

Malaysia

Managing HR Through COVID-19

A Practical Guide For Multinational Employers

Prepared by Shearn Delamore

As at April 14, 2020

Overview

This guide will help employers manage HR legal and practical issues arising from COVID-19.

It covers:

- [Good Practice Guidance giving high-level consideration](#);
- [An Action Point Checklist drilling down into the detail](#); and
- [Answers to Key Questions facing employers in Malaysia](#).

This publication has been coordinated by Mayer Brown and forms part of a wider Mayer Brown Guide for Multinational Employers, [which is available here](#).

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Good Practice

There are a number of key good practice points that employers across all jurisdictions will want to consider in connection with COVID-19:

1. Keep up-to-date with accurate information

It is difficult for an employer to make proper decisions based on rumors, assumptions and “fake news”. Therefore, it is important for an employer to stay up-to-date with accurate information and make decisions based on facts. Employers should monitor official sources, including government advisories and the World Health Organization (“WHO”) website, and check that the information they receive is factually correct.

2. Know where your employees are and where they have been

An employer cannot keep its employees out of harm’s way if it does not know where they are and where they have been. As outbreaks of COVID-19 occur in various parts of the world, keep track of which of your employees could be at risk.

3. Communicate with your employees

Employers should communicate openly and often with their employees so that they have the information they need to help keep themselves educated and updated about the coronavirus. It should not assume that all employees will educate themselves or have access to the same sources of reliable information. Putting everyone on the same page will help the employer and its employees move together in a timely manner as a business. Open and timely communication will help build trust and reduce the spread of rumors that may cause anxiety in the workplace.

4. Provide a safe platform for employees to raise concerns

Employers should give employees a safe platform where they can raise concerns on all aspects related to work, from mental health to the risk of having contracted COVID-19. This is not just good employee relations, but early detection and doing something about it can help to reduce the spread of the virus. It is one thing to have an employee assistance plan and ask employees to report issues, but if those who report are stigmatized or treated with contempt, employees may be deterred from reporting.

There may be nervousness and anxiety in the workplace, and possibly even conflicts, given concerns about the virus. Employees should be given avenues to communicate such anxiety to their employer, so that concerns are addressed earlier and do not balloon into bigger issues.

5. If you can be flexible, then be flexible

Employers should understand that this is a time of stress for all parties, including employees. Recognize that employees will have different needs depending on their circumstances (e.g., those with school-age children may need more time off as school classes are suspended).

This time of uncertainty will pass but employees will remember how their employer treated them long after the threat of the virus has disappeared. A disgruntled employee may try to make it known to the world how badly their employer treated them. This may affect the employer’s brand and ability to attract and retain talent. The employer may then have to wait for another crisis or challenging time to get the opportunity to prove itself as a good employer.

6. One size may not fit all

While consistency in treatment is generally to be favored, be conscious that one size may not fit all. For example, “work from home” or remote working may not work for everyone. The implementation of general directives should be checked against legal obligations under the contract of employment and local law.

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Action Point Checklist

In general terms, the steps an employer needs to be taking now relate to four categories: **Review**, **Communicate**, **Update** and **Travel**. No list of action points will be comprehensive for all employers, but the following will form a good starting point.

1. Review

- Review business continuity plans and how these would be maintained if employees are suffering from coronavirus absences.
- Review existing sickness policies and procedures. Are they adequately disseminated to staff? Do they need amending?
- Review contracts of employment. It may be relevant to establish whether or not individuals can be asked to undertake different work or at different locations or at different times from the norm.
- Review the employer’s emergency procedures, e.g., if there is an infection and the workplace is closed on a temporary basis. If appropriate, carry out a test run of an emergency communication to see how robust the process is.
- Ensure contact details for all staff are up-to-date.
- Undertake a risk analysis of high-risk groups of employees, and what steps can be taken to try and reduce risks for those groups. These groups may include:
 - those who travel frequently to countries where there is currently or may well in future be a risk of infection.
 - those with health issues, such as asthma, diabetes, cancer, or those who are pregnant, who are more likely to suffer adversely if they become infected with the virus.
- Review procedures in the office for preventing the spread of the virus, e.g. increased cleaning, availability of hand sanitizers and tissues etc.
- Review planning for the possibility of large scale absenteeism. For example:
 - Identifying the essential positions within the business, what needs to carry on during an emergency, and what is the minimum number of employees required?
 - Identifying employees with transferable skills so that these essential positions can always be temporarily filled.
 - Considering flexible work patterns, such as employees working from home.
 - Identifying those employees who have the necessary IT infrastructure to work from home (e.g., remote access to the office computer systems).

2. Communicate

- Identify an appropriate person as spokesperson/communicator of updates on policies etc., with appropriate credibility.
- What, if anything, is said about absence from work for reasons other than ill-health, e.g., where an office is closed?
- Assuming the employer has a health and safety committee, have there been any discussions with that committee about COVID-19 and its potential impact? If there is no such committee, the employer may want to consider setting one up.
- Communicate as a matter of urgency with the high-risk groups identified in any risk review to ensure they are aware of their high-risk status and the measures that are being taken to assist.
- Ensure managers are aware of the relevant workplace policies.
- Consider issuing guidance to employees on how to recognize when a person is infected with the coronavirus. What are the symptoms, and what should one do if one is taken ill at home or at work? It is also important to emphasize that individuals may not recognize that they have the virus and so may not be exhibiting symptoms. Employees should be informed of the reporting procedure within their employer if they have a potential infection as well as any official reporting process.
- Provide advice to encourage individuals to take a degree of responsibility for their own health and safety and to slow the spread of the virus. For example, advice on handwashing and use of sanitizer gels, coupled with a willingness to self-identify where it is possible that individuals have come into contact with individuals with the virus, have become infected themselves or have returned from private travel abroad to an area which turns out to be affected by the virus.
- Make clear that where staff are ill, they must not come to work regardless, i.e. "struggle through".

3. Update

- Initiate a system to keep up-to-date, especially given the speed at which infection is spreading.
- Consider establishing a committee on the employer's side to coordinate responses and engage with any staff consultative forum, and with particular responsibility for staying up-to-date with public health updates.
- How will employers communicate to employees regular updates on the coronavirus and its spread? As news develops, it is extremely important for an employer to be issuing fact-based updates, to avoid the possibility of fear being used by worried employees to make decisions about whether or not to come to work, whether to travel abroad, etc.
- Who will have the authority to determine changes to policy and issue any new communications to staff?

4. Travel

- Log employee travel before it is booked and check against the latest travel protocols.
- Ensure staff know that this applies to personal travel as well as business travel.
- Encourage staff to tell you if close family members with whom they share a house are travelling to infected areas.
- Replace face-to-face meetings (especially those involving travel) with video conferences,

telephone conferences, etc.

- Consult/communicate about whether to encourage varied work patterns to avoid travelling on public transport at rush hour.

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Country Overview

As at April 14, 2020

1. What are an employer's main legal obligations?

The crucial part of an employer's legal liability in conjunction with COVID-19 in the workplace includes:

- a) Providing a healthy and safe workplace so far as reasonably practicable for its employees, i.e., obligations under the Occupational Safety and Health Act 1994 ("**OSHA 1994**") and the common law duty of care; and
- b) Complying with the obligations found under the contract of service, the Employment Act 1955 ("**EA 1955**") / Labour Ordinance ("**Sabah Cap 67**") / Labour Ordinance ("**Sarawak Cap 76**") and Minimum Wages Order 2020 ("**MWO 2020**"), including continuing to pay wages and ensuring the employee works within the terms of the contract of employment.

Since the Government of Malaysia has announced a Movement Control Order ("**MCO**") for the period between March 18, 2020, and April 28, 2020, where all private premises are required to be closed during the MCO period, employers are strictly advised to adhere to the MCO.

An employer is also advised to reassess its current insurance policies, including medical insurance, evacuation cover and business interruption, to comply with the various guidelines and FAQs issued by the Government of Malaysia to minimize any unwanted disruptions and disputes at the workplace during this period.

2. Do I need to prepare for and have in place a workplace plan to deal with COVID-19?

The Department of Occupational Safety and Health requires all employers in Malaysia to ensure the safety and health of all its employees at work as far as reasonably practicable. Given an employer's duty to protect its employees' safety and health, and in the interests of business continuity, we recommend that employers put in place such a workplace plan.

3. What should a workplace COVID-19 response plan cover?

We recommend that the plan should list the steps to be taken and to avoid during, and most importantly, after the outbreak.

The Ministry of Health Malaysia has issued COVID-19: Management Guidelines for Workplaces (Annex

25) dated March 24, 2020

(http://www.moh.gov.my/moh/resources/Penerbitan/Garis%20Panduan/COVID19/Annex_25_COVID_guide_for_workplaces_22032020.pdf) to provide employers with a basis for managing employees during the COVID-19 outbreak.

Employers may prepare their plan based on the Ministry of Health's Guidelines.

For general guidance on the contents of a workplace COVID-19 response plan, please see the [Appendix](#), in conjunction with the [Action Point Checklist](#).

4. Can I direct my employees to go home or stay at home if there is an outbreak?

Presently, the Malaysian Government has announced an MCO for the period between March 18, 2020, and April 28, 2020, where all private premises are required to be closed, unless such businesses fall under the category of "essential services". During this period, all employees are required to stay at home.

After the MCO is lifted, if, after careful assessments, employers have found any risks of infection at the workplace, employers may choose to invoke their "work from home" policy and direct their employees to work remotely away from the office. In fact, an employer may be required to do so under section 15 of the OSHA 1994 if it is deemed necessary for the safety and health of the employees.

However, in situations where employers are directing certain/particular employee(s) to stay at home, employers should be cautious that such direction does not amount to discrimination amounting to a fundamental breach of contract which would then entitle the employee(s) to claim constructive dismissal.

5. Can I direct an employee to see a doctor?

Depending on the circumstances, an employer may require employees to obtain a clearance from a medical practitioner before they are allowed to enter the workplace.

As such request may be considered invasive, it is advised that employers formulate a policy that gives such express powers to the employer to make such direction under reasonable circumstances. Such a request may be made pursuant to section 15 of the OSHA 1994, where it is the duty of an employer to ensure the safety, health and welfare of its employees.

6. Do I have to continue to pay wages and provide other employment-related entitlements during a COVID-19 outbreak?

Yes, as the contract of service is still ongoing, employers are required to make full payment of salary and to provide other employment-related entitlements (except for allowance in relation to attendance/travelling) during a COVID-19 outbreak. Further, employers are not allowed to force employees to go on unpaid leave and/or utilize their annual leave entitlements during this period. This is in line with labor and industrial law in Malaysia as well as the Guidelines dated March 23, 2020, issued by the Labour Department of the Ministry of Human Resources, Malaysia.

7. Can I quarantine certain staff to certain parts of an office or send them to a different office?

It may be possible to ask an employee to work from a particular part of an office if it is reasonably necessary to ensure public health and/or as part of the employer's duty pursuant to section 15 of the OSHA 1994. However, as above, employers should be cautious that such direction does not amount to discrimination amounting to a fundamental breach of contract which would then entitle the employee(s) to claim constructive dismissal.

An employer may also send an employee to work in a different office. Nevertheless, this may be dependent on the terms of the contract of employment (e.g., whether it provides that the employee is entitled to work at a fixed location), the extent of the travel required and inconvenience suffered by changing the work location. To illustrate, it may not be permissible to change an employee's workplace from Malaysia to a place overseas when the employee does not usually travel as part of their duties.

8. Can I direct my employees to report suspected cases of COVID-19?

Yes, in light of the COVID-19 outbreak, if an employer suspects its employees have contracted COVID-19, it would be reasonable and lawful to ask them to report to relevant authorities. It would also be reasonable and lawful to ask employees to inform the employer if they suspect either that they, or their colleagues, have COVID-19.

9. Can an employee lawfully refuse to attend work if there is a COVID-19 outbreak?

Under section 14(3) of the EA 1955, employees may terminate their contracts of employment without notice where they or their dependants are immediately threatened by danger to the person by violence or by disease and the employees did not agree to such conditions under their contracts of employment. COVID-19 may be considered such a threat by employees. Moreover, if an employer requires an employee to attend work in these circumstances, it is likely to be in breach of the OSHA 1994.

10. Can I screen employees and customers before allowing them to enter the workplace?

Yes, as a precautionary step, an employer is strongly advised to screen their customers and employees to help reduce the probability of being prone to be infected. As a general rule, employers should ensure that the screening is for the sole purpose of preventing any threat of COVID-19 in the working environment and that the information collected is necessary and not excessive. Over and above that, an employer is required (i) to provide hand sanitizers; (ii) to prepare and implement the best practice guidelines on social distancing; and (iii) to adhere to the COVID-19 preventive procedures set by the Malaysian Ministry of Health.

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Appendix: Workplace COVID-19 Response Plan

A plan should deal with the following:

BEFORE AN OUTBREAK

- Preventive measures.
- Disinfecting the workplace regularly.
- Maintaining good indoor ventilation.
- Making sure that employees, suppliers and customers are aware of the employer's plans in the event of an outbreak.
- Ensuring sufficient supplies of appropriate masks, alcohol wipes, gloves, paper towels, thermometers, disinfectants, etc.
- If employees are required to travel to areas known to have the virus, whether such travel is necessary.

DURING AN OUTBREAK

- The steps the employer will take to ensure the safety of employees while at work during a COVID-19 outbreak include how an employer will identify risks of employees becoming infected and how to minimize such risks. The employer may also wish to seek advice from government/official sources as to what steps need to be taken, e.g., quarantine requirements.
- Communication strategies such as how and what information will be communicated to employees, suppliers and customers.
- Where employees will work, e.g., home, in the office or in alternative temporary offices.
- At what stage will the workplace be closed and who will decide that.
- How to deal with infection and/or deaths of colleagues, e.g., counselling.
- A mechanism for determining whether employees, suppliers and customers will be allowed access to the workplace, especially if they show symptoms of being infected by COVID-19.
- What to do with high-risk/exposure staff (e.g., pregnant, key employees and employees who travel).

AFTER AN OUTBREAK

- Ways to ensure that employees and customers have fully recovered before they are allowed back into the workplace.
- Rehabilitation for sick employees returning to the workplace.
Communication with employees and flexibility on enforcing requirements imposed on employees under their contract of employment will be important in maintaining employee relations and reducing anxiety and panic during an outbreak. Therefore, depending on the circumstances, employers may wish to:
 - Discuss with staff the possibility of a workplace closure prior to closing.
 - Allow employees to take annual leave or unpaid leave once sick leave has been exhausted.
 - Allow employees to work from home.
 - Explore salary reduction or unpaid leave as an alternative to termination of employment

where business has slowed down.

Employers should make visitors to its offices aware of any health and safety hazards associated with entering the workplace before any intended visit, where reasonably practicable.

This publication by Shearn Delamore provides information and comments on legal issues and developments that may be of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.