MALAYSIA
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1. Are there any laws that govern a layoff of employees? If so, what do the laws require?

The Employment Act 1955 (EA) governs the layoff or retrenchment of employees. However, the EA applies to employees who earn less than RM1,500 and manual workers regardless of their salaries. Section 60N of the EA provides that in a retrenchment, employers must terminate their foreign workers first before terminating local workers in a similar capacity. For employees who fall within the scope of the EA, the length of notice depends on the employee's length of employment. Notice must not be less than four weeks if the employee has been employed for less than two years, less than six weeks if the employee has been employed for more than two years more but less than five years. If the employee has been employed for five years or more, notice must be given at least eight weeks in advance.[1]

Termination of employees covered by the EA must also conform with the applicable regulations. Pursuant to Regulation 3 of the Employment (Termination and Lay-Off Benefits) Regulations 1980, an employer is liable to pay termination or lay-off benefits in accordance with Regulation 6 to an employee who has been employed under a continuous Employment Contract for not less than 12 months if the employment contract is terminated or the employee is retrenched. Regulation 6(1) (a), (b), and (c) governs the amount to be paid as termination or lay-off benefits. The regulations depend on the length of the employee's tenure. The benefits shall not be less than ten days wages for every year in service for an employee employed for a period of less than two years, fifteen days wages for every year in service for an employee employed for between two to five years, and twenty days wages for every year in service for an employee employed for more than five.

As for employees who are not governed by the EA, the length of notice and termination benefits would be in accordance with their employment contract. However, employers are encouraged to comply with the Code of Conduct for Industrial Harmony 1975 (CoC) before embarking on a retrenchment exercise despite the fact that the CoC is not legally binding. The CoC is an agreement that was executed by the Malaysian Trade Union Congress and the Malaysian Employers Federation in 1995 with the approval of the then Minister of Labour and Manpower. The CoC sets out the guidelines/measures or industrial practices and procedures in relation to retrenching and laying off employees. Art 22(a)(ii) of the CoC stipulates that employers are encouraged to pay termination benefits to retrenched employees notwithstanding the fact that the employees do not fall under any collective agreement, the EA or any contractual agreement.

It is a well established principle that in the retrenchment of surplus employees, the principle of Last In First Out (LIFO) must be followed. LIFO requires the employer to select the most junior employee in a particular category of employment for retrenchment. For the purposes of LIFO, a Sales Manager would be considered to be in a different category from a Sales Executive. Pursuant to the Employment (Retrenchment) Notification 2004 [PU(B) 430], employers are required to notify the Labour Department

[1] Section 12(2) (a), (b) or (c) of the EA.

and file the necessary PK forms. Articles 20 and 22 of the CoC contain a consultation requirement, but this is only a guideline and lacks legal force.

2. Are there any formal requirements for terminating an employee or groups of employees?

If the company is unionized, the employer must give notice of retrenchment to the union in accordance with the provision of the Collective Agreement. The employer should invite the union to discuss the implementation of the retrenchment. The employer is to inform the union of the necessity to begin retrenchment, the category/group of employees identified for retrenchment as well as discuss the mode of payment. The employer must ensure that the minutes of meeting are prepared and signed by all parties concerned. The employer must then inform the Labour Department via the PK Forms one month before the retrenchment exercise and hold a meeting with all the employees to inform them of the decision to retrench.

If the company is not unionized, the employer must identify the category/group of employees who are to be retrenched and inform the Labour Department via the PK Forms one month before the retrenchment exercise. The employer is to hold a meeting with all the employees to inform them of the decision to retrench.

3. Are there special legal requirements for a layoff caused by redundancy in the workforce?

No. The requirements are the same as above.

4. Are there employment laws that laid-off employees can use to challenge their inclusion in the layoff?

Yes. An employee who has been retrenched or laid off can make a claim at the Industrial Relations Department (IRD) pursuant to Section 20 of the Industrial Relations Act (IRA) 1967 if his retrenchment is without just cause or excuse. The IRD will then hold conciliatory proceedings and make a recommendation to the Minister of Human Resources on whether the matter ought to be referred to the Industrial Court. If the matter is referred to the Industrial Court, the employee can bring his claims against the employer there.

5. What sanctions or penalties may be imposed against employers for violating any of the requirements mentioned in Nos. 1-4 above?

Pursuant to Section 20 of the IRA, if an employee is found to have been dismissed without just cause or excuse, the Court may award back wages up to 24 months and reinstatement or compensation in lieu of reinstatement at one month's salary for each year of service.

6. What are the one or two most common mistakes that employers make that lead to liability for a layoff?

One common mistake is the failure to ensure that the lay-off or retrenchment was with just cause or excuse. Employers must be able to show that there is a legal basis and justification to carry out the reorganization or restructuring exercise. They also must show that the selection criteria was bona fide and not an act of victimization. Cogent reasons

compelling the Employers to embark on a retrenchment exercise must be produced. If the reason is business loss, then the balance sheet and profit and loss accounts must be produced to establish the financial losses suffered by the company. The company must be able to show actual financial loss, not just paper loss. If the company is alleging that the reason is due to reduced turnover, it must be able to show a significant decline in business over the months/years and a reduction in the company's profits.

While failure to follow the LIFO principle constitutes unfair retrenchment, employers can be departed from it if the employer has a recognized and valid reason for doing so. The employer is not required to use the LIFO principle in the following instances: the employer has adopted an objective and fair selection criteria in the retrenchment exercise; it can be established that a more senior employee who was retrenched had a record of poor performance; and where it can be established that a more junior employee retained instead of a more senior employee has special skill or qualification.

7. What other employment issues are likely to arise from a layoff in your jurisdiction that you have not addressed in your answers to the previous questions?

None.