



Tan Hooi Ping
Partner

**Employment &
Industrial Relations**
E: hpt@lh-ag.com

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Why Is A Valid Pass Pertinent To Employers & Occupiers?

In Malaysia, generally an employer is responsible for the application of a valid pass for his foreign employee. It may be an Employment or Professional Visit Pass for an expat employee or a Visit Pass (Temporary Employment) for a blue-collar foreign worker. However, there are exceptions where a foreign employee is allowed to be employed under a permit or pass obtained on his own or through his spouse.

Possible Offences If No Valid Pass

Section 55B of the Immigration Act 1959/63 [Act 155] (“Act”) provides that it is an offence to employ a foreigner who has no valid pass. An employer in Malaysia who employs foreigners who do not possess a valid pass, or who are in breach of the conditions of a valid pass, may also be at risk of committing:

- a) an offence of allowing an illegal immigrant to enter or remain at its premises (Section 55E of the Act); and/or
- b) an offence of harbouring a foreigner whom the person knows, or has reasonable grounds for believing, has contravened the Act (Section 56(1)(d) of the Act).

Where foreign employees without a valid pass, or who are in breach of the conditions of a valid pass, perform work outside the employer's premises, the offences under Sections 55E and 56(1)(d) of the Act would also pose a concern for occupiers (i.e., persons having charge, management or control) of the premises where they are performing work.

For example, Company A who engages suppliers or service providers who then send their foreign employees to perform work at Company A's premises may be exposed to the risk of committing the said offences, notwithstanding, the fact that Company A is not their employer.

Sentencing & Punishment

In the event of an immigration raid, the employer and/or occupier of the premises where foreign employees without, or in breach of, a valid pass are found would be subject to investigation and possible prosecution for any one or more of the above offences. On conviction, each offence entails sentences of fines and/or imprisonment (Sections 55B(1), 55B(3), 55E(2), and 56(1)(bb) of the Act).

Where the employer or occupier is a body corporate found to have committed an offence under Section 55B or 55E, its director, manager, secretary or any other person holding an office or position similar to the manager or secretary at the time of commission of the offence shall also be guilty of the same offence. On conviction, such a person will be liable

Head Office

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office

Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office

51-12-E, Menara BHL Bank,
Jalan Sultan Ahmad Shah,
10050
Penang
Tel: +604 299 9668
Fax: +604 299 9628

Email

enquiry@lh-ag.com

Website

www.lh-ag.com

to the same punishment (Sections 55B(5) and 55E(6) of the Act).

Any person who attempts, prepares, abets or conspires to commit any of the above offences also shall be guilty of the same offence and be liable to the same punishment provided for such offence (Section 56(1A) of the Act).

Other Possible Concerns

An investigation, prosecution or conviction for any of the above offences could directly or indirectly affect business operations, as well as its reputation. Furthermore, this may raise concerns among ESG-conscious investors, customers, and vendors as to whether there are elements of forced labour or human trafficking in the business operations which may then lead to other adverse repercussions.

Conclusion

Considering the above concerns, employers, including those who engage recruiting agencies in the recruitment of employees, should be vigilant in ensuring that each foreign employee has a valid pass at all times and is not in breach of the conditions of the pass. Employers and occupiers respectively should also take all reasonable measures, including prescribed measures, if any, to prevent any illegal immigrant from entering or remaining at their premises. They should not harbour any persons known or suspected to be in breach of the Act.

If you have any further queries, please contact the author, **Tan Hooi Ping** (hpt@lh-ag.com), a Partner in the firm's Employment & Industrial Relations Practice.