SUMMARY OF CURRENT MALAYSIAN LAWS AND REGULATIONS AIMED AT PROVIDING PROTECTION TO EMPLOYEES AT RISK OF UNEMPLOYMENT

Introduction

In early 2012, the International Labour Organization (ILO) reached an agreement with the Malaysian government to provide expertise on the Project "Supporting and Facilitating the Design of a UI system in Malaysia". The project is coordinated by a Tripartite Project Committee comprised of representatives from the Ministry of Human Resources (MoHR), Social Security Organization (SOCSO), the Malaysia Employers Federation (MEF) and the Malaysian Trades Union Congress (MTUC). Datuk K. Selvarajah, CEO of SOCSO, heads the TPC and establishes the focus of the study by making it clear that all stakeholder views must be considered and everyone must benefit from an unemployment protection system that is tailored to the needs of Malaysia.
The project is developed into two phases:

The first phase aimed at facilitating the national consensus on the introduction of the unemployment insurance in Malaysia. Several options for unemployment benefits were proposed and discussed in a National and two Regional Tripartite Workshops with government agencies, social partners and experts. On 20 July 2012, the TPC reached a consensus on a proposed mandatory social unemployment benefits system which will embrace the following agreed objectives:

1. Provide adequate protection for those who lose their job and contribute to poverty eradication;
2. Give flexibility to enterprises in adjusting to economic changes and in reorganizing their business (e.g. in the case of the introduction of new technologies) - UI would therefore contribute to the protection of businesses and not only of employees;
3. Facilitate mobility of labour force through income security and re-employment measures;
4. Be associated with job retention measures;
5. Support job search and placement, training and retraining.

The TPC also attained consensus on elements of the possible unemployment benefits such as:

- coverage - all private sector salaried employees and apprentices under a contract of service of any type or duration;
- qualifying conditions – 12 months of contributions in the last 24 months and termination must be involuntary;
- a benefit rate of 40 to 50% and a duration of 3 to 6 months;
- entitlement conditions – job seekers must register at the employment office upon termination and report monthly on their job search activities.

Also, there would be a phasing out retrenchment benefits while introducing unemployment benefits: workers would remain entitled to the retrenchment benefits accrued up to the effective date of implementation of UI system but no further retrenchment benefits would accrue for work commencing after the effective date of UI system.
The first three scenarios, in agreement with the TPC, build cumulatively on the following three pillars:

	Scenario 1	Scenario 2	Scenario 3
Pillar 1: Compensation for loss of income	Unemployment Insurance (UI)	Unemployment Insurance (UI)	Unemployment Insurance (UI)
Pillar 2: Employability & Business		+ ALMPs	+ ALMPs
Pillar 3:Acknowledgment of tenure			+ Savings Accounts (SA)

On **21 September 2012**, after reviewing the interim report and the four proposed scenario, the TPC decided that the most suitable model for Malaysia is the Scenario 3 which combines social insurance with ALMPs and a supplementary component of savings. However, the TPC also requested the ILO to **assess the feasibility of Scenario 2 in addition to Scenario 3**.

A letter of agreement to pursue the project into its Phase II was signed early December, which concluded the first phase and launched the second phase.

During a **second phase**, a feasibility study to define the parameters of a possible unemployment benefits system based on actuarial and legal assessments, as well as proposed institutional set-up for the implementation, including linkages with employment and skills development programs, will be conducted based on two scenarios formerly agreed. It is also expected that the feasibility study will analyze the unemployment benefits impact on the production cost and enterprises' competitiveness. Findings of the feasibility study will be presented and discussed in a tripartite forum before the report is finalized and submitted to the government.

FIRST PART: NATIONAL POLICY ON EMPLOYMENT SAFETY NET ("NEAC")

Reference is made to the Malaysian New Economic Model under the National Economic Advisory Council "NEAC 2010". In order to inspire the workforce to draw out their best, the Policy purpose include to remove labour market distortions constraining wage growth; and in achieving that purpose, the possible policy measures laid down are to (pages 124-127):

1.- Protect workers through a stronger safety net, while encouraging labour market flexibility;
2.- Revise legal and institutional framework to facilitate hiring and firing; and
3.- Raise pay through productivity gains, not regulation of wages.

Moreover, in the chapter titled "Intensifying Human Capital Development", one of the measures proposed is enhance the labour safety net by introducing unemployment insurance. Some relevant excerpts in that section of the report are the following[1]:

- *"Gaps and inefficiencies remain in safety net mechanisms, particularly for protection of workers. Economic transformation under the NEM is expected to result in some degree of frictional unemployment, for which an enhanced labour safety net is needed to help ease transition for workers."*

- *"The current safety net system focusses on retrenchment benefits for workers laid off due to economic circumstances. Multiple problems have been encountered with this system. Businesses have closed without meeting retrenchment obligations. Or in the case of insolvency, retrenchment benefit claims (other than outstanding wages) are not positioned advantageously for access to the proceeds from liquidation of the failed firm's assets. An appropriate labour safety net would include an unemployment insurance scheme supported by up-skilling and retraining programmes, and upgraded employment services. Unemployment Insurance (UI) would alleviate reliance on retrenchment benefits to cover income loss from a job loss. UI would enable the risks from job market anomalies to be pooled and provide for payouts when needed, similar to any insurance model. It would need to be simple to minimize administrative costs. Benefit payouts should be of limited duration to preserve the financial integrity of the fund. Payouts should represent partial income replacement to force beneficiaries to actively seek a replacement job. This would minimize the risk of employability from prolonged unemployment. Laid-off workers must also participate in up-skilling or retraining for continued access to UI benefits. Dedicated training facilities must be set up for this purpose. Retrenched workers must be prepared for relocation to suitable job locations for continued access to UI benefits. Best practice calls for UI funding through levies on employers and workers. This would add to the costs of doing business, but is understood worldwide as a normal cost of business…."*.

- *"Mechanisms for effective job search and placement services must be enhanced and tailored for retrenched workers. This will require a consolidation of existing public job search assistance agencies into a single nationwide network leveraging internet technology. Coverage could be expanded to include private sector job search networks. Pilot programmes could be established for job search networks for high skill workers and professionals. A side benefit of internet-based search networks is the collection of data to measure evolving demand. This data can be used to*

[1]Complete version of the chapter is available at: http://www.neac.gov.my/files/Chapter_5_Intensifying_Human_Capital_Development.pdf .

plan education, vocational, training/retraining efforts. Its systems can also be extended to access global talent networks to fill gaps."

Under the Malaysian constitutional framework, the establishment of any unemployment insurance requires a legislative reform. The Legislature of each State has the power to make laws with respect to unemployment insurance

Source: Federal Constitution of Malaysia, sections 74.2; Ninth Schedule, Legislative List, List I, section 15(b).

SECOND PART: STATUTES ON SAVING, RETIREMENT AND SOCIAL SECURITY SCHEMES

This second part summarizes the main features of 3 Acts: Employees Provident Fund Act; Employees´ Social Security Act, and the Occupational Health and Safety Act. The description of each Act will comprise**:**

- Contingencies and objective
- Coverage
- Benefits
- Contributions
- Administration and investment
- Supervision

A.- EMPLOYEES PROVIDENT FUND ACT 1991 (Act No.452)[2].

The Employees Provident Fund will be hereinafter referred to as "EPF":

I.- CONTINGENCIES AND OBJECTIVE.

a.-Attain the age of 55 years.
b.-Mental or physical incapacity from engaging employment.
c.-Dead.
d.-Change of residence for foreign workers leaving the country with no intention of returning to Malaysia.
e.-Housing (purchase or construction, or even repayment of loans for the same purposes).
f.-Healthcare.
g.-Higher learning.
h.-Taking up of insurance policy provided terms and conditions are approved by the EPF Board.
Source: Sections54, 58A, 58B, Schedules Fifth and Sixth.

The objective of EPF is to provide monetary benefits once the aforementioned contingencies occur.

II.-COVERAGE.

It could be either mandatory or voluntary:
1.-Mandatory:
a.-Private sector workers, including foreign workers who are permanent residents of Malaysia.
b.-Non-pensionable public sector employees

2.-Voluntary:
a.-Self-employed.
b.-Foreign workers who are not permanent residents of Malaysia.
c.-Domestic workers.
d.-Public servants.[3]
e.-Any person who is employed and whose country of domicile is outside Malaysia participating in a provident fund or other similar scheme established or administered outside Malaysia.

[2] The Employees Provident Fund (Amendment) Act 2007 inserted amendments to the same, particularly as regards to the rate of contributions.

[3] Before being confirmed in his/her appointment, public servants are entitled to opt for either the coverage of the EPF or the Federal Consolidate Fund under Pension Act 1980 (Act No. 227) –Section 6A of the aforementioned Act-.

Source: Sections 43(8), 70A; First Schedule.

III.-BENEFITS.
Qualifying Condition for Withdrawal:

Contingencies	Type of withdrawal of the sums stand to the credit of the employee
Attain the age of 55 years.	All sums, or periodical payments, or both
- Mental or physical incapacity from engaging employment. - Dead. - Change of residence for foreign workers leaving the country with no intention of returning to Malaysia	All sums
Once the employee has attained the age of 50 years: - Housing (purchase or construction, or even repayment of loans for the same purposes. - Healthcare. - Higher learning. - Taking up of insurance policy provided terms and conditions are approved by the EPF Board.	Partial withdrawal
Taking up of insurance policy provided terms and conditions are approved by the EPF Board.	Partial, as necessary
In case of dead	Additional amount equal to RM2,5000 is payable by the EPF
In case of mental or physical incapacity from engaging employment	Additional amount equal to RM5,000 is payable by the EPF

Any amount withdrawn shall be utilized solely for the purpose for which the withdrawal was authorized. If case of contravention, the return of such amounts shall be made within six months from the date of withdrawal, aside from the fact that an offence shall be deemed to exist**.**
Source: Sections 54 to 58B; Fifth and Sixth Schedules.

IV.-CONTRIBUTIONS.
Both employer and employee shall bear contributions. The EPF does not receive funds or subsidies from the Government.
Source: Section 24.

1.- <u>Minimum contributions of employer and employee (since January 2012)</u>:

a.-<u>For national employees and foreign workers who are permanent residents of Malaysia</u>:

Years of Age	Monthly wage	Employer's rate of contribution (of employee's monthly wage)	Employee's rate of contribution (of employee's monthly wage)	Total (of employee's monthly wage)
Below 55	Up to RM5,000	13%	11%	24%
Below 55	RM5,000 or above	12%	11%	23%
Between 55 and 75	Up to RM5,000	6.5%	5,5%	12%
Between 55 and 75	RM5,000 or above	6%	5,5%	11,5%

Source: Third Schedule Parts A and C.

b.-For foreign workers who are not permanent residents of Malaysia: They may opt to contribute to the EPF. If this were the case, contributions will be as follows:

Years of Age	Employer's contribution	Employee's rate of contribution (of employee's monthly wage)	Total (employee's monthly wage)
Below 55	RM5	11%	-
Between 55 and 75	RM5	5,5%	-

Source: Third Schedule Parts B and D.

Employee and employers may select to increase their rate of contribution (**Source:** Section 43(3)).

2.- Definition of wages: 'Wages' means all remuneration in money including any payments payable under the service contract (bonus, commissions or allowances). confirmation .It does not include overtime, gratuity, retirement benefits, termination benefits, and travelling allowances
Source: Paragraph 2(a).

3.- Payment of contributions: The Employer is liable to pay the contributions payable by himself and the contributions payable on behalf of the employee within certain time. Directors, partners and office bearers hold joint and several liability for the payment of the contributions.

The Employer must also comply with obligations related to registration with the Board, furnish of wages.
Source: Sections 43, 45, 46, 47, 48; Third Schedule.

4.- Notifications of the employer with the Board:
a.- Every corporation must inform the Board of its incorporation or registration before the relevant Register not later than 30 days from the date of its incorporation or registration.
b.- Unless already registered with the Board, employers must register with the Board before the end of the first week in the first month in respect of which payment of contributions is required.
c.- Employers must notify termination of employment within thirty days of such termination.

In case the employer fails to keep or maintain any statement, particulars, register book or any record pertaining to each employee as required to be performed by him under this Act; fails or refuse to submit any statement, particulars, register book or record pertaining to each employee as required to be submitted by him, inspector or officers are vested with the powers to assess any contributions which is due by any employer based on any information available if the employer. This assessment shall be sufficient proof of the Board's claim for the recovery of any unpaid contributions.

Source: sections 37A, 40 and 41.

5.- <u>Late payment of contributions</u>: This includes overdue payment and under-paid contribution. Late payment of contribution refers to the payment received by EPF for a certain contribution month after certain period.

Interest and dividend will be imposed for late payment of contribution as follows:

a.-Interest: The interest rate imposed is calculated based on the dividend rate declared by the EPF Board for each respective year with an additional one (1) percent. The minimum interest imposed is RM10. Any total for the interest with *sen* must be rounded up to the nearest higher Ringgit. Example: The interest imposed is RM13.21 and this must be rounded up to RM14 (higher Ringgit).

b.- Dividend: The dividend the contributions would have accrued if they had been paid timely. Therate imposed is calculated based on the dividend rate declared by the EPF Board for each respective year.

<u>Penalty Summary</u>

PROVISION	OFFENCE	PENALTY
Section 41(1)	An employer who fails to register with the Board within 7 days from the date he/she becomes liable to contribute.	Shall be liable to imprisonment term not exceeding 3 years or to a fine not exceeding RM10,000 or both.
Section 41(3)	An employer who fails to notify the Board within 30 days from the date he/she ceases liability to contribute.	Shall be liable to imprisonment term not exceeding 6 months or to a fine not exceeding RM2,000 or both.
Section 42(1)	An employer who fails to furnish the statement of wages to his/her employee.	Shall be liable to imprisonment term not exceeding 6 months or to a fine not exceeding RM2,000 or both.
Section 43(2)	Any employer who fails to contribute to the EPF Board on behalf of each of his/her employee. The contribution shall be remitted on or before the 15th day of the following month.	Shall be liable to imprisonment term not exceeding 3 years or to a fine not exceeding RM10,000 or both.
Section 47(1)	Any employer who deducts or attempts to deduct from the wages or remuneration of any employee the whole or any part of the employer's share of contribution.	Shall be liable to imprisonment term not exceeding 6 years or to a fine not exceeding RM20,000 or both.
Section 48(3)	Any employer who deducts the employee's share of contributions from the wages of an employee and fails to pay the total sum deducted or any part of the sum to EPF.	Shall be liable to imprisonment term not exceeding 6 years or to a fine not exceeding RM20,000 or both.
Section 59(a)	Any person who makes orally or in writing, or signs any declaration, return, certificate or document which is untrue or incorrect.	Shall be liable to imprisonment term not exceeding 3 years or to a fine not exceeding RM10,000 or both.

If no special penalty is expressly provided, any person who contravenes the Act or any regulations or rules made there under, shall on conviction, be liable to imprisonment for a term not exceeding six months or to a fine not exceeding RM2,000 or both.

6.- <u>Protection of the employee in case the employer fails or neglects to pay contributions</u>: If any employer fails to pay any contribution which he has deducted from the wages of an employee, the Board shall, on being satisfied that such deduction has been made, credit the employee with the amount of such contribution together with any dividend which would have been credited in respect thereof if such contribution had been paid by the employer within the prescribed period and shall charge the amount so credited to the general revenues of the Fund.
Source: Sections 41, 43, 45(3), 46, 47, 48, 49, 50(3), 59.

V.-ADMINISTRATION AND INVESTMENT.
1.-EPF is managed by the EPF Board made up of not more than 20 members appointed by the Minister, including Government representatives, employees and employers who are contributing to the fund, and three experts with relevant experience in finance or business.

The Board is bound by the directions given by the Minister. Also, upon requirement of the Minster, the Board shall furnish information relating to its activities (**Source:** Sections 3, 4, 11, 12, 25).

2.-Investment of the funds is governed by law in detail (**Source:** Sections 24 to 29A).

VI.- SUPERVISION.
1.-Employers are subject to examinations, information requirements and inspections carried out by inspectors appointed by the EPF Board. Obstruction of inspections is sanctioned by law. Also, the Minister has authority to determine wages and persons that shall contribute to the EPF.
Source: Sections 34 to 39, 72.

2.-On the other hand, officers and servants of the EPF Board are under the supervision of a Disciplinary Committee belonging to the same Board.
Source: Sections 31 to 34.

B.- EMPLOYEES' SOCIAL SECURITY ACT 1969 (ACT No.4):

The Employees' Social Security Act rules the Employees Social Security Fund (hereinafter referred to as "SSF)". The SSF comprises both the Employment Injury Insurance Scheme and the Invalidity Pension Scheme. The Social Security Fund is administered by the Social Security Organization ("SOCSO").

I.- CONTINGENCIES AND OBJECTIVE.
Two contingencies (and its subsequent schemes of protection) are available under the SSF. These are:

1.- Injury, disease or death caused by accidents or occupational diseases arising out of and in the course of employment. The relevant scheme in this regard is the "Employment Injury Insurance Scheme".

Accidents include also those occurring while the employee is traveling on a route between his/her workplace and his/her residence or the place where he/she takes his/her meal during approved rest hours, or accidents occurring during a journey that is directly connected to employment.

Occupational diseases shall be related to diseases or injuries connected to the respective occupation.

Both the accidents and the occupational diseases are subject to presumptions; this is to say, in the absence of evidence to the contrary, they shall be presumed to have arisen in the course of employment.

Presumption of occupational diseases covers events related to the occupation until six months after termination of employment.
Source: Sections 15, 23, 24, 28; Fifth Schedule.

2.- Death or invalidity due to any cause not connected with employment. The relevant scheme in this regard is the "Invalidity Pension Scheme".

"Invalidity" is related to conditions of permanent nature (incurable or not likely to be cured) as a result of which an employee is incapable of engaging in any substantially gainful activity, being also unable to earn at least one-third of the customary earning a person with similar qualification and training could earn.
Source: Sections 15, 16, 17.[4]

The objective of SSF is to provide monetary and medical benefits once any the aforementioned contingencies occur, in accordance to the regulations provided in the Act.

II.- COVERAGE.
1.- Both schemes provide coverage for all employees with salaries capped up to RM3,000 monthly. Employees with monthly salaries exceeding this limit may anyway decide to pay contributions for SSF, being subject to the coverage of the system accordingly.

"Once In Always In" principle: Once an employee pays contributions under SSF, he/she will always be obliged to continue contributing to SSF- irrespective of the next monthly wage. Thus, employees who have been previously registered with the entity administrating SSF (SOCSO) and now earn more than RM3,000 shall pay contributions and be eligible for coverage.

The Employment Insurance Scheme has a wide coverage considering the amount of wages earned by the worker, whereas the Invalidity Pension Scheme has a narrower scope of application excluding:
a.- Employee of 60 years of age or above.
b.- Employees above 55 years of age with no previous contributions to SSF.
c.- Employee in receipt of invalidity pension.

2.- However, the following employees are excluded of the SSF:
a.- Domestic workers.
b.- Public servants.
c.-Business owner and spouses of sole-proprietorship or partnership.
d.-Foreign workers.
Source: First Schedule.

[4] "*The provisions under ESSA 1969 have made it compulsory for employers to insure their employees against injury under the two insurance schemes. The differences between the two schemes is that the employment injury insurance scheme is where certain benefits are available to the employee who suffered any injury or diseases arising out of and in the course of his or her employment whereas, the invalidity pension scheme is where certain benefits are available to an employee who becomes invalid due to any reason. Nevertheless, the law forbids an injured employee from receiving benefits from both schemes for the same injury. The provisions, however, are still not clear in determining which scheme a permanently disabled employee should choose from and he could get his or her compensation in installments. These provisions require improvement for the purpose of efficacy and efficiency so that an employee should get the maximum benefit available*." Rahim Merican, R. "Employee's Rights Under the Malaysian Social Security Organization". Journal of Politics and Law, vol.3 No.1 (March 2010). Available at: http://webcache.googleusercontent.com/search?q=cache:RkvujJ2EN24J:www.ccsenet.org/journal/index.php/jpl/article/download/5276/4390+.+%E2%80%9CEmployee%E2%80%99s+Rights+Under+the+Malaysian+Social+Security+Organization%E2%80%9D.+Journal&cd=2&hl=es-419&ct=clnk&gl=cl

As regards of foreign workers, they are protected by the coverage set in the Workmens´ Compensation Act (1952) for injuries suffered in the course of employment, insofar his/her monthly wage is not higher than RM500 per month. In case of foreign manual workers, wage amount is irrelevant. Also, employers of foreign workers shall pay an insurance premium of RM86 per year per worker. Failure of compliance with this rule exposes employers to a fine of RM20,000 or imprisonment for a term of 2 years, or to both (**Source:** Section 26, WCA 1952).

Moreover, it is worth noting the observations brought to the attention of the Government of Malaysia in 2010 by the Committee of Experts in the Application of Conventions and Recommendations–CEACR- concerning two ILO Conventions:

- **Migration for Employment ILO Convention, 1949 (No. 97):**[5] [6]

  "*Article 6(1)(b) of the Convention. Equality of treatment with respect to social security. For over ten years, the Committee, as well as the Conference Committee on the Application of Standards, have been pursuing a dialogue with the Government regarding differences in treatment between nationals and foreign workers with respect to payment of social security benefits. The Committee had noted that, as of 1 April 1993, foreign workers in the private sector were no longer covered by the Employees' Social Security Act, 1969 (SOCSO), which provided for periodical payments to victims of industrial accidents and their dependants. Instead they were transferred to the Workmen's Compensation Scheme (WCS) which only guarantees the payment of a lump sum. The Committee had considered that this change was not in conformity with Article 6(1)(b) of the Convention. A review of the two schemes had also shown that the level of benefits in the case of industrial accident provided under the Employees' Social Security Scheme (ESS) was substantially higher than that provided under the WCS.*

  The Committee recalls that foreign workers permanently residing in Malaysia (Sabah) continue to be covered by the ESS, while foreign workers working in the country for a period of up to five years are covered only by the WCS. The Committee notes the detailed comparison provided by the Government of the benefits awarded according to each system in identical circumstances. The comparison shows, however, that the level of benefits in the case of industrial accident provided under the WCS is substantially lower than that provided under the SOCSO. Moreover, the Committee notes that some other differences exist between temporary foreign workers and foreign workers permanently residing in the country and nationals in respect of, for example, the invalidity pension scheme and survivors' pension rehabilitation, as well as accidents outside work. The Committee further notes that the Government maintains its position that the system is reliable and suitable to the needs of the workforce of the country. [...]"

  The Committee recalls that Article 6(1)(b) of the Convention applies to all foreign workers, both those with permanent and temporary residence status, who shall not be treated less favourably than nationals in respect of social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme). The Committee also recalls Article 10 of the Convention, providing that in cases

[5] Available at:
http://webfusion.ilo.org/public/applis/appl-displayAllComments.cfm?hdroff=1&ctry=0950&conv=C097&Lang=EN

[6] ILO Convention No. 97 - Migration for Employment Convention (Revised), 1949, has been ratified only by the Federal Territory of Sabah.

where the number of migrants going from the territory of one Member to that of another is sufficiently large, the competent authorities shall, where necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of the Convention. With respect to industrial accidents, the Committee refers the Government to the comments made under the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), with respect to Peninsular Malaysia. With respect to other social security benefits, and taking into account the large number of foreign workers concerned, the Committee hopes that the Government will consider making every effort to take special steps, including the conclusion of bilateral or multilateral agreements, to ensure that migrant workers do not receive treatment which is less favourable than that applied to nationals or foreign workers permanently residing in the country with respect to other social security benefits. …

The Committee is raising other points in a request addressed directly to the Government. The Committee hopes that the Government will make every effort to take the necessary action in the very near future."

- **Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19):**[7] [8]

"*For many years, the Committee of Experts as well as the Conference Committee on the Application of Standards, have been drawing the Government's attention to the fact that the national legislation and practice need to be brought in compliance with the principle of equality of treatment between nationals and non-nationals with regard to compensation for industrial accidents, in conformity with Article 1(1) of the Convention. In 1993, foreign workers were transferred from the Employees' Social Security Scheme (ESS) which provides for periodical payments to victims of industrial accidents and their dependants, to the Workmen's Compensation Scheme (WCS), which only guarantees the payment of a lump sum. In 1997, the Conference Committee concluded that the level of benefits granted under the ESS was significantly higher than that guaranteed by the WCS and insisted that foreign workers benefit from the same protection as Malaysian nationals. An ILO high-level technical advisory mission visited the country in May 1998 to examine ways of giving effect to the conclusions of the Conference Committee. As a result, the Government stated in its 1998 report that it was planning to review the coverage of foreign workers under the ESS and to propose amendments to the Social Security Act of 1969 in this regard. Since then, however, no steps were undertaken to bring the law and practice into conformity with the Convention.*

In its previous observation of 2008, the Committee noted that, taking into account the large number of foreign workers concerned and their high accident rate, the situation called for special efforts from the Government of Malaysia to overcome administrative and practical difficulties, that were impeding equal treatment of foreign workers who suffer industrial accidents. The Committee invited the Government to avail itself of the technical assistance of the Office in this respect. In particular, the Government was asked to demonstrate the actuarial equivalence of the lump sum paid under the WCS to foreign workers in cases of temporary or permanent incapacity, invalidity or survivors' rights to the amount of the periodical payments granted under the ESS to Malaysian

[7] Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:2327314,en:NO

[8] ILO Convention No. 19 - Equality of Treatment (Accident Compensation) Convention, 1925 has been ratified by the Federal Territories of Peninsular Malaysia and Sarawak.

workers in similar cases. With respect to the difficulties mentioned by the Government concerning the payment of compensation abroad, the Committee pointed out that these difficulties could be overcome by way of special arrangements between the Members concerned in line with Article 1(2) of the Convention. Such arrangements should be concluded in the first place with the main countries supplying workforce to Malaysia. Among the 1.9 million foreign workers currently employed in Malaysia, more than 1.5 million come from Indonesia, followed by India, Myanmar, Bangladesh, the Philippines, Thailand, Pakistan and China. All of these countries are parties to the Convention.

In its response to the Committee's observation, the Government limited itself to reiterating its position that the WCS is a suitable and practical approach for managing compensation of industrial accidents for foreign workers in Malaysia, and expressed the opinion that the system is reliable and suitable to the needs of the workforce in Malaysia.

The Committee regrets to note that the Government, in its reply received on 30 July 2010, sees no need to modify the national law and practice to bring it into conformity with the Convention or to resort to the technical assistance which the international community is willing to provide for this purpose. In such a situation, it is the obligation of the Committee to advise the Government that it is breaching its obligations under international law by not observing the principle of equality of treatment between nationals of any other member State which has ratified the Convention and its own nationals. Such violation of the Convention by the Government of Malaysia undermines the system of automatic reciprocity in granting equality of treatment to nationals of ratifying States that the Convention establishes between them. Given the gravity of the situation, the Committee requests the Government to reconsider its position."

In August 2011[9] the Government informed to the ILO that a technical Committee within the Ministry of Human Resources including all stakeholders is in the midst of conducting an actuarial study to asses and determine which of the three following options in relation to foreign workers is the most suitable:

(i) extension of Employment Injury Insurance Scheme coverage to foreign workers;
(ii) special coverage for foreign workers under Employment Injury Insurance Scheme; and
(iii) raising the level of the benefit provided by the Workmen Compensation Act so as to be equivalent to that of those benefits under the Employment Injury Insurance Scheme.

III.- BENEFITS.

1.- They refer to medical and cash benefits to be provided according to the nature and extent of the injury, and may be outlined as follows[10]:

[9] Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 102nd Session, 2013. Page 774 et seq. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205472.pdf .

[10] Please also see: Rahim Merican, R. "*Employee's Rights Under the Malaysian Social Security Organization*". Journal of Politics and Law, vol.3 No.1 (March 2010).
Available at:
http://webcache.googleusercontent.com/search?q=cache:RkvujJ2EN24J:www.ccsenet.org/journal/index.php/jpl/article/download/5276/4390+.+%E2%80%9CEmployee%E2%80%99s+Rights+Under+the+Malaysian+Social+Security+Organization%E2%80%9D.+Journal&cd=2&hl=es-419&ct=clnk&gl=cl

Benefit	Coverage of the Emp. Injury Insurance Scheme	Coverage of the Invalidity Pension Scheme	Description
Temporary Disablement Benefit	Yes	No	Limited to injuries connected to employment making the employee temporarily -for at least 4 days- incapable to perform his/her work. Periodical cash payment equivalent to 80% of the average daily wage per day of absence under medical leave (Sections 2(23), 22(a), 44, Fourth Schedule). No employer shall dismiss, discharge, or reduce or otherwise punish an employee while in receipt of Temporary Disablement Benefit. Any notice of dismissal or discharge or reduction given to an employee during this period is void (Section 53).
Permanent Disablement Benefit	Yes	No	Limited to injuries connected to employment causing disablements of permanent nature, making the employee incapable to perform the work he/she was doing. Disablement could be either **total**(disabling the employee from all work he/she was capable of undertaking) or **partial** (reducing the employee´s earning capacity in the employment he was capable of undertaking). Periodical pension payment or lump sum, or both, equivalent to 90% of the average daily wage (Sections 2(17),2(18), 22(b), Fourth Schedule).
Invalidity Pension	No	Yes	Triggered upon "Invalidity"[11]of the employee, provided a "qualifying period" is completed.[12] Monthly basic pension equivalent to 50% of employee´s average monthly wage. SOCSO may increase, reduce or discontinue this benefit (Sections 17, 20, Fourth Schedule).

[11] "Invalidity" is related to conditions of permanent nature (incurable or not likely to be cured) as a result of which an employee is incapable of engaging in any substantially gainful activity, being also unable to earn at least one-third of the customary earning a person with similar qualification and training could earn (Source: Sections 16, 17).

[12] "Qualifying period" is related to a density of contributions paid and verified up to the preceding month when the submission of invalidity was submitted to SOCSO. Two qualifying periods exits:
1.- Full qualifying period: (i) no less than 24 monthly contribution within the 40 consecutive months; or (ii) no less than two-thirds of monthly contributions comprised from the first month of entry into SOCSO.
2.-Reduced qualifying period: no less than one-third of monthly contributions comprised from the first month of entry into SOCSO.

			In case the same disablement exists, Invalidity Pension and Permanent Disablement Benefit are not cumulative for the same period, so the employee shall choose which benefit shall receive for that period (Section 96).
Invalidity Grant	No	Yes	Triggered upon "Invalidity" of the employee", provided no less than 12 monthly contributions has been paid from the first month of entry into SOCSO. Grant equivalent to the contributions paid plus the respective interest (Section 21).
Rehabilitation Benefit	Yes	Yes	Free of charge provision of facilities for physical or vocational rehabilitation. It also includes orthotic or other appropriate appliances. Applicable only to persons entitled to invalidity pension or permanent total disablement benefit that requires permanent attendance of another person (Section 40, 57).
Constant Medical Allowance	Yes	Yes	Applicable only to persons entitled to invalidity pension or permanent total disablement benefit who requires permanent attendance of another person. Monthly allowance equivalent to 40% of any of such benefits (Sections 15(e), 30).
Medical Care	Yes	No	Limited to injuries connected to employment. Medical treatment or attendance in a hospital or other institution, or by visits to the home of the insured person, only of such kind and on such scale as may be provided by SOCSO (Sections 15(f),37,38).
Dependant's Benefit	Yes	No	Not received by the employee. Cash payment given to his/her widow and children in case the employee dies as a result of an employment injury. If no widow or children, other kin are entitled (Sections 26, 36).
Survivor's Pension	No	Yes	Not received by the employee. Cash payment given to his/her widow and children in case the employee dies, providedany qualifying period for the purposes of the invalidity pension were completed. If no widow or children, other kin are entitled (Sections 17A, 20A). Dependent's Benefit and Survivor´s Pension are not cumulative for the same period and for the same employee, so the employee shall choose one of them (Section 96A).
Funeral Benefit	Yes	Yes	Not received by the employee. Amount payable to his/her closest kin in case the employee dies, as listed by the

			regulation. If no kin, the person who incurred in the expenditures will be entitled to this benefit (Section 29).
Education Loan	Yes	Yes	Not received by the employee. Loans or scholarship given to dependant´s children in case the employee dies or becomes disabled (Section 57A).

2.-Exclusion of employer's further liability: In case of injuries sustained in the course of employment, the employee or his/her dependants shall not be entitled to receive or recover from the employer, or from any other person who is the servant of the employer, any compensation or damages under any other law (**Source:** Section 31).

IV.-CONTRIBUTIONS.

Contributions depend on scheme of coverage that will be granted by the SSF, as outlined as follows:

1.- Category of contributions:

a.- First Category of contributions: Contributions apply to both Employment Injury Insurance Scheme and Invalidity Pension schemes. Employer and employee shall both bear contributions:

Employer's rate of contribution (of employee's monthly wage)	**Employee's rate of contribution (of employee's monthly wage)**	**Total (of employee's monthly wage)**
1.75% (1.25% for EIIS; 0.5% for IPS)	0.5%	2.25%

b.- Second Category of contributions: Contributions apply only to Employment Injury Insurance Scheme. Only the employer shall bear contributions. This category is limited to employees:

a.- Who attain 60 years of age or above;

b.-Who have attained 55 years of age with no previous contributions to SSF;

c.- Who are in receipt of invalidity pension.

Employer's rate of contribution (% of employee's monthly wage)	**Employee's rate of contribution (% of employee's monthly wage)**	**Total (% of employee's monthly wage)**
1.25	-	1.25

Ratio of contributions is specified in the Second Schedule of the SSF Act and varies according to the employee's monthly wage.

No funds or subsidies are received by the Social Security Fund from the Government. However, SSF allows the Social Security Fund to receive donations and gifts from public entities (**Source:** Sections 6, 68, 70, First Schedule.12).

2.- Definition of wages: 'Wages' means all remuneration payable in money by en employer to an employee (including payments in respect of leave, holidays, overtime). It does not include gratuity, annual bonus, sums allocated to pension or provident funds, travelling allowances or allowances granted to defray expenses as a result of employment.

Source: Section 2 (24).

3.- Payment of contributions: The employer is responsible for the payment of the contributions payable by himself and the contributions payable on behalf of the employee´s contributions . In case of principal employers, they shall pay contributions of all employees, whether directly employed by him/her or through immediate employees.

- Principal employer: Refers to an employer who has employed an employee directly to work for him/her or through immediate employer.
- Immediate employer: Refers to an employer who works for a principal employer or undertakes part of the work of the principal employer by way of a sub-contract. The immediate employer has direct control of the employees employed by him.
- Subsequently, the principal employer is entitled to recover from the immediate employer the amount of contributions so paid in respect to employees´ and employer´s contributions.

Directors, partners and office bearers hold joint and several liability for the payment of the contributions. The employer must also comply with obligations related to furnish of wages and registration with the Board within terms specified.
Source: Sections 6, 7, 8, 9, 108A.

4.- Notifications of the employer with the Board: Every industry to which shall be registered SOCSO within such time and in such manner as may be specified in the regulations.

Contributions shall be payable in respect of employees from the month they enter into employment and such contributions are payable even though the employer has not been registered with SOCSO.

In case the employer fails to keep or maintain any statement, particulars, register book or any record pertaining to each employee as required to be performed by him under this Act; fails or refuse to submit any statement, particulars, register book or record pertaining to each employee as required to be submitted by him, inspector or officers are vested with the powers to assess any contributions which is due by any employer based on any information available if the employer. This assessment shall be sufficient proof of the Board's claim for the recovery of any unpaid contributions.
Source: Sections 4 and 13.

5.- Late Payment of Contributions: Late payment of contribution includes overdue payment and under-paid contribution. The interest imposed will be imposed at a rate of 6% per annum in respect of each day delayed or default in payment of contribution after the given period ends provided that:-
i.- If the amount of interest calculated is less than RM5.00, then the interest payable shall be RM5.00 in respect of each month part of month;
ii.- If the month of interest exceeds RM5.00, then the interest payable shall be calculated to the next highest multiple of RM5.00 in respect of each month or part of a month.

6.- Protection of the employee in case the employer fails or neglects to pay contributions. This event does not prevent SOCSO from paying the employees the benefits them would have been entitled if the failure or neglect had not occurred. In this event, SOCSO will be entitled to recover from the employer the amounts paid to the beneficiary as if the contributions due had been paid or twice the amount of the contributions the employer neglect to pay, whichever amount is greater.
Source: Sections 14A, 48; Regulation 33 of the Employees' Social Security (General) Regulations, 1971.

Penalties: Employer or any person may be sanctioned with fine not exceeding RM10,000 or two years imprisonment, or with both, if found guilty of offence. This is the general sanction in case no special penalty is expressly provided. Example of offences described in the SSF Act would be:
- Provide false or incorrect information.

- Default or delay in registering the company before SOCSO.
- Default or delay in registering eligible employees.
- Default or delay in paying monthly contributions.

Source: Sections 93, 94.

V.- ADMINISTRATION AND INVESTMENT.

1.-The Social Security Fund comprises both the Employment Injury Insurance Scheme and the Invalidity Pension Scheme. The Social Security Fund is administered by the Social Security Organization ("SOCSO"). SOCSO is managed by a Board made up of not more than 16 members, including Government representatives, representatives of employees and employers who are contributing to the fund, and three experts with relevant experience in social security matters.

The chairman of this Board is appointed by the Minster. With regards to the Minster, the Board:

- Is bound by the directions given by the Minister.
- Must submit proposals for the introduction of new social security schemes or the modification of the existing ones, as required.

Source: Sections 58 to 59G, 69, 70.

2.-Investment of the funds is governed by law in detail (Sections 75 to 80). Investment is limited only to the funds that are not immediately required for meeting expenses under the Social Security Fund. An Investment Panel is responsible for carrying out the investment in accordance to instructions issued by the Board.

Source: Sections 75 to79.

VI.- SUPERVISION.

1.-Employers are subject to examinations, information requirements and inspections carried out by inspectors appointed by the Minister. Obstruction of inspections is sanctioned by law.

Source: Sections 12 to 13A.

2.-On the other hand, officers and servants of the SOCSO Board are under the supervision of a Disciplinary Committee belonging to the same Board.

Source: Sections 59H to 59W.

C.- EMPLOYMENT ACT 1955:

The Employment Act contains provisions regulating employee's entitlement, conditions and payment of sick leave. Unless otherwise stated below, the legal source reference of the following information concerning sick leave benefit are sections 60F, 60I (1C-1D) and 100 of the Employment Act.

I.- CONTINGENCIES AND OBJECTIVE.

Illness of the employee not connected to employment, (including dental surgeon).

The objective of the paid sick leave provisions is to provide monetary benefits through the payment of the ordinary salary the employee did not received as if the illness had not occurred. These amounts are borne and paid directly by the employer, with no applicability of contributions, existence of fund or intervention of public social security entities.

II.- COVERAGE.

1.- Sick leave benefit is mandatory to the following employees:

a.- Peninsula Malaysia: Employees who are covered under the Employment Act 1955, i.e., those employees earning wages not exceeding RM2,000 a month, and all manual employees irrespective of salary amount.

b.- For Sabah and Sarawak: Employees who are covered under the Labour Ordinances, i.e., those employees earning wages not exceeding RM2,500 a month, and all manual employees irrespective of salary amount.

However, employees with salaries exceeding those respective caps but no higher than RM5,000 may seek protection before the Director General of Labour in case the employer fails or neglect to pay sick leave benefit agreed in the contract of service. The Director General of Labour has the power to inquire into or decide any disputes concerning this type of complaints.

Additional source: Sections 69 and 69B.

2.- Sick leave benefit is not applicable to:

a.- Domestic workers.

b.- Employees engaged in any capacity in any vessel registered in Malaysia and who are not officer or do not have certain certificates , as prescribed by national law.

Notwithstanding the foregoing, nothing prevent employees not covered by these termination and lay-off benefits from receiving them, provided so agreed by the parties or granted by the sole employer's discretion.

Source: First schedule of the Employment Act for Peninsula Malaysia; Schedule of Sabah and Sarawak Labour Ordinances.

III.- BENEFITS.

The payment of the employee´s ordinary salary he/she would not have received as a consequence of absence due to certificated illness. This illness shall be examined and certified, at the expense of the employer, by a registered medical practitioner appointed by the employer. If the medical practitioner so appointed is not available within a reasonable time or distance having regard to the nature or circumstances of the illness, the examination and certification could be done by any other registered medical practitioner or by a medical officer.[13]

[13] According to section 2 of the Employment Act 1955, "*medical officer*" means a registered medical practitioner who is employed in a medical capacity by the Federal Government, or by the Government of a State; while "*registered medical practitioner*" means a medical practitioner registered under the Medical Act 1971.

The payment of salaries to employees on sick leave is per every day of absence, limited as follows:

Is hospitalization necessary?	Number of paid sick days leave in the aggregate in each calendar year
Hospitalisation is not necessary	It varies according to the length of service: - 14 days if the employee has been employed for less than 2 years; - 18 days if the employee has been employed for 2 years or more but less than 5 years; - 22 days if the employee has been employed for 5 years or more.
Hospitalisation is necessary	60 days. Also, the total number of days of paid sick leave in a calendar year which an employee is entitled shall be 60 sixty days in the aggregate, per calendar year.

Employee must inform the employer: An employee who absents himself on sick leave without informing or attempting to inform his employer of such sick leave within 48 hours of the commencement thereof, shall be deemed to absent himself from work without the permission of his employer and without reasonable excuse for the days on which he is so absent from work.

No coverage duplication: No employee shall be entitled to paid sick leave for any period during which he/she is receiving periodical payments for temporary disablement under the Employees' Social Security Act 1969 or any compensation for disablement under the Workmen's Compensation Act 1952, or the period during which the employee is entitled to maternity allowance under Part IX od Employment Act.

IV.- CONTRIBUTIONS.
No applicability of contributions in relation to paid sick leave.

V.- ADMINISTRATION AND INVESTEMNT.
Not applicable.

VI.- SUPERVISION.
Supervision of compliance of paid sick leave is subject to the general regime of inspections that may be carry out by the Director General under Employment Act. In case employer fails to grant sick leave, or fails to pay sick leave pay, to any of his/her employees, commits an offence, and shall also, on conviction, be ordered by the court before which he is convicted to pay to the employee concerned the sick leave pay for every day of such sick leave at the rate provided by law , and the amount so ordered by the court to be paid shall be recoverable as if it were a fine imposed by such court. Also, any person who commits any offence contravenes any provision of in relation paid sick leave shall be liable, on conviction, to a fine not exceeding ten thousand ringgit (**Source**: Sections 65 et seq, and 99A Employment Act).

D.- PENSIONS ACT 1980 (ACT No. 227):

The Pension Act governs the Federate Consolidate Fund (hereinafter referred to as the "FCF)". The FCF is limited to public servants.

I.- CONTINGENCIES AND OBJECTIVE.

a.- Attain the age of 56 years[14]. Exceptionally, early retirement is also available when the age of 40, 45 or 50 years is attained, provided certain conditions are fulfilled.
b.-Permanent mental or physical incapacity from engaging employment.
c.-Disability as a result of employment injury or disease.
d.-Dead.
e.- Termination of employment due to restructuration of the public offices, including: (i) abolition of the office; (ii) restructuration of the organization to create greater efficiency; (iii) termination of the office´s employment based on the public interest; (iv) appointment of the officer to serve in other organization being men or women younger than 50 or 45 years old, respectively.
f.- Termination of employment on the grounds that false or misleading information was provided by the officer for the purposes of his/her appointment.

Also, the acquisition of a citizenship other than Malaysian (except in the event of marriage) is also envisaged as a compulsory event of retirement.
Source: Sections 10 to 12A, 17 and 18.

The objective of EPF is to provide monetary benefits once the aforementioned contingencies occur.

II.- COVERAGE.

Limited to public servants (General Public Service of the Federal Government; Judicial services, the Police Force; Railway Service; Education Service; Joint Public or Public Services, Parliamentary Service).
Source: Section 2.

III.- BENEFITS.

Benefits are triggered upon the existence of contingencies mentioned in section I. They can be granted in pension, gratuity or other benefit.

The maximum amount of a pension shall not exceed 50% of the monthly contributable salary.

Pensions may also be ceased in case the person to whom it is granted has been sentenced to any term of imprisonment, adjudged a bankruptcy or declared insolvent, or acquired a citizenship other than Malaysian (except by virtue of marriage). It also can be suspended in case the same person receiving any benefit is reappointed as public servant.
Source: Sections 9, 20, 21, 21A, 22, 23.

However, right to pension, gratuity or other benefit under this Act is not absolute, and amounts may be reduced or withheld where the officer has been guilty of negligence, irregularity or misconduct.
Source: Section 3.

IV.- CONTRIBUTIONS.

[14] This age of retirement is only mandatory for those officers appointed on or after October 1st.

The rate of contribution that the respective entity shall pay to the Federate Consolidated Fund? Is 17.5% of the employee´s salary, only apply to permanent and pensionable public servants.
Source: Section 12B.

V.- ADMINISTRATION AND INVESTMENT

1.-In case of federal officers, the *Yang di-PertuanAgong* (i..e. Head of the Malaysian State) has authority to require retirements, authorize early retirement, as well as to grant, suspend or cease benefits. On the other hand, in case of other public officers, the respective Statutory or Local Authority has the authority to exercise such powers.

2.- No regulation are contained in the Pensions Act concerning the investment regime.

VI.- SUPERVISION.

1.-In case of federal officers, the *Yang di-PertuanAgong* (i..e. Head of the Malaysian State) has authority to require retirements, authorize early retirement, as well as to grant, suspend or cease benefits.

2.-On the other hand, in case of other public officers, the respective Statutory or Local Authority has the authority to exercise such powers.

THIRD PART: STATUTE ON TERMINATION AND LAY-OFF BENEFITS

The Employment Act (1955) is the specific statute governing employment relations in Peninsular Malaysia. Although Sabah and Sarawak have different statutes (Sabah Labour Ordinance 1949 -Cap. 67-, and Sarawak Labour Ordinance 1952 -Cap. 76- respectively), their content is in conformity.[15]

Additionally, the Industrial Relations Act (1967) addresses collective issues and trade disputes.

I.- TERMINATION AND LAY-OFF BENEFITS:

Termination and lay-off benefits are governed by law. The Minister is empowered to make regulations for the entitlement of employees to termination, lay-off and retirement benefits. In doing so, the Minister may provide definitions and limit the scope of such termination benefits(sections 60J of the Employment Act 1955, section 104F of Sabah Ordinance; and section 105F of Sarawak).

These regulations are contained in Regulations in force for each region separately -for Peninsula Malaysia, the Employment (Termination and Lay-Off Benefits) Regulations 1980; for Sabah, the Labour (Termination and Lay off Benefits) Rules 2008; and for Sarawak, the Labour (Termination and Lay off Benefits) Rules 2008-.

Malaysian laws and regulations concerning indemnities payables in the event of termination do not provide a definition of "retrenchment benefit". On the other hand, such legal framework does define "termination" and "lay-off" benefits.

"Retrenchment benefit" is mentioned in very few occasions in the regulations concerned. Moreover, the concept of retrenchment is even referred as a different benefit than a termination and lay-off benefit. One example in this regard is Section 2 of the Employment Act that categorizes as a non-wage benefit "*any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme*…".

However, the expression "retrenchment benefits" was used in the Phase 1 Project Report previously submitted.

The purpose of benefits payable upon termination of employment has been stated by the Industrial Court. In the case of Pengkalen Holdings Bhd. v James Lim Hee Meng [2000] 2 ILR 252, the Court held that the purpose of this type of payment *"is to serve as a cushion against the hardships faced by an employee who has to contend with the loss of his employment and the consequential loss of his immediate means to earn an income. In the context of good industrial relations practice, it serves to minimize resistance and opposition to genuine reorganization measures undertaken by management. It acknowledges a workman's security of tenure and recognizes the fact that though no fault of his, such security of tenure has to be given away to his employer's overriding interest of economy and efficiency".*

1.- Statutory termination benefit is applicable to employees hired under a continuous contract of service.

Employment contracts for an unspecified period of time shall continue in force until terminated in accordance with this Part. This type of contact differ from the temporary employment contracts, i.e., contracts of service for a specified period of time or for the completion of a specified piece of work at which expiration or completion, as the case may be, the employment relationship is agreed to end.

Termination and lay-off benefits are applicable for employees whose contract has been terminated or

[15] Legal source references in this section will be made in relation to the Employment Act (1955). No references to the Labour Ordinances for Sabah or Sarawak mean conformity of them with the Employment Act (1955).

who have been laid-off.

The minimum amount of these benefits is set by law:

Length of continuous service	Minimum Amount
Less than one year	None
One year - less than 2 years	10 days' wages per year of service[16]
2 years – less than 5 years	15 days' wages per year of service
5 years or more	20 days' wages per year of service

Relevant information:

- Incomplete years are also included on a pro-rata basis, calculated to the nearest month.
- Period of services prior to the date when the Regulations came into effect are also included.
- The employer shall give to the employee a written statement indicating the amount and the manner in which it has been calculated.
- Benefits shall be paid by the employer to the employee not later than seven days after the relevant date.
- This benefits are cumulative to the indemnity in lieu of prior notice payable in case of termination without notice equal to the amount of wages which would have accrued to the employee during the entire or partial term of such notice.

Any person who commits any offence contravenes any provision of in relation to termination or lay-off benefits shall be liable, on conviction, to a fine not exceeding ten thousand ringgit (**Source**: Section 99A Employment Act).

Source: Sections 2, 3(2), 6, 11 and 12 of Regulations; Sections 12 and 13 of Employment Act.

2.- Concept of termination and lay-off.

a.- Termination. In general, any termination decided by the employer. Termination is also deemed to exist in the following situations:

i. when the employee dies before the expiration of a termination notice given by the employer;
ii. when the employee dies before the expiration of an offer period given by the employer aimed at renewing his/her contract or re-engaging him/her under a new contact;
iii. in case of change of the ownership of the business occurs, if the new employer does not offer to continue employment to the employee within 7 days of the change of ownership.

Exclusions: The following events do not entitle employee for termination and lay-off benefits:

i. Termination of employment based on the employer´s decision when the employee attains the age of retirement if the contract of service contains a stipulation in that behalf;

[16] Definition of wages: basic wages and all other payments in cash payable to an employee for work but does not include: (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service; (b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee; (c) any travelling allowance or the value of any travelling concession; (d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment; (e) any gratuity payable on discharge or retirement; or (f) any annual bonus or any part of any annual bonus. (Section 6 of Regulations; Section 2(1) Employment Act).

ii. Termination of employment based on the employer´s decision due to employee's misconduct inconsistent with the fulfillment of implied or express conditions of his/her services;
iii. Employee´s voluntary resignation. This decision excludes situations where the employee has a "just cause" to leave his/her employment. "Just cause" may be described as the situation where the employee is forced to resign because his/her employer has willfully breached a condition of the employment contract (failure to the payment of wages), or when he/she or his dependants are immediately threatened by danger to the person by violence or disease such as such employee did not by his contract of service undertake to run;
iv. Termination of employment followed by an immediate renewal of contract or re-engagement by the same employer under a new contract of service, on terms and conditions not less favourable;
v. Unreasonably employees´ refusal of an offer given by the employer aimed at renewing his/her contract or re-engaging him/her under a new contract of service with not less favourable conditions than the contact in force, insofar the offer was made by the employer not less than 7 days before the effective date of termination;
vi. In case of change of the ownership of the business occurs, unreasonably employees´ refusal of an offer to continue employment under conditions not less favourable, insofar the offer was made by the employer within 7 days of the change of ownership;
vii. Employee who leaves the service of his employer before the expiration of any notice given to him by his employer, without prior consent of the employer or without making payment to the employer.

b.- Lay-off. Applicable to contracts where the remuneration depends on the employee being provided by the employer with work of the kind he/she is employed to do. The employee shall be deemed to be laid-off if where, within any period of 4 consecutive weeks:

i. the employer does not provide such work on at least a total of 12 normal working days; and
ii. the employee is not entitled to any remuneration for the period or periods in which he/she is not provided with work.

Notwithstanding the foregoing, both termination and lay-off benefits may be increased by agreement of the parties or by the sole employer's discretion.
Source: Section 4, 5, 8, 10 of Regulation; Sections 7, 7A, 13, 14(3), 15 of Employment Act.[17]

II.- COVERAGE.
1.- Termination and lay-off benefits are mandatory to the following employees:

[17] Describing the main features of Malaysian Labour Laws, useful is the following quote: "*Thus, in our context, retrenchment means a discharge of surplus of workers. However, retrenchment does not include termination of contract due to other reasons such as illegality or frustration or dismissal on the ground of misconduct (Ayadurai, 1998). In short, retrenchment occurs as a consequence of redundancy. The words of downsizing and retrenchment are used interchangeably. However, the main legislation governing this issue, that is, the Industrial Relations Act 1967, does not define the meaning of redundancy. Thus, for this purpose, reference should be made to common law principles."* (Marsono H., and Jusoff K. "*Retrenchment in Malaysia: Employer's Right?*". Journal of Politics and Law, vol.1 No.4 (December 2008), page 22.
Available at http://free-doc-lib.com/book/retrenchment-in-malaysia-employers-right-1.pdf).

a.- Peninsula Malaysia: Employees who are covered under the Employment Act 1955, i.e., those employees earning wages not exceeding RM2,000 a month, and all manual employees irrespective of salary amount.
b.-For Sabah and Sarawak: Employees who are covered under the Labour Ordinances, i.e., those employees earning wages not exceeding RM2,500 a month, and all manual employees irrespective of salary amount.

However, employees with salaries exceeding those respective caps but no higher than RM5,000 may seek protection before the Director General of Labour in case the employer fails or neglect to pay indemnities agreed in the contract of service. The Director General Labour has the power to inquire into or decide any disputes concerning this type of complaints.
Source: Sections 69(1)(a), 69A and 69B.

2.- Termination and lay-off benefits are not applicable to domestic workers.

Notwithstanding the foregoing, nothing prevent employees not covered by these termination and lay-off benefits from receiving them, provided so agreed by the parties or granted by the sole employer's discretion.
Source: First schedule of the Employment Act for Peninsula Malaysia; Schedule of Sabah and Sarawak Labour Ordinances.

III.- OUTLINE ON TERMINATION OF EMPLOYMENT.
1.- Type of employment contract:
a.-Temporary employment contracts: A contract of service for a specified period of time or for the completion of a specified piece of work at which expiration or completion, as the case may be, the employment relationship is agreed to end.

b.- Employment contracts for an unspecified period of time: Termination of this contact is subject to requirements specified in this section III.

2.- Written prior notice of termination:
Employer and employee may at any time give to the other party notice of his intention to terminate such employment relationship; insofar a written notice of termination is given in advance. The employer shall also inform the amount and the manner in which the termination or lay-of payment has been calculated.

Minimum prior notice for both parties length is set forth by law, taking into account the tenure of employment:

Length of continuous service	Minimum Prior Notice Length[18]
Less than 2 years	4 weeks
2 years – less than 5 years	6 weeks
5 years or more	8 weeks

Exceptionally, this prior notice is no required when:

a.- an indemnity in lieu of prior notice is paid. This indemnity shall be equal to the amount of wages which would have accrued to the employee during the entire or partial term of such notice.
b.-a party has willfully breached a condition of the contract of service.

Source: Section 12 of Regulation; Sections 12, 13 and 63 of Employment Act;

3.- <u>Notification of termination and lay-off to labour authority</u>:

Employers are required to notify the closest Labour Department when conducting retrenchment, or lay-offs, or voluntary separations, using a termination form known as "PK Form". This notification is an administrative requirement established by the Minister of Human Resources.

In case of retrenchment, notifications must be done at least 30 days in advance. Later, a report on actual employees terminated must be submitted within 14 days after the date of termination, in addition to a report concerning the steps taken to assist terminated workers within 30 days as of the same date.

Failure to comply with this requirements does not trigger the invalidity of the employment termination; however, employer shall be liable of a fine not exceeding RM10,000.

Source: Section 63 of Employment Act; Guidelines on Retrenchment Management -for employers and employees Minister of Human Resources-[19].

4.- <u>Restriction on the ability to terminate employment</u>:

The employer is entitled to terminate employment on the grounds of redundancy or retrenchment. In doing so, the employer shall proceed with "*just cause or excuse"*. To eliminate or minimize the risk of being liable for wrongful dismissal, the employee should bear in mind the following:

a.- <u>Preference of Malaysian over foreign workers</u>:

i. No employer shall terminate the contract of service of a local employee for the purpose of employing a foreign employee.
ii. When reducing workforce, the employer shall first terminate the contract of all foreign employees in a capacity similar to that of the local employee before terminating any

[18] Employment Act states certain cases where this termination notice shall be given in advance, namely -Section 12(4)-:
(a) the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed; (b) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work; (c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish; (d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish; (e) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law.

[19] Also: Hassan, K. and Ali, A. "*Workers´ Retrenchment During Economic Downturn and Dispute Resolution Under Malaysian Law*", 2011, International Conference of Economics and Business Information, IPEDR vol.9 (2011), IACSIT Press, Bangkok, Thailand, page 59.

employment of local employees (foreign employees with permanent residence do not fall into the category of foreign employees).

Source: Sections 60M to 60O Employment Act[20].

b.- "Last in, first out" (LIFO) Principle: Malaysian Courts practice require the employer to strictly comply with this principle "*in each employment category*". That is, the most junior employee in the category must be the first to be selected for retrenchment. However, "*Given that LIFO is not mandatory and not a statutory provision, the employers are not bound to follow. Employers can depart from applying LIFO. The departure must however be objective and using fair selection criteria. The senior employee who was retrenched had a record of poor performance and the junior employee who was retained in favour of a more senior employee has a special skill or qualification (Supreme Corporation Bhd v Doreen Daniel Victor Daniel &OngKhengLiat, 1987)."*

Although voluntary separations schemes "VSS" are not regulated by law in detail, is it lawful for employers and employees to agree any condition or term of termination that is more favoUrable to the employee than the minimum standards set in the law (section 7A, Employment Act). Also, the Code of Conduct of Industrial Harmony, dated 1975[21], recommends guidelines to employers where dismissal are likely, stating that, if retrenchment becomes necessary, despite having taken appropriate measures, employers should introduce schemes for voluntary retrenchment and retirement schemes (paragraph 22(a) Code).

5.- Avenues for redress:

If the employee considers the dismissal was without just cause or excuse, he/she may seek reinstatement. In the first step, the claimant will make written representations to the Director General of Industrial Relations. If there is no settlement, the matter may be referred to the Industrial Court.

Alternatively, an employee can bring a civil action for damages in respect of wrongful dismissal before the civil courts. Likewise, the decision issued by the Industrial Court on unfair dismissal operates as a bar to any action for damages by the employee in any court in respect of wrongful dismissal.

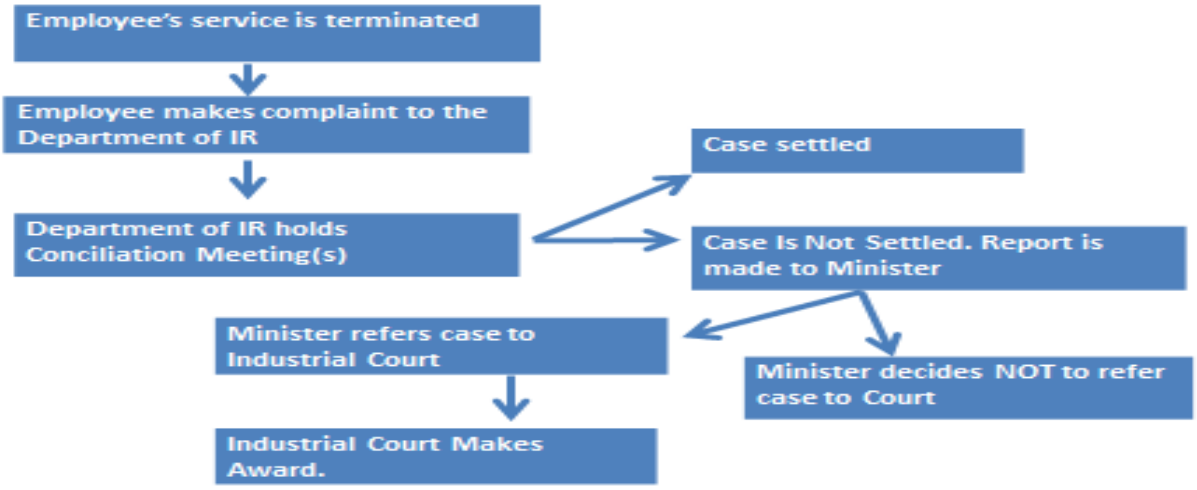
The Industrial Court has wide authority to examine whether a termination was based or not on just cause or excuse. In William Jacks & Co. (M) Sdn. Bhd. v S. Balasingam (1997) 3 CLJ 235, the Court of Appeal held that: *"Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organize his business in the manner he considers best. So long as that managerial power is exercised bona fide, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact bona fide."*[22]

Source: Sections 20 and 30 Industrial Relations Act.

[20] Hassan, K. and Ali, A. "*Workers´ Retrenchment During Economic Downturn and Dispute Resolution Under Malaysian Law*", 2011, International Conference of Economics and Business Information, IPEDR vol.9 (2011), IACSIT Press, Bangkok, Thailand, page 60.

[21] Please see section 5(e) below.

[22] http://mahrconsultants.org/news/Newsletter%20Aug%2009.pdf



In making its reward, the Industrial Court:

a.- Shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

b.- Is not restricted to the specific relief or demands claimed by the parties, and may include any other matter which it deems as necessary to settle the dispute.

c.- Shall have regard to factors related to the public interest, financial implications of the award on the economy of the country, the industry concerned, and probable effects in related or similar industries.

d.- Can determine the payment of backwages.[23]

e.- May take into consideration any agreement or code relating to employment practices between organizations representative of employers and workmen. In practical terms, this means take duly into consideration the well-known Code of Conduct of Industrial Harmony (1975) ("Code"). The Code is a document agreed between the Malaysia Council of Employers' Organization and the Malaysian Trade Unions Congress, with the approval of the Minister of Labour and Manpower, providing objective guidelines to the employer to proceed with termination. Although not strictly legally binding, the Industrial Court has not deemed the Code as a mere compilation of good labour practices. In fact, it has been consistent in its reliance to the guidelines contained therein when examining whether a termination was or not with just cause or excuse[24].

[23] In the event that backwages are to be given, such back wages shall not exceed 24 months' backwages from the date of dismissal based, or 12 months' backwages in case of a probationer. Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the Court, shall be deducted from the backwages given; 4. Any relief given shall not include any compensation for loss of future earnings; and 5. Any relief given shall take into account contributory misconduct of the workman.

[24] Please see:
http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Global%20Markets%20QRGs/Termination,%20Discrimination%20and%20Harassment/qr_malaysia_terminationdiscriminationharassmentguide_2009.pdf

According to these guidelines, which may be summarized as follows, the employer should:

i. Provide greatest possible stability in terms of job tenure.
ii. Provide retirement, retrenchment and sick pay schemes to supplement statutory provisions -where practicable-.
iii. Take, in consultation with trade union representatives-as appropriate- and Ministry of Labour and Manpower, necessary steps to avert or minimize termination of employee, by measures as:
    - Limitation on recruitment.
    - Restriction of overtime work, or work on weekly day of rest.
    - Reduction in number of shifts, days worked a week, or hours of work.
    - Re-training and/or transfer to other department/work.
iv. If retrenchment becomes necessary, despite having taken appropriate measures, take measures to:
    - Ensure no such announcement is made before the workers have been informed.
    - Give early warning as practicable.
    - Spread termination of employment over a longer period.
    - Introduce schemes for voluntary retrenchment and retirement, and for payment of redundancy and retirement benefits.
    - Retire workers who are beyond their normal retiring age.
    - Assist, in co-operation with the Ministry of Human Resources, the workers to find work outside the undertaking.
v. Select workers to be retrenched in accordance with objective criteria been worked out in advance with the workers' representatives, which may include:
    - The need for the efficient operation of the establishment or undertaking.
    - Ability, experience, skill and occupational qualifications of individual workers.
    - Length of service and status (non-citizens, casual, temporary, permanent).
    - Age.
    - Family situation
    - Such other criteria as may be formulated in the context of national policies.

Source: Paragraphs 19 to 22 of the Code.[25]

6.- <u>Tax treatment of termination benefits</u>:

In general, any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment, is treated as an exempted income. In the case of a payment made in connection with a period of employment with the same employer or with companies in the same group, the exemption given is up to RM10,000 for each completed year of service.

Also, in case an employer is about to terminate employment of an individual who is or is likely to be chargeable to tax in respect of income in respect of gains or profits from the employment, the employer shall not less than one month before the cessation give written notice thereof to the Director General of

[25] "*The Malaysian law clearly recognizes the managerial prerogative of the employer to organize and arrange his business in the manner he considers best including to retrench his employees provided that it is made bone fide for the interest of the employer's business. Clearly, the retrenchment exercise is a last resort to the employer in reorganization. Before making decision on retrenchment, the employer should try his very best to minimize the reduction of the number of employees. Perhaps, the employer should take the necessary steps such as by reducing its operational cost and at the same time restructuring his position to suit the current needs. The Industrial Court in Basf (M) Sdn. Bhd. vs. Lee SuanSim (2001) recognized that when the employer is in difficulties, he should first embark on cutting operational costs such as introducing salary cuts, stopping increments and promotions exercise, reducing traveling expenses and entertainment allowances. In the event that he failed to stabilize the financial position of the business, he has, if unavoidable, to retrench the employees."* Marsono H., and Jusoff K. "*Retrenchment in Malaysia: Employer's Right?*". Journal of Politics and Law, vol.1 No.4 (December 2008), pages 24 and 25.

Inland Revenue. In this notification the employer shall state the full name and address of the individual and the expected date of cessation.
Source: Income Tax Act Sections 13.1, 83(3) and Sixth Schedule-Paragraph 15.

A Ruling on Compensation for Loss of Employment (Public Ruling No. 1/2012)[26] was issued by the Inland Revenue Board Malaysia for the purpose of providing interpretation and guidance for the public and officers of the Inland Revenue Board Malaysia.

[26] Available at: http://www.ctim.org.my/file/news/14/01511_Compensation%20For%20Loss%20of%20Employment%20-%20PR1_2012%20(270112).pdf

FOURTH PART: VOCATIONAL TRAINING AND EMPLOYMENT SERVICE ACTIVITIES

A more comprehensive UI scheme to persons who lose their jobs, aside of the mere provision of temporary and partial income replacement, should also support them while seeking for new employment, and thus shortening the periods of unemployment. These measures aimed at matching labor supply and demand and providing vocational training/guidance to maintain or improve employability, are known as "Active Labour Market Policies" (ALMPs).[27]

This section summarizes measures under current Malaysian legal framework similar to those ALMPs that would be intended under an UI.

I.- Vocational rehabilitation funded by the Social Security Fund under the Employees' Social Security Act 1969 (Act No.4):
Any person suffering from or claiming to suffer from invalidity under the Invalidity Pension Scheme or permanent disablement under the Employment Insurance Scheme, both administered by the Social Security Organization ("SOCSO"), may be provided free of charge vocational rehabilitation, in addition to physical rehabilitation.

One example of this measure is the "Return To Work Programme" (RTW), first introduced in 2007 and aimed at providing a vocational rehabilitation to assist employees suffering from disability to recover and re-join the workforce earlier.

Source: Employees´ Social Security Act, Section 57.

The success of the RTW is entirely dependent on the involvement of case managers in each case, from the beginning to the end. Thus, any case is run professionally and systematically to ensure that the objectives of rehabilitation and returning to work are achieved.

II.- Training activities funded by the Human Resources Development Fund (HRDF) under the Human Resources Development Act 2001 (Act No.612):[28]
HRDF is made up of levies paid by employers who belong to the industries listed in the First Schedule of Human Resources Development Act (mainly manufacturing and services industries).However, the list of industries listed included is wide.

Levies are financed and paid by the employer in respect of each employee, on a monthly basis, at the rate of 1% or 0.5% of the employee's monthly wage, as shown below:

[27] Employment Promotion and Protection against Unemployment ILO Convention No. 168, Article 7, declares: "*Each Member shall declare as a priority objective a policy designed to promote full, productive and freely chosen employment by all appropriate means, including social security. Such means should include, inter alia, employment services, vocational training and vocational guidance."*

[28] The name of this Act has been translated from its original name in Bahasa Malaysia *Pembangunan Sumber Manusia Berhard Act 2001* (No. 612).

Type of Employer	Mandatory or voluntary payment of levy?	Rate of Levy Contributions
Employers with 50 employees and above	Mandatory	1% of employees' monthly wages
Employers with 10 to 49 employees and a paid-up capital of RM2.5 million and above	Mandatory	1% of employees' monthly wages
Employers with 10 to 49 employees and a paid-up capital of less than RM2.5 million	Voluntary	0.5% of employees' Monthly wage

HRDF is administered by the Human Resources Corporation that is responsible for collecting of the levies and the assessment and determination of the types of training and retraining needed, according to the needs of industries.

The amounts collected by the HRDF shall be expended only for the purposes of:
a.- promoting, developing and upgrading the skills of employees. This includes provision, establishment or maintenance of training facilities.
b.- providing financial assistance to employers, employers' association or authorized training providers by way of grant, loan or otherwise for the purposes. Amounts granted by the HRDF shall be deemed a debt of the employer.
c.- Carrying out activities or projects to train or retrain retrenched persons or persons to be retrenched, subject to such terms and conditions as may be approved by the Minister.

Source: Sections 1, 2, 3, 4, 14, 15, 20, 22, 24, First Schedule, Pars I and II.

III.- Department of Skills Development under the National Skills Development 2006 (Act No. 652):
The Department of Skills Development is an agency under the Ministry of Human Resources responsible for developing and monitoring national training standards, the latter known as the "National Occupational Skills Standards". In this respect, one the main functions of the Department of Skills Development is related to the approval of training providers, implementation of the National Training Certification Programs and promotion of skills profiles.

The aforementioned standards are determined by the National Skills Development Council, an advisory body on skills training policies[29].In order to strengthen that the determination of the skills standards is in line with the needs of the relevant industrial sectors, members of such Council are representatives from the public and private sector[30].

[29] Excerpts from a paper prepared by the Department of Skills Development 2010, states: "*Malaysia is well on its way towards attaining the developed nation status that the country aspires to be by the year 2020. Central to this aspiration is the country's success in developing its human capital, in order to equip all individuals with the competencies required for a modern, knowledge-based society. Such an endeavor requires that the national education and training systems be continuously enhanced in terms of its quality, efficiency and effectiveness. This, in turn, depends on strong and smart partnership between the government and the private sector, especially to create a workforce that is competent, multi-skilled and versatile*." "*Background Paper for Malaysia: Skills Development in the Workplace In Malaysia* (2010)".

Available at:
http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/meetingdocument/wcms_120569.pdf

[30] Among others, members of the Council consist of representatives from the Prime Minister and Ministries of Education; Human Resources; Youth and Sports; Entrepreneur Development; Agriculture and Public Works. It also includes members private skills training providers; women's organizations, as well as experts with in skills training.

The relevance of the National Occupational Skills Standards lies on the fact that any accredited skill training programme is subject to meet the requirements in terms of curriculum, type of facilities/technologies and instructors set thereof by the National Skills Development Council.

Accordingly, enrollment of trainees for a training programme claimed to be an accredited or the promotion of skills training centers as accredited, without a valid certificate, is an offence subject to criminal and civil liabilities. Likewise, the possession of a false certificate is also an offence leading to such kind of penalties.
Source: Sections 3, 4, 5, 17, 20, 22, 52, 53, 55.

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