

CLIENT UPDATE
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**CAN AN EMPLOYER DEDUCT EMPLOYEES' WAGES
BY REASON OF THE MOVEMENT CONTROL ORDER
("MCO")?**

By now, we would have already entered the 4th phase of the MCO, in which the MCO has been extended thrice. Although there are positive and encouraging signs on the coronavirus (COVID-19) outbreak in Malaysia, it is widely agreed that the outbreak has taken an economic toll on businesses here and around the world.

In order to sustain their businesses during this prolonged MCO, many owners are forced to adopt intensive cost-saving measures, as most of them, being non-essential services, are not allowed to fully and physically operate during the MCO period.

In the midst of cutting overheads and fixed costs, the elephant in the room now is ***whether employers are allowed to deduct employees' wages*** during this time.

Can wages be deducted?

Firstly, employers are generally not allowed to do so. **Section 24(1) of the Employment Act 1955** states that no deductions shall be made unless they are made within the exceptions provided under **sub-sections 24(2) to 24(6)**. Unfortunately, the exceptions do not seem to be relevant to the current predicament. It is silent as to whether an employer can deduct wages due to financial difficulties caused by an outbreak.

Secondly, it is an established principle that any unilateral decision by the employer to deduct an employee's salary when the contract of employment does not provide for

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such a right, is considered a fundamental breach of the contract as confirmed in **Ling Ka Hong v Crystal Establishment Bhd [2010] 4 MELR 619**. This principle applies also to fixed allowances, as can be seen in **BSF Auto & Parts Sdn Bhd v Tan Yam Huat [2005] 1 LJU 47**.

However, employers may deduct the wages if the employees agree and consent to the said deduction. The concept is simple – if both parties are willing, nothing can go wrong.

Therefore, employers must honour the payment of wages and allowances to their employees during this MCO period. It would seem that the only way for employers to go around this is to negotiate with the employee on a good faith basis and come to a mutual consensus with regards to any pay-cut. Though so, employers must ensure that any deductions must not result in the salary going below the minimum wage of RM1,200.00 (or RM1,100.00 depending on location) in accordance with the **Minimum Wages Order 2020**.

It should be highlighted however that there have been some authorities which suggest that pay-cuts during times of economic crisis (though unilateral) may be justified if the other alternative is the retrenchment of employees or closure of the business, especially in times of economic crisis:

- (a) In **Lim Ban Leong v Gold Bridge Engineering & Construction Bhd [2017] 2 LNS 0370** the Court held that if a company is facing losses and is trying to fight off closure of its business or retrenchment of its employees, the company can ask the employees to take a pay-cut in which the salary can then be reinstated and increased when the business eventually improves. As such, the employee's claim against the company in that case was dismissed.

The Court however notes that there should have been much more engagement by the company with its employees in order to maintain industrial

harmony – which again shows the importance of frank negotiations with employees.

- (b) In **Penas Realty Sdn Bhd v Chee Yew Kong [2002] 3 ILR 13**, the company was in financial distress due to an economic downturn. The company however took a proactive stand by finding a win-win solution between the employees and the employer by introducing pay-cuts instead of retrenching or dismissing them. The Court found that the reduction of salary by the company here was justified and done in good faith.
- (c) In **Sama World Asia Sdn Bhd v Teh Soo Seng [2008] 1 ILR**, the company suffered financial distress due to the Asian Financial Crisis. In dismissing the employee's claim against the company for non-payment or delay in the payment of wages, the Court remarked that employees should show their solidarity with their employers to demonstrate their appreciation that the employees only suffered a pay-cut and have not been retrenched instead.

All in all, it remains arguable whether an employer can unilaterally deduct the employee's wages on account of a financial crisis.

If any employer decides to reduce the wages of the employees as a cost-saving measure, employers are advised to have a genuine discussion with the employees first and obtain their consent, by explaining to them the current financial predicament faced by the company.

If a mutual agreement for wages deduction is reached, it should be put in writing and on record. If no mutual agreement is reached, the employer should analyse the risk of any possible legal action taken by their employees for breach of the contract of employment.

Other viable alternatives

Employers may also explore other options before resorting to deduction of wages or salary, such as freezing increment of wages (unless this is guaranteed for in the contract of employment) and discretionary bonuses or reducing overtime or number of hours of work.

Another option widely available for employers to take advantage of is the stimulus package introduced by the Government, namely the [Wage Subsidy Programme](#) (Program Subsidi Upah). In essence, employers are able to receive a monthly subsidy from RM600.00 up to RM1,200.00 (depending on the size of the company) per employee for a period of 3 months, provided that the salary of the said employee is below RM4,000.00.

However, in return for the subsidy, the employers would need to retain those employees for a period of 6 months. Employers are also strictly prohibited from asking the said employees to take unpaid leave or deduct their salaries for a period of 6 months, if this programme is taken up by the employers.

Conclusion

Employers should first exercise and exhaust various other measures before deciding to take any drastic steps which may risk unnecessary litigation.

Nevertheless, if deduction of wages is necessary and inevitable, it would be prudent for an employer to genuinely negotiate with the employee to agree to a temporary deduction of wages, which can then be reinstated or increased in stages when the financial situation improves. After all, from an employee's perspective, a reduction of wages may still be a better trade-off, when the other alternative is retrenchment, termination or insolvency of the company.

Any successful agreement arising from the negotiation between the employer and employee should be recorded in writing – this is to prevent any unnecessary disputes later on.

If no mutual agreement is reached, the employer should analyse the risk of any possible legal action taken by their employees and determine whether it is worth the risk.

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