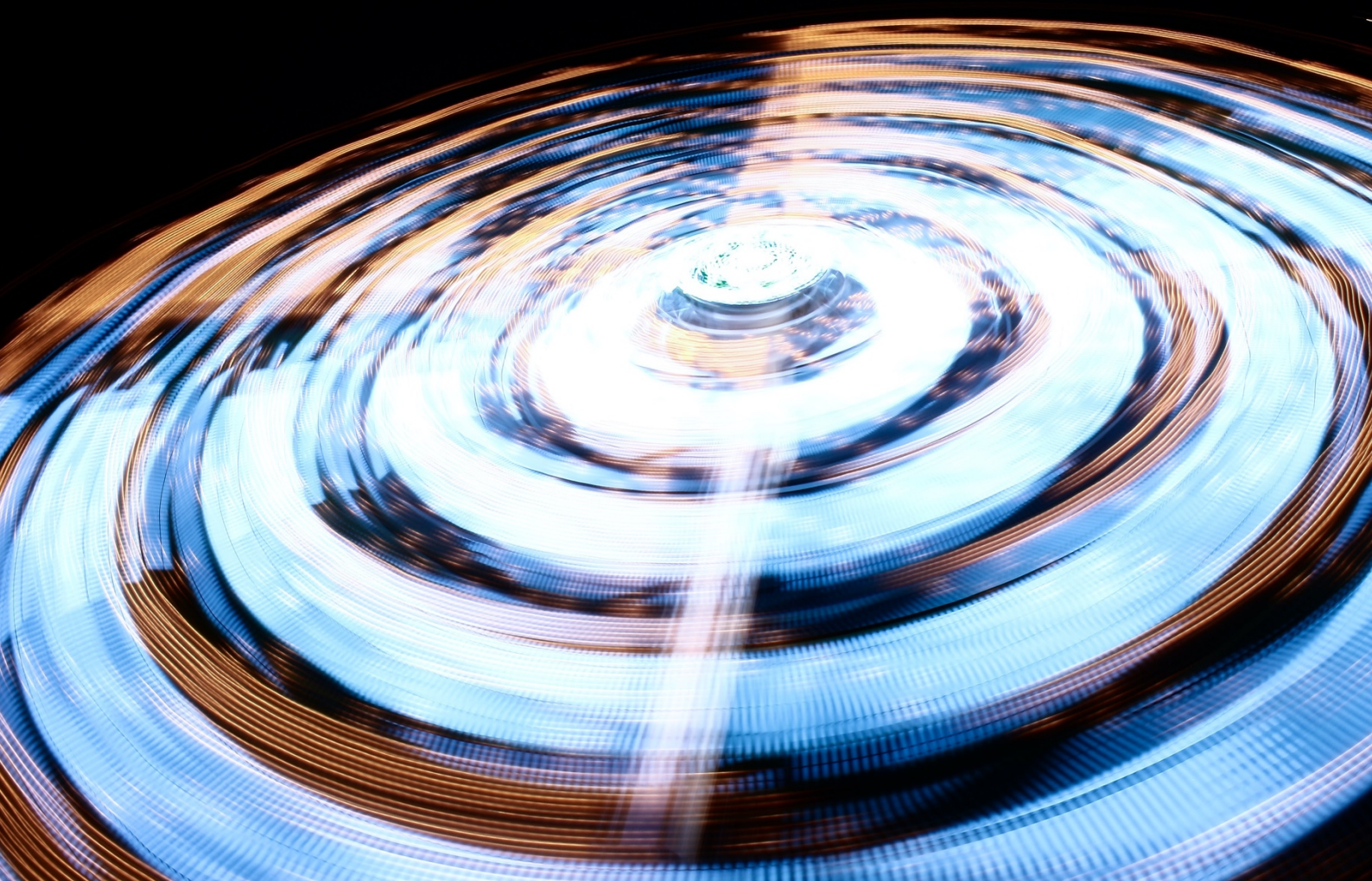
G.C.Hadjikyprianou
& Associates LLC
ADVOCATES & LEGAL CONSULTANTS

FAQs: Board of Directors and Covid-19 Crisis Management

Topics Covered: Cancellation of Dividends | Virtual Board Meetings | Data Protection | Employees' Salary | Redundancy | Frustration of Contractual Relationships | Binding Electronic Execution of Contracts | Directors' Duties and Liabilities | Short-Term Emergency Loans | Government Support Schemes for Suspended Business Operations.



FAQs*: Board of Directors and Covid-19 Crisis Management

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*The Coronavirus (officially called "**Covid-19**") continues to create an evolving list of challenges for the global business community including the business community of Cyprus. Whilst the virus has been declared as a pandemic, we recognize that companies and their business operations are already significantly affected, and a substantial disruption is occurring at almost all levels.*

G.C.Hadjikyprianou & Associates LLC closely monitors the Covid-19 related impact on the business community of Cyprus and is constantly updated on the recent developments. This publication aims to answer the most frequently asked questions as posed by the board of directors of our clients so far during the Covid-19 outbreak.

Our firm advises clients on the legal issues emerged as a result of the emergency measures implemented by the Government of the Republic of Cyprus to tackle the pandemic. Our offices (both in Cyprus and in Greece) remain fully operational and our lawyers; academic experts; external consultants; specialized legal scientists and financial advisors are readily available to support our clients during this unprecedented global health crisis.

Please do not hesitate to contact us using the contact details below should you require our assistance.

⚠ ** Disclaimer: As the situation is fluid, there is no "one-size-fits-all" advice. As a result, this publication serves as a general overview of the relevant Cyprus legislation and the information set out shall not be considered as a legal advice nor shall be relied upon by any natural or legal person. For the avoidance of any doubt, this publication is merely intended to highlight key issues and not to be comprehensive and no party shall re-produce and/or use the same without our prior written consent. ** ⚠

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10 + 1 Most Frequently Asked Questions

This publication aims to answer the following most frequently asked questions as posed by the board of directors of our clients during the Covid-19 outbreak.

The topics covered are: Cancellation of Dividends; Virtual Board Meetings; Data Protection; Employees' Salary; Redundancy; Frustration of Contractual Relationships; Binding Electronic Execution of Contracts; Directors' Duties and Liabilities; Short-Term Emergency Loans; and Government Support Schemes for Suspended Business Operations.

In particular, we hereunder answer the following most FAQs:

1. **Can directors of a private limited company cancel dividends as a result of the recent Covid-19 events?** *[Pages 4-5]*

2. **Can we hold meetings and take valid decisions without our physical presence in the same room?** *[Page 6]*

3. **As an employer, we are concerned about our Data Protection obligations. During the Covid-19 events we would like to know the position of the law on the following:**

    a. **Can we require employees or clients to undergo a medical examination?**
    b. **Can we check their temperature before entering our company's premises?**
    c. **Can we require employees to inform our HR department once they have certain Covid-19 symptoms?**
    d. **Can we require employees to provide us with health data in order to establish whether employees belong to a "vulnerable group" and thus in a more danger?**
    e. **Can we use health data we already hold for a new purpose? For example, if we hold sick notes for the purposes of administering employees sick pay can we use these sick notes for a new purpose and check amongst others for history of respiratory illness?**
    f. **Can we disclose health data to public authorities in case of emergency?**

    [Pages 7-11]

4. **Can we unilaterally alter the salary of our employees in an effort to mitigate the financial impact of Covid-19?** *[Page 12]*

5. **Our company faces unprecedented financial difficulties. Can we apply a redundancy scheme for our employees as a result of Covid-19?** *[Pages 13-14]*

6. **Is our company excused from performing its contractual obligations to third parties due to the Covid-19 outbreak?** *[Pages 15-16]*

7. **A third party with whom we have a contractual relationship argues that our contract is frustrated as a result of Covid-19. What about the expenses incurred by our company so far?** *[Pages 16-17]*

8. **How are we going to execute agreements during the social distancing measures?** *[Pages 18-21]*

9. **Do we, as the board of directors of our company, have any obligation during this crisis and can we become personally liable for the financial damages incurred by our company as a result of the pandemic?** *[Pages 22-25]*

10. **Can we get a short-term loan by a Cyprus bank in order to deal with the Covid-19 related financial impact?** *[Page 26]*

11. **Our business operations have been compulsorily suspended by the Government. What Governmental schemes are in place to mitigate the negative consequences?** *[Page 27]*

FAQs: Board of Directors and Covid-19 Crisis Management

I. Cancellation of Dividends

Question: Can directors of a Cyprus private limited company cancel dividends as a result of the recent Covid-19 events?

Answer:

The Cyprus Companies Law, Cap.113 (hereinafter the "**Law**") does not contain any express provisions as to the payment (and/or cancellation) of interim and/or final dividends to the shareholders of Cyprus private limited companies (*cf* to public companies for which there are some express provisions in the Law). Table A modelled articles of association (which apply to all Cyprus private limited companies unless specifically excluded) contain however some express provisions as to the payment of dividends and in particular they provide that such payments must be made out of "profits". Even in cases where the companies have tailored made articles (and thus Table A articles do not apply), the directors' duties, such as the duty to act in the best interest of the company; the duty to promote the company's success and exercise reasonable care, skill and diligence, place an obligation to the board of directors that for any payment of a dividend, the company must have sufficient distributable profits justified by reference to relevant accounts. As a result, the directors need to be alert to their duties and comply with them in relation to any authorisation and/or recommendation given for the payment of dividends.

It is thus up to each company to expressly provide in its articles of association its internal rules for the payment (and even cancellation) of dividends as well as the related rights of its shareholders. If the company has a shareholders' agreement, that agreement may also set out the company's dividend policy. Typically, the common practice is that directors resolve to pay interim dividends and final dividends are recommended by directors but declared by shareholders in a general meeting. This is not an absolute rule however, and, as mentioned above, each company's articles of association may provide for a different procedure for either interim or final dividend payments.

Covid-19 crisis management and cancellation of dividends:

During the Covid-19 events and the anticipated financial crisis, it is of utmost importance that the directors safeguard the company's assets and exercise reasonable care, skill and diligence in order to ensure the stability of the company's cash flow position and future financial viability before declaring and/or recommending a dividend. With that said, the general principle is that directors not only are eligible to consider delaying or cancelling payment of dividends but are also under an obligation to do so in case they reasonably believe that retaining the said profits may help the company survive the Covid-19 financial impact. In case of a breach of the aforementioned duties causing the company to face financial difficulties

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(and even liquidation proceedings), the directors may be found personally liable for the debts of the company. In general, this may happen if it appears that a director has misapplied or retained any money or other property of the company or is guilty of any misfeasance or breach of duty in relation to the company.

As to whether shareholders may challenge a delay or cancellation of dividends by the directors, we hereby note that (i) interim dividends are not enforceable as a debt before they are actually paid out and thus the directors can cancel them at any time and (ii) final dividends become a debt payable to shareholders only once they have been approved by the shareholders (if required), and thus directors can withdraw their recommendations before then without any implications.

Key takeaway for board of directors:

In light of the aforementioned analysis, the board of directors of each company must:

- Consider whether the company's dividend policy needs to be reviewed and amended;
- Conduct a thorough check on the financial stability of the company before declaring and/or recommending the payment of dividends; and
- Keep records of any decisions related to the payment or cancellation of dividends in writing including the underlying rationale.

Our firm regularly advises on companies' dividend policies and procedures. Should you require any assistance please do not hesitated to contact us.

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II. Virtual Board Meetings

Question: Can we hold meetings and take valid decisions without our physical presence in the same room?

Answer:

In Cyprus, the meetings of the board of directors (as well as the general meetings of shareholders) can be validly conducted via electronic means and thus there is no obligation for the persons participating to be in the same room. In particular, in 2015 the Cyprus Parliament voted for an amendment of the Companies Law, Cap.113 (ref: the Companies (Amending) (No.4) Law 89.(I)/2015) and incorporated, amongst others, section 128D enabling shareholders in a general meetings to participate via electronic means as well as section 191A which provides the board of directors of a Cyprus company with the same power. More specifically, section 191A reads as follows:

> *"Unless otherwise expressly provided in the company's articles of association, a meeting of the board of directors may be held via telephone or via any other electronic means by which the persons participating in the said meeting may at the same time hear and be heard by all other persons involved in it and the persons participating in it this way shall be considered for the purposes of quorum and for any other purpose shall be regarded present at the meeting.*
>
> *For the avoidance of any doubt, in the aforementioned case the board meeting shall be considered to have taken place in the place where the person who kept the minutes of the relevant meeting is present*"

As a result, subject to the articles of association of the company, the board of directors of a Cyprus company can hold meetings and take valid decisions without the physical presence of all the participants in the same room.

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III. Data Protection

Question: As an employer, we are concerned about our Data Protection obligations. During the Covid-19 events we would like to know the position of the law on the following:

a. **Can we require employees or clients to undergo a medical examination?**
b. **Can we check their temperature before entering our company's premises?**
c. **Can we require employees to inform our HR department once they have certain Covid-19 symptoms?**
d. **Can we require employees to provide us with health data in order to establish whether employees belong to a "vulnerable group" and thus in a more danger?**
e. **Can we use health data we already hold for a new purpose? For example, if we hold sick notes for the purposes of administering employees sick pay can we use these sick notes for a new purpose and check amongst others for history of respiratory illness?**
f. **Can we disclose health data to public authorities in case of emergency?**

Answer:

There is no doubt that the Covid-19 outbreak generates, amongst others, several data protection challenges for companies and employers who are trying to maintain a balance between, on the one hand, their duty to provide a safe business environment for employees and clients and, on the other, their data protection obligations under the EU General Data Protection Regulation (known as the "**GDPR**") as well as the applicable local legislation.

The primary goal of the GDPR is the protection of the personal identifying information of data subjects. More specifically, processing of such personal information is specifically limited by the GDPR's enumeration of data subject rights. These rights, however, are not unconditional and under circumstances of civil crisis, some of these protections and rights might be suspended or restricted. In other words, the regulation allows for the temporary suspension of some data-protection rights in times of crisis, such as the outbreak and exponential global spreading of Covid-19.

Covid-19 and its spread across borders is a concern for employers around the world including Cyprus based employers. Whilst employers have an obligation to ensure the safety and health of their employees and visitors, measures intended to ensure a safe business environment can increase processing of employees' and clients' personal data.

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The main question that needs to be answered is whether companies can process "sensitive (health) data" as a result of the Covid-19 outbreak:

Monitoring the Covid-19 situation and taking measures in order to ensure and protect the health and safety of employees and visitors, may require employers to process more health data than usual.

Some of the most commonly raised related questions by our clients so far are the following:

- *Can we require employees or clients to undergo a medical examination?*
- *Can we check their temperature before entering my company's premises?*
- *Can we require employees to inform our HR department once they have certain Covid-19 symptoms?*
- *Can we require employees to provide us with health data in order to establish whether employees belong to a "vulnerable group" and thus in a more danger?*
- *Can we use health data we already hold for a new purpose? For example, if we hold sick notes for the purposes of administering employees sick pay can we use these sick notes for a new purpose and check amongst others for history of respiratory illness?*
- *Can we disclose health data to public authorities in case of emergency?*

Before employers can process "sensitive (health) data" during the Covid-19 health crisis, they should have regard to Article 9 of the GDPR. Article 9 provides that special category data, which includes health data, should not generally be processed, except in a limited number of situations, which are listed in article 9(2). In particular, if employees' consent cannot be relied on as a valid condition to process the data, then one or more of the following alternative conditions under Article 9.2 will need to applied:

- 9.2(b) – "*processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law*".
- 9.2(g) – "*processing is necessary for reasons of substantial public interest*".
- 9.2.(h) – "*processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment, or the management of health or social care systems and services*"
- 9.2(i) – "*processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care*"

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In order to establish whether any of the above can legitimately be relied upon by employers, they have to consider whether they can establish that processing of "sensitive (health) data" is **necessary** in order to safeguard employees and/or clients/visitors as well as to combat the threat of Covid-19. This will largely depend (i) on the level of threat posed by the virus in the geographic area of the business; (ii) on whether the processing activity achieves a proportionate balance between on the one hand the data rights of individuals concerned and on the other the efforts to combat the threat and ensure a safe environment for employees and visitors/clients; and (iii) on whether any alternative less intrusive measures are readily available.

Processing of other personal data:

Except of what has already been mentioned above, other measures that are usually under consideration by companies in an effort to combat the threat of Covid-19 raise a number of data protection questions. Within this context we are often dealing with queries such as the following:

- *Can we ask employees and receive information about their travel plans (either before or after a holiday abroad)?*
- *Can we use contact details of employees and clients to inform them for any Covid-19 related business decisions?*
- *Can we text or email employees to inform them about workplace opening arrangements?*

Both the GDPR as well as with the Cyprus data protection legislation, require companies/employers to have a lawful basis before they collect and process such information.

In such cases, it is important to be remembered that employees' consent is difficult to be regarded as a lawful basis for Covid-19 related data processing activity given the perceived imbalance of power between the company and the said employees.

Therefore, unless the processing becomes truly necessary to protect the "vital interests of the data subject or of another natural person" (usually understood to mean an emergency, "life or death" situation), it seems likely that the most appropriate lawful basis to rely on would be the legitimate interests of the controller (company/employer) or a legal obligation imposed by an applicable legislation. Such legitimate interest must be solid enough in order not to be overridden by the fundamental rights and freedoms of the data subjects (being employees and/or visitors/clients).

In light of the above, although in ordinary circumstances, requesting to receive personal data such as details on travelling activity outside the workplace would constitute an unwarranted intrusion into private and family life, taking into consideration the current health crisis, an employer could have a valid, legitimate interest in asking employees to disclose where they are going on holiday, or have recently been. The employer has a clear interest in and an obligation to ensure the safety of all staff and visitors where the employee works and must take into account the rights of all data subjects. In this situation, it is likely that the employer's legitimate interest is not overridden by the individuals' privacy rights.

It is thus fundamental for companies to always balance confidentiality and privacy of data subjects with their duty of care to other employees and visitors/clients before requesting and processing any personal data.

Retention of personal data collected and processed during Covid-19 crisis:

Whilst the extent of the threat is unknown, companies must ensure that they follow a data protection policy that is transparent on the purpose of processing as well as retention of data collected. They must in particular consider how long this type of data should be retained by closely monitoring the relevant global Covid-19 developments as well as any guidance issued by their local Data Protection Authority.

Concluding remarks and key takeaway for companies:

In light of the serious global threat posed by this virus, data protection is not likely to be the primary concern for companies, but we know that businesses are keen to understand and, where possible, to comply with their data protection obligations in order to avoid related fines that will place an extra burden on them during these very difficult times.

With that said, we have summarized below some of the key data protection compliance steps for companies/employers:

i. Companies must review and if needed amend their employee and client data protection privacy policies and notices in order to address any identified gaps whilst prioritizing the efforts to protect employees' and clients' health and safety. More specifically, companies must ensure whether existing privacy policies and notices are sufficient to cover the data to be collected during the Covid-19 crisis (ie data of employees, visitors, customers and other data subjects) as well as the processing of such data. Most importantly, such policies and notices must provide employees and clients with clear information about the company's related decisions and plans on how their personal data will be processed.

ii. For many groups of companies, it may be necessary to provide a supplementary privacy notice with key information on the additional purposes of processing personal data and special category data.

iii. To help mitigate some of the data-related risks noted above, businesses may wish to establish prudential protocols for the manner in which they will collect, use, secure, retain and share any information collected during the Covid-19 crisis. Businesses should consider GDPR and other legal requirements, such as taking appropriate information security measures and applying data minimization rules.

iv. Subject to certain conditions, companies may need to consider whether a data privacy impact assessment is required before they proceed with new data-related activities during the pandemic crisis.

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v. If such health data will be transferred outside the company, companies must ensure that the contemplated transfers are covered under an appropriate GDPR data transfer mechanism;

vi. Employers who seek to rely on consent (by requesting employees and visitors to tick a consent box or by making the questionnaire optional) should consider the fact that, in an employment context, consent is often deemed to be invalid due to the imbalance of power between the employer making the request and the employee, who may feel compelled to provide the information. Consent under the GDPR must also be revocable, which may undermine the organisation's monitoring process. It is thus essential for companies to establish the basis of their new data-related activities.

vii. Any information collected should be kept at all times confidential; be limited to the absolute necessary and be in line with the data protection principles of data minimization and purpose limitation (i.e. safeguard employees and visitors and combat the threat of the virus).

The exponential spreading of Covid-19 generates a number of challenges for companies/employers around the world including those based and operating in Cyprus. Apart from any commercial and business-related challenges, companies are also likely to confront privacy questions as they seek information on employees' and clients' health and travel activities in an effort to guarantee a safe business environment from everyone. In order to achieve a balance between on the one hand their duty to ensure the health and safety of employees and visitors, employers will need to consider these issues in a holistic and coordinated manner and closely monitor Covid-19 developments and related guidance issued by Data Protection Authorities.

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IV. Employees' Salary

Question: Can we unilaterally alter the salary of our employees in an effort to mitigate the financial impact of Covid-19?

Answer:

In Cyprus, although written employment contracts are not mandatory, the applicable legislation being the Law Providing for an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship (100(1)/2000) (hereinafter the "**Law**") imposes an obligation on the employer to provide to the employee, in writing, specific information regarding the terms of employment. Such information must include:

i. *information about the identity of the parties;*

ii. *the place of work and the registered address of the business;*

iii. *the position or the specialization of the employee;*

iv. *the commencement date of the contract and its duration, if it is for a fixed period;*

v. *notice periods in general;*

vi. *annual leave entitlement;*

vii. ***all the payments (salary, bonuses, etc.) to which the employee may be entitled and the time schedule for their payment;***

viii. *the usual duration of daily or weekly employment; and*

ix. *the application of any collective agreements.*

Importantly, even though the Law contains no specific limitations regarding amendments on the terms of the employment relationship, any unilateral change in employment terms that is detrimental to the employee may give rise to a claim for constructive dismissal (ref: The Termination of Employment Law 24/1967) and/or damages (ref: Law 24/1967) and/or even criminal liabilities (ref: The Protection of Salary Law 35(I)/2007). It is therefore advisable that any major changes are agreed in advance between the employer and employee. The consent of the employee must be confirmed either with an amending agreement or by conduct.

It must also be stressed out that, in case employers unilaterally alter the salary of the employees during the Covid-19 events, the employer will also not be eligible to participate in the emergency government schemes in relation to the employment relationship.

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V. Redundancy

Question: Our company faces unprecedented financial difficulties. Can we apply a redundancy scheme for our employees as a result of Covid-19?

Answer:

Section 5 of the Termination of Employment Law 24/1967 (hereinafter the "**Law**") provides that one of the cases whereby an employment relationship may be terminated by the employer without the obligation to pay compensation to the employee is dismissal due to redundancy.

Section 18 of the same Law expressly provides that the following constitute grounds for dismissal due to redundancy:

a) *the employer has ceased to carry on the business that employs the employee;*

b) *the employer has ceased to carry on the business at the place in which the employee was employed; or*

c) *any of the following grounds relating to the operation of the business:*

   i. *modernization, automation or any other change in the methods of production or organisation which reduces the number of required employees;*

   ii. *changes in the products, production methods or necessary expertise of the employees;*

   iii. *the abolition of departments;*

   iv. *difficulties in placing products on the market or regarding credit;*

   v. *the lack of orders or raw materials;*

   vi. *a shortage of means of production; or*

   vii. ***a reduction of the volume of work or the business itself**.*

As a result of Covid-19, many companies question whether they can terminate their employees' employment by applying a redundancy scheme on the ground that the pandemic caused a "reduction of the volume of work or the business itself". We thus hereunder examine whether section 18(c)(viii) of the Law is applicable during the Covid-19 events. It must however be stressed from the outset that, as a result of the multidimensional characteristics of employment law cases, the below may not be applicable at every single case. Each case must be examined by taking into account its specific facts.

What qualifies as a "reduction of the volume of work or the business itself" for the purposes of redundancy?

Unfortunately, the Law does not provide an express definition of the aforementioned ground for redundancy and thus guidance must be sought from the case law. In accordance with the

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applicable case law, the courts, in order to establish whether there is a reduction of the volume of work or business, will need to apply an objective test and consider in particular the usual turnover of the particular business during the few last years before the contemplated termination of employment. More specifically, the courts will need to establish whether there was a "substantial" reduction of the company's usual turnover to such an extent which may reasonably considered to justify dismissal due to redundancy (a dismissal which, as mentioned above, gives no right to compensation to the dismissed employee by the employer).

The Supreme Court of Cyprus has already clarified in a number of cases that a temporary reduction of the volume of work or income in the Company does not qualify as a "substantial reduction" and must not be regarded as a valid ground for a redundancy. As the Court eloquently put it in the case of **A. Iasonos Ltd v. Charalmpous Christos and others in 1994:**

> "*[I]t is very common and absolutely normal that the volume of work in a business has not only seasonal but also daily fluctuations. If we accept that such a normal variation in the volume of work curve can be regarded as a valid ground for redundancy, we will pave the way for the circumvention of the provisions of Law.*"

It is thus an established principle that "reduction of the volume of work or the business itself" must not be temporary and the elimination of the circumstances that caused such a reduction must not be foreseeable in the near future.

It must also be pointed out that in accordance with the applicable case law, in order for employers to validly apply a redundancy scheme for their employees, they must first examine whether there are any other available less intrusive alternatives that may be applied.

As a result, we believe that, even though Covid-19 financial impact may cause a reduction on the volume of work in many businesses, employers will not be able (at least at this stage) to prove a case for redundancy. This is mainly because (i) they may not have a clear statistical evidence to establish a "substantial" reduction of the volume of work (compared to the average turnovers of previous years); (ii) they may not be in a position to establish that such a reduction will continue to apply for an indefinite period of time; and (iii) the government emergency support scheme in relation to employment relationships may reasonably be considered to be a less intrusive alternative available to employers.

As pointed out above however, due to the multidimensional characteristics of employment law cases, the aforementioned analysis may not be applicable at every single case. Each case must be examined by taking into account its specific facts.

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VI. Frustration of Contractual Relationships

Question: Is our company excused from performing its contractual obligations to third parties due to the Covid-19 outbreak?

Answer:

The exponential spreading of the virus has already caused parties to contractual relationships to consider cancelling various contractual arrangements. Conferences; concerts; sports and other events have already been cancelled because of Covid-19 fears and travel restrictions. With the virus not yet contained, businesses need to examine the practical implications of such unforeseen event on their contractual rights and obligations. We have seen an increase in questions about what contracts say about cancelling events, and how to manage the fall out.

The primary consideration in such cases is to examine whether "force majeure clauses" in contracts and/or the common law "doctrine of frustration" will either protect contractual parties in the event that the virus makes it, either directly or indirectly, difficult to fulfil their contractual obligations or whether the aforementioned principles forbid them from enforcing their contractual rights.

"Force majeure clauses" and the "doctrine of frustration"

Under Cyprus law there is no general definition of "force majeure". It is a concept which is subject to the definition given to it by the parties in each contract. In general terms, this is a clause which sets out what happens if parties cannot perform their contractual obligations because of events beyond their control. Apart from defining the relevant triggering event(s), such clauses usually determine the effect such events will have on the contractual relationship usually being either temporary suspension or complete termination.

However, determining whether a contractual party may be able to rely on a force majeure clause to avoid or delay performing contract obligations because of Covid-19 or the associated travel and other restrictions, requires deep interpretation of the contract as whole and a careful analysis of the wording used. Much may also depend on how the virus is classified by the World Health Organisation and other related authorities, and what restrictions are in place at any given time. It is thus very important when considering relying on such a clause to examine whether this is justifiable as well as what effect the enforcement of such a clause will have on the specific contractual relationship (eg temporary suspension or full termination of the relationship). There is again no "ones-size-fits-all" advice.

As mentioned above, even if there is no "force majeure clause", contractual parties may also be able to mount a defense based on the doctrine of frustration, although the courts are generally reluctant to find that a contract has been frustrated. Frustration occurs where it is impossible for a party to perform a fundamental obligation under a contract, due to an unforeseen event, or makes a fundamental obligation radically different. When a contract is frustrated, neither party has to comply with future obligations. Determining whether a

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contract has been frustrated requires a careful analysis of what the obligations are, and why they cannot be performed.

Importantly, parties to contracts should be aware that a "force majeure" or termination based on the "doctrine of frustration" affecting one contract, such as an agreement for the sale of goods, will not necessarily affect another connected or related contract finance contracts.

Question: A third party with whom we have a contractual relationship argues that our contract is frustrated as a result of Covid-19. What about the expenses incurred by our company so far?

Answer:

Read this answer together with the answer of the previous question

Under Cyprus law, the parties in a contractual relationship may agree and clearly define instances whereby the contract is terminated prematurely. In general terms, such contractual clauses (known as "force majeure" clauses) set out what happens if parties cannot perform their contractual obligations because of events beyond their control. Apart from defining the relevant triggering event(s), such clauses usually determine the effect such events will have on the contractual relationship usually being either temporary suspension or complete termination as well as what happens with any payments made up until that specific period of time.

Doctrine of frustration; the principle of "vis major/act of God" and "unjust enrichment"

Even if there is no "force majeure" or a similar clause, parties in a contractual relationship may also attempt to mount a defense based on the common law doctrine of frustration (known also in some civil jurisdictions as the principle of "vis major/act of God")

The "doctrine of frustration" come into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties or when the change in circumstances fundamentally alter the nature of the parties' initial intentions. Hence, even though the courts are generally reluctant to find that a contract has been frustrated, they may, subject to the facts of each case, give relief on the ground of subsequent impossibility when they find that the whole purpose or the basis of the contract has been frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract.

The doctrine of "unjust enrichment"

Provided that parties in contractual relationships can establish in court that the contract has been frustrated and/or otherwise automatically terminated by an unforeseen event (as per the analysis above), the next question that usually come into play is whether any of the parties in the said frustrated contractual relationship have a legitimate ground to request a refund in relation to any expenses incurred so far to the benefit of their counterparty. Put it more

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simply, there are several cases whereby, before the frustration of the contract, one party has already performed part of its obligations to the benefit of its counterparty with several expenses been incurred as a result.

In this case, the court will need to consider whether the principle of "unjust enrichment" which is applicable under Cyprus law (**ref**: section 65 of the Cyprus Contract Law, Cap.149) provides a legitimate ground to request a refund from the counterparty. In particular, in accordance with the said principle, when a contract becomes void due to an unforeseen event, any person who has received any advantage under such a contract is bound to restore it, or to make compensation for it, to the person from whom he received it. *Importantly this applies irrespective of whether or not the parties have agreed otherwise (ie that ''the deposit will be forfeited'').*

It is thus very common for parties who have already received a financial or other benefit under a frustrated relationship to consider whether the amount received may or may not classified as "*unjust*" enrichment i.e. that time; effort and/or other expenses have been incurred making it justifiable not to return the amount obtained (or part of it).

There is no "one-size-fits-all" advice in such cases, and thus a careful consideration of the facts of each case must always be made.

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VII. Binding Electronic Execution of Contracts

Question: How are we going to execute agreements during the isolation and social distancing measures?

Answer:

There is no doubt that social distancing measures implemented to tackle the pandemic have an immediate impact on companies' business operations and that as a result a substantial disruption is occurring at almost all levels. In particular, isolation has made the signing and execution of agreements more difficult than ever before and there is no doubt that traditional methods used to execute documents are under an urgent need to adapt to the new digital era. Thus, companies that seek to continue their business operations and remain competitive in this emerging digital business chessboard (which will definitely continue even after the end of the pandemic) will have to absorb and incorporate e-business knowledge which includes also the digital execution of legally binding contracts.

The legal framework of electronic execution of contracts:

Fortunately, the legal framework for such practices has long existed within the European Union and thus EU businesses are already in possession of electronic signature solutions (even though such solutions were not commonly used up until today). In particular, the EU has adopted a Regulation ("Regulation No 910/2014 on the electronic identification and trust services for electronic transactions in the internal market") (hereinafter the "**Regulation**") which has established, amongst others, a comprehensive legal framework for e-signatures and e-execution of contracts. Being an EU Regulation, its provisions are directly applicable in all EU Member States without any need of being transposed into national law (compared to the previous repealed Directive on Electronic Signatures (1999/93/EC)). Hence, its implementation plays a direct effect in Cyprus which has nevertheless adopted a related specific Cyprus legislation i.e. Law 55(I)/2018 (hereinafter the "**Cyprus Legislation"**).

Different types of electronic signatures and their legal effects:

When companies consider adopting techniques for the electronic execution of contracts, the following key issues must be taken into account as not all types of electronic signatures are equal in the eyes of the law.

The Regulation as well as the Cyprus Legislation makes a distinction between the following three types of electronic signatures:

1. **Standard electronic signatures** (also known as **"SES"**) which are defined as "data in electronic form which are attached to, or logically associated with, other electronic data, which are used by the signatory to sign". In a nutshell, this type of e-signature refers to the average e-mail signature; a photo or scan of a handwritten signature that is attached and/or otherwise uploaded to a PDF format of a contract.

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2. **Advanced electronic signatures** (also known as **"AES"**) which are defined as signatures "uniquely linked to the signatory, capable of identifying the signatory, and created using e-signature creation data that the signatory can, with a high level of confidence, use under his sole control". In simple terms, an AES is an SES with a number of additional guarantees regarding the identification of the signatory and the immutability of the signed content.

3. **Qualified electronic signatures** (also known as **"QES"**) which are defined as "advanced electronic signatures created by a qualified electronic signature creation device". This type of signature is based on a qualified certificate for electronic signatures, which is issued by a qualified trust service provider at a Member State level. A QES is thus an AES with even more guarantees, such as the involvement of a trusted third party, a certification authority to reinforce the link between the signature and a natural person.

Important Note: Importantly, pursuant to the provisions of the Regulation and the Cyprus Legislation, a SES shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for QES. Furthermore, a QES automatically has the same legal effect as a handwritten signature and a qualified certificate issued in one Member State shall be recognized in all other Member States. It is therefore a great way to sign contracts if the signatories all have a QES at their disposal.

Esignatures on new contracts in Cyprus:

Unfortunately, there is still a large gap in this area of law as many EU countries (and even more countries worldwide) do not have their own state – sponsored QES methods. As a result, for many documents or contracts, companies cannot rely on QES methods alone.

In Cyprus, under the relevant Cyprus Legislation, the Department of Electronic Communications of the Ministry of Transport, Communications and Works is the responsible authority for the implementation of the framework of electronic signatures and supervises and oversees the provision and work of QES.

All sound too complex? – A practical guide and key takeaway for companies:

The general principle is that, except for specific limited situations, no rules prevent companies from simply using SES in their contractual arrangements i.e embedding a scanned signature into a PDF version of the agreement, or even confirming in an e-mail chain that both parties agree. However, as mentioned above, the **enforceability** of that agreement (but not necessarily its **admissibility** as evidence in legal proceedings) could be brought into question, and in such cases companies may be required to use various means of evidence to prove that the other party actually signed that specific agreement.

Thus, where no QES is available, the best practice for the execution of agreements is through wet-ink signatures, on the same page, with all the pages initialed and witnessed in the

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presence of an appropriately qualified person. Clearly however, with the isolation imposed to combat the spread of Covid-19 pandemic and its aftermath, this may not always be feasible.

What follows is a summary checklist of practical steps (which are by no means exhaustive) for companies in order to ensure, to the best degree possible, the enforceability of electronically executed agreements without the use of a QES:

- **Strict express terms:** Strict, express terms may need to be included in the agreements to ensure that only particular individuals can incorporate their esignatures in the agreement in order to minimize the possibility of any ambiguities as to who might have embedded the signature in the document. Similarly, strict express terms shall be included in agreements prohibiting delegation of the aforementioned signing authority.

  Such terms may also require parties to provide written statements at the time of exchange of drafts that the arrangement is entered in reliance on the assurances that:

  - the signatory has the appropriate authority to enter the binding arrangement;
  - the signatory has affixed their own electronic signature; and
  - neither party will challenge the validity of the arrangement by virtue only of the remote electronic signing of the document.

- **Security measures:** Companies may also need to ensure that electronic signatures are securely locked and accessible only by the signatory by using appropriate software and by providing evidence of such security measures to the other party.

- **Caution when exchanging the agreements:**

  - When exchanging the execution versions of the agreements via email, agreements may need to be in a PDF version that is locked and not editable.
  - In case only the signing page is executed, the email shall also include the whole document (even if it is the unsigned version) so there is no ambiguity about the terms agreed.

- **Due diligence:** Pre-transactional due diligences shall also include a confirmation that the counterparty has the authority to execute contracts in such a way and that all the internal documentation providing such an authority are in place.

- **Witnessing:** Although traditional forms of witnessing the execution might not be available, alternative ways of remote witnessing may be applied such as having an independent third party witnessing remotely over a video camera.

- **Wet-ink hard copies:** For strategic and important contracts companies may also proceed with the exchange of a hardcopy version at the first available opportunity or share scans of signed documents.

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Although the above are some key points for consideration, at the end of the day and in the absence of a QES, everything boils down to the mutual trust between the relevant parties.

Concluding remarks:

The exponential spreading of Covid-19 generates a number of challenges for companies around the world including those based and operating in Cyprus. Understandably, companies are grappling to address legal and other issues presented by the current unprecedented circumstances. Therefore, it is more important than ever to allow sufficient time for appropriate arrangements to be made for a document to be signed, whichever method the parties choose to use.

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VIII. Directors Duties and Liabilities

Question: Do we, as the board of directors of our company, have any obligation during this crisis and can we become personally liable for the financial damages incurred by our company as a result of the pandemic?

Answer:

There is no doubt that the boards of directors of every company have a critical role to play in leading their companies through the Covid-19 pandemic and must continuously oversee their companies' responses to this rapidly evolving situation. As a result, during this unprecedented crisis, the directors may need to take difficult and complex decisions that may potentially affect the future viability and cash flow position of their company. It is thus very important for the directors of each company, to carefully consider their duties and obligations imposed on them by the law in order to ensure that they will not have any personal lability in the unfortunate cases whereby their company suffers sever losses or fails to survive the current situation.

Covid-19 and Directors Duties in Cyprus:

The Cyprus Companies Law, Cap.113 (hereinafter the "**Law**") has been modelled on the English Companies Act 1948 and the relevant principles of the common law generally apply in Cyprus so far as this area of the law is concerned.

In practice, a company's memorandum and articles of association prescribe the ambit of a director's powers. A director who acts ultra vires, that is outside the powers conferred by the company's constitution, is accordingly answerable for his conduct to the company as well as to third parties. The function of the law is to supplement these internal constitutional checks on a director's powers and to deal with areas on which a company's constitution is usually silent.

Common law duties:

At common law a director owes two types of duties to the company, a fiduciary duty (duty to act in good faith) and a duty of skill and care.

A. Fiduciary duty: An individual director must act in good faith in his dealings with or on behalf of the company and exercise the powers and fulfil the duties of his office honestly.

The fiduciary duty may be divided into four main pillars:

- **A duty to act in good faith:** A director has a duty to exercise the powers conferred upon him in good faith in what he considers are the best interests of the company, which, in general, are the long-term interests of shareholders, present and future. The courts allow the director absolute discretion, interfering only if no director could have reasonably believed that the course of action was in the best interests of the company.

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However, a director acting not in what he believes to be the best interests of the company (for example, acting in what he believes to be in the best interests of himself personally or of another company or person) is in breach of such duty even if he is acting honestly.

The exercise of a power by a director otherwise than in good faith may be declared by the courts to be ineffectual and void. Besides, an agreement entered into with a third party that was aware of the absence of good faith is voidable against that party. The director may also be liable to make good to the company any loss caused to it by such an exercise of power.

- **A duty to exercise powers for a proper purpose:** Directors must not use their powers for improper purposes (that is for a purpose other than that for which the relevant power, upon its proper interpretation, was conferred), even if they believe that to do so would be in the best interest of the company.

  The exercise of a power for an improper purpose may be declared by the courts to be ineffectual and void. The principle is of general application and can be invoked in relation to any power the purpose of which can be clearly discerned from the articles of association of the company.

- **Conflicts of Interest:** A director must not put himself in a position where there is an actual or potential conflict between his duty to the company and his personal interests. This duty to disclose any conflict of interest is supplemented by provisions in the Law, which require disclosure of the nature of a director's interest at a meeting of the directors of the company. Disclosure must be full and frank and must be made even if the scope of the director's interest is trivial.

  If a director fails to disclose his interest, any profit which the director derives from the contract is recoverable from him by the company, even if the transaction was fair and reasonable or he would have made the same profit after disclosure.

- **Misuse of company property:** A director is regarded as a trustee of company property. Accordingly, he will be answerable if he participates in a misapplication of company property, which he knows or ought to have known to be a misapplication. Misapplication refers to a disposition of company property which the company or the board are forbidden, incompetent or unauthorized to make under the company's constitution, a statute or any other rule of law.

  Company property in this context refers to property in possession or control of the directors, which is beneficially owned by the company even if not legally vested in it. It includes funds standing to the company's credit in a bank account and confidential information of a special and valuable nature, such as secret manufacturing processes and patents. Examples of misapplication include the use of company moneys for purposes ultra vires the company's objects, or the use of confidential information or

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trade secrets for a director's own purposes or to the company's detriment. A director is obliged to restore property of the company which he has misapplied. In addition, any profit arising from the misapplication must be accounted for to the company, regardless of whether such, profit would have otherwise accrued to the company.

B. Duty of skill and care: The director's fiduciary duty (discussed above) imposes on the director a largely negative obligation to do nothing which conflicts with the company's interest. However, when a director is acting in the company's interest he is expected to exercise whatever skill he possesses and reasonable care.

This duty may be divided into three main pillars:

- **Degree of skill and care:** Old case law sets a subjective standard of skill for company directors. A director was not expected, merely by virtue of his office, to possess any particular skills, nor to exercise a level of skill that he did not have. Recent case law, however, suggests that the courts now impose an objective and therefore more demanding standard of skill and care, especially in relation to professionals who act as directors.

  An objective level of skill and care is in any event likely to be imposed in the case of an executive director with a service contract. Even in the absence of an express term in the contract, an implied term requiring the director to display reasonable skill, objectively assessed, in the performance of his duties would be likely to be read into the contract.

- **Attention to the business:** A director, although not bound to give continuous attention to the affairs of the company, must attend diligently to these affairs. It is his duty to acquire and maintain a sufficient knowledge and understanding of the company's affairs to enable him to properly discharge his duties as director.

  The degree of diligence required is different for executive and non-executive directors. The non-executive director must display the same care a layman might be expected to take in the same circumstances on his own behalf. By contrast, an executive director's service contract will normally stipulate that he must devote his full attention to the business of the company.

- **Reliance on others:** Old case law supports the view that, having regard to the articles of association of the company, a director is, in the absence of grounds for suspicion, entitled to rely on his fellow directors or other officers of the company for performance of his duties as director. The modern position is that whilst a director is entitled, subject to the articles of association of the company, to delegate particular functions to those below him in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation will not absolve the director from the duty to supervise the discharge of the delegated functions.

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Statutory duties:

In addition to the duties imposed upon the directors of a company by the common law, various statutory duties are imposed upon them by the Law and other statutes. Duties imposed by the Law include, inter alia, duties of disclosure as already mentioned above and a duty to ensure the keeping of proper books of account and the preparation of a full set of financial statements for the company.

Concluding remarks:

During the Covid-19 events and the anticipated financial crisis, it is of utmost importance that the directors safeguard the company's assets and exercise reasonable care, skill and diligence in order to ensure the stability of the company's cash flow position and future financial viability. In case of a breach of any of the aforementioned duties causing the company to face financial difficulties (and even liquidation proceedings), the directors may be found personally liable for the debts of the company and in some cases even criminally liable. It is thus very important for the board of directors to seek professional advice before taking any decisions during these difficult times and document the rationale underlying each decision in writing.

Our crisis management team, which consists of experienced barristers; next generation award winning lawyers; academic experts; external consultants; specialized legal scientists and financial advisors are readily available to support our clients during this unprecedented global health crisis.

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IX. Short-Term Emergency Loans

Question: Can we get a short-term loan by a Cyprus bank to deal with the Covid-19 related financial impact?

Answer:

As result of the Covid-19 outbreak and the anticipated financial impact on businesses of any size, the Central Bank of Cyprus (hereinafter the "**CBC**") has issued a number of measures to provide, amongst others, support short-term loans to Cyprus businesses.

More specifically, the CBC, in an effort to help businesses in Cyprus gain and/or maintain liquidity during this unprecedented difficult time, has relaxed the criteria for new loans and other credit facilities. The relaxed criteria relate mainly to the assessment of the loan repayment capability as well as to the information requested by the banks from the borrowers. Besides, favourably restructuring measures are now available to performing borrowers, who will have to apply for restructuring by 30 June 2020. Restructuring measures may include the suspension of capital or interest, or both, for a period of nine months, in accordance with the policy of each bank and the financial situation of each customer. New credit facilities may include overdrafts and short-term loans with full repayment at the end of the loan rather than instalment payments. The purpose of these new credit facilities is to cover current needs, including payroll, rent, debt to creditors, etc. The CBC also recommends that banks provide these new loans and other credit facilities at favorable interest rates and bear zero charges and zero arrangement fees.

The CBC is currently examining additional measures in order to support the business community of Cyprus. Our firm closely monitors these developments and can provide professional advice during this unprecedented difficult situation.

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X. Government Support Schemes

Question: Our business operations have been compulsorily suspended by the Government. What Governmental schemes are in place to mitigate the negative consequences?

Answer:

As a result of the Covid-19 outbreak, the Cyprus Government has ordered a number of business to temporarily suspend their operations. As a result, a large amount of businesses are currently in a very difficult financial situation facing difficulties to pay their employees; landlords and other creditors. In an effort to mitigate the current situation, the Government of the Republic of Cyprus has introduced, amongst others, two support schemes aiming to help Cyprus companies survive the crisis. More specifically, Ministry of Labour, Welfare and Social Insurances, has introduced (i) the '*Special Partly Work Suspension Plan'* and (ii) the '*Special Total Work Suspension Plan'*.

The first scheme is addressed to businesses which have partly suspended their operations, meaning that they have a reduction of turnover by over 25% during March 2020 and they expect the same for April 2020, when compared to the respective months of 2019. The second scheme is addressed to businesses which have obligatory suspended their operation in total as a result of the government's decisions. It is important to note that businesses whose operations are directly related with the operations of those which have been ordered by the government to obligatory suspend their operations are also eligible to apply for the second scheme, given that they have a reduction of turnover by over 80% for the concerned period of time. It is noted that in relation to both schemes, the reduction should exclusively be a result of the current situation with COVID-19 pandemic.

According to the schemes, affected employees are entitled to receive statutory unemployment benefit for as long as the businesses suspend operations. The benefit paid will be equal to 60% of the insured amount and cannot exceed EUR1,214 for a one-month period of time.

The basic requirement for a business to apply for both schemes is not to proceed with any dismissals of any of its employees concerning the period between 01 March 2020 and for the period of the plan's duration and also for an additional period equal to the plan's duration plus one extra month. Also, businesses cannot dismiss any employee due to economic reasons for the aforementioned period of time. More information may be found in https://www.coronavirus.mlsi.gov.cy/home.

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