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DO EMPLOYEES HAVE THE RIGHT TO WORK REMOTELY? QUESTIONS ON MYANMAR LABOR LAW FACING THE CORONA VIRUS OUTBREAK

Although the number of confirmed cases of the coronavirus ("COVID-19") in Myanmar is still one of the lowest in the region, companies have already observed quite a stir in their regular operations. The government has been releasing some instructions regarding precautions and safety measures to which everybody has to adhere. However, instructions related strictly to workplaces (instructions for factories and workplaces to prevent COVID-19) do not refer to responsibilities and obligations of both employees and employers that have been based on labor laws and adjusted subject to the rapidly changing situation.

In order to prevent employees from potential health risks and minimize disturbances to business operations and possible losses, most companies have already implemented business continuity planning. In doing so, many of our clients have faced questions, which we attempt to answer below.

If an employee self-quarantines, does this count as annual leave, a normal working day, or leave of absence?

It is unclear whether self-quarantine will be counted as any of the above. Various factors should be considered, such as the possibility of remote work, whether the employee shows any symptoms resulting in entitlement to a medical certificate, or a lack of communication regarding leave from the

Highlights of this note

- ▶ If an employee self-quarantines, does this count as annual leave, a normal working day, or leave of absence?
- ▶ Can an employer oblige an employee to self-quarantine? Can an employer terminate the employment should the employee refuse?
- ▶ If an employer is informed that one employee has tested positive, or has a test pending, what must or may the employer tell the other employees?
- ▶ If an employer discriminates against certain employees (e.g. Chinese), is the employer liable for this?
- ▶ What if an employee wants to stay home to take care of children due to school closures or children being sick?
- ▶ What if public transport is closed and an employee cannot get to work?
- ▶ Is an employee entitled to work from home?
- ▶ If an employee falls sick, who pays the salary?
- ▶ In view of a potential lockdown, does the employer have to pay the full salary to employees in times of pandemic and temporary closure of offices? What financial benefits are employees entitled to in case of permanent closure of business.

employee's side. It is safe to say that any time spent in self-quarantine with the employee not able to provide a medical certificate will not be treated as medical leave. Subsequently, if agreed by the employer as remote work, it can then be treated as a normal working day.

The Ministry of Health and Sports designated COVID-19 as a principal epidemic disease or notifiable disease, by exercising the rights described in Section 21 (b) of the Prevention and Control of Communicable Diseases Law 1995. The Law allows a quarantine for a certain period necessary for medical examination.

Additionally, the government has issued instructions regarding obligatory self-quarantine for all travelers coming to Myanmar.

It remains uncertain whether the time spent in self-quarantine, even if ordered by the Ministry of Health, would be considered by the employer as leave or being absent from work.

It should be noted that anyone who violates the quarantine instructions will be punished with imprisonment for a term that may extend to six months or with a fine which may extend to MMK10,000, or with both, upon conviction.

Can an employer oblige an employee to self-quarantine? Can an employer terminate the employment should the employee refuse?

Based on the general safety obligations resting upon the employer, the employer has a right to request its employee to self-quarantine. If the employee has cold or flu-like symptoms, they should stay at home and not risk exposing their colleagues to illness.

Under the government template of the employment contract, issued by Notification 140/2017, both the employer and the employee have certain obligations. The employer is obliged to take necessary measures for the safety of the workplace as per the business nature, and the employee is required to adhere to those measures and follow the workplace safety directions. The safety requirement obligation is very general in its nature; seemingly, it could involve anything from the safe design of the workplace to adequately maintaining the health of employees, particularly not exposing them to the possibility of contamination.

Under the list of Ordinary Misconduct and Related Disciplinary Actions issued by the Ministry of Labor, an employee is obliged to strictly comply with the

conditions regarding workplace safety, breach of which constitutes a minor infraction. This could lead to termination of the employee once the procedure of three warnings has been exhausted.

However, it is also possible that under the current circumstances, the employee's refusal to follow the instruction of the employer to self-quarantine might be considered as breach of the employment contract, as opposed to a minor violation, resulting in dismissal on the basis of serving a greater cause, including the safety of remaining employees.

If an employer is informed that one employee has tested positive, or has a test pending, what must or may the employer tell the other employees?

Myanmar labor laws do not specify what the rules are in relation to privacy or confidentiality of information related to employment except for the employee's obligation of not disclosing any confidential information related to the workplace as mentioned in the Ordinary Misconduct and Related Disciplinary Actions list.

The Law Protecting the Privacy and Security of Citizens 2017 and its prohibition of acting in any way to slander or harm one's reputation will not be applicable in this case, since this would not be the aim.

However, in exercise of the employer's contractual obligation of taking the necessary measures for the safety of the workplace, the employer should take all appropriate steps to, among other things, determine with whom this particular employee has worked in close proximity in the last 14 days and notify these employees of the possible exposure.

There is, however, no official procedure outlined by the government in relation to providing information to employees.

If an employer discriminates against certain employees (e.g. Chinese), is the employer liable for this?

The employer's obligation section of the government template employment contract provides that "no employer shall discriminate or treat unfairly out of racism, sexism and ageism."



Photo: Tao Ming/Xinhua via AP

Discrimination towards one or some employees should be treated as a breach of the above-mentioned provision of the employment contract; according to section 39 of the Employment and Skill Development Law, an employer convicted of breaching any of the conditions contained in an employment agreement is liable to imprisonment not exceeding three months or a fine or both.

What if an employee wants to stay home to take care of children due to school closures or children being sick?

Under the Social Security Law 2012, the insured parent can take medical leave to care for a sick child up until the child is one year old.

After that period and in case the employee is not registered with the Social Security Board, the employee should be entitled to utilize casual and annual leave for that purpose; however, if the employee would still be required to work during that period, and if the nature of business allows, alternative arrangements can be agreed on between the employer and employee, including working online/remotely.

What if public transport is closed and an employee cannot get to work?

Neither the labor law nor the template employment contract provides a clear solution here. This requires a more detailed look, including consideration of

the applicability of the Contract Act and impossibility of performance resulting in the employment contract being void. However, it's doubtful that it would be within the contemplation of the Contract Act to include physical or literal impossibility.

Is an employee entitled to work from home?

Working from home would be subject to arrangement with the employer and the nature of business. There is no entitlement for an employee to change their place of work performance, and it is not an absolute right of the employer to do so.

If an employee falls sick, who pays the salary?

According to section 6, subsection (1) of the Leave and Holiday Act, an employee is entitled to paid leave not exceeding 30 days in a year subject to provision of a medical certificate. The employee will, however, not be entitled to paid medical leave until he/she has been in service for at least six months.

An employee on medical leave can request to be paid the wages or pay (as the case may be) due to him/her weekly during the period of leave on the medical certificate.

For employees who have been registered with the Social Security Board, the Social Security Law does provide certain benefits for insured employees, including the right to cash benefits under section 23.

In case the medical leave expands beyond the 30-day period entitlement and the employee has been registered with the Social Security Board, in order to enjoy cash benefits relating to sickness, the insured person is required to have worked at the establishment for a minimum of six months before the onset of sickness and to have paid contributions for a minimum of four months during the said six-month period. The cash benefit is in the amount of 60% of the average wage of the previous four months; it relates to sickness up to 26 weeks for the period during which the insured is unable to work, should a reduction of or a halt in income occur (reduction or no payment of salary by the employer) due to the employee being unable to work following the submission of the medical certificate. The cash benefit shall be obtained from the Social Security Board. Although not obligatory, the employer can continue to pay the salary or a certain percentage of it.

Where the insured employee is entitled to a cash benefit given by the employer for the period of leave, as per other agreements, the insured employee shall not forfeit such cash benefit by reason of receiving cash benefit from the Social Security Board. However, if the combined total of the cash benefit given by the employer for the period of leave while the insured employee is sick and the sickness cash benefit of the insured worker is entitled to is more than the average income of the insured



employee, the employer may deduct the amount of money which is in excess.

In view of a potential lockdown, does the employer have to pay the full salary to employees in times of pandemic and temporary closure of offices? What financial benefits are employees entitled to in case of permanent closure of business.

If the employees remain fully employed by the employer, the Minimum Wages Law 2013 provides that the employee should receive full-time wages even if he/she works fewer hours due to no fault of their own or for work stoppage. Additionally, according to section 5(d) of the Employment and Skills Development Law, the ministry shall issue a notification to have employers provide the prescribed amount of compensation to workers if a task is completed earlier than the time stipulated by an employment agreement, a part or the whole of a business closes down because of an unforeseeable situation, or a business is to close down for various reasons. Since no notification has been issued on this subject as yet, the employer should pay regular salaries to its employees.

There is, however, nothing that prevents the employer from terminating the employee, subject only to at least one month's notice and severance payment dependable on the length of the employee's service, as per the table below.

| TERM OF EMPLOYMENT | SEVERANCE AMOUNT DUE |
|-----------------------|--------------------------|
| 0 MONTHS ≤ 6 MONTHS | Nil |
| 6 MONTHS ≤ 1 YEAR | 50% of 1 month's salary |
| 1 YEAR ≤ 2 YEARS | 1 month's salary |
| 2 YEARS ≤ 3 YEARS | 150% of 1 month's salary |
| 3 YEARS ≤ 4 YEARS | 3 months' salary |
| ≥ 4 YEARS ≤ 6 YEARS | 4 months' salary |
| ≥ 6 YEARS ≤ 8 YEARS | 5 months' salary |
| ≥ 8 YEARS ≤ 10 YEARS | 6 months' salary |
| ≥ 10 YEARS ≤ 20 YEARS | 8 months' salary |
| ≥ 25 (MAXIMUM CAP) | 13 months' salary |

Additionally, the Ministry of Labor, Immigration, and Population has issued Directive No.1/2020 related to "Matters to be aware of and guidelines to be followed by employers, employees in work organizations that are shut down due to COVID-19." The notification allows entities registered with Social Security Board to suspend payment of Social Security Contributions if they inform the Board of a temporary closure and cutting back on employees due to various reasons related to the COVID-19 outbreak. A site visit will be performed in order to confirm the closure. If the operations of the work organization resumes, the employer will have to inform the Social Security Board and resume paying contributions within 10 days.

Employees who became unemployed due to closure of the workplace, whether temporary or permanent, will still be entitled to benefits under Social Security Law, as they remained employed.

DOWNLOADS



<http://bit.ly/3276KA1>



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