

Employers' FAQs on the MCO

CORPORATE NEWS

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THE movement control order (MCO) has raised many questions among employers and their workers with regard to salary, time-off periods and usage of the annual leave. This series of frequently asked questions conducted by lawyer Bhavanash Sharma will hopefully help both employers and employees to understand the challenge the country is going through.

Must employers continue paying the full salary and/or allowance of all workers, including employees who cannot work from home?

The Human Resources Ministry has issued directives stating that all employees are entitled to full wages during this period, and that employers cannot force employees to utilise their annual leave in this matter.

Unfortunately, not all employers have this privilege or enough resources to do so. Under the Industrial Relations Act (IRA 1967), every employer has the right and privilege to organise their business in the best way they see fit for the health of the business.

If employers are facing serious cash-flow problems, what are some immediate solutions?

> Reducing employees' pay
In the majority of cases, employers are contractually obliged to make payments to employees on the terms that have been agreed on in the employment contract. Hence, a reduction in the rate of pay can only be achieved through an agreement with the employee.

Employers should talk to their workers as soon as possible to see if such pay reductions can be agreed upon, and such agreements should be recorded in writing to protect the employer in the future should there be a challenge. Obtain an agreement in writing and make sure the employee agrees to it.

Should an employer unilaterally impose a pay reduction and/or make unauthorised deductions, potential liabilities faced by the employer are as follows:

- > In respect of employees covered under the Employment Act 1955, the employer, upon conviction, can be liable to a fine not exceeding RM10,000;
- > The employee may resign and claim constructive unfair dismissal and/or bring claims for breach of contract and/or unlawful deductions from wages; and

> The employee may also further file complaints against the employer with the Labour Department.

> Lay-offs and short-time working A lay-off is a temporary measure whereby an employer provides employees with no work, and therefore no pay, for a period while retaining them as employees.

This is generally a temporary solution to a problem such as shortage of work, or in this context, the impact of a pandemic.

Short-time working means providing the employees with less work and therefore a lower pay for a period of time, while retaining them as employees.

The employer and employee must come to an agreement, and for clarity, it must be written and signed by both parties.

Can an employer downsize their workforce?

The Industrial Relations Act, Section 13(3) IRA 1967 recognises the employer's right to terminate any workman by reason of redundancy, or by reason or reorganisation of an employer's profession, trade, business or work. However, the right of the employer is limited by the law that he must act bona fide and not capriciously.

What is redundancy?

"Redundancy" is the termination of an employment contract as a result of a reduction in the workforce or a reduction in the requirements of the business as a whole for employees to carry out a particular type of work.

What should be the employers' considerations and the measures involved if they want to make their employees redundant?

Where there is a need for redundancy, an employer should take positive steps to avert and minimise the workforce beforehand by adopting the appropriate measures such as limiting recruitment of employees, placing restrictions on overtime work, reducing the number of shifts or days worked by employees in a week, reducing working hours, and also consider re-training and/or transferring employees to other departments/work. However, if redundancy is still necessary after adopting the above measures, an employer should carry out the steps in accordance with good and fair labour practices.

Is there a statutory requirement to pay at least a minimum amount of severance/termination pay upon terminating an employee?

Firstly, look at the employment contract to ascertain if any provisions of redundancy exist. If so, the terms of the contract must be adhered to and the employee be compensated accordingly

In Malaysia, employees who have been retrenched or whose service has been terminated as the result of redundancy, and who have been employed for at least 12 months prior to the date of

termination, are entitled to the payment of minimum termination benefits as prescribed by the employment termination and lay-off benefits regulations 1980 (regulations).

However, the termination benefits under the regulations only cover employees who fall under the purview of the Employment Act.

Any employee falling outside the purview of the Employment Act will not be expressly entitled to severance, compensation and/or payment of termination benefits, unless they are provided for in their contract of employment or in any collective agreement applicable to them.

Nevertheless, in practice, employees are often compensated in a redundancy situation, to mitigate the risks of a claim of dismissal “without just cause and excuse”.

Can employers terminate employment contracts due to this pandemic?

> Contractual obligations

Force majeure clause

Firstly, check your employment contract for any force majeure clauses. If there is one, consider if the “force majeure” clause covers events like “diseases”, “epidemics” and “pandemics”, or if there exists the catch-phrase “beyond reasonable control of the parties”.

The purpose of the force majeure clause in the contract is to excuse one or both parties from liability when an extraordinary event or circumstance beyond control prevents one or the other from fulfilling obligations under that contract.

An employer seeking to rely on a force majeure clause must show that:

- > The force majeure event was indeed the cause of the inability to perform or delayed performance;
- > Their non-performance was due to circumstances beyond their control; and
- > There were no reasonable steps that could have been taken to avoid or mitigate the event or its consequences.

What is the effect of relying on the clause?

The usual remedy if a force majeure clause is invoked is for one or more parties to be excused from their obligations and/or liability under the contract, without any damages being payable. In other words, this clause can be invoked by the employer to terminate the employees without compensation.

Nevertheless, look at the clause carefully, as it sometimes provides for extension of time, suspension of time, or termination in the event of continued delay or non-performance, accordingly.

What if there is no force majeure clause in the contract?

If there is no such force majeure clause in the employment contract, an employer may have to look for another avenue – whether the contract could be discharged on the grounds of “frustration”, upon which the contract will become void.

The doctrine of frustration

With reference to Section 57 of the Contracts Act 1950, a contract is “frustrated” when there is a change in the circumstances supervening or subsequent to the formation of the contract which renders a contract legally or physically impossible to perform.

For a contract to be discharged by frustration:

- > The employer must show that the contract is impossible or unlawful to be carried out due to the event or change of circumstances;
- > The impossibility or unlawfulness of the event or change of circumstances must be supervening, ie, it must have occurred subsequent to a valid contract;
- > The event, or change in circumstances, must be one for which the employer is not responsible for or self-induced; and
- > The event, or change in circumstances, must be such that renders the performance of a contract radically different from what was originally undertaken, to the extent that the court must find it unjust to enforce the original promise.

However, it is pertinent to recognise that the doctrine of frustration can only be applied within very narrow limits: a contract will not be frustrated if it has a relevant force majeure clause, if performance has become merely more onerous or expensive, or if the impossibility of performance is the fault of either of the parties.

The law is clear that frustration may not be invoked merely to get out of a bad commercial bargain, or if the parties have foreseen the relevant event. Additionally, it is questionable whether a pandemic would be considered unforeseeable by the courts.

Unfortunately, there are limited case laws that specifically address whether and how a pandemic could frustrate commercial contracts.

One case from the 2003 SARS epidemic illustrates the restriction of the doctrine. It was decided in Hong Kong that a tenant subjected to a SARS-related 10-day isolation in view of a 24-month lease, sought to invoke frustration to discharge the lease.

The court rejected the tenant’s effort to rely on the frustration doctrine, primarily because the isolation order was for a short duration in the context of the lease at issue.

This ruling demonstrates the difficulty that a party may have in successfully invoking the frustration doctrine to discharge a commercial contract.

Conclusion

Employers are advised to seek legal opinion on how to manage their workforce, to get their employment contract amended and to deal with redundancy and/or termination.

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