smayra
LAW OFFICE

Client Memorandum

Beirut, April 9th, 2020

COVID-19, *Force Majeure* and employment agreements in the private sector.

Background:

As a result of COVID-19, the Lebanese Government declared on March 15th, 2020 a state of general mobilization until March 29th, 2020; which was later extended till April 12th, 2020 (the "**Government Decision**"). The general mobilization included the suspension of all work in private enterprises (except for the production, storing and sale of basic consumables and pharmaceuticals (amongst others); as well as air, land and maritime transport); in addition to circulation restrictions. Evidently, such measures have had, and will continue to have logistical, social, economic and other impacts. Within that context, numerous (i) employers are unable to normally operate their businesses, and/or (ii) employees are unable to attend their workplace.

As a consequence, a number of our clients have inquired about the impact of the measures taken as a result of COVID-19 on their relationships with their employees; and particularly, whether this would qualify as a Force Majeure that allows employers in the private sector to (i) suspend the payment of salaries, or (ii) terminate the employment of some, or all, of their employees.

Given the importance of the matter, COVID-19's legal implications on commercial agreements in general is addressed in a separate Client Memorandum, which we invite you to refer to.

For your ease of reference, you may find below an Executive Summary of the Memorandum, followed by our detailed assessment of the matter being discussed.

I. Executive Summary:

1.1 The Main Rights of Employees under Lebanese Law:

The employee is entitled to a salary in exchange of the work he/she carries out for the employer. However, an employer is absolved from paying the employee's salary if he/she did not carry out his/her work; including as a result of a Force Majeure (assuming all of its conditions discussed below are met). In fact, when the conditions of Force Majeure are met, (i) the employment agreement is deemed suspended, but its term (if it is a limited duration agreement) is not extended, (ii) the employee's salary is not paid during the suspension, however, he/she continues to benefit from the continuity of employment, as well as from the National Social Security Fund ("**NSSF**") benefits, and (iii) his/her employment (and the payment of his/her salary) resumes once the Force Majeure event has ended.

When the employee is carrying out his/her work at the workplace, the employer should provide to the employee the necessary health and safety conditions.

1.2 The definition and consequences of Force Majeure under Lebanese law:

Force Majeure is (i) an unforeseeable and unexpected event, (ii) that may not be avoided or mitigated, (iii) which causes an impossibility to perform (and not merely rendering the performance more onerous), and (iv) that cannot be imputed to the party availing itself thereof. If the conditions of Force Majeure are met, the parties are both absolved from their contractual obligations, and neither party is bound to indemnify the other party as a result thereof. However, if the main and essential obligations may still be carried out once the event of Force Majeure event has subsided, the agreement is deemed suspended, and its performance should be resumed once the event of Force Majeure has ended. In such a case, the term of the agreement remains the same and is not extended.

1.3 Is COVID-19 a Force Majeure absolving employers from paying the salaries of employees not attending work at the workplace?

A distinction should be made between employments entered into prior to the identification of COVID-19 (i.e. prior to December 2019), and those entered into after that. COVID-19 can potentially only be considered as an event of Force Majeure absolving a party from performing in the agreements entered into before it was first identified, given that in the subsequent agreements, the consequences and implications of COVID-19 are objectively foreseeable (and so, it cannot be a Force Majeure). Therefore, in regards to the former agreements, a distinction should also be made between:

1.3.1 Work that can be carried out from home:

Even though the Government Decision specifically provided that work in the private sector is "suspended" (barring limited exceptions), the employer and the employee should arrange for the employee to carry out his/her work from home. In such a case, the salary should be paid by the employer to the employee. If either the employer or the employee fails to arrange for "work from home", then he/she/it will be deemed to have defaulted on his/her/its obligations to mitigate the consequences of COVID-19, and hence, would not be absolved from performing his/her/its obligations under the employment agreement. If the defaulting party is:

- The employer: the salary should be paid by the employer to the employee;
- The employee: the salary should not be paid by the employer to the employee.

In our opinion, the employees should, in the course of their work from home, comply with their work obligations as if working from their usual workplace. Therefore, any legal or contractual provisions relating to the same should apply thereto, including as to work hours, absences and the likes.

1.3.2 Work that cannot be carried out from home:

In principle, the salary should not be paid by the employer to the employee whose work cannot be carried out from home and who in fact, is not carrying out any work for the employer.

However, in such a case, the employer and the employee should communicate early on in order to reach suitable solutions for both parties. This may include, per instance, partial payments, work rotations (to the extent possible), and/or considering that a number of the days during

which work is suspended as a result of the general mobilization are accounted as yearly leave days, up to the number of yearly leave days the employee may still benefit from.

1.4 Is COVID-19 a Force Majeure absolving employers from paying the salaries of employees attending work at the workplace?

Given that the general mobilization excluded the production, storing and sale of basic consumables and pharmaceuticals (amongst others); as well as air, land and maritime transport from the work suspension, then, employees attending this work at the workplace benefit from the same rights they are entitled to under law and their agreement with the employer. However, absences resulting from the circulation restrictions are not to be considered unlawful absences.

In such a case, the employer should provide the necessary health and safety conditions at the workplace; as well as take all measures reasonably required in order to prevent any COVID-19 contagion.

1.5 General Note Relating to Suspension of Work:

Irrespective (i) the nature of the employment agreement and the employee's work obligation, (ii) the employee's performance of his/her obligations under the employment agreement as a result of COVID-19 or not, and (iii) the payment of the salary or not, the employee's right to benefit from the continuity of employment, as well as from the NSSF benefits are not affected by a suspension of work that could result from COVID-19.

1.6 Does COVID-19 entitle the employer to terminate employment agreements?

Article 50(f) of the labor law provides that "*the employer may terminate all or part of its establishment's employment agreement if so required by Force Majeure … in such cases, the employer must notify the Ministry of Labor of its intention to terminate the agreements one month before the termination…*".

In our opinion, given that COVID-19 will hopefully be a transient matter, then this could complicate any such termination, especially since the Ministry of Labor should be notified a month prior to the termination.

1.7 Summary:

As a result of COVID-19 and the Government Decision, the performance of obligations under private sector employments (i) not excluded by the Government Decision from the general mobilization (i.e. not related to the production, storing and sale of basic consumables and pharmaceuticals (amongst others); as well as air, land and maritime transport), (ii) that may not be carried out through "work from home", and (iii) entered into prior to the identification of COVID-19 (i.e. prior to December 2019) should be deemed suspended for Force Majeure (and hence, the employer is not bound to pay the employee's salary).

As for agreements that can be carried out form home, the employer should enable the employees to work from home. In such a case, the salary would be due. Should the employee fail to carry out such work, then the employer is not bound to pay the salary.

In regards to agreements excluded by the Government Decision, employees attending work at the workplace benefit from the same rights they are entitled to under law and their agreement with the employer. However, absences resulting from the circulation restrictions are not to be considered unlawful absences.

Irrespective of whether (i) the agreement is suspended or not, and/or the (ii) salary is due or not, the employee's right to benefit from the continuity of employment, as well as from the NSSF benefits would not be affected. Also, the term of limited duration agreements would not be extended.

In this context, it should be reminded that, in regards to agreements that may not be carried out through "work from home", the current difficult times will pass. Though the effects of COVID-19 compound the economic difficulties employers (and employees) have been dealing with for a number of years, good, trustworthy and trained employees are one of the most valuable assets for any business. Therefore, this matter should be accounted for when addressing their situation. Employers and employees should communicate early on in order to reach suitable solutions for both parties. This may include, per instance, partial payments, work rotations (to the extent possible), and/or considering that a number of the days during which work is suspended as a result of the general mobilization are accounted as yearly leave days, up to the number of yearly leave days the employee may still benefit from.

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THE DETAILED OPINION FOLLOWS

II. Detailed Opinion:

1 The Main Rights of Employees under Lebanese Law:

1.1 The salary:

1.1.1 The rule:

Lebanese Law defines employment agreements as "*an agreement by which one of the contracting parties dedicates its work to the service of another and under its supervision, in exchange of a salary that is paid thereto by the latter*". As such, the employment and the payment of the salary are intertwined; whereby the salary is the counterparty of the service provided by the employee under the employment agreement.

Nonetheless, in specific circumstances, the employee is remunerated "*in the occasion of the work, and not as a counterparty thereof. The legislator decides in some cases to require that the employer pays a salary to the employee for times during which he/she is not carrying out work, such as the yearly holiday, sick leave or maternal leave*…". In addition, the employee should be remunerated even if he/she does not carry out any work, if such failure is imputed to the employer; provided that in such a case, (i) the employee continues to be at the employer's disposition; whereby he/she is not hired by a third party, and (ii) the court is entitled to reduce the salary.

In addition, article 7 of the Arab Work Treaty No. 15 relating to the protection of salaries, which was ratified by Lebanon through Law No. 183 in date of 24/5/2000 (the "**Treaty**") provides that "*the employee is entitled to his/her salary even if he/she does not carry out its work for **causes not imputed thereto**, **provided that local legislations determine such causes***". However, unfortunately, such reasons are so far not determined.

1.1.2 Precedents relating to the suspension of work agreements and the payment of salaries where work was suspended for Force Majeure during the Lebanese Civil War:

Both doctrine and jurisprudence have considered that "*Safety circumstances [in reference to the war] **constitute a Force Majeure that justifies the mandatory absence** and results only in the suspension of the effect of the employment agreement for the employee. As for **the employer, in exchange, he would not be bound to pay any salary to the employee for the said period**, as per the legal principle provided for under article 624 CoC "the salary in the employment contract is in exchange of the work*"".

In fact, it has been repetitively asserted that "*as per the continuous jurisprudence, the salary is in exchange of work (article 624 of the Code of Obligations and Contracts) and the employee is not entitled, in case he/she is compelled to cease work, as in the case of suspension of the employment agreement for Force Majeure, to claim his/her salaries for the suspension's duration from the employer. Would only be excluded from this rule the case where the legislator dealt with the matter through a specific law, as it did with the Legislative Decree No. 17/1977*".

In this respect, during the Lebanese civil war, in order to organize the relationship of employers and employees in view of the work disruptions caused by the said war and its impact on the continuity of employments, the legislator "*overpassed legal principles in some instances*" and regulated work relationships by providing that employment agreements shall be suspended in all cases where they are temporarily not being performed because of the war; provided that the concerned employees do not fail to resume their work thereafter without a valid cause....

1.1.3 The difference between the Jurisprudence and the Arab Work Treaty No. 15:

While courts find that the employer is not bound to pay a salary to the employee, if the latter is not performing his/her work as a result of a Force Majeure, article 7 of the Treaty provides that "*the employee is entitled to his/her salary even if he/she does not carry out its work for* ***causes not imputed thereto***, ***provided that local legislations determine such causes***".

Given that the ratification date of the Treaty is subsequent to the above cited court decisions relating to the suspension of employment agreements during the war…, in principle, the Treaty's provisions should prevail. However, because (i) the legislator did not determine the causes during which the employer should pay the employee's salary if the latter is not carrying out his/her work, and (ii) the fact that Force Majeure is an established legal concept that absolves the parties from performing their contractual obligations when its conditions are met and/or suspends agreements until it ends, in our opinion, it is the said court decisions that should apply to the payment (or not) of the employees' salaries, if COVID-19 causes a Force Majeure impossibility for the employee to carry out his/her work.

1.2 The workplace:

The place where the work is carried out is usually agreed upon between the parties; whereby the employer would be in breach of contract if it unilaterally changes the employee's work location. For that purpose, employment agreements (and/or internal labor regulations) usually include a provision allowing the employer to unilaterally change the employee's work location. In such a case, the unilateral change of work location would not be deemed a breach of contract. Notwithstanding, the employer should provide the necessary health and safety conditions at the workplace.

2 Do the COVID-19 consequences qualify as a Force Majeure under Lebanese law:

2.1 The definition of Force Majeure under Lebanese law:

2.1.1 Definition of Force Majeure:

Lebanese law did not expressly define what constitutes Force Majeure. Nonetheless, it provides that a party is released from performing its obligations, when its failure to perform results from an impossibility to carry out the obligation, (i) provided that the impossibility cannot be imputed to the party availing itself of the Force Majeure, and (ii) to the extent of such impossibility; whereby the release could be partial. However, for that, such party must prove the existence of the Force Majeure that caused the impossibility of performance.

Based on such provisions, courts and doctrine defined Force Majeure as (i) an unforeseeable and unexpected event, (ii) that may not be avoided or mitigated, (iii) which causes an impossibility to perform (and not merely rendering the performance more onerous), and (iv) that cannot be imputed to the party availing itself thereof. It is worth noting that the conditions of Force Majeure could also be met if an event could have been expected, but could nonetheless not be mitigated, provided the other conditions are met.

2.1.2 Consequences of Force Majeure:

If the conditions of Force Majeure are met, then, in principle, the agreement is retroactively rescinded. The parties are both absolved from their contractual obligations, and neither party is bound to indemnify the other party as a result thereof. However, the agreement may survive and continue to be in effect, if the main and essential obligations (i) have been carried out, and those that may not be executed are secondary, and/or (ii) may still be carried out once the event of Force Majeure event has subsided (i.e. if the impediment is temporary). Therefore, in the latter case, the agreement is deemed suspended, and its performance should be resumed once the event of Force Majeure has ended. In such a case, the term of the agreement remains the same and is not extended (unless otherwise agreed).

2.2 Is COVID-19 a Force Majeure under Lebanese law?

As stated above, for an event to qualify as Force Majeure under Lebanese law and excuse a party to a contract from performing its contractual obligations, the event (i) cannot be imputed to the party availing itself thereof, (ii) must be unforeseeable and unexpected, (iii) should cause an impossibility to perform (and not merely render the performance more onerous), and (iv) may not be avoided or mitigated. However, provided all other conditions are met, the conditions of Force Majeure could still be met if the event could have been expected, but could nonetheless not be mitigated.

Therefore, in order to determine whether COVID-19 constitutes an event of Force Majeure, each of these conditions should be assessed.

2.2.1 Not imputed to the parties:

In all reasonableness, it may be asserted that COVID-19 is not caused by the parties to the agreements to be considered.

2.2.2 Unforeseeable and unexpected:

In this regard, a distinction should be made between agreements (i) entered into before COVID-19 was first identified (i.e. in December 2019), and those (ii) entered into subsequently thereto.

- In the case of agreements entered into before the outbreak of COVID-19: it may be assumed that the consequences of COVID-19 were unforeseen and unexpected.

  In this respect, it is worth noting that, given that epidemics are rather frequent in our days (e.g. SARS, Ebola and other severe flu outbreaks), it could be argued that epidemics should not be considered as unforeseeable events; whereby they should be contemplated in the contract; and hence, should not be deemed events of Force Majeure. Nonetheless, given (i) the extent to which COVID-19 has spread (and its characterization as a pandemic by the WHO), and (ii) the measures taken globally as a result thereof, it may reasonably be argued that it was unforeseen and unexpected; and therefore, this condition is met, especially since this is not a normal risk of doing business.

- In the case of agreements entered into after the outbreak of COVID-19: it could be more difficult to argue that the consequences of COVID-19 were unforeseen and unexpected, given the speed and intensity with which it spread; as well as the drastic measures promptly taken globally in order to control it.

2.2.3 Causes an impossibility to perform:

In our opinion, despite the gravity of the disruptions caused by COVID-19, it does not necessarily cause a total impossibility to perform contractual obligations. The fact that the performance of an obligation has become impractical, more onerous, or does not make sense financially or economically, is not sufficient for the consequences of COVID-19 to qualify as an event of Force Majeure. The performance should in fact cause an impossibility to perform that may not be avoided or mitigated, as discussed below. Also, the affected party should prove both, the said impossibility, as well as a causal link between the event of Force Majeure and the failure to perform; which should not be imputed to the said party's action or error.

2.2.4 May not be avoided or mitigated:

The possibility to avoid and/or mitigate the consequences of COVID-19 must be assessed on a case by case basis, depending on the nature of the work. The measures that could be taken in order to avoid and/or mitigate that these consequences cause an impossibility to perform are varied. Today, "working from home" is accessible to numerous employees in different professions. Therefore, when such is possible, the impossibility is mitigated by allowing the employees to work from home; whereby in such a case, excusal of performance for Force Majeure (whether as a basis for the employer not to pay the salaries, or the employee not to work and still require payment of salaries) may not be duly argued.

3 Is COVID-19 a Force Majeure absolving employers from paying the salaries of employees not attending work at the workplace?

As previously touched upon, an employer is absolved from paying the employees' salaries if they did not carry out their work as a result of a Force Majeure. In such a case, (i) the employment agreement is deemed suspended, but its term (if it is a limited duration agreement) is not extended, (ii) the employee's salary is not paid during the suspension, however, he/she continues to benefit from the continuity of employment, as well as from the NSSF benefits, and (iii) his/her employment (and the payment of his/her salary) resumes once the Force Majeure event has ended.

Therefore, in regards to employment agreements entered into prior to the start of COVID-19 (i.e. prior to December 2019), a distinction should be made:

3.1 Work that can be carried out from home:

The Government Decision specifically provides that work in the private sector is "suspended" (barring limited exceptions); whereby, as a result, and as per the agreed upon legal interpretation of "suspension", (i) employment agreements are temporarily put on hold during the suspension time; whereby they resume thereafter, and (ii) the agreement's term is not extended (unless otherwise agreed).

Nonetheless, and (i) since, in general, courts are protective of employees, who are deemed the weaker party in the employment agreement, and (ii) "work from home" is currently largely accessible, the employer and the employee should, to the extent possible, mitigate the consequences of COVID-19 by carrying out the work from home. The employer should allow the employee to work from home, and the employee should perform his/her contractual obligations as if from the workplace.

Should that be the case, then the salary should be paid by the employer to the employee. Should that not be the case; whereby the work is not carried out from home because of:

- The employer: the salary should be paid by the employer to the employee;
- The employee: the salary should not be paid by the employer to the employee.

It may be argued that the employee is not required to carry out his/her work from home given that this would entail a change of workplace. If the employment agreement (or internal labor regulations) allow the employer to unilaterally change the workplace's location, then such argument is rebutted and the employee is required to carry out his/her work from home. However, if the employment agreement (or internal labor regulations) does not allow the employer to unilaterally change the workplace's location, then, in our opinion, the employee would not be taking the necessary measure to mitigate the effects of COVID-19 as a Force Majeure, and he/she would be in breach of his/her contractual obligations towards to employer. Hence, since the salary is in exchange of work, then the employer would not be bound to pay the employee's salary. However, in our opinion, given that, in the relationship between the employer and the employee, the latter is deemed as the weaker party and is usually protected by the court, in view of the COVID-19 consequences, this would not be grounds to terminating the agreement for absence/not performing obligations.

In our opinion, the employees should, during the time of their "work from home" comply with their work obligations as if working from their usual workplace. Therefore, any legal or contractual provisions relating to the same should apply thereto, including as to work hours, absences and the likes.

3.2 Work that cannot be carried out from home:

Given that, as previously established, the salary is in exchange of work, and the employer is not required to pay the salary in case the employee does not carry out his/her work because of a Force Majeure, then in principle, the salary should not be paid by the employer to the employee whose work cannot be carried out from home and who in fact, is not carrying out any work for the employer. Therefore, in such a case, the parties should, to the fullest extent possible, arrange for the employee to carry out work for the employer that falls within the scope of his/her agreement (and job description).

However, in this respect, it should be reminded that the current difficult times will pass. Though the effects of COVID-19 compound the economic difficulties employers (and employees) have been dealing with for a number of years, good, trustworthy and trained employees are one of the most valuable assets for any business. Therefore, this matter should be accounted for when addressing this situation. Employers and employees should communicate early on in order to reach suitable solutions for both parties. This may include, per instance, partial payments, work rotations (to the extent possible), and/or considering that a number of the days during which work is suspended as a result of the general mobilization are accounted as yearly leave days, up to the number of yearly leave days the employee may still benefit from.

3.3 Is COVID-19 a Force Majeure absolving employers from paying the salaries of employees attending work at the workplace?

Given that the general mobilization excluded the production, storing and sale of basic consumables and pharmaceuticals (amongst others); as well as air, land and maritime transport from the work suspension, then, employees attending this work at the workplace benefit from

the same rights they are entitled to under law and their agreement with the employer. However, absences resulting from the Government Decision's circulation restrictions are not to be considered unlawful absences.

Also, since the employer should provide the necessary health and safety conditions at the workplace, then, the employer should:

- Continuously inform the employees about the precaution measures to be taken because of COVID-19; as well as enforce their compliance therewith; and
- Provide a healthy, safe and hygienic work environment; as well as the necessary sanitation products and all measures reasonably required in order to prevent any COVID-19 contagion.

If an employee contracts COVID-19:

- Outside work, the employee benefits from sick leave as per law and his/her agreement with the employer;
- At work, because of the performance of the contractual obligation and in the course of doing them, then this could be deemed as a work emergency.

3.4 General Note:

Irrespective (i) the nature of the employment agreement and the employee's work obligation, (ii) the employee's performance of his/her obligations under the employment agreement as a result of COVID-19 or not, and (iii) the payment of the salary or not, the employee's right to benefit from the continuity of employment, as well as from the NSSF benefits are not affected by the above.

4 Does COVID-19 entitle the employer to terminate employment agreements?

Article 50(f) of the labor law provides that "*the employer may terminate all or part of its establishment's employment agreement if so required by Force Majeure or by economic or technical reasons … in such cases, the employer must notify the Ministry of Labor of its intention to terminate the agreements one month before the termination. It must also discuss this matter with the Ministry in order to set a final schedule for the termination that accounts for the employees' seniority in the establishment, their specialty, age, family and social status, and finally, the means necessary for their reemployment*".

Economic and technical reasons for termination are a distinct issue that requires a separate discussion. However, should an employer wish to terminate any employments because of COVID-19, in our opinion, given that COVID-19 will hopefully be a transient matter, then this could complicate matters, especially since the Ministry of Labor should be notified a month prior to the termination. However, should the employer wish to proceed accordingly, then the Ministry of Labor should be notified, and the concerned employees' seniority in the establishment, specialty, age, family and social status should be provided. The employer should also consider the means necessary for their reemployment, if any.

5 Conclusion:

As a result of COVID-19 and the Government Decision, the performance of obligations under private sector employments (i) not excluded by the Government Decision from the general mobilization (i.e. not related to the production, storing and sale of basic consumables and pharmaceuticals (amongst others); as well as air, land and maritime transport), (ii) that may not be carried out through "work from home", and (iii) entered into prior to the identification of COVID-19 (i.e. prior to December 2019) should be deemed suspended for Force Majeure (and hence, the employer is not bound to pay the employee's salary).

As for agreements that can be carried out form home, the employer should enable the employees to work from home. In such a case, the salary would be due. Should the employee fail to carry out such work, then the employer is not bound to pay the salary.

In regards to agreements excluded by the Government Decision, employees attending work at the workplace benefit from the same rights they are entitled to under law and their agreement with the employer. However, absences resulting from the circulation restrictions are not to be considered unlawful absences.

Irrespective of whether (i) the agreement is suspended or not, and/or the (ii) salary is due or not, the employee's right to benefit from the continuity of employment, as well as from the NSSF benefits would not be affected. Also, the term of limited duration agreements would not be extended.

In this context, it should be reminded that, in regards to agreements that may not be carried out through "work from home", the current difficult times will pass. Though the effects of COVID-19 compound the economic difficulties employers (and employees) have been dealing with for a number of years, good, trustworthy and trained employees are one of the most valuable assets for any business. Therefore, this matter should be accounted for when addressing their situation. Employers and employees should communicate early on in order to reach suitable solutions for both parties. This may include, per instance, partial payments, work rotations (to the extent possible), and/or considering that a number of the days during which work is suspended as a result of the general mobilization are accounted as yearly leave days, up to the number of yearly leave days the employee may still benefit from.