

Our Ref:

Your Ref:

Date:

Dear All,

To enhance efforts to curb the Covid-19 outbreak, the Prime Minister of Malaysia announced that a nationwide Movement Control Order ("MCO"). The MCO was invoked under the Prevention and Control of Infectious Diseases Act 1988 and Police Act 1967, commencing on 18 March 2020 and has been extended by the latest announcement made by the Prime Minister of Malaysia to 28 April 2020. The uncertainty on the uplift of MCO has caused many issues to the normal life and operation of all, including employer and employee, who has been left with lots of uncertainty and queries in their mind in dealing with these unprecedented circumstances. As such, we have prepared the following Q&A for your ease reference, to answer and clarify the queries as may be facing by the employer and employee.

Question 1

During the MCO, can business operate like usual?

Answer :

Premises providing essential services may be opened provided that the number of personnel and patrons at the premises be kept to a minimum. Further, premises involved in food supply chain or in selling food and beverages by way of drive-through, take away or delivery may be open, subject to conditions which the Director General may impose from time to time. To this end, employers in essential services are advised to:-

- Identify the units/departments within the business which need to work from the workplace for the smooth running of the essential services, while considering asking the rest to work from home or to stay at home; and
- formulate employee rotation plans to minimize the number of employees attending at the workplace at any one time.

Please note that respective states in Malaysia have issued guidelines for the operation hours for essential businesses within the state, respectively.

Premises of critical manufacturing businesses may open subject to approval from Ministry of International Trade and Industry. Please note that several conditions, such as reducing work force by at least 50%, providing hand sanitisers and taking daily body temperatures of its employees must be adhered to.

[Please quote our reference when replying]

Premises not providing essential services may not be opened unless earlier specified by the government or written permission from MITI is first obtained. In practical terms, this means that while employers in non-essential services effectively cannot require their employees to attend at the place or premises of work, they can require employees to continue to work remotely and employers can implement work from home measures including :-

- Attending online meetings & conference calls;
- Require employees to attend to client queries and requests by email and other forms of communication; and
- Require employees to be contactable for work at home during regular office hours.

As part of restrictions on movement, employers of essential services and permitted non-essential services are required to provide their employees with letters of confirmation instructing them to work during the MCO and to explain the need for their travel or movement in case the employee is queried by the police/other authorities.

More information with regards to essential services and additional sectors allowed to operate (as may be granted by MITI), kindly refer to Question 2.

Question 2

What are essential services?

Answer

The following falls under the lists of essential services as announced for the second phase of MCO :

1. Food
2. Water
3. Energy
4. Communications and Internet
5. Security and defence
6. Solid waste and public cleansing management and sewerage
7. Healthcare and medical (including dietary supplement)
8. Banking and finance
9. E-commerce
10. Logistics (confined to the provision of essential services)

Essential services listed in the March 18 gazette that are not in the latest gazette include radio communication (including broadcasting and television), postal and telecommunication will fall under "Communications and Internet"; meanwhile, fire, prison, immigration and customs will fall under "Security and Defence".

Further, MITI has on 10 April 2020 announced and listed down additional sectors which may operate during MCO (provided and subject always to the approval granted by MITI through application made to MITI), the additional sectors are :-

- Automotive Industry;
- Machinery and Equipment;
- Aerospace Industry;
- Construction projects and services related to construction works;
- Science, professional and technical services; including research & development (R&D);
- Social health services including registered traditional and complementary medicine (TCM) practitioners;
- Hardware shops, electrical and electronics (E&E) shops in the wholesale and retail segments; and
- Laundry services

Sectors that are allowed to operate must comply with the following :-

- to submit application through MITI official website from 13 April 2020;
- only qualified and complete documents will be processed;
- Companies that are allowed to operate must comply with the Standard Operating Procedures (SOP) that have been established for the respective sectors;
- The approval to operate is also subject to compliance with the rules and guidelines set from time to time by Ministry of Health (MOH) and other related enforcement agencies

Any business which has been granted such permission but fail to comply with the relevant SOP, the permission will be retract and being penalize.

(the lists and/or sectors allowed may be changed by the government from time to time)

Question 3

Since there is no prohibition on carrying on business remotely, can employers organise face-to-face meetings with employees, either in smaller groups or one-on-one?

Answer

As the main purpose behind the MCO Announcement is to enforce social distancing between members of society, employers are advised to avoid requiring their employees to gather in any premise or location whatsoever for work-related purposes, irrespective of the size of the group.

A person may move from one place to another place for the purpose of to purchase food, daily necessities and to seek healthcare or medical services, to perform any official duty or to perform any duty in relation to any essential services, thus movement for work-related purposes or meetings is not permitted and employers cannot require their employees to travel in order to attend small group meetings or discussions.

Question 4

Can employers deduct the employees' annual leave entitlement or enforce unpaid leave during this Period as a result of the MCO?

Answer

Unless the contract of employment provides otherwise, the law does not permit annual leave entitlement to be set off against this Period or for employers to unilaterally require their employees to take unpaid leave during this Period as a result of the MCO.

Question 5

Are employees entitled to the same salary or benefits during this Period?

Answer

It is stated in the FAQ of Ministry of Human Resources (MOHR) that "an employee's salary together with the relevant allowances must be paid except for allowances related to attendance or travel".

Nevertheless, since the execution of MCO, there is no gazette order governing that an employer must pay the salary to the employee during the MCO. The statement made by National Security Council has mentioned the same that employer shall pay the salary to employee during the MCO. The National Security Council is governed under and empowered by the National Security Council Act 2016 (Section 5 of the said Act). All directives and/or guidelines issued by the National Security Council is as good as a gazetted order, even override the directives and/or guidelines issued by other ministry of Malaysia. Thus, though there are several directives and/or guidelines published from respective ministry during the MCO, the National Security Council shall have the final say.

Question 6

Are employees required to pay the full salaries of their employees who cannot work from home or are not required to be on standby?

Answer

MOHR has issued FAQs stating that all salaries and allowances must continue to be paid during the MCO. This practice is also encouraged from a risk management, practical and even humanitarian perspective.

For employers whose businesses are severely impacted by the MCO and are unable to pay employees their full salaries during the Period, employers may need to consider other cost cutting measures.

While an argument may be made that due to supervening events beyond the control of both parties, the contract of employment temporarily cannot be performed by either party in a fundamental way and as the employee has not been able to fulfil the obligation to work, the employer is not required to fulfil its obligation to pay during the Period, this position has significant legal and practical risks especially in view of the recent public position taken by MOHR. We recommend that legal advice be obtained in dealing with potential measures that can be implemented during this time.

Question 7

What about employees currently on sick leave and maternity leave during the Period?

Answer

A maternity leave period that overlaps with this MCO period will not affect the employee's entitlement to or the duration of the maternity leave. If the employee is on sick leave, the employee may not be required to work from home and the sick leave would be deducted from his or her normal entitlement.

Question 8

Can employers require their employees to come back to work during the Period if the employers' business falls under the essential services identified under the Regulations?

Answer

If the nature of your business falls under essential services or under the additional sectors as approved by MITI (refer to Question 2), your business can continue to operate as usual during MCO. As such, if employees in an essential service or permitted non-essential service have been granted approved annual leave during this Period, and if the needs of the business make it necessary, you may revoke the approval of the annual leave to require employees to return to work

You are however encouraged to allow employees in non-essential departments or aspects of these businesses to work from home.

Question 9

How should employers deal with Malaysian employees who return from overseas during this Period?

Answer

All Malaysians who return to Malaysia during the Period are required to undergo a health examination and self-quarantine for 14 days as directed by the Government.

Question 10

Can an employer whose business has been hit hard by Covid-19 take action by retrenching worker or reduce salary to minimize the losses facing by the employer?

Answer

Retrenchment is a form to reduce the workforce due to extra manpower. In general, retrenchment is under the prerogative of an employer. However, to ensure that the process is done fairly, there are three factors that need to be met by the employer.

The first, the excuse of the employer that business has been affected due to Covid-19 has to be genuine. Secondly, the employer must have taken steps to ensure that the termination being avoided such as reducing an employee's working hours, limiting or freezing new hires, limiting overtime, limiting work during weekends or public holidays, reducing an employee's wage, perform a temporary lay-off. Thirdly, if a lay-off is inevitable, foreign employees should be terminated first. If the lay-off involves locals, then the "Last In First Out" principles should be adhered to. However, this principle can be ignored if the employer has a valid reason.

Any form of pay cut has to be negotiated and obtained the consent of the employee first.

Further, to avoid termination of employment, as long as it has been agreed mutually between the parties, employee may take paid leave, half-paid leave or unpaid leave during MCO.

For employee's paid below RM2,000.00, any employment dispute shall refer to the Labour Department and the Employment Act 1955; meanwhile, employee's paid above RM2,000.00 shall always refer to the employment contract between the parties.

Question 11

Is the Government providing any relief to employers during this time?

Answer

The Government has introduced a Wage Subsidy Program to assist employers to retain employees. The Government will provide a subsidy of RM 600- RM1200 a month (refer to table below) to certain employers for each employee earning less than RM 4,000 for a period of 3 months. Employers who qualify are those who have experienced a loss of income of at least 50% from 1 January 2020. In consideration

for this subsidy, employers are not allowed to terminate the employment of their employees and/or reduce their salaries and/or require them to be on unpaid leave for three months after this program is implemented.

| Number of employees | Subsidy amount for each employee |
|---------------------|----------------------------------|
| More than 200 | RM600.00 |
| 76-200 | RM800.00 |
| 75 or below | RM1,200.00 |

Employers, in consultation with the Employees Provident Fund, may choose to defer, restructure or reschedule contributions to the Employees Provident Fund

All sectors are exempt from paying the Human Resources Development Fund levy for a period of 6 months beginning April 2020

Despite of that, the Employment Retention Program as announced by the Government on 16 March 2020, employer may apply for the employees who are granted unpaid leave a subsidy of RM600.00 for 1 to 6 months, provided always that such employee's paid is RM4000 and below and has been granted for an unpaid leave of at least 30 days continuously.

Question 12

Can an employer request the employee to return to work for some important dealings?

Answer

Either the employee from finance or human resource department are allow to return to work for the purpose of issuing salary, subject always that :-

- maximum 2 employees;
- employer shall furnish such employee with letter of authorization;
- the letter of authorization shall contain the name, NRIC No., and contact details for verification purpose;
- employee who allowed to return for the above purpose shall bring along the letter of authorization with them while return to work.

Disclaimer : the above Q&A is for referral only. The employer and the employee are advise to seek for respective legal advise and refer to the directives and/or guidelines as issued by the relevant authorities from time to time.