

MALAYSIA

Items	Regulations in force on 1 January 2013
<p>1: Notification procedures in the case of individual dismissal of a worker with a regular contract</p>	<p>Generally, a written notice is required to terminate an open-ended contract. The section 12 of the Employment Act (hereafter, "EA") provides that either party can terminate an open-ended contract by giving a prior notice, and that such notice shall be in writing. The parties may conclude an agreement on the notice period in advance in writing under the condition that such notice period should be the same to the both parties. If there is no such agreement, a statutory standard would apply (section 14).</p> <p>In case of dismissal because of redundancy, the employer is required to consult in advance with the employees' representative or the trade union (as appropriate) and the labour authority (the "Code of Conduct for Industrial Harmony 1975, hereafter, "Code of Conduct"). The Code of Conduct is not binding on its face, but recognised by the court with a legal foundation in the Industrial Relations Act (hereafter, "IRA"). Moreover, the employer must notify the labour authority the intention of making a retrenchment or temporary lay-off (as well as of putting in place a voluntary separation system or implementing a salary reduction), according to the EA (section 63).</p> <p>Although, there is no statutory requirement, in practice, the notice of dismissal includes the reason of termination.</p> <p>Calculation for EPL indicators: unweighted average of the ordinary individual dismissal case (1) and dismissal case due to redundancy (2)</p>
<p>2: Delay involved before notice can start</p>	<p>The EA (section 14) requires the employer to implement a due inquiry on the ground of misconduct inconsistent with the fulfilment of the express or implied conditions of his service before a disciplinary action such as dismissal, downgrade, or any other lesser punishment.</p> <p>In the case of a dismissal because of incapability or poor performance, the employer is required to give a warning of possibility of dismissal and opportunity for improvement (e.g. Ireka Construction Bhd v. Chantiravathan Subramaniam James [1995] 2 ILR 11; Amsteel Mills Sdn. Bhd. v. Koh Cheng Siew [1997] 1 ILR 216). In the case of retrenchment, the employer must give as early as practicable a warning to the workers concerned (cf. the Code of Conduct, clause 21 and 22(a)(l))</p> <p>Calculation for EPL indicators: average of retrenchment and incapability or poor performance: 6 days for warning/investigation and/or bona fide negotiation with unions (in the case of retrenchment), plus 1 day for notification.</p>
<p>3: Length of notice period at different tenure durations (a)</p>	<p>Unless the parties concluded an agreement on the length of notice period, the statutory notice period applies, which is dependent on the length of service.</p> <p>1) four weeks, < two years 2) six weeks, ≥ two years and < five years 3) eight weeks, ≥ five years</p> <p>In the case of the constructive dismissals (termination by the employee because of reasons caused by the employer, e.g. cessation of business, relocation, or breach of contract), the notice period must not be less favourable to the employee than the statutory notice period, regardless of a prior written agreement on the notice period.</p> <p>Such a prior notice may be waived by paying the amount of wage corresponding to the notice period, which is equally applied to the both parties (section 13). The employer is also exempted to give a prior notice in the case where the employee commits misconduct, but a due inquiry should be preceded (section 14).</p>

4: Severance pay at different tenure durations (a)	<p>Severance pay is regulated by the “Employment (Termination and Lay-off Benefits) Regulation of 1980”, which is based upon Section 60J of the EA. To be qualified for the payment, the employee must have 12 months or more length of service (Section 3(1)). The amount varies depending on length of service (Section 6(1)):</p> <p>(a) ten days’ wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for a period of less than two years; or (b) fifteen days’ wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for two years or more but less than five years; or (c) twenty days’ wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five year or more, and (d) pro-rata as respect an incomplete year, calculated to the nearest month..</p> <p>The amount is the same in the cases of ordinary dismissal and dismissal because of redundancy. Termination due to expiration of the employment contract (i.e. fixed-term contracts) is also covered by the regulation. There are some exceptions that exempt the employer from the payment of severance pay such as termination due to mandatory retirement age, voluntary quit, or dismissal because of a misconduct, after due inquiry.</p>
5: Definition of unfair dismissal (b)	<p>The section 20 of the IRA stipulates on the remedy procedure for an unfair dismissal. However, it does not specify what constitutes an unfair dismissal, which is left to the case law. There are some prohibited grounds for a dismissal, which are regulated by the statute, e.g. pregnancy (section 41 of the EA) or union activities (section 5 of the IRA).</p> <p>Incapability or poor performance constitutes a valid ground for a dismissal if clearly evidenced. But in practice, a warning needs to be given in advance and other relevant measures to improve the situation need to be taken. Redundancy is also a valid cause for a fair dismissal. The Code of Conduct stipulates the selection criteria in the case of retrenchment. They include both a few related to the employer’s interest (e.g. need for the efficient operation, ability, experience, skill and occupational qualifications of individual workers) and others related to the employee’s interest (e.g. length of service, employment status, age, family situation). In addition, the EA (section 60N) mandates that a local employee (with Malaysian nationality) should not be dismissed in the case of retrenchment unless all foreign employees in a capacity similar to that of the local employee are made redundant. In addition, some effort should be given to retraining and/or transferring worker(s) to other branches of the company or at least to try find alternative employment for him/them (or to retain the services of some of them), as suggested by the Code of Conduct (e.g. Trident Malaysia Sdn. Bhd. Penang v. National Union of Commercial Workers [1987] 2 ILR 190; Kuldip Singh A/L Sarban Singh v. Ismeca Malaysia Sdn Bhd Award 553 of 2015, Industrial Court)</p> <p>Calculation: social considerations, age or job tenure must when possible influence the choice of which worker(s) to dismiss; in addition, attempting transfer is advisable as proof of that attempt might be required by the court: average of 1 and 2: 1.5</p>
6: Length of trial period (c)	<p>There is no regulation on the trial period or probation. Probationers are entitled of protection against unfair dismissal, although it is somewhat easier to dismiss a probationer at the end of the probation period, on the ground of lack of the required capabilities or unfitness (e.g. Radicare (M) Sdn Bhd v Fadzlina Tokiman [2006] 2 ILR 1327). The IRA (Second Schedule) restricts backpay to 12 months of wage for the probationers (24 months of wage for the ordinary employees). The Minimum Wages Order 2012 provides that the minimum wages rates may be reduced by at most 30% of the minimum wage rate for the first 6 months of the probationary contract.</p> <p>A survey implemented in 2007 by the Malaysian Employers Federation (MEF) found that the average length of probation period is six months for managerial workers and three months for other workers.</p>
7: Compensation following unfair dismissal (d)	<p>Back pay is usually awarded both in cases of reinstatement and compensation in lieu of reinstatement, with the statutory limitation as seen in the Second Schedule of the IRA (24 months but 12 months for probationers).</p> <p>The Second Schedule also stipulates that the loss of future earnings shall not be considered when deciding on compensation.</p> <p>Although the Industrial Court has plenary discretion in making an award of compensation, it is said that a practical rule is one month salary for one year of tenure (e.g. Lim Chu Chuan v. Volubill Malaysia Sdn Bhd, Award 978 of 2014).</p> <p>Calculation for EPL indicators: 6 months (backpay) + 20 months (compensation) = 26 months</p>

8: Reinstatement option for the employee following unfair dismissal (b)	Under the IRA, the Industrial Court may order an award which could be reinstatement or compensation in lieu of reinstatement. According to 2012 government statistics, reinstatements was awarded in about half of the cases adjudicated in favour of the employee (considering both those adjudicated by the Department of Industrial Relations (Director General) and those settled by Industrial Courts; cf. Ministry of Human Resources, <i>Labour and Human Resource Statistics</i> , 2012)
9: Maximum time period after dismissal up to which an unfair dismissal claim can be made (e)	The employee must file a complaint with the local office of the Director General within 60 days from the date of the dismissal (section 20 (1A) of the IRA). The Minister may refer unresolved disputes to the Industrial Court..
10: Valid cases for use of standard fixed term contracts	There is no regulation on the valid cases for use of a fixed-term contract in Malaysia. But the courts sometimes may invalidate a fixed-term contract, motivated by a mala fide intent. Where successive renewals without an objective basis for any temporary need have continued, and hence, such renewals may arise out of an abusive intention of circumventing employment protection, the court would determine a fixed-term contract as a disguised permanent contract. However, in practice, this case is extremely rare.
11: Maximum number of successive standard FTCs (initial contract plus renewals and/or prolongations)	There is no statutory regulation on the maximum number of successive fixed-term contracts in Malaysia. But where successive renewals without an objective basis for any temporary need have continued, and hence, such renewals may arise out of an abusive intention of circumventing employment protection, the court would determine a fixed-term contract as a disguised permanent contract. However, in practice, this case is extremely rare.
12: Maximum cumulated duration of successive standard FTCs	No limitation.
13: Types of work for which temporary work agency (TWA) employment is legal	TWAs are recognised as “contractors for labour” in Section 2 EA (as modified by the 2012 Employment (Amendment) Act). Although this act does not specify whether the user firm or the contractor for labour should be considered the employer, Section 31 EA (on priority of wages over other debts) refers to workers of the contractor for labour as “his employees”.
14: Are there restrictions on the number of renewals and/or prolongations of TWA assignments? (f)	No restrictions (There is no regulation on the number of renewals and/or prolongations of the TWA assignments)
15: Maximum cumulated duration of TWA assignments (f)	No restrictions (There is no regulation on the maximum cumulated duration of the TWA assignments)
16: Does the set-up of a TWA require authorisation or reporting obligations?	The EA requires the contractor for labour to register with the Director General within 14 days before supplying the employee and keep or maintain one or more registers containing information regarding each employee supplied. Non-compliance would result in sanctions. However, the Employment (Exemption) Order 2012 limits this provision to the agricultural sector.
17: Do regulations ensure equal treatment of regular workers and agency workers at the user firm?	There is no regulation on equal treatment of regular workers and TWA workers at the user firms, even though the employees of the contractors for labour are also protected by the EA or other labour law under the condition that the contractors for labour are the employers responsible for the duties imposed by the EA or other labour law for their employees.
18: Definition of collective dismissal (b)	There is no threshold triggering more restrictive procedures: although redundancy constitutes a reasonable cause for a dismissal, the same rule would apply regardless of the number of the dismissed.
19: Additional notification requirements in cases of collective dismissal (g)	No regulations.
20: Additional delays involved in cases of collective dismissal (h)	No regulations.
21: Other special costs to employers in case of collective dismissals (i)	No regulations.

Legend: d: days; w: weeks; m: months; y: years. For example “1m < 3y” means “1 month of notice (or severance) pay is required when length of service is below 3 years”.

Notes:

- a) Three tenure durations (9 months, 4 years, 20 years). Case of a regular employee with tenure beyond any trial period, dismissed on personal grounds or economic redundancy, but without fault (where relevant, calculations of scores to compute OECD EPL indicators assume that the worker was 35 years old at the start of employment). Averages are taken where different situations apply – e.g. blue collar and white collar; dismissals for personal reasons and for redundancy.
- b) Based also on case law, if court practice tends to be more (or less) restrictive than what specified in legislation.
- c) Initial period within which regular contracts are not fully covered by employment protection provisions and unfair dismissal claims cannot usually be made.
- d) Typical compensation at 20 years of tenure, including back pay and other compensation (e.g. for future lost earnings in lieu of reinstatement or psychological injury), but excluding ordinary severance pay and pay in lieu of notice. Where relevant, calculations of scores to compute OECD EPL

indicators assume that the worker was 35 years old at the start of employment and that a court case takes 6 months on average. Description based also on case law.

e) Maximum time period after dismissal up to which an unfair dismissal claim can be made.

f) Description based on both regulations on number and duration of the contract(s) between the temporary work agency and the employee and regulations on the number and duration of the assignment(s) with the same user firm.

g) Notification requirements to works councils (or employee representatives), and to government authorities such as public employment offices. Only requirements on top of those requirements applying to individual redundancy dismissal count for the OECD EPL indicators (cf. Item 1).

h) Additional delays and notice periods in the case of collective dismissal (only delays on top of those required for individual dismissals – as reported in Items 2 and 3 – count for the OECD EPL indicators).

i) This refers to whether there are additional severance pay requirements and whether social compensation plans (detailing measures of reemployment, retraining, outplacement, etc.) are obligatory or common practice.