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Proposed amendments released by the Ministry of Human Resources

The Malaysian Ministry of Human Resources (MOHR) has recently released the proposed amendments to the **Industrial Relations Act 1967 (IRA)**, the **Trade Unions Act 1959 (TUA)**, and the **Employment Act 1955 (EA)**. The proposed changes are part of MOHR's initiative to elevate the labour standards in Malaysia to be in line with that of the International Labour Organisation (ILO) Convention and to have labour laws that are more reflective of the current employment climate in Malaysia.

This alert, which describes the potentially wide-ranging effects on existing dispute resolution mechanisms under the IRA, is **PART ONE of a series of three alerts**. Two other alerts will be distributed in the coming weeks to cover the proposed amendments to the TUA and the EA.

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Proposed amendments to the Industrial Relations Act 1967

Please note that this alert is based on the proposed amendments published as at 4 December 2018. The draft amendments are subject to further revisions by the MOHR. The key aspects of the proposed amendments along with its possible implications are set out below.

Removal of Minister's discretion

Under existing provisions, the Minister of Human Resources (Minister) has a discretion to filter out frivolous unfair dismissal complaints and only refer claims which are deemed fit for the Industrial Court's adjudication. The Minister's discretion is now removed under the proposed amendments. Reference of unfair dismissal claims will instead be performed by the Director General of Industrial Relations (DGIR) automatically upon the event that the disputing parties fail to reach an amicable settlement during the conciliation meetings.

What this proposed amendment entails is that the decision to refer an unfair dismissal complaint to the Industrial Court will no longer be subject to judicial review by the civil courts. This raises concerns as the automatic referencing of complaints would likely encourage the filing of frivolous and vexatious claims which would result in unnecessary backlog of cases at the Industrial Court.

Industrial Appeal Court

The introduction of the Industrial Appeal Court denotes an unprecedented right of appeal against the awards granted by the Industrial Court. Under the existing regime, the only redress against the Industrial Court awards is by way of filing an application for judicial review at the High Court of Malaya, which is often limited to the review of the decision-making process and not the actual merits of the decision. The inclusion of an appeal process will allow for scrutiny on the merits of the awards.

It is noteworthy that details including the composition and powers of the Industrial Appeal Court has yet to be released by MOHR in the proposed amendments.

Discrimination in workplaces

In line with the increasing scrutiny on workplace discrimination, new provisions have been included to prohibit employers from discriminating against any employee on the grounds of gender, religion, race or disability in connection with the terms and conditions of the employment. Discrimination, however, is allowed only when such distinction or preference is the inherent requirements of the particular job.

Upon receipt of a complaint on discrimination, the DGIR is empowered to undertake relevant measures or enquiries to resolve the complaint. If the complaint remains unresolved, the DGIR will refer the complaint to the Industrial Court for its adjudication where an award deemed necessary and appropriate to restore industrial harmony will be made. However, the proposed amendments do not seem to set out in detail the possible reliefs for employees who are victims of discrimination.

The proposed amendments to the EA also provide for restrictions against discrimination. The difference between the IRA and the EA anti-discrimination provisions are:

(a) the EA restricts pre-employment discrimination as well as discrimination during employment; whereas the IRA only covers discrimination during employment. It is interesting to note that the discrimination restrictions applicable during employment does not cover the wider scope of restriction for discrimination on grounds of language, marital status and pregnancy;

(b) a complaint for discrimination under the EA will expose the employer to a maximum fine of MYR 30,000; whereas the liability exposure for a complaint under the IRA is unclear; and

(c) a complaint for discrimination under the EA will lead to investigations by the Director General of Labour; whereas an unresolved complaint under the IRA will lead to proceedings at the Industrial Court.

Penalty for non-compliance with Industrial Court awards

The amount of fines imposed for non-compliance with an award under the proposed amendment will be increased to MYR 30,000 from MYR 5,000 under the existing provisions.

Penalty provisions relating to trade unions

Several other amendments have been made to the provisions relating to trade unions, which are among others, as follows:

(a) Categorisation of employees

as mentioned above, the task of determining the managerial, executive, confidential or security capacity of the employees for purposes of recognition of trade unions is now assigned to the DGIR instead of the Minister;

(b) *Right to choose between two or more unions*

when there are more than one trade union that has been accorded recognition by the employer to represent a class of employees, the employees will be given the right to vote for their preferred trade union by way of a secret ballot and the trade union with the highest votes will have the sole bargaining rights on behalf of the employees;

(c) *Liberalisation of strike requirements for selected industries*

trade unions are no longer required to provide advance notice for carrying out strikes against employers carrying out the following services: banking services, port, harbour, airport services, postal services, oil refineries, broadcasting services, transport services other than those within Federal Territory of Wilayah, Putrajaya and Labuan or any of the capital cities of the states within Malaysia;

(d) *Retrospective application of collective bargaining agreements*

the limitation for the retrospective date of a collective bargaining agreement to be no earlier than 6 months before the date of it being taken cognizance of by the Industrial Court, is removed. The removal of the 6-month limit means that the collective agreement could be backdated to a much earlier date, which translates to potential higher cost to employers who are required to backpay any additional benefits provided under the newly-negotiated collective agreement;

(e) Removal of union competency requirements

the requirement for the DGIR to determine competency of a trade union (i.e., to consider whether the union falls within the same establishment, trade, occupation or industry) has been removed along with the right of the DGIR to refer the role of such competency determination to the

Director General of Trade Union (DGTU). In other words, a trade union that may not be sufficiently equipped with industry-specific knowledge and experience to appropriately represent the employee's interest in accordance with market practice for the particular industry, may be accorded recognition in the future. Whilst the proposed amendments to the TUA retains the right of the DGTU to enquire into a trade union's competency, it remains unclear as to the purpose or effect of such right and how "competency" is to be determined moving forward. This is because the proposed amendments to the IRA clearly indicates that the DGIR grants recognition solely based on the membership verification of a trade union;

(f) Review of DGIR's decision concerning employee categorisation and union recognition

there now seem to be an avenue for the DGIR's decision in relation to the categorisation of employees (i.e., managerial, executive, confidential or security capacity) and recognition of the union, to be challenged. It is unclear as to whether this is to be challenged by way of judicial review in the civil courts, or through the Industrial Appeal Court; and

(g) ***Union's involvement in matters concerning managerial prerogative***

trade unions may now have the power to encroach into an employer's managerial prerogative. A trade union will be able to include the following matters in their proposal for collective agreement which were previously excluded under the IRA:

(i) the promotion of any employee from a lower to a higher grade or category;

(ii) the transfer of an employee within the organisation, provided that such transfer does not entail a change to the detriment of the employee's terms of employment;

(iii) the employment of any person in the event of vacancies in the organisation;

(iv) termination of an employee due to redundancy or reorganisation;

(v) the dismissal and reinstatement of an employee; and

(vi) allocation of duties in consistent with the employee's terms of employment.

Conclusion

We believe that the proposed amendments, if implemented, would bring about significant changes to the current dispute resolution process. While the proposed changes potentially shortens the dispute resolution process for unfair dismissal claims, the removal of the Minister's role as a filtering mechanism and removal of

the Civil Courts role would likely encourage the making of frivolous complaints / appeals which may result in unnecessary backlogs and unfair cost implications to employers.

Further, in combating discrimination in workplaces, businesses must be more vigilant in reviewing their internal protocols to ensure continuous compliance with the law and to avoid complaints being filed against them.

The liberalisation of union rights reinforces the need for employers to revisit employment benefits and labour practice towards ensuring industrial harmony and minimising the employee's perceived need to unionise.

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