

Embrace the storms of the Movement Control Order (MCO)

Background

On 25th March 2020, the Prime Minister has announced the extension of the MCO. Subject to further changes, the entire period of MCO has been extended from the initial 14 days to 28 days. In light of the extension, what can be done to mitigate the impact of the MCO on the corporate entities, and how to prepare for the storms after the MCO? In this article, we are going to discuss on how to prepare for the difficult times ahead, particularly in human resource management.

During MCO

The pandemic outbreak is unprecedented in Malaysia. It is hence a challenge to our current legal framework. Under these circumstances, the guidelines issued by the Ministry of Human Resources (MoHR) are helpful.

Without expressed revocation or issuance of new guidelines, one has to assume that the guidelines continue to apply throughout the MCO period. The guidelines are available on MoHR website. A write-up on the guidelines could be found on our website.

It is interesting to see how other countries deal with the employment issues during the restrictions period. The table below provides an overview of the interim measures in place in some of the affected countries:

Country	Status	Interim worker-related measures
United Kingdom	3-week restrictions in place (until April 13)	<p>The government introduced a job retention scheme. Under the scheme:</p> <ul style="list-style-type: none"> • The employers will continue to pay the workers that have consented to be “furloughed” at the reduced scheme rate • The HMRC will reimburse employers for 80% of wage costs, up to a cap of £2,500 per month
India	21-day restrictions in place (until April 15)	<p>The government advised businesses to ensure no deduction on salaries or resort to layoffs of the workers</p>
Spain	15-day restrictions in place (reported to be extended until April 9)	<p>The government introduced Royal Decree-Law 8/2020 which allows:</p> <ul style="list-style-type: none"> • the employers to unilaterally impose temporary suspension of contracts and reduction of working time (with proportional reduction of salary) due to force majeure (prior to that, the employers must encourage other working alternatives) • the workers to demand adaptation/reduction of working time

Country	Status	Interim worker-related measures
Italy	Restrictions in place until April 3	<ul style="list-style-type: none"> • Under the “COVID-19 Emergency”, the government recommends to employers that employees are granted with holidays and permits to leave to the maximum extent possible. • Employers are allowed to apply for the ordinary public scheme for integration of the salary which enable the employer to have its employees’ salary (or at least a part of it) paid by the Italian National Social Security Institute for a maximum period of 13 continuous weeks (which may be extended up to 52 weeks)
China	Regional restrictions in place (until April 8)	The government allowed the employers to temporarily suspend workers, as long as workers give consent and those affected receive 70% of the minimum wage

The impact of the MCO is expected to hit the businesses’ bottom-lines. Thus, on 27th March 2020, the Prime Minister announced an economic stimulus package known as package prihatin or caring package valued at RM250bil that is expected to benefit the Rakyat.

In light of the caring package, the Prime Minister appealed to the employer not to dismiss the workers. The Government put in place amongst others a wages subsidy program. This program is applicable to employers whose income has been reducing for more than 50% since 1st January 2020. Under this program, the Government will pay RM600 per month for a period of 3 months in relation to employees who earn below RM4,000 per month and registered under the Employment Insurance Scheme, provided that the employers agree not to terminate or instruct them to take unpaid leave for a period of 3 months after the execution of the program. The employers are not permitted to reduce the employees’ monthly salary.

The caring package received some criticisms from the employers. Some doubt to what extent the economic stimulus package could ease the burden of the employers.

Post MCO

What if the employer still experiences substantial loss in business which then led to surplus of manpower? Under the pressure, cutting cost measures are almost inevitable. There are however some safeguards under the current legal system before the employer can resort to retrenchment.

What is retrenchment and when can retrenchment happen?

Retrenchment refers to termination by the employer of those workers found to be surplus to his requirements. There is a surplus of workers or redundancy when the workers’ job function ceases to exist.

Appropriate measures before retrenchment

Under the Code of Conduct for Industrial Harmony (“Code”), before the employer take the drastic measures of retrenchment, the employer should take positive steps to avert or minimize reductions of workforce by adoption of appropriate measures such as:

- (a) Limitation on recruitment
- (b) Restriction of overtime work
- (c) Restriction of work on weekly day of rest
- (d) Reduction in number of shifts or days worked a week
- (e) Reduction in the number of hours of work
- (f) Re-training and/or transfer to other department/ work.

The Code also requires consultation to be made with the workers or their trade union representatives on the intended reduction of the size of the workforce.

Further measures before retrenchment

If, having taken appropriate measures, retrenchment is still necessary, the employer should take the following further measures:

- (a) Give a warning as early as practicable, to the workers concerned;
- (b) Introduce schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;
- (c) Retiring workers who are beyond their normal retiring age;
- (d) Assist, in co-operation with the MoHR, the workers to find work outside the undertaking;
- (e) Spread termination of employment over a long period;
- (f) Ensure that no such announcement is made before the workers and their representatives or trade union has been informed.

Who can be retrenched?

As regards who can be retrenched, the Code has also provided guidelines. The employer should select workers to be retrenched in accordance with objective criteria. Such criteria may include:

- (a) The need for the efficient operation of the establishment or undertaking;
- (b) Ability, experience, skill and occupational qualifications of individual workers required by the establishment or undertaking for the efficient operation;
- (c) Consideration for length of service and status (non-citizens, casual, temporary, permanent);
- (d) Age;
- (e) Family situation;
- (f) Such other criteria as may be formulated in the context of national policies.

Regard must also be had to the generally accepted principle of retrenchment, that is, LIFO (last in first out), when the employer decides to embark on a retrenchment exercise.

Re-engagement after retrenchment

After the retrenchment, the employer should give priority of engagement/ re-engagement to the retrenched employees when he engages workers.

Industrial jurisprudence of retrenchment

The failure to adhere to the Code cannot vitiate a genuine retrenchment unless the collective agreement between the employer and the employees requires adherence to the Code. Nevertheless, it serves as a guideline and has been taken cognizance of by the courts.

Despite the MCO, when there is an unfair dismissal representation being made to the Industrial Relations Office, it is ultimately the Industrial Court that decides whether there is a genuine situation of redundancy that necessarily leads to the retrenchment exercise.

It is well-settled that the employer is entitled to organise his business in the manner he considers best, nevertheless the managerial power has to be exercised in good faith. Thus, the retrenchment must be justifiably grounded, such as acute financial loss and downsizing of workforce.

Should you have any doubt in regard to redundancy and/or retrenchment benefits, please feel free to speak to us.

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DISCLAIMER:

*This article is for general information only and should not be relied upon as legal advice. The position stated herein is as at the date of publication on 31st March 2020. For any enquiries on this article, please contact **Gan Khong Aik** (khongaik@ganlaw.my) or **Kang Mei Yee** (meiyee@ganlaw.my).*