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EMPLOYERS' OBLIGATIONS DURING MOVEMENT CONTROL ORDER (MCO)

Introduction

The world of work is being profoundly affected by the global virus pandemic. In addition to the threat to public health, the economic and social disruption threatens the long-term livelihoods and wellbeing of millions. This unprecedented event has led several business owners to make the critical decision of laying off employees in an effort to ensure sustenance of the business. Low-income workers in the formal and informal sectors are the most vulnerable in this economic shock. In light of the COVID-19 outbreak followed by the implementation of the MCO by the government, employers are now faced with a massive challenge to strike a balance between sustaining the business and providing employees with security of tenure.

Employment 'Dos and Don'ts' During MCO

Pursuant to the extension of the MCO until 14 April 2020, the Ministry of Human Resources (MoHR) has listed some 'dos and don'ts' for both employers and employees during this period[1].

Generally, only companies providing essential services are allowed to operate during the MCO period. Effectively, employers in non-essential services cannot require their employees to attend office. However, companies which are required to close due to the MCO may instruct its employees to work from home and if the employee refuses to comply, the employer may take disciplinary action against the said employee. The employer should provide the employees with the necessary facilities to work from home, otherwise an employer may be exposed to potential liability arising from lack of appropriate facilities to properly conduct the work. If the nature of the operations do not allow for work-from-home arrangements, then employees must be placed on paid leave.

Throughout the MCO period, employers are required to continue paying monthly salary and related allowances to employees. However, exception may apply to payment of travel-related allowances especially for businesses providing non-essential services. Although salaries must be honoured during this period, the MoHR has recognized employees' salary cut as a desperate bid to save businesses from financial meltdown. Such arrangement is allowed subject to it being negotiated and agreed upon between both parties. Consent of the employee is integral in avoiding a claim for breach of the employment contract. If there is a collective agreement, the negotiation and agreement have to be obtained from the trade union representing the employees.

Aside from honouring salary payments, employers are not allowed to force employees to take annual leave during the MCO period. Utilisation of annual leaves shall be in compliance with the employment contract.

The Wage Subsidy Programme under the Additional PRIHATIN SME Economic Stimulus Package (PRIHATIN SME+)

In order to avoid any possibility of retrenchments being carried out by businesses due to the MCO, the government has recently introduced a Wage Subsidy Programme ("**the Programme**") as part of the PRIHATIN SME+ Package[2]. This aid is meant for employers whose companies are registered with the Companies Commission of Malaysia (CCM) prior to 1st January 2020 and registered with the Social Security Organisation (SOCSO). The Programme will benefit all companies with local employees earning a monthly salary each of RM4,000 and below.

Through the Programme, companies with a workforce of more than 200 people will be provided a wage subsidy of RM600 per month for every retained employee. However, a company is only eligible to claim for a maximum number of 200 employees. This is also subject to the employer having experienced a loss of 50% of business income since 1st January 2020.

For companies employing between 76 and 200 employees, they will be receiving RM800 subsidy for each employee while companies employing between one and 75 employees will be receiving a subsidy of RM1,200 for each employee. The assistance is for a period of three (3) months.

The underlying aim of this Programme is to ensure that no worker is laid off or forced to take unpaid leave for six (6) months after the Programme is implemented, that is 3 months during the period receiving the subsidies, and 3 months thereafter. This effectively means that the government is imposing a moratorium of six months on retrenchment and any retrenchment exercise may only be considered to be undertaken after expiry of the six months period. In the interim, employers may adopt cost-cutting measures to keep the businesses afloat.

Cost-saving Measures and Responsible Retrenchment

Retrenchment refers to an exercise carried out by an employer due to redundancy in his or her business organisation. Redundancy occurs due to the surplus of workers in a situation where the operation costs overshot the profit. The law recognizes the employers' prerogative to re-organise his or her business, and if some employees have to be retrenched or terminated, the law permits such exercise subject to certain conditions.

However, retrenchment shall be the final resort. It is advisable for employers, upon consultation with the employees or representatives of their trade union, to take positive steps to avert or minimize reductions of workforce by adopting appropriate cost-cutting measures such as limitation on recruitment, restriction of overtime work, avoiding unnecessary new ventures or even adopting a flexible wage system. For instance, employers may consider adjusting wages immediately depending on business performance.

If these measures fail and after the six-month retrenchment moratorium has lapsed, companies may then be forced to take drastic cost-cutting measures such as slashing pay across the board or temporary lay-offs. To facilitate wage negotiation, employers may consider sharing relevant information such as company wage information, business performance and prospects with the employees to ensure that employees are well informed of the reasons behind such decision. When employees understand the "whys", they are more likely to align with the organisation, even if they do not fully understand or totally agree with how the employer is handling the situation. Ultimately, communication with employees is key in this troubled time.

However, if retrenchment becomes inevitable despite having taken drastic but necessary cost-cutting measures, the employer should ensure that the exercise is undertaken fairly and in accordance with law to avoid a claim for unfair dismissal by the employee. Employers may be guided by the Code of Conduct for Industrial Harmony which outlines the measures and principles to be adopted in a retrenchment exercise. The Code recommends that employers should select the employees to be retrenched based on an objective criteria (eg. the Last In First Out Principle), and that the retrenched employees should be given priority to be re-employed by the employer if the employer decides to employ workers again in the future. The ultimate responsibility for deciding on the size of the workforce rests with the employer but before any decision on reduction is taken, it is highly advisable for employers to have a prior consultation with the employees on the reduction.

Conclusion

It is recognised that amid COVID-19, employers struggle to balance operation with maintaining employees' wellbeing. The MoHR has issued a list setting out the responsibilities of both employers and employees during the MCO period. Among others, employers are mandated to continue paying full salary to employees and unilateral imposition of annual leave by employers is prohibited throughout the MCO period. On the other hand, in circumstances where work-from-home arrangement is possible, employees are required to comply with such arrangement and failure to do so would warrant a disciplinary action being taken against the said employee.

The government has recently extended its support to struggling businesses through the Wage Subsidy Programme which effectively puts a moratorium of six months on retrenchment exercise. In the interim, employers may adopt cost-cutting measures such as freezing new recruitments or flexible wage system. In a more drastic approach, employers may consider pay cut across the board subject to prior consultation with the employees. Employers and employees have a responsibility to explore viable alternatives to possible retrenchment and should not consider it as the first resort. Nevertheless, if retrenchment is unavoidable, employers must ensure regulatory compliance in carrying out the exercise.

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1. https://www.mohr.gov.my/images/perintah_kawalan_bil2_update.pdf, https://www.mohr.gov.my/images/FAQ_PKP_KSM_BIL03.pdf
2. https://www.pmo.gov.my/2020/04/langkah-tambahan-bagi-pakej-rangsangan-ekonomi-prihatin-rakyat-prihatin/

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Important Information

Azmi & Associates has set up Azmilaw Task Force to look into all issues arising from COVID-19 and MCO. Clients are welcomed to contact their usual Partner who will bring their issues to Azmilaw Task Force for our further action.

LABOUR & EMPLOYMENT AND LITIGATION & ARBITRATION PRACTICE GROUP

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If you have further inquiries relating to the above, or any other inquiries relating to employment and labour law, please contact Azmi & Associates' Labour & Employment and Litigation & Arbitration practice group and we will be happy to assist you with your questions.

Corporate Communication
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