

Malaysia

Introduction

To promote investments and economic growth, the Malaysian government encourages a cordial relationship between employers and employees. Generally, Malaysia has had no occurrence of crippling worker strikes, lock-outs and demonstrations over the past ten to fifteen years. Problems are usually resolved in an atmosphere of goodwill and negotiation between parties, including trade unions.

The major employment laws in the country that directly impact the employment relationship are the Employment Act 1955 (EA) and the Industrial Relations Act 1967 (IRA). The EA governs matters relating to employment in Malaysia and applies to most employees whose wages do not exceed RM1,500 (USD 1 = RM3.22) or who are engaged in specified work (i.e., manual labor or supervising manual labor, or operation or maintenance of a motor vehicle, irrespective of salary amount [“EA employee”]). The employment terms and conditions of employees above this wage level or those who are otherwise outside the ambit of the EA, are governed by common law and by their employment contracts. The main areas covered by the EA are terms relating to employment contracts, including the termination of contracts, maternity protection, days and hours of work, annual leave, public holidays, termination and lay-off benefits and methods of dealing with complaints and enquiries.

The IRA deals with relations between employers and trade unions, and the prevention and settlement of differences or trade disputes through conciliation or by the Industrial Court. In practice it protects the rights of workers and employers to form or join a trade union and to participate in its lawful activities, and prohibits employers from discriminating against workers on the ground of union membership. The IRA further provides for procedures for collective bargaining.

Termination

Restrictions On Employers

In Malaysia, termination of employment falls under the purview of the EA, the Employment (Termination and Lay-Off Benefits) Regulations 1980 (“1980 Regulations”), and the IRA. Although the provisions of the EA only cover EA

employees, these principles of law are generally considered as guidelines for most employer-employee relationships, particularly in the absence of a written contract of service.

Unfair Dismissal

The IRA addresses the issue of unions, trade disputes and dismissals. It also mandates that an employment relationship cannot be terminated without “just cause or excuse.”

While “just cause or excuse” would be an issue to be determined by the Industrial Court in general, independently of the employer’s compliance with the EA and/or the terms and conditions of the employment contract relating to benefits, terminations should be motivated by a bona fide business decision, such as the cessation and sale of a business, continuing losses, or disciplinary or performance reasons. In a disciplinary situation, an employer should ensure that the process of investigation and hearing be adhered to and that the employee be given due warning (if applicable) and the chance to state his or her case.

In the event of unfair dismissal, employees may seek redress before the Industrial Court. In the first step, the claimant will make representations to the Director-General for Industrial Relations for reinstatement. If there is no settlement, the matter may be referred to the Industrial Court for adjudication.

Redundancy Termination

An employment relationship in Malaysia may be terminated for redundancy. Special provisions under the 1980 Regulations govern termination by retrenchment or the take-over or cessation of a business, and mandate that retrenched EA employees are entitled to specific termination indemnities. In a retrenchment situation, employers should select the employees of the same category to be retrenched based on objective criteria. The Malaysian Code of Conduct for Industrial Harmony, which is not legally prescribed by legislation (but is taken note of by the Industrial Court), provides guidelines for the selection of affected employees. The guidelines specify the following criteria:

- (i) The need for the efficient operation of the organization;
- (ii) The ability, experience, skill and occupational qualifications of workers;
- (iii) The consideration for length of service and whether employees are casual, temporary or permanent;

- (iv) The age of the employee;
- (v) The employee's family situation; and
- (vi) The "last in, first out" principle (i.e., the last person employed should be the first person retrenched).

Notice Provisions/Consequence For The Parties' Failure To Provide The Required Notice

The EA also outlines how and when a contract of service may be terminated. Under the EA, a contract of service for a specified period of time or the performance of a specified piece of work lapses when the period expires or when the work is completed. Where the contract of service is for an unspecified period of time, the contract may be terminated by either party by giving notice of termination as specified in the contract. In the absence of a written provision as to the length of notice required, Malaysian law provides that the period of notice shall not be less than:

- (i) Four weeks for employment of less than two years;
- (ii) Six weeks for employment of two years or more but less than five years; and
- (iii) Eight weeks for employment of more than five years.

In lieu of notice, an employer may pay wages to an employee in the amount equivalent to the period of notice. However, regardless of compliance with the notice period or the payment of benefits, the IRA provides that there must be "just cause or excuse." In cases of retrenchment, employers are also required to report to the Malaysian Director-General of Manpower at least one month before carrying out the lay-off.

Termination Indemnities

Under the provisions of the 1980 Regulations, an employee who has been retrenched or whose service has been terminated as the result of redundancy is entitled to certain benefits. These benefits include:

- (i) 10 days' wages for every year of employment of more than 12 months but less than two years;
- (ii) 15 days' wages for every year of employment of two years or more but less than five years; and
- (iii) 20 days' wages for every year of employment of five years or more.

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

Employment Discrimination

Laws On Employment Discrimination

Until recently, Malaysia had no legislation governing employment discrimination, although the Federal Constitution does state that there shall be no discrimination against citizens on the ground of religion, race, descent or place of birth. On September 28, 2001, Article 8(2) of the Federal Constitution was amended to prohibit gender discrimination through the Constitution (Amendment) (N^o2) Act 2001. This, however, has yet to be encapsulated in any specific legislation.

In 2001, the Labor Department of the Malaysian Ministry of Human Resources issued the Code of Practice for the Employment of the Disabled in the Private Sector (“Disability Code”). The objectives of the Disability Code are to:

- (i) Establish guidelines for the registration and job placement of the disabled with the private sector;
- (ii) Increase the awareness of private sector employers on the importance of offering employment opportunities to the disabled; and
- (iii) Encourage the disabled to prepare themselves in terms of ability, qualifications and skill sets to participate in the development of Malaysia as employees.

Though the Disability Code sets out the certain responsibilities of both the employer and the disabled employee, like other similar Codes relating to employment, there are no legal sanctions for non-compliance.

The Malaysian Government recently passed the Persons With Disabilities Act 2008 (PDA). It will be the first specific anti-discrimination law in Malaysia that applies in the workplace. Under the PDA, employers are now legally required to ensure that employees with disabilities are accorded just and favourable work conditions and equal remuneration to those without disabilities. However, it is not expressly clear whether the PDA will cover both employees as well as job applicants. At present, the protections under the PDA only extend to current employees. More detailed guidelines and standards will presumably be promulgated by the National Council

for Persons with Disabilities and/or the Minister of Human Resources in accordance with the PDA. Pending such guidelines and standards, the exact impact on the employment landscape remains to be seen.

The Department of Occupational Safety and Health of the Malaysian Ministry of Human Resources has also issued a “Code of Practice on Prevention and Management of HIV/AIDS at the Workplace” (“HIV/AIDS Code”) on September 2001 to reduce the spread of the disease and guide employers and employees in managing HIV/AIDS issues at the workplace.

The objectives of this HIV/AIDS Code are to:

- (i) Provide guidelines to employers and employees on appropriate and effective ways of preventing and managing HIV/AIDS at the workplace;
- (ii) Promote education and awareness on HIV/AIDS; and
- (iii) Promote a non-judgmental, non-discriminatory work environment.

Practical Advice To Employers On Avoiding Employment Discrimination Problems

Generally, employers in Malaysia may be liable for unfair dismissal pursuant to the employer’s discriminatory acts or omissions where they can be construed as evidencing an intent on the part of the employer to no longer be bound by the terms of the employment contract.

As a first step to minimize discrimination problems at the workplace, employers should set up and implement in-house mechanisms as outlined in the Disability Code, the PDA and the HIV/AIDS Code. Such measures should be implemented despite the codes not having the force of law, so as to promote positive employee relations. More importantly, pursuant to the PDA, employers should now recognize and endeavour to fulfill their new legal obligations towards employees with disabilities to ensure equal and non-discriminatory workplace practices and attitude.

Sexual Harassment

Laws On Sexual Harassment

Malaysia does not have any legislation governing workplace harassment. However, in 1999, the “Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace” was promulgated (“Sexual Harassment Code”). The Sexual Harassment Code is not legally binding, but companies are expected to adopt its recommendations.

The Sexual Harassment Code contains guidelines for the establishment and implementation of internal preventive and redress mechanisms for dealing with sexual harassment. “Sexual harassment” is defined under the Sexual Harassment Code as “any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological, or physical harassment that might, on reasonable grounds, be perceived by the recipient as: (i) placing a condition of a sexual nature on her or his employment; or (ii) an offence or humiliation, or a threat to her or his well-being, but that has no direct link to her or his employment.” This definition is wide-ranging and covers almost every possible form of sexual harassment, including verbal statements, gestures and physical conduct. It also includes employment-related sexual harassment that occurs outside the workplace as a result of employment responsibilities or employment relationships (e.g., at work-related social functions, during work-related travel or over the telephone).

Practical Advice To Employers On Avoiding Sexual Harassment Problems

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

- (i) A policy statement from management prohibiting sexual harassment in the organization;
- (ii) A clear definition as to what constitutes sexual harassment;
- (iii) Setting-up a special complaint/grievance procedure;
- (iv) Clear stipulation of the disciplinary rules and penalties that will be imposed against a harasser as well as against those who make false accusations;

- (v) Formulation of a set of protective and remedial measures for the victim; and
- (vi) Promotional and educational programs to explain the company's policy on sexual harassment and to raise awareness of sexual harassment among all employees.

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