

## **WHY MC NO. 4 WILL NOT WORK**

by Atty. Henry S. Rojas<sup>1</sup>  
Legal Counsel, CMA

On December 18, 2007, the Philippine Overseas Employment Administration ("POEA") issued Memorandum Circular No. 04, Series of 2007 ("MC 04"), entitled "Guidelines on the Direct Hiring of Filipino Workers". According to MC 04 itself, it was issued pursuant to Article 18 of the Labor Code which states:

"Art. 18. Ban on direct-hiring. – No employer may hire a Filipino worker for overseas employment except through the Boards and entities authorized by the Secretary of Labor. Direct-hiring by members of the diplomatic corps, international organizations and such other employers as may be allowed by the Secretary of Labor is exempted from this provision."

The "Boards" mentioned in Article 18 of the Labor Code refer to Overseas Employment Development Board, the National Seamen Board and the Bureau of Employment Services – precursors of the current POEA.

As a backgrounder, the overseas employment program was institutionalized as a government policy and program in the 1974 Labor Code. The set-up of the program may be simplified as follows:

General Rule: All prospective workers must apply, and be deployed, through private recruitment agencies.

Exceptions:

- (a) government-to-government placement by the POEA; and

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<sup>1</sup> email address: <[henryrojas888@yahoo.com](mailto:henryrojas888@yahoo.com)>; c/o CMA, 72-C Matahimik St., Teachers' Village, Diliman, Quezon City; Telephones: +63 2 920 5003; +63 2 4330684; email: [cma@tri-isys.com](mailto:cma@tri-isys.com)

- (b) name hires – workers who are able to secure foreign employment without the intervention of a private recruitment agency but whose documents are processed by the POEA

Based on the rationale that direct hiring affords no protection to OFWs (no joint and solidary liability between the recruitment agency and the foreign employer, no POEA approved contract containing the required minimum standards; no bond posted by a recruitment agency), direct hiring had been banned under Article 18 of the Labor Code save for a few exceptions – direct-hiring by members of the diplomatic corps, international organizations and such other employers as may be allowed by the Secretary of Labor.

From 1974 up to the present, the number of OFWs grew by leaps and bounds. Annual deployment today is at the 1 million mark whereas it was only 40,000 to 60,000 in the mid-70's. The current stock estimate of OFWs (those presently working abroad) can easily be around 4-5 million. More than half of this figure are direct hires - those OFWs hired by a foreign employer without being deployed by the private sector or by the government.

Once the OFW is deployed abroad, the government loses effective control mechanisms for the protection of OFWs other than the on-site assistance by the Philippine Overseas Labor Offices (“POLOs”), Philippine embassies/consulates and OWWA centers. Once the OFW returns home to the Philippines, he/she can enforce the joint and solidary liability of the recruitment agency and the foreign employer by prosecuting his/her money claims against the recruitment agency that deployed him/her.

The inability of the government to afford any kind of protection is most evident in the case of undocumented workers – this is inherent due to their undocumented status. The second problematic category are the direct hires. Yet, their working conditions vary from country to country. There are places like Hong Kong, Canada and other countries where adequate protection mechanisms are in place for direct hires. Sufficient mechanisms exist in these countries where the OFW may prosecute his/her money claims on-site. There are also countries, especially in the Middle East, where the situation of directly hired household helpers is indeed problematic – they are not afforded sufficient protection under the laws of the host country.

Direct hires are of two (2) categories.

The first category includes those hired directly by members of the diplomatic corps, international organizations and such other employers as allowed by the Secretary of Labor provided that they were hired in accordance with POEA regulations.

The second category is more inclusive – it includes those OFWs who are able to secure employment overseas without the intervention of the POEA or private recruitment agencies. The definition may encompass the following: (a) those OFWs working on-site who are renewing their contract with the same employer yet are no longer covered by the joint and solidary liability of the recruitment agency and the foreign employer; (b) those OFWs with legal status who are transferring to a new employer on-site; and (c) those who traveled abroad on a non-working visa but were able to secure a working visa and a job abroad.

MC 04 introduces the following policy changes:

1. expansion of the exceptions to the ban on direct-hiring

Under MC 04, the following are allowed to recruit via direct-hiring: (a) members of the diplomatic corps and international organizations; (b) immediate members of royal family and family of heads of state/government; (c) Ministers, Deputy Ministers and other senior government officials of the host country; (d) employers residing in countries where foreign placement agencies do not operate; (e) Filipino expatriates and residents with capacity to hire Filipino workers; (f) employers who are hiring on a one time basis; (g) employers who need workers immediately and have submitted an undertaking to tie-up with licensed Philippine agencies for its next recruitment; and (h) others as may be approved by the Secretary of Labor and Employment.

**Ironically, while MC 04 purports to enforce the ban on direct-hiring under Article 18 of the Labor Code, it actually does the opposite – to expand the exceptions to the ban on direct hiring and thus open the gates for direct hiring.**

2. Pre-qualification of the prospective employer by the POLOs/consulate and the POEA subject to the following criteria:

- 2.1 no derogatory track record at the jobsite and in the Philippines;
- 2.2 no involvement of an intermediary in the recruitment process whether in the Philippines or in the jobsite;
- 2.3 submission of all the following documentary requirements:
  - (a) business/commercial registration and/or identification documents;

- (b) sample employment contract for the workers to be directly hired;
- (c) proof of capability to hire Filipino workers under the terms and conditions offered;
- (d) undertaking of the employer relating to the following:
  - (i) no charging of placement fee from the worker;
  - (ii) provision of a performance bond equivalent to the worker's three months salary to guarantee compliance of the employer with the provisions of the employment contract;
  - (iii) provision of a US\$5,000 repatriation bond; and
  - (iv) provision of medical insurance to the worker at par with nationals of the host country.

Had this policy been implemented in 1974 at the start of the overseas employment program, its implementation would have probably met little resistance since it will be part of the ground rules of overseas employment. Now that it is being implemented 34 years later, it is met by stiff resistance by the OFWs notwithstanding its avowed purpose – to protect OFWs.

There are several reasons why MC 04 will not work. These are the following:

**1. Problems on coverage:**

Who are exactly covered by MC 04 (translation: who are allowed to hire workers directly and legally)?

**Members of the diplomatic corps and international organizations.** This exception has been there since 1974. Per POEA clarification, they are exempted from the repatriation and performance bond requirements of MC 04. However, I have yet to see the legal basis of this exception since no amendment of MC 04 has been published yet.

**Immediate members of royal family and family of heads of state/government.** This exception may be justified on the basis of comity. Per POEA clarification, they are also exempted from the repatriation and performance bond requirements of MC 04. In effect, MC 04 practically affords no protection to the OFWs hired by these employers, not even the joint and solidary liability of the recruitment agency.

**Ministers, Deputy Ministers and other senior government officials of the host country.** This exception may also be justified on the basis of comity. But who exactly are the "other senior government officials of the host country"? What is the standard to determine who is a senior government official and who is not? Who will determine this? But since per POEA clarification, they are also exempted from the repatriation and performance bond requirements, then MC 04 also affords no protection to the OFWs hired by these employers. In case of illegal dismissals, can the OFW sue the POEA for money claims?

**Employers residing in countries where foreign placement agencies do not operate.** This category is too vague and can be subject to abuse. What countries exactly are being referred to in this category – MC 04 does not say.

**Filipino expatriates and residents with capacity to hire Filipino workers.** While I agree that this is a plausible exception, I have to point out that this expands the exceptions, rather than enforce, the ban on direct hiring.

**Employers who are hiring on a one time basis.** What does this exactly mean? Should not the government be more strict on employers who are hiring on a one-time basis only compared to those with good track records?

**Employers who need workers immediately and have submitted an undertaking to tie-up with licensed Philippine agencies for its next recruitment.** This also appears to be a plausible exception on the ground of emergency provided it is not abused.

In order to explain MC 04, the POEA released clarificatory information in Q & A format available in the POEA website ([poea.gov.ph](http://poea.gov.ph)) and disseminated through the media. The official clarification from the POEA actually muddled the issue further. **In questions nos. 13 to 15, the POEA said that MC 04 applies to (a) a worker who is rehired by the same employer that is no longer represented by a licensed recruitment agency; (b) a returning worker with undocumented status with the POEA and who requests processing with the POEA as a returning worker to go back to the same employer in order to finish his/her contract; and (c) an OFW who is transferring to a new employer.**

**DUH!**

Where in the world did the POEA base the foregoing statements on the coverage of MC 04? I just enumerated the coverage of MC 04 and the additional coverage – the second type of direct hires as discussed above – **IS ACTUALLY NOT INCLUDED IN THE COVERAGE OF MC 04.**

The POEA Q&A muddled the issue even further when it stated that other employers are not covered by MC 04 provided that the following conditions obtain: (a) the employer's national laws and regulations provide ample protection to foreign workers such as a provision imposing on the employer the obligation to repatriate the foreign worker or his remains in the event of death to his country of origin, or to provide a guarantee for the performance of such obligation; (b) such obligation is stipulated in the employment contract; (c) the employer's national law or rules and regulations provide for relief in the event of non-compliance by the employer of the worker's employment contract; or (d) there is an effective mechanism to enforce the above laws, rules and regulations, and contract.

### **DOUBLE DUH!**

Where in Pedro's sake is the legal basis of the foregoing clarification? – unless the POEA is in the habit of issuing clarifications pending the official publication of new policies.

Even assuming that the POEA is working on amendments to MC 04 as manifested by the POEA clarifications, the additional exemptions to the coverage of MC 04 made it even more difficult to determine the coverage of MC 04. Most recently, the POEA declared that Canada, Italy and Hong Kong are exempted from the coverage of MC 04. Again, what is the legal basis for this declaration? If the exemption can be granted to these 3 countries, why not grant exemptions to other countries as well?

I am now confused. Is the coverage of MC 04 limited to those employers enumerated in MC 04 itself or is the POEA actually targeting the direct hires of the second type which consist more than 50% of OFWs? The POEA has a lot of explaining to do on this matter before all hell breaks loose. Attention POEA, if you are listening.

## **2. Problems on the bond requirements**

Under MC 04, the prospective employer is supposed to secure a performance bond equivalent to the OFW's 3 months salary and a \$5,000 repatriation bond, which according to the POEA Q&A, must be secured by the foreign employer from a Philippine surety company accredited by the Insurance Commission.

The first issue is: Will the foreign employer even bother to comply with MC 04? Or will the foreign employer just opt to hire workers from other countries? Will MC 04 result in large-scale loss of employment of OFWs?

How, pray tell, will a foreign employer secure a performance and repatriation bond from a local surety company if the foreign employer has no local agent to do this for

him/her? Will the POEA facilitate access to local surety companies? Is this the true objective of MC 04? Hmmm . . .

The POEA also said that the foreign employer does not have to put up the entire amount of the bond, and that all that the foreign employer has to pay are the bond premiums. Again, the policy appears to be short in substance.

One question that must be answered is: what local bonding company will be willing to issue a performance and repatriation bond to a foreign employer without a security or collateral for the bond? If all that the foreign employer has to pay is the bond premium, in case an OFW claims on the performance and repatriation bond, how will the local surety collect reimbursement from the foreign employer? In local legal bonds, the practice is that in addition to the payment of the bond premium, the surety company asks for additional collateral in order to secure its bond exposure. Who will provide the collateral? I hope not the poor OFW.

A surety company may be willing to take the risk of loss in case of money claims by the OFW provided that the risk assumed by the surety company is sufficiently covered by the volume of its business. In short, will there be a select few local bonding companies that will be accredited by the POEA to provide the bonds for direct hires?

The other way for this bonding system to work is to establish a reinsurance system whereby the foreign employer secures the bond from a foreign bonding company with local tie-up with a local surety accredited with the Insurance Commission – but this set-up will surely jack up the bond premiums. Is the foreign employer willing to go through all this trouble and shoulder the attendant cost?

### **3. Problems on cost transfer to the OFW**

Under MC 04, it is required that the employer should not collect placement fees from the OFW and should not pass-on the cost of securing the bonds to the OFWs.

The problem with MC 04 is that we have heard this inutile policy declaration before.

Up to now, the government stands on its claim that the OWWA membership fees should be paid by the foreign employer and in no case should be passed on to the OFW. In reality, who pays the OWWA membership fee – of course the OFWs, who else? They can't board the plane without paying the OWWA membership fee.

In the government's "supermaid policy" under the Guidelines on the Deployment of Filipino Household Service Workers, it is declared that no placement fees should be collected from the OFW. Is this happening? Of course not. The OFWs are still required

by the recruitment agencies to pay exorbitant placement fees on the sly, or in the form of salary deductions.

Is the government able to enforce the legal ceiling on placement fees? I need not answer the question.

With this background, it is therefore not surprising for the OFWs to expect that the cost of securing a bond (assuming that the foreign employer is willing to go this far) will just be passed on to the OFW by the foreign employer. Even worse, the OFW might even opt for a formal waiver of "protection" from the Philippine government if only to escape the costs and troubles of MC 04.

With all the foregoing problems, I do not see how the POEA will be able to successfully implement MC 04. This is a classic example of a government policy that was formulated, and is being implemented, without the benefit of adequate consultation with the affected sectors – the OFWs themselves.

When will the POEA/DOLE/government ever learn?