

SHEARMAN & STERLING

MANAGING EMPLOYEE COSTS ACROSS MULTIPLE JURISDICTIONS

**INCLUDING INFORMATION ON REGULATORY AND LEGISLATIVE
INITIATIVES IN THE WAKE OF THE COVID-19 PANDEMIC**

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ISSUES

Layoffs and Terminations. With respect to layoffs and terminations, jurisdictions may require that grounds (beyond the employer's economic difficulties) exist for termination and that advance notice or severance or other payments be provided to terminated employees. Further, special rules may apply when a significant number of employees are laid off in a short time span. In addition to considering local law requirements, employee agreements and severance and other plans should be reviewed, as these arrangements often set forth contractual obligations.

Suspension or Reduction of Working Hours (Including Furloughs). With respect to temporary suspensions or reductions of work or temporary leaves of absence, certain jurisdictions may treat the measure as a termination of employment, giving rise to termination obligations and costs. In response to COVID-19, many jurisdictions have implemented programs intended to assist employers in avoiding permanent layoffs, such as providing funds to pay wages to furloughed employees.

Reductions in Salaries or Wages. In many jurisdictions, employers are prohibited from reducing employee salaries or wages without employee consent. In jurisdictions where such reductions are permissible, or where the employee consents to the reduction, the reduced salary or wage must comply with applicable minimum wage laws and contractual obligations.

Other Measures. Beyond layoffs and reductions in hours, salaries or wages, employers may consider a range of cost-saving measures, including reducing or eliminating employee benefits and requiring the use of accrued leave. Employers should take care in implementing these measures in a manner that complies with laws and contractual obligations and avoids triggering unanticipated costs.

BRAZIL

The Brazilian government has issued provisional measures which allow employers to suspend or reduce working hours with financial support from the state. Employers may terminate the employment relationship without cause.

Layoffs and Terminations. Brazil follows the “employment-at-will” model doctrine, which allows Brazilian employers to terminate the employment relationship without cause, upon providing sufficient notice and severance payment determined by statutory law.

Suspension or Reduction of Working Hours (Including Furloughs). Provisional Measure 936/20 allows Brazilian employers to adopt two measures intended to preserve employment: (i) the reduction of employees’ working hours with a corresponding reduction of the employees’ compensation by 25%, 50% or 70% for a period of up to 90 days; and/or (ii) the temporary suspension of employment contracts with a reduction or total suspension of the employees’ compensation for a period of up to 60 days, which may be divided into two periods of 30 days each. The temporary suspension of the employment contract and the reduction of the working hours and salary, on a combined basis, cannot exceed 90 days.

Provisional Measure 936/20 provides that, after the completion of the temporary suspension period of the employment and/or reduction of salary and working hours, the employee shall be entitled to a job security period (*i.e.*, a period during which the employee cannot be dismissed) that is equal to the period of the temporary suspension of the employment and/or the reduction of salary and working hours.

Additionally, in both cases (temporary suspension of the employment and reduction of salary and working hours), the employee will continue to be entitled to the employment-related benefits granted by the employer (*i.e.*, health insurance, meal voucher, etc.) and will receive a grant from the federal government of up to R\$1,813.03.

The measures above must be implemented through a written agreement between the employer and the employee or a group of employees, sent by the employer at least two calendar days in advance. The individual agreements must be communicated by the employer to the Ministry of Economy and the workers union within 10 calendar days of the date on which such agreements were executed.

The execution of a collective bargaining agreement should only be mandatory for agreements providing for the reduction of salary and working hours for percentages other than those expressly provided for in the Provisional Measure 936/20 (*i.e.*, 25%, 50% and 70%), or for employees who receive a monthly salary between R\$3,136.00 and R\$12,202.11.

Reductions in Salaries or Wages. The federal constitution prohibits a reduction of total compensation, which is comprised of fixed salary, any bonuses and fringe benefits. For salary reductions under Provisional Measure 936/20, see the section above.

Other Measures. Pursuant to Provisional Measure 927/20, employers may impose the use of accrued and unearned vacation leave. Provisional Measure 927/20 also allows for, among other measures:

- changing the work regime of employees from on-site working to teleworking;
- the grant and anticipation of individual and/or collective vacations;
- the anticipation of federal, state, municipal and district holidays;
- the implementation of a special offsetting arrangement of work hours through an “hours bank” (*banco de horas*) by means of individual agreements; and

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- suspension of the Mandatory Fund for Unemployment – FGTS (*fundo de garantia por tempo de serviço*) payments between March, April and May 2020, which would be collected, respectively, in April, May and June 2020.

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CANADA

As laws and regulations governing the employment relationship in Canada are generally a matter of provincial law, employers considering employee cost reductions must ensure their compliance with the laws and regulations of each province in which they operate. All Canadian employers, however, regardless of province, must provide notice, or payment in lieu thereof, in advance of any layoffs. Further, any temporary suspension of work or reduction in salary or wages may trigger termination obligations if deemed a constructive dismissal.

Layoffs and Terminations. Because employment in Canada is not “at will,” Canadian employers must provide employees with advance notice, or payment in lieu of notice, prior to a termination without cause. Employers should review any employment agreements covering affected employees to determine if any notice period is stipulated. Employees not covered by employment agreements, or covered by employment agreements that do not provide a specified notice period, are generally entitled to either (1) a prescribed statutory notice period under the laws of the relevant province, or (2) a “reasonable” notice period at common law, which period will vary depending on factors that include the employee’s age, years of service and pay. In certain provinces, the amount of notice required may increase in the event of a “mass termination” (in Ontario, for example, the termination of 50 or more employees at an employer’s establishment within a four-week period; note that employers may also be required to submit notices to government authorities prior to a mass termination). Employers are generally required to continue pay and benefits during the notice period, and if they fail to give appropriate notice of termination (or pay in lieu thereof), the employee may bring an action for wrongful dismissal.

Additionally, employers operating in certain provinces, such as Ontario, or those subject to federal law (e.g., banks and airlines) may be required to provide severance payments (in addition to notice or payment in lieu thereof) to certain terminated employees. Employment agreements, severance plans and other compensation or benefit plans should also be reviewed to determine whether a termination of employment would trigger severance or other payments under those arrangements.

In response to the COVID-19 pandemic, Canada implemented the Canada Emergency Wage Subsidy program pursuant to which eligible Canadian companies that have had a reduction in revenue beyond a set percentage are eligible to receive a subsidy of 75% of employee wages (up to a maximum of \$847 per week) for up to 24 weeks. The program, which is retroactively effective from March 15, 2020 through August 29, 2020, is intended to help companies rehire previously laid off workers and prevent future layoffs.

Suspension or Reduction of Working Hours (Including Temporary Layoffs). A temporary suspension of work or reduction in an employee’s ordinary earnings below a prescribed threshold (referred to in Canada as a temporary layoff) is generally not a termination of employment. However, if the temporary layoff exceeds the maximum time periods set forth in applicable law, or if the employer is not expressly authorized under an applicable employment agreement to implement the temporary layoff, the temporary layoff may be deemed a termination of employment, resulting in the termination obligations discussed above. While temporary layoffs are generally unpaid, employers may be required to provide certain payments or benefits to employees during the temporary layoff period under applicable law or agreement.

In response to the COVID-19 pandemic, British Columbia announced that it would extend the temporary layoff period from 13 weeks to 16 weeks in any 20-week period. The COVID-19 temporary layoff extension is not intended to be permanent, and the government has indicated it will be repealed when no longer needed.

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Reductions in Salaries or Wages. Canadian employers should take care before unilaterally reducing salaries or wages, as such reductions may be treated as a constructive dismissal. Certain Canadian employers may be eligible to participate in the Work-Sharing Program, which is designed to help employers avoid layoffs when there is a temporary reduction in the normal level of business activity that is beyond the control of the employer (including due to the COVID-19 pandemic). The Work-Sharing Program provides income support to eligible employees who agree to work a temporary reduced workweek and share available work with other employees while their employer recovers.

Other Measures. In order to mitigate employee claims, Canadian employers must ensure that reductions or eliminations of compensation and employee benefits are performed in compliance with any applicable plan or program documents, employment agreements, collective bargaining agreements and employee handbooks or policies. Further, legislation in all Canadian jurisdictions broadly prohibits discrimination in employment on the basis of a wide range of grounds, and employers should ensure that all measures are taken pursuant to objective categories (e.g., by salary band) and otherwise comply with applicable human rights legislation.

CHINA

Employers in China who face economic difficulties resulting from the COVID-19 pandemic may implement a suspension or reduction of working hours. Mass layoffs must be justified and approved by the local administration.

Layoffs and Terminations. Layoffs of employees placed in quarantine or affected by the government emergency measures are prohibited. A mass layoff (defined as being either 20 or more employees or 10% or more of the total number of employees) requires the pre-approval of the local labor bureau, which may allow the procedure if it is determined to be justified.

A mass layoff may be implemented provided one of the following circumstances exists: (i) the employer undergoes a restructuring pursuant to the provisions of the Enterprise Bankruptcy Law; (ii) the employer has serious production and business difficulties; (iii) the employer undergoes a change of production, significant technological reform or change of operation mode and there is still a need for layoffs after adjusting the employment contracts; or (iv) the objective economic situation, based on which the employment contracts were concluded, has undergone significant changes and, as a result, the employment contracts can no longer be performed. Severance pay is capped at three times the local average monthly salary.

Suspension or Reduction of Working Hours (Including Furloughs). For companies experiencing economic difficulties resulting from the COVID-19 pandemic, working hours may be reduced and activity suspended. Salaries may be reduced after the first month of suspension of operations. For employees still performing the duties agreed upon in their employment contracts, their salary may not be lower than the local minimum salary. For employees who stop performing their duties, their salary may not be lower than the local minimum living allowance.

Reductions in Salaries or Wages. Generally, employers may not reduce an employee's wages without his or her consent.

FRANCE

In France, employers can benefit from a state-funded indemnity in the event of a reduction or suspension of activity, for which the application process has been simplified. Other employee cost reduction measures would require employers to follow the usual procedures determined by the French Labor Code.

Layoffs and Terminations. Employees may be terminated in France on economic grounds if a company experiences one of four specified economic setbacks. If the company employs more than 50 employees and more than 10 employees will be terminated, specified procedures, including works council or employee representative consultation, must be followed, the *regional directorate for enterprises, competition, consumption and employment* (DIRECCTE) must be notified, and the company must put in place a job preservation plan validated by DIRECCTE. Unless a works council or employee representative exists, the employer must conduct interviews with employees prior to termination.

Suspension or Reduction of Working Hours (Including Furloughs). If employees suffer a loss of pay caused by either a temporary closure of all or part of a company or a reduction in their usual working hours below the legal working time, the company may be eligible for a “partial activity” mechanism. Under this mechanism, if the employer has experienced certain specified “exceptional circumstances” affecting its business, affected employees will receive compensation, paid by the employer, equal to 70% of their gross compensation. Since June 1st, 2020, the employer is eligible for reimbursement from the government of 85% of the gross compensation paid, up to a limit of 4.5 times the minimum wage (€6,927 per month). Before June 1st, 2020, the French government financed 100% of the gross compensation paid to affected employees and this 100% reimbursement is still maintained for sectors subject to specific legislative or regulatory restrictions as a result of the COVID-19 pandemic crisis. Employers must apply for the “partial activity” mechanism within 30 days of the loss of pay suffered by the employee, and, if the application is accepted, the mechanism will apply retroactively to such date. In addition, the employer must obtain an opinion of the works council, and must send that opinion to the mechanism administrator within two months of the date of application. The “partial activity” mechanism is available for a maximum period of 12 months.

Reductions in Salaries or Wages. A salary or wage reduction will require employee consent as a material change to the employment agreement. Employers must propose the salary or wage reduction to employees in writing. The employee has one month following receipt to accept or reject. If the employee fails to respond within the one month, the reduction will be deemed to be accepted. A rejection may grant the employer economic grounds to terminate the employee, discussed in *Layoffs and Terminations* above (provided that the termination is justified by a specified economic setback).

Other Measures. Benefits that are not part of the employment agreement and are granted at the sole discretion of the employer (e.g., discretionary bonuses), may be withdrawn or reduced without employee consent, provided that similarly-situated employees are treated similarly. Employers may impose paid leave, not to exceed 6 working days, through a collective agreement negotiated at the company or industry level. Employers may also require the use of accrued time off. Putting employees on compulsory leave requires one day's prior notice, and the total duration of the leave may not exceed 10 working days. Employers may also conclude *collective performance agreements* with trade unions, in order to reduce salaries or working hours.

ITALY

Terminations for business-related reasons are prohibited until August 18, 2020. Employees who are suspended or have their working time reduced will have access to wage compensation funds.

Layoffs and Terminations. Individual and collective terminations for business-related reasons are prohibited until August 18, 2020. After this date, terminations are possible if objectively justified by an economic reason.

In addition, procedures for collective terminations justified by economic measures (*licenziamento oggettivo*) and individual terminations for just cause are suspended.

Furthermore, employers who terminated the employment of an employee for just cause between February 23, 2020 and March 17, 2020 may withdraw the procedure and request the application of the wage compensation fund (*Cassa Integrazione*); in which case the employment relationship will be deemed to have resumed starting from the date of the termination, without any penalty or cost for the employer.

Suspension or Reduction of Working Hours (Including Furloughs). The “Rilancio” Decree provides access to wage compensation funds to employees who are suspended or have their working time reduced. The wage compensation funds will pay 80 % of the total remuneration that would have been payable to an employee for hours not worked as a consequence of the COVID-19 pandemic crisis. The allowance is capped at (a) €998.18 per month (for salaries of €2,159.48 per month or less), and (b) €1,199.72 per month (for salaries over €2,159.48 per month). It is available for a maximum of 9 weeks from February 23, 2020 until August 31, 2020 and can be extended for a maximum of 5 weeks during this period.

In addition, employers who had access to the 9+5-weeks allowance may also request an additional allowance for a maximum of 4 weeks to be granted between September 1, 2020 and October 31, 2020. Employers in the hospitality, exhibition, congress, amusement parks, live entertainment and cinema sectors may request access to the 4-weeks additional allowance before September 1, 2020.

Employers do not pay any social security contribution for hours not worked.

Reductions in Salaries or Wages. Any salary or wage reductions can only be implemented with employee consent as these will be material changes to employment contracts.

Other Measures. The use of vacation leave is encouraged and even required before applying for emergency government assistance from schemes such as the wage compensation funds. Legislation encourages employers to engage with works councils or employee representatives on such decisions. However, employers should principally rely on methods that may be available under collective and individual employment contract to deal with the crisis (such as reductions in hours or other short-term absences from work (*“permessi retribuiti”*) which employees may use under the employment contract and overtime hours) before resorting to the use of vacation leave.

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JAPAN

Employee cost-reduction measures generally require the employee's consent and layoffs are only permitted in the case of economic difficulties.

Layoffs and Terminations. Layoffs for economic reasons are only permitted if (i) such layoffs are unavoidably necessary for the reasonable operation of the employer; (ii) the employer took sufficient measures to prevent layoffs; (iii) the selection of the affected employees was reasonable (based on objective criteria); and (iv) the labor unions were consulted and information was provided to the employees, explaining in good faith the reasons for the termination process.

Suspension or Reduction of Working Hours (Including Furloughs). With certain exceptions, suspension or reduction of working hours can be implemented but only with employee consent.

Reductions in Salaries or Wages. Any salary or wage reductions can be implemented only with employee consent, as these will be material changes to employment contracts. Salary or wage reductions based on leave of absence resulting from business closures or employees' personal reasons are an exception to this rule.

Other Measures. A company cannot unilaterally force employees to take paid leave.

SPAIN

In the context of the COVID-19 pandemic, the Spanish government has simplified procedures for employment contract suspension and reduction of working hours. Termination of employment contracts based on causes related to the COVID-19 pandemic would be considered as unfair.

Layoffs and Terminations. Force majeure and the economic, technical, organizational and production-related reasons related to the COVID-19 pandemic would not justify the termination of an employment contract or dismissal. Dismissals based on COVID-19 pandemic-related reasons would be considered as unfair and companies implementing such dismissals would have to pay the corresponding statutory severance for unfair dismissal of 45 days' salary per year of service from the hiring date until 11 February 2012 and 33 days' salary per year of service from 12 February 2012 until the termination date.

Suspension or Reduction of Working Hours (Including Furloughs). In the context of the COVID-19 pandemic, the government has introduced simplified procedures for the suspension of employment contracts or reduction of working hours based on (i) force majeure or (ii) objective grounds based on economical, technical, organizational or production criteria. The specific procedure must be followed irrespective of the number of affected employees, including a negotiation period with the employees' legal representatives or the employees elected for this purpose (where there are no existing legal representatives in the company).

Employees placed on short-time working will be able to receive unemployment benefits (70% of the social security contribution base in the proportional part of the working time reduction). This allowance is capped at €1,098.09 per month (person without children), €1,254.86 per month (one dependent child) or €1,411.83 per month (two or more dependent children).

The suspension of employment contracts or reduction of working hours based on force majeure must be proportionate with the restrictions implemented by the government that are in force at that time.

Reductions in Salaries or Wages. Unilateral reduction of employees' salaries by the employer is not allowed. Any reduction of salary must be implemented (i) by mutual agreement in case the legal collective thresholds of employees affected are not met, or (ii) by a single or collective procedure (depending on the number of employees affected), which shall be based in any case on objective grounds (economic, technical, organizational or production-related grounds), justified and evidenced by the employer.

Other Measures. Employees are permitted to adapt and reduce their working day up to 100%, with a proportionate reduction to their remuneration, when they provide evidence that they need to care for a spouse, civil partner or family member (to the second degree).

UNITED KINGDOM

A combination of UK statutory protections and individual contractual rights can present issues that need to be navigated around in considering options for employment costs savings measures in the UK.

Layoffs and Terminations. The economic costs of terminations in the U.K. will include statutory redundancy payments for all employees with two or more years of service, as well as any additional payments due under any enhanced redundancy plan or policy of the company. Collective consultation of either a minimum of 30 or 45 days is required if 20 or more redundancies at one establishment in 90 or fewer days are proposed. Employment agreements should be reviewed to determine the period of notice to which employees are entitled prior to termination, or payment in lieu of notice. Ensure that redundancies are implemented in accordance with “fair” redundancy procedures (e.g., fair selection criteria, individual warning and consultation, search for suitable alternative employment, etc.).

Suspension or Reduction of Working Hours (Including Furloughs). The U.K. Government Coronavirus Job Retention Scheme (CJRS) allows for employees to be furloughed and for the employer to be reimbursed 80% of the furloughed employee’s monthly wages/salary (up to a maximum of £2,500 per month), although from August 2020 employers will be required to pay a quarter of the monthly pay paid to furloughed employees. The UK government has very recently announced that the CJRS will remain in place through the end of October 2020. The furlough should be implemented with a furlough agreement amending the existing employment agreement. Furloughed employees are not permitted to undertake any work for the employer, other than training or volunteering (although the recent government announcement has indicated that, in future, some part-time working may be permitted under the CJRS). Unless existing employment agreements give the employer a contractual power to reduce working hours (which in practice would be unusual), such reductions would require employee consent as a material change to the employment contract. Imposed non-consensual reductions in hours will run the risk of employees (i) resigning and claiming unfair constructive dismissal, or (ii) remaining in employment and claiming for breach of contract or unlawful deductions from wages.

Reductions in Salaries or Wages. Generally, reductions in salary or wages in the U.K. require employee consent. Imposed non-consensual reductions will run the risk of employees (i) resigning and claiming unfair constructive dismissal, or (ii) remaining in employment and claiming for breach of contract or unlawful deductions from wages. In practice, employers may take a view on the relative risks of imposing non-consensual reductions in salary or wages in the current crisis.

Other Measures. If employee benefits are not a contractual entitlement of employees, it may be possible to withdraw or reduce such benefits without employee consent. However, all U.K. employers are obliged by U.K. statutory pension auto-enrollment obligations to make minimum employer pension contributions; as such, any reductions could not go below such minimums. With respect to forced leave, U.K. statutory rules allow employers to give notice to employees requiring them to take vacation on specified days (and this right is often reflected in U.K. employment agreements, as well). The period of prior notice must be twice as many days in advance of the earliest day specified in the notice as the number of vacation days to which the notice relates.

UNITED STATES

In the United States, employers will need to consider and comply with an overlapping framework of federal, state and local tax, labor, wage and hour and employment laws and regulations, while also being careful to understand the cost impacts of employee management strategies, including severance payments, benefit plan changes and “good reason” resignation rights.

Layoffs and Terminations. Begin with a review of employment agreements, offer letters, severance plans, incentive compensation plans and other agreements and plans to determine whether the termination will trigger payment, acceleration or “good reason” resignation rights under those arrangements. These will be the economic costs of the terminations, as there is no statutory severance due under federal or state law. Ensure that terminated employees execute and do not revoke a release before making any severance payment. Large-scale terminations (e.g., plant closings) may require advance notice under federal and state WARN laws. Provide terminated employees with all earned compensation and notice of right to elect COBRA healthcare continuation coverage, as well as information about applying for unemployment. Execute layoffs pursuant to objective categories (e.g., by position type) to mitigate risk of discrimination claims. At termination, aim to have at least two employer representatives present (even if remotely) and a clear plan for the safe return of property. See our publication [Key Considerations in Employee Terminations](#) for more.

Suspension or Reduction of Working Hours (Including Furloughs). A furlough (meaning a temporary unpaid leave of absence with an expectation of return to work) generally is treated as an authorized leave of absence and not an employment termination; as such, severance costs and other termination impacts should not be triggered, though these can be triggered if the furlough becomes permanent or if arrangements provide otherwise by contract. Identify any action required under applicable collective bargaining agreements. Ensure the furloughed employee does not work during the furlough, as all hours worked must be paid. Determine whether furloughed employees remain eligible for healthcare coverage; if not, provide furloughed employees with notice of right to elect COBRA healthcare continuation coverage, as well as information about applying for unemployment. Execute furloughs pursuant to objective categories (e.g., by position type) to mitigate risk of discrimination claims. See our publication [Employee Furlough Considerations](#) for more.

Reductions in Salaries or Wages. Review contractual arrangements to determine whether the reduction gives rise to a breach of contract or may trigger “good reason” resignation rights. Identify any action required under applicable collective bargaining agreements. If the reduction is effectively a deferral of salary (e.g., if the lost salary will be “made up” in another form), complex tax issues under Internal Revenue Code Section 409A may arise. Identify any arrangement or policy that relies on salary as an input (e.g., severance plans, annual bonus targets or share ownership policies) and consider whether the pre-reduction or post-reduction salary should be used going forward. Ensure compliance with federal and state wage and hour laws. Execute reductions pursuant to objective categories (e.g., by salary band) to mitigate risk of discrimination claims. If reducing named executive officer salary, consider whether public disclosure is required. See our publication [Considerations When Reducing Executive Salaries](#) for more.

Other Measures. Ensure that if reducing or eliminating other employee benefits, employer matches or contributions or employees are required to use accrued time off, these measures are performed in compliance with applicable plan or program documents, employment agreements,

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collective bargaining agreements and employee handbooks or policies to mitigate employee claims.

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