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Philippine Association of Multinational Companies Regional Headquarters, Inc. ♦ Semiconductor and Electronics Industries in the Philippines, Inc

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July 2, 2019

President Rodrigo Roa Duterte
Office of the President
Malacañan Palace
J.P. Laurel St.
San Miguel, Manila

Dear Mr. President:

The Senate and the House of Representatives in the 17th Congress have passed the Security of Tenure (SOT) Bill (SB No. 1826). Before said bill becomes a law, we in the Joint Foreign Chambers – a coalition of the American, Australian-New Zealand, Canadian, European, Japanese, Korean chambers and PAMURI, representing over 3,000 member companies engaged in over $230 billion worth of trade and some $30 billion worth of investments in the Philippines – joined by FEF, IBPAP, and SEIPI write to request a careful review of the legislation in consideration of the very serious consequences that it will present for the economy and employment. We believe that this provision on job contracting that is both contrary to fundamental rights and legal principles concerning ownership and property and would result in curtailment of employment rather than promotion thereof.

The Objectionable Provision Under the SOT Bill and its impact

The objectionable provision in the SOT Bill reads as follows:

> (1st paragraph) Section 2. Labor-Only Contracting is Prohibited. There is "labor-only" contracting where the job contractor, whether licensed or not, merely recruits and supplies or places workers to a contractee regardless of whether or not he/she has substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, **or** (underscoring ours) the workers recruited and supplied or placed by such person are performing activities which are directly related to the principal business of such contractee or are under the control and supervision of the contractee.

This implies that when workers recruited are performing activities which are directly related to the principal business of the contractee, there is labor-only contracting. In the current law, the conjunction used is "AND," but the bill seeks to change the conjunction to "OR," making the condition stand alone as qualifier for the prohibited act of "Labor-Only Contracting." Depending on the outcome of the discussions in the industry councils, the Bill could totally prohibit all forms of contracting, including legitimate forms of job contracting that employ hundreds of thousands of Filipinos today. **If the said Bill is a total ban of any form of contracting, it would be considered unconstitutional for violating one's property right, freedom to contract out work, and operate his/her business.**

Moreover, the destructive impact on business, investment, as well as the creation of jobs, would be grave. Our ASEAN neighbors and the rest of the world are moving towards more flexible work arrangements in response to technological developments and emerging demographics. We strongly believe that, if legitimate job contracting is prohibited, the Philippines will be one of only a handful of countries in the world with very restrictive laws governing contracting arrangements. Foreign direct investments (FDIs) will degrade and shift towards countries with more investor-friendly policies than the Philippines. Parties to legitimate job contracting arrangements contribute billions of pesos in taxes that help fund key government projects like Build, Build, Build, Universal Health Care, and other programs. Workers in the construction and agricultural sectors who have only elementary education are given opportunities to work in multinationals through legitimate job contractors. These workers could lose their jobs if the SOT bill becomes a law.

Unduly restricting the flexibility of enterprises to strategically choose which parts of its work processes to contract out will drive up costs of production and make the Philippines less competitive as a production site. Instead of promoting job-creation and security of tenure, it could have the opposite effects as enterprises may choose to eliminate low-skilled work currently contracted out to service providers by using automation and artificial intelligence, re-designing of work processes, or transferring work to more investor-friendly foreign destinations.

Job contracting as an exercise of management prerogative and business judgment is anchored on two constitutional rights: right and freedom to contract and right to property. In the leading case of San Miguel Corporation Employees Union-PTGWO vs. Bersamira, et al.[1], the Supreme Court recognized the propriety right of San Miguel to exercise an inherent prerogative and its best business judgment to determine whether it should contract out performance of some if its work to independent contractors.

The conduct of all forms of businesses involves the exercise of management prerogative. Jurisprudence has reiterated time and again that **the exercise of management prerogative is not subject to interference,** so long as it is done in good faith, based on the exigencies of business and not intended to circumvent the legal rights of labor.

The solution to Endo

At the start of your Administration's campaign in 2016 to eradicate Endo, the Department of Labor and Employment (DOLE) estimated the number of workers under job contracting arrangement at 670,000 in the private sector and more than 700,000 in government. On May 1, 2019, DOLE Secretary Silvestre H. Bello III announced that due to the effective implementation of both E.O. 51 and D.O. 174, some 500,000 of these workers in the private sector have already been given regular status. We believe that DOLE does not need another law to cause the regularization of the remaining workers. 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 and implementation. Sadly, while there are more than 999,000 registered establishments to be inspected, there are only 574 Labor Inspectors to implement regulations.

We submit that there are ample regulatory mechanisms against the employment malpractice known as "Endo." We fully support the DOLE's full implementation of D.O. 174 and E.O. 51 as well as its efforts to study and examine the real effects and consequences of the same.

[1] 186 SCRA 495-505.

Recommendation

We strongly recommend that the word "OR" at the beginning of the above-mentioned bill's provision of "labor-only contracting" be replaced by "AND", and revert to the current provision in the Labor Code of the Philippines under Articles 106 to 109 (Contracting or Subcontracting) being implemented by Department Order (D.O.) 174 and Executive Order (E.O.) 51. The current law, the D.O. 174, and E.O. 51, already expressly prohibit the practice of labor-only contracting or the so-called "endo" and other illegal forms of contracting. What is needed is better enforcement of the current law, not a change in the law that could set back the Philippine economy in terms of global competitiveness.

By retaining the current law, or reverting the conjunction used from "OR" to "AND" in the bill, legitimate job contracting shall continue to flourish and make the Philippines more responsive to the rapidly evolving global practices and business models that promote employment flexibility and respect workers' rights to security of tenure.

Conclusion

First, the country's problem is not lack of regular jobs but simply lack of jobs. Jobs are created by investments, whether local or foreign. If government policy, through the enactment of the SOT bill, limits management prerogative or the flexibility of investors to operate, there will be less jobs for the millions of Filipinos who join the workplace every year. We want to help create more jobs, but government should provide a conducive business environment, with more investor-friendly policies, not like the SOT bill.

Second, curtailment of management prerogative can be considered unconstitutional, as the Constitution itself guarantees property rights to a business owner. We subscribe that both businessmen and workers have Constitutional rights, which must be respected by each other and by government. We believe that there must be effective mechanisms for protection of workers' rights, but in protecting workers' rights "the law should not authorize the oppression or self-destruction of the employers."

Third, if the SOT bill becomes a law, we cannot assume that all contractual employees would be absorbed by the principals as their own regular employees. With the threat of passage of the SOT bill looming, many MNCs are already studying how to automate their operations, review service agreements with suppliers to decide which to cut and which to retain, and whether to seek destinations where they can operate with more ease and flexibility. Many thousands will lose their jobs as regular employees of the contractors, because they do not meet the minimum employment requirements of these MNCs. The Senate, anticipating this potential outcome, has had the good sense to remove government contractors from the purview of this bill on the basis of a potential severe fiscal challenge and the fact that government employees must pass Civil Service Commission standards. The same outcome must be anticipated for private corporations. If passed into law, the SOT bill could wreak havoc and grave consequences on the sector it wants to protect.

Fourth, most of the world follows more flexible work arrangements. Prohibiting legitimate job contracting in the Philippines will, in the words of respected labor law expert Atty. Cesar Azucena, "turn us back to the Dark Ages." Should this happen, the Philippines will slide in its ranking among competitive economies of the world. Investors might opt to locate their manufacturing, logistics, and other functional hubs in other countries with more investor-friendly policies. The jobless growth we have been experiencing could worsen.

In closing, we reiterate that unduly restricting the flexibility of enterprises to strategically choose which parts of their work processes to contract out will drive up costs of production and make the Philippines less competitive as a production site. It could therefore not yield the intended effect of promoting job-creation and security of tenure, as enterprises may choose to eliminate the low-skilled work currently contracted out to service providers by using automation and artificial intelligence, re-designing of work processes, or by transferring the work to more investor-friendly destinations.

Very sincerely yours,

JAMES WILKINS
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