

# COVID-19: LEGAL OBLIGATIONS OF BOTH EMPLOYERS AND EMPLOYEES DURING THE MCO

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Economic hardships are being faced nationwide due to the Covid-19 outbreak and the Movement Control Order (“**MCO**”) implemented by the government on the 18<sup>th</sup> March 2020. Notwithstanding the PRIHATIN Rakyat Economic Stimulus Package recently announced, employers continue to urgently look for ways to cut down overhead costs and to mitigate losses much to the concern of their onlooking employees.

We have therefore prepared a list below to answer some of the most commonly asked questions that have been plaguing both employers and employees during this MCO period:

**1. Q: Do employers have to pay the salary and/or benefits of their employees during the MCO period?**

A: Yes, employers have to continue paying to their employees their salaries and any allowance the employees are entitled to under their respective employment contracts. Any discretionary payments provided for in the employment contracts remain up to the discretion of the company.

**2. Q: Can employers reduce the salaries and/or benefits of their employees during the MCO period?**

A: To date, the Ministry of Human Resource (“**MOHR**”) has released 4 separate FAQs regarding the MCO:

- a) The first FAQ dated 19<sup>th</sup> of March 2020 ([mohr.gov.my/images/perintah\\_kawalan.pdf](http://mohr.gov.my/images/perintah_kawalan.pdf));
- b) FAQ No. 2 dated 23<sup>rd</sup> of March 2020 ([mohr.gov.my/images/perintah\\_kawalan\\_bil2\\_update.pdf](http://mohr.gov.my/images/perintah_kawalan_bil2_update.pdf));
- c) FAQ No. 3 dated 31<sup>st</sup> of March 2020 ([mohr.gov.my/images/FAQ\\_PKP\\_KSM\\_BIL03.pdf](http://mohr.gov.my/images/FAQ_PKP_KSM_BIL03.pdf)); and
- d) FAQ No. 4 dated 7<sup>th</sup> of April 2020 ([mohr.gov.my/images/FAQ\\_PKP\\_BIL4.pdf](http://mohr.gov.my/images/FAQ_PKP_BIL4.pdf)) respectively.

FAQs a) to c) clearly state that employers are obliged to pay their employees their full monthly salaries. That said, employers may pay a reduced salary provided that the said reduction was negotiated and agreed to by the employee without any pressure by the employer. This was also acknowledged in the MOHR’s FAQ dated 23.03.2020, Q&A 18 (see link above).

**3. Q: What can employees do if they are not paid their salaries for the MCO period?**

A: If the salary is above RM2,000.00 but below RM5,000.00, the affected employee may send a complaint via email to the MOHR or head to the nearest Human Resource office. This report will prompt the Director-General of Industrial Relations to inquire into and decide the dispute. If the salary is above RM5,000.00, the affected employee may seek to recover the debt by initiating a civil action in court.

If the affected employee feels the failure to pay his/her salary is severe enough to amount to constructive dismissal without just cause and excuse, the affected employee may make a representation to the Director General for Industrial Relations pursuant to Section 20 of the Industrial Relations Act 1967 for the matter to be referred to the Industrial Court.

**4. Q: Can employers force their employees to agree to take annual leave and/or unpaid leave for the period before the MCO commenced?**

A: Generally, annual leave is taken by the employee, subject to the approval of the employer, for personal reasons and is intended for leisure, enjoyment and travel. It cannot be enforced on the employee to suit the company's financial convenience. Therefore, employers cannot force their employees to take annual paid leave and/or unpaid leave unless specifically provided for in the employment contract and/or negotiated and agreed to by the employee.

**5. Q: Can employers ask their employees to take annual leave and/or unpaid leave?**

A: Employers may ask their employees to take annual leave and/or unpaid leave provided their employees voluntarily agree to the same. This action was endorsed by the MOHR in their FAQ No. 3 dated 31.03.2020, Q&A No. 3 which, translated in English, states:

*"3. What are the actions that employers may take during the MCO period?*

*During the MCO period, employers are advised to take the following actions:*

- i. Employers must pay the full wages and allowances in this extended movement control period.*
- ii. Subject to the agreement of both parties, the employers may offer to the employees either:
  - a) fully paid annual leave;*
  - b) half paid annual leave; or*
  - c) unpaid leave.**
- iii. If retrenchment of employees must be done, employers may refer to the Guidelines on Retrenchment Management and the retrenchment report (Form PK) which can be obtained from the website JTKSM (www.jtksm.mohr.gov.my)."*

**6. Q: Can employers retrench employees as a cost cutting measure?**

A: Although it is generally the prerogative of the company as to how it wishes to run its business efficiently and profitably, any retrenchment and/or redundancy exercise should be taken only as **a last resort**. It **must be done bona fide** (in good faith) and **in accordance with fair labour practices**.

Employers should always try to explore alternative avenues of cost-saving measures to overcome financial constraints prior to any retrenchment exercise being taken. See the Guidelines on Retrenchment Management which can be viewed at:

[http://jtksm.mohr.gov.my/images/sumber/penerbitan/garis-panduan/garis-panduan-retrenchment\\_bm.pdf](http://jtksm.mohr.gov.my/images/sumber/penerbitan/garis-panduan/garis-panduan-retrenchment_bm.pdf).

**7. Q: Prior to retrenchment, what steps can employers take to reduce cost?**

A: Generally, employers are advised to minimise the need for reductions of workforce by, for example:

- (a) Limiting recruitment;
- (b) Restricting and/or reducing overtime work;
- (c) Restricting work on weekly day of rest;
- (d) Reducing shifts or days worked a week;
- (e) Retraining employees;
- (f) Reducing the number of hours of work;
- (g) Reducing wages;
- (h) Determining alternative jobs and/or transferring to alternative departments/work in the same office;
- (i) Temporarily laying-off or shutting down, offering proper wages and assisting employees to find temporary work elsewhere until the company can recommence with its business. If the employer chooses to carry out a temporary lay-off, information regarding the lay-off will need to be reported to the Department of Labour for supervision by filing in a retrenchment report (Form PK);

- (j) By effecting prospective pay-cuts which are done fairly across the board, if all other methods have failed. This will also need to be reported to the Department of Labour for supervision by filing in a retrenchment report (Form PK).

Please note that the steps proposed in points (e) to (j) should be taken subject to written agreement by the employee or their trade union.

**8. Q: If retrenchment becomes necessary, what measures should the employer take?**

A: If retrenchment becomes necessary, despite having taken appropriate measures, employers should firstly send a retrenchment report (Form PK) to the Department of Labour.

Following this, the Guidelines on Retrenchment Management prepared by MOHR sets out as follows:

- “4.1 Hold discussions with workers or the Trade Unions representing them as soon as possible about the impending retrenchment;*
- 4.2 Offer voluntary separation/retirement scheme with reasonable rate of compensation;*
- 4.3 Pay compensation or termination benefits to eligible employees;*
- 4.4 Terminate the contracts of service of workers who have attained their retirement age;*
- 4.5 Give notice of termination of the contract of service as stipulated under the Employment Act 1955 or Labour Ordinance (Sabah Cap. 67) or Labour Ordinance (Sarawak Cap. 76) as follows:*
  - i. 4 weeks’ notice if the worker has been employed for less than 2 years;*
  - ii. 6 weeks’ notice if the worker has been employed for 2 years but less than 5 years; or*
  - iii. 8 weeks’ notice if the worker has been employed for 5 years or more;*
- or*
- according to the period of the termination notice stated in the contract of service, whichever is better;*
- 4.6 assist workers to find alternative jobs elsewhere before the retrenchment is implemented;*
- 4.7 implement retrenchment in stages over a longer period;*
- 4.8 implement the principle of “FWFO” (Foreign Worker – First Out) in the same job category, i.e. retrenching the foreign workers first; and*
- 4.9 implement the principle of “LIFO” (Last-In-First-Out) if the retrenchment only involves local workers in the same job category, i.e. retrenching according to the period of service whereby workers who have just joined will be retrenched first.”*

The Guidelines on Retrenchment Management can be found at:

[http://jtksm.mohr.gov.my/images/pdf/Borang/Pemberhentian\\_Pekerja/garis\\_panduan\\_pemberhentian\\_pekerja.pdf](http://jtksm.mohr.gov.my/images/pdf/Borang/Pemberhentian_Pekerja/garis_panduan_pemberhentian_pekerja.pdf).

**9. Q: What has the government done to provide financial relief for employers?**

A: Previously under the PRIHATIN Rakyat Economic Stimulus Plan, the government had initiated the Wage Subsidy Program of RM5.9 billion to provide RM600.00 a month to employers for each employee earning a wage of RM4,000.00 or below (limited to 100 people) for 3 months beginning 1<sup>st</sup> April 2020 to subsidise the said wages. The Ministry of Human Resource and Social Security Organization had released a FAQ to clarify the questions surrounding the Wage Subsidy Program on 01.04.2020, which can be seen at:

[perkeso.gov.my/images/pengumuman/psu/Soalan\\_Lazim\\_Program\\_Subsidy\\_Upah\\_Latest\\_1\\_4\\_2020.pdf](http://perkeso.gov.my/images/pengumuman/psu/Soalan_Lazim_Program_Subsidy_Upah_Latest_1_4_2020.pdf).

On the 6<sup>th</sup> of April 2020, our Prime Minister, YAB Tan Sri Dato’ Haji Muhyiddin Bin Haji Mohd Yassin announced the ADDITIONAL PRIHATIN Rakyat Economic Stimulus Package. The provision for the Wage Subsidy Program was increased from RM5.9 billion to RM13.8 billion, and companies with local employees earning RM4,000.00 and below will receive subsidies as follows:

- a) For companies with more than 200 employees, a wage subsidy of RM600.00 per employee for 200 employees;

- b) For companies with 76 to 200 employees, a wage subsidy of around RM800.00 per employee;
- c) For companies with up to 75 employees, a wage subsidy of RM1,200.00 per employee.

This assistance will last 3 months and is exclusively for employers registered with the Companies Commission of Malaysia (“**CCM**”) or local authorities before the 1<sup>st</sup> of January 2020 and registered with PERKESO.

For employers who choose to accept this assistance, they will have to retain their employees for at least 6 months, i.e. 3 months while receiving the wage subsidy and 3 months after that.

For more information you may refer to:

- The speech transcript of YAB Tan Sri Dato’ Haji Muhyiddin on the 6<sup>th</sup> of April 2020 at: <https://www.pmo.gov.my/2020/04/langkah-tambahan-bagi-pakej-rangsangan-ekonomi-prihatin-rakyat-prihatin/>
- The latest FAQ No. 4 issued on the 7<sup>th</sup> of April 2020 by the Ministry of Human Resource at: [mohr.gov.my/images/FAQ\\_PKP\\_BIL4.pdf](http://mohr.gov.my/images/FAQ_PKP_BIL4.pdf).

Disclaimer: The information provided herein is not intended to be taken as legal advice.

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