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To Members of the Malaysian Bar and pupils in chambers

**Position Paper by the Bar Council Industrial and Employment Law Committee
in Relation to the Movement Control Order**

Questions relating to employment and the payment of wages have been raised in respect of the Movement Control Order (“MCO”).

The Bar Council Industrial and Employment Law Committee has considered the matter. Please click [here](#) to view its Position Paper (see page 2 onwards) which may serve as a source of assistance and guidance during this time.

Thank you.

**A G Kalidas
Secretary
Malaysian Bar**

Position Paper by the Industrial and Employment Law Committee (IELC) in respect of the Movement Control Order

Introduction

1. On 16 March 2020, the Prime Minister of Malaysia announced the Government's decision that a nationwide Movement Control Order ("**the Order**") would be imposed from 18 March 2020 until 31 March 2020 ("**the Period**") under the Prevention and Control of Infectious Diseases Act and the Police Act 1967.
2. On 18 March 2020, the Government issued the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) Regulations 2020 ("**the Regulations**") which laid down relevant regulations to implement the Order.
3. On 25 March 2020, the Prime Minister issued a statement extending the Order for a further period from 1 April 2020 to 14 April 2020 ("**the Extended Period**").
4. In view of the numerous legal issues facing the employment sector during the period under the Order, the Bar Council has sought the assistance of the IELC to take a position in relation to this matter so that the Bar Council can consider issuing a statement to clarify the position in law.
5. The IELC has also referred to directives and guideline issued by the Ministry of Human Resources (MOHR) in preparing this paper.

Frequently Asked Questions - The Legal Position

1. **Does the employer have to close his business / premises while the Order is in force?**

Yes, unless the business or organisation is providing essential services in which case it may continue operations and open premises, where necessary, provided the number of personnel are kept to a minimum, subject to certain guidelines. A list of essential services is provided under the Schedule to the Regulations.

Any businesses or organisations not providing essential services may continue operations and open premises provided that the owner or occupier of the premises obtains the prior written approval of the Director General of Health.

2. **Is the employer required to pay the salary of employees during the Period and Extended Period?**

The Government has issued a directive that the full salary of employees has to be paid during the Period. The IELC is of the view that this directive reflects the correct position in Law.

The IELC is also of the view that the employer would be under the same obligation to pay the full salary of employees during the Extended Period.

3. Can the employer compel an employee to take annual or unpaid leave during the Period?

The employer cannot compel an employee to take annual or unpaid leave, unless this is agreed by the employee.

4. If the employer is put in financial difficulty during the Order, can the employer not pay the full salary during the Extended Period?

An employer who is faced with financial difficulty in paying full salaries may seek the consent of the employee(s) to pay reduced salaries during the Extended Period to avoid the need for retrenchment.

5. Can the employer retrench or temporarily lay-off employees during the Order?

An employer facing financial difficulties as a result of the Covid-19 pandemic may resort to a retrenchment or temporary lay-off of its employees to reduce its operational costs.

For employees covered under the Employment Act 1955, Regulations 5 and 6 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 make provisions for lay-off and benefits payable, if the conditions for lay-off are complied with.

The retrenchment must be genuine, and the employer must take positive steps to avert or minimise reductions of work force by the adoption of appropriate measures such as reducing the employee's working hours, limiting or freezing new hiring, limiting overtime, limiting work during the weekends and public holidays. In the event a lay-off and/ or retrenchment is inevitable, the foreign employees should be terminated first. If the lay-off involves locals, then the "Last In First Out" principle should be adhered to. In addition, there is a requirement to inform the Ministry of Human Resources of the lay-off and/ or retrenchment exercise by filling-up and submitting the relevant forms to the Ministry of Human Resources at least thirty (30) days prior to the effective date of termination of the employee(s) services.

6. Can an employer rely on *force majeure* clause?

A *force majeure* clause is a contractual provision which allows the non-performance of one or more of the contractual obligations by a party due to unforeseen events beyond the control of both parties which prevents the performance of the said contractual terms, such as wars, natural disasters, epidemics etc.

However, in order for an employer to rely on *force majeure*, the contract of employment must contain a clause which provides for it. In the absence of such a clause in the contract, an employer cannot rely on the Covid-19 pandemic to avoid its contractual obligations.

7. Can the employer rely on the doctrine of frustration?

Frustration will apply when it becomes physically or commercially impossible to fulfill the obligations set out under the contract. Based on case laws, the Courts have interpreted “physically or commercially impossible” to mean **impossibility of performance over a prolonged period of time**.

An employer therefore cannot rely on frustration during the Order unless the Order extends for a prolonged period of time such that the performance of the contract becomes impossible.

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Bar Council

Dated 26th March 2020