

THE COMING INTO FORCE OF THE EMPLOYMENT (AMENDMENT) ACT 2022

The Employment (Amendment) Bill 2021 which proposed wide-ranging amendments was tabled for its first reading on 25th of October 2021. After close to a year, the Human Resources Minister, M Saravanan announced that the Employment (Amendment) Act 2022 ("**this Act**") will come into force on the 1st of September 2022. The key amendments to the Employment Act 1955 ("**EA 1955**") are as follows:-

(1) Working Hours

The maximum weekly working hours for the employees are reduced from 48 hours per week to 45 hours per week.[1] This essentially means that the employment contract for those covered under the EA 1955 would have to be reviewed and amended accordingly as any work performed beyond the now-amended working hours would entitle the employees to overtime pay.

Failure of the employers to adhere to the provisions on working hours, specifically the now reduced weekly working hours would subject the employers to penalty of up to RM50,000.00.[2]

(2) Flexible Working Arrangements

An unprecedented amendment to the EA 1955 would be the option for employees to apply for flexible working arrangements. Employees may now make a written application to the employers to vary the hours of work, days of work or place of work in relation to their employment.[3]

However, the employers may still exercise their prerogative on whether or not such application will be allowed within 60 days from the date the application was made. Upon the employers' refusal to approve such application, the employers merely need to state the grounds of refusal.[4]

(3) Maternity & Paternity Leave

The EA 1955 is amended to increase paid maternity leave from 60 days to 98 days,[5] in line with the recommendations by the International Labour Organization (ILO). This Act also introduced 7 days of paid paternity leave.[6] However, a male employee may only apply for such paternity leave up to a total of five confinements only, regardless of the number of spouses.[7]

A male employee will be eligible to apply for paternity leave if the following 2 pre-conditions are fulfilled, which are firstly, he has been employed by the same employer at least 12 months immediately before the commencement of such paternity leave; and secondly, he has notified his employer of the pregnancy of his spouse at least 30 days prior to the expected confinement or as early as possible after the birth.[8]

(4) Protection against Termination on Pregnancy Grounds

This Act spells out certain restrictions whereby employers are prohibited from terminating an employee when she is pregnant, except on the following grounds:-

- (i) willful breach of a condition of the contract of service;
- (ii) misconduct; or
- (iii) closure of the employer's business.

This prohibition also disallows the employers to even issue a notice of termination to the said pregnant employee except on the grounds enumerated above.[9]

The amendment seeks to provide a wider protection for pregnant employees from being terminated due to her pregnancy or any pregnancy-related illnesses. Previously, the EA 1955 only provides protection to pregnant employees if a pregnant employee is dismissed:-

- (i) prior to 90 days post maternity leave due to illness arising out of her pregnancy which renders her unfit to work;[10] and
- (ii) due to closure of the employer's business.[11]

(5) Employment of a Foreign Employee

Prior to the amendment of the EA 1955, foreign employees may be employed in Malaysia provided that their employers furnish their particulars to the Director General.[12] However, after coming into force of the new amendment, employers may only hire foreign employees after obtaining prior approval from the Director General.[13] The employer's failure to obtain the Director General's approval would subject the employers to a fine not exceeding RM100,00.00 or to imprisonment for a term not exceeding 5 years or to both.[14]

The factors that the Director General may take into account before granting his approval are whether on the day the application is made, the employers:-

- (i) have any outstanding matter relating to any decision, order or directive issued under this Act; or
- (ii) have any case relating to any conviction for any offence under this Act and other specified Acts;^[15] or
- (iii) were ever convicted of any offence under any written law in relation to anti-trafficking of persons and forced labour.^[16]

In addition, the employers also bear a duty to inform the Director General of the foreign employees' termination of service within 30 days of the said termination in any of the following events:-

- (i) the termination is caused by the employer; or
- (ii) the foreign employees' employment pass expired; or
- (iii) the foreign employees are repatriated or deported.^[17]

On the other hand, if the concerned foreign employees terminate their employment or abscond from their place of employment, the employers shall inform the Director General within 14 days of the termination of service or after the foreign employees' absence.^[18]

(6) Prohibition on Forced Labour

Section 90B which stipulates that forced labour is an offence with a punishment of a fine not exceeding RM100,00.00 or imprisonment for a term not exceeding 2 years or both is inserted into this Act.^[19]

Forced labour is said to be committed when an employer threatens, deceives or forces an employee to do any activity, service or work and prevents that employee from proceeding beyond the place or area where such activity, service or work is done.^[20]

(7) Director General's to Inquire on Complaints Relating to Discrimination in Employment

Section 69F is inserted into this Act which gives power to the Director General to inquire into and decide any dispute between an employee and his employer in respect of any matter relating to discrimination in employment. The Director General is also vested with the power to make an order after such inquiry has been done.^[21] Failure to comply with the Director General's order constitutes an offence and can result in a fine not exceeding RM50,000.00 and for continuing offence, a daily fine of up to RM1,000.00 for each day the offence continues.^[22]

However, it is noteworthy that “discrimination” is not defined in this Act which means it could include anything that could be considered discriminatory and ultimately, it would be up to the DG’s discretion to decide on the issue by making an order after inquiring into the complaints.

(8) Presumption as to Employer-Employee Relationship

This Act now introduces presumption as to employer-employee relationship in the absence of a written contract of service. However, this presumption is only applicable to those employees covered under the First Schedule to this Act. The factors that may trigger the presumption would include the following:-

- (i) the amount of control over the manner of work;
- (ii) the amount of control over the hours of work;
- (iii) whether the tools, materials or equipment necessary to execute the work are provided;
- (iv) whether the work done forms an integral part of the business;
- (v) whether the work performed is solely for the benefit of another person; or
- (vi) whether payment is made in return of the work done which constitutes most of the employee’s income.[23]

(9) The Requirement to Exhibit Notice on Sexual Harassment

Section 81H which requires employers to exhibit conspicuously at the place of employment, a notice on sexual harassment at all times is inserted into this Act to raise awareness on sexual harassment.[24]

(10) Court Order for Payments Due to Employees

If an employer has been convicted of any offences relating to payments payable to an employee, including wages, the court before which he is convicted has the authority to make an order for the employer to make such payments to the employee.[25]

In the event an employee fails to comply with the court’s order to make payments to the employee, the aggrieved employee may apply to the court for a warrant to levy the employer’s property by way of distress and sale of the employer’s property or through a fine imposed under the Criminal Procedure Code.[26]

(11) Increment of Penalties

The general penalty is increased from RM10,000.00 to RM50,000.00.[27] On the other hand,

the penalty for failure to comply with the order or decision of the Director General made pursuant to an inquiry is increased from RM10,000.00 to RM50,000.00 and the daily fine for continuing offence is raised from RM100.00 to RM1,000.00 per day.[28]

Prior to the amendment (and up until the First Schedule is amended), the EA 1955 is only applicable to certain groups of employees which involve employees whose earnings do not exceed RM2,000.00. Other groups, irrespective of wages, include those who are:-

- (i) engaged in manual labour;
- (ii) engaged in the operation or maintenance of vehicles;
- (iii) supervising or overseeing other employees engaged in manual labour;
- (iv) engaged in any vessel, or
- (v) domestic servants.[29]

However, there were certain provisions in the EA 1955 which sought to protect every employee employed under a contract of service regardless of their income or the category of work which are the now-deleted sections 44A, 69B and 81G. Previously, section 44A extended the eligibility to be entitled to maternity leave to every employee. Section 69B relating to the Director General's power to inquire into the complaints by employees employed under a contract of service and section 81G relating to the Director General's inquiry into complaints of sexual harassment also extended to every employee, irrespective of wages.

However, although those specific provisions were repealed, the Ministry of Human Resources proposed to extend the protection afforded by this Act to every employee regardless of their incomes in accordance with section 2(2) of the EA 1955 by way of a Minister's Order. At the date of this publication, the Minister of Human Resources has yet to announce any amendments to the First Schedule.

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1. Section 60A(1) of the Employment (Amendment) Act 2022.
 2. Section 99A of the Employment (Amendment) Act 2022.
 3. Section 60P(1) and Section 60Q(1) of the Employment (Amendment) Act 2022.
 4. Section 60Q(2) & (3) of the Employment (Amendment) Act 2022.
 5. Section 37(1)(d)(ii) of the Employment (Amendment) Act 2022.
 6. Section 60FA(1) of the Employment (Amendment) Act 2022.
 7. Section 60FA(2) of the Employment (Amendment) Act 2022.
 8. Section 60FA(3) of the Employment (Amendment) Act 2022.
 9. Section 41A(1) of the Employment (Amendment) Act 2022.
 10. Section 42(1) of the Employment Act 1955.

11. Section 37(4) of the Employment Act 1955.
12. Section 60K(1) of the Employment Act 1955.
13. Section 60K(1) of the Employment (Amendment) Act 2022.
14. Section 60K(5) of the Employment (Amendment) Act 2022.
15. Section 60K(4)(a) of the Employment (Amendment) Act 2022.
16. Section 60K(4)(b) of the Employment (Amendment) Act 2022.
17. Section 60KA(1) of the Employment (Amendment) Act 2022.
18. Section 60KA(2) of the Employment (Amendment) Act 2022.
19. Section 90B of the Employment (Amendment) Act 2022.
20. Ibid.
21. Section 69F(1) of the Employment (Amendment) Act 2022.
22. Section 69F(2) of the Employment (Amendment) Act 2022.
23. Section 101C of the Employment (Amendment) Act 2022.
24. Section 81H of the Employment (Amendment) Act 2022.
25. Section 87A(1) of the Employment (Amendment) Act 2022.
26. Section 87A(2) of the Employment (Amendment) Act 2022.
27. Section 99A of the Employment (Amendment) Act 2022.
28. Section 69(4) of the Employment (Amendment) Act 2022.
29. The First Schedule to the Employment Act 1955.

Written by:



Melinda Marie D'Angelus
Partner
melinda.Dangelus@azmilaw.com



Fadzlin Roslee
Senior Associate
fadzlin@azmilaw.com



Vanessa Iskandar Ng
Associate
vanessa.ng@azmilaw.com

Corporate Communications
Azmi & Associates
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