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# VIRAL LAW

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A blog series on legal issues arising from the *Corona* pandemic

Guest article on Employment  
related issues arising from  
the *Corona* Pandemic

by

Shyamali Ranaraja  
Attorney-at-Law, M.B.A. (Colombo)



Due to the extraordinary measures taken by the Government to limit the spread of *COVID-19* in Sri Lanka a situation has arisen from 16 March 2020 onwards where a special public, bank and mercantile holiday was declared on 16 March and thereafter extended until 19 March, and curfew was imposed island-wide thereafter. The period 20-27 March was then declared as a period of “work-from-home” and has now been extended until 3 April. Other than the declaration of Banks, Insurance, Treasury, etc., as essential services,<sup>1</sup> no guidance or direction has been received in respect of the private sector.

In similar circumstances, other countries<sup>2</sup> have officially announced a relaxation of provisions on the payment of wages and other benefits, etc., by the private sector employers in order to enable such employers to cope with this unprecedented situation. However, such relaxation of employment rules or legislation is unlikely to be adopted by Sri Lanka as there is no provision – firstly, for employers to temporarily lay-off (or “furlough”) workers; or, secondly, to make workers redundant in times of operational difficulty without applying for and obtaining the approval of the Commissioner General of Labour under the Termination of Employment Act.<sup>3</sup> It is likely therefore that the Government will make no announcement on this aspect and will expect employers to absorb the cost of all payments during the cessation of work as happened in April 2019 (albeit for a more limited time) in the post-Easter bombing scenario.

Although some private sector organizations have issued guidance on essential services, and on applying the holidays directive to private sector employees, there is currently an absence of recommendations / guidelines on the payment of wages, etc. The Minister of Industrial Export and Investment Promotion has indicated<sup>4</sup> that employers who are required to remain operational due to the need to provide medical equipment should “take responsibility for workers’ health, food and other facilities,” thus making the additional requirements resulting from the need to stop the spread Covid-19 while operational as an essential service provider the burden and responsibility

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<sup>1</sup> <http://www.pmdnews.lk/central-bank-commercial-banks-and-insurances-services-asked-to-remain-open/>

<sup>2</sup> <https://www.adviceforemployers.co.uk/2020/03/22/furloughing-staff-guidance-for-employers/>

<sup>3</sup> Where the employer has fifteen (15) or more workers

<sup>4</sup> <https://www.news.lk/news/political-current-affairs/item/29877-the-minister-had-instructed-the-investment-board-all-free-trade-zones-to-be-closed-until-further-notice-workers-sent-home>

of such employers. This is likely to be an indicator of the approach of the Government in relation to this vexed issue.

In the circumstances, the following is advised:

1. The Department of Labour has unofficially indicated that there would be no objection to employers paying the basic salary (without allowances, incentives, cash benefits, bonus, etc.). EPF/ETF contributions could also be calculated on this basis, but it would be advisable to inform employees that payments after 16 March (the end of the period of closure or extended closure for Covid-19 prevention reasons) will be made on this basis due to the present circumstances which are beyond the control of the employer.

Another option would be to inform employees that it can only pay half-wages (based either on total salary or on the basic pay) during the period of closure or extended closure for Covid-19 prevention reasons, as an alternative to being forced to close businesses or to institute winding up / liquidation proceedings due to it becoming financially unviable to continue operations.

In both (1) and (2) instances, this could be by way of a notation at the end of the standard pay-slip if a formal announcement is likely to lead to agitation.

As a precaution in both instances above, employees may be requested to consent by returning the duplicate of a written announcement of reduction in wages, but if this is likely to be contentious or lead to disputes, it should be avoided; even if the formal announcement or pay-slip is submitted to the Department of Labour as the basis for a complaint, it should be possible to effectively resist any adverse order due to the obvious inability of the employer to provide work for reasons beyond its control.

2. For employers who are required to remain operational, there is unlikely to be any liability under the Workmen's Compensation Ordinance in the event of any employee being infected while at work (mainly as Covid-19 is not included as an occupational disease and a nexus with the workplace may be difficult to establish), but all precautions should be taken such as the provision of masks / gloves / protective equipment where necessary, or by ensuring that social

distancing is possible, and maintained, while at work. Additional assistance to employees for transport, food, accommodation, etc., (which may have to be provided in order to ensure that employees can report to work) will have to be borne by employers as no assistance / subsidies have been announced by the Government at this time.

3. As the period 20<sup>th</sup> March to 3<sup>rd</sup> April (as further extended) has been designated as “work-from-home” and not categorized as public holidays, in the event that employees are required to work, no overtime (for regular hours of work) or additional / alternative holidays need be provided.
4. Where employees can be required to work from home (in IT, services, marketing, etc.) it may be necessary to provide some reimbursement to compensate for the use of personal data / voice / broadband usage for official business; while not required by law, this would increase willingness of employees to engage in such work on a full or part time basis. Such reimbursement would not attract EPF/ETF contributions. No additional compensation would be necessary for other work done (e.g. such as development of e-learning materials for students of a school by teachers) where the work done away from the workplace is in line with/ancillary to standard duties performed while in the workplace. The work-from-home concept is not contained/conceptualized in any legal provision in Sri Lanka, and employers and employees may make mutually acceptable arrangements in this regard, including the monitoring of time worked, etc. It is debatable whether an employee could refuse to work-from-home, but strict enforcement of compliance or punishment upon refusal is unlikely to be successful, as employees may not be able to comply for practical considerations, such as the need to care for patients while at home, etc.
5. Failure to report to work under current conditions, even in essential industries, is unlikely to be the basis for strong disciplinary action, other than the non-payment of wages. Termination of employment, suspension of service, or issuing of show cause letters / charge sheets for such absence may not be practical or sustainable as an employee may justifiably contend that s/he had left the area where the workplace is located to travel outstation for emergencies and/or were unable to return due to curfew and lack of transport. However, such employees where it is clear that they are deliberately evading reporting to work, maybe informed that they will not

be paid wages and that the employer will be compelled to recruit replacement workers where possible or that they may face disciplinary action in future.

6. It should be noted that any employer that wishes, or is able, to pay wages without any reduction is encouraged to do so, at least for some period of the closure / curfew, and that all efforts should be made to pay at least a portion of wages, where possible, for reasons of equity and social responsibility.

Please note that the content above is merely a guideline, and that there are no provisions in Sri Lankan law that relax or exempt the payment of wages under the current conditions. On a strict application of the law the Commissioner General of Labour (CGL) could authorize all employers to pay wages as usual (perhaps on the basis that the employees' inability to report to work is not to be equated with unauthorized absence or unwillingness to report to work), but it is unlikely that any varying of payments as suggested above would result in prosecution as the circumstances are beyond the control of employers, as much as it is outside of the control of employees. Section 53(3)<sup>5</sup> of the Shop and Office Employees (Regulation of Employment and Remuneration) Act leaves it to the discretion of the CGL whether to direct any unpaid wages to be paid or not, and in these circumstances it is to be expected that the CGL would exercise that discretion in a practical manner.

*This article has been published with the permission of its author, Shyamali Ranaraja (Attorney-at-Law). It contains practical guidance on a number of topical employment-related issues that have arisen as a result of the COVID-19 pandemic – including, the payment of wages and allowances, workplace liability, work-from-home arrangements, failures to report to work and termination. Ms. Ranaraja can be contacted at shyamali.ranaraja41@gmail.com.*

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<sup>5</sup> (3) Where an employee has not been paid the whole or a part of the remuneration required by this Act to be paid to him by his employer, the Commissioner may, if he thinks fit so to do, by written notice require the employer to pay such amount or the balance of such amount to the Commissioner within the time specified in the notice so that the Commissioner may remit it to such employee.