

The New Dynamic Employers & Advisors Toolkit

Barbados

DENTONS

Burnham Court
Bishop's Court Hill
St. Michael BB11115
Barbados
D +1 246 228 2260

Key Contacts



Erica Marshall-Forde
Partner
Barbados
D +1 246 228 2260
erica.marshall-forde@dentons.com



Shellyanne Smith
Attorney-at-Law
Barbados
D +1 246 228 2260
shellyanne.smith@dentons.com

This Dentons Barbados New Dynamic Employers & Advisors Toolkit addresses many of the issues that employers will likely face in the coming year as lockdown restrictions fluctuate, easing and possibly restricting again, as necessary, to prevent the spread of the virus.

This is the first edition of an evolving toolkit designed to help you navigate a rapidly changing legal and regulatory environment, and to help you plot your organization's course for the future. We encourage you to undertake a small internal audit utilizing our New Dynamic checklist to support your internal efforts and highlight areas of non-compliance.

The toolkit is just that - a tool you can use when carrying out your compliance and governance functions. For maximum effectiveness, the toolkit should be leveraged against your organization's existing legal requirements, policies, and contractual obligations. This exercise will provide you with full visibility into your organization's readiness for the New Dynamic. To that end, we recommend you undertake the following activities in addition to our checklist review:

- Review existing policies, procedures, and handbooks for applicability and consistency with present day requirements and expectations.
- Review existing insurance liability plans to ensure compliance or changes that may need to be made to align with government's recommendations. We recommend you talk with your brokers and discuss such plans.
- Review any employment agreements or union agreements that might be applicable.
- Update your Board of Directors and the appropriate Board Committee regarding plans for communications and policies designed to protect the personal health and safety of employees, customers, business partners including suppliers, and the communities in which they work.

The information provided in this toolkit is for informational purposes only and should not be considered legal or professional advice, nor does it constitute a legal opinion. Every organization must develop its own policies, procedures and plan tailored to the realities of its industry, business, and the jurisdictions in which it operates.

We sincerely hope this toolkit and associated checklist will provide you with helpful information when navigating the New Dynamic.

Employer's Responsibilities to Employees

An employer owes its employees a duty of care to provide a safe working environment and to take any necessary precautions to ensure the safety of all persons in the workplace. Though there is currently no legislation that speaks specifically to the working environment as it relates to the spread of communicable diseases, the expectation of a safe working environment extends to making provisions for the safety and well-being of employees when at work. The expectation therefore, is that an employer not place employees in a compromised position when it comes to the spread of communicable diseases and that every reasonable precaution to protect employees against the spread would be taken. An employer is expected to have a general workplace policy that speaks to the workplace, safety and health and welfare of employees, and such policy should be updated as necessary and be communicated to employees. Thus, given the serious health risks associated with COVID-19, it is recommended that the workplace policy be prepared or updated to take account of any precautionary measures and other specific directives given by the government in relation to the disease.

The employer should take special care to safeguard employees who are pregnant or who suffer from respiratory illnesses.

Given the employer's duty to provide a safe working environment, an employee may have grounds to bring a claim if s/he can prove that an employer failed to take the necessary precautions to ensure a safe working environment. Such a claim may be for personal injury. It is therefore recommended that employers take every precaution to minimize the risk of contracting COVID-19 in the workplace.

A group of people are gathered around a table, looking at documents and writing. The scene is overlaid with a large, semi-transparent red circle. The text is centered within this circle.

"According to the latest data from the International Labour Organization (ILO), 9.9 per cent of working hours in the Caribbean are expected to be lost during the second quarter due to the impact of COVID-19. The magnitude is equivalent to a loss of 1.5 million full-time jobs."

Source: ILO: COVID-19 eliminates the equivalent of 1.5 million jobs in the Caribbean, May 2020, online: https://www.ilo.org/caribbean/newsroom/WCMS_744643/lang--en/index.ht

Staffing matters

Given the downturn in economic activity as a result of the COVID-19 pandemic, it may be evident on the return to work that a decrease in business will necessitate a temporary reduction in the labor force. In this scenario, an employer has the following options:

1. Lay-off
2. Short-time
3. Employment terms adjustment

Lay-off is taken to exist where an employee is employed under a contract in which his remuneration depends on his being provided by the employer with ‘particular work’, and he is not entitled to any remuneration under the contract, for a particular week, because the employer does not provide him with the ‘particular work’.

Short-time occurs where by reason of diminution of the type of work which the employee was employed to perform, the remuneration for the employee of any given week is **less than half the week’s wages**.

Redundancy

If the downturn in business is expected to be permanent or long enough to trigger redundancy and there is a diminished need for certain employees, the employer may make those employees redundant. In such instances, however there will be a requirement to make a severance payment (either statutory severance or severance under the employer’s severance plan, if there is one in place, provided the employer’s severance plan is more beneficial to employees). In all scenarios considered above, prior consultation should be had with the employees to keep them fully updated.

If a **significant reduction in the workforce** is expected, there will also be a need for consultation with the Trade Union if employees are unionized and Chief Labor Officer

Employment terms adjustment

It is important to note that it will not be considered short-time if an employee’s wages are more than half his weekly pay but less than what he is entitled to under his employment contract. If it is contemplated that an employee will receive more than half his weekly pay, this will require agreement between employer and employee to vary the contract terms for a specified period during which the employer is unable to pay the full remuneration to which the employee is entitled. Failure to do so could result in a claim by an affected employee for breach of contract. The remedy would be payment of full wages starting from the point where the employee’s pay was reduced.

Flexible work arrangements

Flexible work arrangements have become part of the new dynamic to ensure that businesses are able to adhere to social distancing requirements and containment measures. They are also worth considering in an effort to assist employees who may not be able to return to the office due to familial responsibilities such as child care arising out of the overriding government mandates.

Flexible work arrangements are permissible and encouraged at this time in an effort to limit social contact. Whether such arrangements should be implemented is at the discretion of the employer but will however require employee consent if they will result in a fundamental change in employment terms.

Workplace health & safety

The reopening of businesses, especially where there is an increased need for employees to be physically present at the workplace, will result in a greater responsibility on employers to ensure that the working environment is safe for all.

Employers should therefore ensure that social distancing protocols are followed and employees use Personal Protective Equipment. Office spaces should be frequently and thoroughly sanitized and employees educated on health and sanitizing standards. It is also recommended that a workplace health and safety policy specifically targeted at COVID-19 be shared with employees in an effort in aid of educating the workforce and to assist with discharging the employer's duty of care to employees.

If an employee displays symptoms while at work, the employee should seek immediate medical attention. Given the employer's duty of care to avoid having other employees endangered or compromised, it is recommended that persons suspected to be infected be isolated from the workplace.

Employees who are considered as high risk should be allowed to work remotely where permissible.



Employee Data Privacy

Some matters that fall for frequent consideration are addressed below:

How should an employer treat with employee personal data especially health information?

Employee data should be treated as confidential unless the employee expressly gives consent to disclose it to a third party.

Are employers allowed to take employees' temperatures and use personal data to admit employees at work?

Given that there is no government or public health mandate to screen employees' temperature, the employee's consent will be required. Discussions should be held with the workforce prior to implementing such a policy to ensure employees understand the nature of the screenings and why it is important to maintain the health and safety of the workplace and its staff. If employees do not give their consent, the employer should make alternate arrangements for the employee to work.

It is recommended that the screening process be treated as confidential and results should be kept on the employee's confidential personnel file. The employer must ensure that the testing is in no way discriminatory and that no one employee can be identified or stigmatized during the process.

Should the rest of the workforce be informed if an employee is diagnosed with COVID-19?

There is no legal obligation to disclose this information. Further, to avoid conflict with the data protection laws, it is recommended that the identification of the employee be kept private unless the employee consents to disclosure. It is however recommended, to maintain good employee relations, that the workforce at least be advised that there was a confirmed case and be reassured of the actions being taken to avoid the spread of the disease in the workplace.



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