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Employment

## Movement Control Order – Update on Employment Issues

### Introduction

In our update issued on 18 March 2020, we reported on the declaration of the Movement Control Order by the Government of Malaysia (“**MCO**”). Since the issuance of the MCO, business has slowed substantially for essential services providers and come to a standstill for others. The prospect of the MCO being extended beyond the initial restriction period i.e. 18 March 2020 to 31 March 2020 (“**Restriction Period**”), is weighing heavily on the minds of business owners. The need to minimise expenses and conserve cash at a time when revenue has fallen substantially has given rise to questions of what employers can do to secure their business and at the same time support their employees.

In this update, we examine various laws and pronouncements and explain their effects on the employer-employee relationship. We analyse in particular the two FAQs issued by the Ministry of Human Resources (“**MOHR**”) on 19 March 2020 and 20 March 2020.

#### **Are Employers Obligated to Pay Employees Full Wages During the Restriction Period?**

The FAQ dated 19 March 2020 provides that employers shall pay full wages (including allowances) to all of its employees during the Restriction Period. This includes employees who are paid daily wages or those without fixed wages. For employees who are paid daily wages, such amount shall be paid in accordance with the terms and conditions of the employment contract between the employer and the employee.

For employees without fixed wages i.e. paid based on piece rate, tonnage, task, trip or commission, the daily rate should not be less than the minimum wage rate prescribed under the Minimum Wages Order 2020. Please refer to our [Client Update](#) on the changes under the Minimum Wages Order 2020.

#### **Are Employers Obligated to Pay Employees who are Unable to Work or Refuse to Work During the Restriction Period?**

Employers are obliged to pay full wages regardless of whether the employees are working from home or remotely or are unable to perform their usual functions due to the restrictions imposed during the Restriction Period.

However, if an employee is employed by a business that is designated as an essential services provider pursuant to the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020 (“**Regulations**”), and such employee refuses to work during the Restriction Period due to concerns of exposure to COVID-19, the employer will not have to pay wages to such employee, unless the employee utilises his/her annual leave entitlement during the Restriction Period.

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### **Are Employers Required to Pay an Employee of Non-Essential Services who Refuses to Work Remotely During the Restriction Period?**

If the function of such refusing employee is not impeded by the restrictions of the Regulations and the employee has been provided with the necessary equipment or facilities to work remotely, his/her refusal to work during the Restriction Period amounts to a breach of his/her employment contract. In such circumstances, the employer may consider taking disciplinary action against the employee.

However, an employee may elect to use his/her annual leave to be excused from work during the Restriction Period.

### **Can Employers Compel their Employees to Utilise their Annual Leave or Take Unpaid Leave During the Restriction Period?**

No. Employers may not compel their employees to be on annual leave as annual leave is an entitlement given to employees which is exercisable at each of the employee's discretion. Any employer who deducts its employees annual leave or imposes unpaid leave on its employees during the Restriction Period may be exposed to claims of constructive dismissal by the affected employees.

For employees falling within the Employment Act 1955 ("EA Employee"), an employer who fails to pay full wages to an EA Employee within the prescribed time commits an offence and if convicted, shall be liable to a fine not exceeding RM10,000. If the offence is committed by a body corporate, any person who is a director, manager or other similar officer of the body corporate shall be personally liable for the offence.

### **Are Employees Considered Redundant if they are not Able to Perform their Usual Role During the Restriction Period?**

Redundancy is a situation where there has been a cessation of, or diminution in the requirements of the company's business for the employee to carry out the kind of work which the employees have been engaged to do. Employees who are prevented from performing their usual functions due to the restrictions imposed during the Restriction Period will not automatically be considered redundant as the MCO is temporary in nature. If the employee can reasonably be expected to resume his/her duties once the Restriction Period is over, the Courts are unlikely to accept the employer's contention that the employee is redundant.

### **Can an Employer Retrench its Employees if there is a Genuine Case of Redundancy?**

In the FAQ issued on 20 March 2020, MOHR has also acknowledged that retrenchment of work force due to surplus of labour is the prerogative of the employer. Notwithstanding that, the employer must be able to establish the following grounds prior to proceeding with retrenchment:

- (i) there is a genuine need for retrenchment due to the impact on business arising from the COVID-19 outbreak;

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- (ii) the employer has considered all alternatives to avert retrenchment – such as reduction of working hours, moratorium on new employment, limited overtime, wages reduction and temporary lay-offs; and
- (iii) if retrenchment is inevitable, foreign employees must be terminated first and for the last-in-first-out principle to apply to local employees.

If the Restriction Period or the generally dull economic climate has caused a reduction in business, and the employer, upon considering all alternatives to avert retrenchment, concludes that there is a surplus of labour, the employer is entitled to consider retrenchment as an appropriate measure to address the issue. The declaration of the Restriction Period has not changed the law in this respect. In order for employers to defend against claims of unfair dismissal, they need to be able to show that they genuinely believed redundancies existed, and that they considered practical measures to try to avoid retrenchment.

### **Is the Employee's Failure to Carry Out his/her Usual Functions which he/she has Been Employed for During the Restriction Period a Frustration of the Employment Contract?**

No. The Restriction Period is temporary. The employee will be able to perform his/her employment contract by the end of the Restriction Period unless there is a change in the law or directives imposed by the Government post-MCO, which may render the nature of work contracted between the employer and the employee to be radically different from those contemplated at the formation of the contract or that the performance of his/her usual functions has become unlawful.

***This update is prepared as an alert to clients on the FAQs. This update is not intended to be a legal advice in any respect. As the FAQs are not legally binding, we would be happy to provide a more comprehensive analysis of the law and to advise on specific circumstances faced by businesses following the MCO.***

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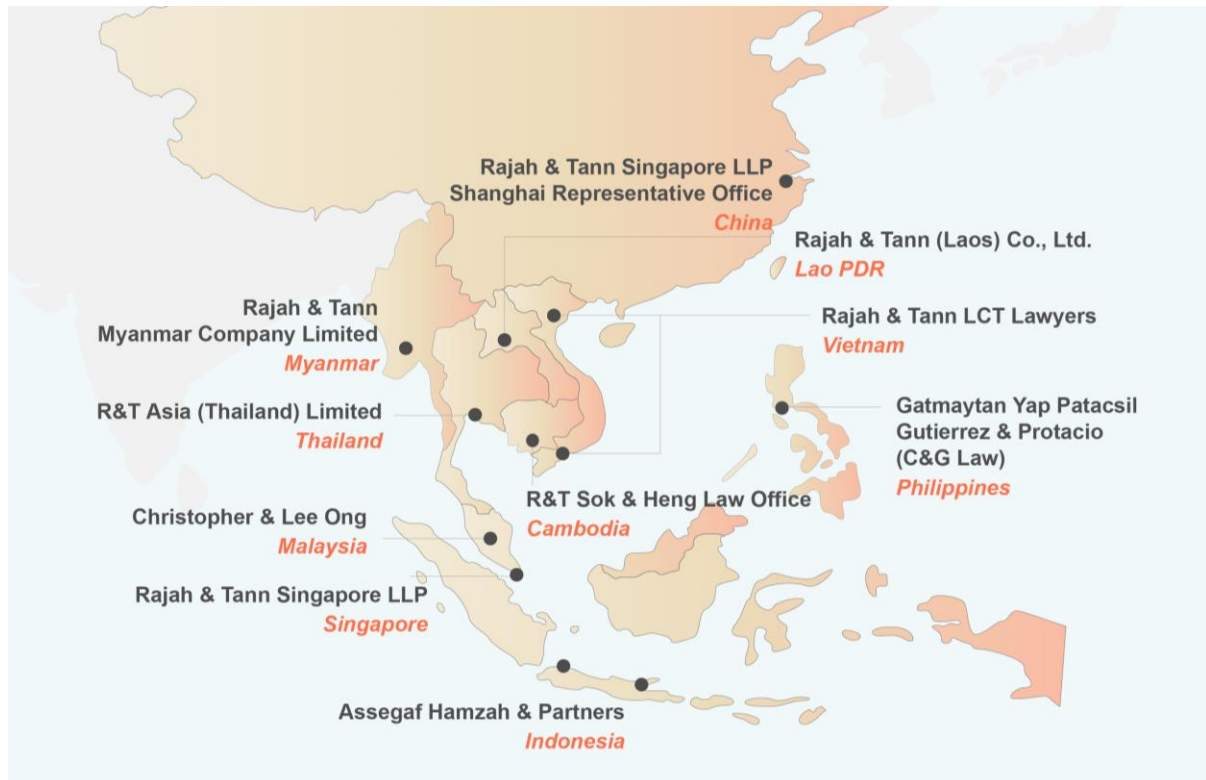
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