



ADVANCING COVID-19 RECOVERY IN MALAYSIA: STRENGTHENING ACCESS TO REMEDY AND ETHICAL RECRUITMENT

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How can the UN Guiding Principles on Business and Human Rights help accelerate the post-COVID-19 recovery in Malaysia? What steps are necessary to ensure that forced labour in Malaysia is a thing of the past?

MALAYSIA'S FORCED LABOUR PROFILE AND THE COVID-19 PANDEMIC

In Southeast Asia, allegations of business-related human rights abuses increased significantly during the COVID-19 pandemic. Observers reported a spike in forced labour abuses in Malaysia as production was ramped up to meet the surge in demand for rubber gloves and other personal protective equipment (PPE) essential to COVID-19 medical care and testing.¹ In July 2020, the allegations were deemed credible enough to justify trade action by the United States against specific Malaysian rubber glove manufacturers.²

In response to these developments, two glove manufacturers announced large-scale reimbursements to migrant workers who had paid excessive third-party recruitment fees.³ One firm detailed total reimbursements amounting to RM 136 million (over US\$33 million), to be paid in monthly installments until July 2021.⁴ The firm also reiterated its commitment to a "Zero Cost Recruitment Policy", to not withhold wages, to not demand excessive overtime and to provide stronger health and safety measures.

Despite these laudable efforts, poor working and housing conditions persisted, and later led to the outbreak of COVID-19 infections among migrant workers in some of the same manufacturing facilities. By November 2020, 28 rubber glove manufacturing facilities were forced to shut down.⁵

Malaysia's post-COVID-19 recovery period can be advanced through the stronger uptake of the UN Guiding Principles on Business and Human Rights, including a focus on greater access to remedy, meaningful remediation practices and a renewed commitment to ethical recruitment policies and practices.

Forced labour concerns in Southeast Asia are not new, nor are they unique to Malaysia. However, Malaysia is one of the largest migrant-receiving countries in ASEAN with estimates

varying between two to four million migrant workers in the country as of 2018. According to a 2019 report, high recruitment fees resulting in debt bondage is one of the most common features of forced labour in Malaysia.⁶

A multitude of factors are believed to contribute to forced labour risks in Malaysia, including opaque recruitment practices. Migrant workers report that recruitment agents use misleading and inaccurate information about work opportunities. Isolated locations of employment and a lack of effective grievance mechanisms also raise risks, as does the lack of enforcement and low number of prosecutions of forced labour offenses.

As recent events in Malaysia demonstrate, both States and companies ignore forced labour risks at their peril. Requiring greater transparency in labour practices would do much to eliminate recruitment fees, excessive overtime, and abusive working and living conditions. Increasing resources to provide greater access to tribunals, courts and other state-based judicial mechanisms, while requiring businesses to improve operational grievance mechanisms, would help spotlight sector-wide risks.

As Malaysia embarks on the drafting of a National Action Plan on Business and Human Rights, there is great opportunity for policymakers to consider the circumstances that lead to forced labour and outline preventative actions that might be undertaken by both government authorities and business leaders.

Among other frameworks, progress can be made through the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). Currently, Malaysia is in the process of developing a National Action Plan (NAP) on Business and Human Rights, based on the UNGPs. The country's National Action Plan provides an opportunity for policymakers to take a multi-stakeholder and whole-of-government approach towards forced labour risks and outline preventative actions that might be undertaken by both government authorities and business leaders. As such, the NAP may advance Malaysia's post-COVID-19 recovery by mitigating the steep reputational and operational costs that forced labour risks present to Malaysian industry, while mitigating any risks to public health, safety and human rights.

THE UN GUIDING PRINCIPLES AND ITS APPLICATIONS

The UNGPs are widely considered the world's most authoritative, normative framework guiding responsible business conduct. Divided into three pillars, the UNGPs delineate separate but complementary roles and responsibilities for States and enterprises.

Under Pillar 1, States have the duty to protect human rights in business operations, taking appropriate steps to prevent, investigate, punish and redress abuses through effective policies, legislation, regulations and adjudication. This may entail, for example, that the Malaysian government investigate the rate of enforcement of labour codes, including housing and working conditions for migrant workers. It may mean that securities regulators mandate non-financial disclosures of listed companies more forcefully. Or it might involve policies that restrict export credits only to those companies who have a positive human rights performance record.

Under Principle 11 of Pillar 2, business should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. As provided by Principles 16 to 24, businesses are encouraged to publicly commit to a human rights policy, conduct human rights due diligence to prevent and address human rights risks in their operations, and provide a remedy when operations have had an adverse impact. Leading Malaysian companies could bolster confidence in rubber glove supply chains by contracting with reputable third parties to conduct human rights impact assessments. A number of large Malaysian companies currently have human rights policies and publish the findings of their human rights due diligence processes. These companies could help formulate industry-wide best practices, peer learning efforts and support capacity-building initiatives.

Box article: Remediation efforts by business enterprises on human rights abuses

Under Principle 29, the UNGPs provide that business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by business operations. Several remediation mechanisms have been employed in Malaysia to address specific human rights abuses.

+ Reimbursement programmes on recruitment fees paid by migrant workers

- Since 2020, four rubber glove companies in Malaysia have facilitated large-scale reimbursement programmes based on guidance from ILO on recruitment fees. In June 2020, Hartalega repaid recruitment fees totalling RM41 million (USD9.7 million)⁷ setting a precedence for the industry. Shortly afterwards, Kossan Rubber Industries completed their remediation repayment programme amounting to RM54 million (USD12.8 million).⁸ In July 2020, WRP Asia Pacific began its remediation programme in response to conditions set by the United States' Customs and Border Protection (CBP) agency. WRP's programme targeted 1,600 of its migrant workers for a total of RM21.4 million (USD5 million).⁹ The largest reimbursement to date, initiated by Top Glove Corporation, was based on a recommendation of an independent consultant that conducted an assessment between August and October 2020. Top Glove was required to reimburse workers a total of RM136 million (USD32 million).¹⁰ To further support these efforts, Top Glove also blacklisted two recruitment agencies that violated the company's Zero Cost Recruitment Policy.

+ Appointment of an independent auditor to assess business operations

- In 2021, Sime Darby Plantation (SDP) embarked on a remote independent evaluation with UK-based Impactt to review SDP's labour practices.¹¹ Based on an earlier statement released by SDP, the programme aims to create a new standard for the ethical recruitment of migrant workers, while identifying existing gaps in their business operations. According to SDP, the programme also enables the company to review whether forced labour indicators are detected, and to what degree.¹² However, due to movement and travel restrictions, the labour assessment is facing challenges and delays. Top Glove employed a similar approach the previous year, appointing Impactt to assess its operations against 11 indicators of forced labour. The third party consultant proposed corrective action plans and agreed to monitor the company's implementation efforts.¹³ More recently, FGV Holdings also sought proposals for an independent auditor to assess their operations.¹⁴ The assessment includes FGV's proposed remediation plan that stresses compliance to human rights and labour standards by improving the recruitment process, conducting capacity building programmes, strengthening grievance mechanisms and enhancing labour monitoring systems.¹⁵

Under Pillar 3, States and businesses must provide for access to remedy for those negatively impacted by business operations. States must ensure appropriate steps are being taken through judicial, administrative, legislative or other means to provide access to effective remedy to victims of business-related harm. Further, Pillar 3 provides that non-state-based grievance mechanisms should be established by businesses to enable participation in effective operational-level interventions. According to Principle 29, a key function of operational grievance mechanisms is to ensure abuses are "remediated early and directly by companies, thereby preventing harms from compounding and grievances from escalating."

Types of remedy include financial compensation, formal apologies, non-financial compensation and criminal or administrative punitive sanctions. The prevention of harm may invoke injunctions or guarantees of non-repetition.

Operational grievance mechanisms may have procedural and substantive aspects. Substantive forms of remedy can involve financial compensation or include formal apologies, non-financial compensation and criminal or administrative punitive sanctions. Remedy may also involve injunctions or guarantees of non-repetition.

The Malaysian government, the business sector and the Human Rights Commission of Malaysia (SUHAKAM) have roles to play in enabling greater access to remedy. The government and SUHAKAM should work closely with the business community, including in the medical supply industry, to enhance the types of remedial action that are available to migrant workers seeking redress, based on the context and severity of human rights abuses.

REMIATION CHALLENGES AND RESPONSES

According to some experts, providing remediation is not a straightforward task. Even if effective grievance mechanisms are established, migrant workers often find it difficult to evidence the illegal recruitment fees charged by the recruitment agencies in the countries of origin via valid documents such as receipts, proof of bank transfers and purchase orders.¹⁶ There are also challenges in identifying recruitment debts incurred by migrant workers, particularly those at the lower ends of the employment hierarchy in large conglomerates with complex supply chains. This is especially the case when the remedy audit process fails to cover all employees equally or otherwise lacks rigour. Remediation audits can also overlook previous employment pathways that might have involved labour brokers and recruitment agents during which high recruitment fees are incurred.

The remediation process is also undercut by recruitment agencies that threaten reprisals against migrant workers for disclosing the actual costs of their recruitment to the auditors or employers. There are reports of recruitment agents blackmailing or making threats to the safety and well-being of the family members of migrant workers back home. Though considered rare, migrant workers and recruitment agencies can also collude to inflate recruitment fees so that both parties benefit from any remediation process.¹⁷

To meet these challenges, a growing list of strategies are being employed to promote fair and transparent recruitment of migrant labour. These include strengthening government regulations through a “central clearing house” and e-recruitment efforts. A central clearing house functions as a centralized government-run entity that provides one-stop services for employers as well as migrant workers. These clearing houses curb unlawful recruitment practices by channelling recruitment to licensed recruitment agencies in labour-sending countries, and by registering the entrance and exit of migrant workers. A centralized database captures relevant data on migrant workers, their placement, and travel to and from their destination of work.¹⁸

Another way to minimize fraudulent and illegal recruitment fees in the process of labour migration is to establish bilateral

agreements that enable government to government (G-to-G) cooperation on recruitment protocols. These agreements can lead to joint committees that harmonize regulations and encourage collaboration between enforcement agencies in migrant sending and receiving countries. An example of this is the Bangladesh–Malaysia G-to-G agreement for employment of Bangladeshi workers in the Malaysian oil palm plantation sector (2013-2015).¹⁹

The recommendations above and below are non-exhaustive. They include preventive and corrective remediation efforts that government and businesses may have adopted in different contexts. They are provided here as recommendations which might be taken up as priorities in Malaysia’s NAP on Business and Human Rights, to reduce forced labour risks in the medical supply sector.

STATE ACTIONS UNDER PILLAR 1:

1. Establishing direct G-to-G mechanisms

The management of migrant workers in the context of the COVID-19 pandemic should be steered by the government through bilateral G-to-G mechanisms such as a Memorandum of Understanding (MoU) that clearly stipulates remediation clauses, should business-related harm be found.

2. Regulating labour recruitment through formal legislation and accreditation of independent audit firms

The government should regulate the migrant labour recruitment supply chain through clear provisions of ethical and responsible recruitment practices for the employers and insert these provisions into national-level legislation to govern against excessive recruitment fees or other forced labour issues. These regulations should include identifying licensed and legitimate recruitment agencies from the migrant-sending countries, recommend pathways by which recruitment costs could be channelled to these overseas recruitment agencies directly, and penalties involved in case of violations.

3. Setting up a national-level taskforce focused on access to remedy in the PPE industry

The government should set up a national-level taskforce that is able to both mediate and adjudicate employer-employee disputes and intervene when allegations of forced labour surface, including unethical recruitment practices. This taskforce should enable cases which cannot be resolved at the company level to be addressed by a national-level resolution committee. This special committee should consult regularly with legal experts on transnational migration, migrant labour specialists and other non-governmental stakeholders when reviewing key labour issues in PPE production.

4. Comprehensive study on the human resource and labour needs of the medical supply industry

A better understanding of the medium- to long-term labour needs of glove producers based on export projections may ensure that there are adequate resources to meet global demand. This would better guarantee that sufficient numbers of workers are available over time, rather than relying on existing workers to produce ever-increasing units of product.

5. Implement multi-level and multi-pronged enforcement of the labour law governing labour migration

Comprehensive legislation governing the rights of migrant workers is needed to effectuate multi-level and multi-pronged enforcement by various government agencies. In addition to the Ministry of Human Resources and the Ministry of Home Affairs which are primarily responsible for the formulation of policies to guide migrant labour recruitment processes, other government agencies such as the Immigration Department of Malaysia play crucial roles to ensure that exploitative migrant labour practices are minimized at the point of entry.

BUSINESS ACTIONS UNDER PILLAR 2:

1. Companies in high-risk or migrant-labour-intensive industries pledge public commitment

Companies should commit publicly to zero-cost migration by drafting clear policy guidelines on ethical recruitment and the management of their migrant workforce in the context of the COVID-19 pandemic. Company policies should outline commitments to a robust range of non-judicial grievance mechanisms as well comprehensive human rights due diligence procedures. Additional policy commitments such as workers' vaccination, regular testing and public health safety precautions should be publicized in the workplace. Company policy commitments should also detail support to mechanisms by which migrant workers are made to be fully aware of the terms of their employment conditions prior to contract signing and departure, in the respective languages of workers.

2. Work closely with suppliers and subcontractors and conduct human rights due diligence

Upstream companies or parent companies should work with suppliers and subcontractors to ensure that they adopt ethical and responsible recruitment practices that are aligned with the fundamentals of zero-cost migration. Businesses should conduct human rights due diligence involving their operations and suppliers to identify and

address forced labour risks. Ethical labour codes of conduct should be developed and accessible, including remediation policies, compensation for overtime and safety protocols—including safe distancing at the workplace—in the light of the COVID-19 pandemic. Upstream or parent companies can also help in developing capacity-building programmes for their suppliers and subcontractors to roll out similar policy guidelines through trainings, workshops and regular audits.

3. Develop a response mechanism for remediation by engaging credible and independent third-party assessors

Companies should aim to engage a credible third-party entity for the independent assessment of unfair and unethical labour practices which include remediation through regular social audits or ad hoc inspection. Workers should be interviewed in an off-site setting that minimizes their employment risks and reprisals. Conflicts of interests, real or perceived, between third-party auditors and the company should be avoided at all costs.

STATE AND BUSINESS ACTIONS UNDER PILLAR 3:

1. Government establishes a national-level taskforce focusing on grievance mechanisms and remediation challenges

The government should set up a national-level taskforce that is able to provide guidance to companies, identify trends and best practices, mediate and adjudicate employer-employee disputes and intervene in special circumstances. This special committee should consult regularly with legal experts on transnational migration, migrant labour specialists, and other non-governmental stakeholders when reviewing high profile cases.

2. Set up industry-wide platforms to address forced labour risks, remediation challenges and grievance mechanisms

Industry groups should act proactively by establishing industry-wide operational-level grievance mechanisms, while providing advice and feedback on the efforts of individual enterprises. Industry bodies should provide at the minimum an internal platform to enable migrant workers to flag and report forced labour practices which include recruitment fees paid by migrant workers. Independent third-party service coordinators can be contracted to assist migrant workers who have been victimized or exploited in the process of migration. Where remedy is to be provided, facilitators and coordinators can be hired to facilitate an equitable process.

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- 14 <https://www.reuters.com/world/asia-pacific/malaysia-fgv-pick-auditor-assess-forced-labour-accusation-2021-06-18/>
- 15 <https://www.theedgemarkets.com/article/fgv-appoint-independent-auditor-assess-groups-alleged-forced-labour>
- 16 See Principle 31 of the UNGPs for criteria for effective non-judicial grievance mechanisms.
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