



GUIDE TO GOING GLOBAL EMPLOYMENT

Malaysia



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INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Employment*.

GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2021 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

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MALAYSIA



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LEGAL SYSTEM, CURRENCY, LANGUAGE

Common law and statute. Malaysian Ringgit(MYR)/Ringgit Malaysia(RM). Malay/Bahasa Malaysia and English.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign company can engage employees in Malaysia without local corporate presence subject to administrative, accounting, and tax considerations. The Companies Act also requires foreign corporations to be registered as a foreign company under the Companies Act before "carrying on a business in Malaysia," but the engagement of employees in Malaysia does not necessarily mean a foreign company will be regarded as carrying on a business in Malaysia. As an alternative to incorporating a Malaysian company, a foreign company can also opt to register a branch office or representative office.

There are several arrangements commonly used by foreign companies which engage employees in Malaysia in relation to payroll:

- Running the payroll directly from the foreign entity/location
- Running the payroll through an entity set up in Malaysia
- Outsourcing the payroll to a third party service provider in Malaysia

The most suitable option for a business will depend on the nature of the business, activities carried out by the employees, and accounting and tax considerations.

Employees are responsible for the declaration and payment of income tax, but local employers will be required to make deductions from salary for income tax and employer contributions to the Employees' Provident Fund (EPF), Social Security Organization (SOCSO) and Employment Insurance Scheme (EIS).

PRE-HIRE CHECKS

Required

Immigration compliance for foreign nationals.

Permissible

Pre-employment background checks are not regulated, and the practice differs among industries. Employers should obtain the individual's consent if the pre-hire checks require accessing, collecting or processing the individual's personal data to ensure compliance with the Personal Data Protection Act 2010.

IMMIGRATION

Foreign individuals must obtain the required pass, permit or visa from the Immigration Department.

HIRING OPTIONS

Employee

Permanent, fixed-term, full-time or part-time.

Independent contractor

Independent contractors can be engaged directly by the company or via a personal services company. Engagement may be subject to misclassification exposure with financial risk. Work instructions, level of control, exclusivity, provision of equipment, access to employee-level benefits and organizational integration, in particular, will jeopardize the independent contractor position.

Agency worker

Agency workers are common in industries where short-term or project-based engagements are the norm, and there are no restrictions on these arrangements.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

The Employment Act 1955 (EA) sets out mandatory terms and conditions of employment for all employees.

Employment contracts are usually documented in writing, but verbal contracts are valid. The EA requires contracts of service for a fixed term exceeding 1 month, or for the performance of a specified piece of work where the time reasonably required for the completion of the work exceeds or may exceed 1 month, to be in writing. Additionally, the EA requires every written contract of service to include a clause setting out the manner in which the contract may be terminated by either party.

Probationary periods

Probationary periods are not regulated, and it is common for probationary periods of 1-6 months to be imposed. However, probationers are generally entitled to similar security of tenure as full-time permanent employees, and the non-confirmation of employment during or at the end of the probationary period must be with just cause.

Policies

No mandatory policy requirements. Depending on the nature of the employer's business, recommended policies include health and safety, whistleblowing, or detailed grievance or harassment reporting policies.

Third-party approval

No requirement to lodge employment contract or policies with or get approval from any third party.

LANGUAGE REQUIREMENTS

No statutory requirements other than the requirement for the data privacy consent/notice document pursuant to the Personal Data Protection Act to be in both English and Bahasa Malaysia. It is standard market practice for employment agreements or policies and other employee communications to be in English.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

The EA sets out mandatory terms and conditions related to minimum employment rights for all employees. The mandatory terms and conditions include the following:

Working hours

Employees (with some exceptions) cannot be required to work:

- More than 5 consecutive hours without a period of leisure of not less than 30 minutes
- More than 8 hours in 1 day
- In excess of a spread-over period of 10 hours in 1 day
- More than 45 hours in 1 week

Overtime

Employees earning up to RM4,000/month are entitled to overtime benefits for any work carried out in excess of the normal hours of work per day at a rate not less than 1.5 times the hourly rate of pay.

Wages

Statutory minimum wage of RM1,500 per month.

Vacation

Employees are entitled to a paid holiday on 11 of the gazetted public holidays and on any public holiday under the Holidays Act 1951. Employees are also entitled to the following minimum paid annual leave entitlements:

- 8 days for every 12 months of continuous service with the same employer if the employee has been employed by that employer for a period of less than 2 years
- 12 days for every 12 months of continuous service with the same employer if the employee has been employed by that employer for a period of 2 years or more but less than 5 years
- 16 days for every 12 months of continuous service with the same employer if the employee has been employed by that employer for a period of 5 years or more

Sick leave & pay

Employees are entitled to the following sick leave:

- Where no hospitalization is necessary:
 - 14 days in the aggregate in each calendar year if the employee has been employed for less than 2 years
 - 18 days in the aggregate in each calendar year if the employee has been employed for 2 years or more but less than 5 years
 - 22 days in the aggregate in each calendar year if the employee has been employed for 5 years or more
 - An additional 60 days in the aggregate in each calendar year if hospitalization is necessary, as may be certified by such registered medical practitioner or medical officer

Maternity/parental leave & pay

All employees are statutorily entitled to paid maternity leave of not less than 98 consecutive days. All employees are entitled to paid paternity leave of not less than 7 consecutive days.

Other leave/time off work

Although not legally required, it is market practice, particularly among multinational employers, to grant employees leave for other purposes, such as bereavement, marriage, adoption or voting, among others.

DISCRIMINATION & HARASSMENT

There is no statutory protection against discrimination. However, the EA gives the Director General the power to “inquire into and decide any dispute between an employee and his employer in respect of any matter relating

to discrimination in employment [and] make an order". Non-compliance by an employer with such an order would be an offense.

WHISTLEBLOWING

The Whistleblower Protection Act 2010 protects individuals who make a disclosure of improper conduct to an enforcement agency. Malaysian law does not protect whistleblowers in the context of disclosures made to an employer.

BENEFITS & PENSIONS

All private sector Malaysian employees must be members of the Employees' Provident Fund (EPF), which is a government agency under the Ministry of Finance. The EPF manages employees' compulsory savings plan and retirement planning. Contributing to and registering with the EPF is mandatory for certain classes of employees, and employees for whom it is not mandatory can also voluntarily opt to contribute to and be registered with the EPF. EPF funds are derived from mandatory contributions from the employers (the rate of contribution is based on the relevant schedule of monthly wages, depending on the classification of the employee) and deductions from the employees' monthly salaries (the rate of contribution is based on the relevant schedule of monthly wages, depending on the classification of the employee).

The Employment Insurance Scheme (EIS) is a financial support scheme intended to assist employees who have lost their jobs due to retrenchments and other specific reasons. The EIS provides financial support, trainings, and other related assistance to employees for up to 6 months post-termination. Employers and employees are required to contribute 0.2 percent respectively of an employee's salary to fund the EIS.

DATA PRIVACY

Collection and processing of personal data is governed by the Personal Data Protection Act 2010 (PDPA). Employers must obtain employees' consent (implied or express) before collecting and processing employees' personal data, and explicit consent is required if "sensitive personal data" is being collected. Employers must notify their employees of the nature and purpose of information being collected, to whom it is being disclosed, and that the employees have the right to access such data. Employee consent is also required before employee personal data is shared with third parties (for example, external payroll service providers).

As a result of the PDPA, an employee consent/notice document is required. This document has to be bilingual – in both English and Bahasa Malaysia – and is usually a separate document and referenced in the employment contract.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

No provision for automatic transfer of employment. Employees will remain employed by the seller in a sale of business transaction. The "transfer" of employees in a sale of business transaction is effected by a termination (by the seller) and rehire (by the buyer), and in this scenario the seller will be exempted from paying any statutory severance payment if the new offer from the buyer is under terms and conditions of employment not less

favorable than those under which the employee was employed by the seller. An employee will not be entitled to statutory severance payment if the employee unreasonably refuses the new offer.

EMPLOYEE REPRESENTATION

Employers and employees have the right to form trade unions, subject to the provisions of the Trade Unions Act 1959 and Industrial Relations Act 1967.

Only a small percentage (less than 10 percent of the total labor force) of employees in Malaysia are organized into trade unions. However, trade unions are very common and established in certain industries, such as banking, manufacturing, and plantations.

TERMINATION

Grounds

Termination must be with just cause. Termination by the employer is usually on the grounds of misconduct, poor performance, redundancy, or closure of business.

Employees subject to termination laws

All employees (including probationers) are protected from unfair dismissal or unfair termination of employment.

Restricted or prohibited terminations

There are specific prohibitions restricting termination of an employee by reason of his joining a trade union, or a female employee while she is on maternity leave.

Third-party approval for termination/termination

No approval required, unless provided for in a collective agreement.

Mass layoff rules

When implementing a retrenchment exercise, employers are encouraged (but not required) to abide by the guidelines in the Code of Conduct for Industrial Harmony ("Code"). Note that there is no headcount threshold and these guidelines apply even if the retrenchment exercise involves only one employee. The employer must also inform the nearest Department of Labor at least 1 month before the retrenchment takes place. Employers must apply fair and objective selection criteria, and are generally required to abide by the "Last In, First Out" (LIFO) principle (departure from LIFO is acceptable, provided the employer can show that an alternative, fair and objective selection criteria was used instead) and any objective selection criteria set out in any collective agreement.

Notice

In the absence of contractual termination notice provisions, the EA provides that employees are entitled to the following minimum notice periods:

- 4 weeks' notice if the employee has been so employed for less than 2 years on the date on which the notice is given
- 6 weeks' notice if the employee has been so employed for 2 years or more, but less than 5 years on such date
- 8 weeks' notice if the employee has been so employed for 5 years or more on such date

In very limited circumstances, an employer may be entitled to summarily dismiss an employee, where it can be shown that the employee is guilty of a serious misconduct which is so serious that it renders the continuation of the employment relationship impossible. The burden of proving that the misconduct was serious enough to warrant summary dismissal lies with the employer.

Statutory right to pay in lieu of notice or garden leave

The EA provides for termination without notice with the making of a payment in lieu of notice. There is no statutory provision for garden leave.

Severance

An employee earning up to RM4,000/month who has been employed for 12 months or more is entitled to the following minimum severance payments pursuant to the Employment (Termination and Lay-Off Benefits) Regulations 1980:

- 10 days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for a period of less than 2 years
- 15 days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for 2 years or more but less than 5 years
- 20 days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for 5 years or more, and pro-rata in respect of an incomplete year, calculated to the nearest month

For employees earning more than RM4,000/month, the entitlement to severance payments depends on the employment contract.

POST-TERMINATION RESTRAINTS

Non-competes

Void and unenforceable pursuant to Section 28 of the Contracts Act 1950, as the former employee is "restrained from exercising a lawful profession, trade, or business."

Customer non-solicits

Valid and enforceable only to the extent that there has been a breach of confidentiality, or misuse of confidential information or trade secrets.

Employee non-solicits

Valid and enforceable only to the extent that there has been a breach of confidentiality, or misuse of confidential information or trade secrets.

WAIVERS

Generally enforceable, but subject to legal review based on the scope and circumstances in which the waiver was given. A waiver by an employee of the employee's right to bring legal action or a claim for unfair dismissal /termination is not enforceable.

REMEDIES

Discrimination

No specific remedies.

Unfair dismissal

Reinstatement or, more commonly, compensation in lieu of reinstatement. Potential exposure of the employer to pay up to 24 months' back wages and compensation in lieu of reinstatement calculated at one month's wages per year of service.

Failure to inform & consult

No specific remedies.

CRIMINAL SANCTIONS

None specific to employers.

KEY CONTACTS



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