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Navigating The Waters Of Worker Classification: Appellate Board Rules Individuals As Independent Contractors

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The classification of individuals as either employees or independent contractors has long been contentious. This stems from the significant economic and legal implications associated with each category. Employees are entitled to numerous statutory protections and benefits, such as minimum wage, overtime pay, and access to social security, which independent contractors generally do not receive.

The Social Security Appellate Board (**Appellate Board**) recently decided that SOCSO had erred when it wrongly classified the individuals as employees instead of independent contractors.

The Company is a member of the Direct Selling Association of Malaysia and engages independent contractors to carry out the servicing of its products. SOCSO declared that these independent contractors were employees under the *Employees' Social Security Act 1969* and *Employment Insurance System Act 2017* (collectively "**the Acts**"). It directed the Company to register these independent contractors with SOCSO and make the

requisite monthly contributions. The Company then filed applications at the Appellate Board to challenge SOCSO's decision.

The Company argued that SOCSO's investigations were flawed and done in bad faith as SOCSO had: (a) only interviewed 2 individuals; (b) failed to interview the Company or its representative – contrary to its own internal procedures; (c) only analyzed 1 document which was the template services agreement between the Company and the individuals; (d) bizarrely conducted a fact-finding interview with one of the Company's independent contractor after SOCSO had already decided that the individuals were employees; and (e) initiated prosecution at the Magistrates Court, notwithstanding that it was fully aware that the Company had filed applications at the Appellate Board to challenge SOCSO's decision.

On the merits of the dispute, the Company argued that the 4 tests (*Control, Integration, Multiple and Entrepreneur Test*) demonstrated that the individuals were independent contractors and not employees, for the following reasons:

- (1) They do not have fixed hours of work and had the freedom to determine their own work schedule.
- (2) They did not need to apply for annual leave.
- (3) They did not need to provide supporting documentation for medical leave.
- (4) They were charged a fee to use the Company's equipment and uniform.
- (5) They could carry out employment with other companies and were not prohibited from carrying out other businesses.

- (6) They were solely responsible for their own income tax liabilities.
- (7) They were not subject to annual appraisal and probation period, unlike the Company's employees.
- (8) They were not eligible for promotion, performance bonus and annual increment, unlike the Company's employees.
- (9) Their recruitment was not handled by the Company's Human Resources department, unlike the Company's employees.
- (10) They were not subject to pre-employment medical examination and background checks, unlike the Company's employees.
- (11) Their terms and conditions of engagement were completely different to that of the Company's employees.
- (12) They wore lanyards which clearly specified that they were independent contractors.
- (13) They were required to represent themselves to customers as the Company's independent contractors.
- (14) They were not provided an office space.
- (15) They were not paid a fixed salary but were paid commissions.

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On 1.6.2023, the Appellate Board quashed SOCSO's decision and declared that the individuals were not employees under the Acts but were instead independent contractors.

The Company was represented by our partner, Amardeep Singh Toor and associate, Wong Lien Taa of Lee Hishammuddin Allen & Gledhill.

If you have any queries, please contact associate, **Wong Lien Taa** (wlt@lh-ag.com) or his team partner, **Amardeep Singh Toor** (ast@lh-ag.com).