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Philippines

Revised Rules on Labor and OSH Standards Compliance Inspections

2023年4月フィリピン労働雇用省は、労働基準の管理及び執行に関する規則を改正し、労働環境の質や安全性を確保する目的で新たな立入り検査の枠組みを導入し、当局による立入り権限と執行権限を強化した。この種の検査は抜き打ちで実施される場合が多いことから、雇用主としては常に法定の要件を満たす労働環境を維持することが求められる。本稿ではこの改正規則について概説する。

Background

On 12 April 2023, the Philippine Department of Labor and Employment (“DOLE”) issued Department Order No. 238, Series of 2023 on the “Rules on the Administration and Enforcement of Labor Standards Pursuant to Article 128 of the Labor Code of the Philippines, as renumbered, and Republic Act No. 11058” (the “**Revised Rules**”).

Labor compliance inspections (with the exception of complaint inspections, occupational safety and health (“OSH”) standards investigations, technical safety inspections, and other inspections directed by the Secretary of Labor and Employment) were initially suspended from the period of 1 December 2022 to 1 February 2023 to allow the DOLE to focus on pending labor standards cases and prepare for its inspection program for 2023.

The Revised Rules were issued shortly after the resumption of labor compliance inspections was announced and strengthen the visitorial and enforcement powers of the Secretary of Labor and Employment under the Labor Code by introducing a new inspection framework to enhance the quality of labor compliance inspections and promote adherence to general labor standards and other social legislation, including Republic Act No. 11058 on OSH standards.

Highlights of the Revised Rules**1. Approaches and priority establishments**

Based on the Revised Rules, the administration and enforcement of labor standards may be through a (i) technical and advisory visit (conducted on micro-establishments employing less than 10 workers), (ii) labor inspection, or (iii) OSH investigation.

In relation to the above, the following have been identified as priority establishments for labor compliance inspections and enforcement of labor standards:

- a) Establishments engaged in hazardous work;
- b) Establishments employing children and/or women;

- c) Construction projects;
- d) Philippine-registered ships or vessels engaged in domestic shipping;
- e) Fishing vessels;
- f) Establishments engaged in contracting or subcontracting arrangement;
- g) Establishments subject of a Single-Entry Approach referral (i.e., an administrative approach to provide speedy, inexpensive and accessible settlement procedure of labor issues or conflicts), anonymous complaint, or request for inspection; and
- h) Other establishments as may be determined by the Secretary of Labor and Employment.

It should be noted that since contracting or subcontracting arrangements are common in manufacturing industries, entities engaged in manufacturing are also among the establishments that would typically be subject of labor compliance inspections.

2. Scope of inspection; Access to Employment Records

All employers are required to keep and maintain employment records (e.g., employment contracts, daily time records, payroll, proof of payment of statutory benefits, etc.) in the workplace premises for at least 3 years.

During an inspection, an employer is obliged to present to the labor inspector its employment records, workplace policies, and such other compliances required under OSH standards. A labor inspector may interview employees and inspect the work premises, and in practice, a labor inspector would also interview the contractor's or subcontractor's employees who are on the work premises to validate that they are deployed under a legitimate job contracting relationship.

An employer's refusal to grant the labor inspector access to its records, work premises or employees during the conduct of an inspection may result in the filing of a criminal action against the employer or its responsible officers.

3. Correction Period

Where the inspection approach is a technical or advisory visit, the labor inspector shall require micro-establishments with compliance gaps to accomplish an action plan indicating the interventions and technical assistance needed. Micro-establishments shall correct the noted non-compliances within 3 months from the receipt of the action plan. Otherwise, remaining deficiencies will be subject of a notice of visit results ("**NOVR**").

On the other hand, for non-compliances discovered during the conduct of a labor inspection, the employer is required to correct violations of labor standards within 20 days from receipt of the notice of inspection results, and for non-compliances discovered during an OSH investigation, the labor inspector shall assist the employer in preparing an action plan and the employer should submit its proof of compliance with the action plan within 20 days from the investigation.

Notwithstanding the above time periods, in the event of imminent danger or dangerous occurrence (e.g., fire causing structural damage) or violations of OSH standards in the plain view or presence of the labor inspector, the labor inspector shall direct the employer to immediately implement corrective or temporary actions to abate or prevent the danger.

4. Other enforcement measures

Work Stoppage Order

The labor inspector may recommend the immediate issuance of a work stoppage order or the suspension of operation of any unit or department of an establishment when continued non-compliance poses a grave and imminent danger to the health and safety of employees, or the imminent danger cannot be abated during the investigation.

The DOLE Regional Director having jurisdiction over the workplace shall conduct a hearing within 24 hours from the issuance of the work stoppage order to determine the cause and remedial measures taken. A work stoppage order will be lifted only if the employer can establish that the imminent danger is abated.

An employer shall be directed to pay the wages of the affected employees during the period of work stoppage if the DOLE finds that the imminent danger is due to the violation or fault of the employer.

Mandatory Conference and Compliance Orders

Uncorrected violations will be the subject of a mandatory conference before the DOLE. A notice of mandatory conference will be issued within 5 days from (i) the NOVR where the approach is technical or advisory visit, or (ii) the lapse of the correction period where the approach is a labor inspection or OSH investigation.

After the termination of the mandatory conference, the DOLE Regional Director may issue compliance orders containing, among others, a statement of the facts, issues, evidence to support the findings of violations, and the corresponding liabilities or penalties imposed, if any.

Final compliance orders or resolutions may be subject of a writ of execution enforced by the DOLE and will not be stayed unless the appellate court, reviewing the compliance order under a petition for certiorari, issues a restraining order or injunction enjoining the execution.

Conclusion

The Revised Rules reinforce the mechanisms that may be availed of by the DOLE for the administration and enforcement of labor and OSH standards in the workplace. Entities or subsidiaries with operations in the Philippines should continue to be mindful and monitor their compliance with Philippine labor laws and regulations in general, especially if they are considered priority establishments under the Revised Rules, since such labor compliance inspections are usually surprise visits.

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Malaysia

Malaysian Government plans to end 5G Monopoly

マレーシアでは現在 5G の通信インフラの整備が進められているところ、政府の特別目的会社である Digital Nasional Berhad が単独で 5G の通信インフラをマレーシア全土に敷設する「シングル・ホールセール・ネットワーク」から、今般、複数の通信事業者がそれぞれ 5G の通信インフラを敷設する「デュアル・ホールセール・ネットワーク」を構築する方向に制度変更がなされた。独占化を防ぎ健全な競争を促す観点から望ましい制度変更であり、また一定の外資規制はあるものの、外国投資家に対しても通信事業への参入機会が広がったと評価できる。

Background

On 31st May 2021, the then Minister of Communications and Multimedia Malaysia issued a direction to appoint Digital Nasional Berhad (“**DNB**”) (which is a state-owned agency) to undertake the deployment of 5G infrastructure and network in Malaysia, and to provide wholesale 5G services. The 5G rollout was intended to be implemented as a Single Wholesale Network (“**SWN**”) which aims to provide nationwide 5G coverage, via one common network, to which licensees under the Malaysian Communications and Multimedia Commission (“**MCMC**” which is the regulator for the communications and multimedia industry in Malaysia) can seek equal access on a wholesale basis.

DNB has been tasked to build, own and operate the common network and for this purpose, it was also granted a Network Facilities Provider (Individual) Licence and a Network Service Provider (Individual) Licence by the MCMC.

“Network Facilities Providers” and “Network Service Providers” are defined in the Licensing Guidebook issued by the MCMC as follows:

- (a) Network Facilities Providers are *“the owners / providers of network facilities, namely infrastructure such as, cables, towers, satellite earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radiocommunications transmission equipment, mobile communications base stations and broadcasting transmission towers and equipment. These represent the fundamental building blocks of the convergence model upon which network, applications and content services are provided”*.
- (b) Network Service Providers *“provide the basic connectivity and bandwidth to support a variety of applications. Network services enable connectivity or transport between different networks. A network service provider usually owns or deploys the said network facilities. However, a licensee providing connectivity services may use the network facilities owned by another licensee”*.

In relation to the above, DNB has obtained an “individual licence” for the 2 licences above as the licensed activity requires a high degree of regulatory control which is for a specified person to conduct a specified activity and may include special licence conditions.¹

Transition from Single to Dual Wholesale Network

However, on 3rd May 2023, the Malaysian Communications and Digital Minister (“**Minister**”) announced that Malaysia will transition from the SWN model to a Dual Wholesale Network (“**DWN**”) model for deploying the 5G infrastructure in the country.

Following the announcement on the DWN model, 3 out of 4 telecommunication companies (which had proposed to subscribe up to 65% shares in DNB) terminated their respective share subscription agreements with DNB.²

Key Features of DWN Model

According to the Minister, some key highlights of the DWN model are as follows:

¹ Paragraph 1.3 of the MCMC Licensing Guidebook (updated as of 1st April 2023).

² Announcement made by CelcomDigi Berhad on Bursa Malaysia dated 3rd May 2023 and announcement made by Telekom Malaysia Berhad on Bursa Malaysia dated 10th May 2023

- (a) There are 2 phases under the 5G rollout. Under Phase 1, DNB will achieve the targeted 80% 5G network coverage in populated areas by end of 2023 (of which approximately 60% has already been achieved).
- (b) Under Phase 2, a separate entity (which will be selected via an open tender process) ("**DWN Entity**") will develop the 5G spectrum network when the coverage has attained 80%.
- (c) The DWN model takes into account the sustainability of the telecommunications industry ecosystem in Malaysia and therefore, ends elements of monopoly associated with DNB.
- (d) Reasonable pricing is an important element to be considered and the wholesale price prepared by DNB (e.g. wholesale price per gigabyte) will be a basis for the DWN Entity under Phase 2.

More key details regarding the implementation of the DWN model may be shared by the Malaysian authorities at a later stage.

Foreign Investment in 5G DWN Model in Malaysia

Subject to the release of the requirements for the implementation of the DWN model, foreign investors may consider applying for the DWN Entity role and it is likely that the DWN Entity may also be required to obtain a Network Facilities Provider (Individual) Licence and a Network Service Provider (Individual) Licence (please see the 2nd paragraph above regarding licences obtained by DNB).

There are some standard conditions which are imposed on the licensee for the 2 licences under the Malaysian Communications and Multimedia Act 1998. These standard conditions include amongst others, the licensee must be a company incorporated in Malaysia; and the shareholding of the company must comply with relevant Malaysian foreign investment restrictions.

Based on the official portal of the Malaysian Ministry of Investment, Trade and Industry, the Network Facilities Provider and Network Service Provider licensee is generally subject to a maximum foreign equity of 70%. Further, the MCMC Licensing Guidebook requires the licensee to have at least 30% Bumiputera shareholding.³ Notwithstanding the above, interested applicants for the licences should check with MCMC on the prevailing equity restrictions (e.g. Foreign and/or Bumiputera equity).

Further, on 9th May 2023, it was reported that the Malaysian Government may consider disposing of its stake in DNB after the achievement of 80% 5G coverage by end of 2023. As a result of the foregoing, in addition to open tender process to appoint the DWN Entity to implement Phase 2 of DWN model, other telecommunication providers may consider taking up a role in Malaysia's 5G market through share ownership in DNB.

Conclusion

The Malaysian Government's decision to implement a DWN model for the deployment and development of the 5G infrastructure in Malaysia is welcomed as it may attract foreign investment into the 5G network landscape in Malaysia and it also dissuades concerns of a nationalized monopoly over the country's 5G rollout.

As at the date of this newsletter, there have not been any publicly available rules and guidelines issued by the Malaysian Government on the open tender process and detailed selection criteria in respect of the Phase 2 of the DWN model, but the introduction of the DWN model appears to signal that Malaysia welcomes telecommunication companies with 5G network expertise to develop the 5G infrastructure in Malaysia. Nonetheless, foreign investors should be mindful of the prevailing foreign and/or Bumiputera equity restrictions under the relevant Network Facilities Provider and Network Services Provider licences and other special conditions that may be imposed on such licences by MCMC.

³ Paragraph 3.1(c)(iii) of the MCMC Licensing Guidebook (updated as of 1st April 2023). The term "Bumiputera" is not specifically defined in the Federal Constitution of Malaysia, but the Court in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 mentioned that although "Bumiputera" literally means autochthons, it is generally used as a composite term to denote Malays and indigenes of the soil.

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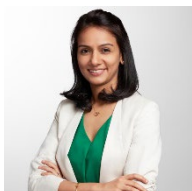
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