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Employment

# Highlights of the Employment (Amendment) Bill 2021

## Introduction

There has been great anticipation over the past few years on the proposed amendments to be made to the existing Employment Act 1955 ("**Act**") in Malaysia. The Employment (Amendment) Bill 2021 ("**Bill**") to amend the Act was tabled in Parliament for first reading on 25 October 2021.

Although the proposed changes set out in the Bill are less wide-ranging as previously envisaged, there are nonetheless notable proposed changes that may affect certain industries. Past proposals to expand the coverage of employees to be made subject to the Act has not made its way to the Bill.

## Key Proposed Changes

We summarise the material proposed amendments below.

### 1) Power of Magistrate and general penalty

The Bill proposes to empower the court of a First-Class Magistrate to try any offence and impose penalties under the Act. The Bill also seeks to increase the amount of the general penalty imposed from RM10,000 to RM50,000 for any offence in the Act or its regulations, for which no penalty is prescribed.

It is also interesting to note that the Bill proposes to empower the court to order an employer to pay any payment due to an employee. If the employer fails to comply, then a warrant may be issued to levy the employer's property for any payments due.

### 2) Calculation of wages for incomplete month of service

The Bill proposes to introduce Section 18A to cover calculation of wages where an employee has not completed a whole month of service due to any of the following reasons:

- (a) His employment commenced after the first day of the month;
- (b) His employment terminated before the end of month;
- (c) He took leave of absence without pay; or
- (d) He was called up for National Service.

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## Employment

The formula shall be as follows:

$$\frac{\text{Monthly Wages}}{\text{Number of days of the wage period}} \times \text{Number of days eligible in the wage period}$$

The existing manner to calculate an employee's ordinary rate of pay under Section 60I of the Act, however, remains unchanged.

### 3) Foreign employees

There will be additional approval requirements applicable to the employment of foreign employees. Currently, an employer is only required to furnish the particulars of foreign employees employed to the Director General of Labour ("**Director General**") within 14 days of commencement of such employment. The proposed amendments now require the prior approval from the Director General to be obtained prior to the employment of a foreign employee.

Such approval is subject to the employer having no outstanding matter relating to any decision, order or directive issued under the Act, or outstanding matter for any conviction under the laws applicable to social security, minimum wages or minimum housing, or conviction in relation to human trafficking and forced labour. An employer who employs a foreign employee without such approval will, on conviction, be liable to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding five years, or both.

The Bill further proposes to impose an obligation on the employer of a foreign employee to inform the Director General within 30 days of any termination:

- (a) by the employer;
- (b) on account of the expiry of the employment pass issued to the foreign employee; or
- (c) by reason of the repatriation or deportation of the foreign employee.

An employer must also inform the Director General within 14 days of any termination of service by the foreign employee himself or due to his abscondment from his place of employment.

### 4) Contractor for labour to enter into written contract

A contractor for labour is a person who contracts with a principal, contractor, or sub-contractor to supply labour required for the execution of work (i.e., a manpower service provider).

Currently, a contractor for labour is required to be registered with the Director General prior to the supply of any employee to the principal, contractor, or sub-contractor, and to maintain registers containing information of each employee that it supplies. The Bill now proposes to also require a contractor for labour to enter into a "contract in writing" and to make such contract available for inspection.

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## Employment

It is, however, unclear from the Bill whether this refers to a written contract between a contractor for labour and the principal or if it refers to a contract between a contractor for labour and its employee being supplied. From the context, the former is more likely to be the case.

Failure by a contractor for labour to comply with any of the above obligations is an offence and will, on conviction, attract a fine not exceeding RM50,000.

### **5) Presumption of employee and employer relationship**

The existing Act requires a contract of service for a period exceeding one month to be in writing. Notwithstanding this, there have been instances where employees continue to be employed without any written contract.

Although the determination of the status of a person without a written contract as an employee can still be decided based on caselaw, the Bill now proposes a rebuttable statutory presumption that applies in the absence of a written contract of service.

A person can now be presumed to be an employee (unless the contrary is proven) in any of the following circumstances:

- (a) Where his manner or hours of work is subject to the control or direction of another person;
- (b) Where he is provided tools, materials or equipment by another person to execute work;
- (c) Where his work constitutes an integral part of another person's business;
- (d) Where his work is performed solely for the benefit of another person; or
- (e) Where payment is made to him in return for work done by him at regular intervals and such payment constitutes the majority of his income.

This presumption may come in useful in situations where an employer deliberately avoids entering into a written employment contract with a person, purportedly to avoid the applicability of the employment law or benefits. For example, organisations who had in the past, engaged persons to undertake work in the guise or the label of a non-genuine "intern", will arguably be subject to this statutory presumption.

### **6) Working hours and sick leave**

Under the existing Act, the normal work hours of an employee may not exceed 48 hours per week and is subject to a maximum of eight working hours per day. Otherwise, overtime rates will apply.

The Bill proposes to reduce this cap to a maximum of 45 hours in a week.

Further, the existing Act currently provides that where hospitalisation is necessary, the aggregate number of days of paid sick leave in a calendar year which an employee is entitled to is 60 days inclusive of any hospitalisation. The Bill proposes to remove this and thus paid hospitalisation leave of 60 days would be treated separately from any paid sick leave. An employee will thus be entitled to 60 days of paid hospitalisation leave plus the number of days of paid sick leave to which they are entitled to in a calendar year (depending on the length of employment).

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## Employment

### **7) Apprenticeship**

The existing Act describes an "apprenticeship contract" as a written contract entered into by a person with an employer who undertakes to employ the person and train or have him trained systematically for a trade for a specified period, which shall not be less than two years. The Bill proposes to reduce this period to between six months to 24 months, thus bringing an apprentice who is engaged in manual labour for a period between six months to 24 months within the definition of an employee under the First Schedule of the Act.

### **8) Flexible working arrangement**

The Bill proposes to allow an employee to make an application for "flexible working arrangements" to vary his hours of work, days of work or place of work. This is, however, subject to the terms of the contract of service. The employee may make the application in writing and the employer is required to either approve or refuse the application within 60 days by informing the employee in writing and state the grounds (in the case of a refusal).

The provisions on flexible working arrangement in the Bill have been watered down compared to the original proposals raised during consultation of the Bill. The reasons for refusal of an application for flexible working arrangement are not provided for under the Bill and hence, it remains to be seen whether such new provisions on flexible working arrangement can be put to good use by employees.

The Minister of Human Resource may, however, make regulations and therefore, further provisions may be provided under regulations to supplement the above.

### **9) Discrimination**

The Bill proposes to empower the Director General to inquire into and decide or make an order on any dispute between an employee and his employer in respect of any matter relating to discrimination in employment. Failure by an employer to comply with any order made pursuant to that dispute is an offence and on conviction, the employer will be liable to a fine not exceeding RM50,000. In the case of a continuing offence, a daily fine not exceeding RM1,000 for each day the offence continues after conviction, will be imposed.

The wordings in the Bill are surprisingly wide and it would suggest that a complaint may be made on various discriminatory practices in the employment context. For example, these may include not just discrimination on grounds of race or gender or disability, but may also extend to include discrimination on promotions, or even approval of leave applications, etc. It is unclear whether these can also be extended to cover job applicants although arguably, job applicants are not employees and thus should not fall within the scope of any inquiry. It remains to be seen whether such provisions will be interpreted narrowly or liberally by the Courts as these may have a material impact on businesses if the Director General is allowed to substitute business management decisions with that of its own, on the pretext of discriminatory practices.

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## Employment

### **10) Forced labour**

The Bill proposes to introduce a new offence of forced labour. Any employer who 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, commits an offence and shall, on conviction, be liable to a fine not exceeding RM100,000 or to imprisonment not exceeding two years or both.

The aim of the Bill is to align the Act with the requirements imposed by the International Labour Organisation ("ILO"). Indicators by ILO may thus be used as reference to ascertain what may amount to forced labour. Such indicators include restrictions on freedom of movement, excessive hours, withholding of wages or identity documents, physical or sexual violence, threats, and intimidation.

### **11) Powers of the Director General in Inquiry**

Under the existing Act, the Director General may inquire into and decide on any dispute between an employee and his employer in respect of wages or any other payments that are due to such employee. Such powers on inquiry are extended under the existing Act to cover not only employees that fall within the ambit of the First Schedule of the Act but also to employees with monthly wages exceeding RM2,000 but not exceeding RM5,000.

In what may be an oversight, the Bill proposes to remove the provisions in the Act which currently allows the Director General to inquire into and decide on any dispute between an employee and his employer in circumstance where the employee earns a wage of more than RM2,000 but less than RM5,000 (i.e., non-First Schedule employees).

The explanatory notes to the Bill suggest that such a deletion is meant to allow an employee to bring any dispute before the Director General irrespective of the amount of wages he receives without the current cap of RM5,000 under the Act. However, in the absence of any express provision in the Bill which extends the powers of the Director General to inquire into matters beyond those involving employees that are covered under the First Schedule, all other employees that do not fall within the ambit of the First Schedule of the Act will no longer enjoy such a benefit currently accorded to them. It remains to be seen whether the Bill will be passed in its current form.

### **12) Women employment and maternity leave**

The Bill seeks to delete the entire Part VIII of the Act, thus lifting any prohibition on employing females for night work, underground work, etc., in compliance with the requirements of ILO.

In relation to maternity matters, the Bill proposes to extend the existing maternity leave and allowance benefit under the Act from 60 days to 90 days. This is in line with previous budget announcements by the government.

The Bill also proposes to make it an offence for an employer to terminate the employment of a pregnant employee except on grounds relating to misconduct, wilful breach of the employment contract, or closure

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## Employment

of business. Burden will be on the employer to prove that the termination is not on grounds of pregnancy or illness arising out of pregnancy.

While the aim of the amendments should be viewed positively, this will certainly affect businesses that may wish to pursue a genuine redundancy or retrenchment exercise which may involve a pregnant employee amongst all other affected employees. The statutory exceptions permitting the termination of employment of a pregnant employee are rather narrow.

Alongside all the well-intended amendments in these areas, the Bill however also proposes the deletion of the entire Section 44A of the Act which currently provides for maternity benefits / protection to be accorded to every female employee who is employed under a contract of service irrespective of the amount of her wages. In the absence of any express provision extending maternity benefits to female employees that fall outside of the ambit of the First Schedule of the Act, female employees that earn a monthly wage exceeding RM2,000 may no longer enjoy the statutory maternity benefits that they currently enjoy. It is unclear whether this is another oversight of the Bill and it remains to be seen whether the Bill will pass into law in its current form.

### **13) Paternity leave**

The Bill proposes for a married male employee to be given three days of paid paternity leave in respect of each confinement, up to a maximum of five confinements, irrespective of the number of spouses. The entitlement for such paid leave shall, however, be subject to these two conditions:

- (a) He was employed with the same employer for at least 12 months before the commencement of such paternity leave, and
- (b) He has notified his employer of the pregnancy at least 30 days from the expected confinement or as early as possible after the birth.

This is a welcome introduction as there is currently no paternity benefit entitlement for new fathers under any Malaysian law.

### **14) Sexual Harassment**

The Bill proposes to require employers to exhibit conspicuously a notice to raise awareness on sexual harassment at workplace. It also proposes to increase the penalty for an employer's failure to inquire into a sexual harassment complaint from RM10,000 to RM50,000.

More notably, however, the Bill also seeks to delete Section 81G of the Act which currently extends the existing sexual harassment provisions under the Act to apply not merely to employees under the First Schedule of the Act but to every employee employed under a service contract irrespective of wages. As with the proposed amendments on maternity provisions, such a deletion will essentially limit the sexual harassment protection provisions to apply only to the existing category of employees under First Schedule of the Act. Thus, if the Bill is passed into law in its current form, there will be an overall regression in the protection against sexual harassment conferred on employees regardless of the proposed increase in penalties for non-compliance of the law.

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Employment

**Remarks**

While most of the proposed amendments are welcomed, the proposed deletions of Section 69B (inquiry in relation to wages), Section 44A (maternity), and Section 81G (sexual harassment) of the existing Act are of particular concern. The Bill will have to be revised to expand the existing protection conferred under those sections of the law to all employees irrespective of the amount of their wages, rather than limit the same to only employees that fall under the First Schedule of the Act.

If you have any queries on the above, please feel free to contact our team members below who will be happy to assist.

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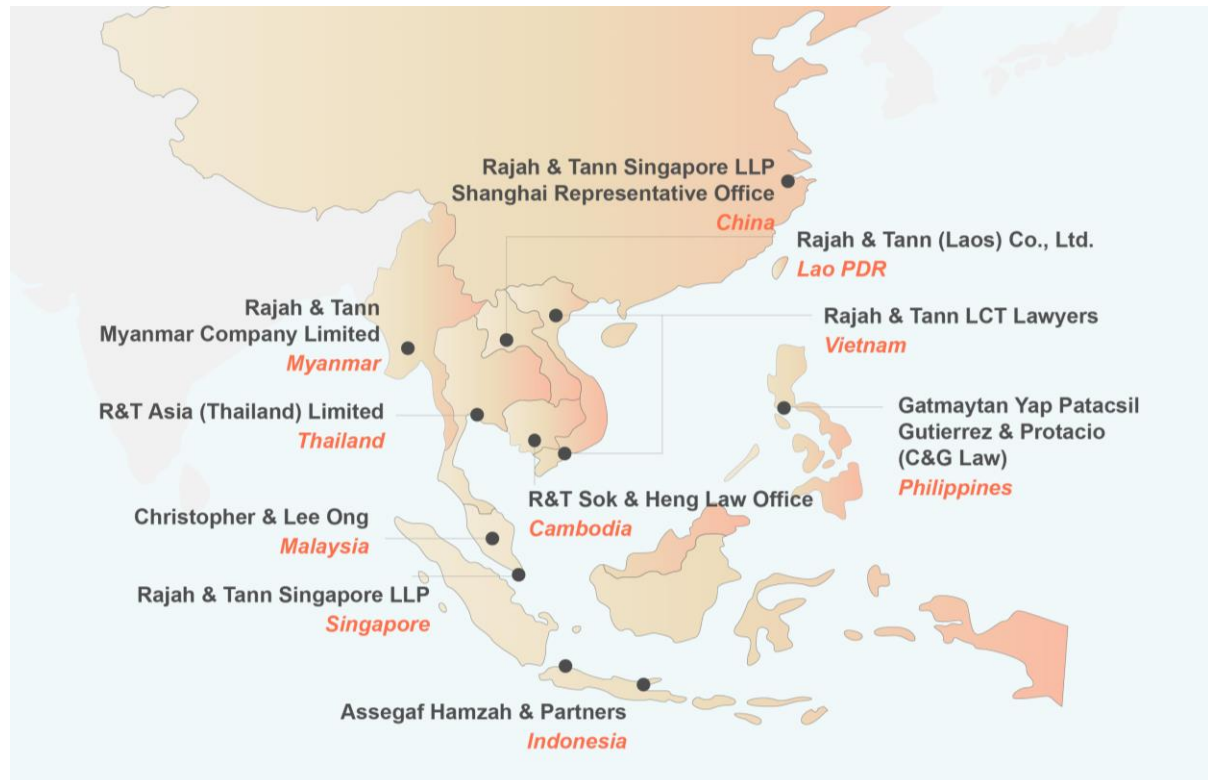
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