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EMPLOYMENT FAQs ON MOVEMENT CONTROL ORDER VOL. 2

FORCE MAJEURE AND FRUSTRATION OF EMPLOYMENT CONTRACTS VS MOVEMENT CONTROL ORDER

EMPLOYMENT FAQS ON MOVEMENT CONTROL ORDER

In light of the recent Movement Control Order ("MCO") announced by the Malaysian government starting 18 March 2020 and the extension of the MCO till 14 April 2020, many businesses that do not fall under the "Essential Services" category have been ordered to temporarily close and employers are facing a conundrum in terms of employer and employee rights during this time.

We shall address several frequently asked questions (FAQs) with a focus on ***force majeure*** and **frustration of contracts** which would hopefully assist employers and employees in these challenging times.

FOR MORE INSIGHT INTO THIS AREA OF LAW, PLEASE CONTACT OUR PARTNERS IN THE EMPLOYMENT & INDUSTRIAL RELATIONS PRACTICE GROUP

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Q1: WHAT IS A *FORCE MAJEURE* CLAUSE?

A *force majeure* clause is a contractual provision which allows non-performance of one or more contractual obligations by a party when facing a *force majeure* event.

A *force majeure* event generally refers to unforeseen events beyond the control of both parties that prevents or impedes the performance of one or more of the contractual obligations. Typical examples of *force majeure* includes natural disasters, epidemic, wars etc.

Q2: IS COVID-19 CONSTRUED AS A *FORCE MAJEURE* EVENT?

The scope of *force majeure* provisions in Malaysia depends on the construction and language used in the clause and is determined on a case-by-case basis. As such, COVID-19 may be construed as a *force majeure* event if there are wordings such as "pandemic", "epidemic" or "disease" in the *force majeure* clause.

Further, in light of the recent MCO, wordings such as "act of government" may also be applicable.

Lack of clarity may render the clause unenforceable and void on the grounds of uncertainty and lack of clarity.

Q3: WILL *FORCE MAJEURE* APPLY IF MY EMPLOYMENT CONTRACT DOESN'T CONTAIN A *FORCE MAJEURE* CLAUSE?

No. This is because the scope of *force majeure* provisions in Malaysia depends on the construction and language used in the clause.

Q4: IN THE ABSENCE OF A *FORCE MAJEURE* CLAUSE, CAN AN EMPLOYER THEN RELY ON THE DOCTRINE OF FRUSTRATION?

Frustration will only apply if the following 3 conditions are fulfilled:
a) The underlying event is not the fault of any party to the contract;
b) The event occurs after the formation of the contract and was not foreseeable by any parties; and
c) It becomes physically or commercially impossible to fulfill the obligations set out under the contract or it changed the nature of the contractual obligation from what was initially agreed upon under the contract.

Based on case laws, the Courts have interpreted "physically and commercially impossible" to mean **impossibility of performance** over a **prolonged period of time**.

As such, Employers CANNOT rely on frustration during the MCO unless the MCO extends for a prolonged period time such that the performance of the contract becomes impossible.

Q5: WHAT IS A "PROLONGED PERIOD OF TIME"?

This has not been defined in the case laws. In one case, the period that the employee would be under detention was 2 years, which was held to be a prolonged period of time enabling the frustration of the contact.

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Q6: ARE THERE ANY OTHER CONSIDERATIONS FOR AN EMPLOYER TO LOOK INTO BEFORE INVOKING THE DOCTRINE OF FRUSTRATION

In determining the lawfulness of the circumstances for frustration, the Courts will also take into consideration other factors such as:

a) Service period of the employee - whether the employee has served for many years thus having greater security of tenure;

b) Position held by the employee - whether the position could have been held vacant or temporarily filled during the employee's absence;

c) Period of time that the employee is unavailable to perform the contract - short stints or intervals of impossibility of performance will generally not be grounds for frustration of contract.

Q7: WHAT CAN AN EMPLOYER DO IF THE MCO CONTINUES AND THE EMPLOYER IS UNABLE TO PAY SALARIES?

If after exhausting other cost-cutting measures, the Employer is still unable to meet its obligation to pay full salaries during the MCO, then the Employer may seek the consent of employees to pay reduced salaries.

The Employer may also resort to temporary lay-off with terms to be agreed with employees, or permanent lay-off in accordance with **Regulations 5 & 6 of the Employment (Termination & Lay-Off Benefits) Regulations 1980**, for employees under the **Employment Act ("EA")**.

For Non-EA employees, the Employer can reduce salary or working days by consent of the employees. If employees refuse, then the unavoidable recourse may be to retrench them and pay them based on contractual obligations.

Q8: WHEN CAN AN EMPLOYER RETRENCH ITS EMPLOYEES? MUST THE EMPLOYER WAIT TILL THE END OF THE MCO?

The right of the Employer to restructure its business is a management prerogative. There is no requirement to wait for the end of the MCO to carry out a retrenchment exercise. However, the Employer must observe the legal requirements in carrying out a lawful retrenchment, such as the principle of redundancy; Last In, First Out (LIFO); the provisions of the Code of Conduct for Industrial Harmony; and the statutory notification to be given to the Labour Department 1 month prior to retrenchment.

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