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## **DEALING WITH EMPLOYMENT ISSUES DURING AND POST THE MOVEMENT CONTROL ORDER (MCO) PERIOD**

*By Mr. Kee Tong Kiak in English and Mandarin*

### **FAQ**

**1. Can the employees be forced to take annual leave or unpaid leave during the Movement Control Order (MCO) period?**

A: If the contract of employment provides for power to the employer to require the employees to take annual or unpaid leave during temporary shutdown, then the employer may do so. Otherwise it may be done only with written consent (agreement) of the employees. The law is that in the absence of contractual provision, the employer may not force the employees to utilise their annual leave or take unpaid leave.

The need for agreement is also stated in the FAQ No. 3 issued by MoHR on 31.3.2020 where it stated that subject to the agreement of both parties, the employer may offer to employees either:

- a) Paid leave;
- b) Half pay leave;
- c) Unpaid leave.

Note: The terms of the contract of employment may be found in the letter of offer, employee handbook, rules and regulations, staff memo and etc.

## **2. Must the employer pay full salary during MCO period?**

A: In the FAQ issued by the Ministry of Human Resources (MoHR) on 19.3.2020, the Ministry has given directives that the employer may not force the employees to take annual leave or unpaid leave and the employer must pay the employees salary in full during the period of MCO. It was also stated that that it is an offence under the Regulation 7 of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 for the employer to breach the directives and if found guilty, the employer may be fined not exceeding RM1,000.00 or imprisoned for a term not exceeding 6 months or both.

The Ministry has not stated what law it is relying on to hold the position.

As far as we are concerned, there is no provision in the Prevention and Control of Infectious Diseases Act 1988 or the Employment Act 1955 providing that the employer is required to pay full wages during temporary shutdown.

We would advise the employer to first take a look at the contract of employment to ascertain whether the employer is given the power to reduce the employees' wages during temporary shutdown. If there is none, we have to look at the common law.

There are conflicting authorities on this issue. On the one hand, there are authorities where it was held that it is unfair to require the employer to pay full wages to the employees during temporary shutdown and that it is fair for the employer to cut 50% of the employees' wages during such shutdown. There was a case which allowed reduction of 66%. On the other hand, there are authorities where it was held that if there is no provision in the contract giving such power to the employer, the employer has no power to reduce the employees' wages.

Our view is that:

- a) Section 2 of the Employment Act defines wages as basic wages and other payments in cash payable to an employee for work done. Naturally, if there is no work done, there should be no pay. This is also reinforced by section 23 which provides for situations where wages is not due for absence from work;
- b) We believe that there is a lacuna in the law;
- c) Therefore it is unfair to require the employer to pay full wages to the employees during temporary shutdown and a 50% reduction may be acceptable and fair.

Our advice is to engage the employees and get them to understand the critical situation everybody is currently facing and the need for the employer to reduce their wages. The best possible way is to get their agreement in writing.

We do have to caution you that if you can't get their agreement in writing but still proceed to reduce their wages, you may have to see them in court if there are any complaints and there may also be criminal charges.

## **3. Do WhatsApp and Telegram messages constitute as written consent?**

The Evidence Act allows electronically transmitted messages as evidence in court. In the case of WhatsApp and Telegram messages, the employer may adduce the evidence in court subject to proof that the messages are from or sent to that particular employee.

- 4. If the employer allows the employees to work from home, does the employer have to pay full wages as it is almost impossible to quantify whether they are working full time as how they would normally do at the office?**

If their nature of work permits them to work from home, then they would be considered working and would be entitled to receive full wages.

- 5. If the employer pay full wages during MCO though the employees are not working, can the employer require the employees to work on Saturdays after MCO?**

The employer may not ask employees to work on extra days in May and June just because they have been paid in full in March and April though they did not have to work. Depending on the contract, they may claim OT.

- 6. Due to Covid-19 epidemic, a new employee who was supposed to start working on the 1st of April will now start on 16th of April. Does the employer have to pay his salary from the 1st of April to 14th of April?**

If the contract of employment provides that he was to start on 1<sup>st</sup> April, then his period of employment commenced on 1<sup>st</sup> April and he should be paid from 1<sup>st</sup> April unless he agrees with the employer to defer the commencement date to 16th of April. However he may be subjected to the same pay-cut as other employees if there is one implemented by the employer.

- 7. Can the employer apply different percentage in reduction of wages where the employees who do not have the same workload?**

Yes, as long as the employer is able to justify based on the fact that they do not have the same workload as other employees.

- 8. Can the employer retrench those employees who refuse to agree to reduction of wages?**

If the employees do not agree with the 'pay-cut' imposed by the employer, they will make a complaint either to the Human Resources Department, make representation to the Industrial Relations Department or file an action in the civil court. If they do not take any action and continue to work on the reduced wages, they may be deemed to have consented to it. The court will look at the facts and circumstances of each case.

- 9. How does the employer implement pay-cut?**

The employer must give notice to the employees stating the reason and the percentage of reduction and get them to agree and sign on the duplicate of the notice. If the employees do not agree, be prepared to see them in court if they lodge a complaint against the employer.

**10. Can the employer ask the employees to work 4 days out of 5 and only be paid for 4 days a week after MCO?**

This would be a different scenario altogether. Generally, the employer may not change the terms of employment without the consent of the employees. However if the employer has no other alternatives but to retrench some employees, the FAQ No. 3 issued by MoHR on 31.3.2020 stated that before the employer undertakes retrenchment of employees, the employer should consider:

- a) Reduce working hours;
- b) Freeze on recruitment;
- c) Limit OT;
- d) Reduce work on weekdays & public holidays;
- e) Reduce pay;
- f) Lay off;
- g) Last in first out principle.

**11. How do I ascertain whether my company is qualified for the Wages Subsidy Programme?**

Wages Subsidy Programme (WSP) is the Prihatin SME Economic Stimulus Package by the government subject to its terms and conditions. Please refer to the FAQ No. 4 issued by MoHR on 6.4.2020, FAQ No. 2 issued by Perkeso on 7.4.2020 and Guidelines for implementation of WSP dated 9.4.2020 for the details. In the event of doubt, please refer to Perkeso, the agency tasked with implementing the WSP.

Dated: 10.04.2020

*Disclaimer: This FAQ is not to be regarded as legal advice. All statements in these FAQs are summaries only and are qualified in their entirety. It should not form the basis of your management decision. For any specific legal issues on the specific facts of your case, kindly consult your legal adviser or contact us for further discussion.*

# 行动管制期间与结束后的劳资课题

## 常见问题 - 由纪通杰律师解答

### 1. 行动管制期间，员工是否可以被迫休年假或无薪假？

答：若雇佣合同里列明雇主有权要求员工在暂时停工期间休年假或无薪假，那么雇主可以那么做，否则这只能在获得员工书面许可（协议）的情况下才能进行。法律规定，在没有合约条款的情况下，雇主不能强迫员工使用他们的年假或休无薪假。

协议的重要性也在人力资源部所发表的第 3 份常见问题中提及，既在双方同意的前提下，雇主可向员工提供以下任何一项：

- a) 有薪假
- b) 半薪假
- c) 无薪假

备注：雇佣合同的条款可在聘请信件，员工手册，规章制度，员工备忘录等中查找。

### 2. 雇主是否需在行动管制期间支付全薪？

答：人力资源部于 19.3.2020 发布的常见问题中，发出指令指示雇主不能强迫员工休年假或无薪假及雇主需在行动管制期间支付员工全薪。若雇主违反指令，将被视为违反 2020 年预防及控制传染病（受感染区域内措施）条例第七条文。若被判有罪，雇主将被罚款不超过 RM1,000.00 或监禁不超过 6 个月或两者兼施。

该部并未说明该立场的法律依据。

对于我们而言，1988 年预防及控制传染病法令及 1955 年劳工法令里并没有条文规定雇主需在暂时停工期间支付全额工资。

我们建议雇主先查看雇佣合同以确认雇主是否有权在暂时停工期间删减员工们的工资。若无，我们需查看普通法。

这个课题有着相反的判例。一方面，有些判决判定要求雇主在暂时停工期间支付员工全额工资是不公平的，而删减员工 50%的工资是公平的。有一个案例允许删减 66%。另一方面，有些判决判定如果雇佣合同中没有条款赋予雇主这样的权利，雇主无权删减员工的工资。

我们的看法是：

1. 劳工法令第 2 条文将工资定义为支付给员工以完成工作的基本工资和其他现金付款。理所当然，若没有工作，那么就不该有工资。第 23 条文也接应了这一点，既列明了因缺勤而没有工资的情况；
2. 我们相信法律中存有空白部分；
3. 因此，要求雇主在暂时停工期间支付全额工资是不公平的，而减少 50%可能更为合理和公平。

我们的建议是雇主应与员工讨论，让他们了解大家目前所面临的严峻情势以及雇主删减他们工资的的必要性。最好的方式是获得他们的书面同意。

我们也需提醒您，若您无法取得他们的书面同意但仍删减他们的工资，那么如果有任何的投诉，您可能需与员工对簿公堂（打官司），并且还可能受到刑事指控。

### **3. Whatsapp 和 Telegram 的信息是否能构成书面同意？**

答：证据法令允许以电子方式传送的信息在法庭上作为呈堂证据。针对 Whatsapp 和 Telegram 的信息，雇主可以在法庭上引证，但条件是需证实该信息是来自或发送给该特定员工。

### **4. 若雇主允许员工在家工作，但因为几乎不可能像他们平常在办公室那样量化他们是否全天候工作，雇主是否需支付全额工资？**

答：若他们的工作性质允许他们在家工作，那么他们将被视为正在工作并有权获得全额工资。

### **5. 若雇主在行动管制期间支付全额工资即便员工并没有工作，雇主是否可在行动管制令结束后要求员工星期六工作？**

答：雇主无法仅仅因为他们在三月份和四月份获得了全薪却无需工作，而要求员工在五月份和六月份加班。取决于合同，他们可能会要求加班费。

**6. 基于新冠肺炎疫情，原定于 4 月 1 日开始工作的新员工将在 4 月 16 日开始工作。雇主是否需支付他从 4 月 1 日至 4 月 14 日的薪金？**

答：若雇佣合同规定他将从 4 月 1 日开始工作，那么他的雇佣期将从 4 月 1 日开始而他也应该从 4 月 1 日起获得薪金，除非双方同意将开工日期延至 4 月 16 日。但是，若雇主实施了减薪，他可能会与其他员工们一样受到减薪。

**7. 针对不同工作量的员工，雇主是否能采用不同的百分比来删减工资？**

答：是的，只要雇主能够证明他们与其他员工并没有相同工作量的事实。

**8. 雇主是否能解雇那些拒绝删减工资的员工？**

答：若员工不同意雇主实施减薪，他们可向人力资源局或工业关系局投诉或在民事法庭呈上诉讼。若他们没采取任何行动并以被删减的工资继续工作，他们可能会被视为已同意。法庭将审视各个案件的事实与情况。

**9. 雇主应如何实施减薪？**

答：雇主需向员工发出通告说明原因以及删减的百分比，征得他们的同意并在通告副本上签名。若员工不同意并针对雇主进行投诉，需做好对簿公堂的准备。

**10. 行动管制令结束后，雇主是否能要求员工每 5 天工作 4 天，并只支付 4 天的工资？**

答：这将是全然不同的情况。普遍上，未经员工同意下，雇主无法更改雇佣条件。但是，若雇主别无选择只能解雇一些员工，人力资源部于 31.03.2020 所发表的第 3 份常见问题表示在雇主解雇员工之前，雇主需考虑：

- a) 减少工作时间；
- b) 冻结招聘；
- c) 限制加班；
- d) 减少周末和假日工作；
- e) 减少工资；
- f) 下岗；
- g) 后进先出的原则。

**11. 我该如何确保我的公司有资格获得工资补贴计划？**

答： 工资补贴计划是政府关怀人民经济刺激配套中的中小型企业援助配套，有特定的发放条件。请查阅由人力资源部于 6.4.2020 发布的第 4 份常见问题，由马来西亚社会保险机构于 7.4.2020 发布的第 2 份常见问题以及 9.4.2020 公布的工资补贴计划实施准则以获得详细信息。如有疑问，请咨询负责单位即社会保险机构。

日期： 10.4.2020

免责声明： 这常见问题不应被视为法律建议。这些常见问题中的所有陈述仅是摘要并且仅适用于整体。它不应成为您管理决策的依据。针对您特定案件的特定事实，请咨询您的法律顾问或联系我们以进行进一步的讨论。