Shearn Delamore & Co.

Dear valued clients and business partners,

We are pleased to bring you the latest update from our Employment and Administrative Law Practice Group.

Mitigating the Impact of the Covid-19 Pandemic

Cost-cutting amid Covid-19

The continued Covid-19 pandemic has caused significant economic disruption where many industries have started to observe or at least expect a steep decline in their businesses and revenue. At the forefront is what cost cutting measures can businesses implement as they grapple with the financial impact of the outbreak.

As of 27 February 2020, the Labour Department of Peninsular Malaysia, Sabah and Sarawak has recorded a total number of 634 employees and 10 employers being involved in retrenchment exercises as a result of the Covid-19 outbreak. The manufacturing sector has been primarily affected with the highest number of reported retrenchments. Out of the 634 employees, 64 employees were permanently retrenched whilst 111 employees were temporarily laid-off due to Covid-19. 459 employees accepted a salary reduction as a result of the impact of Covid-19.

Some of the cost-cutting measures that employers may seek to implement include limitation of recruitment, restriction of overtime work, reduction in number of shifts, hours or days of work, temporary laying off or retrenchment as a last resort.

Agreement to reduce the terms and conditions of employment

While a reduction of the benefits conferred under the terms and conditions of employment may seem feasible, this cannot be done unilaterally. Given that these are contractual entitlements, employers are not permitted in law to unilaterally vary the terms of employment unless the consent of the employees have been obtained.

Unilateral changes to more fundamental terms which include salary reduction and contractual benefits could also give rise to potential claims by employees. Likewise the imposition of utilisation of an employee's annual leave towards the period of working away from the office or temporary shutdowns of businesses would not be permitted.

However, given the impact, employers should as a first measure remove all discretionary payments and non-contractual benefits. This may include freezing of salary increments, annual bonuses or promotions. There should be a corresponding freeze on recruitment. Thereafter communicate with its employees and share the financial impact of Covid 19 towards the business before seeking a voluntary salary

reduction as an alternative to retrenchment. An alternative is to implement a reduced work week which will have a corresponding impact on the salary of employees. This however can only be effected with the consent of the employees. Communication is key in dealing with the present situation as is transparency within the organisation on the impact of Covid 19 on its business.

Nevertheless, where there is a collective agreement in place, employers may negotiate with the trade union to seek a variation of the collective agreement under section 56 of the **Industrial Relations Act 1967** by showing that there are "*special circumstances*" to warrant such variation of its contractual obligations. In **RIH Management Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia**[1]**,** during the JE outbreak, the Hotel had sought to defer the payment of the workers' contractual increments temporarily on the grounds that the occupancy rates were severely affected by the outbreak. The Industrial Court held that the epidemic was not foreseeable by anyone and thus amounted to a special circumstance for the deferment of the contractual increments.

Closure of business

In the event that the outbreak results in an extreme downturn in business, employers may have to re-evaluate its business requirements.

For industries that are directly affected by the outbreak, for example the retail, airlines and hotel industries, a temporary suspension or shut down of the business may be required. In such situations, employers may consider temporary laying-off their employees or enforce paid leave for their employees.

The issue that arises is whether the employees are entitled to their full pay for the duration when they are off-work. Whilst this is dependent on the facts and circumstances of each matter, the Industrial Court has previously held that 50% of the basic wages is a reasonable quantum (**Goodyear (M) Berhad v National Union of Employees in Companies Manufacturing Rubber Products**[2]).

In this context in the event of a downsizing exercise employers will have to comply with the applicable laws on retrenchment in effecting the same including the provision of the requisite notifications to the Labour Department.

Conclusion

Given the fluidity of the current situation, businesses should periodically review any measures taken to minimise the impact of any measures on both the employees and the business while being mindful of their legal obligations as employers.

[1] [2000] 2 ILR 549.
[2] [1982] 2 ILR 105.

For further information regarding employment and administrative law matters, please contact our Employment and Administrative Law Practice Group.