CLIENT UPDATE

3 April 2020

IMPACT OF THE CORONAVIRUS (COVID-19) OUTBREAK ON EMPLOYMENT LAW

a) Legal rights and obligations of Employers and Employees during the MCO Period

Employers must pay their Employees' salary together with the relevant allowances during the 28 days duration of the MCO **("MCO Period")** except for allowances related to attendance or travel. Employers cannot unilaterally reduce the salary of their Employees during or after the MCO Period without first negotiating with the Employees and obtaining their consent. If there is a collective agreement, Employers must negotiate with the Trade Union and obtain their agreement to reduce salaries. Employers cannot force their Employees to take annual leave or unpaid leave during the MCO Period. Carrying out any of the above without the Employee's consent, may result in the Employer facing a claim for constructive dismissal or claims in the Civil Courts for unpaid monies.

Employees who are in the field of "essential services" as defined in the **Schedule to the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020** are required to come to work, unless otherwise instructed by their Employers. If these "essential services" Employees are instructed to come to work but refuse to comply, they must have a valid reason for their absence, failing which the Employer can refuse to pay their salary or it may be regarded as an act of insubordination which could lead to disciplinary action and result in a summary dismissal. Employees who are not in the field of "essential services" and have been instructed by their Employers to work from home, must do so during the MCO Period, failing which they may face disciplinary action.

Employers are under a duty to keep their Employees safe at work. Therefore, any Employer who unreasonably exposes its Employee to the risk of being infected by Covid-19 may be at risk of being exposed to criminal prosecution under the **Occupational Safety and Health Act 1994** and in breach of its contractual and/or tortious duty of care towards its Employees. Employees should abide by any policies implemented by the Employers during the MCO Period to curb the spread of Covid-19, failing which they may face disciplinary action. Employees should also inform their Employers if they are aware of any risk of infection to themselves.

For enquiries please contact:

Sonia Abraham
Partner
+603 2164 0200 (ext no. 148)
sonia.abraham@azmandavidson.com.my

Allison Ong Lee Fong
Partner
+603 2164 0200 (ext no. 181)
allison.ong@azmandavidson.com.my

b) Re-evaluation of business and steps Employers can take as a result of a downturn in business due to the Covid-19 outbreak

Going through a downturn in business due to the Covid-19 outbreak and making tough decisions to keep your Company afloat can be hard. However, Employers who are able to lead with compassion will touch the hearts of your Employees and entrench their loyalty to the Company. This may result in the Company coming out of the crisis stronger than ever before.

Before taking the drastic step to unilaterally retrench your Employees, Employers should consider other options first, such as adopting cost-cutting measures like implementing a business continuity plan, reducing overtime, reducing the number of hours of work, freezing recruitment, increments and discretionary bonuses on a short term basis or conducting a Mutual Separation Scheme or Voluntary Separation Scheme on a long term basis. Under the stimulus package announced by the Government on 27 March 2020, Employers whose revenue has dropped more than 50% since 1 January 2020, are entitled to apply for a wage subsidy of RM600 a month for three months (from April to July 2020) for each Employee earning below RM4,000. However, under this programme, the Employers must not dismiss the Employees, or direct them to take unpaid leave for three months after the programme is implemented and are also not allowed to reduce their salaries.

In the event that a retrenchment is still inevitable despite having taken appropriate measures, Employers will, amongst others, be required to prove that there was a legal basis to carry out the retrenchment exercise as a result of a genuine redundancy due to the Covid-19 outbreak, the selection criteria for the Retrenched Employees was bona fide and not an act of victimization and the manner in which the retrenchment exercise was carried out is fair and in compliance with the suggested guidelines set out in **Code of Conduct for Industrial Harmony**, which includes giving early warning and paying retrenchment benefits. Foreign Employees should be retrenched over local Employees and for local Employees, Employers should comply with the principle of "last in first out".

Employers should tread with caution in deciding which path to take and consider the financial risks in the event that their actions escalate to litigation and are held by the Courts to have been premature/or and without just cause or excuse.

Disclaimer

The purpose of the article above is only to provide general information on current legal topics. Proper professional advice should be sought before taking any action based on the information in the article.