EMPLOYERS GUIDE TO HANDLING CONTRACTS AND OTHER OBLIGATIONS DURING THE COVID-19 PANDEMIC

BVSH BHAVANASHSHARMA
Advocates & Solicitors

Movement Control Order (MCO)

Considering the highly disruptive nature of the coronavirus pandemic, the Government of Malaysia has had to enforce the Movement Control Order (MCO) in a promising bid to curb the spread of the virus. Unfortunately, this has adversely affected majority of companies/businesses and employees.

With these uncertain and challenging times at hand, companies face tough decisions – reduce *opex* to sustain, mitigate risks to avoid financial loss or shut down. A major cost in most businesses is the cost of employees and many companies are exploring this option. The choice to reduce employees should only be done as a last resort; it is crucial to explore all alternatives in order to cut costs.

In view of this, the firm of Messrs. Bhavanash Sharma, legal advisors in the area of Industrial Relations/Employment Law has compiled a series of FAQs to provide employers with a guide in hope to clarify and simplify these matters.

Please note that this FAQ sheet does not constitute legal advice and legal positions may change depending on the facts of individual cases or situations. The information provided in this FAQ does not and is not intended to constitute legal advice.

Please contact Bhavanash Sharma at
bhavanashsharma@gmail.com or 012 261 7730
should you have any legal inquiries.

www.bhavanash-sharma.com

Q: Must employers continue to pay full salary and/or allowance to all workers, including employees who cannot work from home, during the MCO?

The Ministry of Human Resources has issued directives stating that all employees are entitled to full wages during this period and that employers cannot force employees to utilize annual leave in this matter. Unfortunately, not all employers have this privilege or enough resources to do so. For more options on this, continue to explore the FAQs below.

Q: If employers are facing serious cash flow problems, what are some immediate solutions?

If employers are unable to sustain the business, these are the immediate options:

i. Reducing employees' pay

In majority of cases, employers are contractually obliged to make payments to employees on terms that have been agreed in the Employment Contract. Hence, a reduction in rate of pay can only be achieved through an agreement with the employee. Employers should talk to their staff as soon as possible to see if such pay reductions can be agreed and such agreements should be recorded in writing to protect the employer in the future should there be a challenge. Obtain an agreement in writing and make sure the employee agrees to it.

Should an employer unilaterally impose a pay reduction and/or make unauthorized deductions, potential liabilities faced by the employer are as follows:

- In respect of employees covered under the Employment Act 1955, the employer, upon conviction, can be liable to a fine not exceeding RM 10,000;
- The employee may resign and claim constructive unfair dismissal and/or bringing claims for breach of contract and/or unlawful deductions from wages.
- The employee may also further file complaints against employer with the Labour Department.

ii. Lay-Off and Short-Time Working

Lay-off is a temporary measure whereby an employer provides employees with no work, and therefore no pay, for a period while retaining them as employees. This is generally a temporary solution to a problem such as shortage of work or in this context the impact of a pandemic.

On the other hand, short-time working means providing the employees with less work and therefore a lower pay for a period, whilst still retaining them as employees. Like lay-off, it is a short-term measure often designed to deal with a short-term shortfall of work. The employer and employee must come to an agreement, and for clarity it must be written and signed by parties.

Q: Can an employer downsize their workforce?

The Industrial Relations Act, Section 13(3) IRA 1967 recognizes the employer's right to terminate any workman by reason of redundancy or by reason or reorganization of an employer's profession, trade, business or work. However, this right of the employer is limited by the law that he must act bona fide and not capriciously.

Q: What is redundancy?

"Redundancy" is the termination of employment contract as a result of reduction of workforce or reduction in the requirements of the business as a whole for employees to carry out a particular type of work. In Malaysia, the existing provisions on retrenchment are scattered in the form of regulations, codes, Ministry guidelines and decided cases. Under the Industrial Relations Act (IRA 1967), every employer has the right and privilege to organize his business in the manner he thinks fit for the purpose of the economy or convenience.

Q: What should be the employers' considerations and the measures involved if they want to make their employees redundant?

Where there is a need for redundancy, an employer should take positive steps to avert and minimize workforce beforehand by adopting the appropriate measures such as limiting recruitment of employees, place restrictions on overtime work, reduce the number of shifts or days worked by employees in a week, reducing working hours, and also consider re-training and/or transferring employees to other departments/work.

However, if redundancy is still necessary after adopting the above measures, an employer should carry out the following steps in accordance with good and fair labour practices: -

- inform and conduct a discussion with the employees as soon as possible on the retrenchment exercise;
- offer a voluntary termination or separation scheme with the best possible compensation package;
- retire employees who are over the normal age of retirement;
- retrench foreign employees before retrenching local employees of the same category;
- if the retrenchment involves local employees, the last in first out (LIFO) principle should be practised.
- wherever possible, assist employees in finding alternative employment before the retrenchment exercise in stages and stagger it over a long period;

Q: Is there a statutory requirement to pay at least a minimum amount of severance/termination pay upon terminating an employee?

Firstly, look at the Employment contract to ascertain if any provisions of Redundancy exist. If so, the terms of contract must be adhered to and the employee be compensated accordingly.

In Malaysia, employees who have been retrenched or whose service has been terminated as the result of redundancy, and who have been employed for at least 12 months prior to the date of termination, are entitled to payment of minimum termination benefits as prescribed by the Employment (Termination and Lay-Off Benefits) Regulations 1980 ("Regulations"). However, the termination benefits under the Regulations only cover employees who fall under the purview of the Employment Act.

Any employee falling outside the purview of the Employment Act will not be expressly entitled to severance, compensation and/or payment of termination benefits, unless they are provided for in their contract of employment or in any collective agreement applicable to them. Nevertheless, in practice, employees are often compensated in a redundancy situation, to mitigate the risks of a claim of dismissal 'without just cause and excuse'.

Q: Can employers terminate employment contracts due to this pandemic?

1. Contractual Obligations

(a) Force Majeure Clause

Firstly, check your Employment Contracts for any *force majeure* clauses. If there is one, consider if the 'force majeure' clause covers events like "diseases", "epidemics"," or "pandemics" or if there exist the catch all phrase "beyond reasonable control of the parties". The purpose of the Force Majeure clause in the contract is to excuse one or both parties from liability when an extraordinary event or circumstance beyond control prevents one or other from fulfilling obligations under that contract.

An employer seeking to rely on a *force majeure* clause must show that:

- the force majeure event was indeed the cause of the inability to perform or delayed performance;
- their non-performance was due to circumstances beyond their control; and
- there were no reasonable steps that could have been taken to avoid or mitigate the event or its consequences.

Q: What is the effect of relying on the clause?

The usual remedy if a Force Majeure clause is invoked is for one or more parties to be excused from its obligations and/or liability under the contract, without any damages being payable. In other words, this clause can be invoked by the Employer to terminate the employees without compensation. Nevertheless, look at clause carefully as it sometimes provides for extension of time, suspension of time, or termination in the event of continued delay or non-performance, accordingly.

Q: What if there is no *Force Majeure* clause in the contract?

If there is no such force majeure clause in the Employment Contract, an Employer may have to look for another avenue – whether the contract could be discharged on the grounds of 'Frustration', upon which the contract will become void.

(b) The Doctrine of Frustration

With reference to Section 57 of the Contracts Act 1950, a contract is 'frustrated' where there is a change in the circumstances supervening or subsequent to the formation of the contract which renders a contract legally or physically impossible to perform.

For a contract to be discharged by frustration:

- the party relying on the clause, ie the Employer must show that the contract is impossible or unlawful to be carried out due to the event or change of circumstances;
- The impossibility or unlawfulness of the event or change of circumstances must be supervening, ie it must have occurred subsequent to a valid contract;
- The event, or change in circumstances, must be one for which the Employer is not responsible for or self-induced; and
- The event, or change in circumstances, must be such that renders the performance of a contract radically different from what was originally undertaken, to the extent that the Court must find it unjust to enforce the original promise.

However, it is pertinent to recognize that the doctrine of frustration can only be applied within very narrow limits: a contract will not be frustrated if it has a relevant force majeure clause, if performance has become merely more onerous or expensive, or if the impossibility of performance is the fault of either of the parties.

The law is clear that frustration may not be invoked merely to get out of a bad commercial bargain or if the parties have foreseen the relevant event. Additionally, it is questionable whether a pandemic would be considered unforeseeable by the courts.

Unfortunately, there are very limited case laws that specifically addresses whether and how a pandemic could frustrate commercial contracts. One case from the 2003 SARS epidemic, however, illustrates the restriction of the doctrine. It was decided in Hong Kong that a tenant subjected to a SARS related 10-day isolation in view of a 24-month lease, sought to invoke frustration to discharge the lease. The court rejected the tenant's effort to rely on the frustration doctrine, primarily because the isolation order was only for a short duration in the context of the lease at issue. This ruling demonstrates the difficulty that a party may have in successfully invoking the frustration doctrine to discharge a commercial contract.

Q: What is the effect of relying on this Doctrine?

The Contract would be rendered void, bringing all parties' obligations under the contract to an end immediately.

Conclusion

Employers are advised to seek legal opinion on how to manage their workforce, to get their employment contract amended and to deal with redundancy and/or termination.