Q/A: PRIVATE EMPLOYER OPTIONS AND REMEDIES ON PERSONNEL TENURE AND MOVEMENT AMID QUARANTINE[1]

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(1) Q: With quarantine, enhanced quarantine and/or lockdown in effect, what are the options in general, that an employer has regarding the tenure and/or movement of its personnel?

A: An employer may consider options and remedies generally classified as ranging from those that do not involve reduction or adjustment of wage and working schedule of employees, to those that involve termination of employment.

(2) Q: What are the options that do not result in termination of employment?

A: Some of these notable options are: (a) Work from Home [WFH], (b) Flexible Working Arrangements [FWAs], (c) Compressed Work Week [CWW], and (d) b*ona fide* suspension of business operation not exceeding six (6) months.

(3) Q: What are the options that result in termination of employment?

A: These options refer to the authorized causes for termination of employment under the Labor Code on Closure of Establishment and Reduction of Personnel,[2] namely: (a) installation of labor-saving device, (b) redundancy, (c) retrenchment to prevent losses, or (d) closure or cessation of business operations.

(4) Q: In terms of what and how much the employer should pay to the employee, what are the main distinctions between the first and the second class of employer options?

A: In the first class of options not involving termination of employment, the employee continues to receive wages and the options are subject to the principle prohibiting diminution of benefits and prohibition against discrimination. In the second class of options (authorized causes for termination of employment), the employer is obliged to pay separation pay to the affected employee/s (except when closure is due to serious business losses or financial reverses) and is required to observe good faith and avoid discrimination in its implementation.

[1] This is without prejudice to pertinent issuance/s that the Department of Labor and Employment (DOLE) may issue after 18 March 2020.

[2] Labor Code, Art. 298 [283].

(5) Q: What is prohibition against diminution of benefits?

A: A benefit given by an employer to its employees cannot be unilaterally withdrawn if such benefit has expressly become part of the employment contract or has become a matter of practice and/or verbal agreement between the employer and employees.[3] The rule presupposes that the grant of benefits is consistent and deliberate.[4]

(6) Q: What are the exceptions, if any, to this prohibition against diminution of benefits?

A: This rule does not apply if the practice is due to error in the construction or application of a doubtful or difficult question of law[5] or when it results from a joint or negotiated decision freely made by the employer and the employees.[6] In case of error, it should be shown that the correction is done soon after discovery of the error.[7]

(7) Q: What is prohibition against discrimination?

A: This means "equal pay for equal work." Employees who work with substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar salaries.[8]

(8) Q: What is "good faith" observance in the implementation of these options?

A: These remedies must be undertaken for legitimate purpose, *i.e.*, without showing of arbitrary or malicious action.[9]

(9) Q: For these authorized causes for termination of employment, how much separation pay is due?

A: The amount of separation pay depends on the cause for termination of employment, as follows:

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[3] *See* Labor Code, Article 100; ***Tiangco, et al. vs. Hon. Leogardo, et al.***, 122 SCRA 267 (1983); ***Davao Fruits Corporation vs. Associated Labor Union***, 225 SCRA 567 (1993).

[4] ***Central Azucarera de Tarlac vs. Central Azucarera de Tarlac Labor Union-NLU***, G.R. No. 188949 (26 July 2010).

[5] ***Central Azucarera de Tarlac vs. Central Azucarera de Tarlac Labor Union-NLU***, G.R. No. 188949 (26 July 2010).

[6] ***Insular Hotel Employees Union-NFL vs. Waterfront Insular Hotel Davao***, G.R. Nos. 174040-41 (22 September 2010).

[7] ***Central Azucarera de Tarlac vs. Central Azucarera de Tarlac Labor Union-NLU***, G.R. No. 188949 (26 July 2010).

[8] ***International School Alliance vs. Quisumbing***, 333 SCRA 13 (2000).

[9] ***Santos vs. Court of Appeals***, G.R. No. 141947 (2001).

Authorized Cause for Termination	Amount of Separation Pay
1. Installation of labor-saving devices	at least one (1)-month pay or at least one (1) month pay for every year of service, whichever is higher
2. Redundancy	at least one (1)-month pay or at least one (1) month pay for every year of service, whichever is higher
3. Retrenchment to prevent losses	one (1)-month pay or at least one-half (1/2) month pay for every year of service, whichever is higher
4. Closure or cessation of business operation	one (1)-month pay or at least one-half (1/2) month pay for every year of service, whichever is higher No separation pay is required when closure is due to serious business losses or financial reverses.

(10) Q: For these authorized causes of termination of employment, what are the notification requirement/s, if any?

A: Separate and simultaneous service of a written notice must be sent to both the concerned employee and the DOLE Regional office, at least one (1) month before the intended date of the termination.[10]

(11) Q: What government program, if any, offers financial support to affected workers of the COVID-19 quarantine?

A: The DOLE issued Department Order No. 209, series of 2020 (17 March 2020) Guidelines on the implementation of the COVID-19 Adjustment Measures Program (CAMP), which is a safety net program that offers financial support to affected workers in private establishments that have adopted flexible working arrangements (FWAs) or temporary closure during the COVID-19 pandemic.

(12) Q: Who are considered affected workers?

[10] Labor Code, Article 298; DOLE Department Order No. 147-15, Series of 2015, Section 5.3.

A: These are private employees facing or suffering interruption in employment due to COVID-19, such as Retained Workers who do not receive regular wage (workers whose working hours and regular wage are reduced due to FWA implementation like reduction of workhours/workdays, rotation of workers, forced leave). Suspended workers, or those whose employment is temporarily suspended because of the suspension of operation by the employer are also considered affected workers.

(13) Q: What is the coverage of the government's CAMP financial support?

A: CAMP covers workers in private establishments affected by the COVID-19 pandemic from January 2020 until the lifting of the Stringent Social Distancing Measures in the National Capital Region on 14 April 2020, unless extended by the government. This one-time financial assistance equivalent to Five Thousand Pesos (PhP5,000.00) is intended to cover an employee's remaining unpaid leaves, regardless of employment status.

(14) Q: What is Work from Home (WFH)? Is this the same as telecommuting?

A: Telecommuting refers to a work from an alternative workplace with the use of telecommunications and/or computer technologies.[11] Considering that WFH involves residence or home as an alternative workplace, WFH is essentially telecommuting when there is use of telecommunications and/or computer technologies.

(15) Q: What are the essential terms and conditions of employment in a WFH or telecommuting program?

A: Telecommuting program is offered to the employees on a voluntary basis upon such terms and conditions mutually agreed upon with the employer, provided such terms shall not be less than the minimum labor standards; shall include compensable work hours, minimum number of work hours, overtime, rest days, and entitlement to leave benefits;[12] and ensures fair treatment with employees working at the employer's premises.[13] Accordingly, in essence, as WFH or telecommuting involves only an alternative workplace, the essential terms and conditions of employment (like wage and hours of work) of covered employees are the same as those working at the employer's premises.

(16) Q: What is a Flexible Working Arrangement (FWA)?

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[11] Republic Act No, 11165 entitled, *An Act Institutionalizing Telecommuting as An Alternative Work Arrangement for Employees in the Private Sector,* signed into law on 20 December 2018, Section 3.

[12] Republic Act No, 11165, Section 4.

[13] Republic Act No, 11165, Section 5.

A: FWA refers to alternative work arrangement or schedule other than the traditional or standard workhours, workdays and workweek. The DOLE recognizes the desirability and practicality of these arrangements that may be considered by employers after consultation with the employees. Its effectivity and implementation shall be temporary in nature, subject to the prevailing conditions of the company.[14] FWAs are anchored on a voluntary basis and conditions mutually acceptable to both the employer and employees.[15]

(17) Q: What notice/posting requirement, if any, should the employer observe prior to implementing FWAs?

A: Prior to its implementation, the employer shall notify the DOLE through the Regional Office that has jurisdiction over the workplace, in the prescribed DOLE Report Form[16] and post a copy of DOLE Labor Advisory No. 09, Series of 2020 (04 March 2020) in a conspicuous location in the workplace.[17]

(18) Q: What are some of the allowed and recognized FWAs?

A: Related issuances from the DOLE identify the following FWAs:

(a) Telecommuting[18]
(b) Work from Home (WFH)[19]

[14] DOLE Labor Advisory No. 09, Series of 2020 (04 March 2020) entitled "*Guidelines On The Implementation of Flexible Work Arrangements As Remedial Measure Due To The Ongoing Outbreak of corona Virus Disease 2019 (COVID-19);"* DOLE Department Advisory No. 02, Series of 2009 (29 January 2009).

[15] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009).

[16] DOLE Labor Advisory No. 09, Series of 2020 (04 March 2020) entitled "*Guidelines On The Implementation of Flexible Work Arrangements As Remedial Measure Due To The Ongoing Outbreak of corona Virus Disease 2019 (COVID-19);*" DOLE Department Advisory No. 02, Series of 2009 (29 January 2009).

[17] DOLE Labor Advisory No. 09, Series of 2020 (04 March 2020) entitled "*Guidelines On The Implementation of Flexible Work Arrangements As Remedial Measure Due To The Ongoing Outbreak of corona Virus Disease 2019 (COVID-19).*"

[18] The first and only time Telecommuting is mentioned by DOLE as an FWA is in DOLE Labor Advisory No. 11, Series of 2020 (14 March 2020).

[19] The first and only time Work from Home (WFH) is mentioned by DOLE as an FWA is in DOLE Labor Advisory No. 11, Series of 2020 (14 March 2020).

(c) Reduction of Workdays/Hours[20] where the normal workhours or workdays per week are reduced[21] but should not last for more than six (6) months[22]
(d) Rotation of Workers[23] where the employees are rotated or alternately provided work within the workweek[24]
(e) Forced Leave[25] where the employees are required to go on leave for several days or weeks utilizing their leave credits, if there are any[26]
(f) Compressed Workweek (CWW)[27]
(g) Broken-time Schedule where the work schedule is not continuous but the workhours within the day or week remain[28]
(h) Flexi-holidays schedule where the employees agree to avail the holidays at some other days provided there is no diminution of existing benefits[29]

(19) Q: How is Forced Leave implemented as an FWA in light of COVID-19 pandemic quarantine?

A: The leaves of absence during the community quarantine period shall be charged against the workers' existing leave credits, if any. Remaining unpaid leaves during said period may be covered and subject to the conditions provided in DOLE's COVID-19 Adjustment Measures Program (CAMP) discussed above.[30]

(20) Q: What is Compressed Work Week (CWW)?

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[20] DOLE Labor Advisory No. 11, Series of 2020 (14 March 2020).

[21] DOLE Labor Advisory No. 09, Series of 2020 (04 March 2020) entitled "*Guidelines On The Implementation of Flexible Work Arrangements As Remedial Measure Due To The Ongoing Outbreak of corona Virus Disease 2019 (COVID-19).*"

[22] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009), III (2).

[23] DOLE Labor Advisory No. 11, Series of 2020 (14 March 2020.

[24] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009), III (3); DOLE Labor Advisory No. 09, Series of 2020 (04 March 2020), III (2).

[25] DOLE Labor Advisory No. 11, Series of 2020 (14 March 2020).

[26] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009), III (4); DOLE Labor Advisory No. 09, Series of 2020 (04 March 2020), III (3).

[27] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009), III (1).

[28] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009), III (5).

[29] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009), III (6).

[30] DOLE Labor Advisory No. 11, Series of 2020 (14 March 2020), 3.

A: Compressed work week ("CWW") refers to a flexible work arrangement where the normal workweek is reduced to less than six (6) days but the total number of normal work hours of forty-eight (48) hours per week shall remain. The normal workday is increased to more than eight (8) hours but not to exceed twelve (12) hours, without corresponding overtime premium.[31] This can be adjusted accordingly where the normal workweek of the firm is five (5) days.[32]

(21) Q: What are the requirements for a valid CWW scheme?

A: The conditions are that:[33]

(a) It results from an express and voluntary agreement of majority of the covered employees or their duly authorized representatives.
(b) If the employer is using substances, chemical and processes or operating under conditions where there are airborne contaminants, human carcinogens or noise prolonged exposure to which may pose hazards to the employees' health and safety, there must be a certification from an accredited health and safety organization or practitioner or from the employer's safety committee that work beyond eight (8) hours is within the threshold limits or tolerable levels of exposure as set in the Occupational Safety and Health Standards (OSHS).
(c) The employer shall notify the DOLE Regional Office having jurisdiction over the workplace of the adoption of the CWW scheme, in accordance with the DOLE CWW Report Form.
(d) Work beyond twelve (12) hours a day or forty-eight (48) hours a week shall be subject to overtime premium. Meal periods of not less than 60 minutes, rest days, holiday pay, rest day pay or leaves shall not be impaired.
(e) It must not result in a diminution of the existing benefits. Reversion to the normal eight-hour workday, after reasonable prior notice, shall not constitute a diminution of benefits.

(22) Q: What is the effect of *bona fide* suspension of business operation not exceeding six (6) months? Is this the same as temporary lay-off or placing an employee in floating status?

A: A *bona fide* suspension of the operation of a business or undertaking for a period not exceeding six (6) months is allowed[34] after which the employer shall reinstate the employee to his/her former position without loss of seniority rights if he/she indicates

[31] DOLE Department Advisory No. 02, Series of 2009 (29 January 2009), III (1).

[32] DOLE Department Advisory No. 02, series of 2004 (02 December 2004), III.

[33] DOLE Department Advisory No. 02, series of 2004 (02 December 2004), IV.

[34] Labor Code, Art. 301 [286].

his/her desire to resume his work not later than one (1) month from the resumption of operations of the employer. It has been held that an employer may validly put its employees on forced leave or floating status upon bona fide suspension of the operation of its business for a period not exceeding six (6) months**.** In such a case, there is no termination of the employment of the employees, but only a temporary displacement. When the suspension of the business operations, however, exceeds six (6) months, then the employment would be deemed terminated, and the employer would be held liable.[35] When the "floating" status of an employee lasts more than six (6) months, this may be considered constructive dismissal.

(23) Q: What are the requirements for a valid installation of labor-saving device?

A: (a) There must be introduction of machinery, equipment or other devices
(b) The introduction must be done in good faith
(c) The purpose for such introduction must be valid such as to save on cost, enhance efficiency and other justifiable economic reasons
(d) There is no other option available to the employer than the introduction of machinery, equipment or device and the consequent termination of employment of those affected thereby
(e) There must be fair and reasonable criteria in selecting employees to be terminated.[36]

(24) Q: When is there redundancy?

A: There is redundancy when the services of an employee are in excess of what is reasonably demanded by the actual requirements of the business operations. Redundancy or superfluity of a position may result from over-hiring of workers, decreased volume of business or dropping of a particular product line or service activity previously manufactured or undertaken by the enterprise.[37]

(25) Q: What are the requirements for a valid termination of employment occasioned by redundancy?

A: (a) There must be superfluous positions or services of employees
(b) The positions or services are in excess of what is reasonably demanded by the actual requirements of the enterprise to operate in an economical and efficient manner

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[35] ***Innodata Knowledge Services, Inc. vs. Inting***, G.R. No. 211892 (2017); *See also* ***Philippine Graphic Arts Inc. vs. NLRC*****,** G.R. No. 80737 (1988).

[36] DOLE Department Order No. 147-15, Series of 2015, Section 5.4(a).

[37] ***Coats Manila Bay, Inc. vs. Ortega***, G.R. No. 172628 (2009).

(c)There must be good faith in abolishing redundant positions
(d) There must be fair and reasonable criteria in selecting the employees to be terminated
(e) There must be an adequate proof of redundancy such as but not limited to the new staffing pattern, feasibility studies/proposal, on the viability of the newly created positions, job description and the approval by the management of the restructuring.[38]

(26) Q: What is retrenchment?

A: It is the authorized reduction of personnel because of losses or imminent losses of the business.[39] This downsizing is resorted to by management during periods of business recession, industrial depression or seasonal fluctuations or during lulls over shortage of materials. It is a reduction in manpower to minimize business losses incurred in the operation of its business[40] to address losses in the operation of the enterprise, lack of work, or considerable reduction on the volume of business.[41]

(27) Q: What are the requirements for a valid retrenchment?

A: (a) The retrenchment must be reasonably necessary and likely to prevent business losses
(b) The losses, if already incurred, are not merely de minimis but substantial, serious, actual and real, or if only expected, are reasonably imminent
(c) The expected or actual losses must be proved by sufficient and convincing evidence
(d) The retrenchment must be in good faith for the advancement of its interest and not to defeat or circumvent the employees' right to security of tenure
(e) There must be fair and reasonable criteria in ascertaining who would be dismissed and who would be retained among the employees, such as status, efficiency, seniority, physical fitness, age and financial hardship for certain workers.[42]

(28) Q: What are the requirements for a valid closure or cessation of business operations?

A: (a) there must be decision to close or cease operation of the enterprise by the management

[38] DOLE Department Order No. 147-15, Series of 2015, Section 5.4(b).

[39] Azucena, Everyone's Labor Code, 2015 ed., p. 350.

[40] ***Pepsi-Cola Products Philippines, Inc. v. Molon***, G.R. No. 175002 (2013).

[41] ***La Consolacion College of Manila vs. Pascua,*** G.R. No. 214744 (2018).

[42] DOLE Department Order No. 147-15, Series of 2015, Section 5.4(c).

(b) the decision must be made in good faith
(c) there is no other option available to the employer except to close or cease operations.[43]

(29) Q: What, if any, is the implication of the "no work, no pay" principle amid enhanced quarantine?

A: Private sector employers are authorized to suspend work to ensure the safety and health of their employees during natural or man-made calamity. During unworked days, employees are not paid wages unless there is a favorable company policy, practice or collective bargaining agreement (CBA) granting payment of wages on said days. If worked, there is no additional pay except the salary on said days although the employers may provide extra incentives or benefits. Employees who fail or refuse to work by reason of imminent danger resulting from natural or man-made calamity shall not be subject to administrative sanction.[44] The Philippines has been declared by the President under state of calamity because of the COVID-19 pandemic.

[43] DOLE Department Order No. 147-15, Series of 2015, Section 5.4(d).

[44] DOLE Advisory No. 01, series of 2020 (13 January 2020).