

ASIA: OUTSOURCING

This update considers the relevant requirements and risks in relation to outsourcing arrangements across the region.

Questions	Indonesia	Vietnam	Sri Lanka	India	The Philippines
What are the relevant rules relating to outsourcing?	<p>Outsourcing is permitted in Indonesia and is currently regulated by Law No 13 of 2003 on Manpower as amended by Law No 11 of 2020 on Job Creation (Manpower Law) and the Government Regulations No 35 of 2021 (GR 35).</p> <p>The recent amendments to the Manpower Law removed restrictions on the types of work that may be outsourced.</p> <p>However, the outsourcing company must be properly licensed in accordance with GR 35.</p> <p>The outsourcing company must also enter into either a permanent employment contract or a fixed term employment contract with the relevant worker. Where fixed term</p>	<p>Outsourcing is permitted in Vietnam and is currently regulated by the Labour Code 2019 and its implementing regulations, namely the Government's Decree 145/2020/ND-CP dated 14 December 2020.</p> <p>The Labour Code 2019 governs labour dispatch arrangements, which are defined as an arrangement in which an employee enters into an employment contract with a dispatching agency, and the agency subsequently dispatches the employee to work for another employer.</p> <p>There are restrictions on engaging dispatch workers, including:</p> <ul style="list-style-type: none"> the maximum duration of a dispatch arrangement is 12 	<p>Sri Lanka legislation does not prohibit or specifically restrict outsourcing/ subcontracting.</p> <p>Statutes such as the Industrial Disputes Act, Wages Boards Ordinance, Employee's Provident Fund Act, Employees' Trust Fund Act, Payment of Gratuity Act and Termination of Employment of Workmen (Special Provisions) Act define the term "employer" in broad terms. In particular, an "employer" means:</p> <ul style="list-style-type: none"> any person who employs a workman; any person on whose behalf any other person employs any workman; or any person who on behalf of any other person employs any workman. 	<p>Outsourcing is allowed in India and is currently regulated by the Contract Labour (Regulation and Abolition) Act 1970 (CLRA). The CLRA will be replaced by the Occupational Safety, Health and Working Conditions Code, 2020 (OSH) once the OSH becomes effective.</p> <p>Under the CLRA, the requirements governing the use of contract labour generally apply to establishments with 20 or more workmen engaged as contract labour (hired by or through a contract labour provider), as well as to contract labour providers who employ or have employed 20 or more workmen on any day in the preceding 12 months. The 20 workmen limit has been increased</p>	<p>Outsourcing or job contracting is allowed in the Philippines, except labour-only contracting arrangement and illicit forms of employment arrangements.</p> <p>Outsourcing or job contracting is generally governed by Articles 106 to 109 of the Labour Code, as implemented by the Department of Labour and Employment (DOLE) Department Order No. 174 series of 2017 (DO 174).</p> <p>Under Article 106 of the Labour Code, "labour-only" contracting is where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among</p>



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	<p>employment is entered into, the employment contract must specifically guarantee continuity of the employment relationship when the agreement between the outsourcing company and the principal that engages the outsourcing company comes to an end.</p>	<p>months. After 12 months, the outsourcing company is not permitted to continue sending the same outsourced worker to the same principal;</p> <ul style="list-style-type: none"> outsourcing arrangements require a licence. Engaging an unlicensed outsourcing company is prohibited; and outsourcing arrangements are only permissible in specific circumstances, namely: <ul style="list-style-type: none"> where the employment is necessary to address a sharp increase in labour demand over a limited period of time; where the outsourced worker is meant to replace another employee who is 	<p>Both the third party who supplies labour and the principal are jointly and severally liable to pay the salary for work supplied in the execution of the contract and any other related employment benefits, social security payment, compensation, etc.</p>	<p>in certain states in India; the limit is 50 in Maharashtra, Gujarat, Rajasthan, Andhra Pradesh, Uttar Pradesh and 40 in the Union Territory of Jammu, Kashmir & Ladakh.</p> <p>The term 'workmen' is defined as those employed to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward but excludes a person who is employed:</p> <ul style="list-style-type: none"> mainly in a managerial or administrative capacity; or in a supervisory capacity and draws a salary exceeding INR 10,000 (approx. USD130) per month or exercises functions mainly of a managerial nature. <p>Under the OSH, the threshold will be increased and the</p>	<p>others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer.</p> <p>In legitimate or permissible job contracting, the principal is jointly and severally liable with the service provider for any violation of the provisions of the Labour Code, including non-payment of wages, to the extent of the work performed for the principal. However, in the case of labour-only contracting or illicit forms of employment arrangements, the service provider is considered merely an agent of the principal, and the principal is responsible to the workers in the same manner and extent as if they were directly employed by the principal.</p>



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		<p>taking maternity leave, has an occupational accident or occupational disease or has to fulfill their civic duties; or</p> <ul style="list-style-type: none"> where the work requires highly skilled workers (there is currently no specific guidance on the definition of highly skilled workers). Annex II of Decree 145/2020/ND-CP dated 14 December 2020 sets out a list of job categories which are eligible for labour outsourcing; outsourcing arrangements are prohibited in the following circumstances: <ul style="list-style-type: none"> where the outsourced worker is meant 		<p>requirements governing the use of contract labour will only apply to establishments with 50 or more workers engaged as contract labour (hired by or through a contract labour provider), as well as to contract labour providers who employ or have employed 50 or more workers on any day of the preceding 12 months.</p> <p>The definition of a 'worker' is similar to that of a 'workman', but will be expanded to include:</p> <ul style="list-style-type: none"> journalists as defined in the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955; sales promotion employees as defined in the Sales Promotion Employees (Conditions of 	<p>DO 174 imposes additional requirements for a trilateral job contracting arrangement. For instance, a contractor under DO 174 needs to be validly registered with the DOLE. Failure to register gives rise to the presumption that the contractor is engaged in labour-only contracting. However, the DOLE issued the Department Circular No. 01, series of 2017 (DC 01-2017) which clarifies that DO 174 does not apply to information technology-enabled services involving an entire or specific business process, including Business Process Outsourcing.</p>



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		<p>to replace an employee during a strike or settlement of a labour dispute;</p> <ul style="list-style-type: none"> ○ where there is no agreement between the principal and the outsourcing company as to responsibility for compensation for occupational accidents/diseases; ○ the outsourced worker is meant to replace an employee who is dismissed due to changes in organisational structure, technology, economic reasons (ie redundancy) or full division, partial division, consolidation or merger of the enterprise; 		<p>Service) Act, 1976; and</p> <ul style="list-style-type: none"> • persons employed in a supervisory capacity and earning less INR 18,000 (approx USD240) per month. <p>Under the CLRA and the OSH, principals must obtain a certificate of registration from the appropriate authority before engaging contract labour providers (which include BPOs). Principals are also liable to pay relevant wages and meet employment obligations to contract labour where the providers fail to pay wages or meet those obligations.</p> <p>Under the OSH, contract labour engaged by an establishment are prohibited from engaging in the core activities of the establishment, except where:</p>	



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		<ul style="list-style-type: none"> ○ the outsourcing company must enter into a written labour dispatch agreement with the principal, containing specified terms and conditions of the dispatch arrangement. The agreement must not provide terms which are less favourable compared to those for permanent employees. • the outsourcing company's rights and obligations include: <ul style="list-style-type: none"> ○ providing the outsourced worker with the contents of the outsourcing agreement; ○ providing the principal with the CV of the outsourced worker; 		<ul style="list-style-type: none"> • the normal functioning of the establishment is such that the relevant core activity is ordinarily done through a contractor; • the relevant core activities do not require full time workers for the major portion of the working hours in a day or for longer periods; or • there is any sudden increase of volume of work in the core activity which needs to be accomplished in a specified time. 	

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		<ul style="list-style-type: none"> ○ paying the outsourced worker a salary that is not lower than that of a directly hired employee of the principal who has equal qualifications and performs the same or equal work; ○ keeping record and submitting periodic reports to the provincial labour authority; and ○ taking disciplinary measures against the outsourced worker in cases where the principal returns the worker for violations against the principal's internal labour regulations. • the principal's rights and obligations include: 			



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		<ul style="list-style-type: none"> o informing and guiding the outsourced worker to understand its internal labour regulations and other regulations; o not discriminating between the outsourced worker and its own employees in respect of the working conditions; and o reaching an agreement with the outsourced worker on night work and overtime work in accordance with this Labour Code. 			
What are the primary employment risks in using outsourcing arrangements?	There may be co-employment risks in that workers engaged through the outsourcing company may claim that they are direct employees of the principal that engages the outsourcing company.	There may be co-employment risks in that workers engaged through the outsourcing company may claim that they are direct employees of the principal that engages the outsourcing company.	A principal who enters into a contract with any third party for the third party to supply labour on a regular basis may be deemed to have entered into a "disguised employment relationship"	There may be co-employment risks in that workers engaged through the outsourcing company may claim that they are direct employees of the principal that engages the outsourcing company.	There is a risk the arrangement may be considered to amount to a labour-only contracting (ie such that the principal is responsible to the workers in the same manner and extent as if



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	<p>This is a substance over form test. All relevant factors will be considered, including and primarily the degree of control exercised by the principal.</p> <p>Where the workers are deemed to be the principal's own employees, the principal will owe employment obligations to the workers (including social security, leave, overtime pay and rights arising out of termination of employment).</p>	<p>This is a substance over form test. All relevant factors will be considered, including and primarily the degree of control exercised by the principal.</p> <p>Where the workers are deemed to be the principal's own employees, the principal will owe employment obligations to the workers (including social security, leave, overtime pay and rights arising out of termination of employment).</p>	<p>if the work performed by the labour is an integral part of the principal's business activities.</p> <p>Where there is a deemed disguised employment relationship, the worker will be entitled to all employment entitlements (including gratuity, social security, trust fund, provident fund, leave, overtime pay and rights arising out of termination of employment) from the deemed employer.</p> <p>Additionally, the Commissioner General of Labour may in writing direct the employer to refrain from having the work executed under such contract or arrangement. Any employer aggrieved by a decision made by the Commissioner General of Labour can appeal this decision to the Special Employment Relations Tribunal.</p>	<p>This is a substance over form test. All relevant factors will be considered, including and primarily the degree of control exercised by the principal.</p> <p>Where the workers are deemed to be the principal's own employees, the principal will owe employment obligations to the workers (including social security, leave, statutory bonus, overtime pay and rights arising out of termination of employment).</p>	<p>they were directly employed by the principal).</p> <p>Additionally, there may be co-employment risks in that workers engaged through the outsourcing company may claim that they are direct employees of the principal that engages the outsourcing company.</p> <p>This is a substance over form test. All relevant factors will be considered, including and primarily the degree of control exercised by the principal.</p> <p>Where the workers are deemed to be the principal's own employees, the principal will owe employment obligations to the workers (including social security, leave, overtime pay and rights arising out of termination of employment).</p>