

LEGAL ARTICLE



Many foreign residents in Thailand have long familiar with the work permit law and understood that in order for any non-citizen to work legally in Thailand, a foreigner has to obtain a work permit from the Foreign Workers Administration Office, Department of Employment (“DOE”), Ministry of Labor first. Any foreigner who works without a work permit can get himself in a legal trouble easily with an immigration police officer or a DOE official.

THAILAND’S NEW
WORK PERMIT LAW

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Since March 2018, there have been the new amendments to the work permit law, the Administration of Foreign Workers Emergency Decree, B.E. 2560 (2017) (the “Emergency Decree”). But many in foreign communities have not been well aware of or clearly understood this new development even two years have passed. The piece of legislation that we will talk about is the Administration of Foreign Workers Emergency Decree (No. 2), B.E. 2561 (2018) (the “Emergency Decree No. 2”). The Emergency Decree No. 2 essentially amends the Emergency Decree.

1. New Definition of Work

Let start with the definition of “work”. First of all, the definition of “work” is crucial here because it will determine on whether a foreigner has to obtain the work permit or not, to engage in any particular activity.

The catch-all definition is long gone. But you may want to look up at the new definition of “work” under the Emergency Decree as amended in 2018 by the Emergency Decree No. 2.

Meaning of “Work”

Pre 2018 Law	Amendments under the Emergency Decree No. 2
“work” means <u>the use of physical strength or knowledge for engaging in an occupation or a job with or without an intention to obtain wages or any other benefit</u> , except the work prescribed in the Notification of the Minister (of Labor).	“work” means engaging in any occupation <u>regardless of whether there is an employer or not</u> but shall not include business operation of a licensee under the Foreign Business Act, B.E. 2542 (1999) (the “FBA”).



First, the new definition of “work” means regardless of whether a foreigner uses physical strength/knowledge or not to engage in an occupation, it must be deemed “work” under the new definition. So in this regard, the definition of “work” is expanded a bit.

Second, in order to be deemed “work” under the new definition, a foreigner must do it as an occupation to earn a wage. This is the good news for many foreigners. If any foreigner does any work not as an occupation for no wage (i.e. working as volunteer for the benefit of general public), the foreigner’s activity shall not be deemed the “work” under the Emergency Decree No. 2.

For instance, Mr. Anderson volunteers his time to work as an unpaid interpreter at a local police station. Mr. Anderson’s activity does not fall under the new definition of “work” because he does not receive any wage from this activity regardless of whether he receives something else intangible or not. So he does not need any work permit to do this volunteer work.

The DOE emphasizes on doing as an occupation and must receive the wage for the activity to be deemed the “work” under the new definition. This new definition of “work” will not cover a foreigner who serves on an unpaid basis on any committee of any non-profit organizations like associations/clubs, chambers of commerce, and condominiums so on. Of course, Mr. Anderson may get free coffee/drinks, connections and pleasantries/courtesy from local police officers, but free coffee/drinks, connections and pleasantries/courtesy from the police station are not considered the wage. And getting them does not make Mr. Anderson’s activity work under the new definition and he does not need a work permit. This is a good development that is largely unknown.

Applying the new definition of “work” to a digital nomad who shoots and posts one’s own video in Thailand to generate any income as an occupation (regardless of whether the income is derived from You Tube or any other source) is considered working and must obtain the work permit.

On the other hand, any foreign resident in Thailand who shoots and posts his/her own video on You Tube on his/her free time without deriving any income from You Tube shall not be deemed working under the new definition of “work” and is not required to obtain a work permit. This interpretation remains the same even if that foreign resident happens to get any things so intangible such reputation or connections for other businesses. Insofar as the foreign resident does not do as an occupation to derive the income, his/her activity shall not be considered “work” under the new definition.



2. Nature of Work Permit

Now, the new nature of a work permit.

Prior to the 2018 amendments, everyone knows that the work permit is attached to a company/employer. Once, a foreigner leaves any job, his work permit is canceled outright. But now the work permit is attached to the foreigner. If the foreigner leaves one job at one company to take another job in another company in Thailand, the foreigner is allowed to work at the new company right away under the conditions as follows:

Nature of Work Permit

Pre 2018 Law	Amendments under the Emergency Decree No. 2
A work permit is attached to the company and the job. Once a foreigner leaves one job to take another job at another company in Thailand, his work permit is cancelled and has to be reapplied.	A work is attached to a foreign worker. Once a foreigner leaves one job to take another job at another company in Thailand, he and his new employer have up to 14 days to report in at his new employer/company.

- (i) the foreigner has to notify the DOE within 15 days;
- (ii) the new employer/company has to notify the DOE within 15 days; and
- (iii) the previous employer/company has to notify the DOE within 15 days.

Due to the 2018 amendments under the Emergency Decree No. 2, the nature of the work permit has changed inside out. But many in foreign communities have not been aware of this dramatic change to work permit law.

Prior to March 2018, it was illegal for a foreigner with a work permit to carry out the work of the type, with the employer, in a locality or with any working condition that is different from those prescribed in the work permit, unless the permission was obtained first. The Emergency Decree No. 2 decriminalizes these prohibitions insofar as the work permit holder complies with the notification requirement as explained above.

However, the DOE official has warned that if any work permit holder exceeds the scope of work in the work permit without notifying the DOE, or works with the different employee without notifying the DOE within 15 days as required by Section 64/2, or works in the different location without notifying the DOE, the DOE might consider exercising the power under administrative law to revoke the work permit.

In conclusion, while it is no longer illegal to do so, a foreigner with the work permit still has to notify the DOE of any change to the working conditions whenever any change occurs. To avoid any repercussion from a potential revocation of the work permit, it is highly recommended that the work permit holder and the company reports back to the DOE whenever there is any change to the working conditions

(i.e. type of work, an employer or a locality of work).



Section 64/2 of the Emergency Decree as amended by the Emergency Decree No. 2:

“Any person obtaining the work permit shall have the duties to notify the Registrar in regard to his or her employer, the work place of the employer, characteristics of the work within 15 days as from the date of commencement of working and shall notify each time he or she changes the employer.”

3. More Generous Exemptions to Work Permit Requirement



The Emergency Decree No. 2 has not only offered one more exemption to the work permit requirement outright, but also empowered the Thai Cabinet to grant even more exemptions to the work permit requirement. After the nation returns to democracy from the 2019 election, it is a fact of life that any amendment to any Act(s) of Parliament will take a long time in Thailand.

Therefore, under the Emergency Decree as amended by the Emergency Decree No. 2, the Cabinet is now empowered to make more exemption(s) to the work permit requirement. So gladly the Cabinet has already exercised this power to grant one more exemption to the work permit requirement.

Summary of Generous Exemptions

Pre 2018 Law	Amendments under the Emergency Decree No. 2
<p>1. A foreign Director of a company that holds a foreign business license under the FBA had to obtain a work permit to sign any paper for or act for the company in Thailand. (The foreign Director ended up have to violate the work permit law or sign any paper outside Thailand.)</p>	<p>Under Section 4(8) of the Emergency Decree as amended by the Emergency Decree No. 2, a representative (i.e. Director) of a juristic person that has received a foreign business license under the FBA is exempt from the work permit requirement (as his/her role as Director) and is now free to sign any paper for the company in Thailand.</p> <p>It is noted that this exemption does not apply to any Director of a company that has received a protection under the US Treaty of Amity or any other free trade agreement that Thailand signed with Australia, Japan and other ASEAN countries.</p>
<p>2. The Thai Cabinet was not empowered to make any additional exemption to the work permit requirement.</p>	<p>Under Section 4(6) of the Emergency Decree as amended by the Emergency Decree No. 2, the Cabinet is now empower to make any exemption to the work permit requirement for a foreigner who enters the Kingdom irregularly for the arrangement or attendance of meeting, expression of opinion, lecture or demonstration in a meeting, training, visit or a seminar or performance of arts, culture, sports competition or other activities prescribed by the Cabinet.</p> <p>It is noted that so far the Cabinet has not granted any additional exemption under Section 4(6). ^{See Note*}</p>
<p>3. The Thai Cabinet was not empowered to make any additional exemption to the work permit requirement for any investors.</p>	<p>Under Section 4(7) of the Emergency Decree as amended by the Emergency Decree No. 2, the Cabinet is now empowered to make any exemption to the work permit requirement for a foreigner who enters the Kingdom to operate or invest in business or is a person with high knowledge, high capacities or high skills which will benefit Thailand as prescribed by the Cabinet. Any exemption for the work permit requirement extended beyond the members of diplomatic crops are quite new in Thailand.</p> <p>It is noted that the Cabinet has exercised the power under Section 4(7) to exempt the following persons from the work permit requirement a holder of Smart visa who is:</p> <ul style="list-style-type: none"> (i) a high skilled person; (ii) an investor; (iii) a top level executive; or (iv) startup entrepreneur. <p>This exemption extends to (a.) a lawful spouse of any person in (i), (ii) or (iii); (b.) a lawful spouse of any person in (iv) who has been permitted to stay in the Kingdom for more than six months; and (c.) a lawful child of any person in (i) who is 18 years old.</p>

Note:*

The DOE officials at this time interpret that the Notification Re Activities Not Considered Work under the Foreign Workers Act, B.E. 2551 (2008) issued in March 2015 (the "Notification of DOE") still continues to apply by virtue of the transitional provision of the Emergency Decree.

Under this Notification of DOE, the DOE explicitly clarifies that the following activities are not considered the "work" under the Foreign Workers Act, B.E. 2551 (2008), which was repealed in 2017. This means a foreigner who is engaged in any of these activities is still not required to obtain a work permit from the DOE or to notify the DOE for any work with a short period of time.

1. Attending a meeting or a seminar.
2. Attending a fair, an exhibition or a goods exhibition.
3. Making any visit to observe business or to meet and negotiate a business.
4. Attending special and academic lectures.
5. Attending technical training and seminars.
6. Purchasing goods in a good exhibition.
7. Attending a meeting of a board of director of one's company.

While I disagree with a logic for this interpretation especially by relying on the transitional provision of the Emergency Decree (I believe the Cabinet should exempt these activities under Section 4(6) of the Emergency Decree as amended by the Emergency Decree No. 2 instead of continuing to relying on this Notification of DOE) simply because the definition of "work" under the Foreign Workers Act, B.E. 2551 (2008) is different from the definition of "work" under the Emergency Decree as amended by the Emergency Decree No. 2, until the DOE revokes this Notification of DOE (or changes its interpretation) a foreigner who comes to Thailand for any of these activities still can rely on this Notification of DOE and engages in any of those activities without a need to obtain any work permit as the activities are not considered "work".

I wrote extensively on this Notification of DOE, which can be found in this link:

http://www.naritlaw.com/Resources/News%20Foreign%20Workers%20Act%20interpretation_NARITLAW.pdf.



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