



## **THE IMPACT OF COVID-19 ON EMPLOYMENT IN MALAYSIA**

### **A. An Overview of the Movement Control Order**

On 16.3.2020, the Government of Malaysia announced their decision to implement the Movement Control Order (“MCO”) effective from 18.3.2020 to address the Covid-19 outbreak in Malaysia. The MCO was initially implemented until 31.3.2020 (“Phase 1”) and thereafter, extended as follows:

- 1.4.2020 until 14.4.2020 (“Phase 2”);
- 15.4.2020 until 28.4.2020 (“Phase 3”); and
- 29.4.2020 until 12.5.2020 (“Phase 4”).

The MCO imposes the following:

- Prohibition of mass movements and gatherings which includes religious, sports, social and cultural gatherings;
- Restriction on Malaysians travelling abroad with those returning from overseas having to undergo a health screening and a self-quarantine for a period of 14 days;
- Restriction on foreign visitors entering Malaysia;
- Closure of all government and private schools including kindergartens and religious schools;
- Closure of public and private institutes of higher education; and
- Closure of all government and private premises save for essential services.

**B. The Phases of the MCO****(i) Phase 1 and Phase 2**

During Phase 1 and Phase 2 of the MCO, the essential services which were allowed to operate were water, electricity, energy, telecommunications, postal, transportation, irrigation, oil, gas, fuel, lubricants, broadcasting, finance, banking, health, pharmacy, fire, prison, port, airport, safety, defence, cleaning, retail and food & beverage.

**(ii) Phase 3**

In an attempt to revive the economy in Malaysia, which was adversely affected as most businesses had to shut down their operations during the MCO, the Malaysian Government allowed the following sectors to operate during Phase 3 of the MCO subject to prior approval having been obtained from the Ministry of International Trade and Industry (“MITI”):

- Automotive industry (limited to exports of CBU, parts and components, plus after-sale services);
- Machinery and equipment industry;
- Aerospace industry;
- Construction projects and services related to construction works;
- Science, professional and technical services including R&D (services incidental to legal practice, services incidental to oil & gas, R&D activities related to Covid-19 and testing labs for sectors allowed to operate);
- Social health services including traditional and complementary medicine practitioners;
- Hardware shops, electrical and electronic shops; and
- Laundry services (only those offering full-service and does not include self-services laundrettes).

(iii) **Phase 4**

On 1.5.2020, the Malaysian Government announced that most economic sectors will be allowed to resume their business operations effective from 4.5.2020 but subject to strict compliance with the applicable guidelines and the standard operating procedures. This phase is now classified as the Conditional Movement Control Order (“CMCO”). The CMCO is aimed at further boosting the economy in Malaysia and helping companies revive their businesses.

**C. Employment Issues Arising from the Implementation of the MCO**

The implementation of the MCO gave rise to several issues from an employment perspective as most employers, save for those involved in essential services, had to shut down their business operations for long periods. Employers were faced with cash flow issues as they were unable to generate revenue during this period and as a result, the sustainability of their businesses became a major problem. Employees, on the other hand, were faced with possible salary cuts, deductions from annual leave, utilization of annual leave and retrenchment as employers struggled to keep up with their contractual commitments towards their employees in light of their businesses having to shut down.

In view of the fact that we were in uncharted waters and faced with an unprecedented lockdown of business operations to curb the spread of Covid-19 in the country, the Ministry of Human Resources came up with several Frequently Asked Questions (“FAQs”)<sup>1</sup> to address key employment issues faced by employers and employees. Some of these issues shall be looked at below.

**(i) Payment of Salaries**

An employee’s salary must be paid in full in accordance to his or her employment contract during the MCO. This applies to all employees including those employees involved in non-essential services who are unable to work during the MCO.

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<sup>1</sup> FAQ No. 1 dated 19.3.2020, FAQ No. 2 dated 23.3.2020, FAQ No. 3 dated 31.3.2020 and FAQ No. 4 dated 7.4.2020

For employees, whose salaries are not fixed, then they must be paid a daily wage in accordance to the minimum wage prescribed under the Minimum Wages Order 2020.

**(ii) Annual Leave Deduction**

An employee's annual leave should not be deducted during the MCO. The Ministry of Human Resources has stated that no deductions can be made from an employee's annual leave entitlement as the MCO has been implemented in accordance to the Prevention and Control of Infectious Diseases Act 1988 (Act 342).

**(iii) Unpaid Leave**

Generally, employers faced with financial difficulties due to business or economic downturn, can implement measures such as requiring employees to go on unpaid leave out of good faith and to avoid having to go on a retrenchment exercise.

However, as the Ministry of Human Resources has stated that the salaries of employees must be paid in full during the MCO, it is implied that employers are not allowed to require their employees to go on unpaid leave during the MCO.

**(iv) Retrenchment**

Employers are allowed to retrench their employees on the ground of redundancy. Redundancy occurs when an employee's services are no longer required by the company or the employee is surplus to the requirements of the company. Redundancy usually occurs when a company faces financial difficulties due to a slowdown in business or the economy. The implementation of the MCO where companies involved in non-essential services were required to shut down their business operations resulted in many companies facing financial difficulties and some of these companies have looked to lay-off their employees by implementing a retrenchment exercise.

However, retrenchment should only be exercised as a last resort after all other avenues have been exhausted by the employer. The Ministry of Human Resources has stated that employers who wish to retrench their employees during the MCO will have to satisfy the following conditions:

- There has been a genuine financial impact on the business of the company due to Covid-19;
- The Employer has exhausted all other cost-cutting avenues such as reducing the working hours of its employees, freezing or limiting new hires, limiting overtime, limiting work on weekends, reducing wages and temporary laying-off during the MCO; and
- The services of foreign employees should be terminated first. In so far as local employees are concerned, the “*Last In First Out*” principle should be applied unless the employer has valid justification for not following this principle.

Further, employers are required to notify the Director General of Labour of any intended retrenchment exercise 30 days before such exercise is carried out.

(v) **The Rights of Employees in the Event of Salary Cuts, Annual Leave Deduction, Forced Unpaid Leave or Retrenchment**

In the event an employee’s salary is deducted by the employer without the employee’s consent or there has been a deduction from the employee’s annual leave entitlement or the employee has been forced to go on unpaid leave during the MCO, the employee could possibly consider himself or herself to have been constructively dismissed by the employer.

The employee will however have to establish amongst others that:

- There has been a breach of the employment contract by the employer;
- The breach must go to the root of the employment contract;

- The employee has informed and given the employer an opportunity to remedy the breach; and
- The employee must have left his or her employment based on the breach of the employment contract by the employer and not for any other reason.

If an employer has been retrenched by the employer during the MCO and the employee is of the view that there was no valid justification for his or her retrenchment, then the employee may file a written representation at the Industrial Relations Department for unfair dismissal against the employer<sup>2</sup>. The employer will then have the burden of proving that the retrenchment of the employee was done with *just cause or excuse* in accordance to the applicable employment laws in Malaysia.

#### **D. The Reliance on Force Majeure or the Doctrine of Frustration**

##### **(i) The Doctrine of Frustration**

An employment contract can come to an end by the operation of the law. One example is frustration.

A contract is frustrated where an unforeseeable event occurs after the formation of the contract which renders performance of contractual obligations impossible or unlawful through no fault of either party<sup>3</sup>.

An employment contract may be frustrated due to:

- Death of an employee
- Permanent injury rendering the employee unable to work

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<sup>2</sup> Section 20, Industrial Relations Act 1967

<sup>3</sup> Section 57(2), Contracts Act 1950

- Prolonged illness
- Long-term imprisonment
- Revocation of professional license required for the job
- Change in the law
- War

However, employers ought not to rely on frustration to terminate an employment contract due to Covid-19 or the implementation of the MCO due to the following reasons:

- While it is impossible or unlawful for employees involved in non-essential services to work from the office during the MCO, they can still work from home. Therefore, performance is more difficult or onerous but not impossible; and
- The MCO is only for a temporary period. In this regard, effective from 4.5.2020, most economic sectors are allowed to resume their business operations. Employees will therefore be able to return to work to resume their employment obligations. The Ministry of Human Resources have also stated that the doctrine of frustration does not apply as the MCO is only for a short period of time.

(ii) **Force Majeure**

The issue of force majeure is one that has constantly cropped up following the implementation of the MCO. The question that is frequently asked is: Can a contracting party rely on *force majeure* to terminate a contract? This question also arises in the context of employment contracts. This firstly depends on whether the contract contains a *force majeure* provision as *force majeure* is a creature of contract and in the absence of such a clause, a contracting party cannot rely on *force majeure*.

If there is a force majeure clause in the contract, then the wordings of the *force majeure* clause must be considered. Does it cover events such as “diseases”, “epidemics” or

“pandemics”? If the *force majeure* clause does cover these events, then the following factors must also be considered:

- Are there restrictions or conditions that are required to be satisfied?
- Is the consequence of a *force majeure* event provided for in the contract?
- Is there a duty to mitigate?

In the event an employer wishes to rely on *force majeure*, the employer must establish the following:

- *Force majeure* was the cause of the inability to perform.
- Non-performance was beyond their control.
- No steps could have been taken to avoid or mitigate the event or its consequences.

If the employment contract does not allow for termination due to *force majeure*, then termination cannot be exercised by the employer.

In any event, it will be difficult for an employer to rely on *force majeure* as:

- The performance of contractual obligations has not been rendered impossible or totally prevented. Employees are still able to work from home during the MCO; and
- The MCO is only for a temporary period.

It is therefore best for employers to avoid relying on *force majeure* to terminate the employment contract of their employees.

#### **E. ASSISTANCE PROVIDED BY THE GOVERNMENT TO EMPLOYERS AND EMPLOYEES**

The Malaysian Government has come up with an Economic Stimulus Package to provide assistance to both, employers and employees, who are faced with financial difficulties due to



the implementation of the MCO. The Economic Stimulus Package consists of two (2) programs, namely the Wage Subsidy Program (“WSP”) and the Employee Retention Program (“ERP”).

The ERP is aimed at providing financial assistance to employees who have been instructed to go on unpaid leave by their employers, who are economically affected by the Covid-19 outbreak and more particularly, the implementation of the MCO.

The WSP is intended to assist employers who are undergoing cash flow difficulties due to headcount costs. It is also provided so as to ensure that the salaries of employees are paid in full and they are not retrenched.

The details of the ERP and WSP including the applicable conditions are set out in the table below:

Details	Employment Retention Program (ERP)	Wage Subsidy Program (WSP)
Benefit/Incentive Amount	RM600.00 per month (maximum 6 months)	<ul style="list-style-type: none"> <li data-bbox="847 1227 1437 1435">i. RM600.00 per month (maximum of 3 months) – for companies with 200 employees or above (limited to 200 employees only);</li> <li data-bbox="847 1458 1437 1666">ii. RM800.00 per month (maximum of 3 months) – for companies with 76 to 200 employees (limited to 200 employees only); or</li> <li data-bbox="847 1688 1437 1897">iii. RM1,200.00 per month (maximum of 3 months) – for companies with less than 75 employees (limited to 75 employees only).</li> </ul>

<p>Eligibility conditions</p>	<p>a) All private sector employees including temporary employees who have registered and are contributing to the Employment Insurance Scheme (EIS);</p> <p>b) Limited to employees with monthly salary of RM4,000.00 and below only; and</p> <p>c) Employers who have implemented no-pay leave (30 days minimum) for a period of 1 to 6 months, with the No-Pay Leave Notice issued beginning 1<sup>st</sup> March 2020.</p>	<p>a) Employers with declining revenue of more than 50% compared to 1 January 2020 or the following months (Note: For micro and small companies with less than 75 employees, there is no requirement for the employers to prove the declining revenue of more than 50% since 1 January 2020);</p> <p>b) The subsidy eligibility is subject to employees registered and contributing to EIS, for employees with wages of RM4,000.00 and below;</p> <p>c) Employers registered with CCM or local authorities (Pihak Berkuasa Tempatan (PBT)) before 1 January 2020;</p> <p>d) Employers started operating before 1 January 2020;</p> <p><b>**Employers shall not be allowed to terminate and/or lay off employees or force employees to take unpaid leave or to cut salaries of existing employees for a period of 6 months after the implementation of this WSP.</b></p>
<p>Period of assistance</p>	<p>Between 1 to 6 months, depending on the No-Pay Leave notice issued by the Employers</p>	<p>3 months effective from April 2020</p>
<p>Expiry date for application</p>	<p>N/A</p>	<p>15 September 2020 or subject to any decision by the Government</p>

Payment Method	The ERP payment shall be credited to the employer's account. Employers are required to credit the payment directly to the affected employees' accounts within 7 days upon receipt of payment from SOCSO.	The Wage Subsidy shall be credited to the employer's account within 7-14 days upon approval of the application.
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Employers who have previously applied for the ERP are still eligible to apply for the WSP provided that they meet the eligibility conditions as set out in the table above. However, employers are not allowed to apply for both the ERP and the WSP in the same month and for the same employee. Employers are only allowed to apply for the ERP and the WSP for different employees in the same month.

**F. THE WAY FORWARD**

There is no doubt that these are very challenging times for both, employers and employees. The Covid-19 outbreak and the implementation of the MCO to address this outbreak has resulted in many companies facing a significant downturn in business. Companies have faced a huge loss of revenue during this period resulting in many of them being cash strapped and as a result, being unable to fulfill the contractual commitments towards their employees.

Employees are also faced with job insecurities through no fault of theirs. Many employees have had to accept a salary cut or faced the possibility of losing their jobs as their employers are forced into a retrenchment exercise to save their business.

Despite the Ministry of Human Resources having stated that employees must be paid their salaries in full during the MCO and retrenchment should only be exercised as a last resort, the

reality of the situation is such that some of employers are simply unable to comply with their salary obligations or to sustain their workforce due to the downturn in their business, which has adversely affected cash flow.

In the circumstances, in order to cope with the current situation, it is best for there to open dialogue between employers and employees. There should be open and transparent communication between both parties. Employers are advised to explain the difficulties faced by them to their employees and to seek the consent of their employees before implementing any measures which would affect or alter the contractual rights of their employees. Employees are also encouraged to co-operate with their employers and to understand the plight faced by their employers at this moment in time. An amicable solution in the best interest of both parties could possibly be reached if there is proper communication and no unilateral action is taken.

The difficulties faced by employers and employees are also expected to ease now that the Malaysian Government has allowed most business sectors to operate effective from 4.5.2020 through the implementation of the CMCO. In this respect, it is important for both parties to also ensure that the applicable guidelines and the standard operating procedures are strictly complied with.

Employers should ensure that the necessary health and safety measures are implemented at their workplace and this includes:

- Providing face masks to the employees
- Having hand sanitizers at the entrance and other strategic areas of the workplace
- Carrying out temperature checks on all employees and visitors prior to entry into the workplace
- Recording the daily entry and exit of all employees and visitors including their temperature reading
- Ensure that all employees and visitor practice social distancing in accordance to the guidelines provided by the authorities

- Setting travel restriction policies
- Implementing a rotation policy with certain employees working from home or remote areas
- Putting up the standard operating procedures at the entrance and other strategic areas of the workplace

In view of the fact that we are faced with a public health crisis, it is of utmost importance that employers create a safe work environment for their employees in accordance with the measures prescribed by the authorities so as to ensure that their employees can perform their employment obligations effectively and productively without any detriment towards their health and wellbeing. This will also enable employers to meet their business objectives. In short, employers should aim to strike a balance between health and economic considerations to survive through this very challenging period.

*Note: This article does not constitute legal advice on any of the issues addressed above. It merely sets out our views on the impact the Covid-19 pandemic has had on employment in Malaysia. Please contact the following persons should you have any queries:*

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