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MEMORANDUM

ALTERNATIVES TO DISMISSALS

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MEMORANDUM

ALTERNATIVES TO DISMISSALS

1 Introduction

In relation to the Covid-19 (corona) virus and financial implications a traditional step to improve the financial situation would be dismissals/redundancies. This memorandum, however, provides a brief description of a number of alternatives to dismissals that employers can make use of, and of the circumstances to be taken into account in this connection. In general, the memorandum is not dealing with occupational fields covered by collective bargaining agreements since they are often subject to special conditions in this respect.

2 Salary compensation scheme related to Covid-19 (corona) virus

The Danish Parliament is expected to pass special new legislation on partial salary compensation for Danish companies releasing employees temporarily from work. The bill will be based on an agreement between the Government and the social partners. The following is based on information currently available and changes may be made when transformed into legislation in the Danish Parliament. However, it is expected that changes will be minor.

Purpose

The purpose of the Act is to provide state aid to Danish companies, who are significantly financially impacted by the Covid-19 (corona) virus and the instructions to shut down a major part of the public sector, and the recommendation to take precautions to stop the spreading of the disease by. The level of financial impact is in the agreement stated to be a financial necessity to terminate at least 30% of the workforce or minimum 50 employees due to the Covid-19 (corona) virus-situation. The agreement aims at providing partial salary compensation in order to support companies, who chooses not to terminate the employment relationships but instead temporarily releasing the employees with pay.

All companies or legal entities (including foundations etc.) with employees (one employee is enough) are subject to the legislation. The salary compensation cannot be used for other types of work force, e.g. freelancers or self-employed people.

Compensation

- Compensation for permanent employees* is 75% of the employees' full salary or a maximum DKK 23,000 (gross amount) per month per employee.
- Compensation for hourly paid employees* is 90%, maximum DKK 26,000 (gross amount) per month per employee.
- The employees, for which the company will receive salary compensation, must in relation to the compensation period, each take at least 5 days of holiday with pay or holiday allowance, 5 days of additional holidays with pay ("feriefridage"), 5 days of in lieu or 5 days without pay. In other words, the employee must contribute to the scheme with 5 days without compensation.
- Part-time employees are also subject to the scheme. The maximum compensation will be the pro-rated compensation based on the employee's normal weekly working hours / 37.
- Compensation only applies to employees who were employed prior to 9 March 2020.
- Companies can apply for salary compensation for salary paid from 9 March – 9 June 2020
- The compensation period begins at the release of the first affected employee and ends the day the company brings notice of termination or dismisses due for financial reasons
- As a starting point the company may only apply for the scheme once during the period 9 March – 9 June 2020. If there is need to further temporary releases of employees, however, it is expected that a new application could be submitted.

*Note: References have been made in official papers to either "permanent employees" or "hourly paid employees". We assume the reference to "permanent employees" is a reference to employees subject to the Danish Act on Salaried Employees, and the reference to "hourly paid employees" is a reference to employees, who are not subject to the Danish Act on Salaried Employees.

Qualifications:

1. The company must temporarily release at least 30 % of the workforce or a minimum of 50 employees from duty to work ("Released").
2. The employees must *not* be working from home during the period, they are released.
3. The company must pay *full* salary to its employees during the period, they are released.

4. The company may, during the period for which it receives salary compensation, not terminate employees due to financial reasons.
5. The company cannot use other type of mechanisms to reduce workforce in the company, e.g. temporarily release employees without pay, if this would otherwise be possible for the employees in question or use any other type of state-initiated support schemes, e.g. division of work and unemployment ("arbejdsfordeling").

Please note that the purpose of the scheme is to avoid or downscale the number of terminations and maintain the employment rate in Denmark. The communication refers for the scheme to be for companies that would *otherwise* be terminating employees. This is declared by the company, see further below.

It is possible to include employees, who have already been served with notice of termination, provided that these employees accept that the notice is cancelled.

Application

Application will be digital via the Danish Business Authority (www.virksomhedsguiden.dk). The system is expected to be up and running from 25 March 2020. Applications cannot be submitted before the system is ready, but it will be possible to apply for compensation from 9 March 2020.

All companies that meet the qualifications and requirements will receive compensation.

Compensation will be paid out as quickly as possible, and pay-outs are expected to commence in week 14. Applications will, however, *not* be processed by a first filed, first served policy.

Documentation requirements

As part of the application, the company must submit the following documentation:

- The number/share of employees, who are being temporarily released (at least 30% or min. 50 employees)
- National identification number, salary and type of employee (full- or part-time employee)
- The period, the company is seeking compensation for.
- Declaration from the management that the information is correct.

Subsequently, presumably when the Covid19/corona-virus crisis is over, the company must submit the following:

- Documentation, confirmed by an accountant, that the company actually (i) temporarily released the stated number/share of employees (ii) during the period, for which the company applied for salary compensation.
- If the company has a shop steward, the documentation must include a declaration from the shop steward stating that the employees were released and did not work from home.

3 Work Sharing relating to relating to Covid-19 (corona) virus

Another relevant measure to consider as an alternative to dismissals is work sharing.

Accordingly, in connection with a shortage of work, the employer may choose to divide the remaining volume of work between all or some of the employees to the effect that the employees' working hours and salaries are reduced at the same time as they receive complementary unemployment benefits.

As a specific measure relating to the Covid-19 (corona) virus), the Government has made the work sharing possibility more flexible to allow companies to adapt more quickly to the situation and avoid redundancies. Among other things, companies are no longer required to give a prior one week notice to the Regional Employment Council but could implement the scheme immediately.

The advantage of work sharing, compared to imposing part-time work on the employees with prior notice, is that work sharing based on a collective agreement can be implemented at once and is thus not subject to the expiry of a notice period.

The conditions for the introduction of work sharing are as follows:

- The work sharing must be agreed upon according to a collective bargaining agreement or other collective agreements.
- According to its duration, work sharing must be reported either to the relevant employment agency or to the Regional Employment Council within specific deadlines.

- Work sharing can be organised either by reducing the working hours by not less than two whole days a week or by reducing the working hours by a number of whole working weeks.
- Work sharing must comprise an undertaking in general, a department of an undertaking, or a certain production unit of an undertaking.
- The employees must have received a certificate of release from the employer.

The right to complementary unemployment benefits according to the rules on work sharing is limited to a number of weeks - generally 13 weeks - but the Regional Employment Council may approve a prolongation of the period.

Also, the complementary unemployment benefits are generally only available to employees who are member of an unemployment office ("A-kasse").

With regard to the condition that work sharing must be agreed upon according to a collective bargaining agreement or other collective agreements, it must be noted that an undertaking which is not subject to any collective agreement can enter into a collective agreement on work sharing with the employees. However, in this respect it is required that the employees concerned have the same type of job and are subject to the same employment conditions, and that the agreement encompasses all employees of the business area/the department in question. In principle, this means that one single employee could prevent the conclusion of a collective agreement on work sharing.

As noted above, only employees who are member of an unemployment office ("A-kasse") is entitled to the unemployment benefits and the incentive for employees who are not entitled to unemployment benefits to accept the scheme is therefore generally less than for those who are.

4 State refund of sick pay relating to Covid-19 (corona) virus

Although not as such a measure that would qualify as an alternative to dismissal, it is relevant to mention another special measure taken by the Government to ease the costs of implications relating to the effects of Covid-19 (corona) virus with respect to employees.

In particular, the state has adopted an exception to the rule that employers are not entitled to refund of sickness benefits the first 30 days of sickness if the sickness relates to Covid-19 (corona) viru. Under the new rules adopted the 30 day-rule does not apply meaning that

the employer is entitled to refund of sickness benefits from day 1 instead of after 30 days. The right to refund also apply in relation to a quarantine relating to Covid-19 (corona) virus.

The different elements are as follows:

1. The employee must provide a sworn statement that the employee “has a realistic assumption that he/she is sick with Covid-19 (corona) virus”.
2. Application for refund is applied for in NemRefusion and no longer than 5 days after the first day of absence.
3. The company may also apply for refund with respect to employees affected by a quarantine relating to Covid-19 (corona) virus.
4. A quarantine imposed by the employer (self-imposed quarantine) does not qualify for refund under the scheme
5. Employees who are able to work from home will as a general rule not qualify for refund under the scheme.

The scheme applies for sickness or quarantine with first day of absence on 27 February 2020 or later.

There is a number of issues relating to data protection rules including in relation to obtaining information relating to Covid-19 (corona) virus with respect to the employee. It is the assumption that companies are generally entitled to obtain and process such information in relation to the scheme, but data protection rules need to be taking into account in this respect.

5 Salary Cuts

Salary cuts either involve that the employees are notified in advance that their salaries will be reduced or that an agreement is made with the employees in this respect - without the working hours being reduced simultaneously.

A salary cut imposed on an employee constitutes a material change in the employment conditions which must be notified in advance with the employee's' individual term of notice. The employee may then choose to consider him or herself as having been dismissed and consequently leave the employment upon expiry of the period of notice. In that case, the employee will continue to be entitled to full salary during the notice period.

If the employee chooses to consider him or herself as dismissed, he or she will keep the rights normally entailed by a termination of the employment relationship. This means that, depending on the circumstances, the employee will be able to claim a seniority-based severance allowance pursuant to Section 2a of the Danish Salaried Employees Act as well as compensation pursuant to Section 2b of the Danish Salaried Employees Act in case the changes are not reasonably justified, and also to assert special rights in connection with a dismissal that have been agreed upon individually or collectively. Furthermore, the employee will not be bound by any non-competition clause. As a rule, a general salary reduction will be considered justified if there is a reasonable relationship between the pursued cost savings and the economic impact of such measures.

However, particularly in situations where the undertaking is in a financial crisis, the employees might be interested in accepting a salary cut and in entering into an agreement in this respect, always provided that in this manner they can maintain their employment. Such agreement will presumably enter into force with immediate effect. In the event that, in spite of the agreement, an employee is dismissed after all, within a period covering the employee's term of notice, it is presumed that theoretically the employee will, in the given circumstances, be entitled to claim failure of a basic assumption. This could entail that the employer will have to pay full salary to the employee (with retrospective effect) as from the entry into force of the agreement until expiry of the period of notice.

By judgment of 20 June 2011, the Danish Supreme Court has established that an agreement on salary reduction with immediate effect was not in contravention of the provisions of the Danish Salaried Employees Act or general invalidity rules. In this connection, the Supreme Court declared that Section 2 of the Danish Salaried Employees Act is relevant to the term of notice in cases where an employment contract is terminated by dismissal or notice of resignation, i.e. by a unilateral statement from the employer or the employee, and that Section 21 of the Act, pursuant to which the provisions of the Act may not be deviated from to the detriment of the salaried employee, does not prevent the parties from entering into an agreement that the salaried employee has to leave the employment immediately or at an earlier date than required according to the employer's applicable term of notice. Similarly, Section 21 of the Act does not prevent the parties from agreeing that a salary reduction or another essential change in the terms and conditions of employment is to enter into force immediately or at an earlier date than required according to the applicable term of notice.

Furthermore, the Supreme Court did not find that the specific agreement could be set aside pursuant to the general invalidity rules, including in particular Section 36 of the Danish Contracts Act and the rules regarding failure of basic assumptions.

6 Part-time

Similar to salary cuts, but of a less radical nature, is the situation where the employee's working hours are reduced with the consequent proportionate reduction of the remuneration.

Just like salary cuts, this would be a material change in the employment conditions, see the comments above in this respect.

However, the Danish Act on Part-Time Employment contains a prohibition against an employee being dismissed on the grounds that he or she has refused to work on part-time conditions. An employee who is dismissed in consequence of such refusal will basically be entitled to claim compensation. In practice, such claim may, in general, be modified if the request of reducing the employee's working hours is based on a reasonable evaluation of the workforce requirements, which again may be due to, for instance, a decline in orders, etc. This ensues from the legislative history behind the Act as well as from the judgement of 16 May 2006 pronounced by the Danish Supreme Court (U 2006.2346 H).

In the event that the employer subsequently wants to make use of the employee's full services again, this must, in principle, also be notified in advance to the employee. In practice, the employee will often, for financial reasons, be prepared to work full-time again.

The employer may decide in advance that the assignment of the employee to part-time work, or the agreement with the employee in this respect, be limited in time. The advantage is that, after expiry of the part-time period, the employee will resume full-time work without any further notice in this respect. Often the employee will to a greater extent be prepared to accept reduced working hours if it is only for a temporary period.

The disadvantage of having the assignment or the agreement on reduced working hours be limited in time is that the employer again will have to notify the employee or enter into an agreement with the employee on a prolongation of the part-time period if this should still be necessary after expiry of the first part-time period.

Under certain conditions, the employee will be entitled to receive complementary unemployment benefits. This requires that the employee

- is a member of an unemployment insurance fund;
- fulfils the general conditions for receiving unemployment benefits;
- is working less than 29.6 hours a week; and
- has handed in a so-called certificate of release to the unemployment insurance fund.

The employee can only receive complementary unemployment benefits for a maximum period of 30 weeks within a timeframe of 104 weeks. Furthermore, the employer has to pay the unemployment benefits to the employee for the first three days of the part-time period (the so-called "G days").

As mentioned above, payment of complementary unemployment benefits to the employee is conditional upon the employer signing a so-called certificate of release. If the employer accepts to sign such certificate, the employee will be entitled, without further notice, to take up other employment with longer working hours.

Given that the rules and regulations on unemployment benefits are quite complicated, the employee should be requested to investigate whether he or she is entitled to complementary unemployment benefits. It must be noted that a voluntary agreement on reduced working hours might have consequences for the employee's right to unemployment benefits, i.e. he or she might be imposed a waiting period.

7 Other Alternatives

Other possibilities of retrenchments are - without being exhaustive - the following:

- imposing holiday, agreed holidays, time off in lieu, or leave without pay etc.
- zero solution, i.e. a pay freeze
- reduction or discontinuation of bonus schemes
- minimising expenses for benefits, etc.

A number of these arrangements may have the advantage that they will not be subject to the same requirements of prior notice as a salary cut or a part-time arrangement. For in-

stance imposing holiday, agreed holidays, time off in lieu, or leave without pay etc. is often use as a temporary short-term measure. It should be noted that certain notification requirements may apply although the current situation with Covid19 (corona) virus may constitute “force majeure” entitling the employer to notify e.g. holiday with no or only a short notice compared to the ordinary statutory notices of 3 months for the main holiday and 1 month for residual holiday .

8 Other Rules

Other rules to be observed by the employer when implementing the above-mentioned measures are:

Pursuant to the Danish Act on Informing and Consulting Employees, undertakings with at least 35 employees are obligated to provide the employees, at an appropriate time, with adequate information about questions of significant importance to their employment to the effect that the employees are consulted and given the opportunity to formulate an opinion on the relevant questions to the management of the undertaking. Depending on the circumstances, this will also be the case in a situation where the employer intends to make salary cuts, etc.

The Danish Act on Prior Notice etc. in connection with Collective Redundancies (Act on Collective Redundancies) will apply where an undertaking employing a specific number of employees contemplates to dismiss a major number of employees. Inter alia, the Act provides an obligation for the undertaking to negotiate with the employees about the envisaged measures.

With regard to the Act on Collective Redundancies it must be noted in particular that in practice it is not clarified if and when the procedure stipulated by the Act has to be initiated in the event of the employer notifying material changes in the employment conditions, due to the fact that at the time when the employer intends to notify the changes it is still unclear how many of the affected employees will choose to consider themselves as having been dismissed (constructive dismissal). If the employer wants to be on the safe side, the procedure according to the Act on Collective Redundancies should be complied with.

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Copenhagen, March 2020
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