

The Prime Minister of Malaysia had on 16 March 2020 announced the imposition of a Movement Control Order ("**Order**") in an attempt to control the outbreak of Covid-19. The Order, effective across the nation, will commence from 18 March 2020 until 31 March 2020 ("**Movement Control Period**"). Following the Order, the Government has issued the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020 on 18 March 2020.

## 1. Summary of the Order and the Regulations

The Order and Regulations provide as follows:

- (a) Mass Gatherings Prohibited: A blanket prohibition on movements of large numbers of persons and involvement in gatherings, with religious, sports, social and cultural activities specifically identified. Attendance at funeral ceremonies are permitted provided that the number of attendees is kept to a minimum.
- (b) Premises to be Closed: Places of worship, business premises, and all government and private premises are to be closed, save for:
  - (i) supermarkets, public markets, convenience stores (including convenience stores selling everyday necessities) ("**Essential Stores**"); and
  - (ii) those involved in essential services for the country (specifically banking and finance; electricity and energy; fire; port dock and airport services and undertakings including stevedoring, lighterage, cargo handling, pilotage and storing or bulking of commodities; postal; prison; production, refining, storage, supply and distribution of fuel and lubricants; healthcare and medical; solid waste management and public cleansing; sewerage; radio communication including broadcasting and television; transport by land, water or air; water; e-commerce; defense and security; food supply; wildlife; immigration; customs; hotels and accommodations; and any services or works determined by the Minister of Health as essential or critical to the public) ("**Essential Services**").

Businesses which can maintain operations remotely/virtually (e.g. having its employees work from home), or which fall under the Essential Services sector or is an Essential Store do not have to face closure. Premises providing Essential Services will need to keep their number of personnel and patrons at the premises to a minimum.

If you have any related questions/queries please do not hesitate to contact us:

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Premises involved in food supply chain or selling food & beverages may remain open only for the purposes of providing drive-through, take-away or delivery, however, dine-in by customers is prohibited. Other businesses will need to remain closed for the duration of Movement Control Period unless prior written permission of the Director General of Health is obtained.

- (c) Education Sector Closure: Kindergartens, government and private schools including daily schools, boarding schools, international schools, tahfiz centres and other primary, secondary and pre-university institutions, public and private higher education institutions, and skills training/development institutes are to be closed:
- (d) Travel Restrictions and Conditions: Malaysian citizens are not allowed to travel out of Malaysia. Malaysian citizens returning from international travel must undergo a medical examination and be self-quarantined for 14 days. All tourists and foreign visitors are prohibited from entering Malaysia. Travel from one place to another within any infected local area is prohibited except to perform official duties; to visit and return from premises providing Essential Services

## 2. Consequences of Non-Compliance With the Order and the Regulations

The Order has been issued pursuant to the Prevention and Control of Infectious Diseases Act 1988 ("PCIDA") and the Police Act 1967 ("PA"). The police are obliged to provide assistance to enable any officer authorized under the PCIDA to carry out enforcement of the Order, and are empowered to take lawful measures, including:

- (a) apprehending all persons whom they are authorized to apprehend;
- (b) conducting prosecutions; and
- (c) giving assistance in the carrying out of any law relating to revenue, excise, sanitation, quarantine, immigration and registration.

Non-compliance with the Order is an offence under the PCIDA. Upon conviction for an offence thereunder, the applicable sentences are as follows:

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- (a) 1st offence: a fine and/or imprisonment for a term not exceeding 2 years;
- (b) 2nd offence: a fine and/or imprisonment for a term not exceeding 5 years;  
and
- (c) an additional fine not exceeding MYR 200 for every day during which such offence continues.

There is no prescription of a limit on fines imposed under the PCIDA for the 1<sup>st</sup> and 2<sup>nd</sup> offence.

Non-compliance with the Regulations is also an offence under the PCIDA. Upon conviction for an offence thereunder, fines up to RM1,000 or imprisonment for a term not exceeding 6 months may be imposed. If an offence is committed by a corporation, any person who, at the time of commission of the offence was a director/manager/secretary/other similar officer of the corporation or was responsible for managing the affairs of the corporation or was assisting in such management (“Personnel”) may be charged jointly or severally in the same proceedings with the corporation. If the corporation is found guilty, the Personnel will be deemed guilty of the same offence, unless it can be proven that the offence was committed without the knowledge/consent/connivance of the Personnel and that the Personnel took all reasonable precautions to prevent the offence.

#### **FREQUENTLY ASKED QUESTIONS BY EMPLOYERS**

##### **1. Do I need to pay my employees if my business is closed for 2 weeks?**

Non-payment of salaries by an employer is generally considered to be a breach of the employment contract under employment law, even if a business is undergoing temporary closure/downtime. No announcements nor exemptions have been made or granted by the Government to allow employers to refrain from making salary payments.

Guidelines have been issued by the Ministry of Human Resources which provide that employers are required to continue making salary payments to their employees during any quarantine period, whether the employees are working or otherwise, whether due to health reasons or the nature of the work of the employees (e.g. where the employees’ work is ‘on-site’).

Although the said guidelines do not necessarily carry the force of law, compliance with the same would be a best practice for employers to undertake, particularly as the guidelines would most likely be taken into account by the Industrial Court in determining whether constructive dismissal has taken place.

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2. Can I force my employees to take unpaid leave or a pay-cut since I have no revenue?

Generally, unless the employees voluntarily consent and mutually agree in writing to take unpaid leave or a pay-cut, employers do not have the authority to force their employees to take unpaid leave or a pay-cut, particularly in circumstances where temporary closure/downtime of the business results in a lack of revenue for the business. Any requirement by an employer for employees to take unpaid leave or a pay-cut would be a unilateral variation of the terms and conditions of the respective employment contracts, and employers could potentially risk being exposed to claims of constructive dismissal being levied against them.

Frequently, these requests are made before far more drastic cost-cutting measures are taken by the employer, such as a reduction in workforce or closure of business.

Employers must also take note of the minimum basic salary under the Minimum Wage Order 2020 and ensure that the salaries of their employees do not fall below the prescribed rates.

Notwithstanding that the Government has announced that employees forced to take unpaid leave by their employers would be granted a cash assistance of RM600 per month during the Movement Control Period, it remains to be seen whether this recognition by the Government that many employees will be suffering such consequences from the imposition of the Order would negate the position of employment laws in relation to force unpaid leave.

3. Can I require my employees to work from home, or must I give my employees paid leave/time-off instead?

Where practical and depending on the nature of the work the employees are required to undertake, employers may request their employees to work from home as an alternative arrangement to ensure business continuity. To avoid exposure from potential liability relating to lack of the requisite facilities to allow employees to adequately carry out their work from home, employers should provide employees with appropriate facilities to work from home. If employees are unable to carry out work from home during absences from work due to no intention, fault, or illness on the part of the employee, the employers must provide the employees with paid leave on top of the employees' existing leave entitlements **unless** the employees **voluntarily** consent and mutually agree in writing (to serve as evidence in the event the employees bring a claim for constructive dismissal) to take unpaid leave.

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Such mutual agreement/consent by the employees should be in writing to serve as evidence in the event the employees bring a claim for constructive dismissal against.

**4. Can I force my employees to use their annual leave?**

Employers do not have the authority to force their employees to utilise their annual leave, as employees are entitled to such leave. Employees may, however, voluntarily agree with their employers to utilise their annual leave during periods where employers find it necessary.

**5. Can I carry out a retrenchment exercise?**

Under Malaysian employment laws, dismissal of employees must be carried out with just cause and excuse. If employees consider that they have been dismissed without just cause or excuse, the employees may claim for reinstatement to their former employment. As retrenchment is a form of dismissal, businesses must be able to show that they have taken measures to avoid retrenchment in the event unfair dismissal claims are levied against them for the same. Specifically, businesses must be able to demonstrate that:

- (a) they have legitimate business reasons to implement a retrenchment exercise, and such reasons are supported by substantive evidence, preferably documentary in nature; and
- (b) they have carried out the retrenchment exercise in a fair and indiscriminate manner, in accordance with Malaysian industrial practice standards, such as complying with termination notice conditions and providing severance payments to outgoing employees, amongst others.

If the employees affected fall within the ambit of the Employment Act 1955, special considerations would need to be taken into account in line with the provisions thereof.

**CONCLUSION**

Employers will need to take note of the Order and Regulations, and comply with the provisions thereunder, in particular, the applicable restrictions and/or bans. In order to protect their interests, businesses should promptly make appropriate arrangements to ensure compliance and avoid facing liability under the PCIDA and the PA. It should be noted that the Order and Regulations may in fact be extended and/or supplemented with more stringent requirements and businesses are implored to keep abreast of current developments in the weeks to come.

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