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Malaysia News:

Update on Immigration Matters

Upcoming Effects of the
Companies Act 2015

October 2016

Update on Immigration Matters

Only recently Malaysia's Expatriate Services Division (ESD) tightened the requirements for the application of employment passes in Malaysia. Simultaneously, it introduced new restrictions to the employment pass category III which allows companies to hire skilled foreign employees under less stringent conditions.

Overview

Companies that intend to hire foreign employees have to apply for an employment pass before the employee enters the country. In order to submit an employment pass application, the company must be registered with ESD. The company registration process takes approximately 21 days from the submission of the documents to ESD and is subject to the following paid-up capital requirements:

| Shareholding Structure | Paid-up Capital |
|--|-----------------|
| 100% local owned | RM250,000 |
| joint venture | RM350,000 |
| 100% foreign owned | RM500,000 |
| foreign owned companies (foreign equity of more than 51%) operating in the wholesale, retail, trade (WRT) sector | RM1,000,000 |

Since ESD introduced a new category of employment passes on 15th July 2016, there are three different categories now:

Category I for foreigners with a basic salary of a minimum RM5,000 per month and an employment contract valid for a minimum of 24 months.

Category II for foreigners with a basic salary of a minimum RM5,000 per month and an employment contract valid for less than 24 months.

Category III for foreigner with a basic salary between RM2,500 to RM4,999 per month and an employment contract of not more than 12 months.

Tightening the Rules

With its announcement from 20th July 2016, ESD made it clear that it will no longer tolerate the current practice of entering the country for employment purposes before obtaining an approval letter:

“Effective 1 August 2016, please be informed that all Employment Pass Category I, II & III applications must obtain an Approval Letter before entering Malaysia for the purpose of employment.”

From 20th August 2016 onwards, foreigners now have to produce the letter of approval at Malaysia's entry point for verification purposes. Not being able to do so will most likely prevent foreigners who want to work in Malaysia from entering the country. For foreigners who have entered Malaysia with a tourist visa prior to their employment, the new administrative practice means that they have to leave the country for at least 72 hours before entering with the letter of approval again.

Irrespective to which extent the new guidelines are enforced, it is highly advisable to plan the immigration process in advance to avoid issues at the entry point. This involves amongst others also the application for licenses required during the ESD account opening (if applicable).

Employment Pass Category III

According to the Ministry of Human Resources, there are currently more than 2 million foreign workers legally employed in Malaysia. The new employment pass category III was introduced to attract a better skilled work force, while lowering the requirements for the employment pass application. Such new category of employment pass is seemingly in line with the government's decision to issue a freeze on the intake of new foreign workers from all source countries, such as Myanmar, India or Thailand,

The employment pass category III is available for all foreign employees with an employment contract of not more than 12 months and a monthly basic salary between RM2,500 and RM4,999. In addition to the employment pass category I and II, the employment pass category III does not allow the holder to apply for a dependent pass for his/her relatives.

The employment pass category III is valid for 1 year and can be renewed twice, subject to the ESD's review. Upon its second renewal, there is a cooling-off period. As such the employee has to leave the country and to serve a three-month cooling-off

period before being able to apply for a new employment pass category III and enter the country again. According to ESD, an exemption will however be granted, if the employee is converting his/her employment pass category III into an employment pass category I or II. Employment pass category III holders who are changing their employers must leave the country and serve a three-month cooling period as well.

Companies that intend to apply for employment passes category III, have to obtain the approval from the Ministry of Home Affairs to be exempted from the minimum salary requirement of RM5,000.

Summary

Overall, the alterations of the immigration policy are beneficial for all companies that intent to hire high skilled foreign workers in Malaysia. Tightening the administrative practice at the point of entry, does not impair the overall benefits, but only call for a better planning of all employment and immigration matters.

Upcoming Effects of the Companies Act 2016

Introduction

The Companies Act 2016 ('the Act'), gazetted on 15 September 2016, was formulated to replace the Companies Act 1965 (Act 125) which was regulated by the Companies Commission of Malaysia (SSM), is expected to come into force by early 2017.

The Act is expected to transform Malaysia's corporate landscape. The Act aims to ease doing business, spurring entrepreneurship, deregulating certain aspects of the corporate process, and to introduce the concept of corporate rescue for ailing companies.

Indeed, the Act will lead to some interesting changes in the Malaysian corporate scene.

The Goals of the Companies Act 2016

The most significant key points of the Act are set out below:

1. An Easier Incorporation – shareholder, common seal, certificate of incorporation and share certificates

The Act will introduce the ability to incorporate a company with one individual being the single shareholder and single director. This will obviously make incorporating a company more attractive for entrepreneurs and businesses. A single individual can have complete control of the company, and still enjoy the separate liability of the corporate entity.

To further ease the incorporation process, the Act provides that a company may elect whether to have a common seal or otherwise. A document executed by at least two authorised officers (one of whom is a director), or in the case of sole director in the presence of a witness who attests the signature, shall have similar effect as a document executed under the common seal of the company.

The certificate of incorporation will no longer be issued automatically, instead a notice of registration issued by the registrar will be the conclusive evidence that the company has been duly incorporated. Nevertheless, upon payment of prescribed fees, a certificate of incorporation may still be issued on application by the company to the registrar.

Similarly, share certificates is not required to be issued by a company unless requested so by its shareholders or prescribed by its constitution. The entry of the name in the register of members as shareholder is, in absence of evidence to the contrary, prima facie evidence of legal title.

2. No Annual General Meeting (“AGM”) for Private Companies

The Act abolishes the requirement for AGM for private companies, in view thereof, audited accounts are not required to be presented at the AGM. This will lower the running costs for the companies.

3. No-Par Value Regime

The Act introduces a no-par value regime where new shares issued by a company shall have no par-value/nominal value. This new regime will ease the management of the company and remove the concept of share premium accounts and reserves.

4. Easier Passing of Written Resolutions for Private Companies

Written resolutions of shareholders of private companies will no longer be required to be unanimous, the Act allows for majority shareholders to sign off the written resolution to pass it as an ordinary resolution.

5. No More Memorandum and Articles of Association, Constitution of company and Capacity of company

Under the Act, the company will no longer have a Memorandum and Articles of Association. A company may adopt a Constitution if it wishes to tailor provisions for itself and its members. Existing companies will have its Memorandum and Articles of Association deemed to be the new Constitution. With this, there is also no mandatory requirement for a company to set out its object, hence a company will not be restricted from carrying on transactions that are not within its objects. The Act provides a company with the unlimited capacity of a natural person.

6. New Solvency Test Requirement

To permit an easier corporate process, the Act put in place certain safeguards based on a “solvency test” when the company undertakes the following:

- (i) Declaration of dividends;
- (ii) Capital reduction without a court order, financial assistance and redemption of preference shares; and
- (iii) Share buyback.

This new test aims to ease third parties doing business with companies and to protect their rights as creditors of the company.

In the case of a breach of this solvency test, the directors then face personal liability and may face criminal sanctions.

7. Increase in Sanctions on Directors

There is a general increase in the sanctions that directors will face for breaches under the Act – for (i) Director – a fine of up to RM3million or up to five years’ imprisonment, or both; and (ii) company, a fine of up to RM3million.

8. Corporate Rescue

The new Act will introduce two new corporate rescue mechanisms, Corporate Voluntary Arrangement and Judicial Management, to help financially distressed companies. The aim is to allow these companies to restructure their debts, to remain as a going concern and to avoid winding up.

To conclude, the Act seek to reduce costs of compliance via facilitation and giving companies flexibility in their daily operation without compromising on internal control and corporate governance.

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