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Latest - Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment in View of COVID-19

Introduction

In view of COVID-19, the Ministry of Manpower ("**MOM**"), the National Trade Union Congress and Singapore National Employers Federation (collectively, the "**Tripartite Partners**") issued an update to their Advisory on Managing Excess Manpower and Responsible Retrenchment ("**Advisory**") on 11 March 2020. The Advisory sets out possible measures to manage excess manpower and is intended to help employees continue to retain a job amidst a likely prolonged difficult period even as employers work towards keeping their businesses and employees' jobs viable. We highlight some of these updates below. All said, note that these are but guidelines from MOM and not hard law. However, employers are well advised to review and consider how best to ride the current situation for the long haul and keep employees in their jobs.

Adjustments to Work Arrangements without Wage Cuts – Flexible Work Schedule

In anticipation of slowdowns in business during this period, the Tripartite Partners have advised that companies may implement a flexible work schedule to optimise manpower use. Under this scheme, employers may apply to MOM to pay employees a different rate from prescribed salary rates for overtime, rest day and public holiday work, or to be exempted from paying the same. The MOM application requires employers to provide, amongst other things, a detailed proposal including reasons why a flexible work schedule is needed, manpower roster, percentage of overtime cost over total manpower cost, and opt out procedures or forms.

To illustrate, the Advisory provides that employers may consider reducing employees' working hours, and using such unused working hours when normal working hours resume. For example, assuming a 44-hour workweek is reduced to 40 hours for 4 weeks, 16 unused hours will be accrued. When the 44-hour workweek is reinstated, the 16 hours will be offset against hours worked above 44 hours without a need to pay overtime for those 16 hours. In this regard, the Advisory provides that employers and employees (with the applicable unions if any) are to agree on how the offsetting should work and the rate at which the accrued hours are to be valued.

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Our comments

The above proposal, whilst laudable, does raise some legal questions. What is a fair rate to value the accrued hours? Let us take Part IV employees, who are entitled to overtime pay under the Employment Act ("**EA**"). Is it legitimate for employers to argue that the accrued hours, though offset against hours worked above 44 hours, do not count as overtime hours (which are payable at the statutory overtime rate) since accrued hours would otherwise have been paid at the normal rate if they had not been accrued? For employees who are not entitled to overtime pay under the EA, is the argument stronger that employers are not obliged to pay more than the basic rate of pay?

More importantly, the assumption that the employee does indeed work a fixed 44 hours a week and never beyond may not be accurate. Is there detriment taken on by the employee and hence what benefit must be provided by the employer to constitute sufficient legal consideration? Even if the employees agree to an arrangement, do employers still face risk that the arrangement is legally unenforceable? These are details that require close examination at the pre-application stage.

We further highlight that it is critical that employers embark on any such exercises in an objective and fair manner – employers must also be able to justify their decisions against business conditions. From a legal perspective, there are risks otherwise. Failure to do so can suggest that employers are not acting in good faith towards employees. This can create a risk that an employee who eventually separates from the employer for an unrelated reason may bring up the employer's earlier action as a basis for unfair dismissal or constructive dismissal.

Adjustments to Work Arrangements with Wage Cuts – Shorter Work Week, Temporary Layoff

The Advisory further provides guidance for measures pertaining to work arrangements adjustments with wage cuts. The Advisory explains two of these measures, "shorter work week" and "temporary layoff" as follows:

Comparison of measures: shorter work week and temporary layoff

Guideline no.	Shorter work week	Temporary layoff*
1	• Request employees to take up to 50% of their earned annual leave	• Request employees to take up to 50% of their earned annual leave
2	• Reduction in work week not to exceed 3 days in a week (reduction of 3 days only if	• Layoff period not to exceed 1 month at any one instance subject to review

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	company's performance is severely affected) • Reduction does not last for more than 3 months at any one instance subject to review	
3	• Pay the affected employees not less than 50% of their wage on the day(s) that the employees are not working during the shorter work week.	• Pay the affected employees not less than 50% of their wage during the layoff period

* The Advisory provides that temporary layoffs "can be a result of facility shutdowns where a work site is closed for a designated period while some administrative functions are till performed or applied broadly across the whole company".

Our comments

Employers may have certain queries regarding the implementation of the above measures, such as whether the guidelines within each measure are conjunctive or disjunctive, or whether they can be used in combination.

For example, since the Advisory indicates that these measures are adjustments to work arrangements *with* wage cuts, is the intention for employers to be able to implement Guideline No 1 singularly? Yet, in doing so there is no reduction in wages. Further, is there then still a need to inform MOM of this measure (see section below)?

If Guideline No 1 is paired with Guideline No 3, employees will be asked to consume their paid leave *and* be paid only a portion of their salary on such day. This pairing causes a higher detriment to employees as compared to a pairing of Guidelines No 2 and No 3, where employees are *not* asked to consume their paid leave but are still paid a portion of their salary for such days by which the week has been shortened. Is the intention then for employers to carry out the guidelines sequentially, i.e. request employees to use up to 50% of their earned annual leave first, then implement a shortened work week / lay off period (as may be applicable), in conjunction with payment of at least 50% wages for that shortened / lay off period?

If this is the case, how will employers ensure that a request for employees to take up to 50% of their earned annual leave is managed fairly across employees? For example, for an employee who has just joined the firm in 2020, 50% may amount to e.g. one earned day, but for an employee who has been with the firm for longer and carried forward leave, 50% may amount to e.g. seven earned days. Employees in certain groups, such as in the latter scenario, may find it unfair if employers implement this guideline to the letter, without appropriate adjustments.

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Employers need to sort out these issues, failing which there will be issues arising from the above from both a practical and legal perspective.

Direct Adjustments to Wages

The Advisory also touches on direct adjustments to wages. The Advisory specifies that these are more severe cost-saving measures for addressing extremely poor or uncertain business conditions that are likely to be long term. It provides that wage components such as annual wage increments, variable bonus payments, annual wage supplements and monthly variable components may be reduced or frozen. It further advises that companies without a monthly variable component may consider treating any cut in basic wages of up to 10%, but must "set clear guidelines to restore the…cut through future wage increases or adjustments when their business recovers". For managers or executives, the cut could be more than 10% of basic wages. The Advisory provides that employers must engage and seek the consent of unions and employees before putting in place these measures.

Our comments

The above measures may also give rise to certain technical questions. For example, what if an annual wage supplement is stipulated in the contract? How then should employers ensure that not paying the same will not result in a breach of contract? Further, do employers need to first reduce / freeze the discretionary wage components before it reduces basic wages? Who are the "managers or executives" in a business, and should the salary reduction be in proportion with their salary level for parity? Last, what happens if employees do not agree – what recourse do employers have?

Employers must consider these issues carefully before consulting with the relevant parties. Otherwise, the negotiation process will be much harder to manage and can give rise to legal implications.

No-Pay Leave

The Advisory provides that, as a last resort, employers may have to put employees on no-pay leave. It states that in implementing this, employers need to:

- have considered/implemented other measures, and consulted their unions and employees;
- recognise the impact on rank and file employees in determining the extent and duration of the measure;
- have senior management lead by example, by accepting earlier and/or deeper cuts in cost-saving measures; and
- apply no-pay leave together with other cost-saving measures, if business conditions warrant it.

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Mandatory Notification to MOM on Cost-savings Measures

From 12 March 2020, all employees registered in Singapore with ten or more employees are required to notify MOM if they implement any cost-saving measures affecting their employees' monthly salaries and inform MOM that such measures have been implemented fairly. This is meant to be a temporary measure until such time the economy recovers.

Cost-saving measures which may trigger the mandatory notification include the implementation of a shorter work week, temporary reduction in salaries, temporary layoffs and any other cost-saving measures that may result in a loss or reduction of monthly salaries. Measures which do not affect the employees' salaries such as adjustment of discretionary bonuses, increments as well as training or redeployment need not be notified to the MOM if they do not result in any reduction or loss of monthly salaries.

Others – Training and Upskilling

The Advisory advises employers to make use of this business downturn to focus on training and upskilling to meet future business demands when the business recovers. Significant support is provided to employers intending to invest in their employees' capabilities including the SkillsFuture programme, redeployment programmes under the Adapt and Grow initiative and the Jobs Support Scheme.

In evaluating their options, and if retrenchment becomes inevitable, companies must ensure they comply with MOM regulations and work with unions to ensure that workers are compensated fairly and given proper assistance. The newly-piloted NTUC Job Security Council also provides outplacement assistance by matching retrenched workers with job openings.

Our Comments

In addition to our comments above, we urge employers implementing cost-savings measures to review their employment agreements to ensure that they do not contravene any of their contractual obligations. It remains a general principle of law that any variation in the terms of the employment agreement must be supported by proper consideration. Variations ought to be properly documented and signed off by the employee. Business decisions on the measures need to be properly documented.

Employers must also be conscious as to whether the organisation's responses to COVID-19 indeed impact their employees' monthly salaries, which triggers a mandatory notification requirement to the MOM. Note that if foreign employees' salaries are also adjusted, employers will also need to seek separate approval from the Controller of Work Passes for salary adjustments them.

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If you need to speak on any of these issues in further detail, please do not hesitate to contact our team below immediately.

Contacts

Kala Anandarajah
Partner
Head (Singapore), Competition & Antitrust and Trade Practice
Employment & Benefits

T +65 6232 0111
kala.anandarajah@rajahtann.com

Desmond Wee
Partner
Head, Corporate Commercial
Employment & Benefits

T +65 6232 0474
desmond.wee@rajahtann.com

Jonathan Yuen
Partner
Commercial Litigation
Head, Employment & Benefits (Disputes)

T +65 6232 0161
jonathan.yuen@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

Our Regional Contacts

RAJAH & TANN | *Singapore*
Rajah & Tann Singapore LLP
T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*
R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*
Rajah & Tann Singapore LLP
Shanghai Representative Office
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*
Assegaf Hamzah & Partners

Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*
Rajah & Tann (Laos) Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*
Rajah & Tann Myanmar Company Limited
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*
Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

Our Regional Presence