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Unwinding the Bermuda lockdown: Issues to consider as employees return to work

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The end of the beginning?

As we all know the Bermuda Government has announced its national return to work strategy, with a proposed four phase plan:

- Phase 1 (the current level as at 10 May 2020): Limited Business
- Phase 2: Expansion of Services
- Phase 3: Moving to Normal
- Phase 4: New Normal

The full details of the exit framework and its return to work guidance can be viewed here and here (**Guidance**).

Whilst this material is useful it is prudent to highlight some key operational and legal issues employers should consider as their staff return to their offices.

Returning to work – general issues

It is likely some employees will have concerns regarding a return to the workplace – some of those concerns may be based on a medical condition which they or a member of their household have, others may be more general in nature. Employees may also have caring responsibilities (child related and otherwise) which may present difficulties in resuming their full responsibilities. In contemplation of these issues:

- Employers should consider its employees concerns and encourage them to raise them in advance of returning to work fully to allow time to address them.
- Any remote working policies should be dusted off and considered in light of Covid-19 and/or thought should be applied to creating one if none exist. Any such policy should deal with issues such as the criteria for applying, home equipment, data protection, costs and remote supervision. Although there is no statutory right to request flexible working under Bermuda law from an employee relations perspective, it may be more difficult to justify refusing such requests in the "new normal".
- Employers may have agreed (or imposed) changes to working hours, pay and other provisions (such as statutory lay off). Some of these changes may need to be unwound (either immediately or in the medium term) and others may need to remain in place either temporarily or permanently. This process will require careful planning, documentation and execution.
- Employees may have deferred large amounts of annual leave which they will wish to take at a later date potentially causing operational challenges. Employers should consider requesting that any leave is taken and/or ensuring that any roll over policy (or absence of such policy) has been clearly communicated to employees.
- The possibility of further lockdowns and/or the widespread unavailability of employees may not end. Consider your emergency plans for if there is another wave: What could have been done better? What worked well? Learning the lessons from the first shelter in place will reduce the impact if a second one occurs.

Health and safety considerations

The Occupational Safety and Health Act 1982 (**OSHA**) requires every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. This includes the provision and maintenance of a working environment for its employees that is, so far as reasonably practicable, safe, without risks to health, and adequate as regards to facilities and arrangements for their welfare at work.

The OSHA and the Occupational Safety and Health Regulations 2009 (and Occupational Safety and Health (COVID-19) Temporary Regulations 2020) (**Regs**) also require an employer's health and safety committee (as required for employers with 10 or more employees) to, amongst other matters, identify and control health and safety hazards within the place of employment and establish and promote safety and health programmes for the education and information of employees. This is likely to include a requirement to undertake a risk assessment of the business risks arising from returning to work following relaxation of the current restrictions. We also note that the Department of Health is intending to release a training course for employers on infection prevention and control in addition to the recommended screening processes. There is also a raft of common/customary law duties to take reasonable steps to ensure the safety of employees.

Whilst the recommendations set out in the Guidance are not legally binding they are likely to be taken into account when considering if any employer has complied with its legal obligations under OSHA and the Regs. As noted, the Guidance includes some specific industry related guidance which employers should take into account when considering what health and safety measures to implement as part of their return to work plans.

Employers should consider the following:

- Where someone may be at particular risk (for example if they are over 65 or have underlying health conditions), a risk assessment should be carried out in relation to their individual circumstances. Where appropriate, medical advice and/or occupational health advice should be sought on a case-by-case basis.
- Any employee-specific risk assessment should be discussed, in confidence, with the affected employee.
- High risk employees may not always be obvious to employers and employees should be encouraged to come forward (and seek medical advice) if they think that they may be at particular risk.

Reopening safety measures (in addition to those included in the Guidance) could include consideration of resources, policies, communication and (where necessary) training on:

- Staggering working hours
- Continuing remote working where possible
- Ensuring that entry and exit points are appropriately managed
- Closing (or restricting access to) communal areas
- The of cleaning of workplaces with a particular focus on communal areas and/or toilets
- The maintenance of physical distancing (including between colleagues and clients/visitors)
- The wearing of facemasks and gloves (the latter is likely to be of limited application)
- The provision of adequate hand washing and hand sanitiser facilities
- Issuing or restating to employees information on the symptoms of the virus and what to do if they or someone in contact with them develops symptoms
- Isolation for those who are showing symptoms, or share a household with those who do
- Business and social travel policies - there may be different considerations in respect of travel to places like the UK and US.

Human rights considerations

Employers have obligations to employees under the Human Rights Act 1981 (**HRA**) and consider making reasonable adjustments for disabled employees. It should be noted that the definition of "disability" is broad under the HRA and includes a person who has any degree of physical disability or infirmity that is caused by illness. It is possible that employees who have suffered from COVID-19 and are recovering could be considered "disabled" for the purposes of the HRA and therefore protected from less favourable treatment.

As such, if employers implement employee screening as part of their return to work plans they should also be conscious that the consequences of any action taken in relation to employees who confirm that they have suffered from and/or are suffering from the symptoms of COVID-19 could potentially give rise to allegations of disability discrimination. In practice, it may be possible to objectively justify actions based on the information provided by employees during return to work screening but employers should consider such issues on a case-by-case basis. In addition, employers should be conscious of not allowing the fact that an employee has tested positive for COVID-19 to influence future employment related decisions.

For employers who provide goods, facilities or services it is worth noting that it is also potentially discriminatory to refuse or deliberately omit access to goods, facilities or services to a person due to their disability unless the refusal or deliberate omission was reasonable or excusable in all the circumstances. For employers who choose to implement thesecupta Businesses (including their commercial counterparties) which have spent most or all of their cash reserves in surviving

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Government screening protocols and refuse goods, services or access to facilities due to a person displaying COVID-19 symptoms, given the underlying public health reasons for the screening, it is unlikely to amount to an act of discrimination. However, we would recommend taking legal advice on such issues in what will be a tricky area to navigate in the coming months.

Data protection considerations: Health data – testing, employee screening and contact tracing apps

Some employers may wish to introduce private testing programmes to manage the risk to their employees. As noted, the Guidance recommends the introduction of mandatory employee screening as part of any return to work plan and further monitoring of employees once they have returned to work.

Any information that is collated as a consequence of testing, employee screening or contact tracing apps will amount to "sensitive personal information" for the purposes of the Personal Information Protection Act 2016 (**PIPA**) (once it comes into force).

Whilst PIPA sets out specific conditions for processing "personal information" it does not expressly confirm whether there are any additional requirements for processing "sensitive personal information" unlike other data protection legislation such as GDPR.

In practice, most Bermuda employers take the view that in order to process "sensitive personal information" and comply with any future PIPA obligations the consent of the individual to whom the information relates should be obtained. We recommend that any screening questionnaire include confirmation that the employee consents to the processing of their "sensitive personal information" or confirm the condition relied upon for using the personal information in accordance with PIPA.

It is possible that employers may be able rely upon the other lawful conditions for processing personal information, including that the use of the personal information is necessary to respond to an emergency that threatens life, health or security of an individual or the public. This is on the basis that "personal information" under PIPA will include "sensitive personal information" and there are no specific guidelines or conditions for using "sensitive personal information". It may be that the Information Commissioner will recommend that PIPA is amended or further guidance issued to clarify this specific issue.

Employers will also be prohibited under PIPA from using "sensitive personal information" to discriminate against a person contrary to the HRA unless they have lawful authority. Lawful authority includes obtaining an employees' consent or using the information in the context of employment where the nature of the role justifies such use. This is another reason why employers may wish to seek employee consent before using "sensitive personal information". That said, given the global pandemic and the measures which are being recommended to businesses by Governments around the world to implement as part of their return to work plans, it is conceivable that all roles could potentially justify the use of "sensitive personal information". However, even if the information was used with lawful authority so would be in compliance with PIPA, it is still possible that actions taken by employers in reliance upon, or influenced by, this information could be found to be discriminatory.

Workplace testing

In relation to workplace testing regimes, practice is still developing and it may be some time before there is a reliable test available to workplaces.

We are aware that the Guidance recommends temperature testing. Whilst this has little validity in medical terms in diagnosing COVID-19 it should at least flag up those employees with fevers which is one of a wide range of potential symptoms.

We recommend that in line best practice data protection principles employers should consider the following in respect to any workplace testing regime:

- An appropriate privacy notice for employees or other documentation seeking consent to the use of their personal information
- Limited data collection and retention
- Limited disclosure within the employer or to third parties

Operational issues

The unwinding of lockdown is staged, meaning that the range of services businesses will be able to offer is likely to be limited in a range of respects. Employers should plan ahead for what can be done and when.

Businesses may be dependent on other businesses to be able to provide staff, goods and/or services, meaning that any planning will potentially need to take into account the readiness and ability of other businesses to reopen. Consider contacting your suppliers and create a running list of what services are available and where you may have to improvise. This applies to all businesses who use local companies, from the company that delivers milk to outside legal counsel.

Businesses which have reached agreements with landlords, employees and other contractual counterparties to reduce, amend (or suspend) payments and other contractual obligations for the duration of the lockdown will also need to consider if, when and how to unwind those arrangements.

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Businesses (including their commercial counterparties) which have spent most or all of their cash reserves in surviving lockdown should consider what cash levels are required to return to phased operations and paying employees their normal salary. Planning, liquidity position and communications should be undertaken now.

Broader legal issues

We expect COVID-19 to generate significant and sustained legal fallout and unfortunately there is likely to be a higher risk of insolvencies and resulting litigation for many organisations. Businesses may also find that their supply chain and commercial counterparties are under severe pressure which places them at risk either of insolvency or being unable to fulfil their contractual obligations.

Organisations should take stock of their financial, contractual, legal and regulatory position and assess where their probable exposure is likely to be.

Businesses should ensure that they have access to appropriate insolvency and dispute resolution advice. We also expect there to be significant demand in relation to corporate reorganisation, restructuring and refinancing.

Trustees and private wealth managers may also face challenges from beneficiaries and other stakeholders. Dealing with such issues is likely to require access to specialist legal advice.

If you have any questions please do not hesitate to get in touch with our Employment team or your usual contact at Carey Olsen.

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