

COVID-19 - Cayman's Legal Guide

INTRODUCTION

COVID-19 is causing economic concerns around the world and our home-base in the Cayman Islands is no exception. Our lawyers are carefully monitoring and complying with the guidelines as set by the Cayman Islands Government.

As Cayman's go-to legal experts, HSM has prepared this guide to help advise a number of persons and businesses as to the requirements /expectations of the Law, covering areas under corporate and commercial, debt solutions and recovery, employment and immigration, insolvency, insurance, private client and property.

This situation and its effects are ever-changing and we will be updating this guide (as required) on our website.

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CORPORATE AND COMMERCIAL

The inevitable economic downturn and uncertainties resulting from this global pandemic pose questions to our corporate and commercial department, which will not be unfamiliar to many clients due to the lessons learned from the global financial crises of 2007-08.

Whilst the Cayman Islands has been (to a certain degree) recession proof due to the type and quality of services provided locally there will certainly be leaner times ahead and as a result an increased need for certain legal services.

Enhanced Due Diligence

During this time we expect to see (for example) many lenders amending or extending current financing arrangements and inversely borrowers seeking to extend any lending facilities. With the heightened chances of potential enforcement there will be an increased focus on due diligence. The more mundane 'due enforcement and capacity' legal opinion letter will be on par for the course in almost any financing transaction as lenders will seek confirmation that they can enforce the terms of the agreement on a corporate entity borrower and indeed that said borrower is capable of entering into the agreement.

Our team is well-versed in carrying out these enhanced due diligence checks and issuing the requisite legal opinions.

Board Meetings

During self-isolation or "shelter in place" orders it may be difficult for directors of Cayman companies (who have the day-to-day management of Cayman companies) to function as a board. It will be important to check articles of association to ensure the governing documents allow for resolutions in writing to be signed in counterparties and to ensure that meetings are quorate and properly constituted or, where necessary, extraordinary general meetings are being called or shareholder approval is received for certain decisions.

Liquidity and Redemptions

It is common in certain jurisdictions to redeem shares (share buy-backs) in lieu of issuing dividends or as part of a reduction of share capital (it should be noted that under Cayman Law a redemption would not amend the authorised share capital of a Company but in certain jurisdictions a buy-back is given special tax treatments). Under Cayman Law redemptions are subject to a cash flow solvency test (i.e. is the company able to pay its debts as they fall due?). It is likely that in tough financial times a company may not be able to pass this solvency test and as such a redemption should not be authorised. Directors who authorise a redemption whilst a company is insolvent would be in breach of their fiduciary duties and may be liable to compensate the Company for any losses. In addition, any director who knowingly or willfully permits a redemption when a company is insolvent commits an offence under the Companies Law and is liable on summary conviction to a fine of US\$15,000 and 5 years imprisonment. HSM can assist with corporate share buy-backs and provide the necessary further advice.

Director's Duties

Directors of a Cayman Islands company are under a general fiduciary duty to act in the best interests of the Company. Many questions will arise during an economic downturn as to whether or not certain decisions fall within these parameters and a blanket reliance on any directors indemnity built into the Company's articles would not be advisable. We can draft director service agreements, which should be crafted to ensure that any indemnity provisions are expressly provided for in favour of directors who are acting in good faith.

Government Waivers/Concessions

The Registrar of Companies and Department for International Tax Cooperation have extended the filing deadlines for annual returns and economic substance notifications for Cayman companies.



The annual return filing deadline has been extended until *30 June*, and this will apply to all companies, including limited liability companies (LLC's) and foundation companies. Penalties for failure to file will come into force on *1 July*. As a result of the annual-return extension for companies, the deadline for economic substance notification filings is now *30 June*. The economic substance notification remains a prerequisite for companies to successfully file their annual returns.

The Trade & Business Licensing (Amendment of Schedule) Regulations, 2020 was gazetted on 1 May 2020. It provides temporary reduced fees for micro and small businesses in the Cayman Islands. HSM can advise and assist with these applications.

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DEBT SOLUTIONS AND RECOVERY

Businesses also need to preserve their 'financial health' during this time – no matter the business size. Our team can advise on financial health and business projections (incorporating their debt portfolio) in the short, medium and longer term. We provide tailored strategies by working with businesses to assess their current debt portfolio, at this juncture. For example, it may not be advisable for businesses to completely suspend pursuit of all debt at this stage but rather assess and create a strategy for recovering debt, in a sensible measured way. Our expertise allows us to handle local and cross-border matters and we can also provide enforcement and litigation services (including Court representation in both Grand and Summary Courts).

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EMPLOYMENT

The Cayman Islands Government has implemented a number of measures in an effort to prevent local transmission in the community, which includes the closure of the country's borders (international air/cruise ship travel), the closure of all non-essential business operations and public curfews until further notice. From an employment law/HR perspective, the current situation poses concerns from both employers and employees. Many employers have seen a dramatic downturn in their business and employees are also concerned about their employment rights. Please keep in mind that each case is unique and should be treated as such, for which you should seek specific legal advice.

Cayman Islands Labour Law

Redundancy is defined in Cayman Islands Law as "*a situation in which, by virtue of a lack of customers or of orders, retrenchment, the installation of labour-saving machinery an employer's going out of business, force majeure or any other reason, tasks which a person was last employed to perform no longer exist.*" A redundancy is a form of "fair dismissal" provided it is carried out in accordance with the Labour Law. The Law provides for preference in employment. If a group of persons carrying out a specific role within an organisation are to be made redundant, the Law requires that preference be given according to immigration status. It follows that work permit holders are expected to be made redundant before permanent residents, permanent residents are expected to be made redundant before the spouse of a Caymanian holding a Residency and Employment Rights Certificate, and Caymanians are expected, by Law, to be the last to face redundancy. This is entirely academic if a business is closing down. Since a redundancy constitutes a form of termination, it triggers a series of entitlements. These include severance pay, notice pay, and accrued (but untaken) vacation pay.

As a result of COVID-19, the Cayman Islands Government has implemented amendments to the Labour Law, allowing labour issues to be submitted electronically and enacted a new regulation that allows employers to suspend their workers' jobs an additional 30 days (60 days total) before having to pay the severance required if they are not recalled.

National Pensions Law

The National Pensions (Amendment) Law, 2020 has passed and includes a temporary suspension of pension contributions for both employers and employees, commencing retroactively from 1 April 2020 through to 30 September 2020. Persons (some restrictions apply) can also withdraw from their pension up to C\$10,000 (and up to 25% of the remaining amount) until 31 October 2020. It should be noted that severance payments made on redundancy are not pensionable, but accrued untaken vacation pay, and any payment due in lieu of notice, are considered to be pensionable under the National Pensions Law.

Health Insurance Law

All residents in the Cayman Islands are required to have "adequate" health insurance. As a general rule the obligation to ensure that health insurance is in place rests with employers. Upon termination of employment employers are generally required to ensure that health insurance is maintained for 3 months following the termination of employment. Employers are entitled to charge those premiums to the employee. The employer's obligation to maintain health insurance ends upon the person becoming employed elsewhere, being covered by an alternative qualifying policy of insurance, upon the expiry of 3 months, or upon the person leaving the Cayman Islands (whichever happens first).

Sample Question: as a business currently unable to operate due to governmental measures, is there any provision in the law for a temporary or permanent layoff of staff?

We have been asked whether there has been a suspension of the Labour Law as a result of these events. In short, the answer is 'no' and employers remain obliged to act in accordance with the Labour Law. The Labour Law recognises that there will be situations in which an employer decides to reduce the number of its employees and although there are a variety of reasons why employers' take such decisions, economic pressures would certainly be one of them.

Broadly speaking, these situations are classified as 'redundancies' and providing that an employer is able to establish that a genuine redundancy situation existed at the time an employee's employment was terminated, this would be a potentially fair reason for dismissing an employee. Nevertheless, in a redundancy situation, an employee will be entitled to statutory/contractual notice and severance pay. For the notice period, the employee will be entitled to all contractual benefits such as payments for any accrued vacation (not taken), pension and health insurance. There is, however, an important distinction between a temporary and permanent employment termination in connection with the payment of severance pay under Part V of the Labour Law.

Permanent Termination vs. Temporary Termination "Lay Off"

Permanent termination is where a redundancy is intended to be permanent, an employee will be paid severance simultaneously upon the termination of the employment.

Temporary termination aka "lay off" is a circumstance where an employer intends the dismissal of an employee to be a temporary measure, the employer is not required to pay severance at the time when the contract of employment is terminated. Instead, the termination letter should specify that the dismissal is on a 'temporary basis', and state the date upon which the employee intends to 'recall' the employee for employment. As long as the recall date is less than 30 days from the termination date, no severance pay is due.

If, however, the circumstances are such that the employer is unable to specify a recall date, severance will be payable 30 days' after termination if the employee has not been 'recalled' within that period; and, the employee will be entitled to interest on the amount of severance pay due at the rate of 10% per annum for the interval between the original termination date and the date of actual payment. It should be noted that provided the employee is recalled within 30 days of termination, continuity of employment is preserved for the purposes of future employment rights. If, however, severance is paid and the employee is subsequently re-employed by the employer, the employee is treated as if he/she has been newly hired and the commencement date of his/her employment (for the purposes of future employee rights under the Labour Law) shall be from this date.

Sample Question: now that government has mandated the temporary closure of business operations (except for essential services/employees) do we have to pay the employee?

Apart from the circumstances set out in the question above, the issue of paying employees in these circumstances would principally be determined by the contract of employment. Salaried employees are normally contracted to attend work at set times during a normal working week.



Others, are paid an hourly rate with a guarantee that a minimum number of hours will be provided by the employer.

In each of these cases, the failure to pay an employee his/her salary is a breach of the contract of employment. On the other hand, where an employment contract stipulates the payment of an hourly rate but without an agreement that the employer will provide a set minimum number of hours, this is, in effect, a "zero hours" contract for which the Labour Law deems the employee to be a 'casual employee'. As the employee is only paid for work actually undertaken, unless the employer can offer that work, the employer will not be obliged to pay them.

It should be noted that immigration (WORC) permissions are generally granted based on a demonstrable "need" for the post holder and there may be general concerns raised under the Immigration (Transition) Law and the Labour Law in the event that a zero hour contract mechanism is contemplated. Full compliance with the National Pensions Law, and Health Insurance Law will also be required.

Sample Question: once the suspension of business operations is 'lifted', can I request flexible working arrangements to care for children due to continued school closures?

All schools and other education providers in the Cayman Islands have been temporarily closed. This measure is likely to lead to requests from employees for flexible working arrangements to cover child care. From a contractual perspective, employers should clarify whether their employment contracts or company policies entitle such flexible working conditions for their employees. If not, in the current circumstances, then as a matter of best practice, employers should try to accommodate measures if an employee is capable of fulfilling their work duties from home. If remote working is not an option, it will be a matter for the employer to decide whether or not to grant paid (as vacation) or unpaid leave.

Sample Question: as a result of current measures, the Company which I work for has been forced to close permanently and is insolvent. What are my rights as an employee?

This is a complex area of law which is governed by the Companies Law (2020 Revision) and the Companies Winding Up Rules 2018, and would require specific legal advice.

As a basic guide, where a company is insolvent, the assets are placed in the hands of a liquidator which are then sold, and the proceeds are made available for equal distribution (pari passu) to company creditors. However, the principle of pari passu distribution is subject to exceptions and employees are deemed to be preferential creditors which rank above non-secured creditors when distributions are made by the liquidator.



Claims by employees broadly encompass all contractual provisions including salaries, gratuities and commissions, payment of medical health insurance and pension premiums and, severance pay.

Section 40(2) of the Labour Law (2011 Provision) confirms that upon the bankruptcy or winding up of an employer, any liability for severance pay shall be paid in priority to all other debts, secured or unsecured, and shall be paid in full unless the property available is insufficient to meet them.

Regrettably, there is no guarantee that an employee will receive their full entitlements under a contract of employment or under the Labour Law. It will depend upon the amount in cash terms that the liquidator has realised from the liquidation of assets.

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IMMIGRATION

Issues have arisen for those who may be terminated and require a work permit to reside in the Cayman Islands.

We have also found that some businesses are finding themselves in new territory where they may be in breach of the Law, these include working outside the scope of a work permit and not having the appropriate licence to carry out services.

Work Permit Termination

Regulation 9 of the Immigration Regulations provides that where a person on a work permit is no longer employed, any work permit ceases to be valid, and the employer must forthwith notify the Department of Workforce Opportunities & Residency Cayman (WORC). Redundant employees who were on a work permit to be in Cayman have no right to remain once their employment ends. In normal circumstances that means that persons are expected to register as tourists and remain in accordance with permissions extended by WORC/Customs and Border Control. Customs and Border Control have announced that where a permission to work in Cayman ends before 22 March persons should have left before the airport closure on 22 March 2020 without first having to “regularize” their permission to be in the Islands.

As matters stand, no expatriate can work in the Cayman Islands without express permission or exemption from requirements. It will not be impossible for an expatriate made redundant to seek and obtain alternative employment without first having to leave, and if normal rules continue to apply, Caymanians, Spouses of Caymanians and Permanent Residents will be given preference for any opportunity.

Temporary Termination “Lay Off”

This viable alternative to a permanent termination can be found in The Labour Law (2011 Revision) for employers who anticipate that there is a possibility for business to return to somewhat normal conditions within a few weeks (or in the case of construction and agriculture, a few months).

It is unclear what the effect of a temporary termination “lay off” is in relation to the treatment of work permit holders under the Immigration (Transition) Law. But we do not believe there is a notification requirement at least within the first 30 days in regards to work permit holders.

Work Permit Potential Issues

Some businesses may see the demand for new and/or additional services. If this is the case, these businesses and relevant employees should be aware of:

1. Working outside of the scope of any immigration (WORC) permission.

Example: you have permission to employ someone (or be employed) as a cook and are working as a delivery driver.

2. Being licenced to carry on each trade or business undertaken.

Example: you are a licensed restaurant that seeks instead to operate as a food delivery service.

In either scenario, permission should be sought from the relevant agency (WORC or Department of Commerce and Investment) to ensure compliance with legal expectations.

Repatriation

Unless provided for by contract, there is no obligation on an employer to ensure that an expatriate employee is able to return to their home country. It is worthy to note that employers have paid substantial “repatriation fees” to the Cayman Islands Government in the expectation that those funds could be applied towards the costs associated with workers getting to their homeland. For some, returning home is not a reasonable possibility at this time. It requires closed third party borders to be crossed, even if flights are available. These people may be stuck in Cayman, perhaps for an extended period.

The Government has recognized this and it, employers, and the community will have to come together to ensure that everyone's basic needs can be met.

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INSOLVENCY

The disruption and uncertainty created by COVID-19 has had a significant financial impact upon many businesses worldwide. With economic forecasts predicting that 2020 could experience a sharp recession, there is much understandable concern.

Business Recovery

If your company has been feeling financial effects, we have outlined some of the options available to directors to assist in business recovery:

- **Cost-cutting:** Directors should analyze the company's current position and identify the critical business functions in order to streamline or restructure non-profitable aspects of the business. Where possible, cost-saving measures should be implemented on non-essential items to reduce overhead costs.

As stated before, the Cayman Islands Government is also doing its part to help the local business community by announcing on 26 March 2020 that it will be deferring the obligation to pay annual fees until 30 June 2020 for corporate entities registered in the Cayman Islands.

- **Creditor Negotiations:** Early contact with creditors should be made to ascertain whether it is possible to negotiate a payment arrangement or a deferral of payments. This is generally done on an informal basis and is generally less costly and time consuming compared to a judicial process such as a Provisional Liquidation.

- **Funding:** A cash injection from an alternative source of funding may help relieve temporary cash flow difficulties. Although credit may be tighter, refinancing with another financial institution on more favourable terms may provide a longer-term strategy.



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- **“Light Touch” Provisional Liquidation:** Where a company is still viable but is experiencing liquidity problems, formal proceedings may be issued to facilitate restructuring or financing in a Court-supervised provisional liquidation (s. 104(3) of the Companies Law (2020 Revision)).

An application may be made where it appears that a company is unable to pay its debts (within the meaning of s.93 of the said Law). Provisional liquidators are appointed and the company is granted an automatic stay of proceedings as against unsecured creditors, although secured creditors can still take action to enforce their security. These proceedings often allow a company to work alongside the provisional liquidators as the company seeks to negotiate with a new lender, renegotiate terms with existing lenders and potentially “cram down” less significant creditors. Ultimately, the goal is for the business to continue as a going concern.

Business Closure

Unfortunately, sometimes it is not possible to rescue a business especially if the options outlined have been exhausted. If so, the directors may have to consider entering into voluntary liquidation and there are different options available depending on whether the company is deemed solvent or insolvent.

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INSURANCE

One aspect which businesses should consider is whether their insurance policy covers this interruption of business. It is important to seek legal advice as to whether the current situation is covered by its insurance policy. As one can imagine, this is an area in law which legal advice is required to determine whether there is some relief available from their insurers. It is an area complicated by technicalities and the language used in the policy. Each policy will be different with the main key element being what triggers the policy to enable a business to make a claim under these type of provisions. We are equipped to assist in times such as these.

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PRIVATE CLIENT

In times of uncertainty, some people may become more concerned with the state of their assets. We have experienced and anticipate the following in this line of practice:

- **Wills:** There has been an increased demand for Wills driven partially by fears of the virus and also owing to the fact that many people are at home under social isolation and therefore they have more free time to deal with it.

- **Trusts:** No noticeable increased demand at present, however, it is expected that demand will increase in the sphere of estate planning as the pandemic continues as trusts form a vital part of many estate plans.

- **Foundation Companies:** Similar to trusts, there has been no noticeable increased demand yet, but as they are becoming more accepted as an estate planning tool demand should increase if the pandemic continues.

- **Estate Administration:** It is expected the administration of estates will become more cumbersome and may therefore take longer to conclude.

Executors and Administrators who are approaching the one year anniversary of an ongoing administration of an estate should consider applying to the Court for an extension of time in order to comply with Section 5 of the Succession Law (2006 Revision).

- **Probate Applications and Re-seals of Foreign Probate Applications:** This area of practice has remained stable thus far. If the virus claims more lives in Cayman and elsewhere such applications will sadly increase.

- **Powers of Attorney:** No noticeable increase at present, however it is possible some clients may not wish to put one on place in the event they become incapacitated by the virus and need an attorney to deal with their affairs.

Remote Assistance

If clients have been on the fence about putting their estate plan in order or tweaking their estate plan now would be a good time to consider it. The implementation of curfews and restrictions on the free movement of persons impacts the ability to conduct face-to-face meetings. We can take instructions remotely and efficiently during this time and our attorneys are contactable by phone, email or video conference via Zoom. We continue to accept new instructions for all manner of instructions including probate applications, re-seals of foreign grants of probate, powers of attorney and any other legal documents as required. We have to acknowledge complications will arise regarding the execution of certain documents, Wills in particular, which require the presence of two witnesses given the current end of social distancing and self-isolation. HSM is at the forefront of these issues as they evolve and we have potential solutions to overcome these challenges.

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PROPERTY

The property market is affected and we have compiled a synopsis of issues that residents of the Cayman Islands may be wondering about during the curfew period and thereafter.

We highly recommend that you seek legal advice from qualified attorneys and not rely upon unqualified persons.

Lower Interest Rates

Interest rates have fallen and are quite low at the moment. The prime rate in Cayman is currently 3.25%. Should one want to take advantage of purchasing property or refinancing at this time, you should contact your banking advisor and discuss these options.

Mortgages

The financial providers in the Islands announced that there would be a 3 month payment deferral on residential mortgages and personal loans in good standing. Some of these deferrals were automatic within some institutions, at others, one would have to apply for the deferral.

It should be noted that this would result in an extension of the loan terms as interest on the outstanding balance, that is payable during the deferral period where no loan or interest payments are made, will be added to the outstanding principal amount. Thus the payment deferral will increase the amount of interest over the life of the loan. Our Debt Solutions and Recovery Team (pg. 2) can advise on internal processes/policies and training as well as review/update/draft legal documents and agreements. In addition, they can take enforcement action relating to forced sales (foreclosures), personal loans (secured/unsecured) and credit card debt.

What happens if I fall behind on mortgage payments?

One should always contact their banking representative to keep them alight of any financial difficulties. Ultimately they are there to try to assist you as best they can with your banking needs. However, if you are unable to meet the commitments as contracted in your finance documentation and found in the Schedule, the bank has remedies that they will depend on:

1. Assignment of Rent

If your property is tenanted, the bank will have the rental payments paid directly to them in order to ensure that the funds are applied to the outstanding principal and interest.

2. Foreclosure

The bank has the right to foreclosure and to enter into possession of the charged property or both. As per S.72 of the Registered Land Law (2018 Revision).

Strata Properties

Very much like certain remedies the financial institutions may have, it should be noted that some strata properties also have similar remedies in the strata by-laws. For example should you fall behind in your payment of strata fees, rents may also be assigned to the strata to ensure payment of outstanding/ongoing fees. Our Debt Solutions and Recovery Team (pg. 2) can advise on and re-draft by-laws as well as assist/enforce payment on arrears.

Stamp Duty

Stamp duty fees can now be deferred for an additional 45 days. No interest or penalties need be paid for a total of 90 days. This deferral will apply to contracts executed between 1 February 2020 and 15 April 2020. There are also properties available in new developments where the stamp duty has been prepaid by the developers and as an incentive to purchase in the development, will pass those savings onto the potential purchaser (we suggest you contact your realtor).

Renters/Tenants

Currently there is no rental regime in the Cayman Islands. That is why it is important to seek legal guidance and our lawyers are well-versed in drafting and executing rental agreements. The rental agreement between the landlord and tenant will be the document used to determine any outcome. So if one foresees there being an issue with being able to pay the monthly rental speak with your landlord to try and workout some form of settlement. Should the landlord try to raise rents, the rental agreement will also be the document referred to as per the monthly rental amount for the term in which the tenant is in the property. Our Debt Solutions and Recovery Team (pg. 2) can advise and represent clients on disputes relating to both private and commercial leases/licenses, recovery of rental arrears/enforcement and negotiations regarding leases/lease renewals.



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VIRTUAL NOTARY SERVICES

With the passage of the Notaries Public (Virtual Conduct of Notarial Acts) Regulations, 2020, the Cayman Islands Government on 16 April 2020 has formalized temporary mechanisms by which various notarial acts can be conducted online. However, the remotely located individual must be physically located within the Islands. HSM stands ready to assist clients with any appropriate notarial assistance, and count six notaries (including Associate Oscar DaCosta above) on our team.

CONCLUSION

Ultimately we are all in this together and HSM is on-hand to assist you during these unprecedented times. This situation and its effects are ever-changing so we will be updating this guide on our website. If you have a question that is not covered in this guide, please reach out to a member of our team. Our expertise enables us to provide clear, sound and timely advice on any concerns that you may have.

This guide is intended only to provide a summary of the subject matter. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this guide without first obtaining specific professional advice. Alternative solutions also exist which may better suit the requirements of a particular individual or entity.