

Transition to Endemic — What it Means for the Employers in Malaysia?

Introduction

With effect from 1 April 2022, Malaysia will enter the “*Transition to Endemic*” phase. The Malaysian Government has recently announced that with this move, most Covid-19 restrictions currently in place will be lifted, including:

- Abolishing the restrictions on business operating hours;
- Allowing interstate travel for all regardless of their vaccination status; and
- Abolishing the limits on the number of people allowed at the workplace based on vaccination coverage.

Further to that, on 9 March 2022, the Ministry of Health of Malaysia also issued a new protocol for travellers who are entering Malaysia: with effect from 1 April 2022, no quarantine will be required for those who are fully vaccinated; whereas for the unvaccinated or yet to be fully vaccinated, the quarantine period is reduced to five days upon their arrival in Malaysia.

With the ease of restrictions, workplace policies invariably will need to be updated to cater to the business needs. We set out below the legal position on some questions that may commonly arise because of the country’s move into the new transitional phase.

Mandatory vaccination

Our previous article (<https://tinyurl.com/2p8ppr9x>) addressed the general position on whether employers can require their employees to be vaccinated.

Prior to entering the new phase, in Peninsular Malaysia, under the National Recovery Plan 4 (NRP 4), workplaces are already allowed to be operating at 100% capacity irrespective of the workforce’s vaccination coverage. Only the states of Sabah and Sarawak continue to place limit on operating capacity subject to vaccination rates under the NRP 4. Hence pursuant to the “*abolishing of limits of people allowed at the workplace based*

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Shearn Delamore & Co
7th Floor

Wisma Hamzah Kwong-Hing,
No 1, Leboh Ampang
50100, Kuala Lumpur, Malaysia

T: 603 2027 2727

F: 603 2078 5625

info@shearndelamore.com

www.shearndelamore.com

www.linkedin.com/company/shearn-delamore-&-co

on vaccination coverage” under the upcoming Transition to Endemic phase, the situation in Peninsular Malaysia would remain as *status quo*, whereas only the existing limits in Sabah and Sarawak are expected to be lifted.

Since vaccination coverage is no longer a precondition to determine the permitted workforce capacity present at the workplace, employers in Malaysia will continue to face legal headwinds to justify compulsory vaccination on the grounds of business requirements. It remains to be seen whether the Courts in Malaysia are prepared to allow employers to justify workplace vaccination on basis of workplace health and safety pursuant to sections 13, 15 and 24 of the **Occupational Health and Safety Act 1994**.

Arguably, if Covid-19 fundamentally changes the circumstances such that to be vaccinated becomes an inherent part of a particular job, the refusal of employees to comply with the policy may be considered as an inability to perform their normal duties as envisaged under the employment contract. However, we expect that there are limited types of job that may possibly fall under this category: where the work environment undoubtedly contains a higher risk of COVID-19 infection, or where infections occur, are likely to be more serious than others. For example, work that requires direct contact with clients who are vulnerable members of society, a high-density workplace where the nature of work involves close physical contact with other persons, or workplaces located at remote facilities.

Covid-19-related policies at the workplace

Relaxation of governmental imposed restrictions does not mean that employers can afford to throw caution to the wind. Covid-19 is still a clear and present danger in the community and workplaces are not spared. Covid-19 health and safety protocols, including a clear but fair vaccination policy in the workplace need to continue to be in place. Employers must continue to observe their statutory obligations to provide a safe system of work for its employees. At the same time, employers will need to be mindful that vaccination is only part of the strategies to combat Covid-19 in the workplace. To that

end, an employer can devise and update their policies to ensure the smooth running of its business in a post-pandemic environment. For example, adding new types of Covid-19-related misconduct to its disciplinary policies, to minimise any risks of infection at the workplace. Examples of Covid-19-related safety rules include mandatory masking, prohibition of physical congregation at the workplace, etc.

Whilst employers may restrict the entrance of non-vaccinated personnel into its business premises, one potential issue that employers may encounter is the refusal of personnel to furnish their vaccination status. From an employment law perspective, if an employee unreasonably refuses to provide his vaccination status as instructed by the employer, it may potentially be treated as an act of insubordination that warrants disciplinary action. This is notwithstanding that the employee views such instructions of the Company as being unlawful/ unreasonable (see Federal Court case of **Ngeow Voon Yean v Sungai Wang Plaza Sdn Bhd** [2006] 3 CLJ 837).

Alternatively, if the employee still refuses to cooperate, employers may also rely on Section 40(1)(b)(i) of the **Personal Data Protection Act 2010** to process the vaccination status of the employee – which is a form of sensitive data. The said provision provides that employer may still process the employee’s sensitive data if it is:

“for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the employee in connection with employment.”

Before employers decide to implement a policy, employers should conduct an analysis to weigh the benefits of having the same versus the risks in absence of the same. In assessing the risks that would be caused by the absence of such policy, employers should have sufficient evidence or data to justify the implementation of such policies. By way of analogy, in the case of **Gan Soh Eng v Guppy Plastic Industries Sdn Bhd** [2008] 3 ILR 414, the policy of lowering the retirement age for female workers on the ground that there was a higher risk of accidents happening to female workers of older age was struck down by the Court as being unreasonable, as the company was unable to support its averment of “*higher risk*” by any cogent and convincing evidence. Hence to impose any policies that may

segregate the employees by their vaccination status, employers ought to have sufficient evidence to justify the rationale for the same.

Reasons for employee's objection

Before taking any action against employees' refusal to comply with any of the vaccination policies, it may be worthwhile for employers to first look into the reasons for their objection.

Although in law, employees have the duty to obey their employer's instructions, nonetheless, if employees have valid and reasonable medical reasons in refusing to comply with such policies (for example, vaccination), there may be potential discrimination issues as the employees would be subjected to less favourable treatment due to their medical condition. Even though at the time of writing, there are no anti-discrimination laws in Malaysia to specifically prohibit such practice, insisting that such employees comply with those policies may be viewed as unreasonable by the Court in the event of dispute.

Conclusion

The Courts generally do not deny the prerogative of employers to determine the best way to run their businesses, which includes putting in place policies to ensure a safe workplace against the backdrop of a pandemic. Employers however must ensure that the new policies do not give rise to nor amount to a breach that goes to the root of the employment contract. Failure to do so could potentially give rise to circumstances where employees can walk out of their employment by claiming constructive dismissal. Employers should also remember that the relationship of trust and confidence is mutual by nature.

This article was co-written by



[Sivabalah Nadarajah](#)

Head, Employment &
Administrative Law

T: 603 2027 2866

E: sivabalah@shearndelamore.com



[Raymond T C Low](#)

Partner, Employment &
Administrative Law

T: 603 2027 2839

E: raymond@shearndelamore.com



[Grace Chai Huey Yann](#)

Associate, Employment &
Administrative Law

T: 603 2027 2680

E: chai.grace@shearndelamore.com

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