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Philippine Association of Multinational Companies Regional Headquarters, Inc.

August 28, 2018

Sen. Joel Villanueva
Chairperson
Senate Committee on Labor, Employment, and
Human Resources Development
Senate of the Philippines
Manila

Dear Senator Villanueva:

We wish to advise you of views of the Joint Foreign Chambers (JFC) of the Philippines on the consolidated draft Senate Bill No. 1826, otherwise known as the "Security of Tenure and End of ENDO Bill of 2018".

We have serious concerns about the passage of draft Senate Bill No. 1826 for the following reasons:

1. Unduly restricting the flexibility of enterprises to strategically choose which parts of its work processes to outsource will drive up costs of production and could make the Philippines less competitive as a production site. It could therefore have the opposite effect of promoting job-creation and security of tenure, as enterprises may choose to simply eliminate the low-skilled work currently outsourced to service providers by automation, re-designing of work processes, or worse, by transferring the work to other labor markets.

2. The current law governing security of tenure and job contracting is sufficient to protect the interests of workers. Possible alleged abuses are not caused by the inadequacy of the law, but by lack of proper monitoring, implementation, and enforcement of the law. While there are more than 999,000 registered establishments to be inspected, there are only 574 Labor Inspectors.

3. The current law allows contracting of work, whether or not directly related to the principal business of the employer, provided the contractor is an independent contractor. The SB 1826 proposes to disallow what the current law and implementing rules (D.O. 174) recognize as legitimate job contracting, by surreptitiously changing the definition of Labor-Only Contracting, through a seemingly simple or innocuous change of the conjunction 'AND' to 'OR' in the definition of Labor-Only Contracting.

4. If the draft bill (SB No. 1826) will be passed into law, hundreds of thousands of Filipino workers under legitimate job contracting arrangements now would lose their jobs. The majority of these workers

would never have access to decent jobs in large multinationals, except through the legitimate job contractors.

5. The current law and implementing rules amply protect the rights of workers in job contracting arrangements. They are entitled to all the rights guaranteed by the Constitution, as well as full wages and benefits mandated by the Labor Code and all other special laws, rules or orders. They are also regular employees of the job contractors and enjoy security of tenure.

6. Prohibiting the outsourcing of directly related functions is not necessary to achieve the intended purpose of the bill in protecting workers' rights to security of tenure. It is already the principal's obligation and accountability to ensure that the rights of workers employed by its service providers are protected.

7. The SB 1826 is superfluous insofar as ending 'ENDO' is concerned. ENDO is an employment malpractice of hiring workers for less than six months at a time to avoid making them regular employees after the six-month probationary period. Both DOLE Department Order No. 174 and Executive Order No. 51 already strictly prohibit ENDO, and such prohibition need no longer be enacted into law. If there are still violations against this prohibited act, it is no longer because the law or rules and regulations are inadequate. The issue is one of monitoring, implementation, and enforcement.

8. Limiting the forms of employment to only regular and probationary, as provided by SB 1826, is an infringement of management prerogative and will set the Philippine economy backwards. All over the world, non-standard forms of employment are prevalent, giving both employers and employees more flexibility in work arrangements. We suggest that the current law on Security of Tenure should be retained, as it already provides ample protection to workers.

In view of the foregoing, we respectfully submit that the Senate should not enact the pending SB 1826 into law, in order to protect the livelihood of hundreds of thousands of workers now in legitimate job contracting arrangements.

Benefits of Retaining the Current Law on Job Contracting

1. Retaining the current law on Job Contracting, but strengthening its implementation shall make the Philippines at par with other countries in the world and can therefore be globally competitive.

   Consider the following:

   a. Foreign investors from different parts of the world are looking for investor-friendly ASEAN member countries, particularly those with favorable economic, financial, tax, and labor policies. For example, Vietnam and Indonesia have more flexible contracting and

employment laws that allow temporary work arrangements for as long as three years.

b. As we speak, both Indonesia and Vietnam annually receive more than twice as much FDI as that the Philippines. Retaining the current law on job contracting arrangements shall help level the playing field and allow the Philippines to better compete for FDI. All told, allowing job contracting under the present law shall be good for the Philippine economy. Curtailing it shall have adverse unintended consequences.

2. According to estimates from both DOLE and the Philippine Statistics Authority (PSA), close to 700,000 workers are under job contracting arrangements. The majority of these workers performing unskilled or semi-skilled work for large Filipino or foreign multinational companies (MNCs) do not have the appropriate educational qualification to work directly with these MNCs. However, they continue to have regular jobs with the contractors.

    a. Prohibiting job contracting and subcontracting will result in large lay-offs of workers that now enjoy decent jobs, pay and working conditions in large foreign and Filipino multinationals through job contracting arrangements, simply because they do not possess the needed educational qualifications.

    b. Retaining the current law that allows legitimate job contracting shall continue to provide jobs to almost a million workers who would otherwise not qualify for decent jobs and decent pay and benefits in large companies. In short, the continuance of the current law and practice on job contracting is good for the Filipino workers.

3. Legitimate job contractors and subcontractors continue to pay government taxes, particularly value added tax (VAT), of roughly P40 billion annually.

    a. If legitimate job contracting and subcontracting shall be prohibited or curtailed, the government shall lose this source of revenue from VAT and other taxes, registration fees, and other government income. Retaining the current law shall benefit the government.

4. Job contracting and subcontracting arrangements allow large companies the flexibility to grow their businesses as they focus on their core competencies and contract out some parts of their business to legitimate and independent contractors and subcontractors. This allows businessmen to exercise freely their constitutionally-guaranteed management prerogative. This results in lesser costs of operation, equipment, maintenance, recruitment, training, and other management and human resources costs, and other back office collaterals. Retaining the current law shall also benefit business and reduce their costs, which eventually will benefit their customers.

OVERARCHING PRINCIPLES:

Employers and businessmen are guaranteed by the Constitution and other laws the free exercise of management prerogatives. In several rulings, the Supreme Court has maintained that the exercise of management prerogatives is not subject to interference as long as it is done in good faith, based on the exigencies of the business, and not intended to circumvent the rights of workers. The Supreme Court has held in several cases that "management is free to regulate, according to its own discretion and judgment, all aspects of employment, including hiring, work assignments, working methods, time, place, and manner of work, processes to be followed, supervision, lay-off of workers, discipline, dismissal and recall of workers."

We support revisions in labor laws, especially to clarify the intent of law. However, we strongly oppose the passage of any law that unduly curtails management prerogatives that are clearly recognized by the Constitution and other laws. Some of the provisions of the draft bill on "Security of Tenure" tend to prohibit the exercise of management prerogative that heretofore has been allowed by law since time immemorial. We believe that the current law on "Security of Tenure" and its implementing rules and regulations are sufficient to protect the rights and welfare of workers, and at the same time allow the free exercise of management prerogative, including to contract out work as it sees fit.

We believe that all employees, whether in regular status, job contracting, or temporary employment arrangements, must enjoy security of tenure, minimum wages and benefits, and all other rights guaranteed to them by the Constitution. It is a flawed concept that only regular employees enjoy those Constitutional rights. We also agree that whenever applicable, employees of job contractors should also enjoy regular status with these job contractors.

As the DOLE has admitted, there are over 999,000 enterprises to be inspected (99.5 percent of which are Micro, Small and Medium Enterprises that provide 63 percent of employment in the formal sector of the economy), and there are only 574 Labor Inspectors.

The problems of employees in job contracting arrangements in the past, and partly today, do not emanate from the inadequacy of the law. The problems have got to do with the implementation of the current law. What should be strengthened is the implementation. This should be done without changing the law itself. Prohibiting job contracting will create unintended negative consequences for the sector that the law intends to protect – the workers.

The following are our specific, line-by-line, comments to the draft SB 1826:

ON TITLE (Lines 1-2). Remove "End of Endo" from the Title of the Draft Bill. "Endo" as an employment malpractice has already been effectively ended by DOLE D.O. 174 and E.O. 51, which both prohibit "Endo."

On Article 106 of the Draft Bill (Lines 5 to 19 of page 1 and Lines 1-2 of Page 2):

Retain the original Title of Article 106 – "Contractor or Subcontractor" instead of the draft bill's proposed title, "PROHIBITION ON LABOR-ONLY CONTRACTING." It is

inconvenient to start a bill with what is prohibited, without first presenting what is allowable or legitimate job contracting. We suggest that the first paragraph of the current Article 106 be revised as follows, to allow for what is allowed by the current law:

> "**Article 106. Legitimate Contractor or Subcon-tracting.** Legitimate contracting or subcontracting is an arrangement where an employer or entity, in the exercise of management prerogative, enters into a contract with another employer, entity, or service provider for the performance of the former's work, whether directly related to the principal business or not. In all cases, the employees of the contractor, subcontractor or service provider shall be paid in accordance with the provisions of this Code."
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> "In the event that the contractor of subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him."
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> "The Secretary of Labor and Employment, may by appropriate regulations, restrict or prohibit the contracting-out of labor to protect the rights of workers established under this Code. In so prohibiting or restricting, he may make appropriate distinctions between labor-only contracting and job contracting as well as differentiations within these types of contracting and determine who among the parties involved shall be considered the employer for the purposes of this Code, to prevent any violation or circumvention of this Code."

On Article 106, Lines 3 to 35 of Draft Bill: We suggest that Article 107 of the current Labor Code be replaced with the following provision on "Labor-Only Contracting", a prohibited act, as follows:

> **"Article 106. Labor Only Contracting.** "LABOR-ONLY CONTRACTING IS PROHIBITED. "Labor-only" contracting refers to an arrangement where (1) the contractor, subcontractor, or service provider does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others; or (2) the contractor does not exercise the right to control over the performance of his/her employees. In such cases, the contractor, subcontractor, or service provider or intermediary shall be considered merely an agent of the employer who shall be responsible to the workers in the same manner and extent as if the workers were directly employed by him/HER."

On Line 8 of the draft bill, the conjunction "AND" was replaced by "OR". This is NOT an innocuous change of conjunction. This changes the whole concept of what is legitimate and allowed by the current laws and rules on job contracting. The change from "AND" to "OR" shall prohibit the contracting out of work that is directly related

to the principal business of the employer, which the current laws and rules allow. This is the most onerous provision of the draft bill. Prohibiting job contracting altogether shall not result in the regularization of all employees in job contracting arrangements. The reverse is likely to happen, as most of these workers are not qualified for regular positions in large Filipino and foreign multinational companies, but at present they have access to these multinationals through the job contracting arrangements.

Remove the succeeding paragraphs in Lines 15-35 of page 2 of the draft bill, as these are more appropriately placed in the Department Order or Implementing Rules and Regulations.

Additionally, the provision in the draft bill (Lines 21 to 35 of page 2) making final and immediately executory, pending appeal, the decision of the Secretary of Labor affirming Compliance Orders of the Regional Directors is a violation of the employer's right to due process, and therefore unconstitutional.

On Section 3, Article 107. LICENSING OF JOB CONTRACTORS. (Lines 36 to 43, page 2 of draft bill). Under the present law and implementing rules and regulations, contractors and subcontractors are already required to register with the Department of Labor and Employment. This process is sufficient to monitor and regulate the activities of the contractors and subcontractors. Licensing is no longer necessary.

On Lines 11 to 18 of page 3, the draft bill provides that jobs to be contracted out "shall not be directly related to the principal business of the contractee." The current Labor Code and case law allow that any part of the work of any person or business entity can be contracted out to contractors or subcontractors, even if they are directly related to the principal business of the former. This is the essence of current contracting arrangements here in Philippines and all over the world. To prohibit contracting work that is directly related to the principal business of the employer is unconstitutional and curtails management prerogative that is protected by the Constitution and other laws. Today, hundreds of thousands of workers who would otherwise not qualify for decent jobs in large Filipino and foreign multinationals are gainfully employed through job contractors. If a bill prohibiting current legitimate contracting were passed into law, these workers would lose their livelihood and possibly force businesses to use artificial intelligence and robotics in lieu of hiring these Filipinos or move their operations to another country where contracting arrangements are allowed.

On Lines 37-39 of the draft bill. "Any legitimate labor organization shall have access to copies of licenses issued to job contractors and any and all submissions made in connection with such licenses. This is in violation of the rights to privacy, and the property right of employers that is guaranteed by the Constitution. The law does not grant employers access to union papers and documents; why should the law grant access by unions to an employer's business papers and documents?

On Lines 1-14 of Page 4. We suggest that these provisions be removed from the draft bill, as they are more appropriately placed in the implementing rules and regulations, if at all.

On Lines 17 -20, Page 4. We suggest that these be removed, as they are already in the existing implementing rules and regulations, D.O. 174.

On Lines 21 to 26, Page 4. Remove the same and maintain the current Labor Code provision on Posting of Bond.

On Lines 27 to 40, Page 4. Remove the same, as they should be in the Implementing rules and regulations, not the law.

On Lines 1 to 10, Page 5. Continuation of Lines 27 to 40, Page 4. Remove the same, for similar reason on 9. Above.

On Lines 11 to 18, Page 5. Article 109. Solidary Liability. Remove the same from the draft bill, and retain existing provision in the current Labor Code.

On Lines 19-31, Page 5. Article 294 (279). Security of Tenure. Remove the provisions of the draft bill, retain the provisions of the current Labor Code, but remove the opening clause "In case of regular employment …" This should now mean that all employees, regardless of employment status, shall have security of tenure. This does not, however, mean that they are regular employees.

On Lines 32 – 38, Page 5 and Lines 1 – 19, Page 6. Article 295 of Draft Bill. Remove the provisions of the draft bill, and retain the provisions of Article 280 of the current Labor Code, on Regular and Casual Employment.

The current Labor Code and case law recognize several forms of employment, aside from regular employment. All over the world, the rise of non-standard forms of employment has increased over time, granting flexibility and freedom of choice to both employers and employees. Requiring that all employees of an enterprise should have regular status effectively removes the flexibility of management to run the business as he sees fit, a prerogative recognized by the Constitution, the laws, and jurisprudence. Making all forms of employment regular will have unintended consequences to the sector that the law wants to protect, the millions of workers who do not qualify for decent jobs in large multinationals, but could in fact work at these companies through job contracting arrangements or for project, seasonal, and other fixed-term or temporary employment arrangements.

On Lines 20-35 on Page 6 of Draft Bill. Article 296 (281). Probationary Employment. Remove the provisions of the draft bill, and retain the existing provisions of the current Labor Code on Probationary Employment, as they are fair and just, and protect the mutual rights of employees and employers.

On Lines 36-43, Page 6 and Lines 1 – 13 on Page 7. Article 297 (282). Just Causes of Termination. We suggest that the existing provisions of the Labor Code be retained, as they are fair and just and need no amendments.

On Lines 14 – 22, Page 7 of Draft Bill. Article 298-A. Proof of Authorized Cause and Payment of Separation Pay. We suggest that this be removed from the draft bill. Under the present system, employers need only to notify employees concerned and the Department of Labor and Employment 30 days prior to effecting separation of employees due to just or authorized causes. The laws and jurisprudence are clear on the requirements for termination, including validity of termination (just or authorized causes) and due process. There is absolutely no need in insert another process – "THE EMPLOYER SHALL SUBMIT TO THE DOLE FOR VALIDATION PROOF AND UNDERTAKING ON THE EXISTENCE OF THE AUTHORIZED CAUSE IN ACCORDANCE WITH THE RULES AND REGULATIONS AS MAY BE SET BY THE SECRETARY OF LABOR AND EMPLOYMENT." This clearly is a violation of the prerogative of employers to terminate employment of employees, if not a delaying tactic for employees found guilty of violating company rules and regulations to continuously remain in the company's payroll. Obviously, this is not best for the maintenance of discipline and morale of the rank and file.

The JFC is a coalition of the American, Australian-New Zealand, Canadian, European, Japanese, Korean chambers and PAMURI. We have over 3,000 member companies engaged in over $100 billion worth of trade and some $30 billion worth of investments in the Philippines.

Sincerely yours,

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