

March 2020

Coronavirus Update: Employer's Obligations in Malaysia

The spread of the novel coronavirus Covid-19 ("Coronavirus"), which has been declared as a global health emergency by the World Health Organization this year, has been a source of great concern to most employers worldwide.

This article considers some of the key issues and employment obligations that employers in Malaysia should bear in mind in dealing with this recent outbreak.

Health and Safety

Employers in Malaysia are under a legal obligation towards its employees to ensure a safe and healthy workplace. This obligation is provided under common law as well as under section 15 of the Occupational Safety and Health Act 1994 ("OSHA"). OSHA further imposes an obligation on employers to formulate a health and safety policy at the workplace. A failure to comply with the obligations under the OSHA will constitute an offence which is punishable with a fine not exceeding RM50,000 or imprisonment up to 2 years or to both.

In view of the wide ranging obligations from the health and safety standpoint, it is important for employers to devise a policy or action plan on measures that it will implement to prevent, mitigate or deal with the Coronavirus outbreak from the employment law standpoint.

In formulating such a policy, employers could consider a guideline titled "Alert, Enhanced Surveillance and Management of Avian Influenza in Human" ("MH Guidelines") which was issued by the Ministry of Health Malaysia back in September 2004 in response to responding to Avian Influenza outbreak in the country. Whilst dealing with different epidemic, some of the steps recommended under the MH Guidelines for employers would still be applicable:

- Instruct employees displaying symptoms of cough, difficulties in breathing to undergo medical examination immediately;
- Regular dissemination of Coronavirus related health information and materials to all employees and visitors;
- Cooperate with the authorities from the Ministry of Human Resources or Ministry of Health if needed, in the investigation of employees suspected with Coronavirus;
- Provide adequate facilities for employees to practice good personal hygiene such as hand soap and alcohol-based hand rubs;
- Ensure that common areas such as lifts, reception counters or door handles are cleaned and disinfected regularly;
- Periodically review and update the work process related to health risk and comply with any directives related to Coronavirus issued by the Ministry of Health or Department of Occupational Safety and Health from time to time.

Quarantine and Leave Arrangements

Employees must also bear in mind a recent guideline titled "Guidelines on Handling Issues Relating to Contagious Outbreaks Including Novel Coronavirus" issued by the Ministry of Human Resources on 5 February 2020 ("MHR Guidelines"). Although the MHR Guidelines does not prescribe any statutory obligations, employers are strongly encouraged to adhere to the same.

Under the MHR Guidelines, employers are required to take the following steps:

- **Medical examination**

Employers must ensure that employees returning from countries with Coronavirus cases such as China, Hong Kong, Japan and Singapore undergo immediate medical examinations by registered medical practitioners. The medical costs should be borne by the employer.

- **Paid sick or hospitalisation leave**

For employees who have received quarantine orders from registered medical practitioners, employers should provide paid sick leave to the employees. Employers are also encouraged to provide extra remuneration to employees with quarantine order exceeding sick leave or hospitalisation.

- **Paid quarantine**

In respect of employees who are under quarantine orders upon their return from countries with Coronavirus cases due to work requirements, such employees must be fully remunerated throughout the quarantine period.

- **No prohibition from attending work without a quarantine order**

Employers may not prevent employees from attending work if they have not been issued a quarantined order. However, employees who are taken ill may be permitted to stay at home under paid sick leave.

- **Annual / unpaid leave**

Employees should not be compelled to utilise their annual leave entitlement or be made to go on unpaid leave during their quarantined period.

From the legal standpoint, employers ought to bear in mind that it cannot in law unilaterally place employees under unpaid leave on the sole basis that the employee is suspected to have contracted the coronavirus. Leave on such basis should be treated as paid medical leave.

- **Flexible Working and Business Travel**

Employers would be within their legal rights to curtail and restrict business travel of its employees. However, the question that arises is whether it can implement a policy to curtail private travels of its employees during their private time. From the employment law standpoint, employers cannot regulate the private activities of its employees unless such activities may potentially affect the image, reputation or business interests of the employer.

Given that private travels of employees to countries affected by coronavirus may potentially affect the health and safety of other employees at the workplace upon their return from such travels, employers have a strong case to argue that it has a legitimate right to curtail and restrict non-essential private travels of its employees.

In addition, employers should also be circumspect in sending employees abroad for work to countries affected by the coronavirus. An employer's duty to provide a safe system of work is a fluid obligation and if sending employees to affected countries would expose them to health risk, employers would potentially be in breach of such a duty.

Many companies in China, Taiwan and Hong Kong have taken action to temporarily close their offices as a result of Coronavirus. As a precautionary measure, employers in Malaysia may consider invoking their work from home policy or granting their employees the flexibility to do so to prevent the spread of the coronavirus. During this period, employers may also consider to minimise business networking functions.

Employers should bear in mind that in situations where the outbreak poses immediate danger to the safety and health of workers and measures have not been taken to mitigate those risks, the Department of Occupational Safety and Health ("DOSH"), exercising its powers under section 48 of the OSHA, may issue a prohibition notice to order the closure of the workplace.

Terms and conditions of employment and manpower downsizing

The financial impact of the coronavirus to the business and economy of the country has not been assessed. However, in the event that the outbreak results in a downturn in business, employers may have to re-evaluate its business requirements and comply with the necessary retrenchment law if there is a need to reduce manpower.

As far as terms and conditions of employment are concerned, employers are not permitted in law to reduce salary or benefits unless the consent of the employees or trade union are obtained. However, employers who have collective agreements in place may seek for a variation of such contractual obligations under section 56 of the Industrial Relations Act 1967 by showing that there are 'special circumstances' to warrant such variation. In *RIH Management Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia* [2000] 2 ILR 549, an employer sought a temporary deferment of the payment of contractual increments on the basis that its occupancy rates were severely affected by JE virus outbreak. The Industrial Court ruled that the JE epidemic outbreak was not foreseeable by anyone and therefore constituted a special reason for the deferment of contractual increments.

Conclusion

The escalating impact of coronavirus is expected to continue to cause profound workplace challenges and hence it is important for employers to adhere to its legal obligations and best practices formulated by the authorities.

Written by:



Raymond T.C. Low
Partner, Employment and Administrative Law
raymond@shearndelamore.com



Grace Chai
Associate, Employment and Administrative Law
chai.grace@shearndelamore.com