

THE GLOBAL EMPLOYER

GLOBAL LABOUR, EMPLOYMENT, AND EMPLOYEE BENEFITS BULLETIN

Managing Human Capital Resources Across Time Zones And Cultures **Introduction**

Baker & McKenzie's Global Labour, Employment, and Employee Benefits Practice Group is pleased to present its 24th issue of *The Global Employer* TM.

Comprised of more than 400 practitioners from the Firm's 66 offices in 36 countries, the Practice Group provides comprehensive legal services to multinational employers in all of the major jurisdictions of the world.

Highlights

This issue contains a wide variety of articles on legal developments from 14 jurisdictions plus a perspective on international labour standards. The articles focus on managing employment practices, labour, compensation, and benefits issues across borders. Employment issues and the potential liabilities surrounding them continue to cause concerns for multinational employers. The articles in this issue cover a number of recent developments such as occupational injury insurance regulations in China, a new law on working time in Italy, discrimination law in Mexico, new rules for maintaining workbooks in Russia, standardization of working conditions in Venezuela, and recent labour code amendments in Hungary. Other new developments include easing restrictions for purchasing insolvent companies in Germany, clarification of proof for mixed-motive discrimination cases by the United States Supreme Court, and moral harassment case law in Spain.

Additional articles address changes in the international labour arena. In this issue we feature articles on international labour standards and corporate interests, and being a model employer in the Ukraine.

Dealing with benefits and compensation issues can prove to be a major challenge for multinational employers. In this issue, you can learn about Partial Plan Wind-Up Surplus and other recent pension law developments in Canada, and new measures that impact salaries in Argentina.

Finally, in this issue we get a closer look at regulating the activities of immigration consultancy agencies in the Philippines, and a legal overview of industrial action in Malaysia.

Industrial Action In Malaysia: A Legal Overview

Introduction

Malaysian law expressly recognizes the right to organise and to collectively bargain. Malaysia has, over the past four decades, ratified a number of International Labour Organisation (“ILO”) conventions.

Notwithstanding these rights, unions have historically failed to exert much influence on the Malaysian industrial landscape. This can be attributed to the strict regulation of Malaysian trade unions, which arose as a result of trade unions being a “breeding ground” for subversive elements shortly following World War II.

Membership of trade unions are limited to workers who are in similar trades, occupations or industries. All trade unions must register themselves with the Director-General of Trade Unions (“DGTU”) and the scope of collective bargaining is considerably limited.

While an employer is legally bound to recognise an eligible trade union which has the majority support of its workforce for the purpose of collective bargaining, the risk of pickets and strikes interrupting production is very small in practice, owing to the strict regulatory framework and risk of relatively severe penal sanctions.

This article seeks to examine the legal and procedural framework which regulates and prohibits industrial action.

The Right To Organise And The Right Of Collective Bargaining

Under the Malaysian Federal Constitution, all citizens have the right to form associations, subject to the right of Parliament to restrict the right in the interest of security, public order, or morality. Malaysia has also ratified the Convention (C98) of the ILO concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

The Industrial Relations Act (“IRA”), the Trade Unions Act (“TUA”) (collectively, “Malaysian Industrial Laws”) as well as the Employment Act expressly recognise the right to organise and the right of collective bargaining through statutory provisions which, among other things:

- a) Ensures the liberty of workers to form and join a trade union and participate in its lawful activities and require the employer to accord recognition to the trade union as the sole bargaining agent where the trade union commands a simple majority of the workers within the undertaking;
- b) Defines the scope of collective bargaining in order to enable the parties to be aware of what demands may be raised and may be negotiated upon; and
- c) Imposes on the parties an obligation to bargain in good faith or negotiate with each other with a desire to reach an agreement and ensures the smooth administration of the collective agreement by providing means for the interpretation as well as the implementation of the collective agreement.

The Right To Dispute And To Participate In Industrial Action

Malaysia recognises the right to dispute over labour matters, either on an individual or collective basis. The principal aims of the IRA is to regulate relations between employers and their workers and their trade unions and to provide the means to prevent and settle any differences or disputes arising from their relationship.

The worker's right to dispute is ultimately balanced against the employer's right to uninterrupted work. While workers are entitled to participate in industrial action, such rights are ultimately balanced in the employer's favour. In almost all but the most narrow of circumstances, most strikes would be illegal under the Malaysian Industrial Laws.

Picketing And Strikes

Picketing and strikes are usually taken as a last resort to more peaceful means of settling trade disputes. The legal distinction between strikes and picketing will be discussed in this part.

Picketing is the action by workers involved in a trade dispute at or near the workplace for the purpose of obtaining or communicating information or persuading or inducing any workers to work or abstain from working. Picketing is generally held outside of working hours, and the strict substantive and procedural requirements relating to strikes (further discussed below) do not apply to picketing.

While there is a greater degree of freedom to picket, picketing is only allowed so long it is not conducted for purposes discussed above. Any form of picketing must not be conducted in such manner which results in:

- a) Intimidation;
- b) Obstruction to the approach to the place of work or the exit therefrom; or
- c) A breach of the peace.

Contravention of the above is an offence under the IRA, punishable by imprisonment of a maximum one year imprisonment term and/or a maximum fine of RM1,000 or both.

Although workers possess the general right to strike, this right is very closely regulated under the Malaysian Industrial Laws. The overall purpose of such close regulation is to minimise the disruptive and potentially crippling consequences of strikes as a means of settling trade disputes in favour of settlement through arbitration before the Malaysian Industrial Court.

A "strike" is broadly defined under the Malaysian Industrial Laws as:

"the cessation of work by a body of workers acting in combination, or a concerted refusal or a refusal under a common understanding of a number of workers to continue to work or to accept employment, and includes any act or omission by a body of workers acting in combination or under a common understanding, which is intended to or does result in any limitation, restriction, reduction or cessation of or dilatoriness in the performance or execution of the whole or any part of the duties connected with their employment."

A strike therefore includes somewhat lesser forms of industrial action such as "work-to rule" or "go-slow."

Regulating Strikes

Although not expressly provided for under the Malaysian Industrial Laws, only members of a registered trade union may legally participate in a strike. Strikes conducted by workers who are not members of a registered trade union are therefore illegal.

The provisions of the Malaysian Industrial Laws prescribe, as follows, certain substantive and procedural requirements which must be fulfilled in order for a strike to be legal:

a) Substantive Requirements

(i) Strikes may only be carried out for the furtherance of a trade dispute. Strikes carried out by workers to express support or solidarity for fellow workers employed by a different employer in respect of an unrelated trade dispute (also known as “secondary” or “sympathy” strikes) are illegal. This requirement also prohibits workers from carrying out strikes for the furtherance of causes unconnected to their employment, such as strikes for political reasons.

(ii) A strike will be illegal where it is carried out:

(aa) During the pendency of proceedings and seven days following the conclusion of proceedings, of a board of inquiry appointed by the Minister of Human Resources (“Minister”) to investigate any existing or apprehended trade dispute;

(bb) Where a trade dispute has been referred to the Industrial Court. Once the Minister exercises his discretion to refer the trade dispute to the Industrial Court, the continuance of any strike will be rendered illegal;

(cc) In respect of any matter covered by a collective agreement taken cognizance of by the Industrial Court. The IRA requires that a collective agreement must be jointly deposited by the parties with the Industrial Court for its cognizance or approval, within one month of it being entered into.

Once the collective agreement has been granted cognizance by the Industrial Court, the parties will be legally bound to its terms. Any variation to the terms of the collective agreement must also have the cognizance of the Industrial Court, notwithstanding the agreement of the parties to the variation;

(dd) In respect of any of the matters covered by managerial prerogative, i.e., matters which relate to promotion, transfer, allocation of work, retrenchment and termination of employment; and

(ee) In furtherance of a dispute over recognition by an employer of a trade union which is being conciliated by the Director General of Industrial Relations (“DGIR”) and where the Minister decides against making an order for the employer to grant compulsory recognition to the trade union.

b) Procedural Requirements

(i) Trade Union Procedures

To legally go on strike, a trade union of workers must obtain the consent by secret ballot of at least two thirds of its members. The secret ballot must contain a resolution setting out clearly the issues leading to the proposed strike, and describing clearly the nature of the acts to be done, or not to be done.

The results of the strike ballot must then be filed with the Director General of Trade Unions (“DGTU”) within 14 days of it being taken. The DGTU has the power to verify and investigate the results and conduct of the secret ballot, and may declare the secret ballot to be invalid if he is satisfied that the

trade union has not fulfilled all legal requirements. Where the requirements are complied with, a mandatory waiting period of seven days is to be observed before striking can actually commence.

(ii) Essential Services

Essential services are industries such as banking, electricity, water, fire, port and labour, prison, fuel, health, telegraph, transport, petroleum and gas (both in the public and private sectors). Under Section 43 of the IRA, workers in any essential service intending to strike must give notice of strike to their employer of 42 days, besides following all other procedures. Upon receiving such notice of strike, the employer must immediately report the particulars of the notice received to the DGIR.

This requirement for notice would allow a “cooling-off” period and permit appropriate action to be taken, including the Minister referring the trade dispute to the Industrial Court rendering illegal any strike carried out even after the expiry of the notice.

Legal Consequences Of An Illegal Strike

Under the IRA, a worker who commences, continues or acts in furtherance of an illegal strike will be liable to imprisonment for a term not exceeding one year or to a maximum fine of RM1,000, or both, and a further fine of RM50 for every day during which such offence may continue.

Under the TUA, any trade union and every member of its executive who commences, promotes, organises or finances any strike will be liable to imprisonment for a term not exceeding one year or to a maximum fine of RM2,000, or both, and a further fine for RM100 for every day during which such offence may continue.

Workers who have participated in an illegal strike may be lawfully dismissed by their employer. Additionally, the DGTU may direct that workers who have participated in an illegal strike cease to be members of the union concerned and would not be eligible for membership again without the approval of the DGTU.

Conclusion

While the right to collectively organise and bargain are relatively free of legal impediments, the right to strike in Malaysia is severely curtailed in terms of eligibility and procedural thresholds.

The significant penal and disqualification penalties under the Malaysian Industrial laws operate to dissuade both unionised and non-unionised workers from picketing and striking. Additionally, the Malaysian authorities may also prosecute workers on strike under various public order laws.

From the foreign investor perspective, little can be done to impede the collective bargaining process.

This is however balanced by the risk of industrial action, particularly in the form of strikes, being relatively insignificant. The Malaysian Industrial Laws seek as much as possible for trade disputes to be resolved through amicable and arbitral means, and industrial action should only be viewed as a measure of last resort.

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