

The Recent Employment (Amendment) Bill 2021 and Its Potential Effect on the Employment Relationship

On 30 March 2022, the Employment (Amendment) Bill 2021 (“Amended Bill”) was passed in Dewan Negara (Senate). In this update, Vijayan Venugopal and Nur Najehah will outline the key changes and upcoming issues which employers should be aware considering this recent development.

At the outset, before diving into the issues, it is important to first understand the present status of the Amended Bill.

To put things in context, laws are introduced to Parliament as bills and can be introduced either before the Dewan Rakyat or the Dewan Negara. This is referred to as “*tabling a Bill*”. After the Bill is tabled, it must go through three stages of reading.

In this connection, the fact that the Amended Bill was approved by the Dewan Negara on 30 March 2022 does not mean that all the provisions listed in the Amended Bill have come into force, since the legislative process will be completed only after the Yang di-Pertuan Agong assents to the Amended Bill becoming law (“Royal Assent Bill”). The law will take effect on the date specified in the Government Gazette, however, there is currently no indication when this will occur.

Having said that, we will now consider the key changes and concerns that may arise because of the amended provisions encapsulated in the recent Amended Bill which has been approved by the Dewan Negara.

A. Is there any substantive difference between the initial Bill introduced in

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October 2021 and the present Amended Bill?

In essence, the Amended Bill approved by Dewan Negara on 30 March 2022 is similar to the first Bill introduced on 25 October 2021, except for the following provisions:

- a. The paid maternity leave entitlement has been increased from 90 days to 98 days; and
- b. The paid paternity leave entitlement has been increased from three consecutive days to seven consecutive days.

The rationale for incorporating these two new amendments is to ensure maternity and paternity leave protection under the **Employment Act 1955** (“the Act”) is in line with International Labour Organization (“ILO”) standards and practises, as well as to allow male employees to manage family affairs after welcoming their new-born, and to provide equal treatment and protection to both female and male employees. The seven-consecutive days paternity leave is also in tandem with the seven-consecutive days paternity leave accorded to employees in the public sector.

B. What is the Act’s extended scope of application under the Amended Bill?

The proposal to broaden the scope of the Act, much like the initial Bill introduced in October 2021, is not reflected in the Amended Bill.

Be that as it may, the Ministry of Human Resources (“MOHR”) announced in a statement that it will issue an order (hereinafter referred to as “Ministry Order”) under sub-section 2(2) of Act to amend the First Schedule of the Act and confirmed that all employees (regardless of salary limits) will be afforded protection under the Act, subject to certain conditions.

In the same statement, the MOHR also assured that the Ministry Order will be enforced simultaneously on the effective date of the Royal Assent Bill.

In brief, the upcoming Ministry Order would determine the scope of employees who will be protected by all newly amended provisions upon the passing of the Amended Bill; however, as of the date of this article, there are no actual details on this proposed Ministry Order or its contents.

C. What should the employer anticipate if this Amended Bill gets passed?

It is important to note that without the contents of the Ministry Order, it is unclear how far the Act's application will be extended.

Notwithstanding the foregoing, the following are the key changes that can be expected if the Amended Bill is implemented as is (without considering the scope of any proposed extension by the MOHR):

1. Restriction of termination of pregnant employees

Termination of a female employee who is pregnant or is ill because of her pregnancy is illegal, except for dismissal for wilful breach of the employment contract, misconduct and closure of the employer's business. The employer, nonetheless, bears the burden of proving that the termination was not influenced by the employee's pregnancy.

2. Maternity Leave

The entitlement to paid maternity leaves is now extended from 60 to 98 days, and if a female employee entitled to maternity leave requests to return to work during the maternity leave period, a registered medical practitioner must certify her as fit to resume work. Given that the Amended Bill also deletes the provisions of the Act which extend maternity leave to all employees regardless of the wages earned, this indicates that the Amended Bill's "*extended*" maternity rights will explicitly apply only to individuals who are covered by the Act.

It is incongruous that while the proposed amendments seek to extend the protection afforded to employees, this particular revision would effectively only apply to female employees who earn RM2,000 or less. Female employees who earn more than that statutorily prescribed sum would only be entitled to the 60 days maternity leave afforded under the original Act.

3. Paternity leave

Married male employees would now be entitled to seven-consecutive days of paid paternity leave for each child born, up to a total of five children (irrespective of the number of spouses). However, such paternity benefit is conditional on the male employee having worked for the same employer for at least a year prior to the commencement of paternity leave and having notified his employer of his spouse's pregnancy at least 30 days before the expected confinement or as soon as possible after the birth.

4. Protection against discrimination

Under a new section 69F, the Director General of Labour ("DG") is now empowered to consider disputes relating to employment discrimination, and non-compliance of the employer with such orders of the DG in this regard would be an offence upon conviction. The wording of this section, however, does not clarify what constitutes "*discrimination*" or the scope of this provision's applicability. It does suggest that the power of the DG is limited to existing employment relationships and does not extend to pre-employment circumstances, such as potential discrimination in the application screening process.

5. Sexual Harassment

A higher penalty is imposed for employers that fail to perform their statutory duties in dealing with workplace sexual harassment complaints, with maximum penalties increased from RM10,000 to RM50,000. Further, under a new section 81H, employers are now required to put up a

notice to promote awareness on sexual harassment in a conspicuous location at all times at the workplace.

6. Flexible working arrangement

Employees can now apply for a flexible working arrangement (i.e., an arrangement to vary the hours of work, days of work, or place of work). The application must be in writing (and in the form and manner as may be determined by the DG), and the employer must approve or reject it within 60 days. In this instance, employers are not legally obligated to approve all applications. In the event of a refusal, the employer is only required to state the reason for the refusal.

7. Hours of work

The maximum weekly working hours for employees would be reduced from 48 to 45 hours.

8. Apprenticeship

Apprentice contracts must be for a period of at least six months but not more than two years.

9. Calculation of wages

Under the new section 18A, employers will be able to use the following formula to compute wages for work done for a period of less than a full month:

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

10. Employment of foreign employees

Under the new amendment, all foreign employees need be registered and follow the requirements prescribed by the DG.

11. Labour contractors to have contract in writing with the principals

Under the newly amended section 33A of the Act, contractors of labour are required to have a written contract.

12. Hospitalisation leave

With the removal of the first proviso in Section 60F of the Act, employees who are sick and require hospitalisation but are unable to be hospitalised (such as those who test positive for COVID-19) and should be isolated in the hospital but are not required to do so by the Government vide a Home Surveillance Order, will now be considered to be on hospitalisation leave.

13. Forced labour

Under the new section 90B, an employer who threatens, deceives or forces an employee to do any work, and prevents him from moving beyond the place or area where such work is done, commits an offence of forced labour. The penalty for the offence is a fine of up to RM100,000 or imprisonment for a term of up to two years, or both.

14. Financial penalties

Higher penalties for offences under the Act, with maximum fine penalties raised from RM10,000 to RM50,000, while the existing punishment of a fine, which was previously set at RM50,000, will be doubled to RM100,000.

15. Court order for payment due to employees

If an employer is convicted of an offence under the Act, the Court of a First Class Magistrate (“FCM”) has the authority to require the employer to make any payment that is due to an employee. If the said employer consistently fails to make these payments, the FCM may issue a warrant to levy the employer’s property for such payments, either through distress and sale of property or through a fine imposed under the Criminal Procedure Code.

16. Presumption of an employment relationship

Based on the new section 101C, a presumption is now introduced that in any proceeding for an offence under the Act and in the absence of a written contract of service concerning any category of employee under the First Schedule of the Act, the following criteria would apply in determining whether an individual is an employee of an employer:

- Where his manner of work is subject to the control or direction of another person/employer;
- Where his hours of work are subject to the control or direction of another person/employer;
- Where he is provided with tools, materials or equipment by another person/employer to execute work;
- Where his work constitutes an integral part of another person's /employer's business;
- Where his work is performed solely for the benefit of another person/employer; or
- Where payment is made to him in return for work done by him to that person/employer at regular intervals and such payment constitutes most of his income.

The above parameters have codified previous judicial pronouncements.

However, in the absence of clear indication whether such presumptions of an employment relationship would not apply to individuals engaged under contract for service, it remains unclear whether independent contractors (such as Gig workers) would now be subject to the Act' purview and automatically considered as "*employees*".

17. Repealed provision(s)

Removal of several provisions under Part VIII of the Act that include the prohibition on female employees working at night or underground.

Conclusion

The provisions of the Amended Bill are to bring employment law in Malaysia in tandem with the International Labour Law Standards and practices required under the Trans-Pacific Partnership Agreement, the Malaysia-United States Labour Consistency Plan and the International Labour Organisation. It is also intended to face realities in the new norm pertaining to female employees. This is evident through the repealing of provisions regarding female employees working at night and underground. This would now allow employers to engage female employees for work at night and/or underground, thus meeting the manpower needs and increase productivity, output and profitability. The nation then gains from taxes paid through profitable business.

Secondly, the higher penalties for forced labour are a long-awaited change. The recent revelations of forced labour against Malaysian corporations, which have been widely covered in foreign media, demonstrate that implementing a ban on forced labour and adhering to existing norms necessitates a stricter approach.

Whilst significant increase in upcoming employment benefits outlined in the Amended Bill's latest provisions (e.g., the 98-days of paid maternity leave and the seven-consecutive days of paid paternity leave) may be a step in the right direction for workers and their rights, the future of the employment landscape remains uncertain as to what the underlying economic impact it has on the employers. Employers will have to undertake other measures to cover the additional 38-days of maternity leave and the newly implemented seven-days of paternity leave. This would entail extra costs. Further, the reduction in weekly hours from 48 to 45 too would mean the need to reorganise work or reduce overtime claims. The impact would only be felt soon.

It is also to be noted that the industry is in a recovery mode whereby businesses need longer working hours to meet demands for orders which were lost during the pandemic. As such, the longer maternity leave, paternity leave and shorter working hours while giving benefits to employees must also consider the requirements of employers during this recovery period. It is also the government's aim to make Malaysia more

competitive and favourable to business thus increasing foreign investment. Whilst the amendments seek to equate our employment laws to International Standards, it also makes it more costly to carry on business. It is hoped that the said increase will not drive away investors or make Malaysia less competitive. The trend shows some companies relocating their businesses to other jurisdictions due to cheaper labour costs.

The amendments also intend to cover independent contractors or gig workers who are now deemed by the presumption under the new section 101C to be employees, and it would be incumbent upon the employer to prove otherwise.

Be that as it may, the assurance from the MOHR on the extent of the Act's applicability, without revealing the contents of the Ministry Order, raises concerns about not only the future directions of gig workers but also whether the benefits under the Amended Bill, as well as other provisions under the Act, will also be applicable to white collared jobs which consist of highly paid employees. It is hoped that more clarity would be given in the Ministry Order to ensure that the revisions have practical consequences and balance the rights of employers and employees.

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