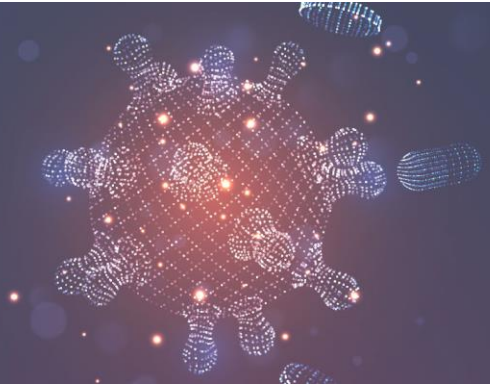
FAQ: COVID-19 Employment

for LexisNexis Resource Hub – COVID-19



Who can report to work?

Regulation 5(1) of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 provides that premises providing essential services may be opened, provided that the number of personnel and patrons at the premises are kept to the minimum. As such, employees working in essential services as defined in the Schedule of said Regulations may be required by their employer to report to work.

What are the duties of employers in essential services?

Employers are to take cautionary steps such as ensuring that the number of workers coming in are at a minimum (or at least 50 per cent less than the usual numbers), to monitor the employees' movements and to provide hand sanitisers. Companies are also tasked with ensuring that the best practice for social distancing is provided and executed. It is important for the employer to ensure that workers' safety and health during the COVID-19 are not compromised, as this is required both by the Occupational Safety and Health Act 1994 and also common law obligations of the employer to ensure a safe place of work.

Can employees in non-essential services be compelled to report to work?

Employees employed in non-essential services can make a police report if the companies are still in operation and compelling the workers to come to work during the Movement Control Order ('**MCO**') period namely, from 18 to 29 April. [only MCO excluding CMCO]

Would employees get paid in this period of time?

Employers are to pay salaries and allowances (except for travelling or attendance allowance which did not take place) of employees during the MCO period, as the contract between the parties is still in force. This would cover all workers, irrespective whether they came within the purview of the Employment Act 1955/Labour Ordinance (Sabah Cap 67)/Labour Ordinance (Sarawak Cap 76).

Daily wage-workers are to be paid according to the rate agreed upon by the employer and employee in the letter of offer/contract of service/the latest increment letter. Workers whose rates are not fixed are to be paid not less than the minimum wage set in Minimum Wages Order 2020.

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Besides that, employers may also offer to their employees either: (i) fully paid leave; (ii) partially paid leave; or (iii) unpaid leave. Should there arise the need for the retrenchment of workers, employers are to refer to the Guidelines on Retrenchment Management.

Employees working in essential services who refuse to work during the entire MCO need not be paid their salaries by their employers, although they could of course be subjected to insubordination, a major misconduct which may, if established, be a basis for the dismissal of the worker.

What are the actions to be taken if the employers refuse to pay salaries?

Wages of an employee is a fundamental factor in a contract of employment. It must be paid within the period specified by the law or as agreed to by the parties. An employer cannot delay in the payment of wages to the employees. The Employment Act 1955 provides, inter alia, that wages must be paid not later than the seventh day after the last day of any wage period the wages. Failure of the employer to pay the wages to its workers when it falls may result in criminal prosecution and on conviction, the employer can be subject to a fine of up to ten thousand ringgit. The non-payment of wages would also constitute a fundamental breach of the employment contract, where the affected worker may resign from employment and have his resignation treated as a constructive dismissal because the employer had repudiated an essential term of the contract.

If an employer refuse to pay the employee's wages during the period of 18 to 29 April 2020, the employee may file an online complaint through the Department of Labour's official email. The complaint should contain all relevant information in order to facilitate the process of complaint. Besides that, the employee may also file a complaint in person at the nearest Department of Labour office after the MCO has been lifted. Do note that investigations relating to the complaint filed will only take place after the MCO comes to an end.

Can employees be made to take leave?

It is undisputed that an employee is entitled to certain types of leave such as annual leave, sick/medical leave, maternity leave, paternity leave, compassionate leave, emergency leave, calamity leave and unpaid leave, among others. However, such leave cannot be claimed as a right. Instead, it is subject to the discretion of the employer. The employer has an administrative discretion as employer to grant or deny a requested leave in accordance with the applicable rules and regulations of the organisation. Normally, the emphasis is on the employer's business operational needs. For example, an annual leave request may be refused when it relates to the exigencies of the employer's business. The exercise of the employer's discretion ought to be done in a manner that is tenable with their business needs at that particular time. Generally, an employer cannot force their employees to utilise their annual leave or unpaid leave throughout the period, as the MCO had been made under the Prevention and Control of Infectious Diseases Act 1988. Nevertheless, the

employees should cooperate with the employer to minimise the impact on business during this trial time. This would include agreeing with the employer to utilise their annual leave or go on unpaid leave (among others).

Can employees work from home?

With modern technology where communication is viable via telephone, hand phone and emails (for example), which makes it easier to communicate with others, it would be completely viable for the employers to direct their employees to work from home. This is especially true in businesses which do not require physical meetings. In this case, the workers are still under direct supervision of the employer and that the salaries and other allowances are to be paid as usual. It is worth noting that work patterns have evolved rapidly in the last few decades, with flexible working arrangements favoured and widely accepted in most advanced countries in the world. These include flexibility of working hours, arrangements regarding work schedules such as part-time work and job sharing and flexibility in the place of work, such as working from home or at a certain location, among others. Such working arrangements is seen as beneficial to both the organisation as well as the potential employees. It brings, inter alia, empowerment and improved employability and staff retention, among others. The flexible work arrangement patterns have now become the preferred work arrangements worldwide including in Malaysia, thanks to the COVID-19 pandemic, which has brought along the 'new normal' that include, inter alia, the social distancing rule. The flexible working arrangements, however, can be challenging. This is due to the fact that the existing employment law lacks legal framework on such arrangements. Hence, a review of the labour legislation to suit the COVID-19's 'new normal' is much welcomed.

What are the repercussions of employers failing to comply with the MCO?

Employers who do not comply with the MCO commit an offence under regulation 7 of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 and if convicted, will be liable to a fine not exceeding RM1,000 or imprisonment not exceeding 6 months or both.

Complaints may be made by any person to the nearest PDRM/RELA/Department of Labour/Department of Occupational Health and Safety if they are aware that non-essential services are still operating without written consent of the Director General of the Health.

The Whistleblower Protection Act 2010 encourages and facilitates the anonymous whistleblowing of wrongdoing or improper conduct in the public and private sector. Whistleblower protection covers any member of the public and private sectors who disclose wrongdoing or improper conduct in an organisation, such as the mismanagement or abuse of authority, violation of any rule, regulation and ethical standards, specific danger to public health or safety and violation of specific public policies.

However, whistleblower protection under the Act is dependent on the fulfilment of the requirement that the disclosure must be made in good faith with a reasonable belief of the improper conduct. In other words, the whistleblower has reasonable grounds to suspect wrongdoing and that the disclosure was made with due care and caution. Further, the report of the wrongdoing must be made to the designated enforcement agencies as specified in section 2 of the Act. Besides that, the disclosures must not be prohibited or violate existing written laws such as the disclosure of customer profiles in breach of the Financial Services Act 2013 or the Official Secrets Act 1972.

If an employer is in contravention of the MCO, employees can make a report to the PDRM/RELA/Ministry of Human Resource either through telephone or email.

Can employers retrench employees during the MCO period?

Generally, retrenchment is the prerogative of the employers. Employers affected by the COVID-19 can retrench their employees. In order to ensure that the retrenchment process has been conducted fairly, employers are to take into consideration the following:

(i) the reason given by the employer is genuine;

(ii) the employer is to take mitigating steps to avoid retrenchment such as cutting working hours, limit or freeze the hiring of new employees, limiting overtime work and so on; and

(iii) if retrenchment is unavoidable, then foreign workers are to be retrenched first. Should retrenchment involve local workers, the principle of 'Last in, first out' is to be observed. However, the principle can be set aside if the employer has strong justification to retrench the employee.

Employers are to report the retrenchment to the nearest Labour Office 30 days before the date of retrenchment.

Aside from the above, where redundancy in an organisation that necessitates retrenchment of workers would be expected, the employer is to take a range of steps that go beyond payment of retrenchment benefits and compliance with basic legal requirements to demonstrate corporate social responsibility. Options necessary to avert the retrenchment include a freeze on new hiring, reducing working hours and overtime, eliminating temporary labour, transfer of workers and considering alternative employment in the organisation. These options primarily ask the employees to sacrifice for the good of the company, thereby minimising retrenchment.

Adequate notice must be given to the affected employees before retrenchment in order to prepare them for the impending retrenchment, and to find suitable alternative employment. The notice must contain relevant information such as reasons for retrenchment, number of employees likely to be affected and their various job categories, selection criteria, when the retrenchment is likely to take place, the assistance the employer will offer (such as time-off to attend interviews), early release should a new job be found, issuing

letters of reference and psychological counselling. Prior notice is a good industrial practice, as it helps to minimise the traumatic impact of the retrenchment on the worker and their families.

Consultation with the employees likely to be affected by the proposed retrenchment or the representatives from the trade union must be carried out. The discussion could be focused on finding ways to, for example, avoid retrenchment, reduce the number of people retrenched, limit the harsh effects of retrenchment, and the method and criteria for selecting workers to be retrenched, among others. The consultation would reflect on the genuineness of the retrenchment and that the employer cares for their workers and that they are doing their best to cope with a difficult time.

Exploring suitable alternative employment in the organisation for the affected workers are also among the generous gestures an employer might offer in an impending retrenchment exercise. The employer should take constructive action to place employees in alternative positions within the organisation. Workers should not be retrenched until all options to place the affected workers elsewhere in the organisation is exhausted.

Although there is no legal duty on the company to offer alternative employment to the affected employees, nevertheless, effort must be made to avert retrenchment. This may be done by exploring alternative employment within the organisation. The Industrial Court has held, inter alia, that terminating the employee without looking into the possibilities of transfer, re-designation or alternative employment may constitute as dismissal without just cause and excuse.

A significant part of any retrenchment plan is a strategy to help these workers find new employment. The employer could assist the retrenched workers to secure alternative employment by way of submission of names to labour exchange organisations or programmes and to local companies known to be recruiting new employees. The company could also arrange with the outsourcing company to re-employ these workers.

Another commonly used alternative to retrenchment is requesting for the selected workers to take an early retirement under a scheme called 'Voluntary Separation Scheme' ('**VSS**'). This can be done by offering an attractive retirement package, which is better than the statutory minimum for retrenchment. By the very nature of the scheme, VSS is done on a voluntary basis without the employee being forced into retirement. Voluntary retrenchment offers should preferably be considered initially during consultation before being offered to employees. The VSS should then be offered to an employee who has been advised that their position has been declared redundant, after all possible redeployment, retraining, relocation or transfer options available in the organisation have been explored. In short, it is important that the employer adheres to the proper procedure before retrenching its workers. The above guidelines are what a prudent employer must follow in order to ensure that the termination on grounds of redundancy is bona fide and in accordance with established principles and procedures of industrial jurisprudence.

Can an employee claim constructive dismissal during the MCO period?

The term 'constructive dismissal' denotes a breach of an essential term of the contract by the employer which goes to the root of the contract. This is where the employer fundamentally breaches the employee's contract of employment or treats an employee in such a way that they are entitled to resign. In short, constructive dismissal occurs when an employee leaves their job due to their employer's behaviour.

The breach of the essential term may be through some conduct of the employer. For example, the employer made the employee's life very difficult, such as making the working life of the employee intolerable or relegating the employee to an inferior or less important position or that the transferring order was tainted with bad faith motive, among others. The conduct of the employer may lead to the employee being unable to remain as an employee any longer. Due to the wrongful conduct of the employer, the workman may imply that the employer had evinced an intention of no longer to be bound by the contract of employment. The employee can regard themselves as having been dismissed and resign from employment without serving notice, thereafter alleging unfair dismissal. The affected worker cannot, however, remain in the employment, asserting that the employer has breached their contract, and at the same time initiate a lawsuit for remedy for constructive dismissal. Therefore, if the employee alleges constructive dismissal, they must leave their employment and either work out a settlement or commence proceedings.

Constructive dismissal does not mean that an employee can automatically terminate the contract whenever their employer acts or behaves unreasonably towards them. If it were so, it is dangerous and can lead to abuse and unsettled industrial disputes. The employer's wrongful conduct must have amounted to a fundamental breach of contract where a reasonable person would be able to conclude that the employer had evinced an intention not to be bound by the contract any longer. Hence, the conduct of the employer has to be looked at as a whole and its cumulative impact assessed. A single act or a series of acts may, according to the particular and peculiar circumstances of the given case, amount to a constructive dismissal.

The wrongful conduct of the employer can take place in a number of cases and may arise in the following circumstances: (a) harassing or humiliating the employee, particularly in front of other less senior staff; (b) victimising or targeting particular members of staff; (c) changing the employee's job portfolio or terms without consultation; (d) making a significant change in the employee's job location at short notice, ie the transfer directive involving a significant geographic relocation; (e) falsely accusing an employee of misconduct such as theft or of being incapable of carrying out their job; (f) a fundamental demotion involving reduced responsibilities and/or positioning within the corporate hierarchy where their newly assigned position involves a substantial reduction in salary, bonus, benefits, status, responsibilities, authority or any combination of these factors; and (g) forced resignation, among others. An employee can resign over one serious incident or due to the build-up of a number of incidents.

Generally, the actions of the employer must be a serious breach of the employment contract. Only the actual conduct by the employer and not perception of that conduct by the employee can potentially support a constructive dismissal claim. In other words, the employee's subjective opinion or personal reaction to

the change is irrelevant. What is relevant is whether, from an objective standpoint, the change to the employment relationship was fundamental in nature.

An employee who alleges constructive dismissal has to establish the following:

(i) that the employer, by its conduct, had breached the contract of employment;
(ii) that the terms which had been breached went to the foundation of the contract;
(iii) that the employee pursuant to and by reasons of the aforesaid breach had left the employment and not for some other reasons; and
(iv) that the employee left at an appropriate time soon after the breach complained of. Where the employee has failed to assert a constructive dismissal within a reasonable period of time following the fundamental change to the employment relationship, this may constitute 'condonation' in law. The above conditions were set out by the English Court of Appeal in *Western Excavating (EEC) Ltd v Sharp* [1978] 1 All ER 713.

There is also a duty on the employee to inform the employer either by words or conduct or both, that they were accepting the repudiation and treating the contract of employment as having been terminated by the employer. The employee is required to inform the employer that they deemed themselves as having been constructively dismissed before initiating any action against the employer. Where a representation was made before or preceded the dismissal, the dismissal would in law be premature and the Industrial Court would not be seized with jurisdiction to hear the claim of dismissal on the representation (see for example *Southern Bank Bhd v Ng Keng Lian & Anor* [2002] 2 CLJ 514 and also *Syarikat Ismail Ibrahim Sdn Bhd v Ong Heng Seng* [2003] 1 ILR 815).

On the issue of burden of proof of constructive dismissal, the burden lies on the claimant to prove on a balance of probabilities that the employer had committed the breach, which consequently led to the claimant leaving employment. It is incumbent upon the claimant to establish the conditions constituting constructive dismissal namely: (a) that the employer had breached essential term of the contract that went to the foundation of the contract; and (b) that they, pursuant to and by reasons of the aforesaid breach, had left the employment at an appropriate time soon after the breached complained of.

What should be done if an employee is suspected of or has tested positive for COVID-19?

In the event an employee is suspected of or has tested positive for COVID-19, the employer has to ensure that all employees working closely with the employee stay at home for 14 days in order to stem the spread of the virus. Prior to that, the employee was to be asked to identify all individuals who had worked closely with them, which enables the employer to have the full list of potentially infected workers. The employer is entrusted with the duty to ensure that the information is kept confidential. Besides that, the employer should see that the office and working spaces be deep cleaned and sanitised. The employer should also inform the office management if the office is located in a shared building or area.

Foreign workers can return to their home countries, subjected to the conditions set by the Immigration Department of Malaysia.

If an employee tests positive for COVID-19, the employer can give paid leave to the other employees. The leave cannot be deducted from annual leave, nor can the employer force employees to take unpaid leave.

Can a person who is suspected of or has tested positive for COVID-19 be made to go to work?
An employer cannot compel an employee to come into the office even if the employee is quarantined, nor can they take disciplinary action against the employee for not showing up to work due to being quarantined.

Absenteeism constitutes a fundamental breach of contract, and is a justifiable ground for dismissal of the employee after adequate opportunity has been given to the employee to refute the allegations framed against them. Section 15(2) of the Employment Act 1955 provides that an employee who absents himself from work for a continuous period of two days or more without prior permission or approval of the employer or without notifying the employer of such absence among others constitutes a gross violation of discipline. The above statutory provision provides that an employee is deemed to have broken their contract of service with the employer if they have been continuously absent from work for more than two consecutive working days, without prior leave from their employer, unless:

(i) they have a reasonable excuse for such absence; and
(ii) they have informed or attempted to inform their employer of such excuse prior to or at the earliest opportunity during such absence. The key words here are 'continuously absent from work for more than two consecutive working days, without prior leave from his employer'.

If the employee has a valid excuse for being absent from work (for example, due to sickness or ill-health), they have a statutory duty to inform their employer of such sick or emergency leave within 48 hours of the commencement of the said leave. Failure to inform his employer at the earliest opportunity shall be deemed an absence from work without reasonable excuse. Section 60F(2) of the Employment Act 1955 provides that an employee who absents himself on sick leave: (a) which is not certified by a registered medical practitioner or a medical officer as provided under subsection (1) or a dental surgeon as provided under subsection(1)(a); or (b) which is certified by such registered medical practitioner or medical officer or dental surgeon, but without informing or attempting to inform his employer of such sick leave within 48 hours of the commencement thereof, shall be deemed to absent himself from work without the permission of his employer and without reasonable excuse for the days on which he is so absent from work.

With modern technology such as telephones, hand phones and emails easing communication between parties, there is no excuse for an employee not to be able to inform their employer of an absence from work on account of illness or other emergencies as soon as possible and in any case within 48 hours from

the commencement of their leave. If the employee is unable to communicate personally due to injury sustained from an accident, the communication in the aforesaid circumstances can certainly be done through their family members or even their friends or colleagues.

Would the periods stipulated in the Industrial Relations Act 1967 be affected by the period of the MCO?

The period between 18 March 2020 to 29 April 2020 should be considered as the 'excluded day' within meaning of section 54(1)(c) of the Interpretation Acts 1948 and 1967. Hence, 'the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day'. The period during which the MCO was enforced should not be counted for purposes of computing the sixty-day limitation period. In fact, all representation under section 20(1) of the Industrial Relations Act 1967 is done manually. The electronic filing service or e-filing in the Civil Courts and the Industrial Court is not made available at the Industrial Relations Department. Further, pursuant to regulation 7 of the Prevention and Control of Infectious Diseases (Measures Within The Infected Local Areas) Regulations 2020, anyone who flouts the MCO would be deemed to have committed an offence and if convicted, a maximum fine of RM1,000 would be imposed. The MCO violators can also be charged under section 24 of the Prevention and Control of Infectious Diseases Act 1988, which carries a jail sentence of not more than two years or a fine or both. For subsequent offences, violators can be imprisoned for not more than five years or fined or both. Hence, during the aforesaid period, it would be impossible for the dismissed employee to file his representations under section 20(1) of the Industrial Relations Act 1967 at the Industrial Relations Department. In this regards, it would be grossly unfair to refuse the representation of filed beyond the 60- day limitation period if the last date happens to be during the MCO since the default was not due to the dismissed employee's own carelessness or negligence but was because the circumstances beyond his control. He is prevented from filing the representation within the aforesaid period due to the strict enforcement of the MCO where its violation as noted above would entail imprisonment or fine.

Can employers rely on force majeure or frustration during the period of MCO?

Should an employer rely on a force majeure clause during this period, such clause must be present in the contract of employment. The absence of the clause means that the employer cannot avoid contractual obligations on the basis of the COVID-19 pandemic. Besides that, the employer cannot rely on the doctrine of frustration during the MCO, unless the period of the Order renders performance of the contract impossible.

An employer therefore cannot rely on frustration during the Order unless the Order extends for a prolonged period of time such that the performance of the contract becomes impossible.

It is worthwhile noting that it is a rule of industrial jurisprudence that a workman's right and status under his employment contract are not to be decided solely on the basis of the law of contract, and neither is a workman's security of tenure to be dependent on the absolute discretion of his employer or on the terms and conditions of his contract of employment. His rights are to be determined on the basis of fair labour practice, equity and good conscience to ensure that the principle of security of tenure is not undermined and social justice is dispensed with. See *Vincent Pillai Leelakanda Pillai v Subang Jaya Hotel Development* [2018] 2 ILR 158, [2018] 2 MELR 667. Hence, the existence of a force majeure clause is no guarantee that the employer could absolved of liability by merely replying on the clause. Where there is a challenge of dismissal, the employer will still have to show on a balance of probability that the dismissal was with just cause or excuse.

In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice. The information presented is correct to the date of its publication.

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