid for each employee between March 13, 2020 and December 31, 2020. For employers with 100 or fewer employees, all wages paid qualify for the credit. For employers with more than 100 employees, qualified wages are only those paid to employees who are not providing services due to the suspension of business or drop in gross receipts. Qualified health plan expenses are included in qualified wages. The amount of qualified wages for each employee for all quarters may not exceed $10,000. Wages for emergency paid sick/family leave under the FFCRA are not included in qualified wages.
- **Delay of payment of employer payroll taxes** – Employers may defer payment of employer share of Social Security tax on employee wages. The deferred amounts must be paid within two years (half by December 31, 2021 and half by December 31, 2022).

Economic stabilization and assistance to severely distressed sectors of the US economy

Advance refunding of credits

The Act provides that employers may receive an advance refund of the payroll tax credit announced in the FFCRA from the Treasury instead of waiting to be reimbursed at year-end. The IRS has published Form 7200 for employers to request these "Advance Payments of Employer Credits Due to COVID-19."

On April 16, 2020, the $349 billion small business lending program (known as the *Paycheck Protection Act*) ran out of money – less than two weeks after the application process started. Congress approved an additional $310 billion that was signed by President Trump on April 23.

Regulations and guidance from federal agencies

Beyond the passage of the new legislation, a number of federal agencies are issuing guidance for individuals and business to follow in the wake of the pandemic. Agencies like the U.S. Department of Labor (USDOL) and Department of Treasury are issuing regulations and guidance on implementation of the FFCRA and CARES Act programs, including the PPP loan and pandemic unemployment benefit programs.

The U.S. Centers for Disease Control and Prevention (CDC) is issuing guidance for individuals regarding the COVID-19 and mitigation measures. The CDC also issues routine reporting on testing and surveillance results, while also providing guidance for businesses to mitigate exposures for workers returning to work. The Occupational Safety and Health Administration (OSHA) also issued general guidance on preparing workplaces for business in the wake of the pandemic, as well a myriad of resources for business on how to mitigate risks and protect workers from workplace exposures and the spread of the virus. The U.S. Equal Employment Opportunity Commission (EEOC) supplemented earlier guidance to employers around responding to pandemics, including guidance about testing and screening workers.

Planning for the end of lockdown

Federal Re-Opening Guidance

In response to the pandemic, President Donald Trump and his Corona Virus Taskforce issued its "30 Days to Slow the Spread" guidance. The federal government thereafter largely deferred action on stay-at-home and social distancing orders to the states. The states, in turn, proactively issued executive orders limiting and restricting the operations of nonessential businesses, and ordering citizens to stay home and limiting nonessential travel. As of Friday, April 24, 2020, it was reported that about 70% of America's population were still under some form of lockdown.

With an eye towards "re-opening" the American economy, the White House's taskforce issued its "Opening up America Again" guidance on April 16, 2020. The guidance does not provide a specific timeframe for relaxing any stay-at-home or social distancing guidelines set by the individual states. Instead, the federal guidance provides a set of criteria, such as a downward trajectory of coronavirus cases, testing and hospital capacity, that state and local leaders should evaluate in deciding whether to lift any restrictions. The federal plan for re-opening the national economy leaves the decision to the states. Some states are working together to coordinate their efforts in re-opening the economy and lifting restrictions regarding gatherings and business operations.

> "The Cares Act provides USD2 trillion in relief to address the expected economic impacts of COVID-19"

THE UNITED KINGDOM

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As the coronavirus infection started to impact the UK, employers were initially concerned with handling employee sickness, holiday and self-isolation and the challenges around home working. With an increase in sickness absence, and vulnerable groups being advised to self-isolate, the UK Government introduced amendments to the Statutory Sick Pay (SSP) regime to mandate that such self-isolation could be treated as sickness absence and also to allow businesses with 250 employees or fewer to claim back the costs of SSP from the government.

On 20 March 2020, the UK Government instructed entertainment and hospitality premises to close to limit spread of coronavirus. This was quickly followed by an instruction for most households to stay at home and only to leave for limited permitted reasons.

The key issue for many employers is dealing with the financial impact of those measures with a reduced supply chain, no customers, and no employees being physically at work (especially impactful where working from home is simply not possible).

Wage support scheme

On 20 March 2020, the UK Government also announced an unprecedented scheme to underwrite wages for employees who are 'furloughed' to assist businesses to retain their employees in the current circumstances. Furloughing is essentially a new legal concept for the UK.

The Coronavirus Job Retention Scheme (CJRS), announced by Chancellor Rishi Sunak as part of a package of support to protect jobs and businesses, has been through multiple iterations since it was first published. It essentially allows employers to claim a cash grant of up to 80% of a furloughed employee's wage costs, capped at gross pay of £2,500 a month. The employer can choose to pay the additional 20% but there is no obligation to do so. That said, technically if there is no express layoff clause in the employment contract, the employer still remains liable for the remaining 20% unless there is agreement from

the employee to the contrary. Employee agreement to be furloughed is key to avoid risks such as breach of contract or unlawful deduction from wages claims.

Whilst furloughed, employees can work for other businesses (provided they are not contractually prohibited from doing so). In the UK, the supermarkets and associated supply chain have been heavily recruiting to keep on top of the demand for food and online delivery. At first the Treasury estimated that approximately three million private-sector employees, or just over 10% of the workforce, would be furloughed at a cost to the Treasury of around £10bn. The scheme was initially put in place for three months (March-May) and was then extended until the end of June 2020. On 12 May 2020, the UK Government announced that the scheme will now be extended by a further four months until the end of October. From August to the end of October, there will be greater flexibility with part-time working permissible. This is something that had been requested by both unions and employer bodies. Workers will continue to receive the same level of support as they do now, however, from August employers will be asked to pay a percentage towards the salaries of their furloughed staff. Further guidance will be published at the end of May. The online portal to apply for the scheme opened on 20 April 2020 and applications for more than 6.3 million furloughed employees have been made so far, at a total value of £8bn (as at 3 May 2020).

All UK employers are eligible to claim under the CJRS. Whilst the initial aim of the scheme was said to be to avoid redundancies, there is no technical requirement for a 'redundancy situation' to exist before a claim is made. The criteria are drafted widely, so employers can apply if their operations have been "severely affected by coronavirus." Employers can furlough the whole or part of their workforce. They can also furlough employees on a rotating basis as long as each employee placed on furlough is furloughed for a minimum period of three consecutive weeks. Whilst furloughed, employees cannot do any work for their employers and one of the criticisms of the scheme is that is cannot accommodate short-time working / reduction in hours. This would be of assistance to many employers both now and during the UK's eventual move out of lockdown.

Many of the concerns raised regarding the CJRS are because the scheme was put together quickly and, until recently, was based solely on guidance documents from HM Revenue & Customs rather than formal legislation. The guidance has also been updated and revised several times, and to date there have been eleven different versions. A formal Regulation was published on 15 April 2020 in the form of a Treasury Direction, however, there remains significant inconsistencies between the guidance and the direction, making it difficult for employers to fully formulate plans for their workforce.

Planning for the end of lockdown

It has been more than six weeks since the CJRS was announced and employers are starting to plan what to do at the end of lockdown and the closure of the CJRS. To assist in this process, the UK Government published sector-specific guidance on 11 May to help employers to prepare to open and operate their workplaces safely. Some of the issues to consider are:

Health and safety measures:

- **Will social distancing still be required** and, if so, how will this be implemented?
- **Can the physical layouts of workstations / workplaces be adapted** to maximize protection for staff and customers / clients?
- **How can travel arrangements be altered**, including reducing the number of staff travelling at peak hours and/or providing free parking or taxi rebates to reduce the need for employees to take public transport?
- **Should employers introduce temperature checks** and/or formal testing for employees returning to the workplace? If so, there will be significant contractual and data protection issues to work through before implementation.

Workforce measures:

- **In the absence of any vaccine, sickness, absence, and self-isolation will still be an issue.** How will employers manage workload in those circumstances?
- **Should employers bring back employees in stages** and, if so, how do employers chose who to bring back from furlough? Employers will need to consider that some employees may still be required to stay at home if they fall into a vulnerable category or if they have childcare constraints, given the schools remain closed.
- **What happens if an employee refuses to return?** Employers need to be cautious of the need to protect the health and well-being of staff and to not victimize those who have raised genuine health and safety concerns.

- **How can employers communicate with, engage and support employees** regarding a return to work? Employers will need to consider early engagement with unions and/or employee consultative bodies and consider producing a "Coronavirus Return to Work Policy".
- **What happens to employees annual leave**, including considering whether employees are required to take annual leave during the furlough period and/or that a percentage of leave entitlement is taken in subsequent years.
- **How to deal with employees suffering with Covid-19 symptoms after returning to work**, including entitlement to Statutory Sick Pay and contractual entitlements, the need for works to self-isolate if a member of their household has symptoms or are shielding, and/or policies for deep cleaning premises.

Changes to workforce /furlough exit strategies:

- **Will redundancies still be required?** If redundancies are possible, employers will need to consider how many employees might be affected and at what locations. If there is a possibility that 20 more redundancies will be required at one location within a period of 90 days, employers will need to consider the consequences of having to comply with the UK statutory obligations around collective consultation, which demands a 30 or 45 day consultation period depending upon affected numbers of employees.
- **What other cost cutting measure** may be implemented as an alternative to or in addition to redundancies, including reducing hours and/or pay, voluntary redundancies, voluntary pay cuts, extending furlough without the benefit of the CJRS grant, or unpaid sabbaticals?

The issues regarding COVID-19 and the UK Government's CJRS evolve almost daily, requiring UK businesses to remain agile with their people plans. They also need to ensure they adhere to the UK Government's lockdown requirements, and manage the wellbeing and job security of their employees.

CANADA

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Businesses that operate in Canada face new requirements under provincial and federal laws, including from employment standards, occupational health and safety, and travel restrictions. Further, these requirements have been changing daily as Canadian legislators enact new laws and benefit programs in response to COVID-19.

Businesses have been navigating these requirements to reduce wage costs, continue operations and avoid exposure to future legal claims.

The general duties of employers during the COVID-19 outbreak

The general duties of employers have focused on health and safety compliance, leaves of absence, and contractual and statutory obligations related to layoff or termination of employment. The statutory obligations have been changing in each jurisdiction as legislative bodies have acted with unprecedented speed to enact changes to employment standards and offer benefits to businesses and employees affected by the COVID-19 outbreak.

Benefits have been made available to contractors and employees, as well as large and small businesses to seek to avoid or weather the economic effects of the outbreak. Employers started with simple policies and resources for proper sanitation, including proper handwashing and social distancing. Any employee exhibiting signs of illness was told to go home, whereas similar flu-like symptoms may have been accepted in the workplace in the past. This has expanded to control of numbers of staff, more significant social distancing, restriction of any symptomatic employees in the workplace, and enforcement of restrictions by regulators through fines and business closures.

The Canadian Centre for Occupational Health and Safety developed a number of guides for good health and safety practices for employers and employees in a range of occupations and industries.

Employers have addressed requirements to advise employees of any risk of exposure to COVID-19 in the workplace, along with more extreme measures, including office closure, if COVID-19 has entered the workplace.

Personal protective equipment for employees

The need for personal protective equipment (PPE) has been considered by workplaces. The healthcare sector has been the focal point for PPE, requiring sourcing for needed resources. Businesses continuing to operate, such as grocery stores, have installed shields, increased cleaning and limited numbers of patrons in-store. Health Canada recommends that personal protective equipment be used on the basis of risk exposure and in compliance with public health and occupational health and safety guidelines for COVID-19.

Health Canada has recently developed a PPE Guidance guide for specific workplaces.

Employer rights

Provinces have legislated the closure of workplaces that are not deemed essential, and forbidden gatherings of people. The number of people allowed to be in a workplace has also been limited (e.g. 50 in British Columbia), and social distancing measures and other safe work practices are required.

For employers allowed to continue to operate as essential services (the list is broad and includes law firms), compliance with statutory occupational health and safety obligations to ensure a safe workplace includes:

- ensuring that safe work practices are in place at the workplace, including social distancing, hand washing and non-attendance when experiencing symptoms of illness
- requiring an employee who has come in direct contact with a person who has tested positive with COVID-19 to not attend work and to self- isolate for a period of time set at 14 days
- removing from the workplace an employee showing symptoms that could be related to COVID-19, such as a sore throat, fever, sneezing, or coughing
- treating an employee who has visited a high risk location (for example, a place with an outbreak of positive tests) the same as an employee in direct contact with a person testing positive, by ensuring the person does not attend at work and self isolates for a period of time, and
- requiring employees travelling internationally (difficult to do now), to stay at home for 14 days after returning.

Employee rights

Employees have the right to refuse 'unsafe work'. This is arising where an employee has a concern regarding exposure to COVID-19 through attendance at work or at a job site.

Employers are obligated to provide a safe workplace. When faced with a concern raised by an employee, the employer is required to investigate any health and safety concerns brought forward by an employee and implement any changes necessary to ensure a safe workplace. Provincial Occupational Health and Safety legislation across Canada prohibits employers from disciplining employees for reporting a safety concern for obvious reasons. However, where the statutory process is followed, and an officer is involved where required, and the workplace or job function is deemed safe and in compliance, the employer may be entitled to discipline the employee for refusing to attend at work.

Unwell employees

Employers continuing to operate are significantly concerned when an employee tests positive. This has led employers to close offices or plants. Those that have failed to do so risk liability and regulatory sanctions. At a minimum, employers have to notify employees and others who may have been exposed, and to disinfect the workplace.

An employee testing positive will be instructed to self-isolate at home and is prohibited from attending the office. Generally, this employee is entitled to statutory leave which in most provinces is unpaid, and is only paid for three days federally. Benefits may make the leave paid. If the exposure occurred at work, a claim for workers' compensation benefits may be made.

This situation also creates privacy and personal information issues. Employers should ensure they are making reasonable efforts, as much as possible in the circumstances, to protect the identity of an employee who has contracted COVID-19 or to only disclose that information as necessary.

An employer may also need to require other employees who came in contact with that individual to self-isolate at home for at least a 14-day period.

Depending on the circumstances of the situation, occupational health and safety legislation may require the employer to temporarily close their office space for sanitation.

Temporary layoffs

For many employers, Q1 2020 was a period of full employment and the pivot to staff reduction has been a shock.

Many businesses have been attempting to have employees operate from home offices, but some cannot operate remotely. This has led many employers to seek to reduce wage costs on a temporary basis.

For Canadian jurisdictions, most non-union employment agreements do not allow for the right to temporarily layoff staff. By contrast, the employment standards legislation does allow for temporary layoff but such terms do not override contractual terms. The Province of Quebec is slightly different as temporary layoff may not lead to a claim by an employee where the layoff does not exceed six months. Added to this confusion has been the fact that the COVID-19 benefits offered by the Canadian Government to all, and by some Provinces under various plans, require employees to be laid off to receive the temporary benefits.

As a result, employers have been laying off employees on a temporary basis with or without employee agreement with the dual expectations that the employee will receive government benefits (which have been paid in record time) and will be recalled to work before the temporary layoff is deemed permanent giving rise to statutory termination pay obligations (e.g. for British Columbia and Ontario, this period is 12 weeks). At least one jurisdiction requires advance notice of temporary layoff of 1-2 weeks.

There have been many articles written by lawyers acting for employees stating that temporary layoff is a constructive dismissal and arguing that gives the employee a right to claim wrongful dismissal damages, which in Canada will be based on contractual express or implied terms and can amount to several months of earnings subject to mitigation arguments. Whether employees will make such claims is yet to be seen.

The receipt of benefits and the continuation of insurance coverages may weigh against these claims, along with arguments that the layoff was due to an unforeseeable event that made continued employment impossible to perform on a temporary basis. Employers have been continuing employee benefits during the temporary layoff period to assist the employee and maintain the employment relationship.

Recall from temporary layoffs

Employers must recall a temporarily laid off employee to work within the statutory timeline set out in the applicable employment standards legislation.

If the layoff exceeds the statutory timeline, the temporary layoff will be considered a permanent termination of the employee. Where more than a certain number of employees are terminated in the applicable jurisdiction, then group notice obligations will apply under the legislation. For example, in British Columbia obligations are triggered with more than 50 employees at a single location in a two month period. Canadian common law termination pay obligations will also arise, which can be significant depending on the terms of employment.

Employers of unionized employees must comply with any requirements of recall as stipulated in the collective agreement. Recall provisions may be based on seniority or other factors.

Seniority considerations

There is no requirement to consider seniority for non-union employees for either temporary layoff or in recalling employees from layoff. However, employees not recalled to their former position may choose to claim constructive or wrongful dismissal. Employers will also need to be wary of potential human rights claims for discrimination where age or family status is seen as a factor. As many schools have remained closed, childcare obligations will need to be considered in a new light. Before the COVID-19 outbreak, childcare obligations were rarely viewed as a need requiring accommodation.

For unionized employees, collective agreements will require that recall be based on seniority subject to the language of the specific agreement, which may also have other requirements such as skill and ability.

Health and welfare benefits

Most employers are continuing benefits coverages during a temporary layoff. Where the employee contributed to premiums, the employer has needed to provide for contribution or make this up during the layoff. Employers have been advised to seek input from the insurer to ensure that coverage can continue during the layoff period.

For employees on statutory leave, including new COVID-19 leaves, the statutory requirement is to continue coverages on the same terms. Payment of health and welfare benefits to employees in some jurisdictions may allow an employer to extend the period for temporary layoff. For example, in Ontario and federally, the period of temporary layoff can be extended if the employer continues to make certain types of stipulated benefits.

AUSTRALIA

Written by Chris Mossman (Partner) and Rebecca Pezzutti (Senior Associate) – Wotton + Kearney

The impact of COVID-19 on employment relations has been swift and dramatic in Australia. Initially employers faced uncertainty about their ability to make necessary workplace changes, such as the right to stand down employees due to a significant downturn in business.

Some of that uncertainty has been addressed through the recent introduction of the JobKeeper Scheme. Underpinning the JobKeeper Scheme are two principles: employers and their employees have a shared interest in working co-operatively to agree on changes to working arrangements; and keeping people connected to their employment is preferable.

These temporary employment law reforms come with new risk factors that will require close attention from employers, their broker and advisors. This significant workplace change also has an impact on liability claims more broadly.

JobKeeper Payments

Eligible employers who elect to participate can access an Australian Government subsidy of $1,500 per fortnight per eligible employee (the JobKeeper payment). The Australian Taxation Office (ATO) administers the JobKeeper payment, which is paid by way of reimbursement to employees monthly in arrears.

To be eligible, employers must satisfy a 'decline in turnover' test, which is:

- for business with a turnover of less than $1billion – a reduction of 30%
- a business with a turnover of $1billion or more – a reduction of 50%, or
- for registered charities – a reduction of more than 15%.

Employers that apply for the JobKeeper payment must make it available to all eligible employees under the 'one in all in' principle. Eligible employees are full-time, part-time and casual employees employed on a regular and systemic basis for longer than 12 months as at 1 March 2020, and include employees who were made redundant after 1 March 2020 but have been reinstated.

JobKeeper enabling directions and requests

The reforms introduce temporarily amendments to the *Fair Work Act (2009)* (Cth) (the FWA) through the addition of a new Part 6-4C. This new Part gives employers an extraordinary amount of flexibility to restructure their workforce through the use of JobKeeper enabling directions and requests.

Critically, a compliant JobKeeper enabling direction is authorised and lawful despite any provision to the contrary in a modern award, enterprise bargaining agreement or contract of employment. However, employers should still consider whether an employee may have a protected attribute, such as family responsibilities, in circumstances where the employer may be vulnerable to allegations of discrimination or adverse action.

There is also a requirement for an employer to hold a 'reasonable belief that the direction is necessary'. The Fair Work Commission (the FWC) has indicated that this particular qualification requires an employer to demonstrate that it actually and genuinely held the belief (the subjective assessment) and that "objectively speaking, there must be something to support it or some other rational basis for the holding of the belief and it is not irrational or absurd".

Employers who document their decision-making processes, including information relied on and reasons for any decisions, will be better placed to defend any allegations of unfair dismissal, adverse action and/or discrimination.

The reforms also make provision for a 'right of request', which permits an employer to ask that an employee work on different days or times or take paid annual leave. Employers need to understand the distinction between the right to make a request and the right to give a JobKeeper enabling direction, as there are important differences in the relevant criteria and protections that apply to each of these approaches.

Payment guarantees

The blanket application of the minimum payment guarantee means that an employee earning less than $1,500 per fortnight will effectively be better off under a JobKeeper payment. This feature of the JobKeeper Scheme is ripe for disputation. Reports have already emerged of tensions between employers and employers where:

- employers want to increase the number of hours worked by employees (ostensibly as a JobKeeper enabling direction) to make up the difference, and
- employees want to reduce their hours and/or refuse to perform meaningful work that is available.

Enforcement, compliance and dispute resolution – a new source of liability claims

Insurers may see the implications of the JobKeeper Scheme wash through to their policies in the following ways:

- **Australian Tax Office (ATO) audit, compliance and enforcement activity** – The ATO will conduct compliance and audit activities to ensure the JobKeeper payment is passed on to employees, and "to swiftly and effectively address fraud and any other abuse of the scheme". Where this action takes the form of an investigation, there may be insurance cover for the investigation costs.
- **Fair Work Ombudsman investigation and enforcement activity** – The FWO has indicated it will undertake enforcement and compliance activities to deal with breaches of the payment guarantee, misuse of JobKeeper enabling directions, and breaches of general protections (e.g. the right to refuse a workplace right). In addition to cover for any FWO investigation costs, the employer may have statutory liability insurance in respect of any enforcement action commenced by the FWO.
- **FWC disputes** – The reforms have expanded the jurisdiction of the FWC to deal with disputes about the operation of Part 6-4C of the FWA through mediation, conciliation or arbitration. These claims will usually trigger any employment practices liability insurance held by the employer, subject to the standard exclusions for wages and entitlements. These claims can ultimately escalate to the Federal Court.
- **Exposures arising from non-compliant JobKeeper directions** – a JobKeeper enabling direction that is beyond the permitted legislative scope or 'of no effect' due to non-compliance puts the employer at risk of contravening the FWA, an industrial instrument or an employment contract. Again, these claims can trigger any available statutory liability insurance or employment practices liability cover.

Other risks and implications for EPL insurers

The new JobKeeper benefits add a level of risk to unfair dismissal claims. Employers contemplating redundancies need to properly consider the alternative of standing down employees and paying them JobKeeper benefits. The FWC is also likely to rule that dismissal for misconduct or

performance is 'harsh' in the current environment as it will deprive the employee of access to JobKeeper payments. As there are already many dismissed employees pushing for reinstatement so that they can claim JobKeeper payments, this is likely to become an active area for disputes.

Where reinstatement is impractical, there is a real prospect that quantum will be assessed by reference to the value of JobKeeper payments. Where an employee would receive more with the JobKeeper payment, the value of these claims may exceed what they would ordinarily be worth based on the employee's earnings.

It is unlikely there will be much active employee protest against any adverse changes while the crisis remains at its peak. However, as the situation settles and business returns to normal, insurers are likely to see a new range of claims, including claims for constructive dismissal, wrongful demotion or wrongful adverse change to terms of employment.

Before the introduction of the new laws, many employers had already moved to make significant changes to employment conditions in response to the pandemic. Employers acting unilaterally and without proper 'consultation' remain exposed to claims for unlawful adverse changes to the terms and conditions of employment. This exposure was seen in the recent FWC decision of *Australian Municipal, Administrative, Clerical & Services Union v Auscript Australia Pty Ltd*, in which Auscript was found to have breached its consultation obligations.

Beyond the consultation expectations, employers also need to comply with the broader legislative requirements when issuing JobKeeper directions, including notice provisions, process requirements and entitlement thresholds.

Income protection claims

Against the background of rising unemployment, insurers are also likely to see an increase in the volume of employees making income protection claims, attached to health issues such as stress and anxiety. As income insurance pays between 75% to 90% of salary, many workers will find access to this insurance considerably more lucrative than the JobKeeper Scheme.

NEW ZEALAND

Written by Rebecca Scott (Partner), Murray Grant (Special Counsel) and Thomas Cunningham (Associate) – Wotton + Kearney

On 23 March 2020, New Zealand Prime Minister Jacinda Ardern announced the implementation of a 4-stage COVID-19 alert system, with Level 4's 'lockdown' commencing 48 hours later. New Zealand went into lockdown for five weeks from 26 March 2020. Everyone was required to stay at home and stop all physical interactions with others outside of their household, except those working in "essential businesses". All "non-essential" businesses were forced to work from home or close all together.

New Zealand moved into Alert Level 3 on 28 April 2020. This eased lockdown measures and allowed some 400,000 people to return to work. Those who could work from home had to continue to do so, and social-distancing measures remained in place. Businesses requiring close physical contact, bars, malls, cinemas and gyms remained closed. Retail and restaurant businesses could only operate if customers did not come onto the premises.

New Zealand moves to Alert Level 2 from 14 May 2020, allowing all businesses to operate, provided they use physical distancing and sanitation measures. Schools will open from 18 May 2020 and bars from 21 May 2020.

New Zealand's borders will stay closed to all travellers except New Zealand citizens and residents, with some limited exceptions. Despite the move to Alert Level 2, tourism, hospitality and retail businesses will likely cut jobs in the coming months.

Wage Subsidy Scheme and legal implications

Many businesses were unable to operate in 'lockdown' or were likely to suffer a reduction in revenue such that redundancies were likely or inevitable. The New Zealand Government attempted to mitigate this by offering a wage subsidy.

The Wage Subsidy Scheme is aimed at alleviating some cashflow issues faced by businesses and assisting them to retain staff. It's available to all businesses (including self-employed, contractors and sole traders), registered charities, incorporated societies and post settlement governance entities adversely affected by COVID-19. It is also available to employers who recently let employees go because of COVID-19, provided they re-hire those

employees. It is a lump sum payment covering 12 weeks per employee; NZ$585 (gross) per week for full-time employees and NZ$350 (gross) per week for part-time employees.

To be eligible, businesses must declare that they:

- have had or are predicted to have a 30% revenue drop over one month in the period January – June 2020, attributable to COVID-19
- have taken active steps to mitigate the effect of Covid-19 on the business
- will retain named employees for at least the duration of the 12-week subsidy
- will not make changes to rates of pay, hours of work or leave entitlements, without written agreement of the employee
- will make best efforts to pay named employees
  - at least 80% of income where reasonably possible, or
  - where not possible at least the full subsidy received for each named employee, except where a person's income is normally less than the subsidy amount, in which case they can be paid their normal salary.

The Wage Subsidy Scheme does not incorporate the concept of furlough. Employers can apply for the subsidy where their employees have been able to work from home or work reduced hours, provided they have the required actual or predicted revenue drop. The Employment Relations Act 2000 does not recognise temporary layoffs. Some employment agreements provide for suspension under a force majeure clause, but this is reasonably rare, and it is debatable whether force majeure can be relied on.

The Wage Subsidy Scheme has not altered New Zealand's employment law. Since the lockdown, there has been only one amendment to New Zealand's *Employment Relations Act 2000* (to provide for increased time for collective bargaining).

The legal regime remains the same as before the lockdown. In New Zealand, that means:

- Employment terms and conditions (including rates of pay, hours of work or leave entitlements) can only be varied by agreement (not unilaterally).
- Both parties need to act in good faith, meaning they must
  - be active and constructive in establishing and maintaining the employment relationship
  - be communicative and responsive in that relationship, and
  - not mislead or deceive each other.
- Employers must provide information and consult on decisions that affect the continued employment of an employee.
- Termination of employment must be justified. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

In a restructuring/redundancy scenario, complying with good faith and the test for justification usually means:

- having a genuine business reason
- providing affected employees with relevant information and the opportunity to comment
- genuinely considering feedback received, and
- considering alternatives to redundancy, including redeployment.

Employment issues

If an employee considers they have not been treated fairly and reasonably, they can raise a personal grievance for unjustifiable dismissal or unjustified action causing disadvantage. Personal grievances usually amount to a claim under employment practices liability (EPL) policies and are the gateway to further action to recover losses and compensation.

At the outset of the lockdown, the main issue was that many employers failed to appreciate that their employment obligations remained unchanged. Unilaterally imposed pay cuts or reductions in hours were common. These "knee-jerk" reactions have increased the risk of valid claims from the staff affected.

As some businesses that were closed in Level 4 can re-open on a limited basis in Level 3 and more extensively in Level 2, businesses may need to select which employees start back at work. There are no specific guidelines on this, but the requirements to be fair and reasonable will mean employers may need consult and to use selection criteria as they do when selecting for redundancy. Selection criteria must be fair and rational, and relevant to the role. Specific selection criteria must be used if mandated in an employment agreement or employer policy.

Health and safety issues

Specific H&S measures and PPE

Employers will need to consider general guidance from the New Zealand Health and Safety Regulator (Worksafe) and their specific industry bodies, including measures that are required at the various alert levels.

For retailers, manufacturers, and the service industries, if they did not use PPE before COVID-19, they do not need it in Levels 2 and 3.

For essential healthcare workers, border agencies, courts and tribunal staff, first responders, and corrections staff, specific PPE guidance applies.

Employer and employee rights

Staff may be reluctant to return to work under Levels 2 and 3, even with physical distancing. This is likely to create issues of health and safety, as well as what employees can and can't refuse to do.

The Health & Safety at Work Act 2015 requires a person conducting a business or undertaking (PCBU) to take all reasonably practicable measures to eliminate or minimise the risk to health and safety from an employee's return to work. A failure to do can be a criminal offence.

In the COVID-19 context, this will include considering whether it is safe for employees to attend work and whether there are necessary measures to minimise any risks of their attendance. This will include managing any anxiety they may experience at returning to face-to-face contact.

In those circumstances PCBUs are expected to discuss with the employee the reasons why they do not want to attend and work with them to alleviate any concerns. This is likely to be expected as part of good faith. Likewise, good faith obligations and obligations under the *Health and Safety at Work Act* require the employee to communicate any issues to their employer.

If all the required health and safety measures including PPE have been put in place then attendance at work under the terms and conditions of employment is expected. If the employee refuses to work in these circumstances and there are no justifiable reasons why the employee shouldn't attend work then non-attendance would be a breach of the terms of employment. There is likely to be scrutiny on whether attendance was necessary and a greater focus on whether face to face contact is actually required. The employer may be justified in not paying the employee and this may also justify disciplinary action for failing to obey a reasonable instruction.

Workers also have obligations for their own health and safety and that of other workers. If employees are concerned that the necessary precautions are not being implemented or taken, then they should first raise concerns with those responsible for health and safety in the organisation. If following discussion, the required measures are still not in place, including appropriate PPE, then employees can refuse to work. If an employer organisation refuses to pay or takes action against an employee, there could be a claim for unjustified disadvantage, or adverse action for a prohibited health and safety reason.

This is likely to result in a number of finely balanced situations. On the PCBU side, a discrimination on grounds of having raised concerns about health and safety is also a criminal offence (as is the failure to comply with health and safety requirements). On the employee side, if they unreasonably refuse to work, they may not be paid and/or it may result in termination of employment. For all parties, the stakes are high and this may result in more statutory liability and EPL claims in the future.

Unwell workers

Both the PCBU and worker have H&S obligations to other workers. An employer can ask questions about COVID-19 status without it being a breach of privacy, where the employer needs to know for public safety and/or H&S reasons.

If the employee refuses to provide information, an employer can suspend on H&S grounds (which likely should be on full pay). This may be a ground for disciplinary action as it is likely to be a breach of good faith and employee H&S obligations.

Potential claims

There is a risk of increased EPL claims due to the restructuring and redundancies arising from the changed business circumstances in the COVID-19 landscape. While hospitality and tourism are likely to be most affected, most sectors of the economy will be impacted in some way. Although the risks can be mitigated by employers by following the appropriate processes, there is no statutory redundancy compensation in New Zealand and most employment agreements do not provide for contractual redundancy payments.

Employees who lose their jobs are more likely to make a claim in these circumstances, particularly if they face a struggle to find alternative employment.

In New Zealand, employers and employees are required by reason of good faith, to work together. Since the government announcement on 23 March 2020, the message has been that New Zealanders are in this together and must work together and be kind and compassionate. Despite this message, a rise in EPL claims in New Zealand seems inevitable.

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