

MESSRS ARTHUR WANG, LIAN & ASSOCIATES

Tel : +603 - 6251 6363

Email : arthur@awl-law.com

Website: <https://awl-law.com/>

INTRODUCTION

- ▶ The Prime Minister of Malaysia had, on 16 March 2020, announced the implementation of the Movement Control Order (MCO):-

- ▶ 18.03.2020 - 31.03.2020 ✓
- ▶ 01.04.2020 - 14.04.2020 ✓
- ▶ 15.04.2020 - 28.04.2020 ✓
- ▶ 28.04.2020 → ?

MCO & COVID-19 RELATED LEGAL ISSUES

- **TOPIC 1 :-**
ISSUES RELATING TO EMPLOYMENT
(Termination and Retrenchment)
- **TOPIC 2 :-**
ISSUES RELATING TO CONTRACT
(Force Majeure and Doctrine of Frustration)
- **TOPIC 3:- INSOLVENCY**
(Bankruptcy, Winding Up & Voluntary Arrangement)

MCO &
COVID-19:
ISSUES
RELATING TO
EMPLOYMENT

WHY EMPLOYMENT CONTRACT IS IMPORTANT?

- ▶ A good employment contract is beneficial to both the employee and the employer. It spells out the rights and obligations of each party.
- ▶ If there is nothing in writing, it can be difficult to prove what the parties have agreed.
- ▶ Could lead to legal disputes between employer and employee(s).

SUGGESTION ON CONTENTS OF AN EMPLOYMENT CONTRACT

- ▶ Full names of employer and employee;
- ▶ Job title/designation, main duties and responsibilities;
- ▶ Start date of employment;
- ▶ Duration of employment (if employee is on fixed-term contract);
- ▶ Working arrangements, such as daily working hours, number of working days per week, and rest day;
- ▶ Salary (basic salary, allowances, deductions, salary period, overtime rate and period);
- ▶ Types of leave;
- ▶ Medical benefits;
- ▶ Probation period;
- ▶ Notice period; and
- ▶ Place of work (Optional).

Key Employment Terms

All fields are mandatory, unless they are not applicable

Issued on: DD/MM/YYYY
All information accurate as of issuance date

Section A | Details of Employment

Company Name	Job Title, Main Duties and Responsibilities
Employee Name	<input type="checkbox"/> Full-Time Employment <input type="checkbox"/> Part-Time Employment
Employee NRIC/FIN	Duration of Employment (only for employees on fixed term contract)
Employment Start Date	Place of Work (if different from company's registered address)

Section B | Working Hours and Rest Days

Details of Working Hours e.g.: - Start & End Time (Weekday & Weekend) - Break Hours - Total Working Hours (excluding break hours)	Number of Working Days Per Week
	Rest Day Per Week (specify day)

Section C | Salary

Salary Period <input type="checkbox"/> Hourly <input type="checkbox"/> Daily <input type="checkbox"/> Weekly <input type="checkbox"/> Fortnightly <input type="checkbox"/> Monthly	Date(s) of Salary Payment
Overtime Payment Period (only if different from salary period) <input type="checkbox"/> Hourly <input type="checkbox"/> Daily <input type="checkbox"/> Weekly <input type="checkbox"/> Fortnightly <input type="checkbox"/> Monthly	Date(s) of Overtime Payment
Fixed Allowances Per Salary Period	Basic Salary (Per Period) (specify hourly rate if on part-time employment)
	Overtime Rate of Pay (only if working hours more than 8 hours a day or 44 hours a week)
Item	Item
Allowance (\$)	Deduction (\$)
Total Fixed Allowances	Total Fixed Deductions
Other Salary-Related Components	<input type="checkbox"/> CPF Contributions Payable (subject to prevailing CPF contribution rates)

Section D | Leave and Medical Benefits

Types of Leave (applicable if service is at least 3 months)	Other Types of Leave (e.g Paid Maternity Leave)
<input type="checkbox"/> Paid Annual Leave Per Year: ____ (days/hrs) (for 1st year of service)	<input type="checkbox"/> Paid Medical Examination Fee
<input type="checkbox"/> Paid Outpatient Sick Leave Per Year: ____ (days/hrs)	Other Medical Benefits (optional, to specify)
<input type="checkbox"/> Paid Hospitalisation Leave Per Year: ____ (days/hrs)	
(Note that paid hospitalisation per year is inclusive of paid outpatient sick leave. Leave entitlement for part-time employees may be pro-rated based on hours.)	

Section E | Others

Length of Probation: _____	Notice Period for Termination of Employment (initiated by either party whereby the length shall be the same)
Probation Start Date: _____	
Probation End Date: _____	

* Please refer to www.mom.gov.sg for more details on employment laws, leave benefits and soft copy of the KETs template.

Sample of KET

*Extracted from the
official website of
Ministry of Manpower
(Singapore)*

王明威、連律師樓
ARTHUR WANG, LIAN & ASSOCIATES

WHAT IS TERMINATION?

- ▶ The end of an employee's contract.
- ▶ Two types of terminations, namely:-
 1. voluntary termination: by the employee; and
 2. involuntary termination: by the employer. Known as “dismissal”.

IN WHAT SITUATIONS CAN EMPLOYER TERMINATE THE EMPLOYMENT CONTRACT?

- ▶ S.11 of Employment Act 1955 (“EA”): When a contract of service for a specified period of time has expired or when the piece of work has been completed;
- ▶ S.12 EA: When a notice of termination has been served to the employee;
- ▶ S.13(2) EA: When the employee conducts a willful breach of the employment contract. No notice is required to be served;
- ▶ S.14(1)(a) EA: When the employee commits a misconduct and due inquiry has been carried out. No notice is required to be served; and
- ▶ Other normal and justified reasons for dismissals are poor performance and/or negligence.

WHETHER DOMESTIC INQUIRY IS REQUIRED UNDER THE LAW?

- ▶ Pursuant to S.14(1)(a) EA, it states that an employer may, on the grounds of misconduct inconsistent with the fulfillment of the express or implied conditions of his service, after due inquiry, dismiss without notice the employee.
- ▶ Q: Whether failure of employers to hold domestic inquiry is fatal?
- ▶ A: In *Marhaini Ariffin v Aminvestment Bank Berhad [2019]*, the court held that the absence of a domestic inquiry is not fatal to the company's case.

CAN EMPLOYER UNILATERALLY TERMINATE THE EMPLOYMENT CONTRACT OF A PROBATIONER?

There are 2 conflicting decisions:-

1) *The Court of Appeal in Khaliah Bte Abbas v Pesaka Capital Corp Sdn Bhd [1997] 1 MLJ 376.*

- Acknowledges no mention of 'probation' or 'probationary' in S.2 of the Industrial Relations Act 1967 ("IRA").
- But S.2 IRA does enlist the word 'apprentice' - an apprentice would normally be a probationer.
- Consequently, an employee on probation would enjoy the same rights as a permanent or confirmed employee and, therefore, his or her services could not be terminated without just cause or excuse.

(CONT.) CAN EMPLOYER UNILATERALLY TERMINATE THE EMPLOYMENT CONTRACT OF A PROBATIONER?

2) The Federal Court in *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320.

- At the end of the probationary period an employer can either confirm or terminate a probationer's services.
- At the end of probationary period, if no action is taken by the employer either by way of confirmation or termination, then the employee continues to be in service as a probationer.

WHETHER EMPLOYER NEEDS TO EXPRESSLY WARN PROBATIONER PRIOR TO DISMISSAL?

- ▶ YES
- ▶ The High Court in *Artworld Advertising Sdn Bhd v Nor Azian Bt Mohd Salleh* [2004] 7 MLJ 349:
 - ▶ Prior to the dismissal for poor performance, the employer must prove that the probationer had been warned and be given sufficient time to improve himself and that, despite so, the probationer failed to sufficiently improve his performance.
- ▶ The High Court in *Robert John Reeves v Menteri Sumber Manusia, Malaysia* [2000] 1 MLJ 107:
 - ▶ For employees of senior positions, the need for warning and an opportunity for improvement is not so apparent for they are fully aware what is required of them and capable to assess their performance for themselves.

WHAT IS RETRENCHMENT?

- ▶ Termination of an employee's services because the employee is redundant, that is, he is regarded as being surplus to the requirements of the organization.
- ▶ Example of grounds for retrenchment:
 - ▶ Cessation or diminishment of job functions
 - ▶ Merger of work units
 - ▶ Discontinuation of production line

IN WHAT SITUATIONS CAN EMPLOYER RETRENCH ITS EMPLOYEE?

- ▶ Companies are generally at liberty to organize their business enterprise in a manner that best achieves their objective of maximizing profit. So long as the exercise is bona fide, the Court will usually not interfere with such decision.

- ▶ Q: What amounts to “*bona fide*”?

- ▶ A: Two main factors are to be considered, as described in *Radio & General Trading Sdn Bhd v Pui Cheng Teck & Ors* [1990] 2 ILR 242 (Award no. 243 of 1990):
 - 1) Whether a redundancy situation arise leading to retrenchment; and
 - 2) If there is a redundancy situation, whether the retrenchment is done in conformity with the accepted standards of procedure.

WHAT MEASURES SHOULD BE TAKEN BY EMPLOYERS TO AVOID RETRENCHMENT?

- ▶ Pursuant to Guidelines on Retrenchment Management issued by the Ministry of Human Resources:-
 - ▶ freeze the recruitment of new workers except for critical areas;
 - ▶ limit overtime work;
 - ▶ limit work on weekly rest days and public holidays;
 - ▶ reduce weekly working days or reduce the number of shifts;
 - ▶ reduce daily working hours;
 - ▶ provide retraining programs for workers;
 - ▶ identify alternative jobs and transfer workers to other divisions/jobs in the same company;
 - ▶ implement temporary lay-off;
 - ▶ introduce pay-cut fairly at all levels and to be implemented as the last resort after other cost-cutting measures have been implemented; and
 - ▶ identify vacancies in other companies to be offered to workers who will be retrenched.

WHETHER IT IS MANDATORY FOR EMPLOYERS TO ADOPT THESE MEASURES PRIOR TO RETRENCHMENT?

- ▶ Note: while the above are not of legal force, but failure to comply can be considered when determining whether retrenchment exercise was carried out according to fair labour practice.

WHETHER A RETRENCHED EMPLOYEE IS ENTITLED TO CLAIM ANY PAYMENT FROM EMPLOYER?

- ▶ YES
- ▶ Regulation 3(1) of the Employment Regulations (Retrenchment and Lay-Off Benefits) 1980 (“ER 1980”) expressly mentions that compensation should be given to:-
 - ▶ An employee whose service under the contract of employment is not less than 12 months; and
 - ▶ if he is terminated or retrenched.

(CONT.) WHETHER A RETRENCHED EMPLOYEE IS ENTITLED TO CLAIM ANY PAYMENT FROM EMPLOYER?

Regulation 4 of ER 1980: certain categories of employees who can be exempted from receiving such payment. They are:

- 1) Contract of employment is less than 12 months.
- 2) Termination by reason other than retrenchment or lay-off. E.g. due to retirement, misconduct or voluntary termination.
- 3) If the employee's contract of service has been renewed, or if he is re-engaged by the same employer under a new contract of service on terms and conditions which are not less favourable than the previous contract and the renewal takes effect immediately upon the expiry of the previous contract of service.

(CONT.) WHETHER A RETRENCHED EMPLOYEE IS ENTITLED TO CLAIM ANY PAYMENT FROM EMPLOYER?

- 4) Where the employer has offered to renew or to re-engage the employee under the new contract of service on terms and conditions which are not less favourable than the previous contract within 7 days from the date of expiry of the termination notice, and the said renewal or re-engagement takes effect on or before the termination date and the employee has refused to accept the offer without any reasonable excuse.

HOW MUCH CAN BE CLAIMED BY THE EMPLOYEE?

Regulation 6 of ER 1980: the amount of termination or lay-off benefits payment to which an employee is entitled in any case **shall not be less than:-**

- ▶ 10 days wages for every year of employment if he has been employed by that employer for a period of less than 2 years;
- ▶ 15 days wages for every year of employment if he has been employed by that employer for 2 years or more but less than 5 years; or
- ▶ 20 days wages for every year of employment if he has been employed by that employer for 5 years or more.

$$\text{Amount} = \frac{12 \text{ months' wages}}{365 \text{ days}} \times \text{Period of Employment} \times 10 \text{ or } 15 \text{ or } 20 \text{ days' wages}$$

WHAT ARE EMPLOYER'S OBLIGATIONS TO EMPLOYEES VIS-À-VIS COVID-19?

- ▶ General obligations of Employers: to provide safe environment for employees to work in.

- 1) General/implied contractual terms.

- 2) Section 15(1) of Occupational and Safety Health Act 1994 ("OSHA"):

"15. General duties of employers and self-employed persons to their employees.

(1) It shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees."

- ▶ Consequences of breach of general obligation by Employers:

- 1) Civil suit by employee(s);

- 2) Breach of OSHA, fine not exceeding RM50,000.00 or imprisonment of up to 2 years or both (Section 19 OSHA).

GUIDELINES TO BE FOLLOWED VIS-À-VIS COVID-19

► Pursuant to Guidelines issued by Minister of Human Resources (“MOHR Guidelines”) dated 5 February 2020, whereby Employers shall:

- 1) Instruct employees to immediately be examined by a registered medical professional or a medical professional, the costs of which to be borne by the employer in line with Section 60F of Employment Act 1955;
- 2) Provide paid sick leave or hospitalisation entitlement during quarantine period to employees receiving quarantine orders from registered medical practitioner, regardless if the employee is quarantined at home or at the hospital;
- 3) *In the event the employee’s quarantine order exceeds sick leave or hospitalisation leave, Employers are encouraged to provide extra remuneration to employee(s);
- 4) Provide full pay to employees receiving quarantine orders from registered medical practitioner upon returning from countries with COVID-19 cases due to official duty or instructions from employers;
- 5) *Not prevent any employees from attending work if no quarantine orders are issued by any registered medical practitioner. However, Employers can instruct any unwell employee from coming to workplace by providing paid sick leave to the employee; and
- 6) *Not instruct employees, in any way, to utilise annual leave entitlement or take unpaid leave during quarantine period.

(CONT.) WHAT ARE EMPLOYER'S OBLIGATIONS TO EMPLOYEES VIS-À-VIS COVID-19?

- ▶ Pursuant to Guidelines issued by Malaysian Employers Federation (“MEF Guidelines”) dated 14 February 2020, whereby members are encouraged, among others, to:
 - 1) Consider and treat employees who are required to be quarantined either in hospital or at home on matters related to COVID-19 to be on sick or hospitalisation leave.
 - 2) Exercise their discretion and compassion in the event an employee has exhausted his/her eligibility to be paid hospitalisation leave by granting additional hospitalisation leave with pay. Such hospitalisation leave is to be treated as part of the employees' eligibility under their respective terms of employment, collective agreement or the Employment Act 1955; and
 - 3) Employers are advised NOT to require their employees to travel on non-essential work matters to the countries affected by COVID-19. Employees should also be advised not to travel to the countries affected by the COVID-19 outbreak for any personal reasons for the duration of the outbreak.
- ▶ ***Note: both MOHR Guidelines and MEF Guidelines do not have the force of law but serve only as guidelines to minimise any potential disputes with employees.**

COMMON QUESTIONS FROM EMPLOYERS RELATING TO COVID-19

- ▶ Q1: Must Employer pay full salary to employees instructed to be placed under quarantine?
- ▶ A: For employees under quarantine, generally speaking, yes they are entitled to full wages throughout the quarantine period.
 - To consider the applicable minimum sick leave entitlement in each calendar year applicable to employees under the Employment Act 1955 (“EA”), for EA employees.
 - As for non-EA employees would be regulated by the terms of their employment contract e.g. medical, hospitalization and insurance benefits for their employee’s pecuniary benefits. These benefits should be dispensed as per the normal course during the COVID-19 outbreak.

(CONT.) COMMON QUESTIONS FROM EMPLOYERS RELATING TO COVID-19

- ▶ Q2: For employees who are not coming into office due to the Movement Control Order (“MCO”), are they still entitled to full wages?
- ▶ A: Two positions to be considered:
 - 1) *Dunlop Malaysian Industries Berhad V. Dunlop Malaysian Industries Employees Union* [1982] 1 ILR 161: if it is due to business downturn whereby the employee has no work to do then the employer must still pay wages and cannot force the employee to take up annual leave.
 - 2) The English case of *Browning And Others V. Crumlin Valley Collieries, Limited*. [1924. B. 5969.] [1926] 1 K.B. 522:
 - The workplace, a mine, was found to be unsafe for work and forced to be closed through no fault of the employer.
 - The contracts of employment were silent on situation such as this - never anticipated.
 - It was found that the mine owners “*should not be liable to pay wages or damages to their workmen during the time which was reasonably to put the mine into safe condition*”.

(CONT.) COMMON QUESTIONS FROM EMPLOYERS RELATING TO COVID-19

- ▶ Q3: Can Employer request specific employee(s) to stay away from the office or workplace or to work from home?
- ▶ A: Employer can exercise managerial prerogative towards the employee by enforcing work-from-home policy, if it does not contravene the employment contract. Employers can consider the MEF Guidelines as follows:
 - Enter into agreement with said employee to take up half-day annual leave while Employer pays half-day wage during the said period;
 - Enter into agreement with said employee not to pay less than half-day wage during the said period;
 - Any other agreed arrangement between the Employer and employee.
 - Must pay wage.

(CONT.) COMMON QUESTIONS FROM EMPLOYERS RELATING TO COVID-19

- ▶ Q4: Can Employer request its employee(s) to volunteer to take up annual leave in lieu of wages?
- ▶ A: Unless an employee freely consents to such an arrangement, the Employer can only request and not impose such a condition.
- ▶ Reminder and/ caution to Employer not to discriminate against employees choosing not to take up annual leave, as this may be a ground for a constructive dismissal claim.