

Labour & Employment 2019

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark E Zelek



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent

adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd

87 Lancaster Road

London, W11 1QQ, UK

Tel: +44 20 3780 4147

Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between March and April 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019

No photocopying without a CLA licence.

First published 2006

Fourteenth edition

ISBN 978-1-83862-115-5

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Labour & Employment 2019

Contributing editors**Matthew Howse, Sabine Smith-Vidal, Walter Ahrens,
K Lesli Ligorner and Mark E Zelek****Morgan Lewis & Bockius LLP**

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Finland, Indonesia, Brazil, Bangladesh, Greece, Egypt and Portugal.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark E Zelek of Morgan Lewis & Bockius LLP, for their continued assistance with this volume.



London

April 2019

Reproduced with permission from Law Business Research Ltd

This article was first published in June 2019

For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	5	Costa Rica	89
Mark E Zelek Morgan, Lewis & Bockius LLP		Alexander Godínez Vargas Bufete Godínez y Asociados	
Mandatory employee board representatives – fantasy or the future?	7	Denmark	96
Matthew Howse and Lee Harding Morgan, Lewis & Bockius LLP		Morten Langer Norbom Vinding	
Argentina	9	Egypt	104
Mercedes Balado Bevilacqua and Analía Durán MBB Balado Bevilacqua Abogados		Mahmoud Ahmed Belal Eldib Advocates	
Armenia	19	Finland	109
Sedrak Asatryan and Janna Simonyan Concern Dialog		Pekka Kiviniemi and Tuuli Willgren Kalliolaw Attorneys	
Australia	25	France	116
Joydeep Hor and Therese MacDermott People + Culture Strategies		Sabine Smith-Vidal and Charles Dauthier Morgan, Lewis & Bockius LLP	
Bangladesh	33	Germany	126
Tanvir Quader and Maliha Ahmed Vertex Chambers		Walter Ahrens Morgan, Lewis & Bockius LLP	
Brazil	39	Greece	136
Ana Lúcia Pinke Ribeiro de Paiva, Flavia Sulzer Augusto Dainese and Marília Chrysostomo Chessa Araújo e Policastro Advogados		Grace Katsoulis Ballas, Pelecanos & Associates LPC	
Canada	52	Hong Kong	144
Craig T Munroe, Clare Hauer and Jessica Forman Pulver Crawford Munroe LLP		Vivien Chan and Patty Chan Vivien Chan & Co	
Chile	63	India	152
Enrique Munita, Paola Casorzo, Marcela Salazar and Catalina González Munita & Olavarría – Ius Laboris Chile		Rohit Kochhar Kochhar & Company	
China	72	Indonesia	160
K Lesli Ligorner Morgan, Lewis & Bockius LLP		Fahrul S Yusuf SSEK Legal Consultants	
Colombia	82	Ireland	168
Vicente Umaña Carrizosa and Isabella Gandini Holland & Knight		Louise O'Byrne and Sarah Faulkner Arthur Cox	
		Italy	176
		Angelo Zambelli Grimaldi Studio Legale	

Japan	187	Portugal	279
Motoi Fujii and Tomoko Narita TMI Associates		Joana Almeida Morais Leitão, Galvão Teles, Soares da Silva & Associados	
Kazakhstan	200	Puerto Rico	287
Klara Nurgaziyeva, Marat Mukhamediyev and Zhamilya Bilisbekova Morgan, Lewis & Bockius LLP		Melissa C Rodriguez Morgan, Lewis & Bockius LLP	
Korea	209	Russia	297
Kwang Sun Lee, Young Hwan Kwon, Ja Hyeong Ku and Jane Young Sohn Jipyong LLC		Bela Pelman and Dmitry Dmitriev Morgan, Lewis & Bockius LLP	
Luxembourg	216	Singapore	306
Guy Castegnaro and Ariane Claverie Castegnaro		Ian Lim, Nicholas Ngo and Elizabeth Tan TSMP Law Corporation	
Malaysia	229	Slovakia	324
Selvamalar Alagaratnam, Siva Kumar Kanagasabai and Foo Siew Li Skrine		Pavol Rak Noerr s.r.o.	
Mexico	237	Sweden	333
Humberto Padilla Gonzalez Morgan, Lewis & Bockius LLP		Robert Stromberg and Jonas Lindskog Cederquist	
Monaco	244	Switzerland	342
Sophie Marquet and Florence de Guzman de Saint Nicolas CMS Pasquier Ciulla Marquet & Pastor		Roberta Papa and Thomas Pietruszak Blesi & Papa	
Nigeria	251	Thailand	351
Adekunle Obebe Bloomfield Law Practice		Pisut Rakwong and Wayu Suthisarnsuntorn Pisut and Partners	
Norway	257	United Arab Emirates	359
Tore Lerheim and Ole Kristian Olsby Hombler Olsby advokatfirma AS		Charles Laubach and Zahra Zaidi Afridi & Angell	
Peru	265	United Kingdom	367
Renato Mejía Madrid and Flavia Zarins Wilding Miranda & Amado Abogados		Matthew Howse, Lee Harding and Nicholas Hobson Morgan, Lewis & Bockius LLP	
Philippines	270	United States	377
Ronald Mark C Llano, Emmar Benjoe B Panahon, Mark Kevin U Dellosa and Hans Cedric I Santos SyCip Salazar Hernandez & Gatmaitan		David A McManus, Michelle Seldin Silverman and Michael A Correll Morgan, Lewis & Bockius LLP	

Malaysia

Selvamalar Alagaratnam, Siva Kumar Kanagasabai and Foo Siew Li

Skrine

LEGISLATION AND AGENCIES

Primary and secondary legislation

1 | What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to employment in Malaysia are as follows.

Employment Act 1955

The Employment Act (EA) applies to employees employed in West Malaysia who:

- earn a monthly salary of 2,000 Malaysian ringgit and below; or
- regardless of salary quantum, are employed:
 - as manual labourers or supervisors of manual labourers;
 - to operate or maintain any mechanically propelled vehicle for the purpose of transporting passengers or goods or for reward or commercial purposes;
 - as a domestic servant; and
 - in certain positions on seagoing vessels.

The states of Sabah and Sarawak in East Malaysia have equivalent legislation (with some differing provisions) that cover similar categories of employees.

Industrial Relations Act 1967

This Act applies to all employees in Malaysia and governs the relations between employers and employees (including trade unions) and the prevention and settlement of disputes.

Trade Unions Act 1959

This Act regulates the registration and constitution of trade unions and the rights and liabilities of trade unions.

Employees' Provident Fund Act 1991

The Employees' Provident Fund Act (the EPF Act) applies to all employees in Malaysia. The Act makes it mandatory for all employers and most employees to contribute to a state-managed provident fund. Contributions by foreign nationals employed in Malaysia and domestic servants are voluntary. All employees, except for those excluded from the application of the EPF Act, are entitled to contributions that are no less than at the rate prescribed by the EPF Act.

Employees' Social Security Act 1969

This Act provides social security for all employees, and makes it mandatory for employers and employees to contribute to the fund at the rate prescribed by the Act.

Employment Insurance System Act 2017

The Employment Insurance System Act (the EIS Act) provides certain benefits and a re-employment placement programme for insured persons in the event of the loss of employment, and makes it mandatory for employers and employees to contribute to the fund at the prescribed rate.

Occupational Safety and Health Act 1994

The Occupational Safety and Health Act (OSHA) is based on the philosophy of self-regulation, and imposes general duties on employers to secure the safety, health and welfare of persons at work. Certain obligations are also imposed on employees.

Minimum Wages Order 2018

This Order prescribes the minimum wage payable to employees as being 1,100 ringgit per month or 5.29 ringgit per hour for employees in Malaysia. The minimum wage may be revised on a periodic basis.

Minimum Retirement Age Act 2012

The Minimum Retirement Age Act (MRA) sets the minimum (not mandatory) retirement age at 60 years old. An employer may not retire an employee before he or she attains this age. Any existing contractual term that provides for retirement at an earlier age is revised by law to 60 years. However, optional early retirement according to the employee's contract of service or any applicable collective agreement is allowed.

Personal Data Protection Act 2010

The Personal Data Protection Act (PDPA) regulates the processing of personal data and sensitive personal data, including employee data.

Protected employee categories

2 | Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

There are no specific statutes or laws that prohibit discrimination save for the Federal Constitution, which provides that all persons are equal before the law and that there shall be no discrimination against citizens on the grounds of religion, race, descent, place of birth or gender in:

- any law;
- the appointment to any office or employment under a public authority;
- the administration of any law relating to the acquisition, holding or disposition of property; or
- the establishing or carrying on of any trade, business, profession, vocation or employment.

Based on that principle, ordinarily when an employee faces discrimination, he or she may have recourse to remedy. On the other hand, other

than in the case of employment with public authorities, decisions that affect a group of employees would not be considered discriminatory even if they are along gender or age lines. Similarly, it is permissible for a contract entered into by two mutually contracting parties to include provisions that may otherwise seem discriminatory.

Although there is no specific anti-harassment legislation in place, the principle that an employee should have a safe and conducive workplace would apply in dealing with harassment complaints. The EA also provides for a mechanism by which an employee who is a victim of sexual harassment may seek redress, and the concerns of an employee who feels discriminated against as a result of his or her or another employee's status as a foreign national may be addressed. Regulations to deal with sexual harassment complaints in the workplace have been proposed but have yet to be implemented.

Enforcement agencies

- 3 | What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Director General of Labour (appointed under the EA) has the power to investigate complaints of discrimination related to a foreign employee, sexual harassment or a breach of the terms and conditions of employment. The latter category extends to employees who earn no more than 5,000 ringgit a month.

The Employees Provident Fund Board and the Social Security Organisation (SOCSO) have powers to examine, make inquiries and prosecute for offences under the EPF Act and the Employees' Social Security Act, respectively.

The Employment Services Officers under the EIS Act have powers to inspect, examine, investigate and enforce the provisions of the EIS Act.

An officer appointed under the OSHA may enter, inspect and examine any place of work and, in keeping with his or her authority to conduct a proper inspection and examination, he or she has powers to issue directives and to examine witnesses.

The Personal Data Protection Commissioner has the authority to inspect, make recommendations pursuant to inspections, investigate complaints and issue enforcement notices pursuant to investigations.

WORKER REPRESENTATION

Legal basis

- 4 | Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Works councils do not exist in Malaysia. However, workers' trade unions do exist and are permissible. The Industrial Relations Act prohibits any person from interfering with or restraining an employee from forming, assisting in the formation of or joining a trade union. However, it is not mandatory for workers to join a union once formed.

Powers of representatives

- 5 | What are their powers?

Trade unions have the right to carry out collective bargaining on behalf of their members. They may also represent their members in disciplinary proceedings. A trade union may call for a strike or picket if certain conditions are met.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

- 6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

The law does not prohibit or restrict background checks. However, the legal requirements under the PDPA (ie, the notice and consent requirements) should be complied with.

Medical examinations

- 7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no restrictions or prohibitions against requiring a medical examination as a condition of employment. There are also no restrictions on an employer refusing to hire an applicant who refuses to submit to a medical examination.

Drug and alcohol testing

- 8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions against drug and alcohol testing of applicants. An employer may refuse to hire an applicant who refuses to submit to such a test.

HIRING OF EMPLOYEES

Preference and discrimination

- 9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

The Persons with Disabilities Act 2008 provides that persons with disabilities shall have the right to access employment on an equal basis with persons without disabilities. Additionally, certain licences may impose conditions to facilitate affirmative action.

- 10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

The EA (which applies only to employees who come under the purview of the EA) provides that employment contracts lasting for more than one month must be in writing. However, under local laws, the lack of a written contract does not by that reason alone invalidate the employment relationship or the contractual terms. The EA also provides that the employment contracts must include a provision for termination.

- 11 | To what extent are fixed-term employment contracts permissible?

There are no restrictions in law against fixed-term contracts and neither are there maximum durations determined by law. However, in the event of a dispute as to whether a contract of employment is of a permanent nature or fixed term, the court will look at several factors, including whether the nature of the work was such that the employee's services were in fact genuinely required for a fixed term only, whether there were automatic successive renewals, the duration of the contract and all contractual terms. Additionally, the MRA provides that the minimum retirement age does not apply to fixed-term employees who are employed for not more than 24 months (inclusive of extensions),

and fixed-term employees with basic wages of 20,000 ringgit per month who are employed for more than 24 months but not more than 60 months (inclusive of extensions). This suggests that all other fixed-term contracts may be treated as permanent contracts for the purposes of the MRA.

Probationary period

12 | What is the maximum probationary period permitted by law?

The law does not prescribe a maximum probationary period. The probationary period may be extended if the employee does not meet the expected standard of employment. It is recommended that the contract of employment reserves the employer's right to extend the probationary period.

Classification as contractor or employee

13 | What are the primary factors that distinguish an independent contractor from an employee?

There is no single test that is available to distinguish an independent contractor from an employee. The entire facts, circumstances and features of a person's engagement will be identified and considered as a whole in determining the nature of the relationship. Among the matters that may be taken into consideration are:

- the nature, degree and extent of control exercised over the engaged person;
- whether what was done under the engagement was an integral part of the business or was merely ancillary to it;
- whether there is a fixed compensation package or whether the individual undertook a business risk;
- exclusivity (ie, whether there is an obligation to work or provide services only for the business);
- provisions for working hours, overtime, holidays and benefits, such as medical expenses;
- arrangements for income tax, EPF, EIS and SOCSO deductions and contributions;
- how the contract may be terminated and the nature of the work involved;
- whether the establishment retains disciplinary rights over the individual;
- which party provides the tools and equipment and ultimately bears the risk of loss and the chance of profit; and
- the way in which the parties themselves treat the contract and describe themselves in the contract.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

There is no legislation governing the hiring of temporary staff through recruitment agencies. However, recruitment agencies are required to comply with the provisions of the Private Employment Agencies Act 1981.

FOREIGN WORKERS

Visas

15 | Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no fixed limitations on the number of visas that will be issued to an employer. Visas are available to foreign nationals hired to work in

Malaysia, whether hired directly or transferred from a different jurisdiction. The issuance of visas is subject to the employer fulfilling certain requirements.

Spouses

16 | Are spouses of authorised workers entitled to work?

Spouses of expatriate employees holding dependant passes are required to apply for employment passes via their employer (and to consequently surrender or shorten their dependant passes) in order to work in Malaysia.

General rules

17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

The rules depend on the type of visa. The types of pass issued by the Malaysian government for those entering for business or employment-related purposes are the following.

Short-term social visit pass

Short-term social visit passes are issued at the entry point to foreign citizens for social and business visits, and are usually valid for 30 days or less. The duration is discretionary but is usually for a period of 30 days. Examples of the limited business purposes include:

- attending meetings, conferences, business discussions or seminars;
- inspecting or setting up factories;
- auditing a company's accounts;
- signing agreements; and
- surveying business opportunities and investment potential.

Professional visit pass

Professional visit passes are issued to foreign citizens who hold acceptable professional qualifications for the purpose of taking up professional work in Malaysia for a Malaysian entity for a short-term period (including extensions) not exceeding 12 months. Applications must be made by the Malaysian entity concerned.

Employment pass

Employment passes are issued to foreign citizens who enter Malaysia to take up paid employment under a contract of service with an employer, referred to as expatriates. The duration of the employment passes depends on the nature of employment and the needs of the employer. The maximum period employment passes are issued for is five years and the norm is between two and three years.

Applications must be made by the employer, and the requirements below must be met before an application will be considered by the Immigration Department:

- minimum paid-up capital of employer ranging between 250,000 and 1 million ringgit;
- recommendation from monitoring agencies;
- registration of employer with relevant monitoring agencies;
- minimum monthly salary of at least 3,000 ringgit;
- the skill, qualification and experience required for the expatriate position must be such that it cannot be fulfilled by local candidates; and
- the expatriate's role must be relevant to the activities of the employer.

Residence pass – talent

The residence pass – talent is only available in Peninsular Malaysia and is issued to foreign citizens considered to be high-achieving individuals

with the capacity to drive business results that contribute towards the national key economic areas (NKEA). The 12 industries that form part of the NKEA are:

- Greater Kuala Lumpur/Klang Valley;
- oil, gas and energy;
- palm oil;
- financial services;
- tourism;
- business services;
- communication, content and infrastructure;
- electronics and electrical;
- wholesale and retail;
- education;
- healthcare; and
- agriculture.

A high-achieving individual with the capacity to drive business results that contribute towards Malaysia's economic transformation may apply for the residence pass – talent. Applications must be submitted online by foreign citizens at <https://rpt.talentcorp.com.my>.

Applications are reviewed against a set of criteria meant to gauge both the applicant's qualifications and economic contributions to the country. The applicant is required to:

- have worked in Malaysia for a minimum period of three continuous years;
- hold a valid employment pass with more than three months' validity at the time of the application;
- hold a PhD, master's degree, bachelor's degree or diploma in any discipline from a recognised university, or a professional or competency certificate from a recognised professional institute;
- hold a Malaysian income tax file number and have paid income tax for at least two years;
- possess five years of total work experience; and
- earn a basic salary of 15,000 ringgit per month.

Visit pass (temporary employment)

These passes are issued for the employment of foreign nationals as semi-skilled, unskilled or domestic helpers, from specific source countries in certain sectors of the economy, such as agriculture, construction, manufacturing, plantation and various types of services.

Different procedures for the recruitment of foreign workers are applicable to employers in Peninsular Malaysia, Sabah, Sarawak and the Federal Territory of Labuan.

Any person who employs one or more foreign nationals who are not in possession of a valid pass or visa shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than 10,000 ringgit but not more than 50,000 ringgit, or to imprisonment for a term not exceeding 12 months, or both, for each such employee. If any person has, at the same time, employed more than five such employees, that person shall, on conviction, be liable to imprisonment of between six months and five years, and shall also be liable to a whipping of not more than six strokes. Where the offence is committed by a corporate body, any person who, at the time of the commission of the offence, was a member of the board of directors, a manager, a secretary or a person holding an office or a position similar to that of manager or secretary of the corporate body, shall, on conviction, be liable to the same punishment. Further, any person who, without reasonable cause, contravenes or fails to comply with any condition imposed in respect of, or instruction endorsed on, any pass, permit or boundary pass, shall be guilty of an offence and liable on conviction to a term of imprisonment not exceeding six months or to a fine not exceeding 1,000 ringgit, or both.

Resident labour market test

18 | Is a labour market test required as a precursor to a short or long-term visa?

Generally, there is a requirement to show that there is a need to hire a foreign national, but the requirement is often fulfilled by submitting an application setting out the reasons for hiring a foreign national and substantiating the application with the foreign national's qualification, skills and experience.

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Limitations on working hours are only applicable to employees who come within the purview of the EA (EA employees). The limitations are as follows:

- not more than eight hours a day or more than 48 hours a week, or more than five consecutive hours without a break of at least 30 minutes; and
- one whole day of rest each week (rest day).

An EA employee may work in excess of the above hours under the circumstances described in question 20. The working hours of non-EA employees are subject to contract.

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

Only EA employees are entitled by law to overtime pay. Overtime pay for a monthly paid EA employee is calculated as follows:

- for any overtime work carried out in excess of normal hours of work, at a rate that is not less than one and a half times the hourly rate of pay;
- for work on a rest day:
 - for any period of work that does not exceed half the normal hours of work, wages equivalent to half the ordinary rate of pay for work done on that day;
 - for any period of work that is more than half but that does not exceed the normal hours of work, one day's wages at the ordinary rate of pay for work done on that day; and
 - for any work carried out in excess of the normal hours of work at a rate that is not less than twice the hourly rate of pay; and
- for work on a public holiday, in addition to the day's wages, two days' wages at the ordinary rate of pay, regardless of whether the period of work done on that day is less than the normal hours of work, and for work in excess of the normal hours of work, at a rate that is not less than three times the hourly rate of pay.

Notwithstanding the payment of overtime pay, no EA employee should be required to work more than 12 hours a day or in excess of 104 hours of overtime in any one month.

21 | Can employees contractually waive the right to overtime pay?

All employees, other than EA employees, may contractually waive their right to overtime pay.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

The EA prescribes minimum paid annual leave and public holiday entitlements. It is only applicable to EA employees.

An EA employee is entitled to paid annual leave of:

- eight days for every 12 months of continuous service if he or she has been in employment for a period of less than two years;
- 12 days for every 12 months of continuous service if he or she has been in employment for a period of two years or more but less than five years; and
- 16 days for every 12 months of continuous service if he or she has been in employment for a period of five years or more.

An EA employee is entitled to 11 paid gazetted holidays, five of which must be:

- the National Day (31 August);
- the birthday of the *Yang di-Pertuan Agung* (Malaysia's monarch and head of state) (the first Saturday of every June);
- the birthday of the ruler of the state (differs from state to state) or the federal territory (1 February) in which the employee wholly or mainly works;
- Workers' Day (1 May); and
- Malaysia Day (16 September).

For non-EA employees, entitlement to paid annual leave and public holiday is subject to contract.

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

The EA prescribes minimum paid sick leave entitlements, which are only applicable to EA employees.

Where hospitalisation is not necessary, an EA employee is entitled to paid sick leave of:

- 14 days in each calendar year if he or she has been in employment for a period of less than two years;
- 18 days in each calendar year if he or she has been in employment for a period of two years or more but less than five years; and
- 22 days in each calendar year if he or she has been in employment for a period of five years or more.

If hospitalisation is necessary, an EA employee is entitled to sick leave of 60 days in each calendar year, provided the total number of days of paid sick leave in a calendar year to which the employee is entitled does not exceed 60 days in aggregate.

For non-EA employees, entitlement to paid sick leave is subject to contract.

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Other than annual leave, sick leave and public holidays referred to in questions 22 and 23, all female employees are entitled to paid maternity leave of no less than 60 consecutive days. This entitlement is limited to employees who have been in employment for no less than 90 days, in the aggregate, in the nine-month period immediately preceding confinement, and must include employment at any time in the four months

immediately preceding confinement. An employee is also not entitled to paid maternity leave if she has five or more surviving children.

There is a proposal to amend the law to increase paid maternity leave to 98 consecutive days.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Employees are entitled to contributions to EPF, SOCSO and EIS at the rates prescribed by the relevant legislation (see question 1). Additionally, employees are entitled to maternity leave (see question 24). EA employees are also entitled by law to paid annual leave, sick leave and public holidays (see questions 22 and 23).

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

The Employment (Part-Time Employees) Regulations 2010, which come under the EA, provide that the normal hours of work of a part-time employee shall be 70 per cent of the normal hours of work of a full-time employee. Where the normal hours of work of a full-time employee cannot be ascertained, they shall be deemed to be eight hours in one day or 48 hours in one week. A part-time employee who is required to work beyond his or her normal hours of work is entitled to overtime pay as follows:

- not less than his or her hourly rate of pay for each hour or part thereof that exceeds his or her normal hours of work but does not exceed the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise; and
- not less than one and a half times the hourly rate of pay of the part-time employee for each hour or part thereof that exceeds the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise.

A part-time employee shall be entitled to a rest day in each week if he or she works five days or more with total working hours of not less than 20 hours a week.

A part-time employee who is required to work his or her normal hours of work on a rest day is entitled to overtime pay as follows:

- not less than two days' wages at the ordinary rate of pay he or she is entitled to for that day;
- for work beyond his or her normal hours of work, not less than one and a half times his or her hourly rate of pay for each hour or part thereof; and
- for work beyond the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise, not less than twice his or her hourly rate of pay for each hour or part thereof.

A part-time employee is entitled to a paid holiday of no less than seven gazetted public holidays in a calendar year, four of which shall be:

- the National Day (31 August);
- the birthday of the *Yang di-Pertuan Agung* (the first Saturday of every June);
- the birthday of the ruler of the state (differs from state to state) or the federal territory (1 February) in which the employee wholly or mainly works; and
- Workers' Day (1 May).

If a part-time employee is required to work on any paid holiday, he or she shall be paid overtime as follows:

- for his or her normal hours of work, not less than two days' wages in addition to the holiday pay he or she is entitled to for that day;

- for work beyond his or her normal hours of work, not less than twice the hourly rate of pay for each hour or part thereof; and
- for work beyond the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise, not less than three times the hourly rate of pay for each hour or part thereof.

A part-time employee shall be entitled to paid annual leave of:

- six days for every 12 months of continuous service if he or she has been in employment for a period of less than two years;
- eight days for every 12 months of continuous service if he or she has been in employment for a period of two years or more but less than five years; and
- 11 days for every 12 months of continuous service if he or she has been in employment for a period of five years or more.

A part-time employee shall be entitled to paid sick leave of:

- 10 days in each calendar year if he or she has been in employment for a period of less than two years;
- 13 days in each calendar year if he or she has been in employment for a period of two years or more but fewer than five years; and
- 15 days in each calendar year if he or she has been in employment for a period of five years or more.

However, a part-time employee shall not be entitled to paid sick leave on his or her non-working day.

There are no special rules or regulations for fixed-term employees.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

No.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Post-employment covenants that restrict an employee from being involved in a business or employment are not enforceable. Section 28 of the Contracts Act 1950 provides that 'every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void'. However, a covenant to refrain from using confidential information gained from employment is enforceable, as is a covenant to refrain from interfering with the business of the ex-employer, including by soliciting employees.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Not applicable (see question 28).

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

An employer may be held liable for acts and conduct of employees carried out in the course of the employees' duties or under the instructions of the employer.

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

Income tax is chargeable on all income earned from an employment relationship. Income includes wages, salary, remuneration, leave pay, fees, commissions, bonuses, gratuities, perquisites or allowances (whether in money or otherwise) in respect of having or exercising the employment, an amount equal to the value of a benefit or amenity provided by the employer (subject to certain exclusions), monies received from a pension or provident fund, scheme or society not approved for the purpose of the Income Tax Act 1967, and monies received as compensation for loss of the employment.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

The Copyright Act 1987 provides that, where an invention is made in the course of employment, the copyright is deemed to be transferred to the employer, subject to any agreement between the parties excluding or limiting such transfer.

The Patents Act 1983 provides that the rights to a patent for an invention made in the performance of a contract of employment or in the execution of work are deemed to accrue to the employer. However, where the invention acquires an economic value much greater than the parties could reasonably have foreseen at the time of concluding the contract of employment, the inventor is entitled to equitable remuneration, which may be fixed by the court in the absence of agreement between the parties. Where an employee whose contract of employment does not require him or her to engage in any inventive activity makes, in the field of activities of his or her employer, an invention using data or means placed at the employee's disposal by the employer, the right to the patent for such invention is also deemed to accrue to the employer. In this case, the employee is entitled to equitable remuneration that, in the absence of agreement between the parties, may be fixed by the court taking into account the employee's emoluments, the economic value of the invention and any benefit derived from the invention by the employer.

The employees' rights to equitable remuneration in the above scenarios may not be avoided by contract.

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

There is no legislation other than those referred to in question 32.

DATA PROTECTION

Rules and obligations

34 | Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The PDPA imposes obligations on employers who process personal data to comply with the Personal Data Protection Principles set out in the PDPA. Among other obligations, the employer is required to inform the data subject (the employee) of the personal information or data that is being processed, and consent of the data subject is required in

most situations where data is collected, processed or disclosed. The employee also has a right to access and correct his or her data.

The European Union's General Data Protection Regulation may have an impact on the processing of personal data of employees residing in the European Union.

BUSINESS TRANSFERS

Employee protections

35 | Is there any legislation to protect employees in the event of a business transfer?

There is no automatic transfer of employees to the new owner of the business in the event of a business transfer. However, in such an instance, Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 provides that the contract of service of an employee shall be deemed to be terminated unless the new owner (within seven days of the change in ownership) offers to continue to employ the employees on terms and conditions no less favourable than those under which the employees were employed prior to the change in ownership. Therefore, if the new owner makes such an offer, there will be no termination of the employees and termination benefits are not payable. There are, however, certain other legal requirements to be met.

TERMINATION OF EMPLOYMENT

Grounds for termination

36 | May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employee may only be terminated for just cause or excuse. 'Just cause or excuse' is not defined by legislation. Generally, misconduct, poor performance and redundancy are accepted as just cause for termination.

Notice

37 | Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Notice of termination must be given. Salary in lieu of notice may be paid.

38 | In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

An employer may dismiss an employee without notice or payment in lieu of notice where the dismissal is for misconduct.

Severance pay

39 | Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Severance pay is payable where the termination is by way of retrenchment or upon closure of business. Case law dictates that, if the financial position of the employer permits it, and especially if the retrenchment exercise is carried out with the aim of increasing efficiency and profits, fair and reasonable benefits should be made available. Currently, one month's salary for each year of service is considered fair and reasonable. However, for EA employees, the law prescribes that the statutory minimum termination benefits are as follows and pro rata in respect of an incomplete year of service, calculated to the nearest month:

- 10 days' wages for every year of employment if he or she has been employed for a period of less than two years;
- 15 days' wages for every year of employment if he or she has been employed for a period of two years or more but less than five years; and
- 20 days' wages for every year of employment if he or she has been employed for a period of five years or more.

Procedure

40 | Are there any procedural requirements for dismissing an employee?

Approval of a government agency is not required prior to a dismissal. However, depending on the grounds for dismissal, there are differing procedural requirements.

Employee protections

41 | In what circumstances are employees protected from dismissal?

All employees are protected from unjust dismissal.

Mass terminations and collective dismissals

42 | Are there special rules for mass terminations or collective dismissals?

Mass or collective dismissals are subject to the same rules. In addition, prior notice has to be given to the Labour Department at least 30 days before the termination date.

Class and collective actions

43 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Employees may make claims only on an individual basis for unjust dismissal. However, the courts may hear the matters together.

Mandatory retirement age

44 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Yes. The minimum retirement age is 60.

DISPUTE RESOLUTION

Arbitration

45 | May the parties agree to private arbitration of employment disputes?

Yes.

Employee waiver of rights

46 | May an employee agree to waive statutory and contractual rights to potential employment claims?

Ordinarily, any waiver of statutory rights by an employee, even if for consideration, is not enforceable. Contractual rights may be waived for consideration, whether economic or otherwise.

Limitation period

47 | What are the limitation periods for bringing employment claims?

A claim for reinstatement pursuant to an unjust dismissal claim under the Industrial Relations Act must be commenced within 60 days of the dismissal date. All other employment claims are generally subject to a limitation period of six years.

UPDATE AND TRENDS**Emerging trends**

48 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction?

The government is currently reviewing the labour and employment laws of Malaysia. Several major amendments were made in the latter half of 2018, including an increase to the minimum wage and amendments to bring foreign workers within the scope of the SOCSO Act 1969 (with relevant savings and transitional provisions including those relating to the Workmen's Compensation Act 1952, which previously applied to certain foreign workers). Further amendments are also proposed to be made in 2019, although no additional bills have been tabled at this time. Among others, it is proposed that the scope of the EA (see question 1) be widened substantially (from the current applicability threshold of employees earning no more than 2,000 ringgit to an applicability threshold of 5,000 ringgit) and that provisions for flexible working arrangements and anti-discrimination in hiring be introduced into the EA. Other proposed amendments include amendments to the Industrial Relations Act to remove the discretion of the Minister of Human Resources in referring disputes to the Industrial Court, to the OSHA and its regulations to provide for better protection of employees in respect of their health and safety at work, and to the Workers' Minimum Standard of Housing and Amenities Act 1990, which governs the applicable standards where an employer provides housing to its employees within its building.

Further, in respect of the issuance of work permits to expatriates, there have been news reports that the government is considering abolishing employment passes categories II and III. Given that this proposed change is likely to impact many employers, it is possible that the government may undertake some form of consultation with major stakeholders before moving forward with the same. However, the holding of any such consultation is at the discretion of the relevant authorities and is not a required part of the process.

SKRINE

Selvamalar Alagaratnam

sa@skrine.com

Siva Kumar Kanagasabai

skk@skrine.com

Foo Siew Li

foo.siewli@skrine.com

Level 8, Wisma UOA Damansara
50 Jalan Dungun
Damansara Heights
50490 Kuala Lumpur
Malaysia
Tel: +60 3 2081 3999
Fax: +60 3 2094 3211
www.skrine.com

Other titles available in this series

Acquisition Finance	Distribution & Agency	Islamic Finance & Markets	Real Estate M&A
Advertising & Marketing	Domains & Domain Names	Joint Ventures	Renewable Energy
Agribusiness	Dominance	Labour & Employment	Restructuring & Insolvency
Air Transport	e-Commerce	Legal Privilege & Professional Secrecy	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Licensing	Risk & Compliance Management
Anti-Money Laundering	Energy Disputes	Life Sciences	Securities Finance
Appeals	Enforcement of Foreign Judgments	Litigation Funding	Securities Litigation
Arbitration	Environment & Climate Regulation	Loans & Secured Financing	Shareholder Activism & Engagement
Art Law	Equity Derivatives	M&A Litigation	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mediation	Shipbuilding
Automotive	Financial Services Compliance	Merger Control	Shipping
Aviation Finance & Leasing	Financial Services Litigation	Mining	Sovereign Immunity
Aviation Liability	Fintech	Oil Regulation	Sports Law
Banking Regulation	Foreign Investment Review	Patents	State Aid
Cartel Regulation	Franchise	Pensions & Retirement Plans	Structured Finance & Securitisation
Class Actions	Fund Management	Pharmaceutical Antitrust	Tax Controversy
Cloud Computing	Gaming	Ports & Terminals	Tax on Inbound Investment
Commercial Contracts	Gas Regulation	Private Antitrust Litigation	Technology M&A
Competition Compliance	Government Investigations	Private Banking & Wealth Management	Telecoms & Media
Complex Commercial Litigation	Government Relations	Private Client	Trade & Customs
Construction	Healthcare Enforcement & Litigation	Private Equity	Trademarks
Copyright	High-Yield Debt	Private M&A	Transfer Pricing
Corporate Governance	Initial Public Offerings	Product Liability	Vertical Agreements
Corporate Immigration	Insurance & Reinsurance	Product Recall	
Corporate Reorganisations	Insurance Litigation	Project Finance	
Cybersecurity	Intellectual Property & Antitrust	Public M&A	
Data Protection & Privacy	Investment Treaty Arbitration	Public Procurement	
Debt Capital Markets		Public-Private Partnerships	
Defence & Security Procurement		Rail Transport	
Dispute Resolution		Real Estate	

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)