

# The Changing Face of Malaysia's Employment Practices in the Endemic World

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Employment Law

*This article was written with contributions from Ms Rubini Murugesan and Mr Kelvin Kho, both Partners at M/s Christopher & Lee Ong, Malaysia.*

The easing of pandemic restrictions and the opening of international borders have allowed many organisations to change their workplace practices from a "Work from Home" norm to more of a hybrid practice where employees are required to work at the office on certain workdays and allowed to work from home on other days. One important consideration that employers have is to ensure that the working environment is safe for their employees. In Malaysia, employers have, under the Occupational Safety and Health Act 1994 (OSHA), a legal obligation to ensure, as far as it is practicable to do so, that the working environment is safe for the health and well-being of its employees.



We spoke to [Rubini Murugesan](#) and [Kelvin Kho](#) of HYPERLINK

"<https://www.linkedin.com/company/rajah-&-tann/>" M/s Christopher & Lee Ong to ask for their insights on how in-house counsel can assist their organisations in terms of creating and adopting new employment policies in post-pandemic Malaysia.

## **What could an organisation do if their employee refuses/is unable to be vaccinated or take the booster shot? Can they enforce mandatory vaccination at the workplace?**

Currently there is no legislation or regulation in Malaysia which allows for employers to make it mandatory for its existing employees to be vaccinated before they are able to return to the office.

However, most employers have relied on the aforementioned legal obligation set out in OSHA to ensure their employees are all vaccinated so that the work environment is safe for all of their employees to return to.

In these circumstances, save for a few   dical reasons (for example pregnancy/allergies where employers may decide as exceptions), most employers have encouraged their employees to get vaccinated before they can return to the office and have discouraged those who are not vaccinated to not return to the office.

However, as Malaysia moves into the endemic phase which saw the restrictions easing from 1 May 2022, and has since been further eased from 15 May 2022, there is no longer a requirement for Malaysians to register/scan their MySejahtera app before entering into any premise. The MySejahtera app is an application developed by the Malaysian government to facilitate contact tracing during the pandemic.

Nevertheless, the legal obligation to ensure a safe working environment remains with the employer. In this regard, there is no legal impediment on employers requiring only fully vaccinated individuals/visitors or those who have received booster vaccinations to enter their premise/workspace on the basis that they want to ensure that the working environment is safe for their own employees.

As for existing employees, an option that an employer can consider is to make it clear through policies/notices made known to its employees that the employer encourages all its employees to get vaccinated in order to create a safe working environment for all and any employee who refuses to get vaccinated bears the health risks of an unvaccinated person for being in the workplace.

However, there are some industries, for instance the aviation industry and hospitality industry that has made it compulsory for all its employees to get vaccinated given the nature of the jobs of these frontline employees.

Although there is a risk that this precludes those who are not vaccinated from being employed within these industries, a compelling argument can be made to show that the particular nature of the industry concerned (which can also extend to the particular job concerned) carries high risk of exposure to Covid-19 virus and it is on this basis that the employer may require such employees to be vaccinated so that they are protected from the medical complications arising from an Covid-19 infection which are more likely to be experienced by unvaccinated individuals.

One issue that has not been tested is the question of whether an employer would be made liable for the adverse side-effects suffered by an employee who has been compelled by his/her employer to get vaccinated. Thus far, no such case has presented itself, but this remains to be seen especially if Malaysians are required to get further booster vaccination shots in future.

At present, Malaysia is only guided by governmental policies as there is no legislation in place which gives the right to employers to mandate vaccination for their employees.



**What changes should organisations be aware of in light of the Covid-19 pandemic in terms of their employment contracts?**

At present, there is no legal impediment for employers to ask job applicants/new recruits if they have been vaccinated. This can be part of the pre-employment screening process.

There is also no legal impediment on employers to require new recruits/applicants to show proof that they have been vaccinated. There is also no legal restriction in place prohibiting employers to update their existing employment contracts and make it a condition within the contract that employees have to be fully vaccinated for this particular job/designation.

In doing so, this will form part of the contractual term of employment, and once the employee signs the contract of employment, the said employee is legally bound to this term.

However, employers should bear in mind that the vaccination status of an individual is considered as sensitive data and falls within the ambit of Malaysia's data protection law.


As such, it is recommended that employers should obtain the consent of the employee concerned in giving such information and that such information will not be divulged to a third party unless required by law.

As for employees who are presently represented by unions, the employers of such unionised employees ought to try and negotiate with the union representatives to make it a condition of employment for new employees/recruits that they are all vaccinated.

This can be included as a term in the Collective Bargaining Agreement if the same is due to be renewed.

Employers should also think of coming up with standard operating procedures in managing Covid-19 infections in their workplace so that there is safe and effective handling of Covid-19 situations.

As part of its business continuity plan, an employer may consider implementing split-team operations where its business units may be separated into two or more working teams who work in the office on different days or are separated by distance so that each working team may continue to function in case of a Covid-19 outbreak within a quarter of its employees. This can also be included in the company's employment handbook to facilitate the split-team arrangement.

However, employers should also be mindful to review these policies where the threat of the Covid-19 virus becomes negligible and where  policies are no longer necessary.

At present, while we are at the endemic phase and restrictions have eased, it is still a good practice for the Covid-19 prevention procedures to be in place as the threat of the virus is still present.

## Has the easing of the pandemic regulations created any changes/updates to employment contracts?

Not that we can see, as employers in Malaysia are still cautious and prefer to continue observing some measures of Covid-19 prevention procedures within the workplace.

## How has the Covid-19 pandemic affected the non-competition and confidentiality obligations in employment contracts?

In Malaysia, by virtue of s 28 of the Contracts Act 1950, an employer is not allowed to restrain an employee from exercising a lawful trade, profession or business and any restrictions placed thereon would be considered as void to that extent.

The court has held that employers do have a right to protect their confidential information.

Due to the rapid digitisation of information during the pandemic and with “working from home” being the norm during the pandemic, many employers have to adapt to online communication which made it harder for employers to protect their business/trade secrets. An employer cannot effectively monitor how employees transmit information electronically within the business or with external parties, more so if employees are allowed to use their own digital devices as a means of communicating with the employer or external parties.

As such, it is recommended that an employer should make sure that the confidential obligation clauses applicable to an employee are drafted with sufficient specificity to ensure that the employee is obliged to take precautions to safeguard the confidentiality of information which comes into his/her possession while working from home. Clauses that are ambiguous are unenforceable. Confidential obligation clauses with geographical limitations would also have to be reviewed as they may no longer be relevant given that one can now work remotely from anywhere in the world as long as there is internet connectivity.

Employers are also encouraged to invest in a more advanced security system and require employees to only use laptops and other electronic devices that are provided by the employer. This would see an increase in expenditure but ought to be viewed as a long-term necessary investment to protect the business secrets of the company.

Employers should also ensure that upon the termination of an employment contract, the employee is required to return all information relating to the customers and trade secrets to the employer and nothing is retained by the employee. All confidential information obtained by the employee in the course of his/her employment which is saved by the employee in whatever form should also be destroyed, deleted and/or returned to the employer, as the case may be.



In addition, employees owe a duty of fidelity to their employers regardless of whether they are working from home or otherwise. They should not take up any competing or part-time employment or place themselves in a conflict of interest during their employment save with the consent of their employers.

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