The COVID-19 Virus and Employment Considerations – Key Considerations for Managing Employee Cost and Terminating Employment Contracts

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Introduction

As more measures are rolled out to limit the transmission of the COVID-19 virus, many businesses have been forced to minimise cost overheads to soften the blow of declining revenue streams and avoid mass retrenchment/layoffs where possible.

One area to minimise cost overheads would be through the managing of employees. Already, many businesses have mandated furlough periods and/or salary deductions. As the battle with COVID-19 continues, more cost-cutting measures may be expected. This briefing note discusses the considerations for minimising employee cost overheads, as well as the safeguards for businesses when terminating employees.

Considerations for Minimising Employee Cost Overheads

Whilst businesses move to implement measures aimed at reducing employee cost, it is important to take note of the requirements in the Employment Act (Cap. 91) of Singapore.

First, businesses seeking to minimise payment of salaries of employees should be aware that: (a) salary deductions are to be limited to no more than half of the employee's salary; and (b) salary minimisation requires the written consent of the affected employees. Otherwise, and in instances where contractual salaries are not paid out at a stipulated time, the employee may deem the employment contract to have been broken, the employee may seek recourse from the employer and the employer may have committed an offence under the Employment Act.

Second, businesses seeking to reduce headcount through employee terminations should provide proper notice to affected employees (in accordance with the employment contract and the minimum requirements of the Employment Act). Affected employees should be allowed to serve out their notice periods or be paid in lieu of such notice periods. In instances where businesses have decided to terminate contracts of employment, especially those of senior employees and employees in sensitive roles ("**key employees**"), businesses should take care to safeguard their commercial interest.

Safeguards for Businesses Terminating Key Employees

Businesses should take appropriate actions to safeguard their commercial interests when terminating the contracts of key employees. Key employees may: (a) hold confidential

commercial information that may benefit a competitor at the expense of the business; (b) have existing client relationships that may be major sources of revenue for the business; and (c) solicitate the employment of existing employees that may ultimately weaken the human capital of the business.

Often, the solution to avoiding the negative consequences of departing key employees is through restrictive covenants (being contractual promises to refrain from certain actions post-termination, such as unfairly competing with the employer or using the employer's confidential and proprietary information). These restrictive covenants may be included in the employment contract or in the termination agreement. Whichever form of inclusion, businesses should take note of the validity and operation of such restrictive covenants.

Restrictive Covenants

In Singapore, the starting point is that restrictive covenants are *prima facie* unenforceable. The starting point may be displaced if an employer can prove that restrictive covenants: (a) protect a legitimate interest of an employer; and (b) are reasonable with reference to the parties' interest and public interest.

To establish a legitimate interest of an employer, the Singapore Courts have generally identified two main interests as meriting protection – trade secrets and trade connections.

- First, whether or not there are trade secrets warranting protection would depend on the facts of the case. It should be noted, however, that the Singapore Courts would frown upon restrictive covenants that merely seek to prevent an employee from exercising his/her own natural skill or talent. Such skills and talents, even if acquired pursuant to training provided by an employer, would generally not be deemed to be trade secrets.

- Second, whether or not a trade connection can be established would depend on the employee's personal knowledge of (and influence over) the customers of the employer. Typically, the Singapore Courts would take into account of the employee's knowledge and influence over the customers, as well as the employer's institutional control over these customers that could mitigate the employee's influence.

To establish reasonableness with reference to the parties' interest and public interest, the Singapore Courts would look at the activity restricted, its geographical extent and duration. If the restrictive covenant is too wide in any of these aspects, it is likely to be struck down as invalid. It is worth noting that both parts of the reasonable test – with reference to the parties' and with reference to public interest – need to be satisfied. That means that even if an employer and its employee agree on the restrictive covenant, the same restrictive covenant would still have to be found reasonable to the public interest.

Summary

The economic shock brought about by COVID-19 is, unfortunately likely to remain with us for quite some time. To avoid subsequent contentious encounters with (ex-)employees, businesses should take care when managing employee cost and/or terminating employees. Our team of lawyers have assisted numerous employers and employees in navigating these matters including in mediating disputes and, where necessary, litigating disputes through the Singapore Courts. Please feel free to contact us if you have any questions arising from the issues discussed above.

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