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The Global Employer: Malaysia 2021

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Malaysia Guide 2021

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**Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law*

About the guide

This guide is intended to provide employers and human resources professionals with a comprehensive overview of the key aspects of Malaysian labor law. It covers the entire life cycle of the employment relationship from hiring through to termination, with information on working terms and conditions, family rights, personnel policies, workplace safety and discrimination. The guide links to our global handbooks, which include information for Malaysia on immigration and data privacy. The guide also contains information on the employment implications of share and asset sales.

Save where otherwise indicated, law and practice are stated in this guide as of October 2021.

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1 Overview

1.1 General overview

Generally, Malaysian employment laws are considered to be pro-employee. As it is relatively easy for an employee to file an unfair dismissal claim, the environment can be quite litigious.

1.2 General legal framework

1.2.1 Sources of law

Employees in Malaysia are generally divided into two categories — those who fall within the ambit of the Malaysian Employment Act (EA) for West Malaysia and those who fall within the ambit of the Ordinances for East Malaysia (collectively, the EA and the Ordinances will be referred to as "**Legislation**"). Those covered by the Legislation are referred to as "**Protected Employees**," and those falling outside the Legislation are referred to as "**Non-Protected Employees**." A Protected Employee is an individual: (i) whose wages do not exceed the prescribed threshold amount (MYR 2,000 for West Malaysia and MYR 2,500 for East Malaysia) per month, irrespective of occupation; or (ii) who is engaged in specific work (e.g., a manual laborer, an employee who supervises manual laborers in and throughout the performance of their work, or a commercial motor vehicle operator), regardless of wage amount.

The Legislation provides minimum standards for Protected Employees' employment benefits. Where the terms of a Protected Employee's employment contract are more favorable to them, the more favorable terms shall prevail. Non-Protected Employees' terms and conditions of employment and benefits are governed by their employment contracts and the common law.

The Industrial Relations Act 1967 (IRA) deals with relations between employers, employees and trade unions, and the prevention and settlement of differences or trade disputes through conciliation or by the Malaysian industrial court. The Industrial Relations (Amendment) Act, which was promulgated on 20 February 2020, introduces several amendments to the IRA; some of these amendments came into effect on 1 January 2021. These include new rights of appeal against industrial court awards and the removal of the discretion of the minister of human resources to refer unfair dismissal complaints to the industrial court.

1.2.2 Collective agreements

Collective agreements are concluded between an employer and a trade union following the recognition of the trade union in accordance with legally prescribed processes.

Collective agreements that have been recognized by the Malaysian industrial court are binding on all employees falling within the scope of the collective agreement, whether they are union members or not. If any term of the individual employment contract is inconsistent with the terms of the collective agreement, the terms of the collective agreement will prevail over those in the individual employment contract.

While the Malaysian Federal Constitution guarantees the rights of all Malaysians to form and join a trade union, there are several restrictions imposed by the laws relating to trade unions, i.e., restrictions under the Trade Unions Act 1959 (TUA) and the IRA.

Membership of any trade union is currently confined solely to those who are employees of a particular industry, establishment, trade or occupation. In addition, Malaysian laws prescribe various restrictions with respect to trade union activities, including strikes, picketing, etc. From 1 January 2021, the Minister of Human Resources has the power to restrain strikes or lockouts based on certain time limits and scope where they would endanger the life, personal safety or health of the population (see **1.4** below).

1.2.3 Court framework

The hierarchy of courts in Malaysia begins with the magistrates' court, and is followed by the sessions court, the high court, the court of appeal and, at the highest level, the federal court of Malaysia. There are also a number of other courts outside of this hierarchy, including the penghulu's courts, the syariah courts, the native courts and the industrial court.

The EA provides that employees who earn not more than MYR 5,000 can file claims before the labor court with regard to their employer's non-payment of contractual amounts.

The industrial court adjudicates unfair dismissal claims (see **15.11** below). Any person who is dissatisfied with an award of the industrial court may appeal against the merits of the award, or appeal by way of judicial review to determine a question of fact or law. Prior to 1 January 2021, there was only the option of judicial review.

1.2.4 Litigation considerations

All employees (regardless of their monthly wage and nationality), including employees on probation, can file an unfair dismissal claim at the Industrial Relations Department against their employer. Any claims must be filed no later than 60 days following the final date of their employment. Due to the ease of filing such a claim, the environment can be quite litigious.

When an unfair dismissal complaint is filed, parties are required to go through a mandatory conciliation process. If the matter cannot be settled after this process, with effect from 1 January 2021, the director general of industrial relations (DGIR) has the power to automatically refer the complaint to the industrial court. Prior to this, the minister of human resources had the discretion to determine whether the unsettled unfair dismissal complaint should be referred to the industrial court for adjudication.

1.3 Types of working relationship

Individuals who provide their service broadly fall into the following main groups: (i) employees; (ii) dispatched workers; (iii) outsourcing service workers; and (iv) independent contractors. The status of an individual is important because it determines an organization's employment-related obligations toward the individual, as well as the organization's employment-related liability, such as those in respect of severance payments, statutory-prescribed benefits, payroll-related obligations and unfair dismissal liability.

The minister of human resources has similarly proposed amendments to the EA. One of the proposals is for a person who renders a service to an organization to be presumed to be an employee of another party unless it is proven otherwise. Under the proposal, a person will be presumed to be an employee if, among other things:

- the manner of work is subject to the control or direction of the other party
- the particular hours of work are subject to the control or direction of the other party
- the person's work constitutes an integral part of the other party's business
- the work is performed solely or mainly for the benefit of the other party
- the person is provided with tools, raw materials or work equipment by the other party

1.4 On the horizon

Malaysia is among 11 countries that signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on 8 March 2018. Malaysia has signed a side letter confirming its

commitment to effect legal reforms in line with the Labor Chapter adopted from the Trans-Pacific Partnership Agreement, following the enforcement of the CPTPP. However, Malaysia has not completed the ratification process. The CPTPP will enter into force 60 days after six signatories, or at least 50% of the signatories, have ratified the CPTPP. It will only become legally binding on the remaining signatories 60 days after their ratification of the same.

The various reforms to the Malaysian employment-related laws required by the CPTPP will most probably encompass greater freedom of association, less restricted trade union activities, greater foreign worker protections and the introduction of anti-discrimination employment laws. The Ministry of Human Resources has proposed amendments to various employment-related pieces of legislation, and the Industrial Relations (Amendment) Act 2020 has been promulgated to amend the existing provisions of the IRA, as set out below. The amendments are consistent with the labor chapter commitments under the CPTPP; although feedback from the ministry is that the amendments are intended to be in line with the International Labour Organization standards.

Amendments to the IRA

On 20 February 2020, the Industrial Relations (Amendment) Act 2020 ("Amendment Act") was promulgated to amend the existing provisions of the IRA. Following this, the majority of the amendments came into force on 1 January 2021. The remaining amendments that have not come into force include, among others, an increase in the scope of collective bargaining, and new procedures to determine sole bargaining rights of a trade union.

Proposed amendments to the EA

The minister of human resources released a list of proposed amendments to the EA, which open the statutory minimum protections under the EA to employees across the board, regardless of income level and nature of work (with certain reservations for employees earning more than MYR 5,000 per month), thereby significantly increasing compliance risks and costs. The proposed changes also include anti-discrimination obligations on grounds of gender, religion, race, disability, language, marital status and pregnancy, which apply at the recruitment stage as well as during employment. Other amendments include the presumption that an independent contractor is an employee, the introduction of flexible working arrangements and paternity leave entitlement, an increase in maternity leave entitlement, a reduction in the maximum number of working hours in one week, an obligation to inquire into complaints of sexual harassment and to have a written code of prevention of sexual harassment, and an increase in the general penalty under the EA from MYR 10,000 to MYR 30,000.

Proposed amendments to union-related laws

The minister of human resources has released a list of proposed amendments to the TUA, which will significantly increase the liberalization of union rights by providing unions with broader bargaining power and increasing bargaining rights.

No bills have been issued thus far in respect of any of the proposed amendments to the TUA, and it is currently uncertain when the proposed amendments will be tabled in parliament.

2 Hiring employees

2.1 Key hiring considerations

The concept of "at will" employment is not recognized in Malaysia. An employee can only be legally dismissed where there is just cause or excuse — please refer to **15** below.

2.2 Avoiding the pitfalls

The content of an individual's service contract with the organization should be consistent with the intended relationship (for example, an independent contractor or fixed-term employee). The employment contracts should also clearly distinguish between a contractual entitlement and a discretionary benefit, as varying the former could lead to constructive dismissal liability (see **15.3** below). Please note that fundamental terms, such as those affecting the employee's remuneration (including bonuses), can generally only be varied with the employee's consent, notwithstanding the fact that a contract may provide for the variation of the same.

2.3 Procedural steps and key documents in recruitment

2.3.1 Identifying the vacancy

When there is a vacancy, the employer should consider whether the position should be filled by a full-time or part-time employee, or, alternatively, by a labor dispatch worker. In addition, the employer should consider whether the employment should be for a fixed term or indefinite term (permanent term) for directly hired employees.

2.3.2 Preparing a job description and person specification for the position

Preparing a detailed and accurate job description is encouraged to help mitigate the risk of future disputes in relation to the employee's performance expectations and, ultimately, unfair dismissal liability should the employee be terminated on the ground of poor performance.

2.3.3 Making an offer of employment, subject to conditions where appropriate

The employment offer should clearly set out any applicable conditions precedent, including the signing of any confidentiality/intellectual property agreements, personal data disclosure forms, satisfactory background check, etc. Moreover, it is strongly advisable to ensure that these conditions have been fulfilled prior to the individual's commencement of employment, i.e., before the individual becomes an employee and qualifies to file an unfair dismissal claim.

3 Carrying out pre-hire checks

3.1 Background checks

Pre-employment screening

Pre-employment screening can be useful for employers but, in practice, the methods for carrying out screening may be limited. Usually, pre-employment screening typically covers at least some of the following areas:

- background check (including criminal background)
- credit history
- verification of employment history
- confirmation of employment references
- verification of credentials (diplomas, degrees, certifications, etc.)

Potential employers can make an offer of employment contingent on the candidate passing background checks (in particular in relation to criminal records) provided this is made clear to the candidate prior to or at the time the offer is made.

Certain types of background checks, such as checks on criminal history, would require express employee consent. An overall consent that is compliant with the Malaysian Personal Data Protection Act (PDPA) should be obtained in all cases.

A candidate's refusal to consent to a background check is a valid ground for the employer to stop considering the candidate for employment, or to not interview or hire the candidate. Consistent with the PDPA, this consequence should be communicated to the candidate.

3.2 Reference checks

Pursuant to the PDPA, the former employer will need the candidate's consent prior to disclosing any personal data, including past employment-related information and their opinion in relation to the candidate. Therefore, the candidate's consent to such disclosure should be made a precondition to hiring.

3.3 Medical checks

Potential employers are allowed to conduct pre-hire medical checks and drug testing, provided this is made clear to the candidate prior to or at the time the offer is made. If the candidate fails the medical or drug test, the employer does not have to further assess the suitability of the candidate for employment. Such information constitutes "sensitive personal data" within the meaning of the PDPA, and explicit consent to the processing of such information must be obtained from the individual.

Even though a candidate may not currently bring a claim against the potential employer for discrimination based on medical checks or drug testing (as the relationship at this point is contractual), the potential employer should not use any information obtained through such checks or tests in a discriminatory or potentially defamatory manner, or in a manner that contravenes the PDPA.

4 Immigration

Please refer to our Handbook — The Global Employer: Focus on Global Immigration and Mobility, which is accessible HERE, for information about the immigration system applying in Malaysia.

5 The employment contract

5.1 Form of the employment contract

Employment contracts in Malaysia can be written, oral, express or implied, subject to mandatory statutory provisions, such as under the Legislation.

5.2 Types of employment contract

Employees can be hired under: (i) a permanent employment contract on a full-time or part-time basis; (ii) a fixed-term employment contract; or (iii) a project-based employment contract.

Where it is clear from the factual circumstances that a fixed-term or project-based employee's services were required on an ongoing basis rather than for a definite term, taking into account the nature of the employee's role in the business and the treatment of the employee in practice, including any repeated renewals, the industrial court may take the view that the employee should have been engaged on a permanent basis. In such a case, the non-renewal of the fixed-term contract will constitute a dismissal, and the industrial court will then consider whether such dismissal was with just cause or excuse.

In determining whether a fixed-term/project-based contract is genuine, the following factors will be considered:

- the nature of the employer's business and the employee's performance of their duties
- whether the part of the employer's business for which the employee was engaged to perform services has a definite or undefined/indefinite duration and whether the performance of the employee's duties was in fact an integral part of the employer's continuing business operations
- whether, as a matter of policy and practice of the employer, such fixed-term contracts were routinely renewed
- whether, but for the stipulation as to the fixed-term/project, the terms and conditions of employment of the employee under the fixed-term/project-based contract materially differ from that of a permanent employee of the same employer

The factors above are not wholly determinative of whether the contract will be deemed to be permanent, given that the industrial court determines liability based on the particular facts before it. The employer needs to be mindful of every factor that can count toward limiting the risk of the fixed-term/project-based contract being deemed to be a permanent contract, and act accordingly.

5.3 Language requirements

There is no legal requirement for employment contracts to be in the Malaysian language in order to be enforceable. English is widely spoken in Malaysia, and many commercial agreements are drafted in English. Where employees do not understand either the Malaysian or English languages, however, employment contracts should be prepared in a language that the employee understands.

6 Working terms and conditions

6.1 Trial periods

In Malaysia, it is common practice for the parties to agree on a probationary period in order to ascertain the suitability of the employee to the organization and the job. There is, however, no legal requirement to impose a probationary period, nor is there any legal restriction on the length of the probation period.

Employees on probation are accorded similar dismissal-related rights as permanent employees. The dismissal of an unsuitable or under-performing employee on probation must be with just cause or excuse, even if the employee had expressly agreed under the employment contract to be dismissed under such circumstances. However, if an employee, who was formerly on probation, is successful in claiming unfair dismissal they will receive back pay compensation limited to a maximum of 12 months (instead of 24 months for permanent employees).

Employees on probation will continue as such unless confirmed in accordance with the terms of the employment contract. There is no automatic confirmation under Malaysian law, unless the contract provides for the employee to be confirmed, say, upon completing a specified period. Employees on probation may, however, be confirmed through conduct, i.e., where rights and benefits usually reserved for permanent employees are granted in practice.

6.2 Working time

For non-shift workers who are Protected Employees, the legally mandated maximum normal hours ("**Per-day Maximum Hours**") are:

- where the employee works a five-day week, nine hours a day
- where the employee works a six-day week, eight hours a day

Further, a non-shift-working Protected Employee's Per-day Maximum Hours must comply with the following conditions:

- be inclusive of at least a 30-minute break
- not be spread over a period of more than 10 hours in a given day
- not be more than 48 hours in one week

There are specific rules for Protected Employees engaged in regular shift work. Shift workers may be required to work for more than eight hours a day (but not more than 12 hours a day), over a period spread over more than 10 hours in a given day and more than 48 normal work hours in any one week, provided that the average number of hours worked over any continuous period of three weeks or more does not exceed 48 hours per week.

One of the proposals under the EA is to allow employees to have flexible working arrangements. Employees who require flexible working arrangements may make a request to their employer, who will consider the request within one month of the date of such request, and will notify the employee of the decision in writing. Nevertheless, the proposed amendment only requires employers to consider the employee's request, and allows employers to refuse the request on several grounds, including:

- inability to reorganize work among existing employees
- inability to recruit additional employees
- detrimental impact on quality
- detrimental impact on performance
- burden of additional costs

6.3 Wage and salary

The Minimum Wages Order 2020 prescribes the minimum wage rates for employees working in both East and West Malaysia, and its Schedule sets out a list of locations ("**Listed Locations**"). As of 1 February 2020, the minimum monthly basic salary rate is MYR 1,200 or MYR 5.77 hourly (approximately USD 287.46/month and USD 1.38/hour, respectively) for employees working in the Listed Locations, and MYR 1,100 and MYR 5.29 respectively (approximately USD 263.50/month and USD 1.27/hour, respectively) for employees working in other locations. These minimum rates cover all employees, both non-Malaysian and local, with the exception of domestic servants.

Employees working in the Listed Locations who are paid wages based solely on piece rates, tonnage, tasks, trip rates or commission must receive monthly wages not less than MYR 1,200, whereas those working outside of these locations must receive monthly wages not less than MYR 1,100.

Non-compliance with the minimum wage law will expose the employer to penalties, including a maximum fine of MYR 10,000 for each employee as well as a maximum fine of MYR 20,000 or a maximum of five years' imprisonment for repeated offenses.

6.4 Making deductions

If an employee falls under the EA, an employer can make deductions from their salary if, for instance, the employer has overpaid the employee or if the deduction is authorized by any other written law.

Other deductions from salary can be carried out should the employee request this in writing. The following deductions can only be made at the employee's written request:

- deductions in respect of the payments to a registered trade union or cooperative thrift and loan society
- deductions in respect of payments for any shares of the employers' business offered for sale by the employer and purchased by the employee

Deductions of salaries may also be carried out with the prior written permission of the Malaysian director general of labor.

Although lawful deductions can be made in the above circumstances, the total amount deductible from the salary cannot exceed 50% of the salaries earned by that employee in that month.

6.5 Overtime

Overtime will only be payable for any hours of work carried out in excess of the Per-day Maximum Hours or the contractually agreed normal number of working hours each day (together — "**Normal Hours**"), whichever is lesser.

The overtime rates under the Legislation are as follows:

- 150% of the employee's hourly rate of pay for work in excess of their Normal Hours of work
- for work performed on a rest day (as defined under the Legislation) by employees paid on a weekly/monthly basis:
    - 50% of the ordinary rate of pay (as defined under the Legislation) for work done not exceeding half of their Normal Hours of work
    - 100% of one day's wages at the ordinary rate of pay for work done for more than half but not in excess of the Normal Hours of work
    - an additional 200% of the hourly rate of pay for work done in excess of their Normal Hours of work
- for work performed on a holiday:
    - 300% of the employee's daily wages at the ordinary rate of pay
    - an additional 300% hourly rate for each hour in excess of the Normal Hours of work

Overtime work for Protected Employees cannot exceed 104 hours in one month.

Protected Employees engaged in regular shift work will be entitled to overtime pay if they work more than an average of 48 hours a week over any continuous period of three weeks.

6.6 Bonus and commission

Bonuses and commissions, which are commonly provided, are permitted but not legally required.

6.7 Benefits in kind

Some employees, particularly senior employees, may receive benefits other than their basic wage, such as company cars, medical and disability insurance, and life insurance, but such benefits are not mandatory.

6.8 Equity incentive plans

For the purposes of implementing an equity incentive plan, the following documents must be filed:

- an information memorandum with the Malaysian Securities Commission, which must be completed within seven days of the documents relating to the equity incentive plan being distributed to employees
- Appendix A to the tax notification form (i.e., Form BT/MSSP/2012) with the Malaysian Inland Revenue Board, which must be completed within 30 days of the expiry of the equity offer acceptance period
- an application to the director general of labor at the labor department, in respect of advances/deductions of wages of employees governed under the Legislation (if required)
- a written notification to the employees

In addition, the consent of the employees must be obtained for the processing/transfer of their personal data for the purposes of compliance with the PDPA (if required).

6.9 Pensions

The Employees Provident Fund (EPF) is Malaysia's government-run superannuation scheme. Pursuant to the Third Schedule of the EPF Act 1991, the minimum contribution rates for most employees (excluding certain employees, such as non-Malaysian citizens and employees above 60 years old), are as follows:

- The rate of employee's contributions is approximately 11% of the employee's wages.
- The rate of employer contributions is approximately 12% (13% for employees earning below MYR 5,000 per month).

However, from January 2021 to 31 December 2021, the common minimum rate of the employee's contributions is reduced from 11% to approximately 9% of the employee's wages, to increase the take-home pay of employees during the COVID-19 pandemic.

Wages do not include payments for overtime work, gratuities or other allowances. Employers can claim income tax deductions of up to 19% for contributions to the EPF. The EPF Board annually credits interest to the contributions.

Private pension funds are relatively rare in Malaysia and in most cases would only be offered to senior executives.

6.10 Annual leave

A Protected Employee is entitled to the following paid annual leave:

- eight days' paid leave if employed for less than two years
- 12 days' paid leave if employed for two years or more but less than five years
- 16 days' paid leave if employed for five years or more

A Non-Protected Employee's entitlement to annual leave is wholly dependent on the employment's contractual terms.

6.11 Sick leave and pay

Under the Legislation, if hospitalization is recommended by a medical practitioner, a Protected Employee is entitled to an aggregate of 60 days' paid sick leave per anniversary year. If hospitalization is not necessary/recommended by a medical practitioner, the Protected Employee is entitled to:

- 14 days' paid sick leave per year if employed for less than two years
- 18 days' paid sick leave per year if employed for two years or more but less than five years
- 22 days' paid sick leave per year if employed for five years or more

A Non-Protected Employee's entitlement to sick leave is wholly dependent on the employment contractual terms.

6.12 Taxes, social security and employment insurance contributions

Malaysia adopts a pay-as-you-earn system of taxation for employment income. The income tax rules require employers to make monthly deductions from the emoluments of employees and pay such tax deducted no later than the 15th day of every calendar month to the director general of the Inland Revenue. The amount of monthly deduction depends on the employees' monthly remuneration, marital status and number of children.

The employer therefore acts as the tax collector for the Inland Revenue in relation to the employment income derived by its employees.

As of 1 June 2015, employers of all private sector employees are required to insure their employees against injury and invalidity, pursuant to the Employees' Social Security Act (ESS Act). The contribution rate for the employer's portion is 1.75% of the employee's monthly wages, and the employee portion, 0.5%. Different rates and coverage apply to certain employees, such as employees over 60 years old.

The Social Security Organization (SOCSO) provides for compensation arising from an injury suffered by an employee that was caused either by an accident or by an occupational disease arising out of and in the course of employment. The SOCSO also provides for the payment of an invalidity pension if the employee has completed a full or reduced qualifying period.

The Employment Insurance System Act 2017 (EIS Act) came into force on 1 January 2018 and seeks to provide post-exit benefits to affected individuals and to assist with re-employment, which is similarly administered by SOCSO.

All private sector employers with one or more employees will be required to register with the employment insurance fund (EIF) and all employees will need to be insured. The EIF will be administered by the SOCSO. The EIF contribution comprises approximately 0.4% of an employee's monthly wages, with the employee and employer contributing 50% respectively. The rate of contribution is subject to a maximum wage cap of MYR 4,000.

Prior to 2019, the SOCSO was not mandatory for foreign workers. With effect from 1 January 2019, companies registered in Malaysia are required to register all their foreign workers with the SOCSO and contribute to the Employment Injury (EI) Scheme and the EIF. Under the EI Scheme, the employers are obliged to make the contributions on behalf of the foreign workers at the rate of 1.25% of their monthly wages in accordance with the schedule of contributions under the SOCSO Act.

Further, from 1 June 2021, coverage under the EIS Act and SOCSO Act has been extended to domestic servants (who were previously not covered nor eligible to claim social security or post-exit benefits), with certain exceptions. Domestic servants are persons employed exclusively in the work or

in connection with work in a private dwelling, and not of any trade, business or profession, such as house cooks, private house servants, private waiters, private butlers, etc.

7 Family rights

7.1 Time off for antenatal care

Malaysian laws do not provide for antenatal care leave. The employee will have to apply for sick leave or annual leave for any antenatal care.

7.2 Maternity leave and pay

Under the EA, all employees in West Malaysia (regardless of their monthly wage amount or occupation) are entitled to 60 days' maternity leave commencing no earlier than 30 days before delivery and no later than one day after delivery. Such leave will be "paid leave" (i.e., the employee will receive salary during the statutory minimum leave period of 60 days) subject to the fulfillment of the EA-prescribed criteria. The 60-day maternity leave entitlement for employees in East Malaysia is limited to those who fall within the ambit of the Ordinances. Currently, the EA prohibits the termination of employment during the period in which an employee is entitled to maternity leave (except on the grounds of closure of the business), but does not specifically prohibit the termination of employment on the grounds of pregnancy. Pursuant to the proposed amendments under the EA, employees will not only be protected from termination during the period in which they are entitled to maternity leave, but will also be protected from termination on the grounds of pregnancy, unless the termination is on the grounds of closure of the business.

7.3 Paternity leave and pay

Paternity leave is currently not available in Malaysia. The minister of human resources has proposed amendments to the EA to provide for three days' paternity leave.

7.4 Parental leave and pay

Parental leave is not available in Malaysia.

7.5 Adoption leave and pay

Adoption leave is not available in Malaysia.

7.6 Other family rights

There are no other family rights available in Malaysia other than those described above.

8 Other types of leave

The main types of leave in Malaysia are already referred to in this guide.

9 Termination provisions and restrictions

9.1 Notice periods

Please refer to **15.5**.

9.2 Payment in lieu of notice

In lieu of notice, an employer may pay wages to an employee in an amount equivalent to the period of notice. However, regardless of compliance with the notice period or the payment of benefits, an employer cannot terminate the service of an employee without "just cause or excuse."

Where the dismissal is because of misconduct, there is no requirement for the employer to provide termination notice or payment in lieu of notice.

9.3 Garden leave

The law is silent on the use of "garden leave," but the parties should be able to stipulate a garden leave provision in the employment contract.

9.4 Intellectual property

Malaysian patent and copyright laws provide for the deemed ownership/rights of the employer over inventions created during the course of employment. Where the work/invention acquires an economic value much greater than the parties could reasonably have foreseen at the time, the individual could be entitled to equitable remuneration, which may be fixed by the court in the absence of any provision to the contrary in the contract of employment.

9.5 Confidential information

There is a common (i.e., judge-made) law implied duty placed on all employees that prohibits the individual from using any confidential information obtained during their employment for their own or another's benefit during and after employment. To rely on this common law duty, the following must be established:

- The information the party is seeking to protect is of a confidential nature.
- The information is communicated in circumstances importing an obligation of confidence.
- There has been or will be an unauthorized use of the information to the detriment of the party communicating it.

Where the former employee's position in the company placed them in a position where they were exposed or made privy to the data and confidential information belonging to the company, their position will be deemed to have attracted an implied duty to preserve confidentiality. What amounts to confidential information necessarily depends on the individual facts.

9.6 Post-termination restrictions

Post-termination non-compete or non-solicitation covenants are generally not enforceable. The alternative course of action is to enforce post-cessation employee confidentiality obligations. However, a breach of such obligations is often difficult to prove.

9.7 Retirement

There is a minimum retirement age of 60, regardless of any agreement seeking to implement an age lower than 60. While the minimum retirement age law specifies the minimum retirement age, it also provides for an optional retirement age prior to reaching the age of 60. This, presumably, can only apply at the employee's discretion. Guidelines in relation to the implementation of the law in this regard have yet to be issued.

10 Managing employees

10.1 The role of personnel policies

Employee handbooks are often used by employers as management tools to communicate rules and regulations to employees. The rules in handbooks or other employer rules may, depending on the individual circumstances, be used as the basis for terminating an employment contract if the employee seriously violates labor discipline or the rules and regulations.

10.2 The essentials of an employee handbook

Malaysian laws and regulations currently do not specify what should be stipulated in an employee handbook. It is recommended, however, that a multinational company localize the existing global policies of its offshore parent company (e.g., global code of conduct, business ethics, corporate values, recruitment policies, exit procedures, patent awards, etc.) for employees in Malaysia. There are some general items that an employee handbook will usually cover, such as a leave policy, work rules, code of conduct, disciplinary actions, working hours, etc.

10.3 Codes of business conduct and ethics

While it is not mandatory in Malaysia, it is advisable for a company to have a code of business conduct and ethics in place in order to build the legal basis for the company to manage employees' business activities and take any disciplinary actions as necessary.

11 Data privacy and employee monitoring

Please refer to our Global Privacy Handbook, which is accessible HERE, for information on data privacy and monitoring requirements in Malaysia.

12 Workplace safety

12.1 Overview

In Malaysia, occupational health and safety is governed by the Factories and Machinery Act (FMA), the Occupational Safety and Health Act (OSHA) and the common law of negligence.

12.2 Main obligations

The FMA imposes on the occupier of a factory a number of obligations regarding the health, safety and welfare of employees. The FMA and its related regulations require occupiers of factories to maintain certain minimum standards of health and safety and to take precautions against specific hazards. The FMA prohibits "young persons" from carrying out work involving the management of, attendance to, or proximity to any machinery.

The Children and Young Persons (Employment) Act 1966 limits the type of work that can be carried out by young persons (aged 15 to 17) and children (aged 14 and below). Briefly, work that can be carried out by such persons includes light work (which is work that is not likely to be harmful to the individual's health, or mental or physical capacity), public entertainment and other specified types of employment.

The OSHA imposes duties on employers, self-employed persons and employees to ensure workplace health and safety. It requires the establishment of workplace health and safety committees, and sets out strict compliance requirements in relation to workplace accident notification.

Employees must obey health and safety orders and job instructions, use appropriate safety methods and equipment, and not misuse or damage protective equipment. Employers must instruct employees

concerning technical safety, sanitation and fire protection. Employers must also provide adequate first aid facilities on the premises and appoint designated employees to look after such facilities.

The employer is prohibited from dismissing an employee, injuring the employee in the employee's employment or altering the employee's position to the employee's detriment because the employee makes a complaint regarding a health or safety issue in the workplace.

12.3 Claims, compensation and remedies

An employer's failure to take steps to ensure the occupational health and safety of its employees will not only expose it to criminal penalties under the relevant legislation and tortious liability, but will also expose it to unfair dismissal liability, whereby the employee could claim constructive dismissal arising out of the employer's breach of a fundamental implied term to ensure the health and safety of its employees.

13 Employee representation, trade unions and works council

Information about working with trade unions and works councils can be found throughout this guide. For more information about this subject in Malaysia, please contact us. See key contacts for contact details.

14 Discrimination

14.1 Who is protected?

Currently, Malaysia has no specific legislation governing employment discrimination. However, please note our comment in section **1.4** in relation to the proposal to introduce anti-discrimination provisions in the EA.

The Malaysian Federal Constitution prohibits discrimination on the grounds of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to establishing or carrying on any trade, business, profession, vocation or employment, except where it is expressly authorized by the Constitution. That said, the Malaysian federal court (the highest court of Malaysia) has held that this only deals with the contravention of individual rights by public authorities and does not govern private contracts between individuals or private treaties.

14.2 Types of discrimination

Discrimination

Please refer to **14.1**.

Under the IRA, no employer may discriminate against any person with regard to employment, promotion, any condition of employment or working conditions on the ground that the person is not a member or officer of a trade union.

The Employment Act 1955 restricts termination of Malaysian citizens or permanent residents for the purposes of employing or retaining foreign employees for similar roles.

The Persons With Disabilities Act 2008 was enacted for the promotion and development of the quality of life and wellbeing of persons with disabilities, including access to employment. The act does not prescribe any consequences for non-compliance.

Sexual harassment

The EA stipulates that an employer is required to inquire into any sexual harassment complaints by an employee against another employee, by an employee against an employer or by an employer against an employee. The inquiry must be done in the prescribed manner, unless the stipulated grounds for refusal are satisfied. Individuals dissatisfied with the refusal may refer the matter to the director general of labor.

If upon conducting an inquiry, the employer is satisfied that sexual harassment is proven, disciplinary action may be taken against the wrongdoer, including dismissal or demotion. Alternatively, where the inquiry is undertaken by the director general of labor and the director general of labor is satisfied that sexual harassment is proven, the complainant may terminate employment without having to comply with termination notice-related requirements.

There is currently no statutory requirement for employers to have a written workplace sexual harassment policy, although the proposed amendments under the EA require an employer to have a written code of prevention of sexual harassment and to place it in a conspicuous area. For now, employers should refer to the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace ("**Sexual Harassment Code**"). The Sexual Harassment Code contains guidelines for the establishment and implementation of internal preventive and redress mechanisms for dealing with sexual harassment. The Sexual Harassment Code is not legally binding, but companies are encouraged to implement it.

A sexual harassment bill is expected to be tabled in parliament by the end of 2021. Precise details of the bill and its relationship with the sexual harassment provisions under the EA remain unclear, but it has been announced that the bill aims to introduce a comprehensive definition of sexual harassment, more effective complaint and resolution mechanisms, and penalties for sexual harassment offenses.

14.3 Special cases

Please refer to **14.2**.

14.4 Exclusions

There are no particular exclusions to the anti-discrimination law referred to in **14.1** and **14.2**.

14.5 Employee claims, compensation and remedies

Where employers do not take action necessary to stop or prevent discriminatory practices or harassment against an employee, the employee may allege that they have been constructively dismissed and file an unfair dismissal claim. The employer's action in this situation must constitute a sufficiently serious breach (specifically of the implied term of mutual trust and confidence) of their employment contract.

14.6 Potential employer liability for employment discrimination

Employers will not be held vicariously liable for acts of their employees.

14.7 Avoiding discrimination and harassment claims

Discrimination

To help avoid discrimination and harassment claims, companies should include anti-discrimination/harassment policies or procedures in their employee handbook/company rules. An important issue in this is ensuring that the reporting channel is effective to protect the employees who submit complaints.

Sexual harassment

To successfully combat sexual harassment in the workplace, employers are encouraged to set up comprehensive in-house mechanisms. The minimum elements of such a mechanism, as outlined by the Sexual Harassment Code, include:

- a policy statement from management prohibiting sexual harassment in the organization
- a clear definition as to what constitutes sexual harassment
- creation of a special complaint/grievance procedure
- clear stipulation of the disciplinary rules and penalties that will be imposed against a harasser, as well as against those who make false accusations
- formulation of a set of protective and remedial measures for the victim
- promotional and educational programs to explain the company's policy on sexual harassment and to raise awareness of sexual harassment among all employees

Although it is not legally binding for now, implementation of the Sexual Harassment Code and the setting-up of in-house inquiry boards will provide employees subject to harassment with an avenue for redress within their organization.

15 Termination of employment

15.1 General overview

There is no concept of "at will" employment in Malaysia. All dismissals must be for "just cause or excuse" and procedures and requirements that are specific to the grounds for termination must be followed.

15.2 By the employer

As mentioned in **15.1**, an employment relationship can only be terminated with "just cause or excuse." While what constitutes just cause or excuse is a question of fact in each case, there are three broad categories of just cause or excuse, namely, misconduct, poor performance and redundancy. This requirement is in addition to any other statutory or contractual obligations relating to termination, such as termination notice.

In the case of a fixed-term contract for a specified period of time or for the performance of a specified piece of work, the contract will generally terminate when the relevant period of time has expired or when the work specified in such contract has been completed.

However, where it is clear from the factual circumstances that a fixed-term employee's services were required on an ongoing basis rather than for a definite term, taking into account the nature of the employee's role in the business and the treatment of the employee in practice, including any repeated renewals, the industrial court may take the view that the employee should have been engaged on a permanent basis. In such case, the non-renewal of the fixed-term contract will constitute a dismissal, and the industrial court will then consider whether such dismissal was with just cause or excuse.

15.3 By the employee

An employee can resign at any time and their obligations with respect to resignation will depend on the employment terms.

Where the employer breaches a fundamental express or implied provision of the employment contract, such as unilaterally varying fundamental employment terms or mistreating the employee, the employee may deem that they have been constructively dismissed by resigning in direct response to the employer's breach, and commencing unfair dismissal proceedings. Depending on the individual circumstances, it is possible to argue that, if the change is implemented and the employee nevertheless continues working for the company, the employee has waived their right to claim constructive dismissal/breach of the employment contract.

15.4 Employee entitlements on termination

An employee may be entitled to statutory severance, compensation for accrued but unused annual leave, payment in lieu of notice or other contractual entitlements depending on how the employment is terminated.

15.5 Notice periods

The notice period for all employees (i.e., the notice period to be given by both the employer and the employee) is determined by contract.

However, for Protected Employees, the following minimum notice periods apply in prescribed circumstances, which essentially cover circumstances where the employee is made redundant:

- four weeks for employment of less than two years
- six weeks for employment of two years or more but less than five years
- eight weeks for employment of five years or more

In lieu of notice, an employer may pay wages to an employee in an amount equivalent to the period of notice.

15.6 Terminations without notice

By the employer

Where the dismissal is because of serious misconduct (which is to be assessed on the individual circumstances), there is no requirement for the employer to provide notice of termination or payment in lieu of notice. Further, for Protected Employees, termination without notice can only be effected after due inquiry into the alleged conduct.

By the employee

If an employee deems that they have been constructively dismissed (see further at **15.3**), they must have resigned in direct response to the employer's breach of a fundamental term of the employment contract, but they are not required to work the period of notice.

15.7 Form and content of notice of termination

The notice of termination from the employer containing the grounds for termination should be in writing.

15.8 Protected Employees

The EA prescribes certain restrictions on terminating pregnant employees and those on maternity leave.

15.9 Mandatory severance

Subject to any higher rate provided under the employment contract, a Protected Employee who has been retrenched or whose service has been terminated as a result of redundancy is entitled to certain benefits. These benefits include:

- 10 days' wages for every year of employment of less than two years
- 15 days' wages for every year of employment of two years or more but less than five years
- 20 days' wages for every year of employment of five years or more

Where the employee has only worked for a portion of a year, payment is pro-rated and calculated to the nearest month of employment. These benefits are in addition to wages paid in lieu of notice.

A Non-Protected Employee's entitlement to severance is wholly dependent on the terms of the employment contract. Notwithstanding the absence of any contractual entitlement to severance payment, goodwill severance payment should be provided to the employee to help mitigate unfair dismissal liability, especially where the employer is financially able to do so.

15.10 Collective redundancy situations

15.10.1 Thresholds

There are no legally prescribed thresholds with respect to redundancy in Malaysia. In all cases of retrenchments, whether individual or mass, apart from establishing the business case for the redundancies, to justify the retrenchment of the impacted employees, the employer will also have to establish that it has complied with Malaysian industrial standards and practices when carrying out the retrenchment exercise.

15.10.2 Procedure and information and consultation requirements

The Malaysian Code of Conduct for Industrial Harmony ("**Code**") sets out various recommendations relating to implementing retrenchment exercises. The court has acknowledged that these recommendations are indicative of generally accepted norms of Malaysian industrial relations practice. The court will not expect the former employer to comply with every single recommendation, but in order to minimize unfair dismissal risks, the former employer must be in a position to prove that it had at least attempted to take on board as many of the Code's recommendations as possible.

Malaysian law generally recommends compliance with the Code's "last in, first out" principle (LIFO) (i.e., the employee with the shortest length of service should be retrenched first) with regard to employees of the same category (which is determined based on the individual circumstances, including whether the employees are carrying out "like work").

If the employer departs from the LIFO principle, the employer must be able to demonstrate that the selection of the more senior employee for retrenchment is based on an acceptable objective selection criteria.

The Code also recommends various measures with the aim of minimizing the impact of the redundancy on the employee.

In conducting the retrenchment exercise, the employer should also be mindful of the notice of termination (which may be statutory or contractual) to which the employees may be entitled. Failure to provide sufficient notice may render the employer liable to make a payment in lieu of notice.

15.11 Claims, compensation and remedies

Even if the basis for the dismissal was for just cause or excuse, the dismissal must follow certain recommended procedures. If such procedures are not followed, the former employee may make a written representation to the DGIR for reinstatement. In such event, the employer and former employee will undertake a mandatory conciliation process, and the DGIR may refer any unsettled claim to the industrial court for adjudication.

The industrial court adjudicates unfair dismissal claims and decides based on equity and good conscience with specific reference to the facts — as opposed to legal principles, procedures and strict rules of evidence. In a successful claim for unfair dismissal, the industrial court may award up to a maximum of 24 months' back wages (12 months for employees on probation) and, if there is no reinstatement, an additional month's wages for each year of service as compensation in lieu of reinstatement. No orders as to legal costs are made, regardless of the verdict.

Parties aggrieved by an industrial court award will have the option to appeal to the high court, or apply for a judicial review.

15.12 Waiving claims

A mutual separation arrangement and the employee's agreement to waivers of claims will mitigate against unfair dismissal liability, as the employment will be deemed to be terminated by way of the employee's resignation. However, neither the entering into a mutual separation agreement nor the receipt of any *ex gratia* payments by the former employee will inhibit their right to bring an unfair dismissal claim against the former employer. This is because the industrial court, which adjudicates unfair dismissal claims, does not enforce waivers of claim. In this regard, it may be necessary, in certain circumstances, to strategize the provision of any *ex gratia* payments or benefits so that the employee is less incentivized to file an unfair dismissal claim.

16 Employment implications of share sales

16.1 Acquisition of shares

In the case of acquisition of shares, it is unlikely that there will be any significant employment law issues and the original employment contract between the target company and the employee will remain unaffected by the acquisition.

16.2 Information and consultation requirements

If the immediate interests of the employees will be affected by any of the management decisions taken as part of the transaction, obtaining the cooperation of the trade union is required. Contractual consultation requirements are typically vaguely worded, with no details provided regarding the timing or procedures. More importantly, no penalties are specified in any of the relevant laws and regulations, so in practice, many private enterprises rarely, if ever, have followed the consultation requirements. However, there is a theoretical possibility that any decision taken without following the necessary consultation procedures can be challenged and invalidated, although we are unaware of any case where this has actually occurred.

17 Employment implications of asset sales

17.1 Acquisition of assets

The test as to what constitutes a change of ownership in business is "whether the business is being transferred as a going concern" and what amounts to a business transfer is a question of fact to be decided by the industrial court.

17.2 Automatic transfer of employees

The acquisition of assets does not automatically transfer the employees from the seller to the buyer. The method for employee transfer is “termination and rehire” or “resignation and rehire,” meaning the employees will either be terminated or resign from their employment with the seller and sign new labor contracts with the buyer. An employer cannot unilaterally transfer an employee to another employer without that employee’s consent.

While this is the case, the buyer is not obliged to offer employment to the seller’s employees. The provision of such offer, and the nature and timing of such offer, will determine whether the employee is entitled to any termination benefits (i.e., severance).

17.3 Changes to terms and conditions of employment

When an employee signs a new employment contract with the buyer, a completely new employment relationship is created. The buyer is under no obligation to take on the terms and conditions that were offered by the seller entity to its employees, unless the buyer agrees to do so by contract. There is no legal requirement that a buyer offer employees the same or, in the aggregate, similar compensation and benefits as were previously provided by the seller. However, if an overall equally favorable employment offer is not provided, then the seller may need to pay termination benefits to the employees.

As employees cannot be forced to sign an employment contract with an entity, employee consent is essential in order to complete any employee transfer. In addition, there is no collective transfer of employees in Malaysia; rather, each individual employee must agree to be employed by the buyer. This puts an employee in a position of power if the buyer truly wants or needs their services. These are practical considerations for determining the employee communication and employment offer strategy.

17.4 Information and consultation requirements

Please refer to **16.2**.

17.5 Protections against dismissal

Please refer to **15.8** above.

17.6 Other considerations

Issues for the buyer: recognition of years of service

There is no legal obligation for the buyer to recognize the employee’s prior years of service with the seller. The decision on whether to recognize past service years is typically driven by the potential to trigger termination benefits payment obligations for certain types of employees and practically convincing the employees to agree to the employment migration.

Non-transferring employees

In an asset deal, another issue that a seller may face is how to handle an employee who does not transfer to the buyer, either because the buyer does not wish to hire the employee or because the employee refuses to transfer. The seller will have to ensure that any action taken with respect to such employee’s employment, including reassignments and termination, is carried out in accordance with Malaysian labor standards and practices.

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