MALAYSIA

Law and Practice

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Skrine

Contents

Skrine is one of the largest full-service law firms in Malaysia providing a comprehensive range of legal services to a broad cross-section of the business community in Malaysia as well as abroad. The firm is currently led by 47 partners with over 100 lawyers across the corporate, dispute resolution and intellectual property divisions. The synergy of all three divisions is the basis for the firm's approach to offering effective solutions for fast resolution of cases.

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1. Employment Terms

1.1 Employee Status

In Malaysia, like many other countries, the terms "blue-collar workers" and "white-collar workers" are commonly used to describe different types of employees based on their job roles and the nature of their work.

Blue-collar workers typically engage in manual labour or skilled trade occupations. They are commonly associated with jobs in industries such as manufacturing, construction, agriculture and services that require physical labour. These workers often perform tasks that involve labour using their hands rather than a specific skill or expertise. Examples of blue-collar jobs in Malaysia include factory workers, construction workers, technicians, drivers and cleaners.

White-collar workers are generally associated with executive, professional, managerial, administrative or office-based occupations that require qualifications, knowledge and/or a certain degree of intellect. These workers often work in industries such as finance, information technology, education, healthcare, legal services and the corporate sector. White-collar jobs in Malaysia include professionals like doctors, lawyers, engineers, accountants, teachers, IT specialists, managers and office administrators.

Blue-collar and white-collar workers may be local or foreign or be permanent, fixed-term or part-time employees. Regardless of the type of employment, the terms and conditions of all employees in Malaysia under a contract of service are governed by the Employment Act 1955 ("EA"), although certain portions of the EA do not apply to employees who earn in excess of RM4,000 and who, regardless of salary, are otherwise performing "blue-collar" type jobs.

1.2 Employment Contracts

Employees in Malaysia, whether local or foreign, may enter into permanent or fixed term employment contracts, which may also be full-term contracts or part-time contracts.

Permanent employees, namely those employed under indefinite contracts, can reasonably anticipate continuous employment until their retirement or voluntary resignation. Their employment contracts may only be terminated for any valid reason other than the natural expiry of the contract.

The Minimum Retirement Age Act 2012 applies to permanent employees and stipulates a minimum retirement age of 60 years. Accordingly, an employee's contract of employment can only be terminated based on age once they reach the age of 60 years.

Fixed-term employees are individuals who have been hired for a specific duration and their employment will usually conclude upon the expiration of the employment contract. Parties may mutually agree to extend the employment after the expiry of the initial fixed term period. However, repeatedly renewing a fixed-term contract without significant changes in the employment terms and conditions and without any gaps between consecutive contracts might give rise to a presumption that the fixed-term employee is a de facto permanent employee. This will ultimately impact the amount of compensation that the employee is statutorily entitled to in the event the employee is later dismissed from employment and is successful in a claim of unfair dismissal under Section 20 of the Industrial Relations Act 1967.

All employment contracts in excess of one month must be in writing, but need not be in

any specific language. However, the lack of a written employment contract does not by itself invalidate an employment relationship or contractual terms.

The employment contract should outline the main features of the employment relationship including the place of employment, work scope, wages, benefits, termination notice, public holiday entitlements, annual and sick leave and wage rates for working overtime or during rest days, to name a few. Any terms and conditions of employment which are less favourable than the requirements under the Employment Act 1955 is to that extent, immediately void. Employers are free to provide terms and conditions of employment which are more beneficial than the minimum requirements under the Employment Act 1955.

1.3 Working Hours

Under the Employment Act 1955 ("EA"), the maximum working hours for employees per week is 45 hours.

Additionally, an employee may not be required to work:

- more than eight hours a day or more than five consecutive hours without a break of at least thirty minutes; and
- one whole day of rest each week (rest day).

The agreed working hours between the part-time employee and his employer must be stated in the contract. Under the Employment (Part-Time Employees) Regulations 2010, a part-time employee works more than 30% but do not exceed 70% of the normal work hours per week of a full-time employee (ie, 45 hours per week).

Under the EA, employees whose wages do not exceed RM4,000 per month or who, regardless of salary earned, 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 domestic employees, or in certain positions on seagoing vessels (collectively, "Covered Employees") are statutorily entitled to receive remuneration, in addition to their regular wages, for working beyond their normal working hours as outlined below:

- for any work carried out in excess of normal hours of work on a normal day of work – not less than one-and-a-half times the hourly rate of pay;
- for any work carried out in excess of the normal hours of work on a rest day – not less than twice the hourly rate of pay; and
- for any work carried out in excess of the normal work hours on a public holiday – not less than three times the hourly rate of pay.

Covered Employees are also eligible to receive remuneration for work performed on a rest day as outlined below:

- 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.

Covered Employers are also eligible to two days' wages at the ordinary rate of pay in addition to the day's wages, regardless of whether the period of work done on that day is less than the normal hours of work.

A part-time employee who is required to work beyond their normal work hours of work is entitled to overtime pay as follows:

- not less than their hourly rates of pay for each hour or part thereof that exceeds their 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.

Additional payments will also apply if a part-time employee is required to work their normal hours of work or overtime on any public holiday.

The EA incorporates provisions for flexible working arrangements, ie, enabling employees to request changes in their hours of work, days of work or places of work through a written application to their employers. The employer must respond to the employee's application within 60 days of receiving it, either approving or refusing the request in writing. If the employer refuses the application, they are obligated to state the reasons for the refusal. However, there is currently no provision within the EA to challenge the employer's decision or the grounds on which the decision was based. There are also no guidelines as to the way in which an employer may exercise his discretion to allow or reject an application for a flexible working arrangement.

1.4 Compensation

As of 1 May 2022, the Minimum Wage Order 2022 mandates that employers with more than five employees must pay a minimum wage of RM1,500 per month or RM7.21 per hour. If employees are compensated on a daily basis, the corresponding minimum rates apply:

- RM57.69 for employees who work six days a week;
- RM69.23 for employees who work five days a week; and
- RM86.54 for employees who work four days a week.

Bonuses and increments are not required under law and are discretionary and/or contingent upon the agreement made between the employer and the employee.

1.5 Other Employment Terms

In Malaysia, the paid time off that employees are entitled to is referred to as "annual leave". Any persons who enter into a contract of service irrespective of their wages are statutorily entitled to minimum paid annual leave over 12 months of continuous services as follows:

- eight days if the employee has been in employment for a period of less than two years;
- 12 days if the employee has been in employment for a period of two years or more but less than five years; and
- 16 days if the employee has been in employment for a period of five years or more.

Employees are statutorily entitled to eleven days of public holidays, five of which must be the following:

- National Day (the anniversary of Malaysia's independence);
- the birthday of the Yang-di-Pertuan Agong;
- the birthday of the Ruler or the Yang di-Pertua Negeri, as the case may be, of the state in

which the employee works, or Federal Territory Day;
- Labour Day; and
- Malaysia Day.

Employers have the authority to determine the allocation of the remaining six days of public holidays for their employees. It is mandatory for employers to provide advance notice of these designated public holidays on an annual basis. Employers may opt to, and commonly do, provide all gazetted public holidays in Malaysia and the relevant state in which the employer's business is located as paid public holidays. The number of gazetted public holidays in Malaysia are in excess of eleven days of public holidays.

Employees are statutorily entitled to (non-hospitalisation) sick leave as follows:

- 14 days if the employee has been in employment for a period of less than two years;
- 18 days if the employee has been in employment for a period of two years or more but less than five years; and
- 22 days if the employee has been in employment for a period of five years or more.

If hospitalisation is necessary, an employee is entitled to 60 days of paid sick leave in addition to the (non-hospitalisation) sick leave entitlement.

Under the EA, female employees are entitled to 98 days of paid maternity leave, provided that:

- the female employee has been employed by the employer for a period of, or periods amounting in the aggregate to, not less than ninety days during the nine months immediately before her confinement; and
- the female employee has been employed by the employer at any time in the four months immediately before her confinement.

Furthermore, if certified to resume work by a registered medical practitioner, a female employee has the option to begin working at any point during her maternity leave, subject to her employer's consent, irrespective of whether she qualifies for maternity allowance. The EA prohibits an employer from terminating the employment of a pregnant female employee. If a female employee is pregnant or experiencing an illness related to her pregnancy, her employer cannot terminate her employment or issue a notice of termination, except for reasons of wilful breach of contract, misconduct or the closure of the employer's business. It is the employer's responsibility to demonstrate that the termination of the female employee's employment was not based on her pregnancy or a pregnancy-related illness.

The EA also provide for paternity leave entitlement of seven days to married male employees for each confinement up to five confinement periods, irrespective of the number of spouses (Muslim men have the right to marry up to four wives under local law), subject to the employee being employed for at least 12 months and having informed his employer at least 30 days before the expected confinement or as early as possible after the birth. There are no provisions in law stipulating when the paternity leave may be taken and employers may decide on this.

Under Malaysian law, there is no statutory entitlement for childcare leave. Instead, the provision of such leave is determined through contractual agreements between the employer and employee.

2. Restrictive Covenants

2.1 Non-competes

In Malaysia, non-competition clauses cannot be enforced as the same contravene Section 28 of the Contracts Act 1950.

2.2 Non-solicits

In Malaysia, non-solicitation clauses are generally enforceable if the same is included as part of the terms and conditions of employment.

3. Data Privacy

3.1 Data Privacy Law and Employment

The Personal Data Protection Act 2012 ("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 (ie, the employee) of the personal data that is being processed and obtain the consent of the data subject in most situations where data is collected, processed or disclosed. Consent must be explicitly obtained if sensitive personal data is being processed. The employee also has a right to access and correct their data.

For the purposes of the PDPA, "personal data" is broadly defined as any information that related directly or indirectly to a data subject, who is identified or identifiable from that information.

"Sensitive personal data" is defined as any personal data consisting of information as to the physical or mental health or condition of a data subject, their political opinions, their religious beliefs or other beliefs of a similar nature, and the commission or alleged commission by them of any offence.

The PDPA mandates that the data subject must receive a notice in both Malay and English, informing them about specific aspects concerning the processing of their personal data and/or sensitive personal data, namely:

- that personal data of the data subject is being processed by or on behalf of the data user, a description 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;
- their right to request access to and 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 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 they fail to do so.

4. Foreign Workers

4.1 Limitations on Foreign Workers

Employers have the option to hire foreign workers and expatriates as part of their workforce, provided that these employees possess the relevant and necessary work passes allowing them to work in Malaysia for the specific employer. As of now, there is no specific fixed restriction on the number of work passes that can be issued to an employer.

The EA provides that employers must first obtain the approval of the Director General of Labour to employ foreign labour.

Expatriates may work in Malaysia pursuant to Employment Passes, Professional Visit Passes or a Resident Pass – Talent whereas foreign workers who perform low level labour ("Foreign Workers") must obtain a Visit Pass (Temporary Employment) to work in Malaysia. Foreign nationals who are married to locals are permitted to work under their Long Term Social Visit Pass, provided a "Permission to Work" has been obtained.

With effect from 1 January 2021, employers intending to hire new expatriates must follow a new process. They are obligated to advertise the job vacancy (which is intended to be filled by the expatriate) on the MyFutureJobs portal for a minimum of 30 days and conduct interview programmes in an effort to consider local candidates who meet the job criteria. Nonetheless, there are some exceptions to this advertising rule, such as when the expatriate's salary exceeds RM15,000 or if they hold a "C-suite" position.

Foreign Workers may only be employed in certain sectors and may only be sourced from certain countries. Employers are first required to obtain a quota from the Immigration Department of Malaysia and undergo an interview process before they may proceed to hire foreign workers.

4.2 Registration Requirements for Foreign Workers

Employers wishing to employ expatriates must first register themselves on the Expatriate Services Division portal. Employers who wish to hire expatriates must meet the paid-up capital requirement (which varies depending on their level of foreign and local shareholding) in order to be eligible to employ expatriates.

Employers wishing to employ low level foreign labour must register themselves on the Foreign Workers Centralised Management System portal.

5. New Work

5.1 Mobile Work

In Malaysia, flexible working arrangements are available at the discretion of the employer, offering alternatives to traditional office-based work.

The Occupational Safety and Health (Amendment) Act 2020, which has yet to come into force, now requires for employers to identify emergencies that can happen in their organisation, develop procedures to handle them and implement the procedures in emergencies.

Additionally, the law obliges employers to conduct hazard identification, risk assessment and risk control for tasks performed by their workers. Workers now have the right to remove themselves from the workplace if they believe an imminent danger is present that could cause death or serious bodily injuries. However, they can exercise this right only after informing their employers about the danger and if the employers fail to take appropriate action to address the issue.

Although the amendment does not explicitly address remote workers, it is believed that employees working from home are similarly protected under this amendment due to the increasing trend of remote work in recent times.

As of now, there are no other regulations or restrictions in relation to remote work, particularly concerning data privacy and social security in Malaysia.

5.2 Sabbaticals

The EA does not encompass provisions for sabbatical leave, and generally, Malaysian employment law does not address sabbatical leave. Consequently, unless explicitly stated in the employment contract, employees do not have an inherent entitlement to sabbaticals.

5.3 Other New Manifestations

Malaysia has not seen any concrete new manifestations in the field of "new work" except in respect of the EA newly providing for flexible working arrangements, which currently remains only a "right of application" rather than a "right to flexible work".

New manifestations such as "hot desking", "job sharing", "reduced work week", menstrual leave, childcare or family leave, wellness days and mental health breaks currently remain unregulated, and is wholly subject to the contract between employer and employee, as some employers offer these as workplace perks.

6. Collective Relations

6.1 Unions

Employers and employees (save for employees who are employed in a managerial capacity, executive capacity, confidential capacity or security capacity) are at liberty to form, join and participate in trade union activities, and an employer may not interfere with or restrain an employee from joining or participating in a trade union. Trade unions are required to register with the Director General of Trade Unions within one month of establishment, and at least seven members must sign the application form for registration.

If a trade union is formed, the Industrial Relations Act 1967 provides a process for the trade union to seek recognition from the employer and the trade union is able to make an offer to commence collective bargaining with the employer if recognition is accorded, with the view of concluding a collective agreement with the employer in order to achieve more favourable terms and conditions of employment on behalf of all employees falling within the scope of the collective agreement.

6.2 Employee Representative Bodies

Employee representative bodies are not specifically provided for under Malaysian laws.

6.3 Collective Bargaining Agreements

Only registered and recognised trade unions may enter into collective agreements with employers. These agreements must be in writing and signed by parties to the agreement.

The collective agreement shall set out the terms of the agreement between parties and must set out the following matters:

- the names of the parties to the agreement;
- the period in which the agreement shall continue to be in force, which shall not be less than three years from the date of commencement of the agreement;
- the procedure for termination and modification of the agreement; and
- the procedure for modification.

The terms of the collective bargaining agreement should not be less favourable than, or in contravention of any provision of, any written laws

applicable to the class of workers under the collective bargaining agreement.

A signed copy of the collective agreement is to be jointly deposited by the parties to the registrar within one month from the date on which the agreement was entered into. The registrar will then bring it to the notice of the Industrial Court to take cognisance of the agreement and only upon such awareness will the agreement come into force and be binding upon all parties, inclusive of those employees who were subsequently employed.

7. Termination

7.1 Grounds for Termination

Under Malaysian law, even if an employment contract contains a termination clause, an employee can only be terminated from employment if there is a valid just cause or excuse. However, the term "just cause or excuse" is not specifically defined by legislation. Generally, misconduct, poor performance, redundancy and other similar reasons are considered just causes or excuses for termination. An employee who considers that he has been dismissed from employment unfairly may lodge a representation to the Director General of Labour to be reinstated to his former position. Parties are then invited to attend mandatory conciliation proceedings following such a representation being lodged. If no amicable solution is reached at the conciliation proceedings, the representation will be referred to the Industrial Court for adjudication.

Dismissal does not necessitate approval from a government agency. However, in cases of retrenchment or business closure or cessations of employment emanating from voluntary separation schemes, the employer must inform the Labour Department of the termination(s) of employment by submitting a "PK Form".

Employers are obliged to give its employees minimum notice periods as set out under the EA (see **7.2 Notice Periods**). Alternatively, employers may pay the employees compensation in lieu of the notice.

7.2 Notice Periods

In cases where termination is not a result of employee misconduct, poor performance or breach of contract – notice of termination must be provided. Alternatively, the employer may opt to pay the employee salary in lieu of notice.

Where a notice period is not specifically provided for in an employment contract or whether the termination emanates from business closure, retrenchment or redundancies, the employer is required to provide a minimum statutory notice period as follows:

- four weeks' notice if the employee has been so employed for less than two years on the date which the notice is given;
- six weeks' notice if the employee has been so employed for two years or more but less than five years on such date; and
- eight weeks' notice if the employee has been employed for five years or more on such date.

Severance pay is only statutorily payable to Covered Employees in the event of termination of employment (except in cases of misconduct, retirement or voluntary resignation) as follows:

- ten days' wages for every year of employment if the employee has been employed for a period of less than two years;
- 15 days' wages for every year of employment if the employee has been employed for period

of two years or more but less than five years; and
- 20 days' wages for every year of employment if the employee has been employed for period of five years or more.

7.3 Dismissal for (Serious) Cause

Summary dismissal typically only applies if the employment contract is terminated on grounds of misconduct, poor performance or breach of contract.

Before an employee is dismissed summarily for misconduct, the following process should generally be followed:

- Step 1 (Preliminary investigation): The employer should undertake thorough investigations to ascertain whether there are grounds to allege that an employee has committed misconduct. Investigations may take the form of interviewing the employee alleged to have committed misconduct, witnesses, investigating documentary evidence and conducting forensic investigations, amongst others.
- Step 2 (Issuing show cause letter): Once the employer is satisfied that there is a prima facie case of misconduct, the employer should afford the employee a chance to respond to the misconduct. The employer may do so by issuing the employee with a show cause letter, setting out the charges of misconduct accurately and concisely and requiring the employee to answer to such charges. It is of utmost importance that these charges contain specific allegations of misconduct and include all pertinent details such as the exact date and time the misconduct took place, the nature of the alleged misconduct and the company policies that have been breached. The show cause letter should also include a statement calling upon the employee concerned to submit an explanation in writing within a certain period of time.
- Step 3 (Reply to show cause letter): the employee ought to be given a written opportunity to reply to the allegations made against him in the show cause letter, and reasonable time for doing so.
- Step 4 (Domestic inquiry): if the employer is of the view that serious misconduct appears to have been committed, a domestic inquiry may be conducted. A domestic inquiry is an internal inquiry held by an employer to inquire into allegations of misconduct by an employee to determine if an employee is guilty or innocent of the same and will involve the calling of witnesses and tendering of evidence to prove the employer's case. The process usually begins with the employer issuing the employee with a notice of inquiry, laying down the specific charges of misconduct. The notice of inquiry will also state the date and time of inquiry and inform the employee that he is entitled to bring witnesses to support his case. A domestic inquiry is not a requirement under law and the Industrial Court has held that the failure to hold an inquiry before dismissing an employee is not fatal to the employer's case. A domestic inquiry must however be held if it is within the employer's written policies and procedures. The employer is entitled to depart from the panel of inquiry's findings and recommendations.

In cases of poor performance, the following process should generally be followed before dismissal:

- the employee should be informed of his poor performance, and warned that failure to bring his performance up to an acceptable level would warrant dismissal from employment;

- the employee must be accorded sufficient opportunity to improve with time and guidance from his employer; and
- notwithstanding efforts taken to warn the employee of his poor performance and to assist the employee to achieve an expected level of performance, the employee failed to sufficiently improve his performance.

The requirements set out above in relation to misconduct and poor performance are specifically laid down in statute but have been expressed by case law to support just cause or excuse for dismissal.

7.4 Termination Agreements

Employers and employees may agree to mutually separate by way of a mutual separation agreement to terminate the employment contract, where as part of the same, the employer offers some compensation in exchange for certain obligations by the employee, including a release of claim or waiver of rights.

Employers may also carry out voluntary separation schemes entailing a termination of employment in which employees are paid some form of compensation in exchange for certain obligations by the employee, including a release of claims or waiver of rights. This is often entered into to avoid mass retrenchments. As part of the voluntary separation scheme, a selected group of employees may be invited to apply for the voluntary separation scheme and the employer has full discretion on who it wishes to select for the voluntary separation.

7.5 Protected Categories of Employee

There are no specific protections against dismissal for particular categories of employees, save for pregnant female employees, as elaborated on in **7.3 Dismissal for (Serious) Cause**.

8. Disputes

8.1 Wrongful Dismissal

An employee who considers that they have been dismissed without just cause or excuse may file a representation for reinstatement under Section 20 of the Industrial Relations Act 1967. If the employee is successful, they may be awarded:

- up to 24 months' last drawn salary in backwages; and
- reinstatement or, in lieu of reinstatement, one month's last drawn salary for each year of service.

A fixed-term employee is only entitled to backwages commensurate with the duration left in the contract of employment if early termination had not occurred.

An employee on probation is entitled to up to 12 months' last drawn salary in backwages.

8.2 Anti-discrimination

All employees have a right to be treated fairly and with mutual trust and respect in the workplace, and discrimination is not permissible. Under the newly amended EA, the Director General may inquire into and decide any dispute between an employee and his employer in respect of any matter relating to discrimination in employment and may also, pursuant to such decision, make an order. An employer who fails to comply with any order of the Director General commits an offence, and shall, on conviction, be liable to a fine not exceeding RM50,000. In the case of continuing offence, the employer shall be liable to a daily fine not exceeding RM1,000 for each day the offence continues after conviction.

However, "discrimination" is neither defined nor made an offence. The amendments also do not

provide any specific remedy that the Director General may afford if the Director General finds that a dispute between employer and employee relates to discrimination in employment.

The law in question is still relatively new, and as a result, there remains uncertainty regarding the burden of proof and potential damages or relief that may apply in such cases. Nonetheless, we can expect ongoing case developments on discrimination in the workplace as legal professionals and courts grapple with its interpretation and application.

It is essential to highlight that the amendments only cover discrimination once the employment relationship has commenced and do not address discrimination as a reason for denying employment or non-employment.

8.3 Digitalisation

At the time of writing, the Industrial Courts in Malaysia have not implemented any regulations concerning the digitalisation of employment disputes, including the possibility of conducting court proceedings via video. However, this practice has been initiated in civil courts primarily as a response to the COVID pandemic.

9. Dispute Resolution

9.1 Litigation

Employees who lodge a representation for reinstatement pursuant to Section 20 of the Industrial Relations Act 1967 will have their representation heard by the Industrial Court if conciliation cannot be reached between the parties. Employees have 60 days to file such a representation. Alternatively, employees may also file a civil claim for wrongful termination of the employment contract but any award of damages will be limited to the applicable notice period of termination. Reinstatement is not a remedy that civil courts can grant.

Class action claims are not recognised in Malaysia. Employees may make claims on an individual basis for unjust dismissal. However, the courts may hear the matters together.

9.2 Alternative Dispute Resolution

Parties may agree to a private arbitration of employment disputes, but these are very uncommon in Malaysia.

9.3 Costs

The Industrial Court does not award a prevailing employee/employer attorneys' fees.