



Dato' Thavalingam Thavarajah
Partner
Employment
T: +603 6208 5857
E: tt@lh-ag.com



Rebecca Sonali Alfred
Associate
Employment
T: +603 6208 5892
E: rsa@lh-ag.com

2 APRIL 2020

Restructuring/Redundancy During MCO [MOHR Update]

In announcing the Prihatin Rakyat Economic Stimulus Package on 27 March 2020, our Prime Minister had discouraged retrenchment exercises on the basis that the government was going to introduce the Wage Subsidy Programme, which entails subsidising RM600 a month as wages for those earning below RM4,000 a month for a three-month duration, subject to the employer having suffered a loss of income of more than 50% since 1 January 2020.

In fact, the PM was of the view that employers should not carry out retrenchment exercises, force a pay cut or impose unpaid leave for the three months after the implementation of the Wage Subsidy Programme, which took effect on 1 April 2020.

The Social Security Organisation (**SOCSSO**) (which is the administrator of the Wage Subsidy Programme) had through its FAQ published on 1 April 2020, laid down that there is effectively a moratorium in place which prohibits retrenchment, any unilateral pay cut and the compelling of employees to take unpaid leave for a further period of three months after the expiry of the three month wage subsidy period. Thus, for example, where an employer has applied for the Wage Subsidy Programme and received the subsidy in April 2020, he can only implement any of the abovementioned cost-cutting measures in October 2020, at the earliest.

The Ministry of Human Resources (**MOHR**) has now come up with the latest guidelines dated 31 March 2020 (FAQ volume 3) which allows for retrenchment exercises to be undertaken during the extended Movement Control Order (**MCO**) (1 April to 14 April 2020), subject to the fulfilment of the following criteria:

- i. The reason that the employer's business has been affected as a result of COVID-19 must be genuine. *In this regard, we are of the view that genuineness would mean that there are, among other things, financial losses, loss of profits or cost-cutting measures already in place backed up by documentary evidence of the same;*

- ii. Prior to undertaking any retrenchment exercise, the employer must first carry out measures including, inter alia, reducing the employees' working hours, limiting overtime work, freezing new recruitment, implementing temporary lay-offs or imposing pay cuts; and

- iii. Should retrenchment be unavoidable, foreign employees must first be retrenched. If the retrenchment exercise involves local employees, the last in, first out (**LIFO**) principle should be adhered to. Notwithstanding the above, the LIFO principle can be departed from should the employer have justifications to do so. This, in our view can be in the form of an objective selection criteria i.e. based on poor attendance, disciplinary records or performance issues preceding the retrenchment exercise. It is pertinent to note that in selecting the employees to be retrenched, employees must be compared with other employees in the same category of work i.e. performing similar or like work. Furthermore, the employer must notify the Labour Department 30 days prior to the effective date of the termination of the employees' services (through the PK Form).

The takeaway from the PM's statement and the MOHR's latest guidelines is that retrenchment should only be undertaken as a last resort and companies that qualify for the Wage Subsidy Programme are not allowed to embark on a retrenchment exercise, implement any unilateral pay cut and impose unpaid leave until October 2020, at the earliest. However, for companies that are not participating in the Wage Subsidy Programme, retrenchment may be undertaken subject to the qualifications highlighted above.

Sources

1. The PM's statement dated 27 March 2020 can be accessed [here](#).
2. The MOHR'S FAQ Volume 3 can be accessed [here](#).
3. The PK Form can be accessed [here](#).
4. SOCSO'S FAQ on the Wage Subsidy Programme can be accessed [here](#).

Rebecca Sonali Alfred (rsa@lh-ag.com)

If you have any queries, please contact the author or her team partner [Dato' Thavalingam Thavarajah](#) (tt@lh-ag.com).

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia

T +603 6208 5888

F +603 6201 0122/0136

E enquiry@lh-ag.com

W www.lh-ag.com

Published by the Employment Practice

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