LABOR ISSUES IN THE TIME OF COVID-19: FROM ECQ, MECQ, TO GCQ, AND BACK AGAIN*

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I. INTRODUCTION

After various medical associations called for the imposition of stricter quarantine measures in light of the continuing rise in confirmed COVID-19 cases,[1] President Rodrigo R. Duterte re-imposed the Modified Enhanced Community Quarantine ("MECQ") last August 2, 2020 in the National Capital Region, and the provinces of Laguna, Cavite, Rizal, and Bulacan.[2] The re-imposed MECQ, which takes effect from August 3 to August 18, aimed to arrest the sudden spike in COVID-19 infections.

As of August 4, 2020, the Department of Health (DOH) reported 6,352 new cases of COVID-19, bringing the total number of infected individuals to 112,593, with 2,115 deaths and 66,049 recoveries. This was the highest number of confirmed COVID-19 cases for a single day.[3]

Naturally, the priority of the Philippine government has been in preventing the further transmission of the COVID-19 virus and ensuring the protection and continued health of its citizens, while balancing the need to keep the economy afloat and mitigate the pandemic's socioeconomic impacts. As such, the government has convened the Inter-Agency Task Force for the

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[1] Kristina Hallare, *Medical Frontliners to Gov't: Time-out, revert Mega-Manila to ECQ,* INQUIRER.NET, Aug. 1, 2020, *available at* https://newsinfo.inquirer.net/1315204/medical-frontliners-to-govt-time-out-revert-metro-manila-back-to-ecq

[2] Philippine Communications Operations Office (PCOO), *Metro Manila put under stricter MECQ for two weeks,* PCOO WEBSITE, Aug. 3, 2020, *at* https://pcoo.gov.ph/news_releases/metro-manila-put-under-stricter-mecq-for-two-weeks

[3] Dep't of Health (DOH), *Updates of COVID-19,* HEALTHY PILIPINAS, *at* https://covid19.healthypilipinas.ph/updates-covid

Management of Emerging Infectious Diseases (IATF) in preparing a "multi-sectoral response" to the pandemic.[4]

While the COVID-19 pandemic is primarily a public health issue, the government has undertaken a militaristic approach in response to the problem, by declaring a six-month state of calamity[5] and imposing strict quarantine measures in specified areas. This meant that movement of individuals and communities within, into, or out of the areas under community quarantine has been restricted in various stages.[6]

The National Capital Region ("Metro Manila") is considered to be the epicenter of the COVID-19 pandemic in the country and, as such, had been placed under Enhanced Community Quarantine ("ECQ") for a cumulative period of two months, from March 15 to May 15, 2020.[7] The quarantine was later relaxed to MECQ for a two-week period, and then further relaxed to General Community Quarantine ("GCQ") for a two-month period, from June 1 to August 3, 2020.[8]

Public transportation was halted during ECQ and MECQ.[9] Mass gatherings and face-to-face classes in school campuses were likewise prohibited.[10] Except for some establishments classified under Category I,[11] most businesses were generally closed—or at least, not allowed to work—during the ECQ and MECQ.[12] The gradual relaxation and lifting of travel

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[4] World Health Organization, *100 Days of COVID-19 in the Philippines: How the WHO supported the Philippine Response*, WHO WESTERN PACIFIC, May 9, 2020, *at* https://www.who.int/philippines/news/feature-stories/detail/100-days-of-covid-19-in-the-philippines-how-who-supported-the-philippine-response

[5] This became effective last March 16, 2020. *See* Proc. No. 929 (2020), declaring a State of Calamity throughout the Philippines due to Corona Virus Disease 2019.

[6] IATF Omnibus Guidelines in the Implementation of Community Quarantine in the Philippines [hereinafter "IATF Guidelines"], § 1.3.

[7] IATF Res. No. 11 (2020). *See also* Third Anne Peralta-Malonzo, *Quarantine Takes Effect: Police Still on Warning Mode*, SUNSTAR MANILA, Mar. 15, 2020, *available at* https://www.sunstar.com.ph/article/1848530/Manila/Local-News/Quarantine-takes-effect-police-still-on-warning-mode

[8] *See* IATF Res. No. 37 (2020); IATF Res. No. 41 (2020); IATF Res. No. 55-A (2020).

[9] IATF Guidelines, §§ 2.12 & 3.11.

[10] §§ 2.10, 2.11, 3.9 & 3.10.

[11] § 4.6.a. Category I includes government work, hospitals, clinics, optical clinics, public utilities, public markets, supermarkets, groceries, convenience stores, drug stores, water refilling stations, manufacturing and processing plants of food, medical and hygienic products, delivery services, energy companies, gasoline stations, telecommunications companies, media establishments, banks and capital markets, among others.

[12] §§ 2.4 & 3.15.

restrictions under the GCQ enabled most businesses classified under Category II[13] and Category III[14] to resume operations up to 50% capacity, subject to their compliance with health protocols and the guidelines imposed by the IATF.[15]

Unfortunately, however, the industries classified under Category IV—composed of businesses relating to tourism, entertainment, and leisure activities—remain restricted even under GCQ and, as such, have suffered steep declines in revenues for the past five months.

Much has been said about the debilitating effect of government-imposed community quarantine on business establishments throughout the country, as well as the Philippine economy in general.

According to statistical data from the Department of Labor and Employment (DOLE), as of July 2020, 112,000 workers have already been displaced during the community quarantine,[16] precisely because around 2,000 companies have undertaken retrenchment or redundancy programs, or have been forced to partially close down their own facilities.[17]

As a consequence, the unemployment rate in the Philippines has tremendously risen—from 5.1% in the second quarter ending June 2019, to 17.7% in the same quarter this year. [18] Note that, from 2.39 million unemployed persons in the first quarter of 2020, there are now 7.25 million

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[13] § 4.6.b. Category II includes other manufacturing sectors, such as electrical machinery and equipment, textiles, paper and paper products, computer, electronic and optical products, wood and furniture, tobacco, transport; cement, steel, mining, postal courier and delivery services, house repairs, legal and accounting services, capital market, architectural and engineering activities, among others.

[14] § 4.6.c. Category III refers to retail trade activities such as malls, hardware stores, clothing and accessories, bookstores, pet food and pet care supplies, IT, communications and electronic equipment, perfume, jewelry, among others.

[15] §§ 4.6.b & 4.6.c.

[16] Jovic Yee, 112,000 workers displaced by COVID-19 – DOLE, INQUIRER.NET, July 8, 2020, *available at* https://newsinfo.inquirer.net/1303439/dole-112000-workers-displaced-by-covid-19

[17] Bernie Cahiles-Magkilat, *Closure of 26% of businesses alarms DTI,* MANILA BULLETIN, July 16, 2020, *available at* https://mb.com.ph/2020/07/16/closure-of-26-of-ph-businesses-alarms-dti. *See also* Ben De Vera, *P2.2 Trillion in losses: Cost of COVID-19 impact on PH economy,* INQUIRER.NET, May 28, 2020, *available at* https://business.inquirer.net/298536/p2-2-trillion-in-losses-cost-of-covid-19-impact-on-ph-economy

[18] Philippine Statistics Authority, *Employment Situation in April 2020*, PSA WEBSITE, *at* https://psa.gov.ph/content/employment-situation-april-2020

persons reportedly without work in the second quarter,[19] an increase of around 203% within a four-month period.

The pandemic quarantine has also deeply impacted the Philippine economy, translating to 2.2 trillion pesos in losses.[20] The economy is anticipated to decline even more so, with the recent re-imposition of the MECQ,[21] which unfortunately followed the two-month GCQ when businesses were allowed to resume operations.

II. PARADIGM SHIFT IN PERSONNEL MANAGEMENT AND SUPERVISION UNDER THE MECQ

A. "Stay Home, Save Lives"

Under MECQ, work is not entirely suspended. As previously intimated, and except for Category I industries, certain establishments (now identified as Category II and III) are still allowed to continue operations, but only up to 50% of its capacity.[22] Generally, this means that half of the workforce will be allowed to work within the business premises, while the other half will be placed on a work-from-home arrangement.

However, inasmuch as health is now prioritized over the economic and financial considerations of businesses, it is imperative that the employer should seek to prevent the transmission of the virus among its staff, clientele, and suppliers while maintaining business operations.

This necessitates a shift in the usual practice of personnel management, as well as a modification of company rules and regulations.

As such, for companies allowed to continue operations,[23] the Joint DTI–DOLE Interim Guidelines on Workplace Prevention and Control of

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[19] *Id.*

[20] Ben De Vera, *P2.2 Trillion in losses: Cost of COVID-19 impact on PH economy,* INQUIRER.NET, May 28, 2020, *available at* https://business.inquirer.net/298536/p2-2-trillion-in-losses-cost-of-covid-19-impact-on-ph-economy.

[21] Ben De Vera, *Return to MECQ risks reversing economic recovery path,* INQUIRER.NET, Aug. 3, 2020, *available at* https://business.inquirer.net/304287/return-to-mecq-risks-reversing-economic-recovery-path

[22] IATF Guidelines, § 3.5.

[23] This is subject to strict compliance with the IATF health and monitoring protocols.

COVID-19[24] exhorts the management to develop policies and procedures for the prompt identification of sick employees.[25]

Contrary to the business norm of telling employees to come to work "by hook or by crook," managers are now required to actively encourage sick employees to stay home and *not* to go to work.[26]

Thus, the manager or supervisor should prohibit any employee from going to work if the latter shows any of the symptoms related to COVID-19 (such as coughs, colds, muscle or joint pain, fever, shortness of breath, diarrhea, headache, or conjunctivitis) *and* has traveled abroad or to local areas with reported cases, or had direct exposure to any Person under Investigation ("PUI") for COVID-19.[27] On the other hand, employees who exhibit the above-mentioned symptoms are required to notify their managers or supervisors of such fact, and to stay home.[28]

Employers are also required to provide clear information to their employees on what to do and where to go should symptoms persist, as well as to continue monitoring for contact tracing, in case the employee is placed under investigation by health authorities.[29]

B. Protocols at the Workplace

The management is required to provide employees clear information on proper respiratory etiquette and hygienic practices in the workplace and post such information in conspicuous places within the company premises.[30]

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[24] Dep't of Trade and Industry (DTI) & Dep't of Labor and Employment (DOLE) Interim Guidelines on Workplace Prevention and Control of COVID-19 (2020).

[25] V.1. "Employers shall [...] [p]rovide the necessary company policies for the prevention and control of COVID-19 in consultation with workers."

[26] World Health Organization ("WHO"), Getting your workplace ready for COVID-19, Mar. 3, 2020, *available at* https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf

[27] DOH Adv. No. 3 (2020). Assessment of Patients in response to 2019-Novel Coronavirus Acute Respiratory Disease (2019-nCoV ARD) Health Event, *available at* https://www.doh.gov.ph/sites/default/files/basic-page/2019-nCoV-Advisory-No3.pdf. *See also* Bonz Magsambol, *When Should You Get Tested for Coronavirus?*, RAPPLER, Mar. 16, 2020, *at* https://rappler.com/newsbreak/iq/signs-when-does-person-need-get-tested-coronavirus

[28] WHO, *supra* note 26. *See also* DOH Mem. No. 2020-0220 (2020). Interim Guidelines on Return to Work, *available at* https://www.doh.gov.ph/sites/default/files/health-update/dm2020-0220.pdf

[29] DOH Mem. No. 2020-0220 (2020), annex A.

[30] DTI & DOLE Interim Guidelines, V.

The quarantine has caused additional expenses for business establishments, as they are now required to provide for tissue, soap, alcohol, or hand-sanitizers, place these in multiple locations within the workplace (especially at the entrance/exit points and conference rooms), and ensure its adequate supply.[31] It is also incumbent upon management to perform routine environmental cleaning and disinfect touched surfaces, such as countertops, desks, conference tables, doorknobs, computer keyboards, monitors, elevator keys, and light switches.[32]

Within the workplace, management should also provide appropriate face masks for their workers,[33] and strictly require them to wear said face masks at all times, removing the same only when eating and drinking. A *social distancing policy*[34] should likewise be rigorously enforced. Whenever possible, the personnel must keep a distance of at least three feet, or around one meter, away from each other to reduce the possibility of person-to-person transmission at the workplace.[35] Work premises may likewise need to be reconfigured to address the distance requirements for on-site work. This may be accomplished by expanding spaces between desks and/or placing acrylic barriers in between desks.[36]

Unlike the usual corporate practice prior to the pandemic, companies are now encouraged at this point to limit face-to-face meetings and unnecessary out-of-town business trips.[37] Aside from electronic mail and cellphones, there are numerous online conferencing applications that may facilitate digital face-to-face interactions, such as Skype, FaceTime, Zoom, Google Hangouts, and Microsoft Teams. Necessarily, therefore, it is advisable for companies to make provisions for increased expenses on cellphone and internet usage for its managers, supervisors, and account owners.

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[31] *Id. See also* US Dep't of Labor & Dep't of Health & Human Services, Guidance on Preparing Workplaces for COVID-19 (2020), *available at* http://www.seiu1training.com/OSHA_Covid19.pdf. *See also* US Centers for Disease Control and Prevention, *Environmental Cleaning and Disinfection Recommendations,* CDC WEBSITE, May 27, 2020, *at* https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html

[32] DTI & DOLE Interim Guidelines, IV.B.2.a.

[33] IV.B.1.a.i.

[34] DTI & DOLE Interim Guidelines, V. *See also* Society for Human Resource Management (SHRM), *Social Distancing Guidelines at Work*, SHRM WEBSITE, Mar. 5, 2020, *at* https://www.shrm.org/resourcesandtools/tools-and-samples/pages/social-distancing-guidelines.aspx

[35] DOLE Labor Adv. No. 11 (2020). Supplemental Guidelines Relative to Remedial Measures in View of the On-going Outbreak of Coronavirus Disease 2019 (COVID-19).

[36] DTI & DOLE Interim Guidelines, IV.C.3-5.

[37] IV.C.2.

C. Implementation of Alternative or Flexible Work Arrangements

To offset the negative economic impact of the quarantine on business activities, companies are allowed to implement coping or remedial mechanisms, such as alternative or flexible work arrangements ("FWA") whenever feasible, as well as undertake cost-cutting measures to ensure its survival.

FWA refers to "alternative arrangements or schedules other than traditional or standard work hours, workdays, or workweek."[38] It can be "any one of a spectrum of work structures that alters the time and/or place that work gets done on a regular basis,"[39] and may refer to flexibility in the scheduling of hours worked (as seen in alternative work schedules), in the number of hours worked (such as part-time work), or in the place of work (e.g. work-from-home arrangements).[40] As coping mechanisms in times of economic difficulties and national emergencies, FWAs are encouraged as cost-cutting measures short of termination of employment or closure of business.[41] These may include, but are not limited to, work-from-home ("WFH") arrangements, forced leave, work rotation, and reduced workweek schemes.

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[38] DOLE Dep't Adv. No. 2 (2009), II, ¶ 2. Guidelines on Adoption of Flexible Work Arrangements.

[39] Workplace Flexibility 2010, Georgetown University Law Center, Flexible Work Arrangements: A Definition and Examples (2006), at 1, *available at* https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1009&context=legal

[40] *Id.*

[41] *See* DOLE Dep't Order No. 02 (2009), I. *See also* DOLE Labor Adv. No. 17 (2020), II (Concept). Guidelines on Employment Preservation upon the Resumption of Business Operation; DOLE Labor Adv. No. 9 (2020), Guidelines on the Implementation of Flexible Work Arrangements as Remedial Measure due to the Ongoing Outbreak of Coronavirus Disease.

1. Work from Home (Telecommuting Law)

"Telecommuting" is defined as "a work arrangement that allows an employee in the private sector to work from an alternative workplace with the use of telecommunication and/or computer technologies."[42] Simply stated, a "work-from-home" arrangement is telecommuting from one's home or residence.

A telecommuting arrangement is not mandatory. Similarly, the employees cannot demand their employer to place them under the said arrangement as a matter of right, since the law explicitly provides that the employer may offer the same on a *voluntary basis* or as a result of collective bargaining (if any), and upon such terms and conditions as they may mutually agree upon.[43]

Those placed on this arrangement are considered *at work*. As such, these employees are to be paid compensation for all the time they are placed on the said WFH arrangement; and hence, there should be no deductions from their salaries. This must be so, because it is presumed that the employer has made arrangements with its employees for the submission of required target outputs on agreed-upon due dates, for which they may rightly be paid their full salaries or compensation.

A telecommuting arrangement is allowed, provided that the terms and conditions thereof are not less than the minimum labor standards set by law.[44] This shall include those relating to compensable work hours, minimum number of work hours, overtime, rest days, entitlement to leave benefits, social welfare benefits, and security of tenure.[45] Additionally, the employer is required to ensure that telecommuting employees are treated in the same manner as comparable employees working at the employer's premises.[46] In relation to this, all telecommuting employees shall be covered by the same set of applicable rules and existing collective bargaining agreement, if any.[47]

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[42] Rep. Act No. 11165 (2018), § 3. *See also* DOLE Dep't Order No. 202-19 (2019), § 2(b). Implementing Rules and Regulations of Republic Act No. 11165 Otherwise Known as the "Telecommuting Act."

[43] Rep. Act No. 11165 (2018), § 4. *See also* DOLE Dep't Order No. 202-19 (2019), § 3.

[44] Rep. Act No. 11165 (2018), §§ 4-5. *See also* DOLE Dep't Order No. 202-19 (2019), §§ 4(a)-(f).

[45] *Id.*

[46] Rep. Act No. 11165 (2018), § 5. *See also* DOLE Dep't Order No. 202-19 (2019), § 4.

[47] DOLE Dep't Order No. 202-19 (2019), § 4.

In all cases, the employer shall provide the telecommuting employee with relevant written information on the terms and conditions of the telecommuting program, including the duration of the program, as well as the latter's rights, duties, and responsibilities.[48]

2. Forced Leave

Forced leave refers to a work arrangement wherein the "employees are required to go on leave for several days or weeks, utilizing their leave credits if there are any."[49] This contemplates a situation in which there is a dearth of work that can be offered by the company to its employees because of the low demand for their goods, products, or services. In the present case, such is due to the mandatory restrictions on movement brought about by the quarantine. In such an instance, employees are not terminated, but are merely required to go on leave for several days or weeks on a "no work, no pay" basis, akin to a "floating status."

From a practical viewpoint, and as a general rule, employees whose jobs cannot be placed on a WFH or telecommuting arrangement may be placed on a "no-work, no-pay" arrangement during this pandemic, *unless* the employee agrees to charge the said days to remaining sick or vacation leave credits, such that that the employee will still be paid despite not doing any actual work for the employer.

Note that, at the very least, the employee who has worked for at least one year in the company is entitled to a minimum of at least five days of service incentive leave entitlement under the Labor Code.[50] This means that the employee has at least five days of *full-pay* leave credits for the year which may be used for the employee's benefit, unless he or she has already utilized the same.

A "forced leave" arrangement may be applied simultaneously with other flexible work arrangements, such as the reduction of the workweek or the rotation of employees, or in cases wherein the management decides to go on temporary closure not exceeding six months.

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[48] Rep. Act No. 11165 (2018), § 4. *See also* DOLE Dep't Order No. 202-19 (2019), § 3.

[49] DOLE Dep't Adv. No. 2 (2009), III.4.

[50] LABOR CODE, art. 95.

3. Reduction of Work Hours and/or Workdays or Rotation of Workers

Employers may also reduce the number of work hours (or workdays per week) of the employees,[51] as well as rotate employees or alternately provide them work within the workweek.[52] Understood to be cost-cutting measures, these arrangements generally arise from a decrease in demand for the employer's goods and services.[53]

The employee will only be required to work for three or four days, as opposed to a regular workweek of five or six days. Since this will result in the diminution of salary or wages, this arrangement should either be (a) voluntary, with the consent of a majority of the employees having been secured; or (b) unilaterally imposed by the management, provided that it can show substantial evidence of business losses or projections on anticipated business losses.

Since this will necessarily result in the diminution of salaries or wages, it is best for the employer to duly notify and discuss the proposed reduction with the employees, and seek feedback from them, so that other viable and feasible options offered by the employees may be considered.

Operationally, in cases wherein the employer unilaterally decides to implement the same as an exercise of its management prerogative, they should come up with projections on anticipated or actual losses, as evidenced by independently audited financial statements. It is also understood that, by careful consideration of the market and other economic variables during the pandemic, the employer has already determined the optimum personnel workforce required for the reduced demand for their goods or services and make the corresponding arrangements for the changes in scheduling. Of course, the management must give written notices to both the affected employees and the DOLE.[54]

4. Temporary closure or suspension of operations

The suspension of operations of an employer's business or undertaking is *bona fide*,[55] when there is a need for renovation works, or an anticipated slump in customer demand for goods or services which makes the

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[51] DOLE Dep't Adv. No. 2 (2009), III.2.
[52] III.3.
[53] I.
[54] DOLE Labor Adv. No. 9 (2020), V.
[55] LABOR CODE, art. 301.

continuous operations of the business not feasible. Note that, in this situation, there is an expectation that the business will resume; and hence, the temporary suspension of operations shall not terminate the employment of the affected employees but is merely considered a "temporary displacement."[56]

The law sets a six-month period within which the operation of a business or undertaking may be suspended, which in turn also suspends the employment of the employees concerned.[57] Since there is no work to be done, and following the general principle of "no work, no pay," the employees are placed on a "floating status," and are thus not paid during this period. This is analogous to a "forced leave;" and similarly, the employees may charge their sick or vacation leave credits for the days they are placed on "floating status."

As the law admonishes indefinite lay-offs, the employer is obliged to recall employees back to work or consider them permanently retrenched pursuant to law at the end of the said six-month period.[58] Should the employer fail to do so, the employees are deemed to have been constructively dismissed, for which the employer is held liable.[59]

III. WORST CASE SCENARIO: WHEN PUSH COMES TO SHOVE

As had previously been stated, the COVID-19 pandemic and the consequent government-imposed lockdown have severely disrupted the operations of Philippine businesses and caused an unprecedented decline in revenues. The continuing uncertainty and fluidity of the situation have constrained companies to reassess their economic and financial viability to ensure its survival.

Preliminarily, it may be well to state that an employer has the perfect right to transfer, reduce, or lay-off personnel in order to minimize expenses and ensure the stability of the business, provided that the same is done in

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[56] Innodata Knowledge Services, Inc. v. Inting, G.R. No. 211892, Dec. 6, 2017.

[57] *Id.*

[58] Sebuguero v. Nat'l Lab. Rel. Comm'n, 318 Phil. 635 (1995); *See also* PT&T Corp. v. Nat'l Lab. Rel. Comm'n, 496 Phil. 164 (2005).

[59] Spectrum Security Services, Inc. v. Grave, 810 Phil. 590 (2017). *See also* SKM Art Craft Corp. v. Bauca, 722 Phil. 128 (2013).

good faith and in the pursuit of the valid interests of the company, *not* for purposes of circumventing the rights and benefits of the employees.[60]

A. Retrenchment

Retrenchment is the termination of employment by the employer as an exercise of its prerogatives, *through no fault of the employees.*[61] This is primarily resorted to avoid or minimize economic or business reverses "during periods of business recession, industrial depression, seasonal fluctuations, lulls occasioned by lack of orders, or shortage of materials."[62]

When the employer suffers serious and actual business losses, the management has the final say as to whether it will continue to risk its capital.[63] However, the employer bears the burden to prove such allegation of business losses.[64] The normal method of proving this is the submission of financial statements duly audited by independent external auditors,[65] covering a sufficient amount of time to "enable both the NLRC and the CA to appreciate the nature and vagaries of the business."[66]

Under Article 298 of the Labor Code, and in conjunction with Section 2, Rule XXIII of its Implementing Rules, the following elements must be strictly complied with in order that the retrenchment may be considered as valid:

1. The losses expected should be substantial and not merely *de minimis* in extent.
2. The substantial losses apprehended must be reasonably imminent;
3. The retrenchment must be reasonably necessary and likely to effectively prevent the expected losses; and

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[60] Malcaba v. ProHealth Pharma Phil., Inc., G.R. No. 209085, June 6, 2018, *citing* San Miguel Brewery v. Ople, 252 Phil. 27 (1989). *See also* San Fernando Coca-Cola Rank-and-File Union v. Coca-Cola Bottlers Phil., Inc., 819 Phil. 326 (2017), *citing* Abbott Laboratories, Phils., Inc. v. Nat'l Lab. Rel. Comm'n, G.R. 76959, 154 SCRA 713, Oct. 12, 1987.

[61] LABOR CODE, art. 298.

[62] *See* Sebuguero v. Nat'l Lab. Rel. Comm'n, 318 Phil. 635 (1995). Beralde v. Lapanday Agricultural and Development Corp., 761 Phil. 476 (2015).

[63] San Pedro Hospital of Digos, Inc. v. Sec'y of Labor, 331 Phil. 390 (1996).

[64] Genuino Agro-Industrial Development Corp. v. Romano, G.R. No. 204782, Sept. 18, 2019.

[65] Anabe v. Asian Constr., 623 Phil. 857 (2009).

[66] Malayang Nagkakaisang Manggagawa ng Pacific Plastic Corp. v. Pacific Plastic Corp., G.R. No. 171617 (Notice), Oct. 11, 2017.

4. The alleged losses, if already incurred and the expected imminent losses sought to be forestalled, must be proved by sufficient and convincing evidence.[67]

In order for a retrenchment to be valid, the same must be reasonably necessary and is likely to prevent business losses which, *if already incurred*, must be substantial, serious, actual, and real; or *if only expected*, are reasonably imminent as perceived objectively and done in good faith by the employer.[68]

In addition, it must be proven that the employer should have taken other measures prior or parallel to the retrenchment to forestall losses, e.g. cutting other costs. Thus, the Supreme Court has ruled that retrenchment undertaken by a company was invalid, since it was shown that the company likewise continued to dispense fat executive bonuses to its officers.[69]

Under Article 298 of the Labor Code, the affected employees shall be entitled the following: a notice to both the affected employee and the DOLE one month prior to the effective date of retrenchment, as well as a one-month guaranteed separation pay or one-half month pay for every year of service, whichever is higher.[70] A fraction of at least six months of service will be considered as a whole year, for purposes of computing separation pay.

Moreover, the notice requirement cannot be dispensed with, even in instances in which the company had placed the employees on "forced leave" or "floating status." In such cases, the employees continue to be on a "no work, no pay" status during that one-month period. Failure to give notice may lead to the imposition of an indemnity amounting to PHP 50,000.00[71] on the part of the employer for failing to comply with the procedural requirements of the Labor Code.

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[67] Flight Attendants and Stewards Ass'n of the Phil. v. Phil. Airlines, Inc., G.R. No. 178083 & A.M. No. 11-10-1-SC (Resolution), Mar. 13, 2018, *citing* DOLE Dep't Order No. 147-15 (2015), Rule I-A, 5.4(c), amending the Implementing Rules and Regulations of Book VI of the Labor Code of the Philippines.

[68] *Id.*

[69] Lopez Sugar Corp. v. Federation of Free Workers, 267 Phil. 212 (1990).

[70] LABOR CODE, art. 298.

[71] Jaka Food Processing Corp. v. Pacot, 494 Phil. 114 (2005). *See also* Veterans Federation of the Phil. v. Montenejo, G.R. No. 184819, Nov. 29, 2017.

B. Redundancy

Akin to retrenchment, redundancy is another authorized cause for the termination *through no fault of the employees.*[72] Under this circumstance, the employer may thus validly terminate an employee because he has no legal obligation to keep in his payroll more employees than those necessary for the economical operation of the business.[73]

Redundancy exists when the services of an employee are *in excess* of what is reasonably demanded by the actual requirements of the business operations. Stated otherwise, a position may be declared redundant, and the employee terminated, if it has become *superfluous or a mere duplication of work*, e.g. caused by the "overhiring of workers, decreased volume of business, or dropping of a particular product line or service activity previously manufactured or undertaken by the enterprise."[74]

The affected employees shall be entitled to the following under Article 298 of the Labor Code, to wit: (a) one-month notice to both the affected employee and the DOLE prior to the effective date of termination by reason of redundancy; and (b) a one-month guaranteed separation pay or one-month pay for every year of service, whichever is higher.[75] A fraction of at least six months of service will be considered as a whole year, for purposes of computing separation pay. As with retrenchment, for those companies that have already implemented a "no work, no pay" arrangement, the affected employees are simply not paid during the one-month period where there is no work.

Similarly, the notice requirement to the affected employee and the DOLE is mandatory and cannot be dispensed with. Absent compliance with the notice requirement, the Supreme Court has imposed the amount of PHP 50,000.00 as an indemnity for failing to comply with the procedural requirements of the law.[76]

As opposed to retrenchment, the employer need *not* prove the existence of business losses in terminating employees by reason of redundancy. Characterizing an employee's services as no longer necessary or

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[72] LABOR CODE, art. 298.

[73] Mejila v. Wrigley Phil., Inc., G.R. No. 199469, Sept. 11, 2019, *citing* Wiltshire File Co. Inc. v. Nat'l Lab. Rel. Comm'n, 271 Phil. 694 (1991).

[74] *Id.* Acosta v. Matiere SAS, G.R. No. 232870, June 3, 2019.

[75] LABOR CODE, art. 298.

[76] Veterans Federation of the Phil. v. Montenejo, G.R. No. 184819, Nov. 29, 2017. *See also* Jaka Food Processing v. Pacot, 494 Phil. 114 (2005).

sustainable—and hence, properly terminable—is an exercise of the business judgment of the employer, which in turn is not subject to discretionary review by the Labor Arbiter or even the Supreme Court, provided that the same is done in good faith.[77]

On the other hand, the disadvantage is obviously the higher financial outlay that will be incurred by the company if this option were to be used, e.g. one month for every year of service.

C. Permanent Cessation or Closure of Employer's Business

The partial or total closure or cessation of operations may be classified into two categories: those due to serious business losses or financial reverses, and those that are not.[78]

Under the first kind, the employer must sufficiently and convincingly prove its allegation of substantial losses.[79] Where the employer has indeed suffered serious business losses akin to bankruptcy, then he is not obliged to pay separation pay to his employees.[80]

In contrast, under the second kind, the employer can lawfully close shop anytime, as long as the cessation of or withdrawal from business operations was *bona fide* in character and not impelled by a motive to defeat or circumvent the tenurial rights of employees.[81] When such closure was done in bad faith, it cannot serve as an authorized cause for the dismissal of respondents.[82] In addition to this, the employer shall pay his employees their termination pay in the amount corresponding to their length of service.[83]

Note that separation pay must be paid, if the closure or cessation of operations of the company is *not* due to serious business losses or financial reverses.[84] For obvious reasons, the Labor Code does not impose any

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[77] Arabit v. Jardine Pacific Finance, Inc., 733 Phil. 41 (2014). *See also* Vda. de Lecciones v. Nat'l Lab. Rel. Comm'n (Resolution), 616 Phil. 254 (2009).

[78] LABOR CODE, art. 298. *See also* Manila Polo Club Emps. Union (MPCEU-FUR-TUCP) v. Manila Polo Club, 715 Phil. 18 (2013).

[79] Angeles v. Polytex Design, Inc., 562 Phil. 152 (2007).

[80] North Davao Mining Corp. v. Nat'l Lab. Rel. Comm'n, 325 Phil. 202 (1996). *See also* G.J.T. Rebuilders Machine Shop v. Ambos, 752 Phil. 166 (2015).

[81] *Id.*

[82] Peñafrancia Tours & Travel Transport, Inc. v. Sarmiento, 648 Phil. 494 (2010).

[83] LABOR CODE, art. 298.

[84] Art. 298.

obligation upon the employer to pay separation benefits when the closure is due to serious business losses, as "[i]ndeed, one cannot squeeze blood out of a dry stone [...] [n]or water out of parched land."[85]

Just as no law forces anyone to go into business, no law can compel an employer to continue its operations. It would be stretching the intent and spirit of the law if a court interferes with the management's prerogative to close or cease its business operations just because the business is not suffering from any loss or because of the desire to provide continued employment to the workers.[86]

In sum, under Article 298 of the Labor Code, three requirements are necessary for a valid cessation of business operations: (a) service of a written notice to the employees and to the DOLE at least one month before the intended date thereof, (b) the cessation of business being *bona fide* in character, and (c) the payment of termination pay amounting to one month pay or at least one-half month pay for every year of service, whichever is higher.[87]

In cases wherein the company had filed for rehabilitation, and a rehabilitation receiver had been appointed by the Securities and Exchange Commission, all actions for claims before any court, tribunal, or board against the company shall *ipso jure* be suspended.[88] Hence, even when the employees have been declared illegally dismissed and duly awarded the corresponding backwages and benefits, the employees are not yet able to enforce the payment of their separation pay.[89]

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[85] North Davao Mining Corp. v. Nat'l Lab. Rel. Comm'n, 325 Phil. 202 (1996).

[86] Zambrano v. Phil. Carpet Mfg. Corp., 811 Phil. 569 (2017). *See also* Alabang Country Club, Inc. v. Nat'l Lab. Rel. Comm'n, G.R. No. 157611, 466 SCRA 329, 345, Aug. 9, 2005.

[87] LABOR CODE, art. 298. Manila Polo Club Emps. Union (MPCEU-FUR-TUCP) v. Manila Polo Club, 715 Phil. 18 (2013).

[88] Garcia v. Phil. Airlines, 596 Phil. 510 (2009).

[89] Case law recognizes that, unless there is a restraining order, the injunction or suspension of claims by legislative fiat partakes of the nature of a restraining order that constitutes a legal justification for respondent's non-compliance with the reinstatement order and payment of the backwages and benefits. Neither can the company under rehabilitation be compelled to pay said salaries which the employee should have received during the period that the Labor Arbiter decision ordering his reinstatement is still pending appeal. *See* Philippine Airlines, Inc. v. Paz, 748 Phil. 661 (2014).

IV. SPECIAL CONCERNS DURING THE PANDEMIC

A. On probationary employment

Probationary employment is generally for a six-month period,[90] and is intended to enable the employer to determine whether the probationary employee has qualified for regular status in accordance with reasonable standards made known to him or her at the time of engagement or hiring.[91] As explained by the Supreme Court, such probationary period "afford[s] the employer an opportunity to observe the fitness of a probationer while at work, and ascertain whether he will become a proper and efficient employee."[92]

On March 30, 2020, the DOLE issued Labor Advisory No. 14 (2020), which caused some confusion among employer-establishments because of its apparent mandatory wording, i.e. "for purposes of determining the six-month probationary period, the one-month Enhanced Community Quarantine[93] is not included thereof."[94] Consequently, the employer is presumably allowed to extend the probationary period for the entire period that the ECQ was in force.

Its mandatory pronouncement notwithstanding, the Labor Advisory should only be applied—and the ECQ (or MECQ/GCQ) period excluded from the computation of the probationary period—in instances wherein the probationary employee was *not* suffered to work during the said period.

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[90] This is subject to exceptions. For instance, there is a three-year probationary period for teachers under the CHED Mem. Order No. 40 (2008), otherwise known as the Manual of Regulations for Private Higher Education (for College); and DepEd Mem. Order No. 88 (2010), otherwise known as the Manual of Regulations for Private Schools in Basic Education (for elementary and high school level). There can also be a longer period of probationary employment where the parties agree to a longer period at the time of the engagement or hiring [Ver Buiser v. Leogardo, Jr., G.R. No. L-63316, 216 Phil. 144 (1984)]; or when the parties agreed to an extension of the probationary period [Mariwasa Mfg, Inc. v. Leogardo, Jr., G.R. No. 74246, 251 Phil. 417 (1989)].

[91] LABOR CODE, art. 296.

[92] International Catholic Migration Comm'n v. Nat'l Lab. Rel. Comm'n, 251 Phil. 560 (1989).

[93] ECQ was later on extended to May 16, 2020, and later extended for another 15 days until 31 May 2020 under IATF Res. No. 37 (2020). *See also* PCOO, *President Duterte extends restriction in Metro Manila, Central Luzon, other areas until May 15*, PCOO WEBSITE, Apr. 24, 2020, *at* https://pcoo.gov.ph/news_releases/president-duterte-extends-restriction-in-metro-manila-central-luzon-other-areas-until-may-15

[94] DOLE Labor Adv. No. 14 (2020), II. Clarification on the Non-Inclusion of the One-Month Enhanced Community Quarantine Period on the Six-Month Probationary Period.

This must be so, because it would be highly unfair and grossly inequitable to exclude the ECQ period wherein the probationary employee was placed on a "work-from-home" arrangement or such other flexible work arrangement. Verily, the probationary employee is considered at work, and as such, any extension of the probationary period under said circumstances should be deemed invalid. So, when the company imposes a reduced workday or work-week arrangement, then the company may make the corresponding deduction for only such days or such time that the employee was not required to work.

In instances in which the company has implemented a retrenchment program, probationary employees who have been included among those retrenched are likewise entitled to separation pay, despite not completing the six-month probationary period. It is believed that the practice of simply considering the probationary employee to have "not completed" the period, or that the probationary period is considered to have "lapsed" in order to avoid payment of separation pay, may actually be legally questionable.

Albeit its limited nature, the probationary employee is entitled to security of tenure. In order to terminate a probationary employee, there must either be just or authorized cause, or failure to qualify in accordance with standards made known to him or her at the time of engagement. Obviously, the failure of the probationary employee to complete the period was not of his or her own doing but rather, on account of the exercise of management's prerogatives.

B. On failure to go to work on account of transportation or comorbidity

Under ECQ and MECQ, public transportation is suspended.[95] As such, employers are exhorted to provide shuttle services and/or decent accommodation on near-site location to reduce travel and movement, whenever feasible.[96] Note that this is not mandatory, but merely voluntary depending on whether the company finances will allow. Hence, employees cannot be expected to go to work during ECQ/MECQ if the employer-establishment is unable to provide for shuttle services.

Additionally, strict home quarantine is to be observed in all households, and the movement of all residents shall be limited to accessing

[95] IATF Guidelines, §§ 2.12 & 3.11.
[96] DTI & DOLE Interim Guidelines, V.5.

essential goods and services, working in permitted offices, and going to establishments and activities allowed by the IATF Guidelines.[97]

This is especially true for certain categories of individuals—such as persons below twenty-one years old, those who are sixty years old and above, and pregnant women, as well as those with immunodeficiency, co-morbidity, or other health risks—who are required to remain in their residences at all times, subject to specific exceptions.[98] Such restriction extends to any person who resides with these individuals.[99]

Under these circumstances, these categories of individuals cannot be compelled to go to work. Indeed, the said employees may validly refuse to go to work even as against the explicit directive of the employer. Note further that, aside from the explicit restriction relating to pregnant women, the Reproductive Health Act of 2012 prohibits using pregnancy as a ground for termination of employment.[100]

Consequently, an employee who fails to go to work during community quarantine cannot be terminated on account of abandonment of work or gross insubordination, as there are justifiable reasons for failing to report for work. Under these circumstances, the employee is simply placed on a "no work, no pay" arrangement.

C. On reduction of company personnel benefits

DOLE Labor Advisory No. 17 (2020) provides guidelines on employment preservation upon resumption of business operation for establishments allowed to do so under ECQ, MECQ, or GCQ, reiterating the call for employers to undertake alternative work schemes as an alternative to termination of employment or closure of business.[101]

Noteworthy is Section 5 thereof, which provides that "[e]mployers and employees may agree voluntarily and in writing to *temporarily adjust* employees' wage and wage-related benefits as provided for in existing employment contract, company policy or collective bargaining agreement (CBA)."[102] Such adjustment shall not exceed a period of six months, upon

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[97] IATF Guidelines, §§ 2.2 & 3.2.
[98] §§ 2.3, 3.3 & 4.3.
[99] §§ 2.3, 3.3 & 4.3.
[100] Rep. Act No. 10354 (2012), § 23(c).
[101] *See* DOLE Labor Adv. No. 17 (2020), §§ 3-4.
[102] § 5. (Emphasis supplied.)

which the employer and employees are mandated to review and/or renew the agreement as may be necessary under the circumstances.

This is in stark contrast to the general principle of non-diminution of benefits found in the Labor Code[103] and jurisprudence, and in cognizance of the dire effects that the COVID-19 pandemic quarantine has caused upon businesses in general. In fact, there are quite a number of companies that had implemented cost-cutting measures and wage adjustments across the board, from managers down to the rank-and-file. Thus, the managers had already been asked to give up some of their allowances, such as representation costs and their transportation allowances during the pandemic. Still, other companies have opted to defer the payment of benefits until such time the economy improves, and the company's revenues return to normal levels.

D. On the extent of employer liability in case of sickness

Could the employer be held liable for all expenses incurred for hospitalization and treatment for an employee who tests positive and falls ill due to COVID-19?

The general rule is that the company cannot be held liable, as long as the company has undertaken measures showing due diligence and strict compliance with the IATF health protocols. Even assuming that the employer neglected to comply with their obligation to exercise due diligence in this regard, such is not a form of strict liability under tort law.[104] Note that the employee bears the burden of proving that he or she had contracted the virus at work, and the employer's failure to comply with the required health protocol is the proximate cause of the illness.

E. Some suggestions for government action from business owners

To estimate the impact of COVID-19 on local businesses in the Philippines, the Asian Development Bank ("ADB") conducted an enterprise survey between April to May 2020.[105] The findings reveal that the quarantine

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[103] LABOR CODE, art. 100.

[104] *See also* CIVIL CODE, art. 2187, 2183, 2193 & 1711; Rep. Act No. 7394 (1992), art. 100; Rep. Act No. 9514 (2008), § 3.

[105] ASIAN DEVELOPMENT BANK ("ADB"), THE COVID IMPACT ON PHILIPPINE BUSINESS: KEY FINDINGS FROM THE ENTERPRISE SURVEY (2020), *available at* https://www.adb.org/sites/default/files/publication/622161/covid-19-impact-philippine-business-enterprise-survey.pdf

restrictions had a significant impact on business activity: around 65.9% of surveyed businesses temporarily closed, while 29.1% continued limited operations.[106] Of those with limited operations, 78.4% of those surveyed operate at 50% capacity or less.[107] Only 4% remained fully operational.[108] Most of these severely hit establishments are comprised of micro, small, and medium-sized businesses ("MSMEs").[109]

It has been reported that micro enterprises constitute 88.5% of businesses in the Philippines, employing around 28.9% of employees in the private sector.[110] Dua, Jain, and Mahajan point out that:

> Small businesses are a recognized proving ground for entrepreneurs, a vibrant source of innovation and competition, and an essential source of employment. They are suppliers and customers to the broader economy and deeply embedded in local communities.[111]

While the pandemic lockdown has generally affected bigger corporate businesses, there is no doubt that micro and small businesses have been impacted more disproportionately, as they are more vulnerable to market changes and demands than large-scale enterprises and have thinner cash reserves. Some are barely hanging on with just nearly a month-worth in cash buffer. In fact, in the ADB survey, around 41% micro enterprises surveyed had already run out of cash and savings, while another 36.3% are expected to run out over in the next one to three months.[112] Constraints on additional credit were also binding: just over half (53%) could not borrow PHP 50,000 within a week, if needed.[113] Even more disturbing is the fact that over 5.7 million workers work in MSMEs—about 3.8 million of which are located in Luzon.[114]

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[106] *Id.* at 7.

[107] *Id.* at 7-8.

[108] *Id.*

[109] *Id.* at 4.

[110] Pauline Macaraeg, *'Sariling Diskarete': The heavy impact of lockdown on micro, small businesses,* RAPPLER, Apr. 7, 2020, *at* https://rappler.com/newsbreak/in-depth/heavy-impact-coronavirus-lockdown-micro-small-medium-enterprises

[111] Andre Dua, Neha Jain, Deepa Mahajan & Yohann Velasco, *McKinsey & Company Report: COVID-19's effect on jobs at small businesses in the United States,* MCKINSEY & COMPANY, May 5, 2020, *at* https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19s-effect-on-jobs-at-small-businesses-in-the-united-states

[112] ADB, *supra* note 105, at 17-18.

[113] *Id.* at 23.

[114] Macaraeg, *supra* note 110. DTI, *2018 MSME Statistics,* DTI WEBSITE, *at* https://www.dti.gov.ph/resources/msme-statistics

Unfortunately, the most vulnerable of these jobs tend to belong to those working in industries that require the lowest skills or educational attainment and, correlatively, employing mostly minimum wage earners. According to National Economic and Development Authority (NEDA) statistics, the top industries most affected by government's quarantine measures are: (a) arts, entertainment, and recreation; (b) travel, hotel, and restaurant industry; (c) technical repair services; (d) education; (e) construction; (f) car repairs; among others.[115] *Ironically, these are affected and vulnerable workers who can least afford to lose their jobs.*

Thus, the results of the ADB is unsurprising:

> The situation and needs assessment questions in our survey revealed that the most pressing payment concern was wages and related social security contributions (37%). In line with this, a wage subsidy was the most frequently requested government support measure (57%). Micro and small enterprises were about 10 percentage points more likely to request a wage subsidy than large enterprises. Some 33% of those surveyed availed of the Department of Labor and Employment's grant program for workers unable to receive wages (Clarificatory Guidelines on the COVID-19 Adjustment Measures Program). Use of the program was higher among small and medium-sized enterprises (38%) than for microenterprises (28%) or large firms (35%).
>
> Deferment of tax payments was the second most common policy support desired, cited by 52% of respondents. The third most common request was for low-interest or subsidized loans (36%) followed by tax reductions or credits (35%). Those surveyed were allowed multiple responses.[116]

It is for this reason that the government should give immediate financial assistance to small- and medium-sized businesses *now*. While giving financial assistance to the marginalized members of society is well-meaning and commendable, it is earnestly believed that such policy does *not* spur actual economic growth.

Thus, in addressing the economic concerns brought about by the pandemic, some countries have given financial subsidies (also known as "jobkeeper incentives") to assist employers in sustaining payment to their

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[115] Andrew Masigan, *Numbers Don't Lie: Why the IATF's strategy did more harm than good,* BUSINESSWORLD, June 14, 2020, *available at* https://www.bworldonline.com/why-the-iatfs-strategy-did-more-harm-than-good

[116] ADB, *supra* note 105, at vii.

workers, even if there is no business.[117] Simultaneously, in order to stimulate economic growth, increased government lending (with minimal or no rates) and tax cuts have been released to businesses. This is being done in the United States,[118] Australia,[119] and the United Kingdom.[120]

With the re-imposition of MECQ over Metro Manila until August 18, 2020, it is sincerely hoped that the government would take time within the two-week period to recalibrate and realign its priorities to economic and fiscal policies, rather than political concerns, and address the increasing call of both employers and employees and stave off a spiraling decline in the national economy.

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[117] Gabe Alpert, *Here's what countries are doing to provide stimulus and relief*, INVESTOPEDIA, May 6, 2020, *at* https://www.investopedia.com/government-stimulus-efforts-to-fight-the-covid-19-crisis-4799723

[118] *Id.* The US Federal Government released a series of relief packages, the largest of which is called the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Amounting to more than 2.3 trillion U.S. dollars, the CARES Act includes loans and grants to small businesses, health care providers, state and local governments, and schools around the country. *See* Mark Kolakowski, *Paycheck Protection Program Liquidity Facility (PPPLF)*, INVESTOPEDIA, July 28, 2020, *at* https://www.investopedia.com/paycheck-protection-program-liquidity-facility-ppplf-4802298

[119] Alpert, *see* supra note 117. Australia has announced a series of stimulus packages worth around 140 billion dollars, which includes payments, loans, and subsidies for businesses worst hit by the pandemic.

[120] *Id.* The United Kingdom has granted a tax cut for retailers, cash grants to small businesses, and provisions for sick pay for sick employees. The UK government likewise extended government benefits to self-employed and unemployed workers. This came with a series of stimulus packages, composed of loans and grants for industries worst hit by the virus.