



Fair Labor Association and Bar Council Malaysia

Migrant Workers Rights Multi-Stakeholder Roundtable Discussion

August 5, 2009

SUMMARY

The Fair Labor Association (FLA) and the Malaysian Bar Council held a multi-stakeholder roundtable discussion in Kuala Lumpur, Malaysia, on August 5, 2009. The meeting was held to discuss issues surrounding migrant workers in Malaysia. The one-day consultation brought together 37 representatives from international brands, local garment suppliers, and representatives from local and international nongovernmental organizations (NGOs), including trade unions.

Participants discussed risk factors for migrant workers in Malaysia during distinct phases of the employment lifecycle -- recruitment, employment, and retrenchment. Break-out sessions allowed for the various groups of stakeholders to meet among themselves and to provide their collective input to the development of five specific recommendations prioritized around: (1) recruitment of migrant workers, including the use of agencies; (2) employment contracts with migrant workers; (3) health care for migrant workers; (4) retrenchment processes of migrant workers and cancellation of work permits; and (5) freedom of movement.

CONTENTS

Summary.....	1
Roundtable Approach.....	3
Legal Framework for Migrant Labor	4
Risk Factors.....	4
Recruitment Phase	
Employment Phase	
Retrenchment Phase	
Recommendations.....	7
Recommendation #1: The Recruitment Process – Use of External Recruitment Companies	
Recommendation #2: The Employment Phase – Contract of Employment	
Recommendation #3: Healthcare for Migrant Workers	
Recommendation #4: Arbitrary Cancellation of Work Permits and Retrenchment Processes	
Recommendation #5: Freedom of Movement for Migrant Workers	
Conclusion.....	11

Note on Rapporteurs

Dr. Chin Peng Kit is an academician with background and training in English Literature and Business Studies. Dr. Chin was most recently Deputy Vice Chancellor of a private university in Malaysia. He has now returned to his first love and passion of teaching; he is also a free-lance writer and editor for various publications.

Mr. Chiam Ter Ping and Mr. Sudharshan Vijaya are staff of Bar Council Malaysia and assisted as rapporteurs for the break-out parallel sessions for brands and NGOs/trade unions respectively.



Dato' M. Ramachelvam, Keynote Speaker for the Roundtable and Chairman of the Malaysian Bar Council Law Reform and Special Areas Committee



Mr. Aurret van Heerden, CEO and President of the Fair Labor Association

Roundtable Approach

The roundtable approach was designed to provide a "safe space" for discussion of potentially divisive issues, and to allow dialogue to go deeper and wider.

Often there are no neat or perfect solutions to the labor and human rights challenges faced by companies with long and complex supply chains. Though there is now greater transparency and information about the inner-workings of companies and brands, there are more revelations and realizations of some of the failures and weaknesses of government and government agencies to fulfill their responsibilities. Arising from this failure, civil society is picking up the dropped ball and stepping in to defend the workers who should normally be protected by law, but are not.

Corporate social responsibility is now a call taken up by many companies, and this progress is in many ways owed to the position taken up by civil society. Part of this corporate social responsibility is incorporating a code of conduct, which enables monitoring of the practices of brands and suppliers.

Together these different groups can find ways to overcome the obstacles, complications and difficulties of achieving sustainable compliance.

This roundtable is designed to help stakeholders reach some critical points of consensus and to arrive at an agreed-upon road map for developing solutions. The collective experiences of all participants can be used to drive a bottom-up approach, and arising from this a coalition could "work up the chain" to the higher levels of government.

Legal Framework for Migrant Labor

Fundamental labor rights, as embodied in the ILO Core Conventions, apply to all workers without exception, including migrant workers. All ILO member countries, including Malaysia, have committed to the implementation of the 1998 ILO Declaration on Fundamental Principles and Rights at Work in national laws and practices.

Migrant workers are the third largest group of people in the population in Malaysia and therefore, violations of migrant workers' rights are a critical issue that needs to be addressed. There are three major types of migrant workers in Malaysia: the higher-skilled (expatriate) migrant workers, documented lower-skilled migrant workers, and undocumented migrant workers.

According to the Malaysian Immigration Department, there are 751,500 migrant workers laboring in the manufacturing sector, making them a substantial percentage of the entire workforce in the sector. These workers primarily come from Indonesia (27%), Bangladesh (23%), Nepal (22%), Vietnam (13%) and Myanmar (11%).

Despite the importance of migrant workers to the Malaysian economy, a number of national and international reports have independently documented the prevalence of labor and human rights violations against migrant workers throughout the recruitment and migration process and their employment in Malaysia.

The number of cases involving labor and human rights violations against migrant workers in Malaysia points to systemic deficiencies in labor migration policies and labor protection systems.

Risk Factors

The following are risk factors identified by roundtable participants. Risk factors were discussed within the framework of the employment life-cycle. For migrant workers, participants agreed that the first phase began with recruitment, then employment, and finally retrenchment.

Recruitment Phase Risk Factors

- The use of recruitment agencies and outsourcing groups (different from employers that directly recruit workers) poses a higher risk to migrant workers' rights, particularly when employers abdicate all responsibility and do not monitor the activities of such groups.
- Recruitment agencies and/or outsourcing agencies often impose exorbitant and unreasonable fees on potential workers.
- The role of recruitment agencies in sending countries needs to be examined. Many of these agencies subcontract recruitment to unscrupulous companies that use false advertisement and charge additional recruitment fees to migrant workers.
- Recruitment agencies and/or outsourcing agencies are also in the habit of bringing in migrant workers to Malaysia without having pre-arranged any employment for them. Workers may be crammed into a group house or hostel while awaiting an employment opportunity; some workers have been "abandoned" at the airport.
- There is a blurring of roles between recruitment agencies and employers. Often the recruitment agency, rather than the actual employer, signs the employment contract with the

worker, for example, and therefore making it unclear who the employee can take to court in instances of breach of contract.

- There is no policy and procedure that allows migrant workers from one factory to transfer to another. For example, if one factory closes down there is no option for workers to transfer to another employer. Instead, once a migrant worker is retrenched, his or her work visa immediately expires and the worker is deported. This ensures that there is a revolving door of workers being recruited and deported instead of retrenched workers being absorbed by other factories actively seeking additional migrant workers.
- Too often migrant workers sign a contract in their home country for a job that is very different from the one that was advertised or described in the contract.

Several government policies were mentioned as creating risks for the recruitment of workers, and throughout the worker's lifecycle of employment.

- Ever-changing and conflicting policies by government ministries make the recruitment process difficult to manage and control.
- Information and details on Government-to-Government Memorandums-of-Understanding ("G2G MoUs") are not disseminated from one ministry to other relevant ministries.
- The G2G MoUs have different provisions, for example, different salary scales. This creates an immediate problem of multiple standards and policies governing migrant workers depending on their country of origin.
- High Commissions and Embassies often side with the employers and do not advocate or help to protect the rights of their citizens in Malaysia.

Employment Phase Risk Factors

- The communication and language barrier between migrant workers and the employer is a major challenge and cause of concern. Even with translators, there is often the question of the reliability of the translations
- Housing and transportation arrangements can be a risk factor. Arrangements often are not made at all, or the quality of the arrangement is unacceptable and sub-standard. Migrant workers are frequently not aware of their rights in this and other areas of their employment.
- The contract between employer and employee has to be examined to ensure that clauses are fair and equitable. There are many instances where this is not the case and the employees have no legal recourse and no advocates to defend them.
- There are few recorded instances of non-payment or late payment of wages to the migrant workers. In addition, hours of work can be varied and unfair to the workers. Workers rarely file complaints out of fear they would be jeopardizing their employment.
- Migrant workers who seek legal recourse for labor violations risk having their work permit cancelled by the employer. A cancelled work permit means the migrant worker will face immediate deportation.
- Employers deduct from migrant workers wage levies, housing and electricity charges.

- Employers are unhappy with the government ruling not to allow deductions from employees, as this restriction places a greater financial burden on the employers.
- With health care and the issue of occupational health, it was noted that many migrants end up in dangerous and dirty jobs, with few safety measures provided. Furthermore, migrant workers experience a double-standard when it comes to receiving health care from government-run hospital services; migrant workers are forced to pay more for treatment but are provided sub-standard care.
- Some migrant workers end up sending lower remittances of their salary to the source country than they thought they would because of factors like bank regulations, currency fluctuations, etc.
- Generally migrant workers raise grievances firstly to the employer, secondly to the recruitment agency, and thirdly to the missions. The process is not as simple in practice, especially when some employers are arbitrary and capricious in their treatment of workers.
- Many contracts limit or prohibit migrant workers' rights to freely associate and become members of trade unions. This is explicitly against Malaysian law, which allows migrant workers to belong to unions.
- Rights and protections of women migrant workers are not being respected. In Malaysia, for example, instances of female migrant workers becoming pregnant or marrying may lead to employers ending work permits and deportation of the workers.

Following are some government policy issues determined to have an impact on the employment risks for migrant workers.

- The issue of freedom of movement for migrant workers has become a complex one, particularly because certain legal identification documents are not accepted as sufficient. For example, certain local enforcement officers choose not to recognize the validity of photocopied documents or worker IDs.
- There is an obvious lack of transparent, consistent and corruption-free enforcement of rulings/laws by the government authorities. Different levels of government will give different answers and interpretations of rulings, thus creating confusion among employers and workers.

Retrenchment Risk Factors

- Transferring of migrant workers from one employer to another is currently not legally permitted. Instead, when a migrant worker is retrenched, he or she is deported.
- Usually when a company downsizes or closes down, the last-in-first-out rule is used. However, when it comes to migrant workers in Malaysia, some employers have taken the practice of a last-in-last-out rule to help newly hired migrant workers to at least save enough earnings to pay down debts.

Recommendations

The following recommendations were made following initial discussion around Risk Factors. The recommendations grouped in two categories: "For Immediate Action" (can be implemented without changes to legal structure) and "For Further Discussion" (requires further discussion and/or action at government level).

Recommendation #1: The Recruitment Process – Use of External Recruitment Companies

"Employers should be directly involved in the recruitment process without having to use recruitment agencies or outsourcing companies, thus leading to more ethical recruitment practices."

FOR IMMEDIATE ACTION

- **Employers should become directly involved in the recruitment process even where MOUs stipulate the use of recruitment agencies.**

Despite there being G2G MOUs whereby some countries stipulate that employers are required to use recruitment agencies only and not recruit directly, the roundtable consensus was that it is preferable for employers to be directly involved in recruitment.

By "direct involvement", it was agreed that the underlying principle of the recommendation is that the employer should be more "hands-on" and knowledgeable about the recruitment process and policies; it does not exempt employers from continuing to use external recruitment agencies, per se, provided the employer performs due diligence on their practices.

Greater engagement by the employer may ensure that potential migrant workers have a clear understanding of the terms of employment and decreases the chances of being misled. This may reduce agency fees for the potential employee, as well as reduce any risks to the employer.

The concern over any initial upfront increase in costs for direct involvement in recruitment could be off-set by the higher costs of risks associated with recruiting through an external agency.

- **Develop list of reliable, trustworthy and accredited recruitment agencies.**

Participants agreed that having a list of reliable, trustworthy and accredited recruitment agencies would be greatly beneficial. There is presently no monitoring system in place to evaluate recruitment agencies. However, information could be gathered through consultation with civil society organizations in the source country. In addition, research could be commissioned to highlight the dynamics of recruitment practices in particular source countries.

Employers who have received workers from a particular source country could also collect feedback and comments on the recruitment agencies that were used so that there can be an ongoing tracking and recording of good-standing recruitment agencies.

Another proposal was to cull from factories a list of good agents and to forward the list to the MEF (Malaysian Employers Association), MFM (Manufacturers' Association of Malaysia) or MATEX. If a factory does not source its labor from the "good agents list", monitors would query the employer as to the due diligence steps it took.

FOR FURTHER DISCUSSION

Stakeholders should promote revisions to government policies.

Present government policy requires companies which need fewer than 50 migrant workers to go through a recruitment agency. A coalition of participants can push to have this restriction lifted.

Linked with the above is the recommendation to push for a proposal to allow migrant workers to move from one company to another upon being retrenched by the original employer. There must be a proposal for the government to reverse its "no-transfer" ruling.

This proposal can be restricted to retrenched workers, to prevent "poaching" of workers by another company or for workers from seeking the "highest bidder" employer. These abuses can be overcome where original and receiving employers give their agreement to the transfer.

The reality of the present situation can be changed with companies all agreeing to minimize working through recruitment agencies.

Recommendation #2: The Employment Phase – Contract of Employment

FOR IMMEDIATE ACTION

- **No double-signing of employment contracts should be allowed.**

Currently migrant workers sign one agreement in their home country and another contract when they arrive in Malaysia. There should only be a single contract signed and endorsed by the Embassy.

There should also be a clear explanation of the contract's contents (and translation into the relevant language) for the migrant worker so that he or she understands the terms and conditions of employment.

There was also a suggestion of a standardized Contract of Employment to be used for all migrant workers, with some items to be modified based on circumstances. For example, certain G2G MoUs have very specific stipulations which may need to be taken into account.

A suggestion was made by a buyer that salary scales for all migrant workers in a factory be harmonized so that all migrant workers, regardless of their country of origin are paid using the same salary structure. Currently, factories may have x number of salary structures for migrant workers from y number of countries. This would decrease administration burden and increase equality among migrant workers.

- **Clauses prohibiting membership in unions should be eliminated from contracts.**

Many contracts carry clauses that prohibit membership in unions. It was recommended that the clause be voided and not be included in the contracts used for the migrant workforce.

- **All contracts should be signed by the actual employer.**

The practice has been for the recruitment agency to sign the contract with the migrant worker, which created challenges for migrant workers seeking legal recourse for unfair practices on the

part of the employer. This practice should stop. The employer should have a direct employment contract with the migrant worker.

- **Define policies and procedures for breach of contract or misconduct by workers.**

There was a recommendation to include in employment contracts a clause that states that if a worker is non-compliant, guilty of misconduct, or in breach of contract, the employer would follow the accepted process of internal investigation/domestic inquiry.

FOR FURTHER DISCUSSION

- Employers should lobby government to allow for the levy paid by companies for migrant workers to be refunded to the employer. The levy collected could be kept for the worker and used only where justified.
- Stakeholders should request legal opinion from Malaysian Bar Council on clauses that prohibit migrant workers from marrying when working in Malaysia and that allow for the termination of women who become pregnant while employed.

Recommendation #3: Health Care for Migrant Workers

FOR IMMEDIATE ACTION

Malaysian labor law stipulates that employers should provide all migrant workers with some form of medical and insurance coverage. Employers should obey national laws mandating health care for migrant workers.

FOR FURTHER DISCUSSION

Stakeholders should lobby the Malaysian government to consider doing away with the two-tier system for government hospital charges/fees.

Presently, there are two systems of health care applying two different fees/rates: one for Malaysian citizens (thus including local workers) and one for non-Malaysians (and migrant workers) in Malaysian government hospitals.

Recommendation #4: Arbitrary Cancellation of Work Permits and Retrenchment Processes

FOR IMMEDIATE ACTION

There must be a guarantee of due process before cancellations of work permits are allowed.

For example, the Immigration Department should have a chance to interview the migrant worker to determine the reason for cancellation of the work permit and not just take the word of the employer.

Employers should adopt best practice when terminating workers. This should be clearly stipulated in a contract by all employer companies.

Companies that have a more established procedure for dismissals could share their expertise and experience with the FLA and the BCM, and these can then be disseminated and shared with other FLA affiliate companies.

FOR FURTHER DISCUSSION

Air-fare of terminated / retrenched migrant workers should be included in the severance package.

There has been controversy concerning who should pay airfare for terminated / retrenched migrant workers. The FLA explained that it is in the midst of discussions with companies to include a fund to cover such air-fare expenses. The fund would be a pro-rated severance that employers calculate before hiring a worker. The fund would not be used for anything else except for severance situations. There remains the question of who would pay for this additional amount.

Recommendations #5: Freedom of Movement for Migrant Workers
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FOR IMMEDIATE ACTION

- **Freedom of movement should be accorded to migrant workers, despite the possibility they might leave their current employer.**

All contracts should stipulate clearly that the employer will allow, in keeping with best practices, migrant workers to have full access to their passports (within 24 hours) and ensure that there are no summary terminations/dismissals if workers raise complaints.

Under Malaysian law, the workers are supposed to hold their passports but the employers may hold their passport in certain situations, for example, to safeguard passports so they won't be stolen.

The main concern, however, is of factories canceling workers' visas because they do not like the particular workers. The solution is to ensure that if there is an employment dispute, the contract of employment cannot be summarily terminated.

The issue of freedom of movement for migrant workers has become a complex one, particularly because certain legal identification documents are not accepted as sufficient. For example, certain local enforcement officers choose not to recognize the validity of photocopied documents or worker IDs.

A general consensus was that workers have to be educated about their rights if they are stopped by police on the street or outside of the factory. They should be properly briefed about their rights and they should be given a list of useful phrases in Malay and their own language to help them converse with the police.

The issuance of the iCard should minimize the instances of wrongful detention of documented workers. Employer could also have the option of taking up a civil suit against the authorities when wrongful detentions take place.

FOR FURTHER DISCUSSION

- The Ministries of Foreign Affairs, Home Affairs, Human Resource and International Trade need to be transparent and communicate clearly and uniformly all developments and changes in policy.

- Research is needed around the wrongful detention of migrant workers, corruption among enforcement officers, and clarity as to what constitutes acceptable copies of documentation to be carried by migrant workers.

Conclusion

Participants at this roundtable agreed that recommendations on the issue around Migrant Workers Rights should look towards a higher standard. This should be the benchmark that all other companies / buyers and organizations should emulate.

The Roundtable ended with all participants in agreement that there would be immediate action taken for the recommendations which representative bodies could implement and that follow-up discussions would be held to address recommendations that require further deliberation.