MARCH:

COMBATING THE EFFECTS OF NOVEL CORONAVIRUS / COVID-19 ON EMPLOYMENT IN ORGANIZATIONS

By Leonard Yeoh & Eri Fu

TAY & PARTNERS

PART A: INTRODUCTION

Since the outbreak of the novel coronavirus / COVID-19 in January 2020, major industries such as travel, hotel, F&B, retail and manufacturing businesses in the country had felt the commercial disruptions caused by the outbreak.

In times of uncertainty, we believe it is apt for the management of all commercial organizations, particularly the human resources department, to be prepared to deal with the effects of COVID-19 on the company and its employees. This article will provide a general guidance based on the Malaysian employment laws with respect to ten (10) most frequently asked questions by employers in the wake of COVID-19.

PART B: TEN (10) MOST FREQUENTLY ASKED QUESTIONS BY EMPLOYERS

1. Is there any guideline from the authorities in managing issues on employment relating to novel coronavirus / COVID-19?

   Employers should take note of 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"). The MHR Guidelines do not prescribe any statutory obligation but employers are strongly encouraged to adhere to the same.

   The MHR Guidelines seem to focus on employees who returned from countries with COVID-19 such as China, Thailand, Japan Hong Kong and Singapore. However, given the change of circumstances after issuance of the MHR Guidelines where the outbreak of COVID-19 had spread to other countries such as South Korea, Italy, Germany, France, Spain, the United Kingdom and the United States, we opine that the guidelines are no longer limited to the few countries named in the MHR Guidelines.

Below are employers' obligations under the MHR Guidelines:

1.1. Medical Examination

Employers are to instruct employees, especially those returning from countries with COVID-19 such as China, Thailand, Japan Hong Kong and Singapore, to be examined immediately at the expense of employers. The medical examination is to be conducted by a registered medical practitioner or by a medical officer as stipulated by Section 60F of Employment Act 1955.

1.2. Leave arrangements during quarantine period

In the event that an employee has been instructed to be quarantined by a registered medical practitioner, the employer is to provide paid sick leave or hospitalisation entitlement during quarantine period, regardless the employee is quarantined at home or in the hospital. Employers are also encouraged to provide extra remuneration to employees with quarantine order exceeding sick leave or hospitalisation. This appears to mean that if an employee had fully utilised his/her paid sick leave or hospitalisation leave yet there is an on-going quarantine order, the employer is encouraged to treat the extended quarantine period as paid sick leave or hospitalisation leave.

1.3. Pay arrangements during quarantine period

For an employee who returned from countries with COVID-19 cases due to work duties and therefore put under quarantine order by a registered medical practitioner, his/her employer is to provide full pay to the employee during the quarantine period.

1.4. Preventing employees without quarantine orders to attend work

Employers cannot prevent any employee from attending work if no quarantine order has been issued by a registered medical practitioner. However, employers are allowed to instruct any unwell employee from coming to workplace by providing paid sick leave to the employee.

1.5. Annual / Unpaid leave

Employers cannot compel employees to utilise his/her annual leave entitlement or take unpaid leave during quarantine period.

While the MHR Guidelines were issued by the Ministry of Human Resources, as mentioned earlier, the guidelines do not prescribe any statutory obligations. As such, they can be challenged if it appears that such guidelines have been abused by either employers or employees.

2. During quarantine period, what is the leave arrangement to be adhered by an employer?

In the event that an employee is ordered to be quarantined by a registered medical practitioner, an employer is to treat the quarantine period as paid sick leave or hospitalisation leave regardless if the employee is quarantined at home or in the hospital. This would also mean that the employee is entitled to be fully remunerated during the quarantine period.

3. Can employers send employees to novel coronavirus / COVID-19 affected countries for work?

It is the employers' prerogative to instruct employees to travel for business. However, employers should be wary in sending employees abroad especially to countries which are affected by COVID-19. This is because an employer generally owes a duty of care and a duty to provide a safe environment for work to an employee.

Sending an employee to countries with high risk of COVID-19 would potentially expose the employee to health risk and thus breaching the employer's duties as enunciated above, which can be express or implied in an employment contract.

4. Can employers restrict employees' private travels?

Generally, an employer cannot restrict or regulate private activities of an employee. This would mean that the employer's permission or approval is not a pre-requisite for employee's private travels.

However, in view of the intensity of the outbreak of COVID-19, it is arguable that any private travel to countries affected by the virus would potentially cause the safety of work premises to be compromised upon the employee returning from his/her private travels. It would then be reasonable for an employer to query the employee's private travels.

In this regard, we would advise employers' human resources management to outline a company policy in respect of non-essential private travels during the outbreak of COVID-19. The policy may mandate employees to report any private travel during the outbreak period, arrange for alternative work arrangement such as working from home upon return from private travels or even prohibit non-essential private travels to places with high reported cases of COVID-19.

5. To what extent can employers track and disclose employees' medical information relating to novel coronavirus / COVID-19?

Given the infectious nature of COVID-19, the time has come for employers to prepare themselves with the possible circumstances of their employees being contracted with COVID-19 and subsequently expose their colleagues and/or clients/customers to infection.

Although it is the employers' prerogative to ask and be provided with data pertaining to employees' wellbeing for the purposes of human resources management, the question then arises is to what extent can an employer track and disclose an employee's medical information, especially when an employee is being contracted with COVID-19?

Any information relating to the medical condition of an employee would be personal data under the purview of the Personal Data Protection Act 2010 ("PDPA"). Such personal data, e.g. test result of COVID-19 of an employee, can only be disclosed to a third party when the employee had consented to the disclosure or in certain circumstances stated in the PDPA. Unauthorised disclosure of personal data or non-compliance of the PDPA would amount to a breach of the PDPA and the employer can be subjected to fines and/or imprisonment.

In the circumstances, employers are advised to take preventive measures by imposing human resources policies such as issuing guidelines and policies in respect of mandatory disclosure of medical condition relating to COVID-19 and to obtain consent from employees for such disclosure.

Be that as it may, employers should be cautious and handle the disclosure delicately to avoid employees from being discriminated against at the workplace upon disclosure of his/her medical condition in respect of COVID-19.

6. Can employers require employees to work in work premises which are potentially compromised by novel coronavirus / COVID-19?

Employers are bound to provide a safe and healthy workplace under the Occupational Safety and Health Act 1994, failing which an employer can be subjected to a fine or imprisonment or both.

In view of the rising numbers of local transmission cases of COVID-19, employers are advised to ensure work premises are clean and hygienic. In the unfortunate case where work premises are potentially contaminated due to certified case of COVID-19, we would advise the employer to take immediate measure to disinfect the work premises according to the authorities' standards and to comply with instructions from the authorities including closure of work premises and quarantine orders for the rest of the employees who were at the work premises.

Simply put, prior to requiring their employees to return to the work premises, employers should make sure they have taken reasonable measures to ensure the work premises are safe for their employees.

7. Can employers require employees to work in alternative work premises or remain at home?

Unlike China, there has not been any order for territorial shutdown or closure of workplace due to COVID-19 being issued by the Malaysian government or authority. However, should the need arises and subject to the terms of employment between the parties, employers may require the employees to work in alternative work premises or work from home.

8. Can employers require their employees to take paid or unpaid leave due to business downtime caused by novel coronavirus / COVID-19?

   An employer cannot require and/or compel an employee to take paid or unpaid leave during business downtime caused by COVID-19. From the legal standpoint, paid leave is employees' entitlement and it is entirely up to an employee to decide when to utilise his/her paid leave. Further, employers cannot compel their employees to take unpaid leave in order to minimize overhead cost during business downtime. However, in the event the business downtime had escalated to a redundancy situation, then the laws governing redundancy would apply.

9. Can employers require their employees to take pay cut or unilaterally deduct employees' salary during business downtime caused by novel coronavirus / COVID-19?

   It is undeniable that the outbreak of COVID-19 had impacted commercial turnover and profits in the country. Employers are facing a hard time trying to maintain business operation. In this regard, some employers have resorted to minimize overhead costs by cutting down employees' pay unilaterally.

   From the employment and industrial relations laws standpoint, an employer cannot require an employee to take pay cut or unilaterally deduct the employee's pay. The law only allows unilateral deductions of salary in limited circumstances - business downtime is not one of the permissible circumstances. Should the circumstances necessitate salary deduction, employers are encouraged to have open dialogues with employees and achieve amicable consensus between the parties. Again, in the event the business downtime had escalated to a redundancy situation, then the laws governing redundancy would apply.

10. Can employers terminate the employment of their employees during business downtime caused by novel coronavirus / COVID-19?

    Under Malaysian employment and industrial relations laws, any dismissal of a workman must be with just cause or excuse. In the event where a workman considers that he/she has been dismissed without just cause or excuse by his/her employer, he/she may make representations in writing to the Director General of Industrial Relations to be reinstated in his/her former employment.

    Business downtime per se is not a straightforward ground for termination of employment, more so when the business downtime caused by COVID-19 remains to be assessed (uncertain as to how long it will last) and the financial impact of COVID-19 would vary depending on industry. For example, a travel agency which brings travel groups from Malaysia to China would be severely impacted by COVID-19 as compared to a company which provides medical supplies - the latter may even thrive in this period of time. Employers are advised to comply with the necessary redundancy and retrenchment laws in so far as termination of employment due to extended business downtime caused by COVID-19 is concerned.

PART C: CONCLUSION

Whilst it is understandable that employers are facing difficulties during the outbreak of COVID-19, they remain bound by their contractual and legal commitments to their employees which include paying salary, security of tenure and providing a safe and healthy working environment. We encourage employers to maintain an open dialogue with their employees in respect of measures to be taken in order to overcome or reduce the impact of COVID-19.

Should you have any queries or require more information, please do not hesitate to contact Tay & Partners' Employment and Industrial Relations Practice Group.

LEONARD YEOH
Partner, Head of Litigation and Dispute & Resolution Practice Group.

For further information and advise on this article and/or on any areas of Litigation and Dispute & Resolution, please contact: leonard.yeoh@taypartners.com.my

ERI FU - Associate
eri.fu@taypartners.com.my