

## Human Rights Due Diligence in Malaysia's Manufacturing Sector



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# Executive Summary

This report provides an analysis of the conditions experienced by migrant workers employed in the Malaysian manufacturing sector. This research has been carried out in response to a number of reports in recent years that highlight the considerable risks faced by lower skilled foreign migrants in Malaysia, including revelations of forced labour in the rubber and electronics manufacturing sectors. These reports have had a significant international impact, leading to a US Customs and Border Protection Agency order in 2019 that requires companies to prove they can prevent and remediate forced labour in specific suppliers' rubber gloves manufacturing facilities.

This report therefore provides an overview of the operating context along with the risks experienced by migrant workers in the sector against the ETI Base Code labour standards, including an overview of the legal context and risks in practice. It also outlines actual and potential risks against the "Protect, Respect, Remedy" Framework. The findings are based on a review of applicable legislation and policy in Malaysia, desk research on reported risks, and interviews with key civil society, trade union, and international stakeholders based in Malaysia.

The report is aimed at companies that source, or are considering sourcing, manufactured products from Malaysia, and is designed to support human rights due diligence in supply chains and responsible business practices. This includes an overview of what company responsibilities are when it comes to respecting human rights in line with the UN Guiding Principles on Business and Human Rights (UNGPs).

Malaysia has one of the world's most open economies, with an export market that constitutes 73% of GDP and employs roughly 40% of the country's workforce. Manufacturing constitutes a significant share of this export economy and employs a large number of foreign migrant workers, who make up 25% of the workforce in the manufacturing sector. The total reported number of foreign migrant workers employed in Malaysia varies wildly, from 1.8 to 5.5 million. The uncertainty is due to widespread "irregularity" in the labour market. Either way, foreign workers form a significant share of the total labour force of 15.6 million.

Companies sourcing manufactured products from Malaysia, or any product that requires low skilled work, can face considerable challenges in ensuring their requirements on labour standard are adhered to. This is primarily because of the risks faced by low skilled migrant workers.

A key driver of the risks faced by migrant workers is government policy and regulation. Whilst national labour law provisions are generally consistent with the ETI Base Code (gaps relate to working hours, freedom of association, non-discrimination and living wages), national security and migration policy actually reinforces or exacerbates migrants' vulnerability to exploitative employment practices. This is driven by a narrowing of the scope of what migrants can and cannot do when in Malaysia, making it easier for a migrant to find themselves with an "irregular status" and increasing the means through which migrants may be deported or jailed.

This is significant for many migrants, as they will have accrued debts in order to secure their work in Malaysia, thus will make great efforts to avoid upsetting employers or the government which would result in becoming "irregular" and risk being returned home still in debt with no means of paying back their loans.

The issues faced by migrants are reinforced by the lack of access they have to effective complaints mechanisms. Whilst there are sectoral unions in the manufacturing sector, union membership is generally low amongst migrants, who fear that participating in unions may result in them losing their jobs or being returned home. The Malaysian Trade Union Congress (MTUC) is taking steps to improve support to migrant workers in negotiations and disputes whilst also advocating for improved rights, though this is not widespread across Malaysia. Likewise, the state-led remedy mechanisms through the labour department

and civil and criminal courts are not widely effective or trusted by migrant workers, despite rulings often working in their favour.

### **ETI Base Code**

**The salient labour risks facing migrant workers the sector include forced labour, workplace health and safety, wage payments and long working hours, and irregular work.**

1. **Employment is freely chosen:** Migrants working in conditions of forced labour is a risk in Malaysia, particularly in more informal workplaces. These risks are driven by excessive fees paid by workers in their home countries to secure work, restrictions placed on workers' movement including document retention by their employers or risks of arrest / deportation by Malaysian authorities. There are also issues of compounding labour rights violations including excessive hours, issues with wage payments, and contract substitution.
2. **Freedom of association and the right to collective bargaining are respected:** Migrant workers are permitted to join but not form trade unions in Malaysia. In practice there are numerous allegations of systematic violations of trade union rights across Malaysia alongside practical obstacles that prevent migrants from joining unions.
3. **Working conditions are safe and hygienic:** Health and safety risks are high. There are a number of reported injuries and fatalities in the sector, in addition to cramped and unhygienic living conditions that migrant workers experience.
4. **Child labour shall not be used:** The minimum age of employment in Malaysia is 14, with under 18s not permitted to work in proximity to machinery. Child labour is also not reported to be a risk in the manufacturing sector though is thought to exist in small family-based manufacturing units and other sectors of the economy.
5. **Living wages are paid:** Low and non-payment of wages are a concern for lower skilled migrant workers in the manufacturing sector despite the recent increase of a minimum wage applicable to all workers. The minimum wage is also below some estimated living wage levels.
6. **Working hours are not excessive:** Low pay creates a situation where migrants feel pressured to work excessive hours in order to recoup enough to pay off debts and send money home. This is facilitated by overtime laws which are in excess of the ETI maximum requirement of 60 hours, though there are reports that employers also fail to pay their workers appropriate premiums.
7. **No discrimination is practiced:** There are legal gaps related to workplace discrimination. Migrant workers, especially women, face barriers to employment and are at greater risk of abuse when employed. There is generally a lack of clear information on this issue.
8. **Regular employment is provided:** All lower skilled migrant workers are employed on fixed term contracts. This means that workers are more likely to accept poor conditions to ensure that their contracts are renewed and that they are not sent home. Migrants are also vulnerable to employers going bankrupt or needing to lay off workers for economic reasons.
9. **No harsh or inhumane treatment is allowed:** Widespread mistreatment of migrant workers is reported in Malaysia's manufacturing sector. This includes some reports of verbal and physical abuse. However, there is limited reporting of harsh or inhumane treatment such as harassment or sexual harassment in the sector.

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# 1. Malaysia background

## 1.1 Socio-economic context

Malaysia is a federal constitutional monarchy with a parliamentary system of government selected through multiparty elections, and an appointed prime minister. Officially, the king is the head of state but serves a largely ceremonial role. In the 2018 parliamentary elections resulted in the first transfer of power between coalitions since independence in 1957.

In March 2019, the population stood at 32.66 million people, with an annual population growth of 1.1%. Approximately 75% of Malaysia's population live in urban areas (compared to about 50% in the mid-1980s). Average years of schooling have also increased from below 7 years in the mid-1980s to about 10.5 years in 2010.<sup>1</sup> Since gaining independence in 1957, Malaysia has successfully diversified its economy from a reliance on agriculture and commodities, to one that hosts robust manufacturing and services sectors that have propelled the country into becoming a leading exporter of electrical appliances, electronic parts and components.

## 1.2 Exports

According to the World Bank, Malaysia is one of the most open economies in the world, with a trade to GDP ratio averaging over 130% since 2010. After the Asian financial crisis of 1997-1998, Malaysia's economy has been on an upward trajectory, averaging growth of 5.4% since 2010. It is expected to transition from an upper middle-income economy to a high-income economy by 2024.<sup>2</sup>

Openness to trade and investment have been instrumental in employment creation and income growth, with about 40% of jobs in Malaysia linked to export activities, and exported goods and services constituting about 73% of GDP in 2017 (51% services, 22% goods).<sup>3</sup>

Malaysia's top export destinations and partner shares include Singapore, China, the United States, Japan and Thailand.<sup>4</sup> Since the mid-2000s, trade between the EU and Malaysia has been steadily increasing, with Malaysia enjoying a surplus in trade with the EU in 2017. Malaysia's exports to the EU amounted to EUR 25 billion, while its imports amounted to EUR 14 billion.<sup>5</sup>

## 1.3 Labour market

Malaysia's labour force is estimated to number 15.6 million in April 2019 with a participation rate of 68.5%<sup>6</sup>. This has been increasing in recent years with a rise in the number of women participating in the labour force - though this is still relatively low overall, at just 55.7% in early 2019<sup>7</sup>.

The Malaysian labour market is characterised by low and stable unemployment rates. When coupled with high educational attainment among nationals and labour shortages across a number of agricultural construction and manufacturing industries, this makes the Malaysian economy heavily reliant on migrant workers to perform low-skilled jobs.

As a result, roughly one quarter of the workers in the Malaysian manufacturing sector are estimated to be foreign migrants. Within manufacturing, the shares of migrant workers are relatively higher in furniture and

wood-work related occupations; textiles; and plastic and rubber products. In the electronics sector, roughly 20/30% of the workforce is estimated to be foreign, of which two-thirds are female.<sup>8</sup>

**Informal sector**

Although the Malaysian economy is largely formalised, there are estimated to be roughly 1.36 million people employed in the informal sector in 2017, making up 9.4 % of total employment in Malaysia.<sup>9</sup> Data from 2017 shows that 10.6% of the people employed in non-agricultural sectors were employed informally and that male workers and urban workers are more likely to be employed informally than women and rural workers.

As a total of informal employment in Malaysia, the services sector (62%) has the greatest share, followed by construction (20%) and manufacturing (17%). Unlike services and construction which decreased, the share of manufacturing as a total of informal work increased from 15.9 % in 2015.<sup>10</sup>

**Foreign workers**

Malaysia has a long history of labour migration, which increased in scale during the years of British colonial rule, and the arrival of mainly male migrants from south eastern China, southern India and modern-day Indonesia. These workers were largely indentured (at least initially), employed as labourers in mining and plantation agriculture, which Malays were either excluded from working in or refused to work under the conditions being offered.<sup>11</sup>

Following independence in 1957, the government sought to limit immigration to skilled migrants only, but by 1970, increasing industrialisation and urbanisation led to shortages of workers in plantation and construction sectors, increasing pressure to bring in low wage migrants from abroad. Employers initially recruited workers independently until the government signed labour accords with Bangladesh, the Philippines and Thailand, and dramatic increases in migrant workers were seen after the government encouraged the private recruitment industry to manage overseas recruitment.<sup>12</sup>

Table 1: Numbers from the Malaysia Ministry of Human Resources. As noted, figures are disputed and may not account for significant numbers of undocumented workers

Country	Est of migrant workers
Indonesia	705,154
Nepal	382,651
Bangladesh	268,050
India	113,891
Myanmar	107,555
Pakistan	56,719
Philippines	54,402
Viet Nam	23,902
China	21,265
Thailand	15,515

Malaysia has a dual work permit system to manage foreign labour which divides labour by skill level. This study focuses on low-skilled foreign workers. Estimates on the number of foreign workers range from around 1.8 million to 5.5 million. Official figures from the Ministry of Home Affairs are at the lower end, though figures from other departments can be marginally higher<sup>13</sup>. These numbers do not account for irregular foreign workers in Malaysia, whose numbers are estimated to take the total foreign worker population up to anywhere between 3 and 5.5 million,<sup>14</sup> meaning they account for a significant proportion of the country’s labour force.

There are also a considerable number of stateless children believed to live in Malaysia as their undocumented parents cannot risk registering them out of fear of being arrested and deported by the immigration authorities (the children are deemed to be at serious risk of being subjected to forced labour or other abuses).<sup>15</sup>

Today, Malaysia remains an attractive destination for migrant workers in the region and there is high demand for non-citizen workers to help fill in the vacancies in the lower-skilled occupations. The demand for migrant workers varies by sector and state, and to ease the process of bringing workers into the country Malaysia has signed non-binding Memoranda of Understanding (MoU) on the recruitment and employment of migrant workers with eight countries: Bangladesh, Cambodia, China, India, Indonesia, Pakistan, Philippines, Sri Lanka, Thailand and Viet Nam.<sup>16</sup>

The precarity of these workers' situation in Malaysia has been highlighted in recent years by numerous reports of low skilled migrants being subject to exploitative working conditions in Malaysia. This includes reports of forced labour in the electronics<sup>17</sup> and rubber<sup>18</sup> manufacturing sectors and child labour in the palm oil sector.<sup>19</sup>

## 2. International obligations

Through its ratification of human rights treaties, Malaysia has international obligations under UN and ILO Conventions to protect worker's rights and respect human rights. In addition, Malaysia's trade relationships and treaties also bring obligations to ensure the implementation of human rights and labour conventions, as well as those related to monitoring and reporting.

### 2.1 International human rights conventions

Malaysia has ratified 18 ILO Conventions, including 6 of the 8 Fundamental Conventions. Of the 18 ratified, one Fundamental Convention on the Abolition of Forced Labour (no.105) was denounced in 1990 and is not in force. The other two Fundamental Conventions not ratified are Convention 087 on Freedom of Association and 111 on Discrimination in Employment.

Malaysia has also not ratified those conventions that are most relevant to migrant workers. This includes the Migration for Employment Convention (no.97), the Migrant Workers (Supplementary Provisions) Convention (no.143), and the Private Employment Agencies Convention (no.181).

Malaysia has only ratified or acceded to three of the eight core international human rights conventions, as well as two optional protocols. The ratified core conventions include Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD). Malaysia has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) which is directly relevant to migrant workers.

Finally, Malaysia is not a signatory to the 1951 UN Refugee Convention which enshrines the right to work, meaning that refugees and asylum seekers essentially have the status of irregular migrants in Malaysia unless they have some other legal status.

### 2.2 International trade agreements

With Malaysia's reliance on international trade, the country has adopted very liberal trade policies, placing emphasis on joining regional and bilateral trade agreements. It was a founding member of the World Trade Organization (WTO), and has since established seven bilateral Free Trade Agreements (FTAs) with the

following countries: Australia, Chile, India, Japan, New Zealand, Pakistan, and Turkey. None impose any labour or human rights standards. Negotiations for an FTA with the EU have been underway since 2010.

Since the United States' formal withdrawal from the Trans-Pacific Partnership (TPP) in 2017, the remaining TPP countries formed the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) and signed the agreement on 8 March 2018. However, the new Malaysian government has stated its intent to scrutinise the agreement, including potentially reopening negotiations. Nonetheless, Malaysia may undergo a major reform of many of its labour laws if the CPTPP remains unchanged, amending the laws to conform to the high labour standards as set out in the ILO's Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998).<sup>20</sup> It is expected that Malaysian workers would then be granted the right to collective bargaining and the right to strike.<sup>21</sup> Nonetheless, these current requirements would not address key drivers of migrant workers' vulnerability in Malaysia.

## **2.3 Regional trade agreements**

The Association of Southeast Asian Nations (ASEAN) collectively represents a market with a GDP of more than USD 2.2 trillion and a population of 620 million. Across this market Malaysia has regional FTAs with China, Japan, Korea and India, Australia, and New Zealand.<sup>22</sup> Malaysia also supported the establishment of the ASEAN Free Trade Area (AFTA), a trade bloc aiming to support the competitive edge of local manufacturing in ASEAN countries, attract more Foreign Direct Investments (FDI), and increase its production base globally. Notably, these agreements do not impose any labour or human rights standards.

# **3. National labour framework and human rights due diligence**

## **3.1 Overview**

The UN Guiding Principles on Business and Human Rights (UNGPs) set out the standards of practice expected of all states and businesses in relation to respect for human rights. They put into operation the "Protect, Respect and Remedy" Framework, which consists of the following three pillars:

- A state's duty to protect human rights
- Corporate responsibility to respect human rights
- The need for greater access to remedy for victims of business-related abuse.

These pillars are operationalised by ETI's Human Rights Due Diligence Framework which serves as a guide to implementing the UNGPs. As shown below, there are significant deficits in the Malaysian State's protection of migrant workers' rights in Malaysia and as such there are considerable risks of ETI members not meeting their responsibility to respect the rights of migrant workers without putting in place appropriate due diligence measures.



#### Box 1: Company responsibility to respect human rights

Conducting human rights due diligence asks that companies take steps to both identify and act upon actual and potential human rights risks that may arise in their operations and supply chains. Human rights due diligence itself is a process of:

- 1) Assessing actual and potential human rights risks
- 2) Mitigation of risk and remediation for workers impacted by human rights violations
- 3) Identification of corporate leverage and responsibility, decision making, and actions needed
- 4) Monitoring, review, reporting and continuous improvement

Where actual negative impacts occur companies, should take steps to understand what has caused this to arise and where they have caused or contributed to the negative impact, to provide effective remedy. Whilst international buyers are less likely to directly cause labour issues in Malaysian factories, they may contribute to them if they fail to undertake adequate due diligence, if their purchasing practices undermine supplier capacity to meet ETI Base Code standards, if no leverage is applied on supplier factories, or if there is no avenue for workers to access effective remedy.

Where the company is only linked to the impact, they should take steps to increase leverage to address the issue. To do this effectively, and to address systemic issues such as those faced by migrant workers in Malaysia, it is important to engage and collaborate with other stakeholders in the public and private sectors, and with rightsholders and their representatives.

The section below provides an overview of some of the key deficits in the “Protect, Respect and Remedy” Framework which are important to consider when considering how to carry out human rights due diligence when sourcing manufactured goods from Malaysia.

### 3.2 Protect

To understand risks faced by migrant workers in Malaysia it is essential to review the state’s duty to protect the rights of migrant workers. Thus it is important to examine the protections afforded under labour legislation and the restrictions put in place under migration policy.

#### **Labour protections afforded to migrant workers in Malaysia**

Ministry of Human Resources (MOHR) is the government body responsible for enforcing the country’s labour laws, including the employment of local and foreign workers.

There are a range of legal instruments that regulate the recruitment and employment of migrant workers in Malaysia. The primary piece of labour legislation is the Employment Act, 1955, which clearly sets out the legal minimums for all workers in Malaysia, including equal labour protections for migrant and Malaysian workers. This is supplemented by the Workmen’s Compensation Act 1952; the Children and Young Persons (Employment) Act 1966; the Factories and Machinery Act 1967; the Employees’ Social Security Act 1969; the Workers’ Minimum Standards of Housing and Amenities Act 1990; the Occupational Health and Safety Act 1994; and the National Wages Consultative Council Act 2011.

Employers are also bound to comply with the Passports Act, 1966 which prohibits employers from withholding worker passports.

#### **Gaps in labour legislation**

Malaysia’s labour laws are generally consistent with the ETI Base Code requirements though there are some notable gaps and enforcement issues. Whilst freedom of association and collective bargaining is

provided for under national law, migrant workers face obstacles in participating in union activities. This includes a prohibition on foreign nationals forming unions or becoming elected representatives and it is reported that the government seldom acted against employers that discriminated against workers for engaging in union activities.<sup>23</sup>

Malaysian labour law also permits working hours considerably in excess of ETI's 60-hour limit. This is a challenging issue for suppliers in the manufacturing sector. On the one hand international buyers restrict permitted working hours to 60 hours per week, whilst on the other there is anecdotal evidence that migrants are keen to work the legally permitted overtime (104 hours per month at a premium rate).

The newly increased national minimum wage of RM 1,200 that applies to all migrants in Malaysia is below the living wage estimates for Malaysia. Though the wage is set by a tripartite council it is deemed by the MTUC to be uncompetitive, and that it is in fact deterring migrants from coming to Malaysia in search of work. This has potential consequences for a labour market that is struggling to bring in workers. It may also explain workers' willingness to work overtime hours.

Women migrant workers face a greater risk of discrimination in recruitment and employment, particularly in relation to pregnancy, as it is prohibited for low skilled migrants to be pregnant whilst employed in Malaysia. This increases their vulnerability to becoming irregular in fear of deportation.

The Department of Labour within the MOHR enforces wage, working conditions, and occupational safety and health standards. However, labour enforcement officers were responsible for enforcing labour law at hundreds of thousands of businesses and in private residences that employ domestic help. In 2016, there were a reported 315 labour inspectors in Malaysia<sup>24</sup>, which according to the US Department of State is insufficient to enforce compliance across all sectors.<sup>25</sup> Department of Labour officials reported they sought to conduct labour inspections as frequently as possible and CSOs note that they are making improvements in how they inspect and address labour issues. Nevertheless, many businesses could operate for years without an inspection.

### **Migration policy undermines labour protections**

The UN Special Rapporteur on extreme poverty and human rights has recently described the abuses experienced by migrants in Malaysia as a "scandal", adding that enforcement of labour protections is "woefully inadequate" while also acknowledging that migration policies in Malaysia increases migrant vulnerability to abuses and exploitation.<sup>26</sup>

Migrant workers' status and security are reportedly undermined by government migration policy, specifically through the implementation of the Immigration Act, 1959/63.<sup>27</sup> The Ministry of Home Affairs (MOHA) are responsible for enforcing this. The priority of this Act is to secure the country's borders and maintain public order, an indication that labour migration policy is framed as a public safety rather than a labour administration issue.<sup>28</sup>

This should be viewed in a context where the Malaysian government wants to reduce the number of lower skilled migrants in Malaysia in order to encourage economic restructuring away from low skilled manufacturing work. They have sought to reduce dependency on migrant workers through a variety of strategies, including making it less attractive to employ migrants (e.g. charging employers a levy for their employment, introducing quotas), making the recruitment process more complicated (can take up to 3 months to recruit manufacturing workers with many administrative hurdles<sup>29</sup>) and promoting employment of Malaysian nationals (e.g. raising the retirement age and increasing the number of women entering paid employment).<sup>30</sup>

These measures help contribute to migrant workers’ vulnerability in Malaysia by increasing the likelihood of workers ending up as “irregular”. Importantly, a migrant worker’s status in Malaysia is tied to their employer and if a worker becomes “irregular” they lose the protections afforded to them under labour laws and risk being deported or imprisoned by the Malaysian authorities. This creates a significant power imbalance in the employment relationship, whereby migrant workers are likely to accept poor working conditions and less likely to raise complaints for fear of losing their work permit and employment status.

Box 2: Drivers of “irregular” status

The International Organization for Migration (IOM) defines irregular migration as “movement that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination”.<sup>31</sup> In Malaysia, Section 8 of the Immigration Act defines a number of categories whereby non-citizens can be “prohibited immigrants”.<sup>32</sup>

As demonstrated below, there are a number of pathways through which a foreign migrant worker can become irregular.<sup>33</sup>

Anyone that is deemed to fall into this category will either be denied entry into Malaysia, be subject to immediate removal, imprisoned for up to five years or fined up to MYR 10,000 (£1,950). This may happen to a worker if:

- They cannot show they’re employed or have a means of supporting themselves
- They’re entering or have entered Malaysia unlawfully
- They are not in possession of valid documents or their documents are forged
- Their permit has been cancelled
- They refuse to be medically examined / are found to have a contagious or infectious disease
- They have been convicted of a criminal offence.

For workers in the above categories that remain in Malaysia, they become irregular migrants. There are a number of drivers that lead foreign migrant workers to becoming “irregular”.<sup>34</sup>

Pathway	Drivers of irregular status
Admissions	<ul style="list-style-type: none"> <li>• Agencies apply for permits in the plantation sector (due to cheaper levy) then place worker in manufacturing sector where there is demand</li> <li>• Workers that fail medical tests rarely go home as they seek to recover up front migration costs that they have incurred.</li> <li>• ASEAN citizens enjoy visa free travel to Malaysia which increases risk of irregular status if they then start working.</li> <li>• Refugees and asylum seekers are de facto integrated into the foreign worker population in Malaysia, but their legal status is confused, and they’re often seen as illegal immigrants, and cannot work if they cannot pay for passes that permit them to work.</li> </ul>
Employment	<ul style="list-style-type: none"> <li>• Employers may only hire a defined number of migrant workers according to government quotas. When quotas are exhausted, they turn to irregular workers. This is made more likely by labour shortages across the manufacturing sector.</li> <li>• Employers knowingly hire irregular workers to reduce their costs for complex and lengthy recruitment process.</li> <li>• There is weak enforcement and oversight of employer practices.</li> <li>• Employers exploit and mistreat workers leaving them with no option to runaway</li> <li>• Outsourcing practices allow employers to turn a blind eye on the status of foreign workers</li> </ul>

Exit	<ul style="list-style-type: none"> <li>Female migrants become pregnant and choose irregular status over deportation</li> </ul>
Exit	<ul style="list-style-type: none"> <li>There is a low financial incentive in returning home.</li> <li>Weak coordination between government agencies means family members who come to Malaysia on tourist visas often stay.</li> <li>There is anecdotal evidence of corruption in governance of this issue</li> </ul>

Box 3: Immigration requirements on employing migrant workers

**Employers may only hire workers who are nationals of a country that is permitted to work in their sector**, which are classified as agriculture, construction, manufacturing, plantation, services. This means that only foreign workers from the following countries are permitted to work in the manufacturing sector: Cambodia, Indonesia (women only), Kazakhstan, Laos, Myanmar, Nepal, Pakistan, Philippines (men only), Sri Lanka, Thailand, Turkmenistan, Uzbekistan and Vietnam.<sup>35</sup>

**Low skilled foreign workers require a Visit Pass (Temporary Employment) (known as a “VP(TE)”) if they wish to work in Malaysia.** This grants worker temporary permission to reside and work in Malaysia, until their contract expires or is terminated. This is controlled by the Ministry of Home Affairs, who control annual inflows of workers through an employer-specific quota mechanism coupled with the foreign worker levy system. Conditions of a VP(TE) include:

- Workers are aged between 18-45 at time of application
- VP(TE) are renewed every year, subject to medical checks by the Foreign Workers Medical Examination Monitoring Agency (FOMEMA)
- The maximum stay in Malaysia is 10 years, dependents cannot accompany the worker to Malaysia, and workers must leave Malaysia after the end of their contract
- Workers on a VP(TE) cannot change employer, even within the same sector or industry

**There are set fees associated with the employment of foreign workers**, which must be paid to the Immigration Department. As illustrated below, for a single foreign worker, an employer in the manufacturing sector must pay at minimum MYR3,045 (£595) before visa costs. Employers in the services sector should pay more, while those in plantation and agriculture pay less.

Sector	Levy (Peninsular)	Levy (Sabah / Sarawak)	VP(TE)	Process	Visa
Manufacturing	MYR 1,850	MYR 1,010	MYR 60	MYR 125	Based on nationality
Construction	MYR 1,850	MYR 1,010	MYR 60	MYR 125	
Plantation	MYR 640	MYR 590	MYR 60	MYR 125	
Agriculture	MYR 640	MYR 410	MYR 60	MYR 125	
Services	MYR 1,850	MYR 1,490	MYR 60	MYR 125	

### 3.3 Respect

The UNGPs recognise that businesses can be involved in adverse human rights impacts in different ways; i.e. a business can have an adverse human rights impact indirectly through any of its business relationships. Under UNGP 13, a company has a responsibility to prevent or mitigate adverse human rights impacts that are directly linked to their products, operations, or services through their business relationship. Companies that have suppliers in Malaysia, therefore, have a responsibility to mitigate and prevent risks of labour rights violations even if they do not cause or contribute to them directly.

Companies that are sourcing manufactured products from Malaysia face considerable challenges in managing and mitigating risks faced by migrant workers in the sector. Complex international recruitment supply chains, a hostile political and regulatory environment and weak enforcement of labour laws all contribute to heightened precarity of migrant workers' living and working conditions in Malaysia. These issues are common across all sectors in Malaysia, though risks vary according to the employer, the formality of the workplace and the location of work.

To understand how to mitigate risks it is important to consider how migrant worker vulnerabilities are created and exacerbated across their entire employment lifecycle, from recruitment, through employment to termination.

#### **Recruitment practices create vulnerabilities**

Employers in Malaysia struggle to recruit local workers to do low skilled jobs and are therefore highly reliant on foreign migrant workers. To recruit these workers, employers utilise the services of private recruitment agencies or labour contractors who use their contacts in foreign countries to bring in the necessary labour. It is common for employers to have very little oversight of these agency or subcontractor practices, including whether they have charged workers fees to secure work and come to Malaysia. Whilst workers should not be charged fees to secure work it is reportedly common practice for processing costs to be passed on to the worker including in relation to medical tests, work permits, transport to Malaysia, sectoral Levy fees.<sup>36</sup>

To pay for these costs, and additional other costs for the services of labour brokers and other intermediaries in their home countries, workers typically take out loans, often from informal loan sharks with high interest rates, getting themselves into debt before they have even started working in Malaysia. Three separate investigations into the treatment of migrant workers in the manufacturing sector in Malaysia by Transparentem, DanWatch and the Guardian found that some workers had paid in excess of RM 18,000 to come to work in Malaysia. Given that the minimum wage is RM 1,100 this debt would take roughly a year and a half to pay off before the worker starts making any money. Experts noted that Bangladeshi migrants working in Malaysia were likely to have paid the highest fees due to practices of agencies in Bangladesh.<sup>37</sup>

#### **Employment practices increase precarity**

When migrants start their jobs, it is reportedly common practice for the employer to take their passports (see section on [Employment is Freely Chosen](#) for more information). Whilst this is illegal under Malaysian law it is common for employers to state that it is to ensure it is kept safe and not damaged or lost. Regardless of why this happen, it means workers are less likely to leave their employers, even if they are treated badly, because without their documentation they could be arrested and deported. This is a risk worth taking as the alternative is going home without money to pay off the debt they have accrued. This gives rise to a number of issues, namely that migrants are more likely to accept work in hazardous conditions, to live in inadequate accommodation, and to not complain about their employer.

Additionally, given this dynamic, there are reports of workers being underpaid for the work they do meaning that they are more susceptible to working excessive hours to earn overtime premiums or earn enough money to send to families back home.

### **Termination**

There are reports of employers in the manufacturing sector dismissing workers collectively and not paying them their due wages or benefits. This can also lead workers stranded in Malaysia, without a formal work permit which can place them in a situation where their status is irregular. This again opens them up to risks of deportation or arrest.

## **3.4 Remedy**

A key principle of the UNGPs is the duty of States and companies to provide individuals with access to effective remedy if their rights have been negatively impacted. It is therefore important to understand what judicial and non-judicial mechanisms are in place for migrant workers in Malaysia, alongside what routes are available to workers at a workplace level, and how effective these are.

Generally, there is little trust or faith in state remedy mechanisms among migrant workers, compounded by the barriers put in place by government migration policy. Whilst trade unions try to support migrants with grievances, they have limited coverage of the manufacturing sector and limited capacity to deal with specific needs of migrants. Civil society, faith-based groups and embassies also try to support migrants acting as intermediaries to provide remedy, but again their resources are limited.

### **State remedy**

For migrants seeking to raise complaints about their working conditions, there are a number of potential Government-led avenues through which they may do so<sup>38</sup>:

- the Department of Labour (remedies in scope related to wage and termination benefits, compensation for workplace injury or death, and employer prosecutions for violations of labour standards)
- the Department of Industrial Relations (remedy through conciliation after an unfair dismissal)
- tribunals at the Industrial Court (deciding claims for reinstatement, non-compliance with collective bargaining agreement terms, and trade disputes), and
- judicial remedies through civil, criminal (claims for breach of contract, personal injury, wrongful detention, or prosecution of criminal defendants), and
- high courts (appeals from courts and the Department of Labour, and judicial review of government decisions).

Across the generally available remedy mechanisms available to migrant workers, it is noted that workers can receive remedy if they have strong claims and sufficient evidence. However, based on the lack of formal complaints raised to these mechanisms it is clear that migrants do not see them as an effective route to remedy.

A common worker complaint to the Department of Labour relates to unpaid wages and overtime. Roughly 50% of such cases which are brought to the Labour Departments are handled through negotiation at early stages of proceedings, and around 20% of filed complaints proceed to hearings. Of these, 85% of Department of Labour decisions reportedly favour migrant workers' claims, though according to MOHR data

almost 40% of cases brought by migrant workers to the Department of Labour are withdrawn before decisions are made, likely because the worker is unable to stay in the country.<sup>39</sup>

Remedy options related to more serious issues, such as human trafficking, are less well managed. The ATIPSOM Act offers trafficking victims remedy, in the form of convicting perpetrators and certain rehabilitation support such as medical care. However, at the end of the case a migrant worker raising a claim will be deported, and there is a perceived lack of actual remedy available to migrants under this.<sup>40</sup>

The Department of Labour has reportedly made efforts to improve the accessibility of their complaints processes to low skilled migrant workers and a number of civil society groups note that there are genuine efforts by some in the Department to improve the process.<sup>41</sup> Complaints can be submitted free of charge, in person, by email or letter or by calling the Department's hotline. Labour inspections are also a key tool in the Department of Labour's efforts to support workers raising complaints. Complainants may be assisted by a trade union or employer's representative.

Nonetheless, there is low awareness among migrants of how to raise complaints and the systems set up to receive complaints do not cater to all languages spoken by foreign workers.<sup>42</sup>

A critical barrier to raising complaints in Malaysia is the legal requirement that workers may not continue working for their employer whilst pursuing a case against them. This means that for a migrant to pursue an employer they may lose their work permit as there are no anti-retaliation measures in the Employment Act. This means they may end up becoming irregular unless they are able to obtain a Special Pass (costing RM 100 per month) for three months whilst their cases are ongoing.<sup>43</sup> Additionally, migrants would not be earning money and would rely on goodwill of friends or civil society groups for food and accommodation.

To try and help overcome these difficulties workers are reportedly encouraged by civil society groups that are aiding them to make official complaints towards the end of their employment.<sup>44</sup> In addition to the above, it is reported that few migrants feel comfortable raising a complaint both because the process is not necessarily clear and they lack confidence in the system.<sup>45</sup> This lack of trust is likely reinforced by the lack of transparency and data from the Department of Labour on complaints they have received and processes in place to resolve them.

### **Non-state remedy**

Trade unions play a central role in providing workers with access to remedy for workplace related issues. However, the level of trade union activity in the manufacturing sector is reportedly low, with even lower participation among migrant workers.<sup>46</sup> Key barriers to active participation in independent trade unions in Malaysia include legal obstacles on migrants forming unions and becoming elected representatives, and fear of having contracts terminated, overtime hours being reduced or other negative consequences for participating in union activities. There are also deficits in language skills amongst unions looking to support foreign workers.

To improve this situation, the Malaysian Trade Union Congress (MTUC) has established three Migrant Resource Centres (MRC) as a means through which migrants can raise complaints and receive remedy. These are located in Penang, Kuala Lumpur and Johor. MRCs provide case management support, including conflict resolution, documentation, case monitoring and analysis. This can involve making appropriate referrals to government departments or state services such as hospitals and can involve facilitation of safe repatriation. Additionally, MRCs also provide representative support in industrial disputes and labour claims.<sup>47</sup> Between September 2011 and December 2014, the MTUC was successful in winning awards of

over USD 65,300 in compensation for migrant workers and are now working in partnership with the Vietnam General Confederation of Labour (VCGL) and the General Federation of Nepalese Trade Unions (GEFONT) to strengthen end to end support for migrant workers.<sup>48</sup> They are typically involved in wage dispute resolution though can also provide support with other claims, and there is also one MRC that provides women and children with shelter whilst negotiating with employers.<sup>49</sup>

Other avenues for workers raising complaints include civil society organisations, faith-based groups and migrant workers' embassies. Their primary role is to act as an intermediary for workers to reach a settlement with employers. However, many of these groups lack the capacity and resource to provide complaining workers with adequate support throughout the complaints process.

Regarding the role of embassies, some countries have a specific labour attaché to provide support and advice to its citizens that are working in Malaysia. Rather than providing remedy itself, labour attachés support workers negotiate with employers or help find lawyers to represent workers. According to the Malaysian Bar Council<sup>50</sup>, embassies describe being overwhelmed by the number of migrant workers seeking assistance. For example, the Indonesian Embassy has one of the most active labour attaches in Malaysia, yet it only has 3 people employed to deal with around 4,000 cases per year.

Many other embassies lack any capacity or training on the Malaysian labour system, and thus there is a heavy reliance on Malaysian NGOs to provide support in helping migrant workers access any form of remedy. Some migrant workers also allege that their labour attaches take advantage of their vulnerability to extort money from the worker in order to secure support.<sup>51</sup>

## 4. Application of the ETI Base Code in Malaysia

### 4.1 Employment is freely chosen

#### Summary – High risk

**Forced labour is explicitly prohibited under Malaysian law. The Malaysia Federal Constitution (Art. 6) prohibits all forms of forced labour, punishable with up to one-year imprisonment and/or a fine for employers (Penal Code art. 374).**

**However, there are a number of high profile reports of forced migrant labour in the Malaysian manufacturing sector. Risks are driven by excessive fees paid by workers in their home countries to secure work, restrictions placed on workers' movement including document retention by their employers or risks of arrest / deportation by Malaysian authorities, and compounding labour rights violations including excessive hours, issues with wage payments, and contract substitution.**

#### **Forced labour is a significant risk in Malaysia's manufacturing sector**

There have been numerous studies and exposes in recent years that highlight the risks of forced labour in the Malaysian manufacturing sector. From reports in late 2018 of migrants being subjected to conditions of forced labour and debt bondage in medical rubber glove factories connected to international supply chains,<sup>52 53</sup> through to widespread issues related to migrant forced labour in the electronics sector<sup>54</sup>, it is clear that lower skilled migrant workers in Malaysia face significant risks when working in Malaysia.



In addition to these well publicised issues in the electronics and rubber manufacturing industry, forced labour or related practices are reported in the manufacturing of furniture and garments and also in plantation agriculture (including palm oil), fishing, construction, restaurants and domestic households, among both adults and children.

The drivers of forced labour amongst migrant workers are complex, though they exhibit similarities across all sectors. Risks are reportedly heightened in more informal settings.<sup>55</sup> It is useful to view forced labour as a result of a combination of factors, including the practices of actors involved in the recruitment process, government policy and employer practices in Malaysia.

### **Recruitment practices contribute to risks**

It is common for migrant workers in Malaysia to have paid significant fees to secure their work. An ILO and IOM report found that the costs of migrating to Malaysia (US\$1,082 on average) from other South East Asian countries is more than four times higher than the costs of migrating to Thailand.<sup>56</sup>

For almost three quarters of these migrants, paying for the cost of recruitment required borrowing money, which resulted in migrants going to Malaysia being indebted before leaving their countries of origin.<sup>57</sup> According to the NGO North South Initiative (NSI), Bangladeshi workers are the most vulnerable of the non-citizen workers in Malaysia. They pay the highest recruitment fees and are often heavily indebted when they arrive to the country. They are legally only permitted to work in plantation work, via a government to government agreement, but are also reportedly employed informally in the construction sector.<sup>58</sup>

High debt is linked to forced labour as it makes workers more vulnerable to exploitative and abusive conditions in work. This is because migrants become dependent on the job in order to repay debts and are thus less likely to walk away from their situation of work, leaving them vulnerable to exploitation from employers.<sup>59 60 61 62</sup>

It is common for migrants to be promised high wages and better working and living conditions by local recruitment agents in their countries of origin, only to arrive at the destination to find sub-standard conditions with little or no options for improvement.

Migrants typically incur excessive debts to a complex system of actors in both the countries of origin and destination. These debts are sometimes impossible to pay off and effectively tie migrants into situations of debt bondage.<sup>63 64</sup> The actors included in the recruitment chain include informal and formal recruiters, third-party employment agencies, sub-contractors and sub-suppliers, governmental institutions and others, all of whom are collecting fees from migrant workers along the migration pathway.

Fraudulent practices in relation to medical examinations and tests have also been found to increase the costs of migration significantly for Nepali workers going to Malaysia.

Critics of the former Malaysian government often characterised the entire foreign worker recruitment system as corrupt or broken.<sup>65 66</sup>

An investigation by non-profit Transparenem found serious labour abuses at five apparel factories in Malaysia, where hundreds of migrant workers had paid illegal recruitment fees, ranging from RM 3,109 up to RM 18,182 (GBP 596 - 3,489), sometimes exceeding one year's salary. Four of the factories investigated also commonly retained workers' passports and other documents, practices akin to forced labour.<sup>67</sup>

A recent DanWatch study revealed that electronics workers in Malaysia may end up paying more than RM 18,397 (GBP 3,531) to get employed in the country, with a 'syndicate' of recruitment agents profiting from this business resulting in high amounts of corruption and money being paid under the table for services to migrant workers.<sup>68</sup>

The Guardian found cases where sub-contracted Bangladeshi workers at an electronics factory had paid up to Rm 18,232 (GBP 3,500) – more than three times annual per capita income in Bangladesh.<sup>69</sup>

Thompson Reuters led an investigation into working conditions of migrant workers in the rubber manufacturing sector that revealed migrants working long hours to pay off huge debts that they had accrued during their recruitment.<sup>70</sup>

### Risks related to employer practices

The issues faced by migrant workers are well known within the private sector and by the government. Indeed, in each of the last three years, forced labour has been ranked as the number one issue for Malaysian businesses according to a survey of its members by the Responsible Business Alliance (RBA).<sup>71</sup>

Nevertheless, employer practices that have been found to contribute to the risks of forced labour. These include restrictions on freedom of movement and passport retention, violation of contracts or contract substitution, and wage fraud or theft and illegal wage deductions. These are all issues which are reported to be widespread and which are typically more acute further down supply chains in Malaysia. <sup>72 73 74 75 76 77 78 79 80 81</sup>

There are also recent reports that suggest migrant workers are being traded between employers in the retail sector and among SMEs, in clear violations of Malaysian labour laws and international conventions. According to these reports, migrants are sent to work for different employers when they arrive in Malaysia which effectively turns them into illegal or irregular workers, as their work permits are only valid for the specified employer. Reportedly, workers are then sometimes passed between different manufacturing companies for a fee, which is deducted from workers' wages.<sup>82</sup>

In a study conducted by ILO in 2017, 94% of assisted complaints lodged by migrant workers in Malaysia involved multiple severe and compounding labour rights violations, such as withholding of identification documents (77% of cases), inability to take leave from work (74%), excessive work hours (70%), and contract substitution (64%).<sup>83</sup>

ILO CEACR expressed deep concerns about the persistence of reports that migrant workers are experiencing severe labour rights violations and abusive working conditions that amount to forced labour, including passport retention by employers, wage arrears, long working hours and forced contract extensions. It urged the government to strengthen measures to ensure that migrant workers are fully protected from abusive practices.<sup>84</sup>

### Risks arising from government practices

Government migration policy and enforcement practices are also viewed as a key driver of forced labour risks in so far as they exacerbate migrant workers' vulnerabilities to exploitation. Despite forced labour being criminalised and prohibited in Malaysia, it is reported that the five government agencies which have enforcement powers under the law do not actively search for indications of forced labour.<sup>85</sup>

The number of government agencies involved also leads to an inconsistency in policy which undermines protections for migrants. Whilst migrant workers are afforded rights under labour legislation, laws on security devised by the MOHA, specifically through the implementation of the Immigration Act, 1959/63, trump and undermine labour protections. The key issue is that migrant labour is viewed as a public safety issue rather than a labour administration issue.<sup>86</sup>

Lack of labour inspectors is a problem. According to the NGOs North South Initiative (NSI) and Migrant Care, manufacturing workers in remote areas are more vulnerable as their factories are in rural areas where NGOs and labour inspectors have less presence.

However, it should be noted that in 2019 the Malaysian authorities decided to set up a tripartite cooperation group between government, employers and workers representatives and committed to develop a National Action Plan on Business and Human Rights in order to find solutions to end modern slavery and forced labour.<sup>87 88</sup>

## 4.2 Freedom of association and the right to collective bargaining are respected

### Summary – Medium risk

The Federal Constitution of Malaysia, the Employment Act, Trade Union Act and Industrial Relations Act all allow for freedom of association, although it can be limited on the grounds of maintaining security and public order.<sup>89</sup> Discrimination on the grounds of trade union membership is prohibited when hiring, employing and dismissing workers (IRA, Art. 5).

Whilst, migrant workers are permitted to join unions and to bargain collectively with employers they may not form a union or become elected representatives without special permission. In practice there are numerous allegations of systematic violations of trade union rights across Malaysia alongside practical obstacles to joining unions.

### There are legal obstacles to migrant workers' participation in trade union activities

Legislation provides workers with protections related to freedom of association, collective bargaining and industrial action, but observers consider there to be significant restrictions which prevent workers from effectively exercising these rights.

Limitations to freedom of association may be made on the grounds of maintaining security and public order.<sup>90</sup> Specifically the Constitutions, Industrial Relations Act and Trade Union Act impose restrictions including:

- The right of Parliament to restrict any association in the interests of national security and public order and pertaining to labour laws (Constitution)
- Prohibition of employees and trade union representatives persuading employees to join a trade union without the prior consent of the employer during working hours at the place of business, (IRA Art 7).
- Workers can only become a member of a trade union in the industry in which they are employed, prohibiting the formation of national-level unions (TUA and IRA). As such, the law contravenes international guidelines by restricting unions to representing workers in a single or similar trade.<sup>91</sup>
- The Director General of Trade Unions may refuse to register an additional trade union if there is already an existing one in an enterprise, trade or industry. Registration may also be refused if the

Director General believes that the union will be used for unlawful purposes or not comply with Trade Unions Act (TUA, Art. 12)

- Trade unions which have their registration refused, withdrawn or cancelled, are deemed to be illegal organisations (TUA, Art. 19).

The government is reported to often impose strict preconditions on, or simply refuses to register unions deemed particularly unfriendly towards the government.<sup>92</sup> As a result, unions in Malaysia are weak and fragmented with only a 6-10 percent unionisation rate in the country, and unions are widely seen as unable to support workers comprehensively.<sup>93 94</sup>

Migrant workers are permitted to join but not form unions and are prevented from becoming elected representatives.<sup>95</sup> Additionally, as migrant workers are usually employed on short term, two-year contracts, joining unions and potentially challenging employers is not a priority as they fear termination or not having their contract renewed. This issue is not specific to the manufacturing sector and reflects risks faced by migrants in all job types.

#### **Union advocacy and support for migrants**

Whilst data on the number of migrant workers that have joined unions is generally lacking, there are some unions which claim to have migrant worker members. These include TEUPM (furniture manufacturing union with roughly 75% of members as foreign workers), AMESU (timber union), and NUPW (plantation union with more than 70% of members as foreign workers).<sup>96</sup> Whilst the percentage of migrant members in some unions may be explained by the large numbers of migrants in these industries, the overall level of union activity is still low. The MTUC has also helped workers organise in specific workplaces, including the organisation of migrant workers in Penang to join the Electronics Union.<sup>97</sup> The MTUC also advocates for improved implementation of labour law along with proposed changes, to address existing gaps.<sup>98</sup>

In practice, migrant workers have less access to trade unions through which they can raise complaints about their treatment across the manufacturing sector, and are therefore more reliant instead on workplace grievance mechanisms or support from civil society groups.

#### **Employer attitudes towards trade unions**

Employer attitudes are regarded as a problem in some instances. The International Trade Union Confederation's states that anti-union discrimination and 'systematic violations of rights' are common in Malaysia<sup>99</sup> and union leaders express frustration that workers are often hindered from participating in union activities by their employers.<sup>100</sup> BWI report that it is not uncommon for workers' overtime to be cut for participating in trade union activities.<sup>101</sup>

#### **Collective bargaining and industrial action can be restricted**

Collective bargaining rights are also limited by law, particularly in designated high-priority industries.<sup>102</sup> In collective bargaining agreements, there are important restrictions related to promotion, transfer, dismissal and reinstatement of employees, or assignment or allocation of duties (IRA, Art. 13).

There are also specific requirements on the right to strike related to member consent and notice to the Director General of Trade Unions (TUL, Art 25a).

In order to strike, trade unions must gain consent (through secret ballot) by two-thirds of concerned members and strikes can only be conducted at least seven days after the ballot is submitted to the Director General of Trade Unions (TUL, Art 25a). When disputes have been referred to or are under deliberation of an industrial court or minister-appointed Board of Inquiry, strikes are not allowed (IRA, Art. 44). Additionally,

a strike is illegal if it breaks prohibitions in IRA Art. 44 or contravenes any other written law (IRA, Art. 45), and workers engaging in illegal strike action may be liable to up to one year's imprisonment and a fine of up to RM1000 (IRA, Art. 46).

### 4.3 Working conditions are safe and hygienic

#### Summary – High risk

Occupational Safety and Health (OSH) is regulated through several laws and acts, including the Occupational Safety and Health Act (1994), and the Factories and Machineries Act (1967). Additionally, the Employment Act (1955) and the Labor Ordinance Acts (2005) also includes provisions pertaining to OSH.

Despite legal protections in place, OSH issues are reportedly widespread among workplaces that employ migrant workers, including those in the manufacturing sector. This includes reports of migrant deaths.<sup>103</sup>

Migrant workers in the manufacturing sector also reportedly often live in overcrowded, unhygienic and unsafe accommodation provided to them by their agencies or employers.

#### Data on workplace safety is unreliable – but there are risks

According to the Department of Occupational Health and Safety in Malaysia 5,031 occupational accidents were investigated, which included 260 deaths and 234 permanent disability cases in 2018. Johor Province recorded significantly more occupational accidents than any other province, accounting for 41 deaths and 39 disability cases. Nationwide, 62 deaths were recorded in the manufacturing sector, and 26 in agriculture, forestry and fisheries.<sup>104</sup> However, these figures rely on employer reporting so are likely to only account for documented workers.

A 2016 study on deaths of Nepalis abroad reinforces the risks faced by migrant workers in Malaysia. It found that 1,562 Nepali migrant workers died in Malaysia from 'all causes' between the financial years of 2008/2009 and 2014/2015, which amounts to approximately four workers per week (2016).<sup>105</sup>

#### Conditions are more precarious in remote locations

Reportedly, industries located more remotely such as furniture factories see worse occupational safety and health conditions and more negative impacts than other industries. According to one NGO, remote factories are largely unregulated, with workers experiencing long hours of work in dangerous settings without provision of appropriate Personal Protective Equipment (PPE).<sup>106</sup> In the rubber manufacturing industry, there have been reported cases of high inside temperatures of up to 70C for workers in close proximity to factory ovens and other heat producing equipment.<sup>107</sup>

It is reported that some migrant workers are afraid to challenge their employers, and are forced to work even when they are unwell or not fit to do so.<sup>108</sup>

#### Inadequate accommodation is a risk

Inadequate accommodation is a risk issue in Malaysia, and there are several reports that migrant workers are often forced to live in unhygienic and overcrowded housing provided by employers. For example, migrant workers at a condom manufacturing factory were found to be living in cramped and undignified conditions, housed up to 12 in a room in damp and unhygienic dormitories.<sup>109</sup> Fire safety breaches were

also identified in the accommodation blocks of workers in another rubber manufacturing factory.<sup>110</sup> In another case, 3,000 workers were allegedly housed in a hostel built for a maximum of 1,800 workers.<sup>111</sup>

#### 4.4 Child labour shall not be used

##### Summary – Low risk

Workers under the age of 14 may only perform “light work” in family undertakings, and there is a specific requirement that no young person (under 18) may work operating or in proximity to any machinery.

Child labour is not reported to be a risk in the manufacturing sector though is thought to exist in small family based manufacturing units and other parts of the economy.

In Malaysia, the minimum age for full-time employment is 14, and children under 14 may only perform light work in family undertakings (however there is no minimum age for light work) (Children and Young Persons Act, Art. 2). Light work must only be performed if it is suitable to their capacity and should be limited to 6 hours per day for children under 14, and 7 hours per day for children aged 14-16 (Children and Young Persons Employment Act, Art 2, 5, 6).

Additionally, the Factory and Machinery Act states that no young person shall carry out work involving the operation of, or in proximity to, any machinery (Art 28). Children and young people (defined as children aged 14-15) are prohibited from any employment underground (CYPEA, Art 2).

Reports of child labour in Malaysia are typically confined to the agricultural sector. The 2016 US Department of State’s List of Products produced by child labour indicated that children were commonly used for the production of palm oil in rural areas.<sup>112</sup> In urban settings, indications by ILO CEACR points to some instances of children working in restaurants, shops and small manufacturing units owned by family members.<sup>113</sup> Overall however, child labour is not deemed to be a high-risk or widespread issue in the Malaysian manufacturing industry.

#### 4.5 Living wages are paid

##### Summary – High risk

The national minimum wage in Malaysia was raised in January 2019 to RM1,100 (GBP 216).<sup>114</sup> This is applicable to all workers whether local or foreign migrants (with the exception of domestic workers).<sup>115</sup>

However, this is significantly lower than the living wage estimate set by the Central Bank of Malaysia at RM2,700 for individual workers in Kuala Lumpur.<sup>116</sup>

Migrant workers in the manufacturing sector face significant risks of under- or non-payment of wages.

##### Minimum wage is below living wage estimates

The government makes decisions about minimum wage levels following a recommendation from the National Consultative Council, a tripartite advisory body which includes technical experts. According to the Central Bank of Malaysia’s (Bank Negara) estimates, however, the minimum wage increase in January 2019 to RM 1,100 (GBP 211.09) per month is significantly below their estimated living wage for a worker working and living in Kuala Lumpur which they set at RM 2,700 (GBP 518.12) per month. The study

concluded that up to 27% of households in Kuala Lumpur were still earning below their definition of a living wage.<sup>117</sup>

It is important to note that the living wage calculation made by Bank Negara differs significantly from calculations made by other estimates such as Wage Indicator, which sets the living wage for a single adult in Malaysia at RM 1,200 (GBP 230.28) per month.<sup>118</sup>

Regardless of the chosen estimate, the MTUC note that the current wage level may be contributing to increased hesitation among ASEAN migrant workers on the viability of going to Malaysia to find work.<sup>119</sup>

#### **Non-payment and delayed wage payments are an issue**

Employers incur fines of up to RM 10,000 for each employee who is not paid correctly (National Wages Consultative Council Act, Art 43), with the penalties increasing for repeated offences (Art. 46 & 47). Additionally, the employer may be ordered by the court to repay the difference between the basic wages paid to employees and the minimum wage (NWCCA, Art 44).

Nevertheless, non-payment or under payment of migrant workers' wages remains a severe concern in Malaysia.<sup>120</sup> According to experts in Malaysia, the main problem lies further down supply chains rather than in factories of large multinationals.<sup>121</sup>

Migrant workers without access to their passport are reportedly vulnerable to receiving lower wages than promised with unexpected wage deductions.<sup>122</sup> These reports are confirmed by stakeholders in Malaysia who note that minimum wage payments are often not adhered to by employers in relation to migrant workers,<sup>123</sup> with widespread reports of under- or non-wage payments in the electronics sector.<sup>124</sup> An ILO and IOM report in 2017 found that the average migrant in Malaysia is paid below the minimum wage despite working for long hours (ten hours per day) nearly every day (6.2 days per week on average). This includes cases where migrant workers were forced to work excessive overtime just in order to receive their stipulated basic wages.<sup>125</sup>

Workers' wages are reportedly deducted to cover a range of costs, including new work permits, food, and accommodation.<sup>126</sup> Whilst this is permitted by Malaysian law, it must be with the consent of the employee and with permission from the Director General of Labour (Employment Act, Art 2). In some instances, these costs are reported to exceed the workers' actual wages during weeks when the factory does not offer fulltime work and overtime hours. This resulted in workers having to pay the factory money from their savings at the end of the month.<sup>127</sup>

## **4.6 Working hours are not excessive**

### **Summary – High risk**

**Legal limits on working hours exceed the 60 hour limit set in the ETI Base Code with up to 104 hours of overtime permitted each month, on top of the normal 48 hour working week.**

**There are a number of reports of excessive hours being worked by migrant workers in the manufacturing sector, alongside workers not being paid the legally mandated overtime premiums.**

### **Legal limits exceed ETI requirements**

Normal working hours include 8 hours per day with a maximum of 48 hours per week (Employment Act, Art. 60a). The Employment (Limitation of Overtime Work) Regulations Act (1980) also allows for up to 104

hours of overtime in any month (Sec. 60a (4) (a)), which is equivalent to approximately 23 hours of overtime per week.

This takes the legal maximum over the ETI's requirement of a maximum of 60 hours per week. Additionally, the Director General of Labour may grant permission to employers to enter into contracts with employees specifying longer working hours than those above (EA Art 60a). On top of this, employers may also require employees to work for longer hours in special circumstances including for example if there has been an accident, an unforeseen interruption, urgent work needed to be done, and work of which the performance is necessary to the life of the community (EA Art 60a). All overtime pay is to be paid at 150% of the basic rate with double pay for work on a rest day, usually Sunday (EA, Art. 60a).

Every employee is entitled to one rest day per week (EA Art 59), and paid annual leave consisting of: 8 days for every 12 months of continuous service if employed for less than two years; 12 days for every 12 months of continuous service if employed for between 2 and 5 years; 16 days for every 12 months of continuous service if employed for more than 5 years; a number of days calculated on completed months of service if employed for under 12 months (EA Art 60E). In addition, employees are entitled to 11 paid days of annual public holiday (EA 60D).

### **Excessive overtime is a risk**

Migrant workers, particularly those without access to their passports, are reportedly vulnerable to excessive hours.<sup>128</sup> Conversely, overtime hours are also often sought for among workers who need to repay debts owed to recruitment agents in their countries of origin.<sup>129</sup>

Excessive working hours for Indonesian migrant workers has been documented and is particularly problematic in the manufacturing sector with 76% of migrant workers working between 8-12 hours per day and 5.9% working 12-16 hours per day in the relevant study.<sup>130</sup>

Nepalese and Indonesian workers in the electronics sector reported being forced to work up to 14 hours per day and in some cases up to a year without a day off under the threat of violence.<sup>131</sup> Similar reports have been found in the Malaysian rubber gloves manufacturing sector in 2018, with Bangladeshi and Nepalese workers working 90-160 hours of overtime per month, far beyond legal limits.<sup>132 133 134</sup>

In addition, there is evidence of workers not receiving the full overtime premium for working on their allocated rest. These practices may deprive workers of significant sums per year.<sup>135</sup>



## 4.7 No discrimination is practiced

### Summary – Medium risk

National non-discrimination legislation does not cover employment.

Women migrant workers must pass mandatory pregnancy tests, and other forms of discrimination in and outside of employment in Malaysia.

Women migrant workers are reportedly more vulnerable to harassment and abuse by employers and authorities and have little recourse to support if they become pregnant.

There is a general lack of detailed information about the experiences of women migrant workers in the sector.

The Constitution prohibits discrimination against citizens on the grounds of religion, race, descent, place of birth or gender, although the article does not invalidate or prohibit any provision restricting office or employment (Art. 8). Additionally, the ILO CEACR notes that national legislation does not fully reflect the principle of equal remuneration for men and women for work of equal value.<sup>136</sup>

Women, migrants, minority groups, and persons with disabilities are all reportedly discriminated against in Malaysia. The ILO CEACR noted that the gender wage gap is particularly high in certain industries and occupations including agriculture, forestry and fishing, technical activities, and accommodation, food and beverages.<sup>137</sup> NGOs reported continued discrimination against women in the workplace in terms of promotion and salary, and the CEDAW Committee has concluded that Malaysia's Constitution does not sufficiently protect women against discrimination by private employers based on gender. Migrant workers also reportedly faced employment discrimination.<sup>138 139</sup> This includes being denied work in the recruitment process if pregnant or sick or even being deported for these issues if already in work.

### Women migrants face heightened risks

Whilst there are a significant number of female migrant workers in the manufacturing sector (estimated two-thirds of migrants in the electronics sector), there is a lack of detailed information about the specific conditions faced by these workers.

However, some women's groups in Malaysia report that migrant women are at greater risk of exploitation in Malaysian workplaces.<sup>140</sup> Whilst the Malaysian Employment Act provides protections to pregnant women in employment (they are entitled to sixty consecutive days of maternity leave at a normal rate of pay), these protections do not apply to migrant women workers.

Women face overt discrimination in employment through pregnancy tests legally mandated by the Government. At all stages of their recruitment, employment and termination female migrant workers must pass a pregnancy test to receive a work permit<sup>141</sup>. This occurs twice during recruitment and annually during first three years employed. If they fail, they are subjected to immediate deportation. As such there are reports of female migrant workers in Malaysian factories being deported at their own expense by employers upon realising that they have become pregnant.<sup>142</sup>

To avoid this occurring, some may enter informal workplaces where there is even less adherence to labour laws.<sup>143</sup> If pregnant and undocumented in Malaysia, women also have to pay high hospital rates to receive treatment, which even if they can afford often do not use for fear of arrest at hospital without proper documentation.

## 4.8 Regular employment is provided

### Summary – High risk

Employers are required by law to employ lower skilled migrant workers in Malaysia on fixed term contracts, which is seen as contributing to the precarity of migrant workers' employment in Malaysia.

Migrants are also vulnerable to employers going bankrupt or needing to lay off workers for economic reasons.

### Fixed term contracts increase migrant vulnerability

Low skilled migrant workers' contracts are fixed term and tend to be in place for one to three years. These workers are to be given VP(TE) which only permit temporary status.<sup>144</sup> As many hope to extend their stay in Malaysia beyond this period, there is little incentive to raise complaints in fear of being sent home, which would result in an inability to repay loans taken out to secure work in the first place.<sup>145</sup> Typically, when employers are aware that workers will only be there for a shorter period, they also know they can count on them not being able to lodge and process cases against their employers.<sup>146</sup>

### Mass dismissals heighten risks faced by migrant workers

Under Malaysian law, the employer shall not terminate the contracts of a local employee before terminating the contracts of all foreign employees employed in a similar capacity (EA, Art. 60n). This means that migrants are vulnerable to being dismissed by employers who do not provide them with their accumulated wages.

For workers in this situation it is reportedly common to take up informal employment in other sectors leading to an irregular migration status.<sup>147</sup> As a result, it is estimated that there are more undocumented than documented migrant workers in Malaysia, despite many having entered the country through regular means.<sup>148</sup> Typically, the irregular status further compounds known risks and makes migrant workers more susceptible to exploitation by their employers.

In one case reported by DanWatch<sup>149</sup>, an electronics factory made 40 Nepalese workers redundant due to operational changes, and simply stopped paying their wages despite the workers having over one and a half year left on their contract. Workers were told to wait for new jobs at their accommodation but never heard from factory management again. They had to start using their savings and borrow money to pay for food and other essentials and were unable to get out of the situations as the factory had retained their passports since their initial visa applications, and subsequently demanded money to release the workers' documents.

The ITUC documented a case in Johor where 900 migrant workers from Bangladesh, Nepal, and Pakistan lost their jobs without notice when a furniture company was shut down due to insolvency.<sup>150</sup> As the workers' immigration status was tied to their work permit – which did not allow them to transfer to another employer – they were in a difficult and uncertain situation. The Migrant Worker Resource Centre run by the Malaysian Trades Union Congress (MTUC) helped negotiate an amicable layoff settlement for the workers, with an option of either transferring to another employer or repatriating.<sup>151</sup> Negotiations held at the Department of Labour resulted in the employer agreeing to pay each worker one month of wages in compensation for not giving adequate notice in accordance with Malaysian laws, in addition to the two months of wages that had been left unpaid when the factory closed.

Under Malaysian law, employment contracts longer than one month must be in writing (Employment Act, Art. 10). However, the ILO has documented lack of written contracts as a common risk issue for migrant workers who are employed in Malaysia various sectors and provinces for periods of up to three years.<sup>152</sup>

According to Verite and Somo, companies that employ fewer than 50 foreign migrant workers are required to hire them through “contractors for labour”, which removes the employment relationship between the manufacturing facility and the worker.<sup>153</sup> This means there is less visibility of their terms and conditions, and means that migrants in this situation have less bargaining power when engaging with a factory about their working conditions.

#### **Labour contracting creates uncertainty for workers**

There are no specific provisions in the Employment Act regulating the employment of agency workers. However, the Private Employment Agencies Act (1981) regulates the establishment and operation of employment agencies. This has recently started to be implemented and aims to make the cost of business too high for small scale recruiters who now need to pay RM 250,000 to operate as a recruiting agency. The principal employer is, together with contractors and sub-contractors (if applicable), jointly and severally liable for payment of wages to an employee as if they have been immediately employed by the principal. However, the principal, contractor or sub-contractor is not liable to pay the employee for more than three consecutive months of outstanding pay (EA, Art. 33).

The use of outsourcing companies by employers has increased in the last 15 or so years and reportedly includes a large market of unlicensed agencies.<sup>154</sup> The ILO report that labour outsourcing companies (known as “contractors for labour”) are not well regulated by the government and that they are granted licenses in a non-transparent manner. Civil society note groups that their use can shield employers from accountability in ensuring these workers are protected in line with the labour law and reduces migrants’ security of employment, whilst creating ambiguity over who is legally responsible to protect workers.<sup>155</sup>

The labour contractor is responsible to keep a register with information pertaining to each of their employees, and to have them ready for immediate inspection. Not doing so is an offence liable for a fine of up to RM10,000 (EA, Art. 33a).

### **4.9 No harsh or inhumane treatment is allowed**

#### **Summary – Medium risk**

**Widespread mistreatment of migrant workers is reported in Malaysia’s manufacturing sector. This includes some reports of verbal and physical abuse.**

There is little recent reporting or evidence of harassment (including sexual harassment) in the Malaysian manufacturing sector. Nonetheless, there is documented mistreatment of migrant workers during their recruitment or employment in Malaysia. Reported issues include verbal, physical and sexual violence, though domestic workers are considered most at risk of sexual violence.

This may also be a risk in the manufacturing sector where there are significant number of female foreign migrant workers in some of the lowest skilled positions, including workers with an irregular status. According to evidence submitted to the ILO prior to the adoption of the new ILO Convention on Workplace Violence and Harassment, this category of workers are particularly vulnerable to sexual abuse through all

stages of their recruitment and employment journey.<sup>156</sup> These risks are heightened by the lack of effective routes to remedy for migrant worker (see section on Remedy)

Manufacturing workers also reported verbal and other abuse<sup>157</sup> and according to some reports, Bangladeshi workers experience higher rates of racism from their Malaysian employers than migrant workers from other countries.<sup>158</sup>

The Employment Act includes provisions related to sexual harassment, and what steps employers must take if complaints of the same are received (EA, Art. 81a & b). Where a complaint is made directly to the Director General of Labour against an employer who is the sole proprietor, the Director General shall instead follow-up on the case (EA, Art. 81d). In the case of a proven complaint of sexual harassment the complainant may terminate his/her contract without notice and is entitled to wages, termination benefits and indemnity as if notice of termination had been given (EA, Art. 81e). Employers failing to follow procedures on sexual harassment are liable for a fine of up to RM 10,000 (EA, Art. 81f).

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