Using "force majeure" to deny employer responsibility in the COVID-19 pandemic

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In the COVID-19 pandemic employers must not terminate workers and must continue to pay wages even if the business is temporarily closed. This is an essential part of government policy responses across the region. Employers must also engage with unions to develop COVID-19 responses that ensure safe work and to safeguard jobs and wages during a temporary closure. Governments must also provide income support.

In some countries in the Asia-Pacific region, employers in the hotel & tourism industry are trying to designate the COVID-19 crisis as "force majeure" to terminate employment contracts without due legal process and without fulfilling their obligations.

Force majeure (meaning "superior force") refers to an occurrence or event beyond the control of a government, company or any person or institution with a legal identity. Such events may include war, riots or crime waves on a significant scale, or an event described by the legal term "act of God" (hurricane, flood, earthquake, volcanic eruption, etc.). The occurrence of an event described as *force majeure* means that a government, company or any person or institution is unable to fulfill their obligations and are free of liability or responsibility. In most cases, clauses in laws or contracts only suspend the obligations of the parties for the duration of the *force majeure*.

In most countries the legal requirements for *force majeure* are strict. Not only must the company, individual or institution prove that the event was due to circumstances beyond their control, they also must prove that the event could not be anticipated. It also must be demonstrated that the the situation clearly prevents them from fulfilling their obligations and that there is no bad faith in doing so.

Some employers are attempting to use the COVID-19 pandemic as *force majeure* to terminate employment contracts and free themselves of employer responsibility. However, there are several reasons why *force majeure* cannot and should not be applied in this situation.

The outbreak and spread of the COVID-19 disease caused by the SARS-Cov-2 virus is not a natural occurrence, but the result of human actions (or inaction) and the failure of governments and institutions at local, national and international level to prevent the outbreak or epidemic becoming a pandemic. This suggests that the COVID-19 pandemic is not a natural phenomenon and does not fall within the legal definition of "act of God". [This is in the eyes of the law, not religious belief.]

Most common law and civil law in the region do not include "pandemic", "epidemic" or "outbreak" in the definition of *force majeure*. More importantly, contracts governed by labour and employment laws do not include *force majeure* clauses. Only legally proven bankruptcy as a result of the COVID-19 pandemic can be understood as effectively ending obligations. However, bankruptcy requires the liquidation of assets to meet outstanding liabilities - including financial obligations to employees as privileged creditors.

None of the employers claiming *force majeure* are bankrupt or facing liquidation. Hotel properties, for example, are only temporarily closed during the COVID-19 pandemic and will resume business once the

pandemic is over and the emergency measures are lifted. This is particularly important for owned and/or hotels operated by business groups that are not facing bankruptcy. It is only a temporary suspension of business.

To treat the COVID-10 pandemic as justification for permanent closure and mass termination, while maintaining the business for re-opening after the crisis, is an act of bad faith and this negates the right to attribute this to *force majeure.* Furthermore, any business group or corporation that terminates workers using *force majeure* should not be eligible for any government assistance or benefit from government stimulus packages.