EMBRACING
ISSUES AND CHALLENGES DURING COVID-19

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Chapter 3

CORONAVIRUS DISEASE 2019 (COVID-19): RIGHTS AND OBLIGATIONS UNDER EMPLOYMENT LAW DURING THE IMPLEMENTATION OF THE MOVEMENT CONTROL ORDERS

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INTRODUCTION

World Health Organization (WHO) has on 11 March 2020, declared Coronavirus Disease 2019 (COVID-19) outbreak as a pandemic. The declaration is issued due to the rapid surge in the number of reported cases outside China over the preceding two weeks. As for Malaysia, since there was a steep increase in the number of COVID-19 cases recorded on a daily basis, the Prime Minister, Tan Sri Muhyiddin Yassin, has on 16 March 2020 announced the implementation of a nationwide Movement Control Order (MCO) for the period of 18 – 31 March 2020 (MCO 1). The order is enforced under the Prevention and Control of Infectious Diseases Act 1988 (PCID) and the Police Act 1967 in order to prevent the further spread of the virus nationwide. Subsequently, on 18 March 2020, the Health Minister, Dato' Sri Dr. Adham Baba, has issued the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 (PCID Regulations No 1) pursuant to section 11(2) of the PCID. The PCID Regulations No 1 has effectively enabled the government to introduce specific measures in containing the spread of COVID-19 throughout the country during the MCO. As of to date, the MCO has been extended twice by virtue of the Prevention and Control of Infectious Diseases (Measures within

the Infected Local Areas) (No 2) Regulations 2020 (PCID Regulations No 2) for the period of 1 – 14 April 2020 (MCO 2) and the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) (No 3) Regulations 2020 (PCID Regulations No 3) from 15 – 28 April 2020 (MCO 3).

Apart from these three PCID Regulations, the Ministry of Human Resources (MOHR) has issued four series of Frequently Asked Questions (MOHR FAQs) on employment issues arising out of the implementation of the MCOs on 19 March 2020, 23 March 2020, 31 March 2020 and 7 April 2020 respectively. Prior to the commencement of MCO 1, the MOHR via the Department of Occupation Safety and Health (DOSH), has on 4 March 2020 issued a Compliance Order to the Occupational Safety and Health Act 1994 (OSHA) in Relation with Preventive Measures on Contagious Outbreak of Coronavirus Disease 2019 (COVID-19) at the Workplace (Compliance Order). And earlier than that, Guidelines on Handling Issues Relating to Contagious Outbreaks Including Novel Coronavirus (2019-NCOV) (Coronavirus Guidelines) were already issued on 5 February 2020 by the Department of Labour Peninsular Malaysia (DOL), a department under the MHOR.

Nonetheless, an uncertainty arises as to whether the MOH FAQs and the Compliance Order that have been referred as 'directives' by the MOHR as well as the Coronavirus Guidelines are legally binding like the provisions of the three PCID Regulations and shall therefore be abided by all employers in the country. The issue on the status of the aforesaid documents may be referred to the judgment of the Court of Appeal in *Tenaga Nasional Berhad v Manfield Development Sdn Bhd & Anor*. The ongoing dispute between the conflicting parties was centred upon the respondents' (plaintiffs) shares in another private limited company as the appellant (defendant) had been ordered by a government's directive to purchase the shares at a fair price. Among the critical issue that ought to be judicially decided was the legal status of the directive on the appellant (defendant). It was ruled by Mohd Hishamudin Yunus (JCA) that:

"As a company, the defendant has its own board of directors who owes a fiduciary duty and is accountable to the shareholders; and the company is subject to the Companies Act 1965 and to legal principles concerning corporate governance. It cannot just obey the directive of the Government blindly... unless such a directive is clearly pursuant to a specific statutory provision, compliance with the Government's directives was merely out of deference for the Government, and not as a legal obligation".

In relation thereof, by applying the aforesaid principle on the status of the 'directives' of the MOHR FAQs, the Compliance Order and the Coronavirus Guidelines, it was argued by Jayasingam, Keat Ching and Pararajasingam (2020) that unless these documents are formulated pursuant to applicable laws, they are merely guidelines to clarify uncertainties in the law and are not legally binding on employers in the country. Nonetheless, Hon Cheong (2020) claimed that even though these documents do not have the force of law, employers are advised to take them into consideration to avoid any potential conflicts with their employees. Irrespective of the legal status, it is however pertinent to scrutinize those documents as well as the three PCID Regulations in order the comprehend the rights and obligations under the Malaysian employment laws during the subsistence of the MCOs. References are also made to the Holy Quran and Hadith of the Prophet in order to make a comparative analysis of these legal obligations from the Islamic perspectives.

PROVISION OF SAFETY AND HEALTH WORKPLACE

It is trite law that employers are mandated to provide a safe and healthy place of work under the employment law in Malaysia. The provision of safety and health workplace is generally one of the implied terms in employment contracts between employers and employees. Further, employers are bound by the provisions of the Occupational Safety and Health Act 1994 (OSHA) which inter alia aims at securing "the safety,

health and welfare of person at work against risks to safety or health arising out of the activities of person at work". This obligation on the part of employers is explicitly reiterated in section 15(1) of the OSHA which provides "It shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees". As such, all employers are statutorily mandated to the ensure the workplace is conducive to the safety and health of their employees. Failure to comply with the statutory obligation constitutes an offence under OSHA and may, upon conviction, expose such employers to a fine not exceeding RM50,000 or maximum of two years imprisonment or both.

The application of section 15 of the OSHA can be best seen in *Jabatan Kesihatan dan Keselamatan Pekerjaan v Sri Kamusan Sdn Bhd.* In this case, the employer was prosecuted for violating section 15 of the OSHA due to the death of the deceased (one of the employees) who had dropped off the employer's tractor whilst travelling through an angular corner towards the workplace. At the court of the first instance, the respondent employer was acquitted as the deceased was not working when the accident occurred. On appeal to the High Court, the discharge and acquittal of the respondent was upheld. Douglas Cristo Primus Sikayun JC ruled that section 15(1) of the OSHA imposed an obligation on the employer "to ensure the safety, health and welfare of its workers while they are at work and not when they are not working". Consequently, the respondent cannot be held liable for the accident that took place after the working hours of the deceased.

The safety and health of employees at workplace is not entirely entrusted on employers alone as section 24(1) of the OSHA requires employees to take reasonable care of themselves at the place of work and to evade acts which could adversely affect the safety or health of others. Any breach of this statutory obligation constitutes an offence which is punishable with a fine not more than RM1,000 or up to three months' imprisonment or to both. Further, non-compliance with employer's rules on safety and health is considered a misconduct that would entail disciplinary action.

The imposition of this statutory duty on employees can be seen in *Abdul Rahim bin Mohamad v Kejuruteraan Besi dan Pembinaan Zaman Kini.* In this case, the plaintiff had met with an accident whilst he was working as a general labourer with the defendant. The plaintiff sued the defendant for the personal injury suffered by him alleging that there was negligence on the part of the defendant in ensuring the safety and welfare of his employees while carrying out their work. The court decided that the defendant had failed to fulfil his statutory obligations as an employer. Nonetheless, it was further ruled that the plaintiff was equally to be blamed for the accident because he failed to comply with section 24 of the OSHA and this amounted to contributory negligence by the plaintiff.

Apart from the statutory obligations in the OSHA, the common law has also established legal principles relating to the provision of a safe system of work and a safe place of work (Ali Mohamed, 2019). This can be illustrated by the judgment of Arifin Zakaria J in *Abdul Rahim bin Mohamad v Kejuruteraan Besi dan Pembinaan Zaman Kini* whereby it was highlighted that "At common law a master is under a duty, arising out of the relationship of master and servant, to take reasonable care for the safety of his workpeople in all the circumstances of the case so as not to expose them to unnecessary risk".

In Islam, there are general teachings that the people should at all times take good care of their safety and health. This is best illustrated with verse 195 of Surah Al Maidah which says:

> *"And make not your own hands contribute to (your) destruction".*

In addition, the Prophet Muhammad S.A.W. was reported in Shahih al Bukhari (Vol 3) to have said:

> *"The companions of Allah's Apostle used practice manual labour, so their sweat used to smell, and they were advised to take a bath."*

To sum up, the aforementioned implied term in contract of employment, the statutory requirements of sections 15 and 24 of the

OSHA, the common law principles as well as the Islamic principles have all highlighted the importance of ensuring a safe and healthy workplace to their employees. In consequence, Hon Cheong (2020) submitted that these legal requirements could impose an obligation on employers to adopt suitable preventive measures in containing the spread of COVID-19 at workplace, in particular during the subsistence of MCO. For that reason, it is important to examine the three PCID Regulations and the four series of MOHR FAQs (issued after the MCO) as well as the Compliance Order and the Coronavirus Guidelines (issued before MCO) in order to facilitate the employers in discharging their legal obligation in providing a safe and healthy workplace to their employees.

By virtue of the PCID Regulations No 1, the government has essentially restricted movements and gatherings of the people in the country during the implementation of MCO 1. In a nutshell, almost all activities are halted and the majority of employers are mandated to close their premises, except those that provide essential services such as banking and finance, electricity and energy, healthcare and medical, food supply and many others as specified in Schedule 1 of the PCID Regulations No 1. As for employers of non-essential services, they may be permitted to open their premises provided that prior written permission has been granted by the Director General of the Ministry of Health in accordance with regulation 5(2) of the PCID Regulations No 1. Nonetheless, those employers are mandated to comply with regulation 5(1) of the PCID Regulations No 1 which requires them to reduce the number of employees at their place of work.

As for MCO 2, the government has gazetted the PCID Regulations No 2 in its efforts to avert the escalation of COVID-19 throughout the country. It is pertinent to underline that a few regulations in the PCID Regulations No 2 are different from its predecessor. A good illustration is a classification of 'essential services' in the Schedule of the PCID Regulations No 2, which have dropped wildlife, immigration, custom, and a few others as compared to the PCID Regulations No 1. Further, the 'control of movement' has been separated from the 'control of gathering' as the restrictions for the

former are stipulated in regulations 3, 4 and 5 whilst the limitations for the latter are contained in regulation 6 of the PCID Regulations No 2. It is apparent that these regulations have more elaborated and tighter restrictions as compared to the 'control of movement and gathering' in the PCID Regulations No 1.

With regard to MCO 3, the PCID Regulations No 3 that has been introduced for the period of 15 – 28 April 2020 contains almost similar regulations to its predecessor. Apart from the categories of 'essential services' in the Schedule, it is observed that the same arrangement of regulations has been maintained. Further, like the requirements in the PCID Regulations No 2, employees are also requested to produce authorisation letter from their employers if they are travelling to perform their official duties or other duties in relation to essential services.

Detailed analysis of the three PCID Regulations shows that the preventive measures that ought to be adopted by employers in discharging their obligations to provide a safe and healthy workplace is very minimum as compared to the MOHR FAQs, the Compliance Order and the Coronavirus Guidelines. The first series of MOHR FAQs that has been released on 19 March 2020 for instance have explicitly listed down specific precautionary measures to be followed by employers including to minimise number of employees at workplace; to provide body temperature monitoring device and take daily recording of employees' body temperature; to provide hand sanitiser and practise social distancing at the workplace; to carry out sanitation and cleaning process and many others in order to make sure the workplace is safe and healthy for the employees as required by the law.

PAYMENT OF WAGES AND ALLOWANCES

Wages are defined in section 2 of the Employment Act 1955 (EA) as "basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service...". Therefore, it is the duty of an employer to pay full wages as stated in the contract

of employment. Apart from that, section 18 of the EA also requires the period of payment shall not exceed one month. It has also been prescribed a duty of employer to pay any wages not later than the seventh day after the last day of that wage period. However, such period may be extended with the consent of Director-General if there exist reasonable justifications.

Unlike wages, allowances are given based on managerial prerogatives of an employer to his employees. Allowances are normally given to employees for the purpose of encouraging loyalty to the organisations. In certain circumstances, allowances are given subject to a person's type of job. Some are fixed and others are based on the tasks given. Nevertheless, the amount of wages does not include any allowances eligible for the employees. As such, an employer has a right to deduct any non-fix allowances in which he thinks reasonable during the MCO. For instance, during the subsistence of the MCOs, apart from essential services as stipulated in the three PCID Regulations, all employees could only be required to work from home. Therefore, several allowances such as travelling, foods and attendance allowance could be deducted by the employer.

The obligation to pay wages or other monetary forms of payment for works done is also explicitly stipulated in verse 85 of Surah Al Araf which says:

> *And to Madyan (We sent) their brother Shu'aib. He said: O my people! serve Allah, you have no god other than Him; clear proof indeed has come to you from your Lord, therefore give full measure and weight and do not diminish to men their things, and do not make mischief in the land after its reform; this is better for you if you are believers.*

This matter has also been reminded by the Prophet S.A.W in a number of hadiths as follows:

Narrated Abu Sa'id al-Khudri (RA), The Prophet (ﷺ) said:

"Whoever hires a worker should pay him his wages in full." [Reported by 'Abdur-Razzaq, and it has Inqita' (a break) in its chain of narrators. Al-Baihaqi reported it Mawsul (unbroken chain) through the narration of Abu Hanifah].

Narrated Abu Huraira, The Prophet (ﷺ) said:

Allah says, I will be against three persons on the Day of Resurrection: 1. One who makes a covenant in My Name, but he proves treacherous. 2. One who sells a free person (as a slave) and eats the price, 3. And one who employs a labourer and gets the full work done by him but does not pay him his wages.

Abu Hurairah (May Allah be pleased with him) reported, the Prophet (ﷺ) said,

Allah, the Exalted, says: 'I will contend on the Day of Resurrection against three (types of) people: One who makes a covenant in My Name and then breaks it; one who sells a free man as a slave and devours his price; and one who hires a workman and having taken full work from him, does not pay him his wages.

WORKING HOURS AND LEAVE

With the implementation of the MCO, most of the companies in Malaysia are prohibited to operate in their premises except those who are categorized as 'essential service'. However, they can still run their business operations by adopting the work from home approach. Nevertheless, the new approach is still subjected to the existing employment laws particularly on working hours and leaves that ought to be adhered to by all employers.

With regard to working hours, section 60A(9) of the EA 'hour of work' as the time during which an employee is at the disposal of the employer and is not free to dispose of his own time and movements.

Section 60A(1) states that an employee shall not be required to work:

1. More than five consecutive hours without a period of leisure of not less than thirty minutes duration;
2. More than eight hours in one day;
3. In excess of a spread over period of ten hours in one day; or
4. More than forty-eight hours in one week.
5. It is pertinent to highlight that there are some exceptions to the provision above as stated in section 60A(2), whereby in certain circumstances, an employee is allowed to exceed the limit of hours prescribed in the case of:
6. Accident, actual or threatened, in or with respect to his place of work;
7. Work, the performance of which is essential to the life of the community;
8. Work essential for the defence or security of the country;
9. Urgent work to be done to machinery or plant;
10. An interruption of work which it was impossible to foresee; and
11. Work to be performed by employees in any industrial undertaking essential to the economy of Malaysia or any "essential service" as defined in the Industrial Relations Act 1967.

Pertaining to overtime, the EA has defined an 'overtime' as the number of hours of work carried out in excess of the normal hours of work per day. In exercising an overtime, the Industrial Court in *Kulitkraf Sdn. Bhd.* v *Kesatuan Sekerja Dalam Pembuatan Kasut Kebangsaan* (Award 256/1990) has set the rule that it is the right of the management to demand their employee to do overtime, provided that:

1. There is a need for overtime work;
2. The overtime work is paid;
3. The overtime work is not intentional with the purpose of interfering with the employee; and
4. The overtime work is fair and reasonable.

Regarding leaves, the EA accords several types of leaves to employees in Malaysia. Firstly, annual leave which is stipulated in section 60E that every employee shall be entitled to paid annual leave as follows:
If employed for a period of 12 months but less than two years, the number of leave he is entitled to is eight days;

If employed for a period of two years but less than five years, the number of leave he is entitled to is 12 days; or
If employed five years or more, the number of leave he is entitled to is 16 days.

Further, section 60F of the EA states that an employee is entitled to paid sick leave at the expense of the employer on several conditions;

1. Examination is conducted by a registered medical practitioner appointed by the employer;
2. Examination is conducted by a dentist;
3. If no medical practitioner is appointed or, if having regard to the nature or circumstances of the illness, the services of the medical practitioner so appointed are not obtainable within a reasonable time or distance, examination is conducted by any other registered medical practitioner or by a government medical officer; or
4. The employee must inform or attempt to inform the employer of such sick leave within 48 hours from when it commenced.

Other than sick leave mentioned above, employees in Malaysia are also entitled for another paid sick leave if they are not hospitalized. Nevertheless, this benefit varies according to their period of service. Finally, female workers are also entitled to maternity leave of up to 60 days for every confinement as stated in Part IX of the EA.

In Islam, though there is nowhere mentioned in the Quran and Sunnah on the specific working hours and leave entitlement for an employee, it is impliedly understood that employers are generally obliged to protect the welfare of their subordinates and not to cause hardship or impose unnecessary burden that is beyond their

capabilities. This can be clearly seen in verse 159 of Surah Al Imran which says:

> *"And by mercy of Allah you dealt with them gently. And had you been severe and harsh, they would have broken away from about you."*

On a similar note, the Prophet SAW was reported to have said:

> *"Your slaves are your brethren upon whom Allah has given your authority. So, if one has one's brethren under one's control, one should feed them with the like if what one eats and clothe them with the like of what one wears. You should not over burden them with what they cannot bear, and if you do so, help them in their hard job."*

CONTRIBUTIONS UNDER SOCIAL SECURITY LAWS

Employers are statutorily required to make some contributions under social security laws such as contributions to Employees Provident Funds (EPF) under the Employee's Provident Fund Act 1991 and the Employee Social's Security Act 1969 for their employees. These obligations are mandatory even during the MCOs.

Employees Provident Fund Act 1991

The Employees Provident Fund Act 1991 (EPFA) was enacted with a special purpose to safeguard the interest and welfare of the employees through their contributions or savings after retirement. EPFA has required both parties in contract of employment to contribute when the employee is employed for more than one month. Although the main objective of this contribution is for saving for welfare of employees after their retirement, they may withdraw certain amount from their contribution account for specific purpose as permitted by the government such as for payment of house loan deposit.

Recently, realising the impact of MCO to employers and employees, the EPF has introduced Employer COVID-19 Assistance Program (e-CAP) to support SMEs affected by the MCO. This new mechanism will allow both employer and employee to restructure their monthly contribution up to four months, starting from April until June 2020. Not only that, the employees also may withdraw up to RM 500 per month from their contribution account.

Employee's Social Security Act 1969

The Employee's Social Security Act 1969 (ESSA) was enacted with the prupose to provide employee insurance scheme for all employees in private sector. It is mandatory for all employers in the private sector who employ one or more employee in their industry to register and contribute to the SOCSO.

Through amendment in 2004, SOCSO has required all employees who are employed under contract of service earning a salary of RM 3000 or less to be registered and cover under the insurance scheme. However, for those who earn more than RM3000, they may choose to contribute to SOCSO on condition that the employer agrees to contribute.

During the outbreak of COVID-19 pandemic, SOCSO has also come up with incentive for employers and their employees. SOCSO will conduct a screening process for all workers in companies that have been permitted to operate during the Movement Control Order. This screening process will be conducted by SOCSO's panel clinics and supervised by officers from the Ministry of Health.

CONCLUSION

It is apparent that the implementation of the MCOs during this global pandemic has raised several issues relating to the rights and obligations of employers and their employees. Closing down the operation of several industries which are regarded as non-essential services

for indefinite period has forcibly caused most of the companies to restructure and rationalise their operation to meet their operation costs. They believe that such actions are crucial and necessary to save the company from keep losing due to the business closure. As a rapid developing country Malaysia, industrial harmony is always a priority and concern of the government to ensure the substantiality of the country's economic growth. Therefore, several incentives such as levy and subsidies are welcoming by industrial key players. Nonetheless, it is submitted that several directive actions and general obligations as stated in the existing laws such as in the EA and other social security laws are comprehensive enough to govern and control such unpredicted accident in order to maintain good relationship between these employers and employees in the country.

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