

## Detention of Foreign Employees

### Foreign Employees Working for Multiple Employers

The increase in immigration raids in recent months has highlighted a common occurrence in multiple industries facing a labour shortage. Foreign employees are often found to be working at a premise, entity or location different from that specified in the work permit or alternatively may be holding a different position from that specified in the work permit.

On both fronts this would be a breach of the terms under which the work permit has been issued thereby running the risk of the work permit being cancelled<sup>1</sup>. A breach of the terms of any work permit issued runs the risks of repercussions on, not only the entity sponsoring the work permit named in the work permit but also the foreign employee and entity where the employee is found located.

### Risks Against Employees & Their Rights

Regulation 39(b) Immigration Regulations 1963 provides that any person who without reasonable cause contravenes or fails to comply with any condition imposed in respect of, or instruction endorsed on, any Pass, Permit or Boundary Pass shall be an offence which carries a term of imprisonment not exceeding six months or to a fine not exceeding RM1,000 or both upon conviction. To the employee, he runs the risk of arrest and detention at the immigration depot for further investigation.

Unlike a Malaysian citizen who has been arrested and is entitled to the right to be brought before a Magistrate within 24 hours, the second proviso to Article 5 provides that a non-citizen who is arrested or detained under immigration laws can be brought before a Magistrate within 14 days before a further detention can be made. The same requirement is incorporated in section 51(5)(b) of the **Immigration Act 1959/63** ("Act"). The existing work permit can also be cancelled arising from a breach of Regulation 39(b)<sup>2</sup>. A deportation order may

# Immigration Law Update

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also be issued simultaneously with the cancellation of the work permit.

It is worth noting that Regulation 39(b) is a compoundable offence pursuant to the First Schedule of the Immigration (Compounding of Offences) Regulations 2003 subject to the consent of the Public Prosecutor<sup>3</sup>. The limit of the maximum compound is 30% of the maximum fine as prescribed under the Regulations<sup>4</sup>.

In the event the offence is compounded under the provision, no prosecution may be instituted in respect of the offence against the employee provided the requisite monetary amount is paid within the prescribed period<sup>5</sup>. However, the employee may remain detained under section 4 of the Act pending arrangements for his removal from Malaysia<sup>6</sup>.

The failure to pay the compound within the specified time may result in prosecution thereafter<sup>7</sup>. In the event the offence is prosecuted, the individual may face a term of imprisonment not exceeding six months or a fine not exceeding RM1,000 or both upon conviction.

Employees are strongly encouraged to contact the Embassy or Consulate General or High Commission in Malaysia for any assistance which may be required in the event there is any issue in respect of their stay in Malaysia.

## Risks Against Employers & Their Rights

### *Do you have the right to refuse entry or refuse the request for provision of documents?*

It should be noted that any senior immigration officer, senior police officer, any other police officer generally or specially authorised in that behalf by the Director General and any officer of the Customs Department acting under the instructions of a senior immigration officer may without a warrant and with or without assistance enter and search any premises, or stop and search any vehicle or person, if he has reason to

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<sup>1</sup> Section 55B (2) of the Act.

<sup>2</sup> Regulation 19(1)(a) Immigration Regulations 1963.

<sup>3</sup> Section 58A of the Act.

<sup>4</sup> First Schedule of Immigration (Compounding of Offences) Regulations 2003.

<sup>5</sup> Section 58A (3) of the Act.

<sup>6</sup> **Shudangshu Chandra v Ketua Pengarah Imigresen Malaysia** [2022] 3 MLJ 277.

<sup>7</sup> Section 58A (2) of the Act.

believe that any evidence of the commission of an offence against the Act is likely to be found on such premises or person or vehicle and may seize any evidence so found<sup>8</sup>.

During the raid, inquiries will be made by the immigration officer if he considers it necessary to do to ascertain whether the presence of any person in Malaysia is lawful. In connection with the raid, the documents or other evidence as the immigration officer may consider necessary is required to be produced. In short you cannot refuse entry nor refuse the request for provision of documents particularly if it relates to the subject matter of those found at the premises without the requisite permits<sup>9</sup>.

### *Prosecution or Fines?*

The Public Prosecutor is vested with wide and unfettered discretion to institute a charge against the employer under section 55B of the Act for employing a person who is not in possession of a valid Pass. This is a criminal offence which carries a fine of not less than RM10,000 but not more than RM50,000 or to imprisonment for a term not exceeding twelve months or to both for each employee upon conviction.

### *Defences*

There are however valid defences to the offences stated above<sup>10</sup>.

One such ground being where the offence was committed without the employer's knowledge or connivance; or where all reasonable precaution has been exercised; or due diligence has been demonstrated to prevent the commission of the offence.

Section 55E of the Act further provides that the presumption shall be established that the occupier of the premises where the illegal immigrant is found had permitted the illegal immigrant to enter or remain at the premises and had knowledge that he is an illegal immigrant.

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<sup>8</sup> Section 51 of the Act.

<sup>9</sup> Section 39 of the Act read together with section 57 of the Act. A failure to answer any question that may be lawfully put by an immigration officer and failure to produce documents or other evidence without reasonable excuse is an offence which on conviction would carry a fine not exceeding RM10,000 or to imprisonment for a term not exceeding five years or to both.

<sup>10</sup> Section 55C of the Act.

The presumption may be rebutted if the occupier proves that he has taken all reasonable measure to prevent the illegal immigrant from entering or remaining at the premises. On conviction, the occupier of the premises may be liable to a fine of not less than RM5,000 and not more than RM30,000 or to imprisonment for a term not exceeding 12 months or both.

In conclusion, employers and employees are required to abide by the prevailing laws in Malaysia to avoid any legal ramifications that could potentially ensue.

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