

# LABOUR & EMPLOYMENT

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## THE INCONSISTENCIES AND AMBIGUITIES

IN THE PROVISIONS OF THE  
EMPLOYMENT CODE ACT NO. 3  
OF 2019 - P14

## BEST PRACTICE PROCEDURES

FOR CONDUCTING  
INVESTIGATIONS - P24

## CHANGES

IN THE MALAYSIAN  
EMPLOYMENT LAW  
LANDSCAPE - P44

## REMOTE WORK AFTER COVID:

PANAMA'S EXPERIENCE - P36



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& ROGERS

# CHANGES IN THE MALAYSIAN EMPLOYMENT LAW LANDSCAPE

WITH A FOCUS ON THE 2022 EMPLOYMENT (AMENDMENT) ACT

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Malaysia has welcomed changes to the country's Employment Act 1955 pursuant to the Employment (Amendment) Act 2022 ("2022 Amendments"), which has encapsulated most of the trending areas of employment in the current global landscape, such as discrimination, enhanced maternity leave, paternity leave, flexible work arrangement, and forced labour. The main objectives of the changes are to increase and improve the protection and welfare of employees in Malaysia and to ensure that the provisions of labour laws in the country are in line with international standards and practises outlined by the International Labour Organization. This article will touch on the significant amendments that are anticipated to change and improve the legal landscape of employment and labour laws in Malaysia.

## The Employment Act governs all

The most significant change introduced through the 2022 Amendments is that with effect from 1 January 2023, all employees in the private sector irrespective of wages earned,\*\* will enjoy the benefits and added protection under the country's Employment Act 1955.<sup>1</sup>

\*\*The following provisions of Employment Act 1955 are not applicable to an employee whose wages exceeds RM4,000/month (except for specified groups of employees within Paragraph 2 of the First Schedule of Employment Act 1955):<sup>2</sup>

- Payment for work on rest day (Section 60(3))
- Payment for overtime in excess of normal hours of work (Section 60A(3))
- Entitlement of allowance during shift work (Section 60C(2A))
- Additional Payment for work on any paid public holiday (Section 60D(3))
- Full payment for a half working day that falls on a public holiday (Section 60D(4))

1. First Schedule, Employment Act 1955

2. Paragraph 1A of the First Schedule, Employment Act 1955

- Termination, Lay-off, and retirement benefits (Section 60J)

Prior to 1 January 2023, the Employment Act 1955 only applied to employees earning up to RM2,000/month, or specified groups of employees irrespective of wages earned within Paragraph 2 of the First Schedule of Employment Act 1955, with some specific sections applying to all employees. The Employment Act 1955 now becomes the minimum threshold for terms and conditions of employment for all employees, which employers are required to ensure compliance with.

## The Employment Act creates a 'presumption of employment'

Through the 2022 Amendments, the country's Employment Act 1955 now sets out guidelines for determining who is an employer and an employee, respectively, in any proceeding for an offence under the Employment Act 1955, in the absence of a written contract of service.<sup>3</sup>

In any proceeding for an offence under the Employment Act 1955, in the absence of a written contract of service, a person shall be presumed to be an "employee" until the contrary is proved, if:<sup>4</sup>

- they are provided with tools, materials, or equipment by another person to execute work;
- the manner of their work is subject to the control or direction of another person;
- their hours of work are subject to the control or direction of another person;
- their work constitutes an integral part of another person's business;
- their work is performed solely for the benefit of another person; or
- payment is made to them in return for work done at regular intervals and such payment constitutes the majority of their income.

3. Section 101C, Employment Act 1955

4. Section 101C(1), Employment Act 1955

Similarly, a person shall be presumed to be an “employer” until the contrary is proved, if:<sup>5</sup>

- they control or direct the manner of work of another person;
- they control or direct the hours of work of another person;
- they provide tools, materials, or equipment to another person to execute work;
- the work of another person constitutes an integral part of their business;
- another person performs work solely for their benefit; or
- they are paid in return for work done for them by another person.

As such, where a person is presumed to be an “employee” and an “employer”, the employer will be liable for any breach of the provisions under the Employment Act 1955.

#### Introduction of paternity leave and enhancement of maternity leave

Following the 2022 Amendments, married male employees in the private sector in Malaysia are now statutorily eligible to seven consecutive days of paid paternity leave, subject to specified conditions.<sup>6</sup>

Paternity leave will commence on the date the male employee’s spouse gives birth and it must be granted continuously for seven days.

In line with the International Labour Organization’s Maternity Protection Convention, 2000 (No. 183) which stipulates a leave period of not less than 14 weeks (98 days), the 2022 Amendments to the Employment Act 1955 increased maternity leave for every female employee from 60 days to 98 days in respect of each confinement, subject to them fulfilling the prescribed

5. Section 101C(2), Employment Act 1955

6. Section 60FA, Employment Act 1955

conditions.<sup>7</sup> “Confinement” is defined as the process of giving birth after 22 weeks of pregnancy.<sup>8</sup>

However, a female employee may, with the consent of her employer, commence work at any time during the maternity leave if she has been certified fit to resume work by a registered medical practitioner, regardless of whether she is entitled to receive maternity allowance.<sup>9</sup>

#### Introduction of flexible working arrangement

The 2022 Amendments includes an essential provision that provides for Flexible Working Arrangement. It is created to meet current requirements to implement flexible work arrangements in necessary conditions such as to curb the spread of the COVID-19 disease outbreak, and is particularly important for the post-pandemic business landscape. In this regard:

- An employee may apply in writing to his employer for a flexible working arrangement to vary his hours, days and/or place of work.<sup>10</sup>
- The employer is required to inform the employee in writing of his approval or refusal of the application within 60 days from receipt of the application.<sup>11</sup>
- An employer who refuses the application is required to state the ground of such refusal.<sup>12</sup> However, there is no provision to challenge the employer’s refusal or the grounds on which the decision is made.

It is pertinent to note that it is neither mandatory for employers to implement Flexible Working Arrangement nor to put in place a Flexible Working Policy. It is however, a recommended best practice to increase productivity and a Flexible Working Policy will

7. Section 37(1), Employment Act 1955

8. Section 2, Employment Act 1955

9. Section 37(1)(aa), Employment Act 1955

10. Section 60P, Employment Act 1955

11. Section 60Q, Employment Act 1955

12. Section 60Q, Employment Act 1955

provide clarity on the flexible working arrangement to both employees and employers.

#### No room for discrimination

The new provision relating to discrimination created through the 2022 Amendments is in line with the Convention of the International Labour Organization related to Discrimination (Employment and Occupation) Convention 1958 (No. 111). The Director General of Labour is now empowered to 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.<sup>13</sup>

Although “discrimination” is not defined under the Employment Act 1955, the provision clearly relates only to any post-employment discrimination of any person who has entered into a contract of service.

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.<sup>14</sup>

#### Advancing the fight against sexual harassment

Sexual harassment is defined under the Employment Act 1955 as “*any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.*”<sup>15</sup>

Employers are now statutorily obliged to inquire into any sexual harassment complaint made in relation to the following parties:<sup>16</sup>

13. Section 69F(1), Employment Act 1955

14. Section 69F(2), Employment Act 1955

15. Section 2, Employment Act 1955

16. Sections 81A and 81B, Employment Act 1955

1. by an employee against another employee;
2. by an employee against any employer; or
3. by an employer against an employee.

If the employer refuses to inquire, the employer shall, not later than 30 days after the date of receipt of complaint, inform the employee the reason of refusal.<sup>17</sup> Upon failure to do so, the employer shall be liable to a fine not exceeding RM50,000.<sup>18</sup>

The 2022 Amendments also imposes an additional statutory obligation on employers to, at all times, exhibit conspicuously at the place of employment, a notice to raise awareness on sexual harassment at the workplace.<sup>19</sup>

#### Prohibiting forced labour

“Forced labour” as a specific offence is also created through the 2022 Amendments to prevent the practice of forced labor in the workplace. “Forced labour” is defined as the act of an employer threatening, deceiving or forcing its employees to perform any activity, service or work and preventing the employee from leaving the place or area where the activity, service or work is carried out.<sup>20</sup>

In order to prove the existence of forced labour, the following three elements must exist, namely:-

- i. the existence of threats, fraud or coercion against employees to perform any work, service or activity;
- ii. the existence of acts that prevent employees from leaving the workplace or work area where the work, service or activity is carried out; and
- iii. acts in paragraphs (i) and (ii) above are done by the employer (including any person acting on behalf of the employer) against his employees.

17. Section 81B(2), Employment Act 1955

18. Section 81F, Employment Act 1955

19. Section 81H, Employment Act 1955

20. Section 90B, Employment Act 1955

### Conclusion

With the 2022 Amendments to the Employment Act 1955 and the First Schedule thereunder, the distinction between an employee within the scope of the Employment Act 1955 and non-Employment Act 1955 employee have been abolished. Now, all employees

irrespective of wages earned or type of job performed will benefit from the added protection under the Employment Act of 1955, notably the minimum terms and conditions of employment as prescribed therein. Time will tell how effective and adequate these changes are in upholding and improving employment and labour laws in Malaysia.



**Keat Ching** is an active litigator and has appeared at all levels of the Malaysian Courts, from the Labour Court to the Federal Court. Apart from advising on cases involving workplace misconduct, sexual harassment, poor performance and fixed term contracts, Keat Ching also provides regular advice on corporate restructuring affecting employees, in particular voluntary separation scheme (VSS), restructuring of senior management positions, establishment and closure of foreign companies in Malaysia as well as legal forensic investigation and labour due diligence. Keat Ching currently serves as the Vice Chair of the LAWASIA Employment Law Committee and the Co-Chair of the Bar Council's Industrial & Employment Law Committee. She speaks regularly at local and international conferences. She graduated from the University of Nottingham, UK and was admitted as Advocate & Solicitor of the High Court of Malaya in 1998.



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