

Movement Control Order & Employment: 4 Key Aspects for Employers

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On 16th March 2020, the Malaysian Prime Minister announced the Movement Control Order (“MCO”) throughout Malaysia as a measure to curb the spike of COVID-19 cases in Malaysia. In addition to some frequently asked questions that have been issued, we address four key aspects on employment following the enforcement of the MCO and the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020ⁱ (“Regulations”) from 18th to 31st March 2020.

Can employers request employees to work from home during the MCO period?

Pursuant to the MCO, private sectors which are not involved in essential services must be closed. In that case, the employers can request their employees to work from home, if their job nature so allows, and the employees should be paid their salary as normal.

According to Regulations, the following premises may be operated provided the conditions are met:

- (a) premises providing essential services, provided that the number of personnel and patron at the premise are kept to the minimal;
- (b) premises not providing essential services may be open, subject to the owner obtains prior written permission of the Director General of Health (“DG”), who may impose any conditions; and
- (c) premises involving in food supply chain or in selling food and beverages by way of drive through, take away and delivery may be open, subject to any conditions imposed by DG.

“Essential Services” covers the following:

- (a) Banking and finance;
- (b) Electricity and energy;
- (c) Fire;
- (d) Port, dock and airport services and undertakings, including stevedoring, lighterage, cargo handling, pilotage and storing or bulking of commodities;
- (e) Postal;
- (f) Prison;
- (g) Production, refining, storage, supply and distribution of fuel and lubricants;
- (h) Healthcare and medical;
- (i) Solid waste management and public cleansing;
- (j) Sewerage;
- (k) Radio communication, including broadcasting and television;
- (l) Telecommunication;
- (m) Transport by land, water or air;
- (n) Water
- (o) E-commerce;
- (p) Defense and security;
- (q) Food supply;
- (r) Wildlife;
- (s) Immigration;
- (t) Custom;
- (u) Hotels and accommodations; and
- (v) Any services or work determined by the Minister of Health as essential to public health or safety.

Can employers request the employees to work on shift in the office premise during the movement control period?

Under the Regulations, no person can travel between places within any infected local area which has been declared under the Prevention and Control of Infectious Disease (Declaration of Infected Local Areas) Order 2020ⁱⁱ, except for the following purposes:

- (a) to perform any official duty;
- (b) to make a journey to and from any premises providing essential services;
- (c) to purchase, supply or deliver food or daily necessities;
- (d) to seek healthcare or medical services; or
- (e) any other special purposes as may be permitted by the Director General.

Furthermore, the Regulations states that no person shall travel from one infected local area to another infected local area, except with the prior written permission of a police officer in charge of a police station.

Therefore, employees are not permitted to work in the office premise if it requires them to commute between two locations in the infected local area and across infected local areas. As an example, employees are prohibited to travel from their respective homes in Selangor to their offices in Kuala Lumpur. While the employers who are not providing essential services may open their office premise provided that they obtained prior written permission from DG, the employees that have not obtained any permission from the authorities to travel are disallowed to travel to work in the office premise.

Employers are advised to abide the Regulations strictly as any contravention amounts to an offence under the Regulations and the following penalties may ensue:

- (a) if an offence is committed by a person, the person shall be liable to a fine not exceeding RM1000; or to imprisonment for a term not more than 6 months; or to both, upon conviction; or
- (b) if an offence is committed by the company, any person who, at the time of the commission of the offence was a director, manager, secretary or other similar officer or was in any manner responsible for the management of the affairs of the company, may be charged severally or jointly in the same proceeding with the company.

However, the person in charge of the management of the company may defend himself by proving that the offence was committed without his knowledge or consent, and that he took all reasonable precautions and had exercise due diligence to prevent the commission of the offence.

To ensure the continuity of business operation during the MCO period, employers are advised to take the following steps:

- (i) assess the functions and duties served by employees and implement a work from home ("WFH") arrangement by resorting to technologies; and
- (ii) redesign reporting lines between employers and employees for monitoring purpose; or
- (iii) reallocate the work scope for employees whose function cannot be done under the WFH arrangement, subject to the conditions in their respective employment contract.

Can employers force their employees to take unpaid leave or annual leave during the movement control period?

Unless the employment contract expressly caters for a situation for outbreak of disease which allows special measures to be taken by the employers, the employers are bound by the employment contract to pay salaries to their employees.

Before the MCO was made, the Ministry of Human Resources had issued guidelines (“MOHR Guidelines”)ⁱⁱⁱ on 7th February 2020 to state that, amongst others:

- (a) employers should provide full pay to employees receiving quarantine orders;
- (b) employers should not instruct employees to utilise annual leave entitlement or take unpaid leave during the quarantine period.

However, the MOHR Guidelines do not have force of law and that they are not issued pertaining to the MCO.

Be that as it may, it is likely that the Ministry of Human Resources would maintain the stance that no annual leave or unpaid leave should be forced upon the employees during the MCO period. The employees may claim constructive dismissal if they are forced to take unpaid leave, in relation to which the employers may run a risk of having to pay compensation to the employees for unjust dismissal.

Can employers retrench their employees due to COVID-19?

Employers have the prerogative to retrench employees, if the employees are found to be redundant to the business operations of the employers, but such exercise must be done in good faith and for the better interest of maximising the employers’ profitability. One of the examples for such redundancy could be the financial losses suffered by the employers due to COVID-19 pandemic.

However, retrenchment should only be used as a last resort. The employers may first communicate with the employees on this, and take measures based on mutual agreement such as limit the hours of work or bona fide salary reductions across the board.

We also consider the laws on retrenchment in Malaysia in light of the implementation of MCO as a measure to address the COVID-19 pandemic. Under section 5 of the Employment Act 1955, for employees whose remuneration depending on him being provided with work, they are considered to be laid-off if:

- (a) the employer does not provide such work for him on at least a total of 12 normal working days within 4 consecutive week; and
- (b) the employee is not entitled to any remuneration under the contract for the period in which he is not provided with work.

However, it is not deemed to be laid-off if the employee is not provided with work as a result of "any other leave authorised under any written law". Based on the above, it may be unlikely to consider the employees as being laid-off because the employees are prevented from work as a result of the MCO enforced under the Control and Prevention of Infectious Diseases Act 1988 and the Police Act 1967.

Furthermore, the movement control period is less than 12 normal working days. Nonetheless, the above is only applicable to employees governed by the Employment Act, whose salaries do not exceed RM2000 per month. That being said, the Industrial Court may use it as a guideline in determining a genuine lay-off.

*Note: This article is for general information only and should not be relied upon as legal advice. For any inquiries on this article, please contact **Gan Khong Aik** (khongaik@ganlaw.my) or **Lee Sze Ching (Ashley)** (szeching@ganlaw.my).*

ⁱ P.U(A) 91/2020 Prevention and Control of Infectious Disease (Measures within the Infected Local Areas) Regulations 2020 http://www.federalgazette.agc.gov.my/output/pua_20200318_PUA91_2020.pdf

ⁱⁱ For the list of Infected Local Areas, please access: P.U(A) 87/2020 Prevention and Control of Infectious Disease (Declaration of Infected Local Areas) Order 2020 http://www.federalgazette.agc.gov.my/output/pua_20200317_PUA87.pdf

ⁱⁱⁱ *Panduan Mengendalikan Isu-isu berhubung Wabak Berjangkit termasuk Novel Coronavirus di Tempat Kerja* <http://jtksm.mohr.gov.my/images/pdf/Panduan%20Wabak%20Tempat%20Kerja%207%20Feb%202020.pdf>