

Labour & Employment 2021

Contributing editors

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Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth 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 Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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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 editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.



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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 ringgit and less; 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 Act.

Employees' Social Security Act 1969

The Employees' Social Security Act (the SOCSO Act) provides social security for all employees in the event of contingencies, such as employment injuries. The Act 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 imposed on employees as well.

Minimum Wages Order 2020

The Order provides different minimum wage rates payable to an employee depending on the employee's place of employment. The minimum wage rate payable to an employee who works in a place of employment in any of the 16 city council areas or the 40 municipal council areas specified in the Schedule to the Order is 1,200 ringgit per month or 5.77 ringgit per hour.

The minimum wage rate payable to an employee who works in a place of employment in any areas other than the city council or municipal council areas specified in the Schedule to the Order is 1,100 ringgit per month or 5.29 ringgit per hour.

Minimum Retirement Age Act 2012

This Act 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

This Act 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 except 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.

However, the protection against discrimination under the Federal Constitution has so far been read by the courts to be limited in application to public-sector employers, not private-sector employers. Nevertheless, although this reflects the present position of the law as determined by the courts thus far, the correctness of the court decisions appear to be doubtful.

Although there is no specific anti-harassment legislation in place, the principle that an employer has a duty to provide a safe and conducive workplace applies when 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 certain breaches of the terms and conditions of employment.

The Employees Provident Fund Board and the Social Security Organisation Board have powers to examine, make inquiries and prosecute for offences under the Employees Provident Fund Act and the SOCSO 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 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 (IRA) 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 conduct collective bargaining on behalf of their members. Subject to the terms of the collective agreement, they usually have the right to represent their members in disciplinary proceedings. A trade union may call for a strike or picket if certain conditions set out in the IRA and the Trade Union Act are satisfied.

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 Personal Data Protection Act (including the notice and consent requirements) should be complied with. The employer should provide a personal data protection notice (in both English and Malay) to the applicant informing them of the purpose of data collection, how his or her personal data will be processed, his or her rights as data subjects, etc, and seek the applicant's consent for the collection and processing of his or her personal data.

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 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 Employment Act (EA) (which applies only to employees who come under its purview) 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 itself invalidate the employment relationship or the contractual terms. The EA also provides that employment contracts must include a provision for termination.

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

There are no restrictions in the law against fixed-term contracts, nor are there maximum durations determined by law. However, a fixed-term contract may be found to be not genuine and to be, instead, a permanent contract disguised as a fixed-term contract after examining the substance and factual relationship between the parties.

Additionally, the Minimum Retirement Age Act (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 who have a basic wage of 20,000 ringgit per month and above and 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 will be subject to 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 required standard of performance. 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. All the 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; and
- which party provides the tools and equipment and ultimately bears the risk of loss and the chance of profit.

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?

To work in Malaysia, spouses of expatriate employees holding dependant passes are required to apply for employment passes through their employer (and to surrender or shorten their dependant passes in connection with this).

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 as follows.

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 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 depend 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:

- the minimum paid-up capital of the employer must range between 250,000 and 1 million ringgit;
- a recommendation from monitoring agencies must be obtained;
- the employer must register with the relevant monitoring agencies;
- the minimum monthly salary must be 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;
- 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 by the foreign citizen online.

Applications are reviewed against a set of criteria that is 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 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 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 apply 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 is guilty of an offence and will, on conviction, be liable to a fine of between 10,000 ringgit and 50,000 ringgit, or 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 will, on conviction, be liable to imprisonment of between six months and five years, and will 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 will, 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 is 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?

There is a new requirement announced by the Malaysian government applicable to companies that intend to hire new expatriates by way of an Employment Pass, namely, the requirement to advertise job vacancies, which has come into effect on 1 January 2021. Based on guidelines recently issued by the government, employers that enjoy automatic exemptions from advertising vacant positions before hiring new Employment Pass holders include companies:

- whose intended new Employment Pass holders hold important positions (C-Suite and key posts) or who receive a basic monthly income of not less than 15,000 ringgit;
- with representative offices and regional offices;

- whose investors or shareholders are directly involved in the company's operations;
- that receive expatriate employees from a parent company for purposes of training, knowledge and experience sharing between companies;
- that are international organisations subject to the International Organisations (Privileges and Immunities) Act 1992 that appoint Foreign Recruited Staff; and
- whose sports' sectors recruit athletes or professionals to join any sports organisation or club.

The advertising requirement also will not apply for purposes of renewal of existing Employment Passes.

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 Employment Act (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 certain circumstances. 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: 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: 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: 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:

- National Day (31 August);
- the birthday of 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, 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 nine-month period immediately preceding confinement, which must include employment 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 the Employees Provident Fund, Employees' Social Security and the Employment Insurance System at the rates prescribed by the relevant legislation. Additionally, employees are entitled to maternity leave. EA employees are also entitled by law to paid annual leave, sick leave and public holidays.

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 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:

- National Day (31 August);
- the birthday of 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; 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 two times 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 competing 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, the position is not clear on whether non-solicitation clauses are enforceable subject to reasonableness.

Post-employment payments

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

No, because post-employment restrictive covenants (non-compete) are not enforceable in the first place.

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 the conduct of employees carried out in the course of the employment or on 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 the execution of work are deemed to be with 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 the invention is also deemed to be with 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?

No, other than the Copyright Act 1987 and the Patents Act 1983.

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 Personal Data Protection Act (PDPA) imposes obligations on employers who process personal data to comply with the Personal Data Protection Principles set out in the Act. 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 EU General Data Protection Regulation may have an impact on the processing of personal data of employees residing in the European Union.

35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

Yes. The PDPA requires the data subject (the employee or the candidate) to be notified of certain matters, namely:

- that personal data of the data subject is being processed by or on behalf of the data user, and a description of the personal data;
- the purposes for which the personal data is being or is to be collected and further processed;
- any information available to the data user regarding the source of the personal data;
- his or her right to request access to and to request correction of the personal data and how to contact the data user with any inquiries or complaints in respect of the personal data;
- the class of third parties to whom the data user discloses or may disclose the personal data;
- the choices and means the data user offers the data subject for limiting the processing of personal data, including personal data relating to other persons who may be identified from that personal data;
- whether it is obligatory or voluntary for the data subject to supply the personal data; and
- where it is obligatory for the data subject to supply the personal data, the consequences for the data subject if he or she fails to supply the personal data.

The notice must be provided in both English and Malay and should be provided as soon as practicable, if possible at the time the personal data is first collected or requested.

36 | What data privacy rights can employees exercise against employers?

An employee has, against his or her employer, the right to:

- be informed;
- access his or her personal data;
- correct his or her personal data where it is inaccurate, incomplete, misleading, or not up to date;
- withdraw consent to the processing of personal data in respect of which he or she is the data subject;
- prevent processing that is likely to result in distress; and
- prevent processing for direct marketing purposes.

BUSINESS TRANSFERS

Employee protections

37 | 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 a business transfer, Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 provides for a mechanism for the transfer of the vendor's employees if the buyer offers to continue to employ the employees on terms and conditions no less favourable than those under which the employees were employed before the change in ownership.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 | 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

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

Notice of termination must be given if the termination is not owing to any misconduct or other breach of contract by the employee. Salary in lieu of notice may be paid.

40 | 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

41 | 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 to increase 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 employees who come within the purview of the Employment Act, 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.

If the employee's contract of employment provides for more favourable severance pay to be made, the employer should comply with it.

Procedure

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

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

Employee protections

43 | In what circumstances are employees protected from dismissal?

All employees are effectively protected from unjust dismissal.

Mass terminations and collective dismissals

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

Mass or collective dismissals are subject to the same rules. Also, prior notice has to be given to the Labour Department at least 30 days before the termination date if the termination is owing to redundancy or business closure.

Class and collective actions

45 | 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

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

Yes, mandatory contractual retirement age is permissible provided that it is not less than the minimum retirement age of 60.

DISPUTE RESOLUTION

Arbitration

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

Yes.

Employee waiver of rights

48 | 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

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

A claim for reinstatement pursuant to an unjust dismissal claim under the Industrial Relations Act 1967 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

Key developments of the past year

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

A major amendment that has recently been made to labour legislation in Malaysia is the amendment to the IRA, which came into partial effect on 1 January 2021.

The key changes to the IRA taking effect from 1 January 2021 involve the dispute resolution process surrounding unfair dismissal claims, including the removal of the Minister's discretion to refer representations of unfair dismissal to the Industrial Court, the option of an

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appeal against an Industrial Court award to the High Court, the imposition of interest of 8 per cent per annum to an Industrial Court award, the increase on penalty for non-compliance with an Industrial Court award, the abolition of punishment for picketing, illegal strikes and lockouts, and the empowering of Trade Unions to raise questions of general character relating to promotion, transfer, dismissal and reinstatement and the assignment or allocation of duties.

There are also proposals to make significant amendments to the Occupational Safety and Health Act 1994 (OSHA). The Occupational Safety and Health (Amendment) Bill 2020 has recently been tabled for its first reading in Parliament on 2 November 2020. The key proposed amendments include the extension of the applicability of OSHA to all workplaces, new duties and responsibilities for employers, imposition of duties on principal, and an increase in penalties and liability of director.

Meanwhile, there is also a recent key decision by the Federal Court, the apex court in Malaysia, in the case of *Ahmad Zahri Mirza Abdul Hamid v Aims Cyberjaya Sdn Bhd* [2020] MLJU 595 that held, among others, that in determining whether a contract of employment is a genuine fixed-term contract, there are three main considerations, namely:

- the intention of the parties;
- the employer's subsequent conduct during the course of employment; and
- the nature of the employer's business and the nature of work that the employee is engaged to perform.

The Federal Court further held in this case that citizenship of an employee has no bearing in deciding whether the employee is in permanent employment or employment under a fixed-term contract.

Coronavirus

51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 Act, aimed at providing temporary relief to temporarily reduce the impact of the pandemic, came into effect on 23 October 2020.

Also, the government has implemented various initiatives to assist individuals and companies during the pandemic including:

- providing financial assistance to eligible employees who had agreed with their employer to take unpaid leave for a duration between one to six months beginning on 1 March 2020 (the Employee Retention Program);
- providing wage subsidies to eligible employers for a three-month period (the Wage Subsidy Program); and
- providing a 25 per cent reduction in foreign worker levy payments for foreign workers whose work permits expire between 1 April 2020 to 31 December 2020.

Also, amendments have been made to the Pembangunan Sumber Manusia Berhad Act 2001 to exempt payment of the Human Resources Development Fund levy for a period of six months, and a rate reduction for the Employees Provident Fund Act 1991 statutory contribution for employees from 11 per cent to 9 per cent for the period between January 2021 and December 2021.

In terms of the best practices advisable for clients, we advise that they keep updated on the standard operating procedures governing their industry, as occasionally issued by the government, and the provided reliefs.

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