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Key Changes to the Occupational Safety and Health Legislation in Malaysia

Introduction

The Occupational Safety and Health Act 1994 ("**OSHA**") establishes the legal framework relating to the occupational safety and health in Malaysia. The overall objectives of the OSHA are to:

- (a) secure the safety, health and welfare of persons at work against risks to safety or health arising out of the activities of persons at work;
- (b) protect persons at a place of work other than persons at work against risks to safety or health arising out of the activities of persons at work;
- (c) promote an occupational environment for persons at work which is adapted to their physiological and psychological needs; and
- (d) provide the means where the associated legislation on occupational safety and health may be progressively replaced by a set of regulations and approved industry codes of practice operating in combination with the provisions of the OSHA designed to maintain or improve the standards of safety and health.

After almost three decades, the Occupational Safety and Health (Amendment) Act 2022 ("**Amendment Act**") was passed with royal assent on 4 March 2022. It will come into force on 1 June 2024, together with two new subsidiary legislations, namely the Occupational Safety and Health (Plant Requiring Certificate of Fitness) Regulations 2024 and the Occupational Safety and Health (Licensed Person) Order 2024. The Amendment Act brings about substantial amendments to the OSHA which seeks to enhance the existing legislation on occupational, safety and health in Malaysia, in particular by expanding the scope and applicability of the OSHA to all places of work throughout Malaysia including the public services and statutory authorities, with very limited exceptions.

Some of the significant amendments introduced by the Amendment Act are highlighted below.

Key Amendments to the OSHA

1. Greater scope and applicability throughout Malaysia

The existing OSHA is only applicable to the following specific industries:

- (a) manufacturing;

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- (b) mining and quarrying;
- (c) construction;
- (d) agriculture, forestry and fishing;
- (e) utilities, i.e. electricity, gas, water and sanitary services;
- (f) transport, storage and communication;
- (g) wholesale and retail trades;
- (h) hotels and restaurants;
- (i) finance, insurance, real estate and business services; and
- (j) public services and statutory authorities.

Post-amendment, the OSHA will be extended to cover all places of work including public services and statutory authorities in Malaysia with the exception of the following:

- (a) domestic employment in relation to a person who employs another, or is employed, as a domestic servant within the meaning of the Employment Act 1955;
- (b) armed forces; and
- (c) work on board ships governed by the Merchant Shipping Ordinance 1952, the Sabah Merchant Shipping Ordinance 1960 or the Sarawak Merchant Shipping Ordinance 1960.

2. Definitions of "employer" and "principal"

The amended OSHA removes the concepts of "immediate employer" and "principal employer" under the existing OSHA, which may cause some confusion as to where the responsibility lies because "employer" in the existing OSHA refers to the "immediate employer" or "principal employer" or both.

The amended OSHA now makes a clear distinction between "employer" and "principal". An "employer" simply means *"any person who has entered into a contract of service to employ any other person as an employee"*; while a "principal" is *"any person who in the course of or for the purposes of his trade, business, profession or undertaking contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal"*.

3. Expanded duties of a principal

Under the existing OSHA, an employer or self-employed person is only obligated to take necessary measures to ensure the safety and health of his employees. However, the amended OSHA has extended these duties, which are to be undertaken by a principal, to any contractor the principal engages, subcontractor or indirect subcontractor or any employee employed by such contractor or subcontractor at work, who act under the direction of the principal. A non-exhaustive list of the

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measures necessary to ensure the safety and health of the persons at work are specified under the amended OSHA and include the following:

- (a) the provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risk to health;
- (b) the making of arrangements including the allocation of sufficient time, budget and other resources for ensuring, so far as is practicable, safety and absence of risks to health in connection with construction work activities, use or operation, handling, storage or transport of plant and substances;
- (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health of the persons at work;
- (d) so far as is practicable, as regards to any place of work under the control of the principal, the maintenance of a place of work in a condition that is safe and without risks to health, and the provision and maintenance of the means of access to and egress from it that are safe and without such risks;
- (e) the provision and maintenance of a working environment for the persons at work that is, so far as is practicable, safe and without risks to health; and
- (f) the development and implementation of procedures for dealing with emergencies that may arise while such persons are at work.

4. Duty to conduct and implement risk assessment

The amended OSHA imposes duty on every employer, self-employed person or principal to conduct a risk assessment in relation to the safety and health risk posed to any person who may be affected by his undertaking at the place of work. This risk assessment is not a requirement under the existing OSHA. Such risk assessment involves the process of evaluating the risks to safety and health arising from hazards at work, and determining the appropriate measures for risk control.

Where the result of the risk assessment indicates that risk control is required to eliminate or reduce the safety and health risk, the employer, self-employed person or principal shall implement such control.

5. Increased penalties and punishments

The maximum penalties and punishments imposed for certain offences have been significantly increased under the amended OSHA, as follows:

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Section under the OSHA	Types of offences	Current maximum penalty/punishment	New maximum penalty/punishment
Section 19	Failure of an employer, self-employed person or principal to uphold its duties under Sections 15 to 18 and the new Sections 18A and 18B	RM50,000 fine or imprisonment for a term not exceeding two years, or both	RM500,000 fine or imprisonment for a term not exceeding two years, or both
Section 23	Failure of any designer, manufacturer or supplier to uphold its duties under Sections 20 or 21	RM20,000 fine or imprisonment for a term not exceeding two years, or both	RM200,000 fine or imprisonment for a term not exceeding two years, or both
Section 27(3)	Where an employer or trade union takes action against an employee who lodges a complaint on the safety and health risk at work, who is a member of a safety and health committee or exercises its function as a member of the safety and health committee	RM10,000 fine or imprisonment for a term not exceeding one year or both	RM100,000 fine or imprisonment for a term not exceeding one year, or both
Section 30(4)	Failure of an employer to establish a safety and health committee where there are more than 40 employees at the work place or as directed by the Director General	RM5,000 fine or imprisonment for a term not exceeding six months, or both	RM100,000 fine or imprisonment for a term not exceeding one year or both
Section 49(2)	Failure of an employer or principal to comply with the improvement or prohibition notice issued under Section 48	(i) RM50,000 fine or to imprisonment for a term not exceeding five years, or both (ii) RM500 fine for each day during which the offence continues	(i) RM500,000 fine or imprisonment for a term not exceeding two years, or both (ii) RM2,000 fine for each day during which the offence continues

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Section 51	Any person who contravenes any provisions of the amended OSHA and where no penalty is expressly provided for the specific offence	(i) RM10,000 fine or to imprisonment for a term not exceeding one year, or both (ii) RM1,000 fine for each day during which the offence continues	(i) RM100,000 fine or imprisonment for a term not exceeding one year, or both (ii) RM2,000 fine for each day during which the offence continues
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6. Greater protection for employees

The amended OSHA provides a more extensive protection framework to employees which gives the employees the right to take proactive measures to safeguard their health and safety at the place of work. Such rights are not expressly provided for in the existing OSHA.

For instance, where an employee has justifiable suspicion of an imminent danger at work, the employee is now given the statutory right to remove himself from the danger at work, provided that the employer has been duly informed of the danger but fails to put in place any measures to remove the danger. An '*imminent danger*' refers to a serious danger which may result in death or serious bodily injury caused by plant, substance, activity, process, practice, procedure or place of work hazard. An employee who exercises such right shall not be discriminated against and is protected from any undue consequence by the employer.

In addition, the amended OSHA makes it an offence for an employer to take any action against employees who aid in any inspections or investigations carried out by the authorities or anyone who reports any health and safety risk to the employer or relevant authorities.

7. Appointment of Occupational Safety Officer and Health Coordinator

The existing OSHA mandates that a competent person be appointed as the safety and health officer. Such appointed person must possess the relevant qualifications or have undergone specific trainings. The amended OSHA now provides a new requirement for an employer who has five or more employees at work to appoint one of its employees as an occupational safety and health coordinator ("**Coordinator**"), unless otherwise excluded in the Gazette. The appointed Coordinator shall carry out his duties to oversee and manage all occupational safety and health matters at work. It is pertinent to note that an employer who has appointed a safety and health officer at the place of work, pursuant to the existing OSHA, shall be deemed to have complied with the requirement to appoint a Coordinator.

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In the event the employer fails to appoint a Coordinator or safety and health officer, as the case may be, the employer shall be liable to a maximum fine of RM50,000 or a maximum imprisonment term of six months, or to both.

8. Attendance of occupational safety and health training course

The Minister of Human Resources ("**Minister**") may now require certain categories of individuals to attend an occupational safety and health training course, which is not provided for under the existing OSHA. The training course shall be conducted by a registered training provider. It is the employer's obligation to ensure that its relevant employees have completed the training course before authorising these employees to perform any task where such training is required. As and when deemed necessary, the Director General of Department of Occupational Safety and Health ("**Director General**") may also issue a notice to request that a refresher course be undertaken by the employee. An employer who fails to comply with the relevant obligation shall be liable to a maximum fine of RM50,000 or a maximum imprisonment term of six months, or both.

9. Directors and office bearers jointly and severally liable

Where a company commits an offence under the amended OSHA or any of its subsidiary legislation, the director, compliance officer, partner, manager, secretary or other officers of the company (collectively referred to as "**office bearers**") may now be held jointly and severally liable for such an offence. This is a new approach and is not present in the current OSHA. The burden is on the affected individual to prove that the offence was committed without his knowledge or consent and that the individual has done all reasonable precautions to deter the occurrence of the offence.

Where any person would be liable to any punishment or penalty under the amended OSHA for any act, omission, neglect or default committed by (i) the person's employee during his employment term, (ii) the person's agent when acting on behalf of that person, or (iii) the employee of the person's agent when acting in the course of his employment by the person's agent or otherwise on behalf of the person's agent acting on behalf of that person, that person shall be liable to the same punishment or penalty for every such act, omission, neglect or default of the person's employee, agent or employee of the agent. This is an expansion of the existing OSHA, where a person would only be liable to any penalty for anything done or omitted as if the act or omission had been done by him personally if the act or omission were committed by his agent.

10. Insertion of new Fourth and Fifth Schedule

The new Fourth Schedule sets out different forms of bodily injuries to provide a precise representation of the definition of serious bodily injury.

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The new Fifth Schedule outlines an exhaustive list of activities that a competent person and registered training provider must perform to fulfil its responsibilities in an effective manner.

Repeal of the Factories and Machinery Act 1967

Apart from the amendments to the existing OSHA, the Factories and Machinery Act 1967 ("**FMA**") will also be repealed as the approach used in the existing FMA is no longer compatible with current evolving technology. The Factories and Machinery (Repeal) Act 2022 was passed on 16 March 2022 and will take effect on 1 June 2024. From 1 June 2024, the relevant provisions of the repealed FMA, in particular provisions relating to the inspection of machineries, will be consolidated (with changes) into the amended OSHA. The significant changes in the amended OSHA which incorporate the FMA provisions are as follows:

1. Inspection of plant

The licensee's rights under the amended OSHA seems to be more restrictive compared to the FMA. Under the FMA, the Minister may grant licence to any person whom he thinks fit to perform the functions specified in the FMA. However, post-amendment, the Minister may grant licence to any person to carry out inspection of plant prescribed by the Minister and issue a certificate of fitness in respect of the plant. The licensed person may even be authorised to demand, collect and retain charges, fee or levy for any services provided.

2. Installation and operation of plant

The current position under the FMA is that no person shall use any premises as a factory until one month after he has served a written notice to the inspector, unless with the express permission of the inspector. Nevertheless, this scope has been well expanded under the amended OSHA to cover all places of work, instead of only factory, except for those specified in the First Schedule of the amended OSHA.

Under the amended OSHA, any person who intends to install and operate any plant must obtain the approval and certificate of fitness from the officer or a licensed person. In order for a licensee to install a prescribed plant, in which a certificate of fitness is deemed necessary by the Minister, the licensee shall first comply with all the requirements set out by the Minister and obtain the written approval by the Director General. Once the prescribed plant has been installed, the licensee is required to serve a written notice to the officer for an inspection to be carried out. Upon the inspection, if the officer deems that all requirements have been fulfilled by the licensee, a certificate of fitness will then be issued for the prescribed plant to be operated.

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This requirement for certificate of fitness before the installation and operation of any prescribed plant under the amended OSHA essentially mirrors the fitness certification of prescribed machineries under the FMA.

3. Registration as '*competent person*'

Under the amended OSHA, activities including the installation and operation of a plant, and health risk assessment are required to be carried out by persons registered as '*competent person*'. This is in contrast with the position under the FMA, where such registered competent person is only responsible to be in charge of the operation of specified machineries.

Any person who intends to be registered as a competent person shall submit an application for registration to the Director General. Once approved, the registration shall be valid for a period of three years only from the date specified in the approval. Prior to the expiry of the registration, the competent person may apply for the renewal of the registration, subject to payment of prescribed fees. The Director General may either allow the renewal, with or without condition, or reject the renewal if the applicant has failed to comply with any conditions of registration or any provisions under the amended OSHA or any subsidiary legislation thereof. Such application may also be rejected if any information or document submitted by the applicant is found to be false, regardless of knowledge of the applicant.

Conclusion

The amendments to the OSHA are welcomed changes to the three-decade old legislation in keeping with the rapid changes in various industries over the past years. The most notable amendment is the expansion of the scope and applicability of the OSHA to all places of work with very limited exceptions. This is in line with the increasing focus on occupational safety and health globally to ensure sustainability of human resources.

The amended OSHA also introduced more measures to safeguard occupational safety and health by (i) placing more responsibilities on the employers and principals, (ii) giving more rights to the employees, and (iii) setting higher and more serious penalties for offences under the OSHA.

Companies, particularly those in industries which are not previously subject to the OSHA, should be well aware of all the changes under the amended OSHA and plan for their implementation accordingly. Companies are encouraged to seek legal advice if they are unsure of the applicability of certain provisions of the amended OSHA.

Should you require further information or any advice in relation to the above, please feel free to reach out to any member of our team listed below.

Contacts



Christopher Lee
Consultant

T +603 2273 1919
F + 6012 335 7250
christopher.lee@christopherleeong.com



Lim Siaw Wan
Partner

T +603 2273 1919
F +6017 312 2517
siawwan.lim@christopherleeong.com

Contribution Note

This Client Update is contributed by the contact Consultant and Partner listed above, with the assistance of **Chris Tan** (Senior Associate, Christopher & Lee Ong) and **Vanessa Khoo** (Associate, Christopher & Lee Ong).

Regional Contacts

RAJAH & TANN SOK & HENG | *Cambodia*
Rajah & Tann Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*
**Rajah & Tann Singapore LLP
Shanghai Representative Office**
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*
Assegaf Hamzah & Partners
Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*
Rajah & Tann (Laos) Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*
Rajah & Tann Myanmar Company Limited
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Singapore*
Rajah & Tann Singapore LLP
T +65 6535 3600
sg.rajahtannasia.com

RAJAH & TANN | *Thailand*
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*
Rajah & Tann LCT Lawyers
Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

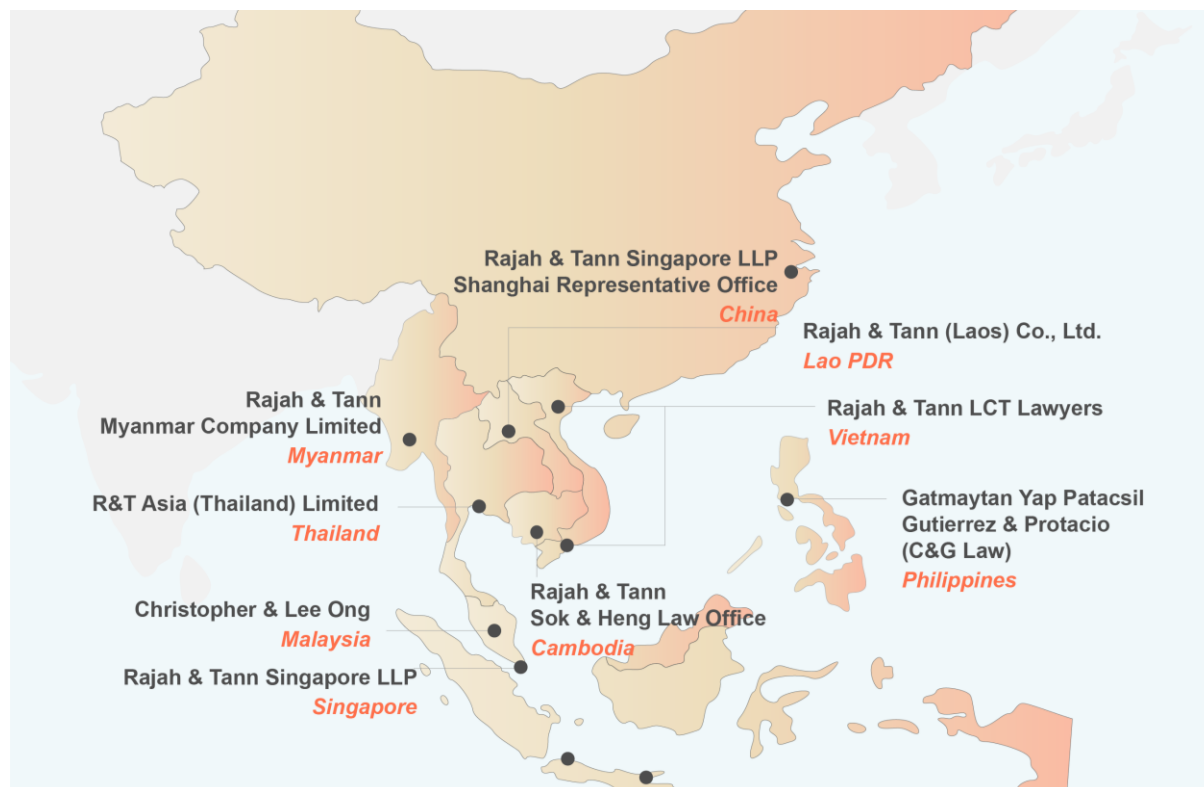
Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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