

No.	Questions from Members	Answers from Lawyers
1.	<p>MOHR has directed that companies are not allowed to force staff to take any unpaid leave or annual leave during the MCO period. However, the Employment Retention Program allows employers to negotiate a mutual agreement with employees to take unpaid leave. Does this mean that the ERP is not applicable during the MCO since this program has been in effect since 1st March 2020?</p>	<ul style="list-style-type: none"> <li>• No, Employment Retention Program (ERP) is still applicable during MCO period.</li> <li>• ERP is a financial assistance for employees who are on unpaid leave for 1-6 months.</li> </ul>
2.	<p>Since ERP has already been in place since 1 March 2020 and offers more flexibility than Wage Subsidy Programme, why is there a need for WSP (Wage Subsidy Program) which comes along with stringent terms and conditions?</p>	<ul style="list-style-type: none"> <li>• WSP is a financial assistance for employer for 3 months.</li> <li>• One of the main criteria for WSP is 50% sales drop of your business and the base month is January 2020. For example if there is a sales drop of 50% in February and March as compared to January 2020, you are eligible to be considered for WSP.</li> <li>• However, you might be requested to submit the company audited or management account and attend any other queries.</li> </ul>
3.	<p>To what extent can tenant use force majeure to stop paying rent?</p>	<ul style="list-style-type: none"> <li>• Not all tenancy agreement contains a Force Majeure (FM) clause. One would need to check if the tenancy agreement contains such a FM clause if he or she wishes to rely on this clause. Even if there is a FM clause in the tenancy agreement, one would also need to refer to the specific wordings in the clause as it is worded differently in each and every agreement.</li> <li>• Most FM clause covers acts of god, war and earthquake and some would cover disease, epidemic and pandemic.</li> <li>• If the FM clause covers “disease”, “epidemic” and/or “pandemic”, it can be relied upon as Covid19 falls squarely within the meaning of disease and pandemic.</li> <li>• If “disease”, “epidemic” or “pandemic” is absent in the FM clause, one may</li> </ul>

still be able to rely on the FM clause if it covers the events of acts of states or governmental action/order, order in accordance with an Act of Parliament etc since the Movement Control Order (MCO) is clearly a governmental policy and/or order.

- Ideally, all agreement that contains a FM clause should also include a “follow up” clause in the agreement. A well written tenancy agreement would also have covered a “follow up” action should the FM clause applies i.e the provision of suspension of rental period or an event of termination of the agreement.
- If there is a FM clause but **no “follow up” clause** can be found in the agreement, the tenant may negotiate with the landlord on the basis that the agreement is silent on what needs to be done thereafter. Whether the rental should be suspended, or whether the suspension is temporary or it is a permanent end to the agreement is an open question and is subject to argument. Hence, a tenant may take this opportunity to discuss and negotiate with the landlord in order to work out an amicable solution during this MCO period rather than to take the matter to court.

- If **no FM clause** in the tenancy agreement, refer below:

From Landlord’s perspective:

- If there is no FM clause in the tenancy agreement, the closure of non-essential business pursuant to the MCO does not nullify the tenancy agreement and the tenant has to comply with the terms in the tenancy agreement and continue paying the rental.

From Tenant’s perspective:

- Comply with the terms in the tenancy agreement to continue paying the rent. However, the tenant pay take a proactive step to plea to and/or negotiate with the landlord for a discounted/lower rental or even suspension of rental in view of the long term relationship between the landlord and the tenant. Nonetheless, it is the discretion of the landlord whether to accede to such request of a tenant.

4.	Is there any relief in law to relief businesses that are unable to fulfil their contractual obligations? Can employers use Doctrine of Frustration during Covid19 period?	<ul style="list-style-type: none"> <li>• If there's a Force Majeure clause, you can capitalize on that. In the absence, you can look into the issue of Frustration of contract.</li> <li>• Two key words to trigger frustration are "<b>Legally or Physically impossible to perform</b>"</li> <li>• If it is just more "difficult or less profitable to perform" you might not be able to seek relief under Doctrine of Frustration.</li> </ul>
5.	Is there a provision to prohibit a contracting party from taking legal actions against a non-performing party in such situation?	<ul style="list-style-type: none"> <li>• Anyone can take legal actions, no law to stop any parties from taking legal actions.</li> </ul>
6.	No business / bad business during MCO. On top of the fixed operating costs i have to pay, MOHR says i have to pay my staff full. Can i ask my staff to take unpaid leave or annual leave? How do i deal with these issues legally?	<ul style="list-style-type: none"> <li>• It is a general rule that an employer cannot force an employee to take unpaid leave during MCO period.</li> <li>• Consent must first be obtained from the employee before requiring the employee to take unpaid leave.</li> <li>• Government is foreseeing that the employer has no choice but to force the employee to take unpaid leave.</li> <li>• Employee have two choices, either: <ul style="list-style-type: none"> <li>a. Object to the request and treat it as a constructive dismissal event and may sue the employer for unfair dismissal; or</li> <li>b. Bite the bullet and claim the 6 months financial assistance (Employment Retention Programme) from the government which also means that the employee agreed to take unpaid leave and thus employee might not be able to sue the employer for forcing the him/her to take unpaid leave.</li> </ul> </li> </ul>
7.	I don't know how long can my business sustain as nobody knows when will MCO be lifted. How do I deal with pay-cut and retrenchment legally? Can I freeze employment?	<ul style="list-style-type: none"> <li>• You need to justify your retrenchment if you failed you may face some problem later because the employee can sue you for unfair dismissal. Do follow the required rules and regulations under the labour/employment law in respect of retrenchment, as you need to fulfil some government set requirements.</li> <li>• Some rules or best practices for retrenchment like LIFO (last in first out) and retrench the foreign workers first.</li> <li>• Employer is not allowed to freeze employment</li> <li>• Only able to do pay-cut if the employee consented to it.</li> </ul>

8.	If I am a franchisee, can I do not pay my franchisor annual fees?	<ul style="list-style-type: none"> <li>• No. Franchise fee is an annual payment and it is an annual obligation of the franchisee. This MCO does not in any way affect such annual obligation of the Franchisee.</li> <li>• However, a Franchisee may try to plea to the franchisor to ask for a discount or lower franchise fee.</li> <li>• Out of goodwill, a franchisor might consider to grant a discount to a franchisee, as a franchisor would also have to take into account the cost of having the matter brought to the court in order to demand for the franchise fee.</li> </ul>
9.	I am selling vouchers now for future business patronage. What if I go bust before I can fulfil the redemption before expires?	<ul style="list-style-type: none"> <li>• If go bust depends on whether you are a Sendirian Berhad or a Sole Proprietor or an enterprise.</li> <li>• If you are a Sendirian Berhad nothing much you can do to the voucher as your company has been wound up.</li> <li>• If you are a Sole Proprietor or an enterprise you will have the issue of personal liability whereby you will be personally liable for the losses suffered due to your failure to fulfil the redemption.</li> </ul>
10.	How do we handle foreign workers if to terminate them first and now, in order to save the company?	<ul style="list-style-type: none"> <li>• For foreign workers, the same law is applicable as to the local workers during retrenchment, do abide by the rules and regulations applicable for retrenchment, e.g the compensation benefits and all, and justify your retrenchment. If not then it is an unfair dismissal.</li> </ul>