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## Employer's Duty To Provide A Safe Work Environment In The Covid Era

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The first Covid-19 case was detected in Malaysia on 25 January 2020. Despite the initial success in flattening the curve, one year on, many Malaysians continue to find themselves in lockdown, and the nation records thousands of new cases on a daily basis.

Malaysians have blamed the resurgence of the disease on different causes and events, but amongst them, is the outbreak at workplaces such as offices and factories. The high number of cases at these locations was said to be contributed by poor compliance with the standard operating procedures (**SOPs**) set by the Government, long working hours, cramped workers' dormitories and so on.

This article addresses an employer's duty to provide a safe and healthy workplace and seeks to remind employers to not neglect that responsibility in the chase of profit, otherwise they may find themselves being sued or being prosecuted.

### Statutory liability

#### ***Prevention and Control of Infectious Diseases Act 1988 (PCIDA)***

First and foremost, it is pertinent that employers abide strictly by the Regulations made by the Minister of Health pursuant to the powers delegated to him by the PCIDA, and the directions of the Director General of Health during this pandemic.

At the time of the writing of this article, states in Malaysia are under different Regulations, namely the Prevention and Control Of Infectious Diseases (Measures Within Infected Local Areas) (Conditional Movement Control) (No. 2) Regulations 2021 and Prevention And Control Of Infectious Diseases (Measures Within Infected Local Areas) (Movement Control) (No. 2) Regulations 2021.

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However, common amongst both Regulations is that any person who contravenes any provision of the Regulations or any directions of the Director General of Health commits an offence and shall, on conviction, be liable to a fine not exceeding RM 1,000 or to imprisonment for a term not exceeding 6 months or to both.

More importantly, where it is a business entity that is the offender (i.e. for operating beyond the permitted hours), the director, partner or other similar officer of the business entity, may be charged jointly in the same proceedings with the business entity; and if the business entity is found guilty of the offence, the officer shall be deemed to be guilty personally of that offence too. The officer may only avoid liability if he could prove that the offence was committed without his knowledge and consent and that he had taken all reasonable precautions to prevent the commission of the offence.

Thus, it is pertinent that officers at managerial level do all they could to ensure the Regulations and the Director General's directions are complied with by the company and their employees.

### ***Occupational Safety and Health Act 1994***

Other than the PCIDA, employers should also be aware of their obligations under the Occupational Safety and Health Act 1994 (**OSHA**). Under Section 15 of OSHA, it is the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health, and welfare to work of all his employees.

This duty includes the provision and maintenance of a working environment for his employees that is, so far as is practicable, safe, without risks to health, and adequate for their welfare at work. Under Section 19 of OSHA, a person who contravenes the provisions of section 15, shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

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Although at this juncture, there is no reported case where an employer is prosecuted under OSHA for Covid-19 related health concerns, given the generality of the Act, it is believed that the duty under OSHA to provide a safe working environment includes the duty to provide a workplace with minimal risk of exposure to the deadly virus.

However, it is important to note that OSHA only applies to these industries:

- Manufacturing
- Mining and Quarrying
- Construction, Agriculture, Forestry and Fishing
- Utilities (Electricity, Gas, Water, Sanitary Services)
- Transport, Storage and Communication
- Wholesale and Retail Trades
- Hotels and Restaurants
- Finance, Insurance, Real Estate and Business Services
- Public Services and Statutory Authorities.

## Contractual Liability

Other than statutory obligations, an employer also has a contractual duty to provide a safe workplace for his employees. In the case of ***Melewar Corporation Bhd v Abu Osman [1994]***, the Industrial Court held that an employer owes a contractual obligation to his employees to provide a safe and conducive working environment.

Although the case concerns a complaint of sexual harassment, it is believed that the implied duty to provide a safe and conducive environment would encompass an environment that is reasonably safe from disease as well and sexual harassment.

A failure to provide a safe workplace or by putting employees in a work environment that has high risks infection would likely constitute a breach of the employment contract. This might either lead to a contract-based litigation by an employee if he gets infected, or the employee resigning and then claiming against the company for constructive dismissal.

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### Tortious Liability

Lastly, several cases, including ***Gelau Anak Paeng V Lim Phek San & Ors [1986]*** have established that an employer owes a common law duty of care towards their employee, which includes the duty to take reasonable precautions to protect his employees against danger.

While the employer is not required to insure the employees and to protect them against all risks of any kind, he is obliged to provide a reasonably safe system of work and to take reasonable care for his employees.

Thus, an employer who fails to provide a reasonably safe workplace for his employees, he may be at risk of being sued by an employee who contracts the Covid-19 virus at work.

### Advice to Employers

In summary, an employer who fails to provide a safe and healthy work environment to his employees may be prosecuted for breaching the statutory provisions stated above, as well as being sued by his employees for constructive dismissal, breach of contract, and negligence.

As such, until the pandemic is over, employers are advised to, to their best ability, do the following:

1. Reduce working hours at the workplace;
2. Encourage working from home;
3. Implement team rotation system;
4. Take employees' temperature daily;
5. Make available masks and sanitizers to employees;
6. Prohibit gatherings at workplace including meetings and social events;
7. Reduce physical meetings with external parties;
8. Promote frequent and thorough hand washing;
9. Routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment;
10. Encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure;
11. Encourage exposed employees to stay home;

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12. Ensure that sick leave policies are flexible; and
13. Maintain social distancing at the workplace.

This list is not exhaustive; employers and human resource managers should continue to monitor practices used by other companies and/or introduced by the Government and adopt them to their workplaces.

## Conclusion

The pandemic has brought devastating effects on businesses and companies. However, a failure to take precautionary measures and implement suitable workplace policies will only lead to more disputes and lawsuits, which will only hurt the business' bottom line further.

As such, employers are encouraged to seek professional human resource management advice and legal advice to ensure their workplace have minimal risk of exposure to the virus, while being able to function efficiently in the new normal.

Furthermore, if a prosecution or lawsuit is anticipated or pending, employers should promptly engage a legal counsel familiar with this area of law to ensure the company's interests are protected.

Authored by Louis Liaw, a Senior Associate with the firm's Employment & Industrial Relations practice.

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