

FAQ 1 on COVID-19 Pandemic: **Employment Related Implications**

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COVID-19 Pandemic: Employment Related Implications

1 Introduction

With the Corona Virus (“COVID-19”) now a global pandemic, the Prime Minister of Malaysia (“PM”) announced that a nationwide Movement Control Order (“MCO”) is implemented from 18 March 2020 to 14 April 2020 (“MCO Period”) under the Prevention and Control of Infectious Diseases Act 1988 and the Police Act 1967.

The implementation of MCO effectively immobilised most of the industries in Malaysia, save for those defined as essential services. As the economy takes a hit from the COVID-19 outbreak, such unprecedented implementation of the MCO has significantly impacted businesses in Malaysia.

This FAQ deals with several issues arising from the MCO’s impact on employer-employee relations.

Q1: Can employers reduce employees’ salaries in light of the current COVID-19 situation?

Unilateral deductions by employers are impermissible under the Employment Act 1955 (“**Employment Act**”) unless it falls within the purview of lawful deductions. Such lawful deductions include:

- (a) Overpayment of wages made during the immediately preceding three months from the month in which deductions are to be made;
- (b) Indemnity due if an employee resigns without giving notice;
- (c) Recovery of any advance of wages, provided no interest is charged on the advance; and
- (d) Deductions authorised by other laws such as the Employees Provident Fund Act 1991 and the Employees Social Security Act 1969.

Thus, to avoid a claim of unfair dismissal, employers that are seeking salary reduction would generally find it prudent to obtain consent from their employees before undertaking such exercise.

Employers should communicate with their employees about the purpose of the salary reduction so that such deductions can be made by mutual consent from both parties.

Q2: Are employers allowed to deduct employees’ annual leave entitlement or enforce unpaid leave during the MCO Period?

No, the current law does not permit annual leave entitlement to be set off against the MCO Period or for employers to unilaterally request their employees to take unpaid leave, unless the contract of employment provides otherwise or it is mutually agreed by both parties.

Q3: What should an employer do if its employee tests positive for COVID-19?

An employer must instruct its employee(s) who came into close contact with the tested positive employee to quarantine themselves for 14 days.

A quarantined employee is entitled to be paid sick leave. The length of entitlement to paid sick leave depends on one’s contract of employment.

An employer is also required to undertake disinfection of the workplace in which the infected employee had worked; and if the work premises are in a common space or a shared office building, the employer must also inform the building management.

Q4: Can employers retrench their employees during the MCO Period?

Retrenchment involves terminating employment because an employee's position is or is likely to become redundant to the employer. Retrenchment usually takes place when an organisation decides to close or sell a portion of its business or is undergoing restructuring.

The law provides that employers may retrench their employees if they have legitimate commercial grounds to do so. Such retrenchment must be done in good faith, fairly, justly and in accordance with the general principles of industrial law in Malaysia.

Q5: Are there any FAQs that have been issued by the Ministry of Human Resources ("MOHR") concerning retrenchments in the context of COVID-19?

Yes, on 23 March 2020 and 31 March 2020, MOHR released two FAQs¹ respectively on the MCO, where they addressed amongst others the issue of retrenchment.

Although it is provided in the FAQs that retrenchment is a prerogative of an employer, the FAQs listed three requirements that employers ought to follow in implementing a retrenchment exercise, as follows:

- (a) the reasons provided must be genuine vis-a-vis that business was in fact affected as a result of the COVID-19;
- (b) employers should exhaust other alternatives before opting for retrenchment such as reducing working hours, reducing or freezing the hiring of new employees, reducing or limiting overtime, limiting employees from working on weekends or on public holidays, reducing employees' wages or laying-off their employees temporarily; and
- (c) if retrenchment is inevitable, employers should terminate services of foreign workers first. In the event the retrenchment involves local employees, the principle of "Last In First Out" should be adopted. Nevertheless, such principles may be departed from if employers have strong justifications to do so.

These requirements are broadly similar to those which apply to retrenchments as a matter of general Malaysian law.

Q6: What are the rights of a workmen if they are retrenched as a result of COVID 19 and what can they do?

Where a workman considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General for Industrial Relations to be reinstated to his former employment.

The representations can be filed at the office of the Director General for Industrial Relations nearest to the place of employment from which the workman was dismissed within sixty (60) days of the dismissal. This is a strict limitation period that must be complied with to pursue reinstatement.

¹ http://jtksm.mohr.gov.my/images/novel_coronavirus/soalan_lazim/FAQ%20KSM%20Bi1%202.pdf
http://jtksm.mohr.gov.my/images/novel_coronavirus/soalan_lazim/FAQ%20KSM%20Bi1%203.pdf

The representations will be referred to the Industrial Court if the Director General for Industrial Relations is satisfied that there is no likelihood of the representations being settled.

Q7: Are employees who are not able to report to work entitled to full salaries during the MCO?

MOHR has issued FAQs respectively on 19, 23 and 31 March 2020² stating amongst others that salaries and allowances for all employees must continue to be paid in full during the entire Period.

An argument may be made that this is a situation that is beyond the control of employers and employees in which the contract of employment cannot be performed temporarily due to no fault of either party, and hence that if an employee has not been able to fulfill obligation to work arising thereto, employers should not be liable to pay full salaries to their employees.

Nevertheless, such argument has significant legal and practical risks, especially if an employee may still be able to discharge his/her functions by working remotely, and in view of the public position taken by MOHR.

Therefore, it is advisable to obtain proper legal advice in dealing with potential measures that can be implemented during this time.

2 Conclusion

The information provided herein does not, and is not intended to, constitute legal advice.

Our MKP Litigation & Dispute Resolution Department is monitoring the relevant developments and we may from time to time issue updated FAQs.

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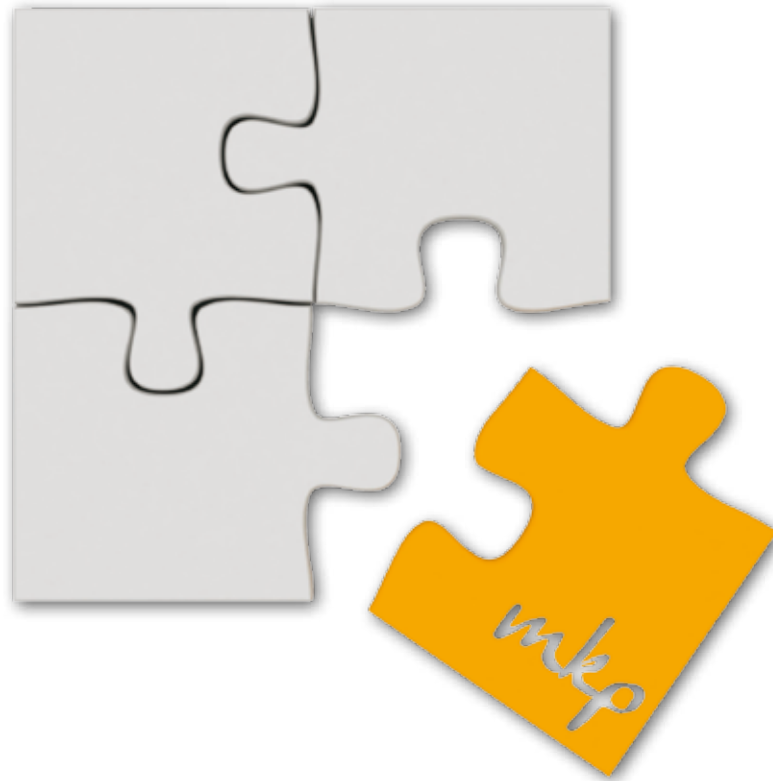
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² http://jtksm.mohr.gov.my/images/novel_coronavirus/soalan_lazim/FAQ%20KSM_COVID19_Edited%20Version.pdf
http://jtksm.mohr.gov.my/images/novel_coronavirus/soalan_lazim/FAQ%20KSM%20Bil%202.pdf
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