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Labour Law in Malaysia

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Content

A. Introduction

As you navigate the global business landscape, you will encounter various countries with unique legal systems and approaches to employment regulations.

Some countries, such as Singapore, Hong Kong, and the United States, are known for their more liberal employment laws, which often grant greater flexibility to employers. On the other hand, civil law countries like Germany and France tend to emphasise stronger protective measures for employees.

Malaysia, positioned somewhere in the middle of this spectrum, offers a delicate balance that combines elements from both ends. As a result, comprehending the nuances of Malaysian employment law is crucial to ensure your business's success and compliance with local regulations.

This guide provides an introduction to Malaysian employment law for employers, addressing considerations at each stage of the employment relationship: before hiring, during employment and upon termination.

B. Before hiring: Understanding basic employee entitlements and contractual considerations

The Employment Act 1955 ("**the Act**"), the primary legislation governing employment matters in Malaysia, has recently been amended. This guide therefore discusses the most salient changes introduced by the new legislation, as well as key rights afforded to employees and basic contract considerations for employers.

I. Changes introduced by the Employment (Amendment) Act 2022

The Employment (Amendment) Act 2022 came into force on 1 January 2023.

The most important changes to the Act for employers are the following:

- The scope of the Act has been widened to include all employees with a contract of service;
- maximum working hours have been reduced to 45 hours per week;
- flexible working arrangements are now provided for;
- introduction of increased maternity leave entitlement and protection for pregnant women against termination;
- introduction of paid paternity leave;
- establishment of a presumption of employment;
- separation of sick leave and hospitalisation leave;
- changes to the provisions governing the employment of foreign employees.

New provisions have also been included to prohibit forced labour and combat sexual harassment. Employers who threaten, deceive or force an employee to do any work or prevent that employee from leaving a place of work after work is done, are liable to a fine not exceeding MYR 100,000 or imprisonment not exceeding two years or both.

This widening of the Act's scope means employers should ensure that their employment contracts comply with the minimum standards set under the Act. Any employment terms that are less favourable to the employee can be rendered void and unenforceable.

1. Expansion of the scope of the Act

Previously, only lower-income or lower-skilled employees benefited from the protections of the Act. Under the amended Act, the scope of this legislation now includes all employees, irrespective of their wages.

An important caveat to note is that most employees earning above MYR 4,000 per month are exempted from certain provisions of the Act relating to:

- working on a rest day;
- overtime rates;
- allowance for shift-based work;
- working on public holidays;
- statutory entitlement to termination and lay-off benefits.

The above provisions do however still apply to certain groups of employees regardless of the amount of wages earned, if they are engaged as one of the following (the "**Exempted Categories**"):

- manual labourer;
- someone who operates or maintains any mechanically propelled vehicle;
- supervisor of other employees engaged in manual labour employed by the same employer;
- domestic employee;
- personnel on vessels registered in Malaysia, with certain exceptions.

2. Reduction in maximum working hours

The amended Act reduces the maximum number of weekly working hours to 45 hours a week, down from the previous maximum of 48 hours a week. Employees are now entitled to overtime payments for any extra hours spent beyond the 45 hours.

3. Flexible working arrangements

Employees are now entitled to apply in writing for flexible work arrangements to vary their hours, days or place of work.

The employer is free to approve or deny such requests at their discretion. However, the employer must respond in writing with a decision within 60 days of the application being made and in case of refusal, it is also obligated to provide the reasons behind the decision. It is currently unclear what the sanction for an improperly justified refusal would be, if any.

4. Increased maternity leave and protection for pregnant women against termination

Previously, the Act provided for a minimum of 60 days of paid maternity leave, but the new amendment has increased this to 98 days.

The amendment Act also introduce more comprehensive protection for pregnant employees against termination. Employers are now prohibited from terminating a female employee who is pregnant or suffering from a pregnancy-related illness unless there is:

- a wilful breach of contract;
- misconduct; or
- closure of the business.

Female employees may also now resume work at any time during maternity leave if they have been certified fit to resume work by a registered medical practitioner.

5. Introduction of paid paternity leave

The amended Act includes, for the first time, a provision for paid paternity leave. Male employees are now entitled to a minimum of seven consecutive days of paid paternity leave for five births.

In order to claim this entitlement, the employee must:

- be married to the mother of the child;
- have been employed by their current employer for at least 12 months; and
- notify their employer at least 30 days before the expected date of childbirth or as early as possible after the birth.

6. Presumption of employment

Under the Act, "employee" means any person or class of persons who has entered into a contract of service. This definition is somewhat circular, as the Act also defines a "contract of service" as any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve their employer as an employee, including apprenticeship contracts.

Another part of the Act provides more guidance as to what may characterise an employee. In the absence of a written contract of service, a worker is presumed to be an employee under law if:

- there is control over their hours and manner of work;
- they are provided with tools, materials or equipment;
- their work constitutes an integral part of the business;
- their work is performed solely for the benefit of the business; and
- they are paid at regular intervals in return for work done and such payment constitutes the majority of their income.

The same set of criteria in reverse allows to presume that a person is an employer. This new presumption of employment will allow workers without a written contract to rely on the provisions of the Act if they satisfy the conditions above.

This amendment may also allow contractors and gig workers to show that they are in an employment relationship and obtain the same rights and privileges enjoyed by formal employees. However the concrete application and impact of this presumption to gig workers remains to be seen, as, prior to the amendment, the courts had held that an e-hailing driver was not an employee.

7. Separation of sick leave and hospitalisation leave

The amended Act separates sick leave and hospitalisation leave, with the effect that employees are now entitled to claim a full 60 days of hospitalisation leave in addition to their full non-hospitalisation leave entitlement.

Employee's period of employment	Less than two years	At least two years, less than five years	Five years or more
Sick leave where no hospitalisation is required (per calendar year)	14 days	18 days	22 days
Hospitalisation sick leave (per calendar year)	60 days		

8. Changes to the provisions governing employing foreign employees

The amended Act introduces more onerous regulations for employing foreign nationals. Whereas previously employers merely had to inform the Director General of Labour of the new foreign employee, they must now obtain prior approval before hiring a foreign employee.

The obligation to notify the Director-General within 30 days if a foreign employee is terminated is maintained, however it is reduced to 14 days if the foreign employee terminates their service or absconds.

9. Forced labour, sexual harassment and other provisions

The amendments to the Act outlaw forced or bonded labour by making it an offence for an employer to threaten, deceive or force an employee to do any activity, service or work and prevent that employee from proceeding beyond the place or area where such activity, service or work is done.

Employers must now exhibit conspicuously at the place of employment, a notice to raise awareness on sexual harassment. In addition, a duty to act by inquiring into any complaints of sexual harassment has been imposed onto employers.

The Director General of Labour has been granted power to inquire and determine any disputes and matters relating to discrimination in employment.

II. Snapshot of other key employee rights under the Employment Act 1955

There are a number of other key provisions contained in the Act to be aware of, which remain unchanged.

Employers should bear in mind, however, that, as a result of the new amendments, the scope of application of these provisions is now significantly wider than before.

1. Working hours

In addition to the new 45-hour weekly limit, employees cannot be asked to work in excess of the following limits, subject to certain exceptions:

- more than five consecutive hours without a period of leisure of not less than 30 minutes;
- more than 45 hours in one week;
- more than eight hours in one day
- in excess of a spread over period of 10 hours in one day – with "spread over period of 10 hours" meaning a period of 10 consecutive hours to be reckoned from the time the employee commences work for the day, inclusive of any period or periods of leisure, rest or break within such period of ten consecutive hours.

For any overtime work carried out in excess of the normal hours of work, employees earning MYR 4,000 or below or who fall in the Exempted Categories are entitled to overtime. Employees earning more than MYR 4,000 are not. Overtime must be paid at a rate not less than one and half times the employee's hourly rate of pay irrespective of the basis on which the rate of pay is fixed.

2. Wages

Wages means basic wages and all other payments payable to an employee for work done in respect of the contract of service but does not include allowances, amenities, services, contributions paid by the employer to pension funds and other funds or schemes established for the benefit or welfare of the employee, sums to defray special expenses, any gratuity payable on discharge or retirement, annual bonuses.

The monthly minimum wage is MYR 1,500 nationwide. The contract must specify the wage period, which cannot exceed one month. If no wage period is mentioned in the contract, the wage period is deemed to be one month. Employers must pay employees their wages, less lawful deductions, no later than the seventh day after the last day of any wage period.

Where an employee did not complete a whole month service, their wages should be calculated according to the following formula:

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

Employers must pay wages through a financial institution, which includes licensed banks, licensed Islamic banks and prescribed institutions. Employer may pay employee wages by cash or by cheque only at the written request of the employee and with the approval of the Director General. Employees must be provided with pay slips for each wage period.

Advances to employees cannot exceed more than what the employee earned in the preceding month, or, where the employee has not been in employment for that long, what the employee would have earned in a month. Advances may exceed this amount if approval is obtained from the Director General. There are also exceptions to enable the employee to make certain specified purchases. Advances must be without any interest.

The circumstances in which an employer is permitted to lawfully deduct from an employee's wages are limited to where the deduction is authorised by law (e.g. social security contributions) or the amount is owed to the employer as a result of (1) overpayment of wages, (2) compensation for termination without notice, (3) advance of wages, (4) payment to a trade union or co-operative, (5) purchase of shares in the employer's business, (6) payment into a scheme established for the benefit of the employee, (7) payments made to a third party on behalf of the employee, (8) purchase by the employee of goods of the employer's business, or (9) accommodation, services, food and meals provided by the employer to the employee. Most of these deductions can only be made at the request in writing of the employee and/or with the approval of the Director General.

An employer cannot make any other deductions from the wages of an employee than the above unless it requests the prior approval of the Director General, even if there is an agreement between the employer and employee to allow deductions. With the Employment (Amendment) Act 2022 extending the scope of the Act to include all private sector employees, the rules on salary deductions now apply to employees who would previously have been exempt from these restrictions.

3. Leave

The longer an employee has served, the higher their minimum leave entitlement, as follows:

Employee's period of employment	Less than two years	At least two years, less than five years	Five years or more
Annual leave (per 12 months of continuous service)	8 days	12 days	16 days

In addition, employees are entitled to a paid holiday at the ordinary rate of pay on 11 of the gazetted public holidays and on any day designated as a public holiday for that year under the Holidays Act 1951. If any of the public holidays falls on a rest day or another public holiday, the working day following immediately the rest day or the other public holiday shall be a paid holiday in substitution. It is normal market practice for all employees to be granted paid holidays on all the National and State level public holidays.

4. Termination and lay-off benefits

Likewise, an employee's minimum termination notice period and termination and lay-off benefits are dependent on their period of employment:

Employee's period of employment	Less than two years	At least two years, less than five years	Five years or more
Termination notice period	4 weeks	6 weeks	8 weeks
Termination and lay-off benefits (per year of service)	10 days' wages	15 days' wages	20 days' wages

Employers should note that, as per Part B.I.1 above, employees earning in excess of MYR 4,000 per month are not entitled to the above allowances, unless they fall within one of the exempted categories. Employers may nevertheless choose to contractually grant these benefits to employees earning in excess of MYR 4,000 per month.

III. Employment agreements

✓ **Do:** Use contracts drafted for Malaysian law

✓ **Do:** Seek professional help for drafting contracts

✗ **Don't:** Use contracts prepared for another country

✗ **Don't:** Use group policies without checking for conflicts

For an employment agreement to properly protect an employer's interests, it needs to be both clear and thorough. It is also much easier to ensure that important conditions are contained in the employment agreement from the outset rather than to introduce them after the agreement has been signed.

For instance, an employer can make passing a qualification, a background check or a medical examination a pre-condition of employment in the employment agreement. If the employee refuses to sign or fails to meet the condition, the employment simply never starts. If the employee signs but starts work without fulfilling the condition, it would be a breach of the employment agreement and a potential ground for termination of employment.

In contrast, if the employment agreement is silent on the condition, introducing it later would be a variation of the terms of employment, which in principle requires the employee's consent.

1. Basic topics

As a general guide, an employment agreement should address at least the following matters:

- conditions for commencement of employment, e.g. the grant of work permit for the employee to work in Malaysia.
- commencement date, duration, and probation period.
- the employee's duties, with provision for reasonable later change at the employer's discretion.
- place of work, e.g. whether the employee can work from home and if yes, on what terms, whether the employee can be instructed to travel within the country or overseas.
- working hours, including rules on flexible hours if applicable.
- remuneration, including the base salary and any entitlements to bonuses and allowances, set out in unambiguous terms. Annual wage supplements are not mandatory in Malaysia and it is up to each employer to decide whether to grant them. It is especially important for the rules on bonuses to be crystal clear on whether the bonus is subject to the employer's absolute discretion, to be paid as of right provided specified conditions are met, or to be paid as of right without conditions.
- conditions for the reimbursement of expenses.
- benefits, e.g. medical insurance coverage, phone, allowances, company car, etc.
- annual leave and sick leave, including whether untaken leave is forfeited without compensation.
- confidentiality obligations.
- disciplinary procedures. If in doubt over what an employer can and cannot do as a disciplinary measure, seek professional advice.
- termination of employment, including notice period during and after the probation period, whether termination by payment in lieu of notice is permitted and the circumstances in which an employee can be dismissed without notice. Termination of employment tend to be especially contentious and risky for the employer, as discussed in Part D below. It is therefore essential for termination provisions to be properly drafted.
- governing law and forum for dispute resolution.
- personal data protection provisions.

We will consider these issues in more detail below.

a. Oral agreements

Although the Act defines a contract of service as any agreement "whether oral or in writing", it also provides that a contract of service exceeding one month or where the time reasonably required for the completion of the work exceeds or may exceed one month, must be in writing. Therefore, any employment contract for more than one month should be in writing. The contract must also include a clause setting out the manner in which it may be terminated by either party.

b. Electronic signatures

Electronic signatures on contracts have been legally recognised in Malaysia since 1997. According to the law, information in an electronic form shall not be denied its legal effect, validity, and enforceability.

The use of electronic signatures is never mandatory, and all parties must provide their consent to the use, provision, or acceptance of the electronic message. Consent may be inferred from a person's conduct. Not all documents and transactions can be signed digitally and electronically; some accept only certified digital signatures and others always require traditional wet ink signatures.

Regarding employment agreements, it is well-settled that they may be signed electronically. In this context, however, it is essential to understand that Malaysia makes a distinction between digital signatures and electronic signatures.

i. Digital signatures

A digital signature is narrowly defined as a "transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine whether the transformation was created using the private key that corresponds to the signer's public key and, whether the message had been altered since the transformation was made." Essentially, it is a signature that uses an encryption, which can be verified by reference to a valid certificate issued by a licensed certification authority.

Currently, there are only four certification authorities who are licensed in Malaysia to issue legally binding digital certificates: Pos Digicert Sdn Bhd, MSC Trustgate.Com Sdn Bhd, Telekom Applied Business Sdn Bhd, and Raffcomm Technologies Sdn Bhd. There are no recognised foreign certification authorities at present.

Digital signatures can be used for employment contracts, but as they are quite burdensome, employers tend to prefer electronic signatures.

ii. Electronic signatures

An electronic signature is defined as "any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature".

Electronic signatures can be used in "commercial transactions", which are defined as a single or multiple communication(s) of a commercial nature, whether contractual or not, including all matters relating to the supply or exchange of goods or services, agency, investments, financing, banking and insurance. Under this definition, the employer-employee relationship is treated as a "commercial transaction" since it arises from a contract of service in exchange for remuneration.

For an electronic signature to be legally valid, it must:

- be attached to or logically associated with the document;
- adequately identify the signer and their approval of the information to which the signature relates; and
- be as reliable as is appropriate given the purpose and circumstances for which the signature is required.

An electronic signature is "as reliable as is appropriate" if (i) the means of creating the electronic signature is linked to and under the control of the signer only; (ii) any change to the electronic signature post signing is detectable; and (iii) any change to the document post signing is detectable. Whilst the courts have held that even an SMS is considered a valid signature, as it adequately identifies the signer, we would generally recommend the use of e-signature software that provides a signature log as a built-in tamper-proof feature to meet the reliability criteria. Common examples of such software include DocuSign, SignRequest, Dropbox Sign, PandaDoc, SignNow, etc.

It is a common misconception that inserting a scanned copy of someone's signature is equivalent to electronically signing the document. A scanned signature is not recognised as an electronic signature as it is not under the sole control of the signer and it does not allow for the detection of post-signing changes.

Employment agreements can, of course, still be signed in wet ink.

c. Probation

Probationary periods are not regulated by law in Malaysia. However, employers often use probationary periods to assess the suitability of new employees before confirming their permanent employment. A probationary period of three to six months is common.

A probationer has the same rights as a confirmed employee. Therefore, employers cannot terminate a probationer's service without just cause or excuse and a probationer has the right to file an unfair dismissal claim with the Director-General for Industrial Relations if they feel they have been unfairly dismissed.

d. Perquisites and benefits-in-kind

In the past, employee perquisites were generally tax-free, but the current regulations make most fixed allowances taxable income. Most are still tax deductible for the company as employment expenses.

Under certain conditions, some allowances can be excluded from taxable employment income. These include:

- travelling allowances, petrol cards, petrol allowances or toll payments for travelling in exercising an employment: exempted up to MYR 6,000 per year. If the allowance exceeds MYR 6,000, the employee may be able to make a further deduction of the actual amount spent for official duties, if sufficient records are kept.
- childcare subsidies/allowances:. exempted up to MYR 2,400 per annum.
- parking fees or allowances, Meal allowances: fully exempted.
- subsidies on interest for housing, car and education loans: exempted if the total amount of loan taken does not exceed MYR 300,000.
- award (in cash or in kind) given to employees for excellent service, long service (more than 10 years), past achievement, innovation, productivity: exempted up to MYR 2,000 per annum
- under specific conditions, some benefits-in-kind can be excluded from taxable employment income. These include:
- leave passages: one overseas leave passage up to a maximum of MYR 3,000 for fares only, or three local leave passages including fares, meals, and accommodation.
- employer's goods provided free or at a discount: exempted up to MYR 1,000 per annum.
- employer's own services provided full or at a discount; maternity expenses and traditional medicines; driver provided from a pool of drivers provided by the employer solely for business purposes: fully exempted.
- telephone (including mobile telephone), telephone bills, pager, personal data assistant, and broadband subscription: fully exempted, limited to one unit for each asset.
- mobile phones, laptops, and tablets provided by employers to employees (flexible work arrangement incentive): exempted up to MYR 5,000.

The value of Benefits-in-Kind (BIK) provided to an employee can be determined by either the prescribed value method or the formula method. Under the formula method, the annual value of BIK provided to an employee is computed using the following formula:

$$\text{Annual Value of the benefit} = \frac{\text{Cost of the asset provided as benefit}}{\text{Prescribed average life span of the asset}}$$

The exemptions listed above do not apply if the employee in question is a director, or an employee who has controlling power of the company.

e. Jurisdiction

Employment-related disputes can be resolved through two alternative methods: the Director General of Labour and the Industrial Court. These options are more cost-effective and less formal compared to the regular court system.

The Director General of Labour handles disputes between employers, employees and contractors related to salary payments or monies covered under the Act.

The Industrial Court on the other hand has various adjudicative powers related to applications for recognition of collective agreements; the interpretation or variation of awards or collective agreements; cases of unjust dismissals; cases of constructive dismissals; trade disputes; victimisations.

The Malaysian courts will generally give effect to a choice of jurisdiction clause. However, a choice of jurisdiction clause specifying a foreign jurisdiction does not oust the jurisdiction of the Malaysian courts. Malaysian courts retain discretion to decide on the applicable jurisdiction on a case-by-case basis, taking into account the principle of forum non conveniens (that is, whether the Malaysian courts are the most appropriate tribunal to try the case) and whether there is some injustice in requiring a party to litigate in the foreign

jurisdiction. Generally, in assessing whether Malaysia is the appropriate forum, they will take into account the links of the employer, employee or employment relationship to other jurisdictions.

Parties may also agree to arbitrate employment disputes.

f. Choice of law

In Malaysia, where a contract has foreign elements involved such that the contract is an international one, and the parties expressly choose the law of the contract, that choice will be given effect.

However, parties cannot use this choice of a foreign law to avoid the mandatory provisions of Malaysian domestic law, and employment law tends to have many mandatory provisions.

g. Personal data

Employers must obtain the consent of employees before collecting and processing their personal data. Express consent is required where "sensitive personal data" is involved. Employers must inform employees of the nature and purpose of the information being collected, to whom it will be disclosed and that employees have the right to access this data. Consent must also be obtained before this information is disclosed to third parties. Employers must provide bilingual employee notices and consent documents in both English and Bahasa Malaysia.

2. Implied terms

Any term or condition in an employment contract that is less favourable than the provisions of the Act will be replaced by the minimum standards prescribed by the Act.

Employees are subject to certain implied duties, such as the duty to exercise reasonable care and skill in the performance of their duties, the duty to obey all lawful and reasonable orders given by their employer (subject to two qualifications: the employer cannot order the employee to do anything illegal or dangerous), and the duty to serve the employer in good faith and fidelity.

Employers, on the other hand, owe their employees a duty to pay wages, provide employees with a safe and conducive work environment, and, subject to certain exceptions, provide work.

Employers also have an implied right to transfer their employees within the organisation. However, to ensure fairness and protection for the employee, this right may be limited or excluded by contract. In addition, the transfer must be made in good faith and in the interest of the business; it should not be influenced by motives that could force the employee to resign or be used to harass or victimise the employee; and it should not result in a change in the employee's terms and conditions of service.

Although this right is recognised, it is recommended that employers who wish to exercise it include an express clause in employment contracts regarding the possibility of transfer, in order to avoid future disputes.

3. Use of employee handbooks

Malaysian employment agreements tend to be lengthy and complex which makes them unfriendly to employees and also difficult for HR staff to handle when a new employee is hired.

A popular solution is the use of employee handbooks, as follows:

- the handbook contains terms which are applicable to all employees, for example a company's disciplinary and grievance procedures, policy on usage of company cars, etc.
- the employment agreement will only contain the core terms of employment which vary between employees, for example job title, salary, employee- or position-specific benefits. Including only core terms means the employment agreement can be very short and easily readable. The employment agreement will expressly state that the handbook forms part of the employment agreement as well, which means that the handbook's terms are still legally binding.
- using the split arrangement above yields a short, accessible employment agreement, which, together with the lengthier handbook, forms a comprehensive set of employment terms.
- The handbook is then easier to amend, especially if the right to unilaterally amend is reserved.

Other documents, such as project specifications, may also be incorporated by reference into employment agreements in a similar manner. Collective agreements are also deemed to be incorporated into all members' employment contracts without the need for a reference, as will be discussed in Part B.IV below.

When incorporating a particular document by reference into the employment agreement, it is important to specify the order of precedence. This will be the employment contract, as it allows the employer to deviate from the general terms set out in the handbook and other documents.

It is also crucial that incorporated documents are properly communicated to employees in order to be effective. In practice, an employer should ideally provide each employee with a copy of all applicable terms and conditions of employment and obtain a written acknowledgement that the employee has received and had the opportunity to read and understand the contents of each document. Where this is impractical, an employer should either hold a group briefing to inform employees of the relevant terms or issue a notice of the relevant terms and ensure that this notice is emailed to all affected employees or posted in a prominent and accessible location, such as a notice board.

4. Cautionary note on the use of group templates and policies

For multinational corporations setting up in Malaysia, it may be tempting to simply take employment agreements and policies drafted for another location and use them in Malaysia with minimal changes.

This approach is risky. Terms drafted based on the laws of another jurisdiction may not be compliant with Malaysian legislation. Other countries may have more terms dictated by statute which could mean their employment agreements are sparse and do not need to spell out much.

Although all employees in Malaysia are now within the scope the Employment Act 1955, the exclusion of certain workers from key provisions, as discussed in Part B.I.1 above, means that the statutory framework remains limited in certain respects. Therefore, it may need to be supplemented by a more comprehensive employment contract.

Using employment agreements specifically drafted for Malaysian law is therefore strongly recommended.

In particular, caution also needs to be exercised with respect to group policies. There are three common mistakes when using group policies:

- the employment agreement mentions a policy without expressly saying that the policy forms part of the contract. In consequence, whether the policy's terms are legally binding contractual terms or "soft" guidance is unclear.
- the employment agreement incorporates a group policy, but some terms of the two documents contradict each other, and there is nothing in either document which says which one prevails in the event of conflict. This produces uncertainty regarding which of the contradictory terms applies.
- an employment agreement with Malaysian governing law incorporates a policy drafted under another system of law or contains terms which are non-compliant with Malaysian law.

In order to prevent the issues above arising, group policies should be reviewed by counsel in Malaysia before being incorporated into a Malaysian employment agreement.

5. Cautionary note on alternative methods of employment

One approach some companies adopt when they do not want to set up a local entity is the use of an "Employer of Record." However, it is important to proceed with caution if ones decides to go down this route.

The Employer of Record ("EOR") arrangement involves a local employee working for a local service company, the EOR, which has a service agreement with a foreign company. Through this agreement, the EOR deals with local employment, HR, and tax matters while the foreign company provides work to the employee. The EOR charges the foreign company a fee which includes the employee's salary, any incidentals, and a service fee for the EOR. Although this method may seem appealing as a vehicle for exploring new markets, to set up temporary projects, to guard against independent contractor noncompliance, as an entity stopgap or to facilitate an acquisition, it comes with inherent risks.

Because EORs act as the full legal employer, they can potentially limit the foreign company's ability to manage workers. For example, before they can enforce formal disciplinary action, foreign companies will need to secure the cooperation of the EOR.

One significant risk is the potential for this arrangement to fail, especially if it is used on a large scale. The contract between the service company and the foreign employer is often poorly drafted, making it easy for the courts to requalify the relationship between as the local employee and the foreign company as de facto employment.

Being seen as de facto employer may have unintended consequences for the foreign employer, as they now may be

regarded as having a business presence in the country which may trigger corporate registration requirements and/or the establishment of a permanent establishment, which in return may lead to detrimental fiscal consequences.

On the other hand, for the EOR to safeguard against its risks, it is crucial for the foreign employer to provide it with a comprehensive indemnity. Additionally, the foreign employer should confirm in writing that it fully understands the risks associated with the Employer of Record arrangement.

IV. Trade Unions and collective bargaining

A Collective Agreement is a formal agreement between an employer or employer's union and a trade union representing employees. It is the result of collective bargaining between these parties and outlines the terms and conditions of employment for the employees in that particular trade. Where collective agreements exist, they play a significant role in shaping the employment relationship.

Collective Agreements which have received cognisance from the Industrial Court become part of the employment contract between the employer and the employees in the trade covered by the agreement. This means that the terms and conditions specified in the Collective Agreement are deemed to be incorporated in any existing and future employment contracts of employees in the said trade.

V. Work permits

For non-Malaysian employees, distinguishing between an employment contract and a work permit is important as they serve different purposes.

A work permit is not required in order to hire a foreign employee and have a valid employment contract, so long as the employee is not physically present in Malaysia. The work permit is only necessary if the employer wishes for the employee to physically work from Malaysia.

Most expatriates who work in Malaysia will require an Employment Pass. For more information on visas and work permits, please refer to our brochure on Immigration into Malaysia.

VI. Social security

There are three main social security schemes employers should be aware of, namely:

- the Employees Provident Fund ("**EPF**"), a government pension scheme. For Malaysian employees, EPF contributions calculated based on the employee's wages must be made by both employer and employee. For employees with a foreign domicile, employers are not obliged to make EPF contributions, they are entirely voluntary.
- social security for employment injury administered by the Social Security Organisation ("**SOCSO**"). Both Malaysian and foreign employees are entitled to SOCSO contributions from their employer.
- the Employment Insurance Scheme ("**EIS**"), which provides insurance against loss of employment, also administered by SOCSO. The EIS only covers Malaysian citizens and permanent residents within a specified age range.

Upon hiring its first employee, an employer will need to register as an employer with SOCSO and, if applicable, the EPF and EIS, as well as register the employee with each applicable organisation. Each subsequent employee must also be registered.

C. During employment

Once the initial set-up —signing employment agreements, social security registrations, etc— has been completed, the employment generally begins with a probation period. An employer should document the employment relationship thoroughly as it progresses, especially on two points: variations of terms and performance.

Employers should also be aware of their rights to impose restrictions on employees during employment, to transfer employees, and in relation to employees who have absconded.

I. Probation period

As discussed in Part B.III.1.c above, a probationer has the same rights as a confirmed employee. Therefore, an employer cannot terminate a probationer's service without just cause or excuse and a probationer has the right to file an unfair dismissal claim with the Director-General for Industrial Relations if they feel they have been unfairly dismissed. The difference between a probationer and a permanent staff is in the remedy. If the court find that a probationer's service was terminated without just cause, the probationer is entitled to compensation in lieu of reinstatement of a maximum of 12 months' back wages. By comparison, confirmed staff are entitled to reinstatement or to a maximum of 24 months' back wages as discussed in Part D.IV below.

While termination of a probationer must be for just cause or excuse, case law recognises that the standard of proof required of the employer is lower in the case of probationers.

If no action is taken by the employer at the end of the probationary period, either by way of confirmation or by way of dismissal, the employee remains in service as a probationer. Do note that confirmation may be implied by conduct, meaning that if a probationer is treated as if they are a confirmed employee —e.g. by granting them the same benefits— the courts may recognise that the probationer has been confirmed.

To avoid any confusion, employers should always carry out an appraisal at the end of the probationary period, and confirmed employees should be issued an official confirmation letter.

II. Varying terms of employment

Any change to the terms of the employment agreement generally requires the employee's consent. Consent may be implied based on the employee's conduct. Unilateral variation of a substantial or fundamental term of the contract could result in repudiation of the contract. In order to minimise the risk of dispute, any agreed changes should be recorded in writing, ideally via an amendment agreement signed by the employer and employee. Such changes could include, for instance, a salary increase, a switch from working at the office to working from home, fixed hours to flexible hours, and so on.

The employment agreement may also expressly permit variation of certain terms by the employer without requiring the consent of the employee, such as location, duties or other relevant matters. The employee will be bound by the employer's decision to vary the contract in such instance, although notice of the variation must still be given to the employee.

Should the agreement provide that any changes must be in writing, the courts will interpret this strictly and no variations can be made other than in writing.

III. Performance

As will be discussed in Part D below, the termination of employment in Malaysia can be challenging. In essence, an employer must have a good reason to dismiss an employee and must be able to prove that reason if challenged in court. Trying to dismiss an employee for poor performance tends to be especially difficult. Often, an employer finds that, although it considers an employee unsatisfactory, it does not have sufficient proof to show what its expectations as an employer were, how those expectations have not been met, how long the employee has been unsatisfactory and what it has done to try to remedy the situation. Lacking such evidence means that, if the employee challenges the dismissal, the employer runs a very high risk of being unable to show that it had just cause or excuse for dismissing the employee, resulting in the dismissal being unlawful.

It is therefore important to clarify the employee's duties and what is expected of them at the outset, as well as maintain comprehensive performance records throughout the course of employment as a safeguard against a potential dispute.

In practice, as an employer you should:

- set a clear and measurable standard of performance for each employee at the outset and ensure that each employee is aware of what is expected of them;
- consistently conduct performance appraisals and, as far as possible, base these on objective criteria;
- document the outcome of every appraisal undertaken;
- clearly communicate to the employee in writing if their performance has been falling short of the set expectations

and offer constructive feedback and guidance on how they can improve;
- afford a reasonable timeframe for the employee to improve their performance and consistently review and offer feedback during the process;
- retain all correspondence regarding the performance of your employees.

IV. Restrictions on employees during employment

1. Non-compete clauses

Employers can enter into an exclusivity agreement with their employee. Although, as will be discussed below, post termination non-compete clauses are void, exclusivity agreements can be enforced against current employees.

In addition, employees owe a duty of good faith and fidelity to their employer and working for the benefit of another company other than the employer or setting up a competing business would constitute a breach of this duty.

2. Non-solicitation clauses

In the same vein, employees planning team-moves and soliciting other employees to join a competitor while still employed by their current employer would also be in breach of the aforementioned duty of good faith and fidelity.

V. Employee transfers

In Malaysia, when a business or its assets are sold, there is no direct equivalent to the EU's Transfers of Undertakings Directive or the UK's Transfer of Undertakings (Protection of Employment) Regulations, which aim to safeguard employees' rights in the event of transfers of undertakings, businesses, or parts of businesses. In the event of a transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger, there is no provision for the automatic transfer of employment.

Employees will by default remain employed by the seller in such transactions. Any "transfer" of employees in a sale of business transaction must be effected by a termination (by the seller) and rehire (by the buyer). In this scenario, the seller will be exempted from paying any statutory severance payment if the new offer from the buyer is made within seven days of the change of ownership and is under terms and conditions of employment not less favourable than those under which the employee was employed by the seller. An employee will not be entitled to termination benefits if the employee unreasonably refuses this new offer.

VI. Absconding employees

If an employee is absent from work for more than two consecutive working days without prior leave, unless they have a reasonable excuse for such absence and have informed or attempted to inform his employer of such excuse prior to or at the earliest opportunity, the employee is deemed to have broken their contract of service with the employer.

D. Termination of employment

✓	**Do:**	Seek legal advice before terminating
✓	**Do:**	Ensure understanding of termination options and risks
✓	**Do:**	Prepare comprehensive documentation on reason for termination
✗	**Don't:**	Dismiss without reason (!)
✗	**Don't:**	Dismiss without a strong and provable just cause or excuse

Malaysian employment law is highly protective of employees when it comes to the termination of employment. This means termination always carries risk for employers, and it is crucial for employers to understand what constitutes a lawful termination and what kinds of liabilities they could face if a termination is found unlawful.

I. Dismissal without cause not possible

There is no such thing as a lawful dismissal without cause in Malaysia. An employer must have just cause or excuse (essentially, a good reason) for dismissing an employee, whether the employee is still on probation or confirmed.

A former employee who considers himself dismissed without just cause or excuse may, within 60 days of their dismissal, make representations to the Director General of Labour. The Director General would then try to facilitate settlement between the former employee and employer. If settlement is not possible, the case will be referred to the Industrial Court. For convenience, we will refer to a claim brought to the Industrial Court in this manner as an "Unjust Dismissal Claim".

II. Commonly recognised dismissal causes

There is no fixed or comprehensive list of acceptable grounds for termination of employment by an employer in Malaysia, but the most common grounds for dismissal include misconduct, poor performance, medical incapacity, redundancy, or closure of business.

Generally, when concerns or allegations arise that may warrant dismissal, an employer should conduct a thorough and impartial investigation. The investigation will include gathering relevant evidence, interviewing involved parties, and allowing the employee an opportunity to present and explain their case. If the investigation establishes a valid case for dismissal, then the employer may arrange a disciplinary meeting with the employee and consider disciplinary action, including dismissal. The employee may be accompanied by a representative throughout the process, if they so choose.

1. Misconduct

Misconduct is any conduct on the part of an employee inconsistent with the faithful discharge of their duties, any breach of the express and implied duties of an employee towards their employer. Examples include theft, fraud, insubordination, harassment, absenteeism, conflict of interest, or breach of the employer's policies and procedures.

Misconduct may be intentional or not on the part of the employee, which will impact the outcome. It is always easier for an employer to show cause when the employee acted intentionally or even with premeditation. To reduce the risk of confusion or misunderstanding, it is important for employers to include an employee misconduct policy in their handbook and agreements. This should include relevant examples and precise disciplinary procedures.

Before an employer may dismiss an employee, the employer should issue a show cause letter, enjoining the employee to explain their conduct. The employer must also conduct an investigation, known as a domestic inquiry.

A domestic enquiry is an employer-led investigative process convened to determine an employee's culpability where allegations of misconduct have been made. The employer must determine the veracity of the allegations before charges of misconduct are brought against the employee. If the allegations have some basis, the inquiry must give the employee a fair and reasonable opportunity to provide detailed and specific explanations or to challenge the employer's evidence in relation to the said charges. The employee has the right to be represented during the inquiry, as well as to request witnesses and/or documents.

There are no strict rules on how a domestic inquiry should be conducted. A properly constituted domestic inquiry should, in essence, impartially investigate whether an employee has committed a misconduct, allow the employee to defend themselves, and make use of all relevant evidence, including documentary, oral, and testimonial evidence. The domestic inquiry should be recorded and a report prepared at the end.

During the domestic inquiry, the employer may suspend the employee from work for a maximum of two weeks to carry out the inquiry. Note that the employer is required to pay the employee at least half their salary during their suspension period and that, if no misconduct is found, the employer is required to restore the full salary that was withheld during the suspension period to the employee.

If the inquiry establishes misconduct, the employer has a number of options at its disposal, including downgrading the employee, dismissing the employee, or imposing any other lesser punishment as deemed just and fit. The punishment should be appropriate for the circumstances; dismissal without notice for a minor first offence is likely to be considered disproportionate and therefore unjust for instance. If the punishment is suspension without pay, it should not exceed a period of two weeks.

An employer should act swiftly when an issue of misconduct arises, as inaction could be seen as condonation. An employer who condones the misconduct of the employee is deemed to have waived the right to take action against the employee and cannot subsequently dismiss the employee for the said misconduct.

2. Poor performance

Poor performance relates to an instance where the employee's quality of performance does not correspond with the standards expected of the said employee in discharging their duties. The employee must consistently fail to meet the performance expectations outlined e.g. in their job description, despite receiving adequate support, guidance, and opportunities for improvement.

An employee cannot be fired at the first sign of poor performance. The employee must be given sufficient notice or warning about their performance. The employee must also be accorded sufficient opportunity to improve. It is only if, despite the notice and the time and opportunities to improve, the employee failed to do so, that the employee may be terminated. It is therefore essential to have both clear expectations as to employees' performance and clear guidelines on managing poor performance internally.

It is almost impossible for an employer to dismiss an employee based on poor performance if it does not properly document its actions. As a rough guideline, when a case of poor performance is brought to the employer's attention, it should take the following actions:

- issue a warning to the employee that their performance does not meet the standards expected of them. The warning should be very specific in detailing how the employee's performance is poor, using metrics and specific examples (e.g.: "your monthly billable/quota target is X, but for the past six months you have failed to reach this target"; "you do not follow our policies and guidelines"; "you failed to highlight a problem with a client to your supervisor").
- schedule meetings with the employee and their supervisor(s) to discuss how the employee can improve and what support they need. The employer should explore all possible avenues for improvement, but also set realistic goals, or it will not be considered to have given the employee a real opportunity for improvement.
- if all parties agree on a course of action, set this out in writing ("Performance Improvement Plan" or "PIP") and have the employee review and sign this PIP.
- monitor the employee's progress, together with the employee's supervisor.
- keep a written record of all interactions.

The employer should give the employee reasonable time to improve, but where the employee fails to conform to the PIP, it should issue further warnings. The employer may also have further meetings with the employee and amend the PIP to reflect these.

The employer should also generally first consider other disciplinary actions if the employee continues to perform poorly.

If the employee has been warned multiple times of the poor performance, has been on an appropriate PIP, and still has failed to improve sufficiently, then generally employer may lawfully dismiss the employee.

In the case of probationers, the employer should consider extending the probationary period as an alternative to termination, if it believes that there is still potential for the employee to improve. If the probationer still fails to improve their/her performance after the abovementioned steps have been taken by the employer and probation has been extended, the courts would be more likely to find that the termination was with just cause and excuse.

3. Medical incapacity

Medical incapacity refers to an instance where an employee's medical condition has rendered the employee incapable of fulfilling their obligations under the employment contract.

Before dismissing an employee for medical incapacity, the employer must take into account the employee's length of absence and likelihood of recovery, refer to a certified medical opinion, and consider alternative job duties.

Where an employer becomes aware of an employee's medical condition that significantly affects their ability to do their job, it should obtain a certified medical opinion. In securing this opinion, the employer should apprise the examining practitioner of the employee's specific job functions, for example by providing a job description, so the attending physician can properly determine whether the employee is fit to perform their original job duties.

Once the employer has obtained a certified medical opinion, it should consult the employee on their medical condition, fitness to do their job, likelihood of recovery, and any accommodations that may be considered. The employer's decision to dismiss or not must be decided in light of sufficient medical advice, taking into account the expected length absence and likelihood of recovery.

Where the medical opinion suggests a good likelihood of recovery or that the employer should place the employee on "light duties", the employer must consider temporarily reassigning the employee on alternative or lighter job duties. The employer does not need to create a new job function for the employee, but it must consider whether there are any appropriate alternative positions for the employee, including at a lower pay.

Where the employer makes the decision to dismiss, in order to reinforce the fairness of the decision, the employer should consider extending termination benefits to the employee if there is no contractual obligation to do so. There is no statutory obligation to do so, but it may reflect good industrial practice and goodwill.

Where an employee's medical condition is a pretence or an indication of an unwillingness to perform their contractual duties, it may constitute misconduct instead.

4. Retrenchment

Retrenchment refers to a discharge of surplus labour or staff by an employer for any reason whatsoever other than as a punishment inflicted by way of disciplinary action. This is usually undertaken in situations where a company needs to reduce its workforce due to economic reasons, technological advancements, restructuring, or any other valid operational necessity.

In undertaking a retrenchment exercise, an employer must, inter-alia, comply with the last-in-first-out principle, meaning that where there are two employees of a similar category, the employee with the lesser duration of service should be retrenched. An employer may depart form this principle only if it adopts an objective assessment for the selection of employees.

In the event of retrenchment or redundancy, employers are also prohibited from terminating the employment of a Malaysian employee, unless they have first terminated the services of all foreign employees employed by them in a capacity similar to that of the local employee.

III. Constructive dismissal

Constructive dismissal is where an employee considers themselves dismissed as a result of present or anticipatory breaches committed by the employer in the course of the employment relationship. This is often a result of the employer's breach of contract in one serious incident or a series of incidents that are serious when taken together. For example, an employer might constructively dismiss a member of staff by demoting them for no reason or preventing them in other ways from carrying out their regular duties.

An employee who considers themselves constructively dismissed may also have an unjust dismissal claim. In order to succeed in such a claim, the employee must be able to prove (1) that there was a breach by the employer or the employer indisputably indicated it would not perform or future non-performance by the employer was inevitable, (2) the breach was a fundamental one going to the root of the contract, (3) the employee place the company on notice of the breach and the company did not remedy the defect (4) the employee left in response to the breach and not for any other unconnected reason, and (5) the employee did not delay in terminating the contract and did not waive the breach.

If the employee fails to establish the above, the claim will fail and be considered plain resignation or even abandonment of employment.

IV. Basics of Unjust Dismissal Claim

An Unjust Dismissal Claim is the main risk employers face in every termination of employment. It is very easy for a disgruntled former employee to make representations to the Director General.

Because the settlement stage can be done without legal representation, there is no monetary deterrent against employees simply initiating the procedure, even if they do not have a strong case, in the hopes of obtaining a settlement with a pay-out from the employer.

If the Unjust Dismissal Claim reaches the Industrial Court, the employee will first need to prove that they were dismissed. In a typical scenario where a notice of termination was issued by the employer, the employee's burden is easy to discharge. If discharged, the burden shifts to the employer to prove that the dismissal was with just cause or excuse which is considerably harder. The standard for constituting "just cause or excuse" is very high. In essence, an employer not only needs to have had a very good reason for dismissing the employee, but it must also have followed appropriate procedure, and must be able to prove both to the satisfaction of the Industrial Court. It is therefore essential to carefully document the entire dismissal process, including investigations and efforts to retain the employee.

V. Risk

The potential liability for an employer in an Unjust Dismissal Claim can be substantial.

The following is an outline of the general rules:

- if a former employee succeeds in an Unjust Dismissal Claim, their principal remedy is reinstatement to their old position.
- if reinstatement is not feasible, for example where the relationship between employer and employee has broken down completely, the Industrial Court would usually grant compensation in lieu of reinstatement ("compensation in lieu"). The amount of compensation in lieu is ultimately up to the discretion of the Court, but the most common basis is one month of the employee's last-drawn wages per completed year their service. In circumstances where there are aggravating factors, such as bad faith on the part of the employer, additional punitive damages may be awarded.
- in addition, the former employee would also usually receive an award of back wages, i.e. the wages they would have received had they not been dismissed.
- back wages are calculated from the date of dismissal to the award of the Court, up to a maximum of 24 months' wages for a confirmed employee. A case taking 24 months to reach an award is unusual, however; 12 is a more typical timeframe. An award of back wages can be subject to deductions. For example, where a former employee has found new employment, part or all of the wages they have earned post-dismissal may be deducted from their back wages.

As an example, consider an employee with last-drawn wages of MYR 10,000 with five completed years of service:

- assuming compensation in lieu is granted on the usual basis without punitive or other additional damages, it would likely be calculated as MYR 10,000 x 5 = MYR 50,000.
- maximum back wages (i.e. 24 months and no deductions) would be MYR 10,000 x 24 = MYR 240,000.
- the employer's maximum financial liability can therefore be estimated as MYR 50,000 + MYR 240,000 = MYR 290,000.

VI. Minimising risk

Given that Unjust Dismissal Claims are easy for employees to initiate and could result in substantial liability for an employer, terminations of employment should be approached by employers with planning and caution.

Whether a termination was with just cause or excuse, is assessed by the Industrial Court on a case-by-case basis depending on the facts. This means each termination case is unique and must be considered based on its own circumstances. There is unfortunately no fixed roadmap an employer can follow which results in safe termination. For instance, there is no rule that three warning letters is enough before dismissing an employee; it depends on the facts.

Therefore, before terminating an employee, an employer should seek legal advice on at least the following counts:

- Based on the specific facts of the case, whether it is likely that a dismissal would be considered without just cause or excuse.
- What is the safest possible termination option on the facts and how to implement it. For example, termination by concluding a mutual separation agreement with an employee is often a safer option for employers than a dismissal, but mutual separation negotiations must be handled correctly.

In summary, the risk of a Unjust Dismissal Claim will always be present in a termination of employment, but it can be managed with proper advice and planning. It is also worth mentioning that the least risky cases tend to be those where precautions have been taken before the employment relationship went wrong, for example through the mechanisms

discussed above: the use of well-drafted employment agreements, thorough and documented investigations, and keeping comprehensive records over the course of the employment relationship.

VII. Resignation and mutual termination

1. Resignation

An employee may decide to leave their employer and resign voluntarily. If an employee tenders their resignation but the employer wishes to retain the employee, it can negotiate a possible stay with the employee.

If the employer accepts the resignation, it should notify the employee and ensure to record both the acceptance and the notification in writing. An employee who resigns is not entitled to termination benefits, unless provided for in their employment contract.

If an employee was pressured to resign, the employee may have a claim for unjust dismissal. A forced resignation may be regarded as tantamount to a dismissal and unless the employer can show that there would have been grounds for dismissal, it will be regarded as unfair dismissal. Employers should therefore be careful not to suggest resignation or put employees in a position where resignation is preferable to continued employment.

2. Mutual separation

Mutual separation is a voluntary agreement between an employer and an employee to end the employment relationship in a fair and mutually beneficial manner. The process allows both parties to part ways amicably, recognising that the employee's goals or circumstances may have changed, or that the employer's needs may have evolved.

Either party can approach the other to negotiate a mutual separation, but as with resignation, if an employee was pressured into signing a mutual separation agreement so that the company could avoiding dismissing them, the employee may have a claim for unjust dismissal.

It is therefore crucial to approach mutual separation with the utmost sensitivity, emphasising transparency and fairness. Throughout the process, the employer should emphasise that the decision to enter into the agreement is entirely voluntary and that there will be no negative consequences for declining.

If both parties agree to proceed with mutual separation, it is essential to sign of a mutual separation agreement that outlines the terms and conditions of the separation. In particular, this should cover any applicable notice period and benefit entitlements.

VIII. General termination considerations

Depending on the manner of termination, employees may be entitled to certain benefits, such as severance pay, or may be subject to certain obligations, such as notice requirements.

1. Termination by notice or payment in lieu of notice

Apart from certain exceptions, employers and employees are required to give notice before terminating the employment relationship. The minimal statutory period of notice required depends on the employee's length of service, as set out below:

Employee's period of employment	Notice period required
Less than two years	4 weeks
At least two years, less than five years	6 weeks
Five years or more	8 weeks

The parties can extend the notice period by contract.

Alternatively, either party may terminate the employment relationship by paying to the other party payment in lieu of notice ("PILON"), i.e. a sum of money equal to the amount of the employee's wages which would have accrued during the required period of notice. Even if notice has already been served, termination may be expedited if PILON equivalent to the wages which would accrue in the remaining period of notice are paid.

2. Summary dismissal

Either party to an employment contract may terminate such contract of employment without notice in the event of any wilful breach by the other party of a condition of the contract.

Provided that due investigation has been carried out, an employer may terminate an employee without notice or PILON

where it finds that there is just cause for doing so. For example, where the employee is dismissed for misconduct, has committed a criminal offence which affects their position, has refused or neglected to comply with the employer's lawful and reasonable orders and directions, has become of unsound mind, or has become permanently incapacitated.

3. Garden leave

During the notice period, an employer may at any time and for any period require the employee to cease performing their duties, or to perform only limited duties. The employer may also exclude the employee from its premises for any period it decides. This is generally known as "Garden Leave".

During Garden Leave, the employee remains bound by all of their obligations under the contract of service and the employer's policies. The employee is also entitled to receive their salary and all other contractual benefits during this period.

4. Termination benefits

As previously discussed, employees earning in excess of MYR 4,000 per month are also not entitled to the statutory termination benefits, unless they fall within one of the exempted categories. Employers may nevertheless choose to contractually grant these benefits to employees earning in excess of MYR 4,000 per month.

The statutory termination benefits an employee is entitled to depend on the employee's length of service, as follows:

Employee's period of employment	Notice period required
Less than two years	10 days wages for every year of employment
At least two years, less than five years	15 days wages for every year of employment
Five years or more	20 days wages for every year of employment

For partial years of service, severance is determined on a prorated basis.

Eligible employees who have been employed for twelve months or more are entitled to statutory termination benefits payment when their employment contract is terminated for any reason, except when the contract is terminated upon reaching the contractual age of retirement, when the contract is terminated on grounds of misconduct, when the employee voluntarily terminated their own contract, or if the contract of service is renewed immediately with equal or improved terms.

IX. Post-employment restrictions

1. Non-compete restrictions

Where a non-compete agreement with an employee aims to cover a period after employment has ended, it will be void and unenforceable against the employee. The reasonableness and duration of the non-compete clause are of no consequence; even a reasonable clause limited in duration to a short post-employment period cannot be enforced. Consequently, former employees are allowed to take up employment with rival companies and set up competing businesses immediately after their employment is terminated and employers cannot make use of non-compete clauses to restrict this.

An employer may wish to nevertheless include such a clause as a deterrent, but it must be emphasised that it will not be enforceable in court in any way.

2. Non-solicitation restrictions

Although non-compete clauses are not enforceable, non-solicitation clauses may be upheld. A key point to note from the perspective of future enforceability is that the scope of the non-solicitation clause must be reasonable, or it carries a risk of being voided by the courts for restraint of trade.

Employers should set a reasonable post-employment period for the duration of the non-solicitation restriction and ensure that the clause is clearly worded and properly incorporated to ensure effectiveness if enforcement is required.

3. Confidentiality obligations

Non-disclosure agreements and confidentiality clauses are enforceable even after the employment relationship has ended, provided that the agreement or clause expressly provides that it applies after termination of the employment relationship, e.g. "the employee shall not disclose confidential information during the employment relationship or for one year thereafter." Confidentiality clauses may even be perpetual in duration, as long as they do not restrict the ability of former employees to compete.

E. Contact

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Luther has been named "Law Firm of the Year: Germany 2021" and also "European Law Firm of the Year 2021" by The Lawyer, one of the most well-known legal magazines worldwide.

Lawyers and tax advisors

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Locations

21

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We have a global outlook, with international offices in 11 key economic and financial centres in Europe and Asia. We also maintain close relationships with other commercial law firms in all relevant jurisdictions. Luther is a founding member of unyer (www.unyer.com), a global organisation of leading professional services firms that cooperate exclusively with each other. This way, we ensure a seamless service for our clients throughout their demanding international projects.

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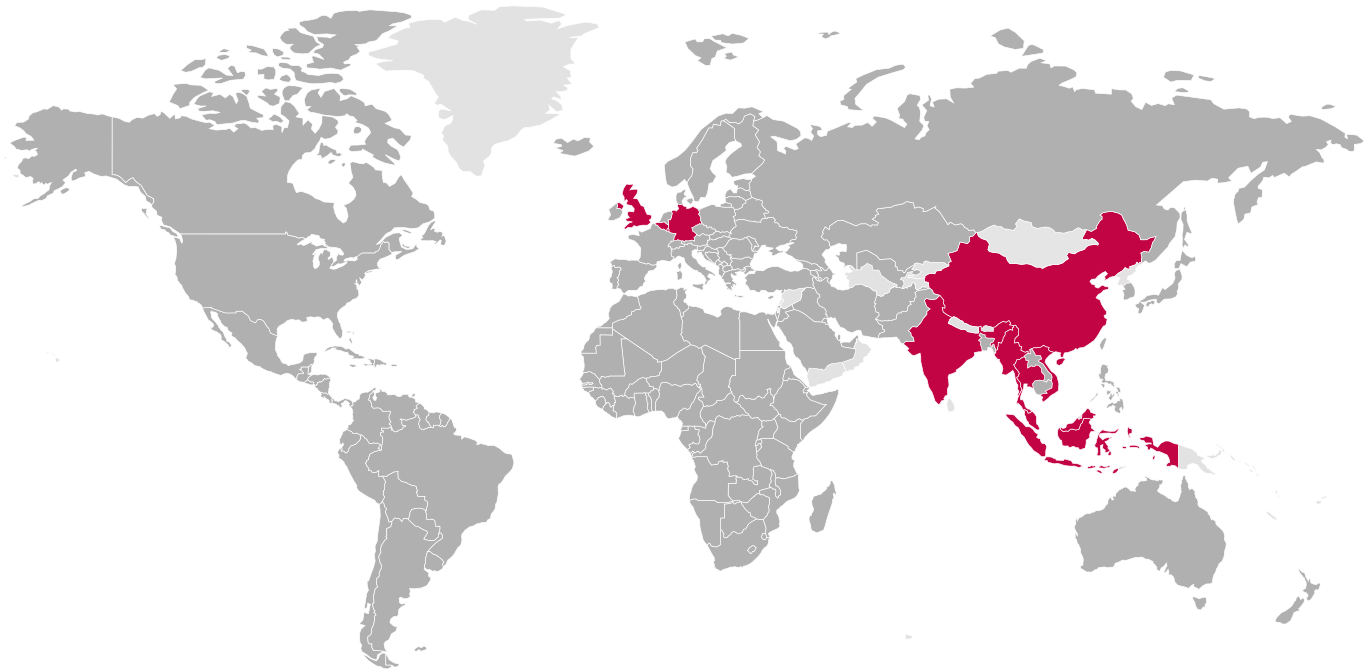

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Singapore
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Our awards

JUVE

In the 2022/2023 JUVE Guide to Commercial Law Firms, 52 lawyers from Luther were recommended, and 10 of these were also listed as “leading advisors”. The legal publisher JUVE ranked Luther in 31 areas of law. In 2022, Luther was nominated for the JUVE award “Employment Law” as well as “Real Estate” and was named “Law Firm of the Year” by JUVE in 2019. In the past, Luther already won the JUVE award “Law Firm of the Year 2017 for Environmental and Regulatory Law”.

The Legal 500

The Legal 500 Germany 2023 recommends Luther in 30 areas of law, with “Top Tier” rankings in two of these areas. 72 lawyers are being recommended, 12 of whom have been specially recognised as “Leading Individual” or “Next Generation Partner”. Luther has also been included for Germany in the first edition of **The Legal 500 Green Guide EMEA 2022**. This guide provides an overview of law firms’ engagement with sustainability, including both work for clients as well as firms’ own best practices and initiatives.

Chambers

In 2023, Luther was recognised by Chambers Europe for 13 practice areas in Germany as well as in two practice areas in Luxembourg. Moreover, 15 partners were included in the Individual Ranking. Additionally, in 2023, Luther was recognised by Chambers Global in three advisory areas in Germany and Myanmar, while five partners were also included in the Individual Ranking.

The Lawyer European Awards

Luther has been named “Law Firm of the Year: Germany 2021” and also “European Law Firm of the Year 2021” by The Lawyer, one of the most well-known legal magazines worldwide.

Kanzleimonitor

Kanzleimonitor 2022/2023 recommends Luther in 25 areas of law and has also included 16 Luther lawyers among the recommended lawyers mentioned by name.

„Best Lawyers in Germany 2024“

For the year 2024, 99 lawyers have been recommended by Luther as “Best Lawyers in Germany 2024”, an award presented by the US publisher “Best Lawyers” in cooperation with the German Handelsblatt, including one partner as “Lawyer of the Year” for his area of law, and 19 colleagues who have received the recommendation “Best Lawyers - Ones to Watch”.

WHO’S WHO LEGAL

WHO’S WHO LEGAL listed 21 lawyers in December 2022, four of whom were recognised as Thought Leaders, which is the highest award, and three of whom were named Future Leaders.

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