
Workplace & Employment

Movement Control Order: Update on Employment Issues

Introduction

The Movement Control Order by the Government of Malaysia (“**MCO**”) which started on 18 March 2020 has been extended till 28 April 2020 (“**Restriction Period**”).

In this update, we discuss the initiatives introduced by the Government to assist employers and employees during the Restriction Period and the updated FAQs issued by the Ministry of Human Resources (“**MOHR**”) as a result of consultations with stakeholders in the wider industry.

Government Initiatives to Assist Employers and Employees

Employee Retention Programme (“**ERP**”)

The ERP was introduced on 16 March 2020 as part of the revised 2020 Economic Stimulus Package. It aims to assist employers affected by the COVID-19 outbreak that are required to take cost-cutting measures by issuing notices requiring employees to take unpaid leave (“**CTG Notice**”). The Social Security Organisation (“**SOCSSO**”) is offering financial assistance of RM600 per month to affected employees (excluding foreign workers) who have been given a CTG Notice for a minimum of 30 days from 1 March 2020 onwards. Employers will receive the ERP subsidy from the SOCSSO monthly and are responsible for crediting the payment directly into the affected employees’ bank accounts within seven days upon receipt of payment from the SOCSSO.

The ERP is only applicable to employees earning RM4,000 and below and is for a maximum duration of six months. The employer and affected employees must already be registered and contributing to the Employment Insurance Scheme (“**EIS**”).

Employers may apply for the ERP by emailing the completed forms and relevant documentation to erpc19@perkeso.gov.my.

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EIS Benefits

Since 1 January 2018, employers and employees in the private sector have been required to pay monthly contributions under the EIS. Affected employees are entitled to the following monetary benefits in the event of loss of their employment due to, amongst others, retrenchment and redundancy¹:

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|-------------------------------|---|--|
| Job Search Allowance (“JSA”) | : | A monthly allowance for a minimum of three months and a maximum of six months where the affected employee is looking for a job. |
| Reduced Income Allowance | : | A lump sum payment to those who have multiple jobs and have lost at least one, but not all of their jobs. |
| Early Re-Employment Allowance | : | A lump sum payment to JSA recipients who have managed to return to work while waiting for the first instalment of the JSA or while they are still receiving the JSA. |
| Training Allowance | : | A monthly allowance for a maximum of six months to encourage the affected employee to attend all relevant vocational training under the EIS. |

Affected employees must apply for the monetary benefits under the EIS within 60 days after their loss of employment (i.e. retrenchment). They must also have made the required number of monthly contributions to the EIS over an eligibility period specified under the Employment Insurance System Act 2017.

Affected employees may [apply online via SOCSO](#).

Wage Subsidy Programme (“WSP”)

The WSP was introduced to assist employers in retaining their employees. Once the employer’s application for the WSP is approved, the SOCSO will provide a wage subsidy for each entitled employee earning a monthly salary of RM4,000 and below, to the employer. Employers may apply for the WSP via the [online application form](#).

¹ <https://www.perkeso.gov.my/index.php/en/benefits-of-eis/types-of-benefits>

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Overview of the WSP

Size of the Business	75 employees or less	76 to 200 employees	201 employees or more
Financial assistance	RM1,200 a month for each employee	RM800 a month for each employee	RM600 a month for each employee
Limit of employees	75 people	200 people	200 people
Period of subsidy	Three months	Three months	Three months
Conditions for Eligibility			
Rate of reduction of revenue or sales	No conditions applicable	50% or more reduction in revenue or sales from January 2020 or the months after January 2020	50% or more reduction in revenue or sales from January 2020 or the months after January 2020
Registration of the employer	<ol style="list-style-type: none"> The employer and the employee must be registered with and contribute to the SOSCO. Employer has registered with the Companies Commission of Malaysia or the local authority prior to 1 January 2020. Employer has started operations prior 1 January 2020. 		
Employees salary	Employees earning RM4,000 or less		
Other conditions	For employers who choose to accept this assistance, they are subject to the condition to retain their employees at least for a period of six months, that is within three months whilst receiving this wage subsidy and a further three months after the subsidy period.		
Date of enforcement	Commencing from 1 April 2020		
Form of application	Applications are to be presented by the employer through the webpage from 9 April 2020.		
Last date of application	15 September 2020 or subject to the remaining funds that are provided or any decision of the Government.		
Form of payment	The WSP will be credited to the employer's account within 7 – 14 days from the date of approval.		

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Can an Employer After Receiving WSP Impose Unpaid Leave, Reduce the Wages or Retrench its Employees?

Upon receiving the WSP, employers are not allowed to carry out a retrenchment exercise, impose unpaid leave or force a reduction of wages of its employees throughout the three-month period and the subsequent three months after the WSP period². The fourth FAQ issued by the MOHR states that under the WSP, these measures cannot be carried out even if they are mutually agreed between the employer and its employees. The employer must also continue to pay regular social security contributions under the SOCSO and the EIS based on the salary of its employees in the regular manner. If the employer makes any further applications for the WSP, it must inform the SOCSO of any changes to the list of names of employees submitted, employer's profit rate, business status or any other related information.

If an Employer Does not Utilise the WSP, Can an Employer Retrench its Employees at Any Time?

Yes, an employer who does not utilise the WSP may retrench its employees at any time. However, the employers are subject to the relevant Malaysian laws in this respect, including but not limited to the Employment Act 1955 and the Industrial Relations Act 1967.

Can an Employer that Started Operating Prior to 1 January 2020 but is Not Registered Under the SOSCO Apply for the WSP?

Yes, any employer that wishes to utilise the WSP but has yet to register with the SOSCO may do so, under the following conditions:

- (i) the organisation has registered under the Companies Commission of Malaysia, a local authority, or the relevant authority of the professional service, scientific, or technical body;
- (ii) the organisation has at least one employee; and
- (iii) the organisation registers itself with the SOSCO.

Can an Employer who Applied Under the WSP that was Announced on 27 March 2020, Reapply Under the WSP that was Announced on 6 April 2020?

Yes, any employer who applied pursuant to the 27 March 2020 WSP announcement and has more than 100 employees can make a fresh application for its remaining employees so long as the total number of affected employees does not exceed 200.

²[https://www.perkeso.gov.my/images/Soalan%20Lazim%20Program%20Subsidi%20Upah%20Latest%2031032020%20\(20.43\).pdf](https://www.perkeso.gov.my/images/Soalan%20Lazim%20Program%20Subsidi%20Upah%20Latest%2031032020%20(20.43).pdf) at No. 6(iv)

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How can an Employer with More Than 76 Employees Prove the Reduction in Profits or Sales of 50% or More?

The reduction in revenue and sales can be proved through supporting documents that show the total revenue and sales in January 2020 in comparison to the months following January 2020.

Where an Employer Has Many Different Departments/Divisions/ Branches/Units, is the Employer Entitled to Choose Which of its Employees from its Various Departments/Divisions/ Branches/Units for the WSP Application?

Yes, the employer may choose any of its local employees who earn less than RM4,000 for the purpose of the WSP.

If an Application Under the WSP is Made After April 2020 (i.e. June 2020), Will the WSP Be Paid from April Retrospectively, or from June Onwards?

There will be no backdated payments under the WSP. All payments will be made from the date of the application onwards.

Can an Employee Make an Application Under the WSP?

No, all applications must be made by the employer.

How would an Employer Pay its Employees if it Utilises the WSP?

An employer would pay its employees' usual salaries at the same rate and subsequently produce its application under the WSP to the SOSCO. This subsidy is a form of financial assistance to employers. Payments to the SOSCO and the EIS will continue based on the employee's actual salary.

If an Employee Works at Company A and Company B and Contributes to SOSCO, are Both Companies Entitled to Apply Under the WSP?

Yes, both companies are eligible to apply under the WSP for the same employee as long as they meet the requisite application criteria.

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Employees Provident Fund (“EPF”)

i-Lestari Account 2 Withdrawal Scheme

The new i-Lestari Account 2 Withdrawal Scheme will allow EPF contributors that are below 55 years of age to withdraw a maximum of RM500 monthly from their savings in Account 2 for a period of 12 months³. Applicants are only required to make a one-time application and payments will be issued on a recurring monthly basis for the eligible months⁴.

Applications for the i-Lestari Account 2 Withdrawal Scheme are open from 1 April 2020 to 31 March 2021. Eligible applicants may [apply online via i-Akaun](#). Alternatively, eligible applicants can complete the application form manually (available on the [EPF website](#)) and submit it along with the supporting documents to ilestarimohon@epf.gov.my or via post/registered post/courier to Kumpulan Wang Simpanan Pekerja, Beg Berkunci No 220, Jalan Sultan 46720 Petaling Jaya.

Reduction of EPF Statutory Contribution Rates for Employees

Pursuant to the 2020 Economic Stimulus Package announced on 27 February 2020, the EPF has reduced the employee’s share of the statutory contribution rate from 11% to 7%. This new rate will affect April 2020’s wage (May 2020’s contribution) up to December 2020’s wage (January 2021’s contribution) subject to the Third Schedule of the Employees Provident Fund Act 1991. The new statutory contribution rate for employees applies to those below 60 years old who are liable for contribution⁵.

EPF contributors can choose to maintain their employee contribution rate at 11% by completing the Borang KWSP 17A (Khas 2020) (available on the [EPF website](#)) which must be submitted via their employers.

Customised Advisory Support

The EPF is also providing customised advisory support for employers from 15 April 2020 onwards. These include consultation on options for deferral of payments, restructuring and rescheduling of employers’ contributions.

³ <https://www.kwsp.gov.my/-/applications-for-i-lestari-open>

⁴ <https://www.kwsp.gov.my/en/faq-i-lestari#i-Lestari-Withdrawal>

⁵ <https://www.kwsp.gov.my/-/reduction-of-statutory-contribution-rate-for-employees>

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FAQ No. 3: Updates by the MOHR

On 31 March 2020, the MOHR released its third FAQ to clarify the obligations and rights of employers and employees (“**Third FAQ**”) during the Restriction Period. Generally, the existing MCO restrictions will continue to be applicable throughout the Restriction Period. We set out an analysis of some of the pertinent issues covered under the Third FAQ below.

Do Employers Still Have to Pay their Employees Throughout the Restriction Period?

Yes. Employers must pay their employees’ wages and fixed allowances (other than allowances related to attendance or travelling that are not carried out during the Restriction Period).

Subject to the agreement of the employer and the employee, the employer may offer the employee fully paid leave, half-pay leave or unpaid leave.

Can Employers Affected by the COVID-19 Outbreak Retrench their Employees?

Please refer to our [Client Update](#) on the retrenchment of employees in a genuine case of redundancy. The Third FAQ further prescribes that any retrenchment of employees must be made known to the nearest Department of Labour via an employment notification retrenchment form at least 30 days before the retrenchment is conducted. Such notification is not new and is required by law for the retrenchment of employees, temporary lay-offs and reduction of wages under the Employment (Retrenchment) Notification 2004.

What Must Employers Do if their Employees are Suspected of or Have Been Tested Positive for COVID-19 (“Positive Employees”)?

The Positive Employees must be asked to identify all individuals that have worked in close proximity to them (3 to 6 feet) in the last 14 days before the suspected / positive COVID-19 diagnosis. Employers must instruct all employees that have come into close contact with the Positive Employees to self-quarantine at home for 14 days. In this respect, employers must keep the information of the Positive Employees confidential.

Employers must also disinfect the affected workplace. If the workplace is in a building or a shared office space, the employers must inform the relevant building management so that appropriate precautions can be taken.

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If an Employee is Tested Positive For COVID-19, Can an Employer Require its Other Employees to be Absent from Work?

Employers can require certain employees to go on paid leave to preserve the health and safety of others. The salaries of these employees cannot be reduced, and the employer is prohibited from forcing any employees to take unpaid leave.

Will the Duration of the Restriction Period be Included When Calculating the Time Limit for an Employee to Bring an Unfair Dismissal Claim Under Section 20 of the Industrial Relations Act 1967 (“IRA”)?

By section 20 of the IRA, if an employee considers himself/herself to be dismissed without just cause or excuse by his/her employer, the employee must make a representation in writing to the Director General of Labour within 60 days of his/her dismissal for it to be referred to the Industrial Courts for an award. According to the Third FAQ, the Restriction Period is to be disregarded in calculating the time period in which an employee is allowed to make an unfair dismissal representation to the Director General of Labour.

FAQ No. 4: Updates by the MOHR

On 7 April 2020, the MOHR released its fourth FAQ (“**Fourth FAQ**”) to clarify, amongst others, the wage subsidy programme and reporting obligations to the Department of Occupational Safety and Health (“**DOSH**”).

Is COVID-19 an Occupational Disease that is to be Reported to DOSH?

Based on the Occupational Safety and Health (Notification of Accident, Dangerous Occurrence, Occupational Poisoning and Occupational Disease) Regulations 2004 (“**Regulations**”), COVID-19 may be categorised as an occupational disease. Employers of employees with occupations that involve working with activities that have direct contact with the COVID-19 virus, such as doctors, nurses, laboratory workers and researchers are required to report incidents of COVID-19 cases to DOSH. Such reports are to be [made online via DOSH](#).

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Employee A and Employee B are Manufacturing Operators in an Electronic Factory. Employee A has Been Infected with the COVID-19 Virus from An Outside Source. Employee B Was then Infected with the COVID-19 Virus from Interactions with Employee A at Work. Should These Cases be Reported as an Occupational Disease to DOSH?

No. This is because the above incidents are not occupational diseases as defined under the Regulations since the scope of work of Employee A and Employee B does not involve direct contact with the COVID-19 virus.

Legal Standing of the FAQs

There is a wide assumption that the FAQs and directives issued by the MOHR are legally binding. For any guideline, directive, circular or order by the executive branch of Government to have the force of law, it must be issued pursuant to a power given by law⁶. In fact, if the FAQ is intended to attract penal consequences, the relevant sections of the primary legislation need to be referred to in the FAQ⁷.

The Employment Act 1955 (“EA”) and IRA confer powers on the MOHR to make necessary regulations (which have to be gazetted) for the implementation of the respective legislation. However, there are no provisions allowing the MOHR to issue guidelines or circulars (i.e. the FAQ), as is found in other legislation. All FAQs issued by the MOHR so far also do not specify that they are issued pursuant to any legislation.

The first FAQ issued by the MOHR on 19 March 2020 does state that non-compliance with the MCO is an offence under Regulation 7 of the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020. However, the said regulations and the subsequent Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) (No. 2) Regulations 2020 (gazetted to extend the Restriction Period), do not regulate the payment of salaries of employers during the Restriction Period. Further, only the Director General of Health (Ministry of Health), and not the MOHR, is empowered to issue orders and regulations pursuant to the Prevention and Control of Infectious Diseases Act 1988.

The Third FAQ recommends that employees make a complaint to the nearest Department of Labour office if their employer does not adhere to the requirements of the FAQ (e.g. failure to pay full wages and allowances during the MCO)⁸. Whilst the Director General of Labour is empowered to inquire into and decide on any dispute between employers and employees, this is generally limited to wages due to an employee under any term of their employment contract, provisions of the EA and its subsidiary legislation and provisions of the National Wages Consultative Council Act 2011. There are also no

⁶ *Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri* [2019] 2 MLJ 433 at [33]

⁷ *Edwin Wong Lee Tuck v Pendakwa Raya* [2016] MLJU 581

⁸ FAQ No. 3

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specific penalties on the breach of any guideline, directive, circular or order issued by the MOHR or the Department of Labour.

The reporting obligations to DOSH under the Fourth FAQ are based on a statutory obligation pursuant to the Occupational Safety and Health (Notification of Accident, Dangerous Occurrence, Occupational Poisoning and Occupational Disease) Regulations 2004. As such, non-compliance with the same may lead to a penalty of RM10,000 fine or to imprisonment for a term not exceeding one year, or to both (see Regulation 13 of the Regulations).

Accordingly, it is unlikely that the Director General of Labour can take any action strictly for a breach of the provisions of the FAQs. Any enforcement actions will be limited to the non-compliance with payment of wages in accordance with the EA and its subsidiary legislation and minimum wages under the National Wages Consultative Council Act 2011. The usual avenues of unfair and constructive dismissal are also still open to affected employees. That said, the Industrial Courts are likely to take cognisance of the FAQs in any claims brought by the employees against their employers for unfair and/or constructive dismissal.

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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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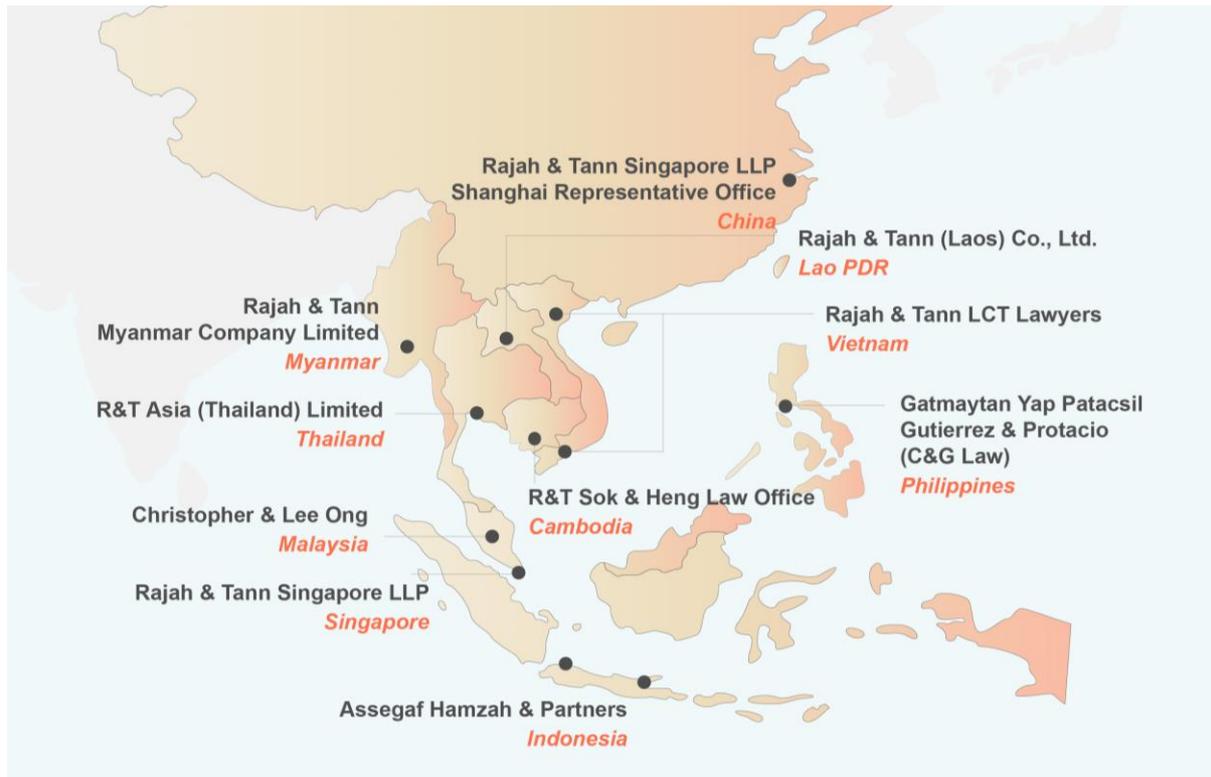
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