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In this March issue we first examine the important developments in fee arrangements for disputes. These amendments will no doubt be of practical interest to clients, who will now have more options for how they can pay their lawyers. We also consider the measures for vaccination at the work place, which have recently been changed in light of Singapore's new "endemic" approach to the Covid-19 situation.

I. Developments on Fee Arrangements in Singapore

Leon Ryan, Attorney-at-law

1. Introduction

Clients will soon have access to additional fee arrangement options when engaging lawyers for dispute resolution proceedings. On 12 January 2022, the Singapore Parliament amended the Legal Profession Act (LPA) to allow for conditional fee agreements between lawyers and clients. This change follows previous amendments in 2017 allowing for third party funding, and will likely be welcomed by businesses seeking to arbitrate their disputes in Singapore.

2. The regulation of fee arrangements

The fee arrangements that clients are likely most familiar with are fees that are paid on a time-cost or lump sum basis. Under such arrangements, the lawyer is paid for work which has been done, with the fees being billed hourly or as a pre-agreed lump sum. These arrangements can also be modified by fee caps (after a certain defined limit, no further fees will be payable), or retainer arrangements. These traditional fee models are commonly used in Singapore.

Third party funding was introduced in 2017. Under a third party funding model, a third party with no direct interest in the dispute will agree to fund some or all of the legal costs that one of the parties might incur. In exchange, the third party funder is promised a portion of the proceeds that might be received if the claim is successful. Such a fee arrangement was originally prohibited under laws which prevented third party interference in disputes. However, the law was amended in 2017 to allow for third party funding, in part due to such funding being available in many other international arbitration venues such as London.

Conditional fee agreements are fee agreements under which the client will only have to pay some or all of the legal fees when a certain specific event has occurred. This event is typically the claim being successful. As such, conditional fees are also sometimes referred to as “no win, no fee” agreements. They were previously prohibited under laws which prevented lawyers from having a personal interest in the outcome of cases, since this may give rise to conflicts of interest. It was thought that if the lawyer would only be paid if the case is successful, this may result in a “win at all costs” mindset which could conflict with the lawyer’s duties to the court.

Conditional fee agreements were legalized on 12 January 2022. The main features of such agreements are:

- (i) The fee is in relation to a prescribed proceeding. Currently, the prescribed proceedings comprise of domestic and international arbitration, Singapore International Commercial Court matters, and related court and mediation proceedings.
- (ii) Parties can agree for some, or all, of the fee to be payable only when the specified circumstance has occurred.
- (iii) Parties can also agree to an uplift fee. The uplift fee is an additional fee that will be paid when the specific circumstance has occurred. However, this uplift fee must still be reasonable and related to the actual work performed by the lawyer.

To illustrate, under the new rules, parties can agree to any of the following arrangements:

- (i) 100% of legal fees payable only in the specified circumstance that the claim is successful;
- (ii) 80% of legal fees to be paid on a normal hourly basis, the remaining 20% of hourly fees to be paid if the claim is successful; or
- (iii) 80% of legal fees to be paid on a normal hourly basis, the remaining 20% of hourly fees to be paid if the claim is successful, and an additional uplift fee to be paid (the basis of calculation of such an uplift to be agreed upon).

For now, the Government will be allowing clients and lawyers to agree upon commercially acceptable terms in their conditional fee agreements. However, the Government may in the future release guidelines if the need arises. For example, the Government may provide guidelines on what is a reasonable amount to charge as an uplift fee.

Finally, contingency fee agreements remain prohibited. Unlike conditional fee agreements, where the fees are in-principle tied to the actual legal work done by the lawyer, under a typical contingency fee agreement, the lawyer will be paid a portion of the proceeds which are obtained from a successful claim. For example, if the client successfully recovers \$1,000,000, it can be agreed that the lawyer shall be paid 30% of that amount. In such a situation the lawyer's fees would have no direct relationship with the amount of work done, and is purely a proportion of the proceedings.

3. Future of fee arrangements in Singapore

In passing the law, the Government stated several times that the one of the intended goals of the changes was to allow Singapore to compete on an even footing with other arbitration venues. Many such venues have permitted alternative fee arrangements for some time. Accordingly, we can expect for future developments to further bring Singapore in line with international practice. Some developments to watch out for in the future include:

- (i) Expanding the category of prescribed proceedings to include standalone mediation matters. This is a development that the Government is already studying;
- (ii) Incremental and cautious expansion of prescribed proceedings to include some domestic litigation. The Government has indicated that one of the concerns of alternative fee arrangements is that it could result in less sophisticated clients being taken advantage of. Such litigants are most likely to be found in domestic litigation matters, and hence the Government may continue to take a more protective approach to such matters. The Government may however take a mixed approach and permit alternative fee arrangements in specifically prescribed areas such as commercial litigation (where the litigants are likely to be corporate entities who can afford proper legal advice), while keeping other proceedings such as personal disputes (i.e. personal injury, employment matters, family law) under the traditional fee model.
- (iii) Legalizing contingency fee arrangements. As contingency fees are already permitted in other jurisdictions, permitting the same in Singapore would be in keeping with the policy goal of making Singapore a competitive venue for dispute resolution.

II. Vaccination Differentiated Measures at the Workplace

Sherman Ng, Attorney-at-law

1. Introduction

As part of Singapore's efforts to safely re-open the country, the Ministry of Health ("**MOH**") revised the country's existing workplace vaccination measures on 27 December 2021, following discussions with the Ministry of Manpower ("**MOM**"), the National Trades Union Congress (NTUC), and the Singapore National Employers Federation (SNEF) (collectively, the "**Tripartite Partners**").

The new workplace vaccination measures (the "**New Measures**"), which took effect from 15 January 2022, provides that only employees¹ who are fully vaccinated, certified to be medically ineligible for vaccination, or have recovered from COVID-19 within 180 days (collectively, the "**Criteria**"), can return to the workplace. While unvaccinated employees were previously permitted to return to the workplace with Pre-Event Testing² ("**PET**"), this concession no longer applies³ under the New Measures, and all employees must now meet the Criteria in order to enter the workplace.

2. Differentiated New Measures

Under the MOM's updated advisory⁴ of 27 December 2021 (the "**Advisory**"), different workplace vaccination measures apply not only between vaccinated and unvaccinated employees, but also amongst unvaccinated employees. In particular, special consideration is afforded for unvaccinated employees who are medically ineligible to receive an approved COVID-19 vaccine under the National Vaccination Programme⁵ ("**NVP**"), as well as those who are pregnant.

Before allowing employees back to the workplace, employers are required under the Advisory to first verify that their employees meet the Criteria. This also enables employers to distinguish between vaccinated and (the different classes of) unvaccinated employees for the purposes of implementing the various differentiated measures at the workplace. If employees refuse to furnish proof that they meet

¹ While the term "employees" is used in the Advisory (as hereinafter defined), the MOM has separately clarified, as at the time of writing, that non-employees such as independent contractors, vendors, and any other persons working at the same workplace as employees, will likewise be required to comply with the New Measures. For more information, please see: <https://www.mom.gov.sg/covid-19/frequently-asked-questions/covid-19-vaccinations>

² According to the MOH, a "Pre-Event Test" refers to a COVID-19 test taken by a person who wishes to enter a venue where selected events, businesses, or activities are being held. The test must be taken within a specified period and the results thereof must be negative, before the person is allowed to enter the venue or participate in the event, business, or activity. For more information, please see <https://www.moh.gov.sg/covid-19/statistics-old/pet>

³ Employees were however given a grace period of up to 31 January 2022 to continue relying on negative PETs to enter the workplace, following which they were required to meet the Criteria.

⁴ <https://www.mom.gov.sg/covid-19/advisory-on-covid-19-vaccination-in-employment-settings>

⁵ An employee can only be certified to be medically ineligible for the vaccines under the NVP by a registered doctor in Singapore.

the Criteria, their employers may treat them as unvaccinated for the purpose of the New Measures.

3. Work Arrangements Under the New Measures

Under the New Measures, vaccinated employees may return to the workplace, subject to prevailing government-mandated Safe Management Measures⁶. According to the MOM, while employers have the prerogative to decide whether certain jobs of its employees may be performed from home, employers and employees may nonetheless agree to adopt alternative working arrangements (e.g. for the employees to continue working from home).⁷

Where unvaccinated employees are concerned, employers have the discretion to allow such employees to work from home if the employer is of the view that such working arrangements can meet their operational / business needs. However, the employer is also entitled to take into account the employee's prolonged absence from the workplace and the effect (if any) of such absence on their individual performance and the performance of their team or the organisation overall.

If an employer assesses that home working arrangements are not suitable for an employee (for example, where the employee's duties and responsibilities require them to physically attend at the workplace to carry out their work), they have the discretion to take any of the following measures:

- (i) redeploy the employee to a suitable alternative job that can be done from home (if available), and adjust the employee's remuneration to be commensurate with the responsibilities of such alternative job;
- (ii) place the employee on no-pay leave, on mutually agreeable terms; or
- (iii) as a last resort, terminate the employee's employment (with notice) in accordance with the employment contract.

The MOM has clarified in the Advisory that if an unvaccinated employee is terminated due to that employee's inability to attend at the workplace to perform their contracted work, such termination of employment would not be considered as wrongful dismissal. However, this is subject to the special considerations afforded to certain unvaccinated employees, as set out below. Unvaccinated employees given special consideration should not be terminated on the basis of their inability to be at the workplace.

4. Special Considerations - Medical Ineligibility for Vaccines Under the NVP

Unvaccinated employees who are certified to be medically ineligible for vaccines under the NVP are allowed to work on-site, unlike the unvaccinated employees who are medically eligible (see paragraph

⁶ <https://www.moh.gov.sg/covid-19-phase-advisory>

⁷ <https://www.mom.gov.sg/covid-19/frequently-asked-questions/covid-19-vaccinations>

3 above). However, employers should consider taking the following measures for such employees:

- (i) where the employee's job function allows them to work from home, employers should allow them to continue working from home. The employees' absence from the workplace should not affect their performance assessment; or
- (ii) where the employee's job function requires them to physically attend at the workplace, employers can also try to redeploy the employee to a suitable alternative job that can be done from home (if available), and adjust the employee's remuneration to be commensurate with the responsibilities of such alternative job.

5. Special Considerations – Pregnancy

The Advisory also provides that employers should not terminate the employment of pregnant employees who are unvaccinated but medically eligible for vaccines under the NVP, and encourages employers to give special consideration to such employees. Employers are also encouraged to consider affording their pregnant employees with support similar to that which is given to those medically ineligible for vaccines under the NVP (see paragraph 4 above), or no-pay leave⁸, until they have delivered.

6. Conclusion

Compared to previously announced workplace vaccination measures, the New Measures are certainly more stringent, and reflect the MOH's and Tripartite Partners' collective bid to strengthen Singapore's capacity to deal with COVID-19-related health and medical crises, as well as their controlled approach towards the reopening of the country.

In light of the emergence of more transmissible variants of COVID-19, businesses are all the more encouraged to ensure that their workplaces and employment practices are compliant with COVID-19-related guidance, directions, and advisories issued and updated by the authorities from time to time, such as the MOM's recent advisories on Business Continuity Plans⁹, and requirements for Safe Management Measures at the workplace¹⁰, so as to ensure that they are well-prepared to deal with the changing circumstances of the pandemic.

⁸ Such no-pay leave should not affect the right of the pregnant employees to maternity benefits required under any legislation, employment contract or collective agreement.

⁹ <https://www.mom.gov.sg/covid-19/advisory-on-business-continuity-plan>

¹⁰ <https://www.mom.gov.sg/covid-19/requirements-for-safe-management-measures>

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