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Malaysia News:

Proposed amendments to employment law

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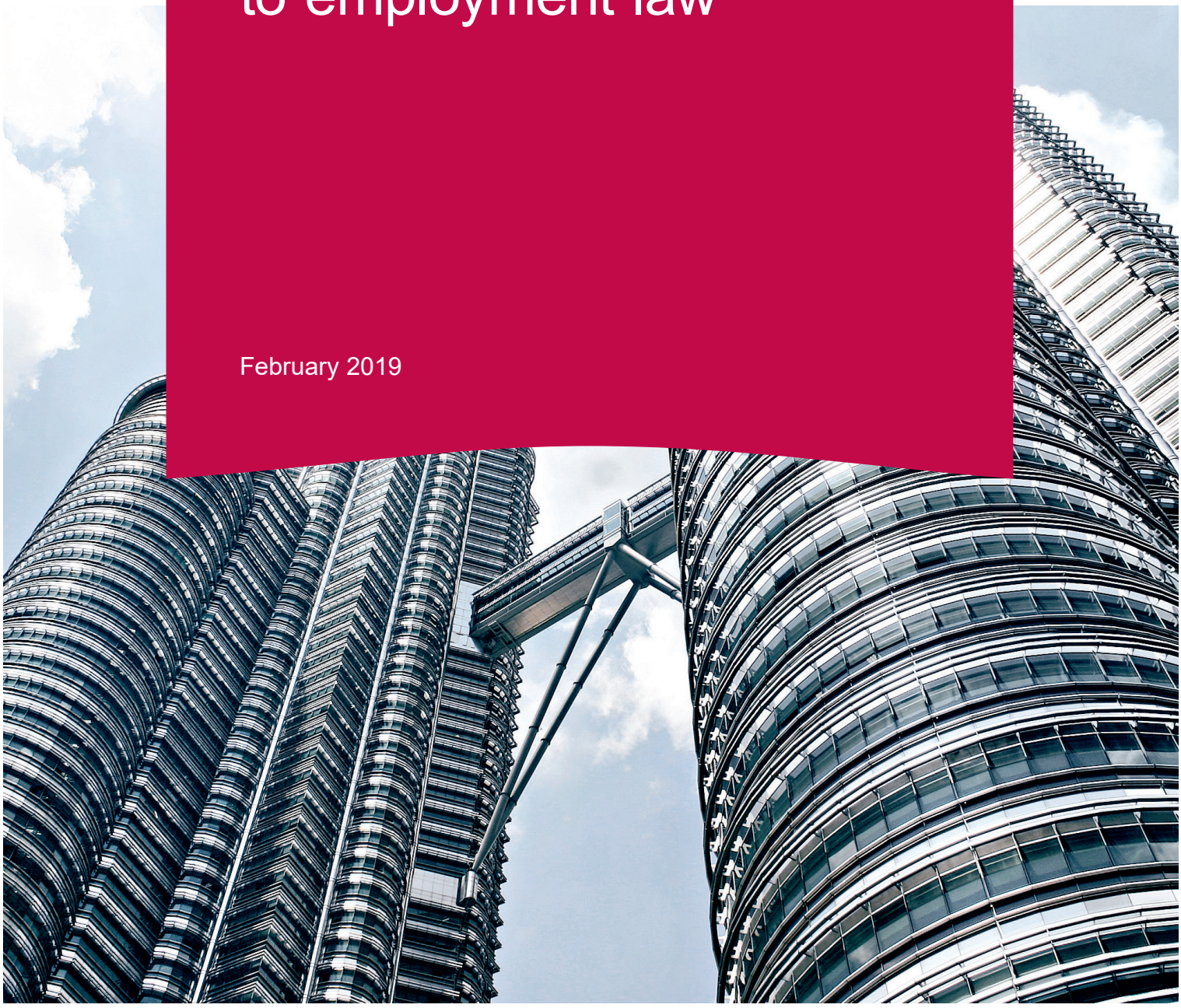

Proposed amendments to employment

Introduction

In late 2018, the Ministry of Human Resources (MOHR) proposed significant amendments to the Employment Act 1955 (EA) and the Industrial Relations Act 1967 (IRA). At present, the Ministry is seeking public feedback, and the proposals are subject to further revisions.

The proposed changes are part of the MOHR's initiative to better align Malaysia's employment law with the standards of the International Labour Organisation Convention. If approved, the amendments will have wide-ranging effects on Malaysia's employment law landscape, most notably in four respects:

A. The term "employee" will be redefined, with the consequence of more individuals being categorised as employees and being entitled to the benefits of that status.

B. There will be substantially greater workplace protection for employees in relation to working hours, discrimination, maternity considerations and sexual harassment;

C. The system for employing foreign employees will be reformed; and

D. An Industrial Appeals Court will be created, introducing a right of appeal against awards of the existing Industrial Court.

Though by no means an exhaustive guide to the MOHR's proposals, this newsletter aims to address these four issues in turn and examine their potential implications for employers.

A. Anyone with a contract of service is "employee"

Prior to examining the kinds of protection available under the Acts, questions on who the Acts cover must first be addressed. The IRA protects "workmen" while the EA protects "employees". Under the Acts as they presently stand, anyone with a contract of employment is a workman under the IRA, but only those with annual wages not exceeding MYR 2,000 or are engaged in manual labour are employees under the EA. In other words, an individual who is a workman and thus protected under the IRA may not also be an employee entitled to the protection of the EA.

The proposed EA amendments abolish the MYR 2,000 threshold and define employees as anyone with a contract of service. It should be noted that high-level personnel such as directors, managers and executives will also be employees under the EA. This change begs the question of whether there are any differences between contracts of employment and contracts of service, on which the Acts and proposals are unhelpful. If they are substantially the same, post-amendment, anyone who is a workman under the IRA will very likely also be an employee under the EA.

Nevertheless, while the proposed EA amendments widen the range of individuals who can be classed as employees, it also introduces a two-tiered scheme of protection for employees:

- Employees with wages exceeding MYR 5,000 (not including overtime payments, commissions or subsistence allowances); and
- Employees with wages below that threshold.

The difference between the first and the second category of employees is its respective scope of protection: While employees of the second category are covered by all provisions of the EA, the provisions regarding the following matters do not apply to the first category:

- Overtime payments;
- Limitation on maximum weekly working hours;
- Entitlement to additional pay if an employee is required to work during paid public holidays; and
- Termination, lay-off and retirement benefits.

In other words: Contracts for employees earning more than MYR 5,000 per month should expressly address these matters.

The table below summarises the scope of the amended Acts for individuals with contracts of employment/ service:

	IRA	EA
Wages not exceeding MYR 5,000, excluding overtime, commissions and subsistence allowances	Full protection	Full protection
Wages exceed MYR 5,000, excluding overtime, commissions and subsistence allowances	Full protection	No protection on weekly hours, additional pay on public holidays and termination, lay-off and retirement benefits.

There are two further changes to the EA that should be noted, the first being that all contracts of service **under the EA will have to be in writing**, as opposed to the present rule where only those exceeding one month have to be so.

Secondly, the EA proposals introduce **the *presumption* that an individual is an employee**, regardless of the terms of his contract of service, if one or more of the following factors are present:

- The individual's manner of work is controlled or directed by another;
- His working hours are controlled or directed by another;
- His work forms an integral part of another's business;
- His work is performed solely or mainly for another's benefit;
- His tools, raw materials or work equipment are provided by another;
- He is paid wages at regular intervals; or
- Such wages are his sole or principal source of income.

Taken together, these changes may be helpful in cases where an individual's status as an employee is questionable. However, the greater number of individuals who count as employees and thus being entitled to the benefits of employment will increase costs for employers.

B. Increase in protection of employees

Having addressed how an employee is defined by the EA proposals, this following section will examine the four most significant areas in which those proposals strengthen employee protection, namely:

I. Working hours;
II. Protection against discrimination;
III. Maternity considerations; and
IV. Protection against sexual harassment.

I. Working hours

In relation to working hours, the EA proposals introduce the following three major changes:

1. The creation of a right to request flexible working arrangements;
2. A reduction of maximum weekly hours; and
3. The creation of new restrictions on night work.

1. Flexible working arrangements

If the EA is amended as proposed, **an employee will always have the right to *request* flexible working arrangements**, regardless of the terms of his contract of service. However, an employer will only have the obligation to *consider* that request and give a decision in writing within one month. If an employer refuses the request, his decision must be justified by reasons specified in the proposed amendments, for example that the employer is unable to reorganise work or recruit additional employees to accommodate the employee's desired hours.

An employee who believes the employer infringed these rules can complain to the Director General of Labour (DGL), who can then issue directives against the employer.

2. Maximum weekly hours

At present, the maximum number of hours an employee can be required to work per week is 48. **The EA proposals reduce it to 44, but will reserve this protection for employees with monthly wages not exceeding MYR 5,000.**

3. Night work

"Night work" is that performed between 10pm and 5am. The proposed amendments introduce a new restriction on such work, namely that **an employee must be given 11 consecutive free hours before he can be required to commence night work.**

II. Protection against discrimination

One of the most significant aspects of the proposed amendments is the creation of express prohibitions against discrimination in both the EA and the IRA. There are differences, however, between the proposed regimes of each Act, and the precise way they interact awaits further clarification by the MOHR. For now, three elements of the proposed scheme are worth addressing:

1. Employee protection, which concerns *existing* contracts of service;
2. Jobseeker protection, which concerns the *offer* of contracts of service *not yet in existence*; and
3. The single exception to all prohibitions on discrimination.

1. Employee protection

Both the IRA and the EA proposals introduce express prohibitions on discrimination by an employer on grounds of gender, religion, race and disability. Keeping in mind the point mentioned in Part A., i.e. that anyone who is a workman under the IRA will likely also satisfy the criteria to be an employee under the EA, the upshot of the proposed amendments is this: **an employee who believes he was a victim of discrimination on the listed grounds will be able to choose the Act under which to bring his complaint.**

There will be two main differences between a complaint under the EA and one under the IRA, namely in the procedure for the investigation of a complaint and an employer's potential liability. The table below summarises these differences:

	Procedure	Employer's liability
Complaint under EA	The complaint is investigated by the DGL, who may issue directives to the employer.	A failure to comply with the DGL's directive is an offence, for which an employer can be fined up to MYR 30,000.
Complaint under IRA	The complaint is investigated by the Director General for Industrial Relations (DGIR). If it cannot be resolved, the DGIR will refer it to the Industrial Court.	The proposals simply state that the Industrial Court may make "necessary or appropriate" awards. In general, however, penalties under the IRA cannot exceed a fine of MYR 30,000, imprisonment for two years, or both.

It should be noted that an employee will not be able to bring a complaint under *both* Acts. If he tries to do so, the DGIR will ignore the complaint under the IRA.

2. Jobseeker protection

In contrast to employees, jobseekers are only protected against discrimination under the EA, not the IRA. In consequence, if a complaint relates to *the offer of employment*, either regarding *to whom* a job offer was made, or *the terms* of that offer, it is a jobseeker matter, and the individual can only bring a complaint under the EA, with its associated procedure and potential employer's liability.

It is worth noting that jobseekers will have a wider range of protected characteristics than employees. In addition to gender, religion, race and disability, **jobseekers will also have the benefit of protection against discrimination on grounds of language, marital status and pregnancy.**

3. Exception to prohibitions

All the prohibitions against discrimination mentioned in Parts 1. and 2. above are subject to the same exception, namely that **differential treatment based on a protected characteristic will NOT be discriminatory if it is an inherent requirement of the job.**

III. Maternity considerations

The proposed EA amendments introduce three maternity-related protections. The first, discussed in Part 2. above, is that employers are prohibited from discriminating against pregnant jobseekers.

The second concerns **maternity leave, which under the present law is 60 consecutive days and the MOHR proposes to increase to 98.**

The third concerns protection in relation to the termination of an employee for pregnancy-related reasons. At present, it is only an offence to dismiss a woman during her maternity leave. **Under the amendments, *dismissal at any time on the ground of pregnancy* will be an offence,** unless the employee is being dismissed because of the closure of the employer's business.

IV. Sexual harassment

Last but not least regarding employee protection, the proposed amendments suggest stricter rules for the prevention of sexual harassment of employees. Two notable changes should be addressed:

- Currently, both employers and the DGL can refuse to inquire into a sexual harassment complaint if, for example, it was previously looked into and not proven, or it is frivolous. **The amendments, in contrast, will require both an employer and the DGL to investigate all complaints.**
- **The amendments will also require all employers to have a written code of sexual harassment prevention, to be displayed in a conspicuous area.**
- Taken together, the MOHR's proposals, so far as they relate to the protection of employees, will require employers to comply with narrower and more prescriptive rules in order to not fall foul of the Acts.

C. Change in process of employing foreign employees

Turning aside from the protection of employees, another major aspect of the MOHR's proposals concerns reform of the regime for employing foreign employees.

At present, an employer who wishes to employ foreign employees is free do so, so long as he notifies the DGL afterwards. Should the employee be terminated, the employer would similarly notify the DGL.

In contrast, if the EA amendments are passed, **an employer will first have to apply for certification from the DGL before engaging any foreign employees.** Once he possesses a certificate and has hired an employee, the employer will have 14 days to file the employees' particulars with the DGL. A second duty to notify arises upon the termination of the employee, and the deadline for this duty will vary depending on the circumstances of termination:

Reason for termination	Employer's deadline for notifying DGL
■ Termination by employer ■ Expiry of employee's employment pass ■ Repatriation or deportation of employee	30 days from date of termination
■ Termination by employee ■ Employee absconded from his place of work	14 days from date of termination

In addition to the more onerous conditions for employing foreign employees, the possible penalties should an employer contravene the new rules are also more severe. At present, the highest fine imposable on a violating employer is MYR 10,000, with no possibility of imprisonment. Under the amendments, the penalty will be a fine of not exceeding MYR 100,000, imprisonment not exceeding 3 years, or both.

For employers, it is likely that the proposed regime would be more time consuming than the system currently in use. Whether it will prove overly burdensome, however, hinges on the exact requirements of the certification procedure, the details of which are absent from the MOHR's proposals.

D. Creation of the Industrial Appeals Court

Thus far, the proposals discussed concern the introduction of new rules for employers. The MOHR's proposal to create an Industrial Appeals Court, in contrast, relates to the employment law dispute resolution process.

In the existing system, an award by the Industrial Court can only be challenged by way of judicial review at the High Court of Malaya. A significant limitation of this mechanism is that the High Court can mostly only examine the process through which the Industrial Court came to its decision, as opposed to the merits of the decision itself. **An Industrial Appeals Court will, on the other hand, be able to conduct a review on merits.**

Nevertheless, while the promise of a full right of appeal against Industrial Court judgments is potentially of great significance, as of yet no details on the powers or composition of the Industrial Appeals Court have been released by the MOHR. Further discussion should therefore be reserved for the future.

E. Other significant changes

In this final section, a few other notable changes proposed by the MOHR are briefly outlined. These changes concern the following matters:

I. General penalties under the EA and IRA;
II. The abolishment of prohibitions on females performing certain types of work;
III. Disputes on wages; and
IV. Unfair dismissals.

I. General penalties

For offences under both Acts, where no express penalty is specified, a general penalty may still be imposed on the offending party. The table below summarises the new maximum general penalties in the proposed amendments:

	Fines (MYR)	Imprisonment	
	Present	Proposed	(No changes made)
EA 1955	10,000	30,000	N/A
IRA 1967	5,000	30,000	Remains at 2 years

II. Abolishment of prohibitions on females performing certain work

The present EA does not allow women to perform work of the following kinds:

- Night work;
- Underground work; and
- Any other kind specified by the Minister for Human Resources.

The proposed amendments will remove all such prohibitions.

III. Disputes on wages

On disputes on wages, the differences between the proposed amendments and the existing law concern enforcement measures against an employer who fails to pay wages owed:

- The maximum fine which can be imposed on an employer will be MYR 30,000 instead of the current MYR 10,000. For continuous offences, the daily fine will be MYR 200 instead of MYR 100; and

- There will be a new power for courts to issue warrants for the employer's property to be levied for payment.

IV. Unfair dismissals

While the MOHR's proposals do make changes to unfair dismissal claims, such alterations are mainly procedural and are of limited immediate concern to employers.

Conclusion

As a whole, the MOHR's proposed amendments indicate a move towards markedly stronger protection for employees and consequentially stricter rules for employers.

Should the Acts be amended as proposed, employers will need to carefully review their internal protocols to ensure compliance with the new rules, especially in light of the higher penalties imposable on employers.

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