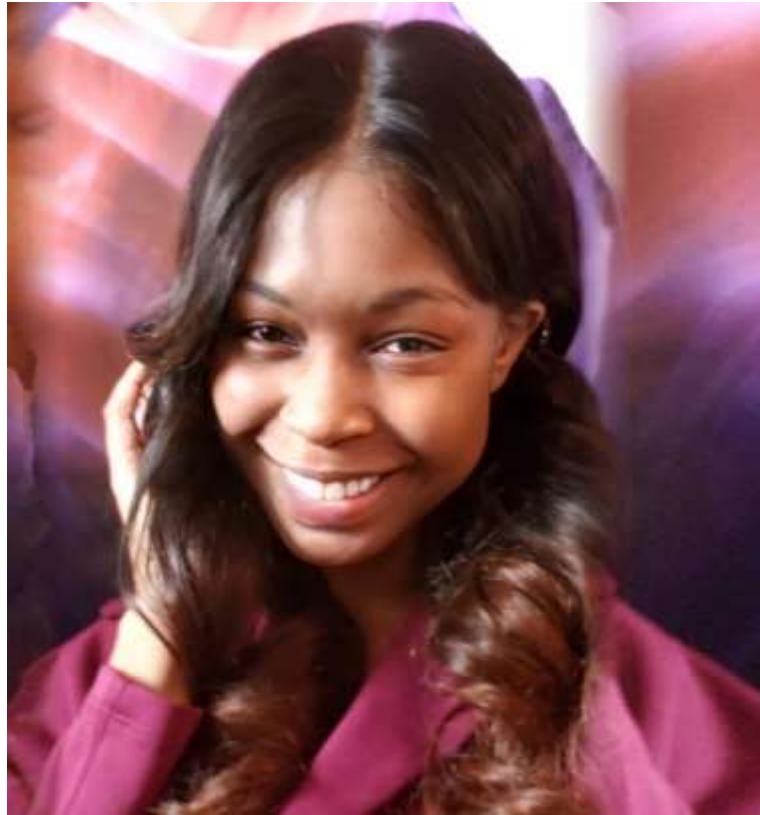


# Legal Implications of Hiring and Managing Remote Workers in Asia Pacific





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**Chulaphan Chettha Bienkowski**  
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# Overview

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## Legal Implications of Hiring and Managing Remote Workers in Asia Pacific

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- Legal requirements for employing remote workers in a foreign jurisdiction
- Risks for foreign employers employing remote workers in a foreign jurisdiction
- Crafting & implementing a successful cross-border remote worker policy



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# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



**Stephen I. Warokka**  
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- What is considered a work activity in Indonesia and when does someone need a work permit to work in Indonesia?
  - While there is lack of clear definition of “work”, the common understanding is that when there is an Indonesian employer giving compensation to a foreigner in Indonesia to conduct a certain work activity, then a work permit is required



# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



**Stephen I. Warokka**  
Partner  
SSEK  
Indonesia

- What are the basic requirements for a company to employ a remote worker in Indonesia?
  - Although it is likely that the employment contracts will be governed by foreign law, it is advisable to have them executed in dual language with a Bahasa Indonesia version as required by the Indonesian Language Law



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# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



**Raymond Low**  
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## Engagement of Malaysia citizens as remote workers that are based in Malaysia

- Generally, no legal prohibition under Malaysia law for a foreign company to engage Malaysians to perform work remotely in Malaysia.
- The basic requirement will be the employment contract to set out the parameters of engagement.
- The question then is the choice of law – whether Malaysia law or a foreign law.
- If parties opt for Malaysia law, then there will be a need to comply with local employment legislation (minimum wages; retirement age, national pension fund, social security). Need local agent to make statutory contributions.

# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



**Raymond Low**  
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## Engagement of non-Malaysia citizens as remote workers

- Social visit pass to stay in Malaysia is only up to 30 to 90 days.
- There will be a requirement for work permit if the engagement is for a longer term and will require a local entity to sponsor the work permit application.
- No major issue if the remote worker is a Permanent Resident.



# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



**Raymond Low**  
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## Non-employee contractors

- Choice of law & Immigration – Same considerations as above.
- Terms – Contractors are not considered as employees in Malaysia and therefore the employment related obligations will not be applicable.
- Caution : The Courts are not bound by the labels used by the parties and will examine the substance of the engagement to ascertain whether in reality, there was an employment relationship (Control test).



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# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



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- Prohibition on hiring and managing remote workers
  - Generally, no legal prohibition on a foreign company to engage Filipinos to perform work remotely for them from the Philippines.
- Written employment contract is not required
  - Not a formal requirement but a practical necessity
  - Terms and conditions of the contract must not be prohibited nor contrary to law, morals, good customs, public order or public policy.

There are **mandatory benefits** required for employees under the law such as holiday pay, overtime pay, night shift differential and service incentive leave, 13th month pay, retirement pay and benefits, separation pay, health insurance benefits, and social security benefits.

# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



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- Hiring remote workers – contractor vs. employee

	Employee	Contractor
<b>Local entity employer</b>	Required	Not required
<b>Statutory benefits</b>	As required under existing labor laws (e.g., holiday pay, premium pay, overtime pay, health insurance benefits, etc.)	Employee benefits are generally not applicable to contractors, unless agreed upon in the contract
<b>Grounds for termination</b>	Should be based on just and authorized causes under the Philippine labor laws	Governed by the agreement of the parties to the contract
<b>Court practices and procedure in case of dispute</b>	Depending on the nature of the dispute (e.g., referred to Labor Arbiter, National Labor Relations Commission, etc.)	Governed by the agreement of the parties in the contract; generally under the jurisdiction of Philippine courts



# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



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**Philippines**

- As employees - Work permits, visas, employer of record
  - Employer of record in the Philippines is needed if the remote worker is a foreigner, unless the foreigner can obtain a long-term visa that gives him the right to work in the country.
  - Regulatory requirements and compliance (e.g. social security and tax laws).
- As contract workers - Visas, business registration
  - Long-term visa that gives the foreigner the right to stay in the country.
  - Taxation issue.



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# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



**Chulaphan Chettha Bienkowski**  
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- Hiring an independent contractor vs. Hiring an employee in Thailand
  - Independent contractor relationship – “Hire of Work” – accomplishment of defined work - governed by Civil and Commercial Code.
  - Employment relationship – “Hire of Service” – rendering of services - governed by Labour Protection Act and other Labour Laws and regulations.
  - The employer has little to no control and oversight over the actions of the independent contractor.
  - The employer has management control over the employee’s work.
- Hiring Remote Workers in Thailand
  - No prohibition. However:
    - See comments below on tax risk;
    - Non-Thai individual would require a work permit;
    - If hired as an independent contractor a non-Thai would also require a foreign business license, which in practice would be virtually unobtainable.

# Legal Requirements for Employing Remote Workers in a Foreign Jurisdiction



**Chulaphan Chettha Bienkowski**  
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- Visa and Work permit requirement
  - Every foreigner working in Thailand must hold a work permit. When the work permit has been obtained, its holder may then apply to the Immigration Bureau for a long-stay visa.
- Establishment of local entity to hire remote workers in Thailand
  - In principle, there is no requirement to establish a local entity to serve as the employer of remote workers hired in Thailand.
  - However, in reality, no work permit would be obtainable by the employee in those circumstances, as the non- Thai employee (work permit applicant) would be unable to provide required supporting documents pertaining to the employer's business operations in Thailand.





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# Risks Involved in Employing Cross-border Workers



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- Being questioned, detained, or even deported by immigration officials if there is sufficient evidence that the remote worker violates his/her stay permit while in Indonesia
- Depending on the applicable tax treaty and the relevant time test, there is a risk of being deemed to have established a Permanent Establishment in Indonesia



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# Risks Involved in Employing Cross-border Workers



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## Income Tax and Permanent Establishment

- Tax is payable on the income of any person which accrues or derived in Malaysia.
- Foreign employing entity could be subject to income tax in Malaysia if the activities / presence in Malaysia triggers Permanent Establishment (“PE”).
- Whether PE exist or not is a question of fact depending on nature of activities and double taxation treaty (DTA) between Malaysia and the relevant countries.

# Risks Involved in Employing Cross-border Workers



**Raymond Low**  
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## Data Privacy and security

- Cross border transfer of data prohibited unless consent is obtained.
- Data security – sufficient security standards

## Health & safety

- Employers will need comply with local health and safety laws even for remote workers who are working from home.
- Update your health and safety policy to cover remote working environment.

## Risk of unfair dismissal claims

- Remote employees, irrespective of nationality can still resort to unfair dismissal claims if the foreign entity has a local registered presence





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# Risks Involved in Employing Cross-border Workers



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- Data protection and employment privacy
  - Philippine Data Privacy Laws apply to protect personal data of Philippine citizens.
  - Consent is generally required from the data subject for the processing; reasonable access must also be given to the contents.
- Liability for acts of employees
  - Vicarious liability on employers for the damages caused by employees acting within the scope of their assigned tasks (New Civil Code).
  - Exercise of ordinary diligence to prevent damage by employer.

# Risks Involved in Employing Cross-border Workers



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- Risk of litigation
  - Employees may raise illegal dismissal issues if terminated:
    - without just and/ or authorized causes or
    - non-compliance with due process.
  - Creation of client-contractor relationship to mitigate risk.
- Employer registration and mandatory social security contributions (e.g., Social Security System, Home Development Mutual Fund)
  - Compliance might be an issue if there is no local entity presence in the Philippines and the relationship is one of employer-employee.



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# Risks Involved in Employing Cross-border Workers



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## “Permanent Establishment or PE risk”

Hiring an independent contractor or an employee in Thailand may result in tax exposure for the foreign employer if the contractor or employee is deemed a permanent establishment of the employer. This risk will vary case by case, according to the applicable Double Tax Agreement, and according to the circumstances and activities of the contractor/employee.

## “Termination dispute resolution”

In most circumstances a terminated employee would have a claim to severance pay, and possibly additional damages for unfair dismissal. Rights of a terminated contractor would depend on the contract.

# Risks Involved in Employing Cross-border Workers



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## Data Protection

- Personal Data Protection Act B.E. 2562 (PDPA) in Thailand was enforced in certain chapters since 2019 and will be fully effective on 1 June 2022.
- Employer who collects, use or disclose personal data from data subjects/owners (e.g. employee, suppliers, vendors or entity or individual), is subject to PDPA.
- Consent of data subjects is generally required (there are exceptions), and the data subjects/owners have the right to withdraw consent any time.





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# Crafting & Implementing a Successful Cross-border Remote Worker Policy



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It is imperative to fully understand the local rules where the expatriate will be located to avoid legal and/or practical issues.



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# Crafting & Implementing a Successful Cross-border Remote Worker Policy



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Documentation, especially the crafting of the employment contract for remote workers is key.

Ascertain what type of engagement and then proper documentation to follow

Compliance with local laws as a safety net.



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# Crafting & Implementing a Successful Cross-border Remote Worker Policy



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The remote employer must define what it requires of the remote workers to determine if the activity can be documented via a contractor relationship. If an employment relationship is needed for the operation (e.g. where control over the means and methods of doing the work is important) then it is recommended that a local entity employer should be set up or engaged with to provide the appropriate vehicle for the activity.





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# Crafting & Implementing a Successful Cross-border Remote Worker Policy



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Understanding the local laws and regulations together with understanding the needs of the employer's business are the Keys.

# Questions?



# Thank You!

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*Moderator*



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