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Navigating choppy waters: Employment measures in the age of COVID-19

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Employers batten down the hatches

There is no doubt the world has changed – for certain businesses, even previously reliable revenue has severely declined, and for the first time employers are examining their otherwise stable workforce with an apprehensive eye on surviving the coming months. Across the world, employment norms are shifting, and this is equally true in Singapore.

In March 2020, the Ministry of Manpower (MOM) issued a directive that companies must notify the MOM if any cost-cutting measure taken during the COVID-19 epidemic impacts employees' salaries, and indicate that any change has been introduced fairly. Whilst the intention is, "to encourage a sense of social responsibility and prevent downstream salary disputes", the indication is clear – if measures must be taken to protect employee jobs, even if those measures adversely impact salary, then so be it.

So, with remote working becoming the norm, and retrenchment remaining a "last resort", what options are available for Singapore employers looking to batten down the hatches? This briefing sets out a high-level summary of the most common issues facing employers in Singapore.

Communication is key

When introducing any cost-saving measure, communication is critical. Once a course of action has been decided upon (and legal advice has been sought, if necessary), an employer should:

- Put in place a communication plan to explain the measure to employees, and explain why the measure is necessary in the current exceptional climate.
- If possible, seek volunteers from the workforce first, before unilaterally imposing any measure on staff (for example, some staff may be happy to reduce their working week).
- Confirm that the company will do everything it can to reverse the measure in the future (whilst avoiding any concrete promises that may not be kept).
- Give all employees an opportunity to discuss the measure with management in an open and honest way.
- Ensure that management lead by example, with senior staff accepting similar (or more drastic) cost-saving measures.

If any cost-saving measure impacts salary, the MOM should be notified (this is mandatory for businesses with at least 10 employees). In addition, if any foreign employee is impacted, approval from the Controller of Work Passes must be sought. And of course, if a trade union or collective agreement applies to the employees, discussions with the trade union should take place.

A raft of Orders

Your employee has been quarantined. Can they still work? Are they entitled to paid, sick leave? What about annual leave?

There are three types of Orders that a person may be issued in Singapore, in descending order of severity; (1) a Quarantine Order (issued to isolate individuals who are, or are suspected to be, carriers of an infectious disease), (2) a Stay-Home Notice (issued to those who must remain in their place of residence at all times during a 14-day period), and (3) a Leave of Absence Order (issued as a precautionary measure, whereby the individual can leave to buy meals and household supplies). If an employee is under a Stay-Home Notice or Leave of Absence Order, but isn't actually unwell, that person should work from home to the extent possible – the employee will receive their usual salary, and no sick leave will apply. The same applies to any office closures or preventative self-isolation measures being taken.

If working from home isn't possible, or the employee is actually unwell, an employee's statutory entitlement to 14 days' paid outpatient leave and 60 days' paid hospitalization leave can be quickly expended. To be clear, there is no option for them to work in their usual place of business during these periods. In this case, employers are encouraged to be flexible, for example by:

- Providing additional paid leave on top of an employees' annual leave entitlements.
- Treating the period as part of their paid outpatient sick leave, or paid hospitalization leave entitlements.

Normal sick leave policy, such as requiring medical certificates from a medical practitioner, may also be relaxed to assist social distancing measures.

What other options are available?

On 12 March 2020 the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment (the Guidelines) were updated in light of COVID-19. The Guidelines set out various options for struggling employers to avoid retrenchments, effectively on a sliding scale of severity, as follows:

1. Adjustments to work arrangements without wage cuts (for example, working from home, training and upskilling employees, redeployment of employees to different business units, or making use of paid holiday leave).
2. Adjustments to work arrangements with wage cuts (for example, making full-time employees part-time, implementing shorter work weeks, or temporary layoffs).
3. Direct adjustments to wages (for example, pay freezes or cuts).
4. Unpaid leave (or "furlough").

We have briefly set out some of common questions in respect of these measures below.

Can an employee be required to work from home?

In short, yes. It's common for a Singapore employment contract to include a clause allowing the company to specify the location of work; this is usually sufficient to enforce working from home.

But even in the absence of such a clause, following MOM announcements, an employer is permitted to require employees to work from home.

Should we tell other staff the identity of an employee who has tested positive for COVID-19?

Employers will need to consider duties of confidentiality and data protection requirements before naming a member of staff who has tested positive for COVID-19. While employers will want to keep staff informed about cases, as a general rule there will be no need to name the member of staff concerned. Employers should not provide more information than is necessary. This would normally involve informing co-workers who have been in contact with an employee who has subsequently developed COVID-19, without actually telling them who that person is.

Should we notify staff if we are aware someone has been tested for COVID-19, but doesn't have the results?

There is no obligation to do so and market practice, given the number of people testing simply out of precaution, is that the employer keeps an eye on such persons without notifying all employees.

Can an employee be required to take paid annual leave?

Employers in Singapore cannot, typically, enforce annual holiday leave against the employee's wishes (either paid or unpaid). However, the MOM recognizes that where a business is facing exceptional strain, measures may be unilaterally enforced on a temporary basis in order to prevent redundancies. In the current situation, it may be reasonable for a company to require employees to take annual leave where the financial condition of the business requires.

Can we suspend employee benefits?

If an employee benefit is truly discretionary (and is not part of an employee's contractual employment terms), there is no issue with an employer suspending discretionary benefits without employee consent. Note, however, that many employment contracts in Singapore provide for certain benefits (such as medical and dental) on a nondiscretionary basis (i.e., "*You will be entitled to…*"). Here, the employee's consent should ideally be sought to remove any nondiscretionary benefit.

What about a shorter work week, or reduced hours?

One option is for an employer to introduce reduced hours on a temporary basis. Typically, reducing an employee's hours (and therefore their salary) isn't permitted without the consent of the employee; payment of salary is a fundamental employee contractual right. However, where such measures are necessary to protect jobs in an exceptional situation such as COVID-19, such measures may be justified, on a case-by-case basis.

The Guidelines provide that for a shorter work week, employers may implement a reduction in the normal five-day work week (noting that a reduction of three days should only be implemented if the company's performance is severely affected). Under the Guidelines, a shorter work week shouldn't last for more than three months at any one instance, subject to review, and employees should be paid at least 50 percent of their wage when not working.

Wherever possible, employees should be given the option of voluntarily reducing their hours; only if sufficient numbers do not volunteer, or the financial condition of the company demands it, should an employer impose reduced hours without consent.

Can an employer impose pay freezes, or even pay cuts?

Provided the employee doesn't have a contractual right to a salary increase, and a salary increase hasn't been offered and accepted, there's no issue with an employer unilaterally imposing a salary freeze. If an employee has a contractual right to a salary increase, the employee's consent should

be obtained to suspend or cancel the salary increase. In the current situation, however, if employee consent cannot be obtained and the salary freeze is unilaterally imposed, the risk of a successful action being brought against the company by the employee would appear low.

If a company wishes to implement a pay-cut for all employees, each employee would ordinarily need to consent to the pay-cut. However, provided there are very good reasons for the pay-cut and implementing the pay-cut will help prevent layoffs, imposing a pay-cut may be justifiable in certain circumstances. This is particularly the case where the pay cut is temporary, and a one-off payment would, hopefully, be made to make up for the pay-cut later in the year. Under the Guidelines, this will be treated as a reduction of the "Monthly Variable Component" of salary, and any cut should ideally be limited to a 10 percent reduction, and the company should specify when the salary will be reinstated. Voluntary pay cuts, with consent, should be sought as a first option.

We're in serious trouble: can we impose temporary unpaid leave or furlough?

Unsurprisingly, unpaid leave cannot typically be implemented against an employee's wishes, and employees would not, usually, agree to unpaid leave. In exceptional circumstances, unpaid leave may be unilaterally enforced, albeit this is not without risk. Various options are set out in the Guidelines to avoid retrenchment, with unpaid leave being a last resort prior to retrenchment.

Before implementing unpaid leave, an employer should have considered and implemented any other less drastic measures first, as well as consulted with employees where possible. Voluntary unpaid leave should be offered, before being imposed on any employee. The company should also recognize the impact on rank-and-file employees in determining the extent and duration of the measure. Unpaid leave is effectively treated as a temporary layoff under the Guidelines, and various recommendations apply.

If we follow the Guidelines, could an employee still bring a contractual claim against us for breach of employment terms?

In short, yes. Any material change in employment terms typically requires an employee's consent. Whilst the Guidelines and current MOM guidance suggests that a unilateral change in employment terms is permissible in certain circumstances, it doesn't wholly reduce the risk of a contractual claim being brought by an employee for breach of employment terms. Saying this, however, provided the measure is necessary to avoid retrenchments or to continue operations in Singapore, and the measure was imposed fairly, any such claim would appear unlikely to succeed.

These are extraordinary times, and many employers are being required to take extraordinary measures to protect their workforce, or indeed their very existence. As an employer and an employee in Singapore, one can only hope that such temporary measures are indeed that: temporary.

Note that the above is a general guide only, and the measures that can be introduced by a business will depend on several factors; specific legal advice should be sought on a case-by-case basis.

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