LHAG Insights

Employment & Industrial Relations

ABOUT THE AUTHOR

Amardeep Singh Toor
Partner
Employment & Industrial Relations
E: ast@lh-ag.com

23 NOVEMBER 2021

Proposed Amendments to the Employment Act 1955: One Step Forward, Three Steps Back?

The long-awaited amendments to the Employment Act 1955 (**Act**) were recently tabled in Parliament on 25 October 2021. The Ministry of Human Resources had plans to table these amendments as far back as 2018.[1] The intention of the Employment (Amendment) Bill 2021 (**Bill**) is to comply with the international standards and practices as required by the Trans-Pacific Partnership Agreement, the Malaysia-United States Labour Consistency Plan and the International Labour Organization (**ILO**).

A summary of the key amendments proposed is seen below:

Flexible working arrangements

The Bill proposes to introduce a new section on flexible working arrangements. This covers the process and a timeline for application by the employee and approval/refusal by the employer. This welcome addition is most timely in light of the advent of remote working arrangements during the COVID-19 pandemic. The Bill does not place an obligation on employers to approve flexible working arrangements, but merely requires an employer to consider all applications and respond with the ground(s) of refusal.

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1 Martin Carvalho, 'Kula: Amendments to employment and child labour laws on the table' *The Star Online* (13 September 2018) https://www.thestar.com.my/news/nation/2018/09/13/kula-amendments-to-employment-and-child-labour-laws-on-the-table

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Reduction of normal working hours

The Bill proposes to reduce normal working hours from 48 hours to 45 hours per week. While this is within the standard set by the ILO (which is 48 hours),[2] it is still below the ILO 1935 Convention, which has not been ratified by Malaysia, where each member state which ratified this Convention declared its approval of the principle of a 40-hour week applied in such a manner that the standard of living is not reduced in consequence.[3]

Paternity leave

The ILO has repeatedly recognised the importance of the provision of family leave to fathers.[4] The Bill proposes to introduce three days paid paternity leave for married male employees.

Maternity leave

The Bill proposes to:

(a) increase maternity leave from 60 to 90 days. This is in line with the entitlement for employees in the public sector. Notably, this revised standard is still below the standard provided by the ILO, which is 14 weeks.[5]

(b) introduce a restriction to terminate the employment of a pregnant employee or a person suffering from an illness related to her pregnancy except on the grounds of: (a) wilful breach of a condition of the employment contract; (b) misconduct; or (c) closure of the employer's business. Where the employment of a pregnant employee is terminated, the burden will be on the employer to prove that such termination is not on the ground of her pregnancy or for any illness related to her pregnancy. This is in line with ILO standards.[6] This is an expansion from the current protection where employers are restricted from terminating the employment of an employee during maternity leave.

(c) delete s 44A of the Act. This section provides that the maternity protection provisions in the Act are applicable to all female employees, regardless of whether they fall within the ambit of the Act.[7] The Explanatory Statement explains

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2 Hours of Work (Industry) Convention 1919 (No 1) and Hours of Work (Commerce and Offices) Convention 1930 (No 30)

3 ILO 1935 Convention, Forty-Hour Week Convention 1935 (C47)

4 K Booth, 'Paternity and Parental Leave: Towards a New International Labour Standard' [2020] Hastings Women's Law Journal, p 3

5 Maternity Protection Convention 2000 (No 183), Art 4(1)

6 *Ibid*, Art 8

7 Employees who fall within the ambit of the Employment Act 1955 are employees employed in Peninsular Malaysia whose maximum monthly salary does not exceed RM2,000; or regardless of their salary, are employed:

(a) as manual labourers or supervisors of manual labourers;
(b) to operate or maintain any mechanically propelled vehicle for the purpose of transporting passengers or goods or for reward or commercial purposes;
(c) as a domestic servant; and
(d) in certain positions on seagoing vessels.

that this deletion is a consequence of the extension of the scope of the Act. However, with no amendment to the definition of "employee" under the Act itself, female employees who do not fall within the ambit of the Act are no longer statutorily entitled to maternity leave.

Anti-sexual harassment measures

The Bill proposes to:

(a) introduce the requirement for employers to place a notice to raise awareness on sexual harassment. This requirement may be a toothless tiger. It does not compel employers to take practical steps such as introducing internal policies and codes to eradicate or handle complaints of sexual harassment. The ILO standards in place are arguably more comprehensive and likely to be more pragmatic. It stipulates the need for adequate workplace policies on violence and sexual harassment, appropriate complaints mechanisms, and information and training on the identified hazards and risks of violence and harassment and the associated prevention and protection measures.[8]

(b) increase the fine payable by employers for, among others, their failure to investigate complaints of sexual harassment from RM10,000 to RM50,000.

(c) delete s 81G of the Act. This section provides that the provisions on sexual harassment in the Act are applicable to all employers or employees in the private sector. The Explanatory Statement is silent as to why this specific deletion was necessary. With no amendment to the definition of "employee", this deletion effectively limits the scope of those entitled to the protection against sexual harassment to only those within the ambit of the Act — making this proposal notably regressive.

Prohibition against forced labour

The Bill introduces an express prohibition against forced labour. It bars employers from: (i) threatening; (ii) deceiving; or (iii) forcing an employee to carry out work and prevent that employee from leaving their workplace — a long-overdue addition which is recognised under the ILO.[9]

Employee status

The Bill proposes to introduce a set of presumptions as to who is engaged under a contract of service instead of a contract for services i.e., employee vs independent contractor. These

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8 Violence and Harassment Convention 2019 (No 190), Arts 4 and 9

9 Protocol of 2014 to the Forced Labour Convention 1930 and Forced Labour (Supplementary Measures) Recommendation 2014 (No 203)

presumptions are in line with the four tests (control, integration, multiple and entrepreneur) laid down in the well-written High Court judgment in *Ekajaya (M) Sdn Bhd v Ahmad Mahad & Ors* [2014] 3 ILR 457.

Access to justice

Currently, the Act only applies to a select group of employees as stipulated in the First Schedule of the Act. At present, s 69B of the Act extends access to the Labour Department (commonly known as the Labour Court) to employees whose earnings do not exceed RM5,000 — rendering its application to a wider scope of individuals earning between RM2,000+ and RM5,000.

The Bill proposes to delete s 69B. The Explanatory Statement notes that this deletion is intended to allow an employee to bring any dispute before the Director General, irrespective of the amount of wages he receives, which under the current provisions are capped at RM5,000. While this leaves the impression of widened access to justice, the contrary appears to be the case. With this removal, and no amendment to the definition of "employee" within the Act, access to the Labour Court will be limited to employees within the ambit of the Act — running contrary to the purported intention behind the deletion of s 69B.

Discrimination

The Bill proposes to introduce the power of the Director General to inquire into and investigate disputes on discrimination in employment. While this is a welcome addition, the Bill does not define discrimination nor does it set out the remedy available to the Director General.

Employment and termination of services of foreign employees

Currently, any employer who employs a foreign employee is required to furnish the Director General with the particulars of the foreign employee within 14 days of their employment.[10]

The Bill proposes to impose a requirement for employers to apply for prior approval from the Director General before proceeding to employ a foreign employee. In exercising his discretion, the Director General may take into account whether the employer has any outstanding matter or case relating to any decision, order or directive issued under the Act. This would include a claim filed under s 69 of the Act.

The Bill also proposes to impose a requirement for employers to inform the Director General should the services of a foreign employee be terminated by their employer, by reason of the

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10 Employment Act 1955, s 60K

expiry of their employment pass, or due to repatriation or deportation.

Conclusion

While certain amendments bring Malaysia in line with contemporary labour standards, others merely "skim the surface" of the problems they seek to solve, such as the superficial nature of the statutory requirement to exhibit a notice against sexual harassment.

Additionally, other amendments, while well-meaning, are akin to toothless tigers that do not serve their intended effect, by virtue of the untouched definition of "employee" within the Act. As such, there is a clear need to review the scope of those who fall within the ambit of the Act. Without this revision, protection once given to pregnant employees, those subjected to sexual harassment, etc, will be eroded. With further thought and development, it is possible for such additions to bring about meaningful changes to the Act.

Amardeep Singh Toor and **Ashreyna Kaur Bhatia** (Pupil-in-Chambers)

If you have any queries, please contact team partner **Amardeep Singh Toor** (ast@lh-ag.com).

LH AG ADVOCATES AND SOLICITORS

Head Office
Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office
Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office
18-33-A3 Gurney Tower
Persiaran Gurney
10250 Georgetown
Pulau Pinang
Tel: +604 299 9668
Fax: +604 299 9628

Email
enquiry@lh-ag.com

Website
www.lh-ag.com

Published by the Employment & Industrial Relations Practice