



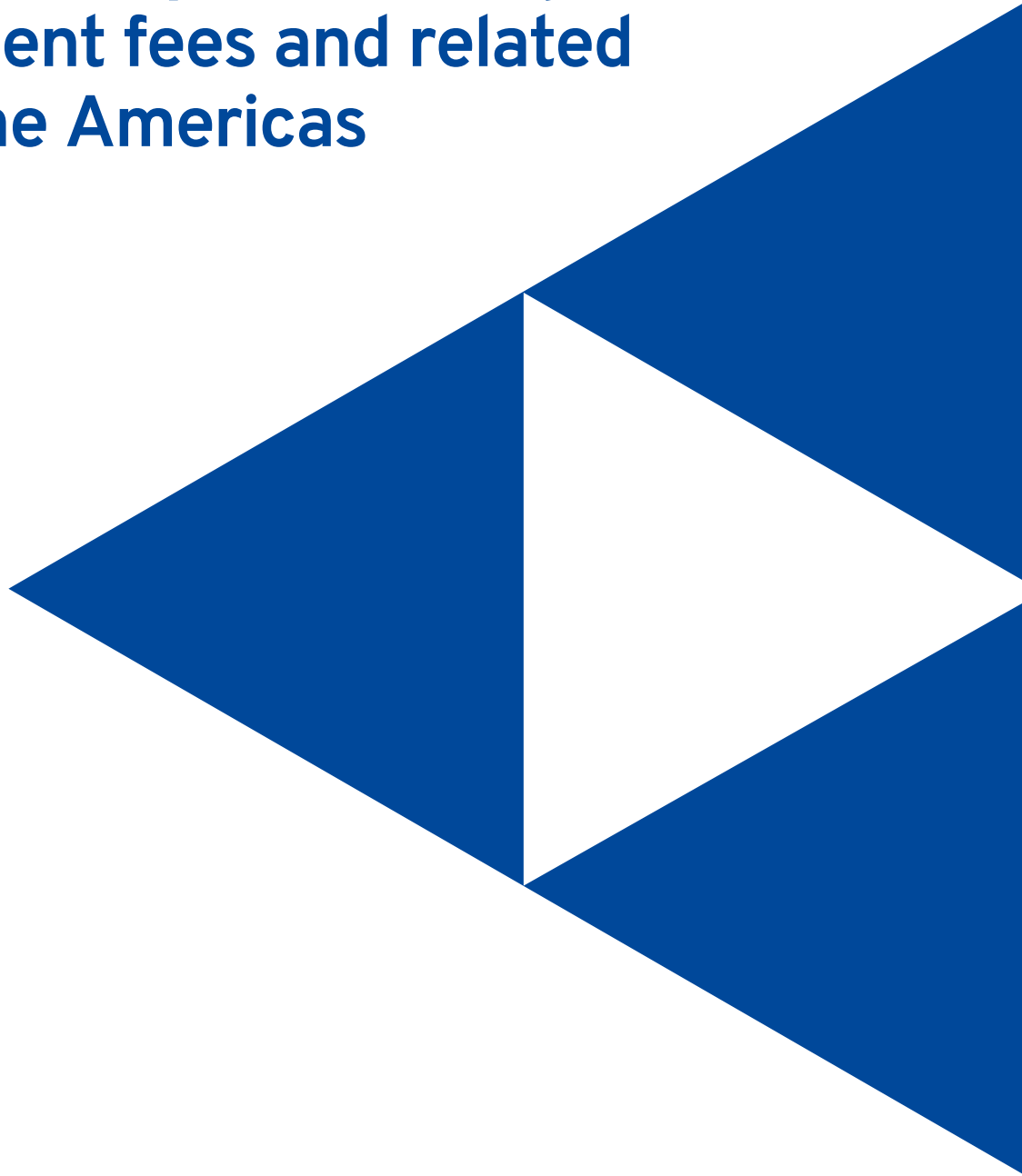
International
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► Regional study on defining recruitment fees and related costs: The Americas



- ▶ **Regional study on defining recruitment fees and related costs: The Americas**



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Regional study on defining recruitment fees and related costs: The Americas

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► Acronyms

BLA	Bilateral Labour Agreement
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CSO	Civil Society Organization
ESDC	Employment and Social Development Canada
FAR	Federal Acquisition Regulation (US)
ILO	International Labour Organization
IRIS	International Recruitment Integrity System (IOM)
IOM	International Organization for Migration
KNOMAD	Global Knowledge Partnership on Migration and Development
MoL	Ministry of Labour
MoU	Memorandum of Understanding
NES	National Employment Services (Mexico)
PEA	Private employment agency
PES	Public employment service
SAWP	Seasonal Agriculture Worker Program
TFW	Temporary Foreign Worker
US	United States



1

Introduction

▶ 1. Introduction

This regional study was developed as part of a global comparative study on the definition of recruitment fees and related costs, which was prepared in 2018 to support discussion at a Tripartite Meeting of Experts on Defining Recruitment Fees and Costs, held in November 2018. The definition was approved by the ILO Governing Body in March 2019. The definition is to be read alongside the General Principles and Operational Guidelines for Fair Recruitment.

This regional, comparative study aims to summarize the situation in the Americas,¹ by identifying regional and national policies and legislation on defining recruitment fees and related costs and regulation of Public Employment Services (PES) and Private Employment Agencies (PEAs). The study also aims to present and discuss the most relevant issues that different stakeholders identified as challenges in agreeing upon a global definition of recruitment fees and related costs.

The International Labour Organization (ILO) has promoted the adoption of international labour standards for migrant workers due to the magnitude of evidence suggesting abusive and fraudulent practices in international labour migration processes. Labour migration, especially the phase during which workers are being recruited, represents a high financial cost for migrants, particularly low skilled migrant workers, due to a lack of recruitment regulations, the need for better monitoring and enforcement mechanisms, and a lack of social dialogue at the national and international level around the issue (ILO, 2014).

The recruitment process implies finding a match between a worker's skills and the employer's job offer. Both workers and employers undertake certain activities and assume certain costs in order to establish an employment relationship, most often through the signing of an employment contract. In practice, workers must have the required experience or qualifications and relevant certifications expected from the employer, fulfil mandated medical criteria, and in some cases, cover the transportation costs involved in attending an interview, tests or specific training required by the employer. Employers identify the experience and knowledge they require from a worker and they perform, directly or with the aid of a third party (either a PES or PEA), the recruitment process. This process includes advertising the vacancy, pre-selection, conducting interviews and tests, selecting the candidate, issuing a contract and enabling access to the social protection system in accordance with national legislation.

It is the responsibility of governments to protect jobseekers and workers – an objective that can be reached through labour laws and legislation and adequate monitoring and enforcement. Within the region, conditions of employment are usually covered in Labour Codes, while the regulation of labour intermediation tends to be covered by national legislation clarifying the operation of the PESs and PEAs.

¹ For the purposes of this study this includes the following countries: Antigua and Barbuda, Argentina, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, United States, Uruguay, the Bolivarian Republic of Venezuela.

The ILO has developed international labour standards as well as guidelines for setting standards on fair recruitment and labour migration, which can guide the development and implementation of national legislation that regulate recruitment processes. The standards and guidelines cover national and migrant workers. The nature of international labour migration is that it cuts across national boundaries and jurisdictions, requiring special measures to be adopted.

In this regard, the ILO has promoted the ratification of the Employment Service Convention, 1948 (No. 88) (C88) and the Private Employment Agencies Convention, 1997 (No. 181) (C181). The two Conventions set the guidelines for providing access to labour intermediation nationally and internationally and highlight the importance of providing these services to workers free of charge. These international standards were complemented by the adoption of the ILO General Principles and Operational Guidelines for Fair Recruitment, in 2016, and Definition of Recruitment Fees and Related Costs in 2018.

► Box 1. The Fair Recruitment Initiative

In 2014 ILO launched the global Fair Recruitment Initiative with the aim to:

- help prevent human trafficking and forced labour;
- protect the rights of workers, including migrant workers, from abusive and fraudulent practices during the recruitment and placement process; and
- reduce the cost of labour migration and enhance development outcomes for migrant workers and their families, as well as for countries of origin and destination.

The initiative is implemented in close collaboration with governments, representative workers' and employers' organizations, the private sector, and other key partners. The Initiative takes a four-pillared approach, which puts social dialogue at the centre:

1. Enhancing global knowledge on national and international recruitment practices
2. Improving laws, policies and enforcement to promote fair recruitment
3. Promoting fair business practices
4. Empowering and protecting workers

Relevant stakeholders involved in labour migration management, including governments, employers' organizations, workers' organizations, civil society organizations (CSOs), human rights organizations and academia have different understandings on how recruitment fees and related costs are defined, what they constitute, and who is responsible for their payment. Nonetheless, all stakeholders agree that the revision of legal frameworks is needed to address loopholes and differences in interpretation, and to reduce or eliminate the costs migrant workers pay to access employment opportunities within their country or abroad.

There are additional aspects to consider around defining recruitment fees and related costs. These considerations include migration dynamics within a country (including the presence of immigration, emigration, internal, and transit migration), labour migration legislation/regulation, the employment situation (for example levels of unemployment or sector-specific labour shortages), employment policies, human trafficking legislation, as well as the divergence or coherence between national laws, regional and international instruments. Lastly, providing a definition on recruitment fees and related costs should acknowledge the different phases of the recruitment process and focus on the actual costs, for employers and workers, in filling a given position.

1.1 Methodology

The study relied on a literature review of national legislation on the regulation of PEAs and PESs and the status of ratification of ILO Private Employment Agencies Convention, 1997 (No. 181) (C181) and Employment Service Convention, 1948 (No. 88) (C88) in the countries of the region. In most cases, the departing point for collecting information on legal instruments was the ILO database of national labour, social security and related human rights legislation (NATLEX). Nonetheless a detailed review was necessary to include the most up to date information on the issue, with a focus on if payment of recruitment fees and related costs by workers is permitted in the law, and if the regulation applies to either or both national and migrant workers. Due to the complexity and dispersion of the national legislation, the document does not include information for every country.

Secondly, five bilateral agreements were analysed to see if and how recruitment fees and related costs are considered. The agreements cover selected migration corridors including Mexico-United States, Costa Rica-Nicaragua, Spain-Colombia, Spain-Dominican Republic, and Spain-Ecuador. The study also analysed how recruitment fees and related costs are defined (or not) in the case of temporary foreign worker programmes from Mexico to the United States and Canada.

The literature review also considered the proposed United States Federal Acquisition Regulation's (FAR) definition of recruitment fees, a definition that applies to workers recruited by entities participating in United States' government contracts. The proposed definition was opened to comments from all stakeholders between 2015 and 2017. For the purposes of this study, the main comments and concerns raised by the different stakeholders were selected for review in order to understand areas of consensus and discrepancy. The final definition was issued in December 2018 with an effective date of January 2019.

After collecting and analysing the information in a comparative framework, interviews with national representatives were carried out based on a questionnaire developed by the global team, which was then adjusted according to the particularities of the region. ILO labour migration specialists in Geneva, Lima and San Jose provided the different relevant country contacts. ILO National Officers in Chile, Guatemala and Mexico provided context information as well as relevant contacts in their respective countries. The interviewees include public officers from Ministries of Labour and Public Employment Services, workers' representatives and member of civil society organizations. Unfortunately, interviews could not be scheduled with employers' representatives. While national and regional representatives were contacted, it was not possible to meet with them.

The interviews served to verify national legislation around the issue, confirm the existence (or not) of a definition of recruitment fees and related costs, as well as detect gaps, challenges, opportunities and measures that could be taken to better understand and regulate the phenomenon. The interviews also served as a means for feedback and guidance on the most relevant aspects of the issue that require further research, such as challenges and opportunities in developing a global definition of recruitment fees and related costs. A comparative table was used to list the differences and similarities between governments', workers' and recruiters' opinions on a global list of possible recruitment fees and related costs. The study concludes with a review of regional perspectives on areas of dissent and consensus with regards to a definition of recruitment fees and related costs.

► Box 2. Legal instruments providing information on national and international recruitment

- Labour law
- National legislation on PES and PEA
- National legislation on international recruitment processes
- Bilateral labour agreements
- Template contracts for temporary worker programmes
- Migration policy in countries of origin and destination



2

**International migration in
the Americas**

▶ 2. International migration in the Americas

This study of international migration in the Americas considered the differences that exist between sub-regions;² the changing dynamics of intraregional migration; and the political response of governments in addressing internal conflicts, regularization of migration and international protection responsibilities. Migration policies and the economic situation in countries of destination, such as the United States, Canada and Spain, is vital to understanding emigration flows from the region. Further factors are return migration dynamics and the management of international migration within regional integration processes.

2.1. Estimated number of migrants and migration dynamics within the region

In 2017, the estimated number of international migrants worldwide reached 258 million people, representing 3.4 per cent of the total population.³ Of this number, 22.4 per cent (57.7 million) were living in the Northern America region and 3.7 per cent (9.5 million) in Latin American and the Caribbean. In terms of regions receiving the most migrants in 2017, Northern America is ranked third (after Asia and Europe), and Latin American and the Caribbean is ranked fifth (after Africa and before Oceania).

Latin America and the Caribbean represent 8.6 per cent of the total population worldwide and migrants from these countries represented, in 2017, 14.6 per cent of the total share of migrants. In the case of Northern America, 4.8 per cent of the global population live in the region and 1.7 per cent of international migrants come from these countries.⁴

The United States is the world's top country of destination – it is the country with the highest number of resident migrants. In 2017, 49.8 million migrants were in the US, an increase from 34.8 million migrants in 2000.⁵ Mexico is a top country of origin – it has the second highest number of emigrants abroad, after India. In 2000 9.6 million Mexican emigrants were living abroad, a number that increased to 13 million in 2017.⁶

Latin American and the Caribbean nationals have a history of emigration towards Northern America. For example, in 2017, 70 per cent of all migrants from Latin America and the Caribbean migrated to the US, Mexico and Canada – while 16 per cent migrated between countries within the Latin American and Caribbean region; 12 per cent to Europe, and 1 per cent to Asia. In 2017, 31 per cent of Northern American nationals migrated towards Latin American and the Caribbean, 28 per cent to countries in

2 There are different approaches to categorizing sub-regions in the Americas: 1. South America, Central America and the Caribbean, and North America. In this categorization Mexico is included in Central America or Northern America. 2. Latin America and the Caribbean, and Northern America, which is usually comprised of the United States and Canada; and 3. South America, Central America, the Caribbean and North America, in this categorization the dynamics of the Caribbean are analysed separately as there are cultural, linguistic and economic differences in relation to Central America.

3 UNDESA (2017) International Migration Report.

4 Ibid.

5 Ibid.

6 IOM (2018) World Migration Report.

the region, 23 per cent to Europe, 11 per cent to Asia, 5 per cent to Oceania, and 1 per cent Africa.⁷ This represents a shift from 2000, when data indicated that 35 per cent of Northern American nationals migrated within the region and 25 per cent migrated towards Latin American and the Caribbean.⁸

Female migrants worldwide represented 48.4 per cent of the total migrant population in 2017. In Northern America they accounted for 51.5 per cent of the total, and in Latin American and the Caribbean they represented 50.4 per cent. The median age among international migrants is 39.2 years old, with 44.7 years old as the average age in Northern America and 35.8 years old in Latin American and the Caribbean.⁹

According to the International Organization for Migration (IOM) in 2015, in Latin America and the Caribbean, the countries with the highest number of emigrants were Mexico, Colombia, Brazil, Cuba, El Salvador, and Peru.¹⁰ The countries with the highest share of emigrants compared to the total population were Guyana, Jamaica, El Salvador, Cuba and the Dominican Republic. The countries with the highest number of immigrants were Argentina, Venezuela (Bolivarian Republic of)¹¹ and Mexico.¹²

2.2. Migration corridors in the Americas

The most significant corridors in the Latin American and the Caribbean region were Mexico, El Salvador and Cuba towards the United States.¹³ The corridor between Colombia and Venezuela (Bolivarian Republic of) was the fourth most significant and the Dominican Republic migration towards the United States was the fifth.

The corridor between Colombia and Venezuela (Bolivarian Republic of) is drastically transforming. Since 2016 more Venezuelans are migrating to Colombia and other countries of the region due to socioeconomic conditions. According to IOM population estimations, in 2015, 86,964 Venezuelans were living in another South American country and by 2019, that number had increased to 2,889,923 people, of which 1,298,300 (almost 45 per cent) lived in Colombia.¹⁴

Other significant migration corridors in the Latin American and Caribbean region identified by the ILO¹⁵ include:

- ▶ Nicaragua, Panama and Central America to Costa Rica
- ▶ Central America, particularly Nicaragua, to Panama
- ▶ Central America, particularly El Salvador, Honduras and Guatemala to Belize
- ▶ Haiti to the Dominican Republic
- ▶ Caribbean countries, particularly Guyana, Jamaica and Grenada to Trinidad and Tobago
- ▶ Haiti and Paraguay to Brazil
- ▶ Bolivia (Plurinational State of), Paraguay, Peru and Ecuador to Argentina
- ▶ Peru and Argentina to Chile

7 UNDESA (2017) International Migration Report.

8 Ibid.

9 Ibid.

10 IOM (2018) World Migration Report.

11 The socioeconomic situation in Venezuela (Bolivarian Republic of) has influenced the emigration of an important percentage of its population. UNDESA data and estimations that come from the last Population Census might not be able to identify in detail the dynamics of migration in the country since 2015. Additional data is being collected, analysed and shared to have a better understanding of the situation in this country.

12 IOM (2018) World Migration Report.

13 Ibid.

14 IOM (2019) Migration trends in the Americas. Bolivarian Republic of Venezuela. May 2019.

15 ILO (2016) La Migración Laboral en América Latina y el Caribe.

► Peru, Ecuador, Bolivia (Plurinational State of) and Colombia to Spain

For the Northern America migration corridors, IOM highlighted the importance of immigration from China, India, the Philippines and Viet Nam to the United States.¹⁶ Migration from Asia to Canada was also very significant, with Asian nationals increasing in the total share of the immigrant population. In 2015, migrants from China, India and the Philippines occupied the top three origin countries.¹⁷

International migration in the region poses various challenges, one of them being access to safe and orderly migration channels. Although steps have been taken by governments to establish and maintain temporary labour migration programmes (see below in section 4) there is still a high percentage of the Latin American and Caribbean population who are in irregular situations.¹⁸ In 2012, the ILO estimated that 78 per cent (8.9 million) of irregular migrants living in the United States came from the Americas region.¹⁹ Estimates from 2014 indicated that the number of irregular migrants was 11.3 million, equivalent to a quarter of the total immigrant population registered in the United States.²⁰

16 IOM (2018) World Migration Report.

17 Ibid.

18 An irregular or undocumented migrant is someone who is not authorized to enter, to stay or to work in the country of destination.

19 ILO (2016) La Migración Laboral en América Latina y el Caribe.

20 Ibid.



3

**National legislation on
public employment ser-
vices, private employment
agencies and recruitment
fees and related costs**

▶ 3. National legislation on public employment services, private employment agencies and recruitment fees and related costs

Governments are responsible for implementing active labour market policies that ensure jobseekers acquire skills that are in demand by employers. The participation of intermediaries in this labour market process, both in the public and private sphere, is the subject of two ILO Conventions: the Employment Services Convention, 1948 (No. 88) (C088) and Private Employment Agencies Convention, 1997 (No. 181) (C181). National laws define the role and responsibilities of the intermediaries and Ministries or Departments of Labour usually supervise their operation. Nonetheless, and due to the increased number of intermediaries and their operations at the local, national, or international level, guaranteeing fair recruitment processes as well as the prohibition of charging recruitment fees and related costs to workers, poses a challenge for governments. This section presents the state of ratification of C088 in the region, including an assessment of national regulation of PEAs; and an assessment of the state of ratification of C181, focusing on how recruitment fees and related costs are defined.

3.1. Public employment services in the Americas

Public employment services (PESs) provide a variety of services for workers and employers including the dissemination of job vacancies and the provision of labour market information. They can implement labour market policies to adjust labour demand and supply, manage unemployment benefits, and govern labour migration.²¹ In their operation, PESs are able to liaise with private institutions to deliver services, considering the specific local context of each region. They are often also responsible for the monitoring and oversight of private recruitment agencies, ensuring that the private sector abides by standards set by the government, including not charging recruitment fees or other related costs to workers.

The Inter-American Development Bank and World Association of Public Employment Services survey,²² applied in 71 countries in 2015, provides an overview of the operations of PESs in the Americas. The study highlighted four main challenges that are shared across countries within the region. Firstly, at the national level, job vacancies are typically not posted or advertised widely; rather information is disseminated through informal networks. This suggests that workers are unaware of

21 IDB, WAPES and OECD (2016) The World of Public Employment Services.

22 Ibid.

the full range of vacancies available in the country and that the government, given this same lack of information, is unable to address skill mismatches. A high rate of informal networks can also increase the vulnerability of workers and the possibility that they are being charged illegal recruitment fees and related costs.

Secondly, PESs in the Americas are young institutions. As such, they are subject to constant and ongoing changes related to national social and political priorities. Legislative and administrative changes and budgetary availability also have an impact on PESs' operations and consequently on workers' perceptions about their effectiveness. To secure their relevance and effectiveness within this context, maintaining clear coordination mechanisms and ensuring that services are provided at no charge to jobseekers is essential.

Thirdly, international migration is one of the activities managed by PESs and services are tailored according to the country's labour migration profile (for example, whether they are an origin or destination country), and the needs of the domestic labour market. The related activities PESs typically provide include information and advice to nationals seeking jobs abroad; assistance to foreign employers looking for migrant workers; assistance to migrant workers already residing in the country of destination; and support to returning migrants. PESs across countries of origin and destination should coordinate to ensure fair recruitment for migrant workers, including when in partnership with private employment agencies or intermediaries. To ensure this, PESs must be provided with clear guidance and regulation, including monitoring mechanisms.

Fourthly, regarding different funding mechanisms for job placement by PESs in the Americas, the study found that ten countries depend on public funding solely, and 11 countries depend on a mix of public and other sources of funding including from non-governmental organizations, donors, customer fees and the private sector.²³ Within this context, it is important to analyse the extent to which it is possible to grant free access to PESs services for workers, particularly in cases where countries have ratified C088.

3.2. State of ratification of the ILO Employment Service Convention, 1948 (No.88) (C088)

C088 provides the framework for countries to create, develop or improve a national institution to oversee the implementation of active labour market policies. According to the Convention, in relation to labour migration and recruitment fees and related costs, PESs are required to facilitate the mobility of workers both within the country and abroad to fill vacancies according to their skills (Article 6); and maintain free access to all their services, including where PESs coordinate activities with PEAs (Articles 1 and 11).

Eighteen countries have ratified C088 in the Americas as presented in table 1, in all cases the Convention has entered into force.

²³ Ibid.

3. National legislation on public employment services, private employment agencies and recruitment fees and related costs

▶ Table 1. Ratification of the ILO Employment Services Convention, 1948 (No. 88) (C088)

Country	Status of ratification	Date of ratification	National legislation/application	Competent authority
Argentina	In force	1956	Law No. 24.013/1991 recommends that the Ministry of Labour coordinates the National Network of Employment Services. Resolution No. 176/2005 creates the Employment Service Unit and Resolution No. 316/2005 regulates its operation.	Ministry of Labour, Employment and Social Security
Bahamas	In force	1976	Bahamas online skills bank; Employment Assistance Services and Public Employment Service Units.	Department of Labour
Belize	In force	1983	The Employment and Enterprise Development Unit is in charge of job placement services.	Ministry of Labour, Local Government and Rural Development. Department of Labour
Bolivia (Plurinational State of)	In force	1977	According to the Ministry of Labour 2013 Regulation, the Employment Directorate implements and coordinates the operation of the Public Employment Service.	Ministry of Labour, Employment and Social Provision
Brazil	In force	1957	Law 7998/1990 Establishment of the Workers' Support Fund Council (CODEFAT). Redesign of active employment policies aiming to integrate a unified public employment system.	Ministry of Labour
Canada	In force	1950	Establishment of the Employment Service of Canada in 1918; Labour Market Development Agencies in 1996; and Canada Job Fund Agreements in 2013.	Ministries/Departments of Labour and/or Advanced Education as defined by each Province
Colombia	In force	1967	Law No. 118 of 1957 creates the National Apprenticeship Service. Decree No. 2852 of 2013 regulates the Public Employment Service.	Ministry of Labour
Costa Rica	In force	1960	Decree 34936 of 200 creates the National System for Employment Intermediation, Orientation and Information.	Ministry of Labour and Social Security
Cuba	In force	1952	Local or sectorial employment services are a recent development; Law 116 of 2014; the Labour Code.	Ministry of Labour and Social Security
Dominican Republic	In force	1953	Establishment of the National Employment Service in 2007.	Ministry of Labour
Ecuador	In force	1975	Socio Employment Network, created in 2010.	Ministry of Labour
El Salvador	In force	1995	National Network of Employment Opportunities, created in 2003.	Ministry of Labour and Social Provision
Guatemala	In force	1952	National Employment Service, created in 2016.	Ministry of Labour and Social Provision
Nicaragua	In force	1981	Establishment of the National Employment Service in 1982-1983.	Ministry of Labour
Panama	In force	1970	National Employment Service; Resolution No. 552/2016 established the Labour intermediation procedures manual.	Ministry of Labour and Workforce Development
Peru	In force	1962	Supreme Decree No. 001-2012-TR, 2012 created the Employment Promotion Unit. República del Perú (2012) Supreme Decree No. 002-2015-TR transformed the Unit into Employment Centres.	Ministry of Labour and Employment Promotion
Suriname	In force	1976	Employment Services Ordinance No. 10 of 1965; Employment Agency Unit, 1970 Ministry of Labour Terms of Reference.	Ministry of Labour, Technological Development and Environment
Venezuela (Bolivarian Republic of)	In force	1964	Creation of the National Employment Institute. Benefit Regime of Employment Law (Official Gazette No. 38.281, 2005), National Assembly of Venezuela (2015).	Ministry of the People's Power for the Social Process of Labour

Source: Compiled by the author based on national legislation

Following the ratification of C088 in each country, the national legislation on PESs varied, both in the form of the legislation and when it was introduced. The normative and operational amendments for setting up the PES typically did not occur immediately and completely after the ratification, and therefore the guidelines for the operation of PESs are found in different pieces of legislation including the labour code, public services and unemployment compensation norms, and the constitutive regulations for the Ministries of Labour.

Some of the countries had initiatives related to labour intermediation even before they ratified C088, while other countries established PESs without having ratified it. Such is the case of Barbados, Chile, Guyana, Honduras, Jamaica, Mexico, Paraguay, Trinidad and Tobago and Uruguay. In the case of Belize, a member State that ratified C088, the government received technical cooperation support (from Jamaica) on the operation of its PES in 2009, a country that has not yet ratified the Convention.²⁴

Although it is expected that access to PESs is free of charge for workers as agreed to in the Convention, not all the national regulations include an explicit statement about this fact. If workers are charged any recruitment fees, the regulations are not clear on the available redress.

This study points to the need for a thorough assessment of related national legislation to identify loopholes and areas of weakness. Furthermore, States must work to ensure that jobseekers, workers and employers are aware of the services provided by PESs, including that workers are not to pay for these services. In addition, coordination with private service providers should be aligned with national legislation.

3.3. National legislation related to private employment agencies

This section provides an overview of national legislation governing private employment agencies and the prohibition or regulation of recruitment fees and related costs to be charged to workers. It also reviews the cases of Colombia, Honduras and Peru, who have adopted legislation specific to international recruitment processes. The specific case study of legislation in Mexico is also explored.

Countries in the Americas use different legal or administrative mechanisms to identify, authorize, regulate and define sanctions for the operation of PEAs in their territories; and differences might apply depending on the existence of national or federal norms. Countries have developed specific regulations for international migration that apply to migrant workers (emigrants or immigrants) and the agencies that offer intermediation services. In section 4 of this study, cases of countries that have agreed on bilateral instruments will be further explained.

PEAs are regulated through different instruments in the region. Usually the National Labour Code includes a section about labour intermediation, the role and activities developed by PES (or related institution), and the requirements for operation and activities that could be performed by PEAs. The specific regulation is enacted through a Law, a Decree, or a Resolution. In general, agencies complete a registration process followed by an evaluation which is usually carried out by the Ministry of Labour. Once the authorization or a license for operation is granted, PEAs are meant to provide regular information about their activities to the public entity who supervises them. In some cases, the license is granted only for a given period (i.e. one or two years) and then needs to be renewed.

Overall, this study finds that it is necessary for national legislation and policies to include a stronger definition of recruitment fees and related costs, so that workers are aware of which services are free of charge and the specialized services that might incur costs. The wide publication of these recruitment fees and related costs, for example, will contribute towards a fairer and more transparent recruitment system.

²⁴ Ministry of Labour, Local Government and Rural Development of Belize (2009) Report on the project on-site visit to the Ministry of Labour and Social Security of Jamaica.

► Table 2. National legislation on private employment agencies: Selected countries in the Americas

Country	National legislation on private employment agencies	Recruitment fee to be paid by worker	National or international recruitment
Antigua and Barbuda	Recruitment of Workers Act (Cap. 372) (No. 41 of 1941)	Charging fees to workers is prohibited. Travel costs, including return (in the case of illness or repatriation) shall be borne by the employer or recruiter.	Applies to workers within and outside the country. The Act does not apply to the recruitment of workers to any country included in the Emigrants Protection Act.
Argentina	Ley 24.648/1996, C096, Part III, Art. 10 (c) Ley 24.648/1996, C096, Part III, Art. 11 (b) Decreto 489/2001, ANEXO I, ARTICULO 10, INCISO C) Decreto 489/2001, Anexo I, Artículo 1, Inciso A) Decreto 489/2001, Anexo I, Artículo 11, Inciso B)	The charging of recruitment fees and/or related costs to the worker is regulated. Private employment agencies, which operate for profit, can charge a worker up to 10% of the first monthly salary. Non-profit agencies can only charge up to 3%. Neither temporary employment agencies nor cooperatives can act as "for-profit agencies" in the sense of the law.	The policy applies to both national and international recruitment of workers.
Bolivia (Plurinational State of)	Decreto No. 1.486, 2013. Ministerial Resolution No. 1321/2018 regulates the registry and functions of PEAs.	Placement services must be covered by the employer. Any commission, payments in money, in kind or other types of payment for the labour intermediation services may not be borne by the worker (Article 18).	The policy applies to both national and international recruitment of workers. The Decree enforces the national Law on trafficking of human beings.
Brazil	Law No. 6.019, 1974. Additional legislation: Laws No. 13.429 and No. 13.467, 2017. Bill 8772/17 aims to explicit prohibit charging of fees to workers.	It is prohibited for the temporary placement agencies to charge the worker any amount, even by way of mediation, and can only operate the deductions set forth by law (Article 18).	The policy applies to both national and international recruitment of workers. Temporary employment agencies cannot recruit migrants with temporary visas.
Canada (provincial legislation) ²⁵	British Columbia. Employment Standards Act, RSBC 1996 Ontario. Employment Standards Act, LO 2000 Manitoba. The Worker Recruitment and Protection Act, C.C.S.M. c. W197 Alberta. Employment Agency Business Licensing Regulation, Alta Reg 189/1999 (EABLR)	Charging fees to workers is prohibited (Articles 10-12). Charging fees to workers is prohibited (Article 74.8(1) and 74.14(1)). Charging fees to workers is prohibited (Articles 11 and 15). Charging fees to workers is prohibited.	The policies apply to both national and international recruitment of workers.

²⁵ Source: Global Worker's Justice Alliance (2016) Recruitment Rules: Countries of Employment: The recruitment of migrants in the Mexico and Central America Region for temporary work in the United States and Canada.

► Table 2. National legislation on private employment agencies: Selected countries in the Americas (continued).

Country	National legislation on private employment agencies	Recruitment fee to be paid by worker	National or international recruitment
Chile	Labour Law, as amended in 2017	Under no circumstances can the temporary placement agencies charge any fees to the worker, either for training or placing them (Article 183-5).	The policy applies to both national and international recruitment of workers.
Colombia	Decree No. 722, 2013	PEAs are allowed to charge the employer a fee for their services once the contract has been signed (Article 38). Workers have free access to basic job placement services (Article 8). Any charge for additional services should be authorized by the MoL.	The policy applies to both national and international recruitment of workers. International recruitment and placement of workers needs to be authorized by the MoL.
Ecuador	Resolution 1481, 2013 (transnational employment agencies). Decree 2166 (RO 442) 2004	Charging fees to workers is prohibited (Article 4). Charging any fee to workers or job seekers is prohibited (Article 22).	Regulates only international recruitment. The policy applies to both national and international recruitment of workers.
El Salvador	Labour Law, Decree 682, 1996	The charging of recruitment fees and/or related costs to the worker is regulated. Placement services will be provided free of charge by the National Employment Directorate. Private employment may charge fees (they operate under the supervision of the government). Hiring Salvadorians for work abroad is allowed and should be authorized by the MoL. Traveling costs to and from the place of employment should be borne by the employer, including repatriation costs if necessary. Repatriation costs must also be borne for Salvadoran seafarers who work on foreign ships (Article 74).	The policy applies to both national and international recruitment of workers. The Labour Code/Law includes a section that establishes conditions for the recruitment of Salvadorians for job positions abroad. The MoL authorizes the recruitment process and grants exit permission for workers who migrate with a contract.
Guatemala	Decree 1441, Labour Code, 1961	The charging of recruitment fees and/or related costs to the worker is regulated. Employment agencies or the employers have to pay the travel and repatriation costs of workers in case of international recruitment and national recruitment, if the workplace is more than 15km away from the worker's home.	The policy applies to both national and international recruitment of workers. For workers with a contract away from their place of residence or abroad, the agency or employer should bear costs related to return travel, migration permits, and family expenses. The agency or recruiter should have an authorisation from the MoL (Articles 33-35).
Guyana	Recruitment of Workers Act. (Cap. 98:06), 1943	The charging of recruitment fees and/or related costs to the worker is regulated. The Act states that travel costs for the worker and his/her family, including return in the case of illness or repatriation shall be borne by employer or recruiter (Articles 7,8).	The policy applies to both national and international recruitment of workers.

► Table 2. National legislation on private employment agencies: Selected countries in the Americas (continued).

Country	National legislation on private employment agencies	Recruitment fee to be paid by worker	National or international recruitment
Honduras	Acuerdo No. STSS-141-2015, Reglamento para el Funcionamiento de las Agencias de Empleo Privadas y Servicios Conexos	The charging of recruitment fees and/or related costs to the worker is regulated. Honduran workers who are hired with the aid of an agency are subject to pay fees according to their salary and the duration of the contract. STSS-141-2015 established a prohibition of fees but these provisions were derogated by the subsequent amendments introduced by STSS-155-2017, which states that private employment agencies can charge up to 50% of the first monthly salary for permanent jobs, and for temporary jobs the fee will vary depending on the duration of the contract: 30% of the first monthly salary for a three-month contract, 20% of the first monthly salary for a two-month contract and 10% of the first monthly salary for a one-month contract. The measure of agreeing on charging a fee according to the duration of the contract acknowledges the fact that several positions managed by PEAs in the country are of a temporary nature and therefore the maximum fee authorised should not be available for all cases (STSS-155-2017). Fees can only be charged after the recruitment took place.	It applies only to national recruitment. If a PEA is interested in international recruitment it must be authorized by the Mol.
Jamaica	Acuerdo No. STSS-155-2017, Reglamento para el Funcionamiento de las Agencias de Empleo Privadas y Servicios Conexos Law 43, 1956 – The Employment Agencies Regulation Act (last amended in 2007) Regulation 254, 1957 – The Employment Agencies Regulation (last amended in 2010)	The charging of recruitment fees and/or related costs to the worker is prohibited. Acuerdo No. STSS-252-2008, Article 10(a) states that employment agencies for the recruitment of Hondurans abroad are not allowed to charge workers any fees. The charging of recruitment fees and/or related costs to the worker is regulated. Art. 16(1) and (2)(e) of Law 43, 1956, allow the government to regulate fees charged by employment agencies. This was enacted by Regulation 254, 1957. Fees that can be charged by employment agencies are limited depending on whether the placement takes place within Jamaica or internationally (Regulation 254, 1957, Art. 10, Nr. 1). Additionally, it is illegal to charge fees to any person intended to be placed in an employment programme which prohibits charging fees (e.g. to the US via a H-2B visa) (Art. 10, Nr. 1A). In case a client is refused entry into the country of placement, the agency has to refund at least three-quarters of the fee paid (Art. 10, Nr. 2).	This policy applies to international recruitment of workers. It applies to the recruitment of Hondurans and workers abroad. The policy applies to both national and international recruitment of workers.
Mexico	PEAs Regulation, 2006 amended in 2014. Additional legislation in the updated Federal Labour Law (last amended in 2019).	Charging fees to workers is prohibited (Article 5. PEAs Regulation 2006). Article 539(2) of the Federal Labour Law states that the Secretariat of Labour and Social Welfare will authorize, register and supervise the operation of private employment agencies in the country and that the operation of these agencies can be regulated. In this regard, in 2006 the President issued a Recruitment Regulation, which prohibits the charging of any fees to workers for employment services for both private and public employment agencies (Art. 5). According to Art. 281(a) of the Federal Labour Law, the labour contracts of Mexicans working abroad must prescribe that the employer has to bear any repatriation costs.	Regulation of PEAs in the Federal Labour Law (2018) covers international and national recruitment. If the workplace is 100km away from the place where recruitment took place, workers are entitled to receive free of charge transportation, lodging and meals. Article 539(2) of the Federal Labour Law states that the Secretariat of Labour and Social Welfare will authorize, register and supervise the operation of private employment agencies in the country.

► Table 2. National legislation on private employment agencies: Selected countries in the Americas (continued).

Country	National legislation on private employment agencies	Recruitment fee to be paid by worker	National or international recruitment
Nicaragua	Ministerial Agreement (CHG-004-04-07, 2007 on the regulation of PEAs.	The charging of recruitment fees and/or related costs to the worker is prohibited. If the workplace is 100km away from the place where recruitment took place workers are entitled to receive free of charge transportation, lodging and meals (Article 9).	The policy applies to both national and international recruitment of workers. If PEAs participate in an international recruitment process for Nicaraguans, they need authorization by the Ministry of Labour.
Panama	Executive Decree No. 32, 2016 (C181 Enforcement), Additional Legislation: Law No. 18, 1999.	The charging of recruitment fees and/or related costs to the worker is prohibited. The Executive Decree No. 32, 2016, prohibits employment agencies to charge any fees, directly or indirectly, to jobseekers (Art. 7, para. 3).	The policy applies to both national and international recruitment of workers.
Paraguay	Law No. 213, 1993 (Labour Law)	The charging of recruitment fees and/or related costs to the worker is prohibited. All workers have the right to use the services of private or public employment agencies free of charge (Art. 67(k) of Law No. 213, 1993). Employers should pay for relocation costs if the hired worker and his/her family need to change their residence.	The policy applies to both national and international recruitment of workers. The recruitment of Paraguayans abroad should be authorized by the MoL and transportation, meals and migration costs should be borne by the employer.
Peru	Decree No. 020-2012-TR, 2012	The charging of recruitment fees and/or related costs to the worker is prohibited. Payment for services of PEAs is assumed by employers (Art. 6 of Supreme Decree No. 020-2012). It makes specific exception with regards to football players and specialized advisory services for highly skilled workers.	The policy applies to both national and international recruitment of workers.
Uruguay	Decree No. 137, 2016 (C181 Enforcement)	Article 13(a) of Decree No. 127, 2006 prohibits charging any direct or indirect fees to workers related to intermediation, application, or placement, as well as the imposition of exclusivity clauses.	The policy applies to both national and international recruitment of workers, except seafarers. Article 18 includes the following extract from C181, Article 8: "provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies".
Venezuela	Labour Law No. 6076, 2012	Art 65 of the Labour Law, 2012 states that a foreign employer willing to hire a worker should deposit in a Venezuelan bank a guarantee to cover the cost of repatriation and of transportation to the place of residence, and should provide the worker with a contract of employment specifying that travel, food, and immigration-related costs are covered by the employer.	The policy applies to international recruitment of workers.

Source: Compiled by the author based on national legislation

A review of the national legislation on the operation of PEAs and their application to national and international recruitment processes reveals several common factors. Firstly regarding application or coverage of the law, the preamble of the legislation typically defined the terms “worker”, “migrant”, “migrant worker” and/or “recruitment”. This is crucial to understanding whether the definition of a worker applies to nationals and migrants residing in the country, the conditions of that residence, and if recruitment covers national and international processes.

Regarding governance, in most cases, PEAs require authorization from a competent authority such as the Ministry of Labour to facilitate international recruitment. In Guatemala, a Ministerial Agreement of January 2020, establishes for the first time a public registry of PRAs. Uruguay has designated a tripartite commission to monitor the implementation of ILO Convention No. 181 and to oversee that the conditions included in the national regulation are fulfilled.²⁶ In Bolivia (Plurinational State of), until 2018 PEAs were regulated through the same instrument that enforces the law on trafficking of human beings. However in 2018 Bolivia (Plurinational State of) adopted Resolution No. 1321/2018, which established regulations and a registry for monitoring the operation of PEAs. This approach resembles the one presented in the United States FAR regulation (see section 5), where the charging of recruitment fees and related costs is linked with human trafficking policies.

In some situations, the legislation is sector specific. For example in Argentina, PEAs are explicitly not authorized to provide services for workers in seasonal employment in the agriculture sector – a sector with a significant workforce of internal and international migrants.²⁷ Rather, following the adoption of a 2013 regulation, PESs are the only institution authorized to provide intermediation services in this sector. The same approach has been adopted in Ecuador.²⁸

Countries in the region take a variety of approaches in regulating payment of recruitment fees and related costs by workers. In Argentina and Honduras, it is clearly stated in regulation that workers hired through an agency are required to pay fees according to their salary and the duration of the contract. Costa Rica, however, does not make any explicit mention of the prohibition of charging fees in its legislation, even though it has ratified Part II of the ILO Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), and through Law No. 1860, 1955, Article 80 prohibits for-profit recruitment agencies. In comparison, El Salvador does not explicitly mention the permission or prohibition of charging fees to workers. In Jamaica, the Minister may regulate the fees to be charged by employment agencies for their services, nonetheless the Recruiters Act states that PEAs shall not charge any fees to persons under employment with the United States H-2B visa, or if charging fees is prohibited in the country where the job placement will take place.²⁹

A further general trend observed was that while the surveyed countries’ regulations expressly prohibit PEAs from charging fees to workers for their services, there are certain conditions under which exceptions can be made after an evaluation by the ruling authority. For example for certain sectors of employment (agriculture in the case of Ecuador and Argentina), specific occupations (footballers in the case of Peru and highly skilled professionals in the case of Honduras and Peru), a specific geographic scope, or for a particular visa category (workers with United States H2-B visas in the case of Jamaica). PEAs may also be granted an exemption to charge a fee to a jobseeker or worker who provides specialised services. There are limited details on the types of specialized services for which PEAs are authorized to charge workers, however during interviews with PESs and PEAs contacted in Colombia, it was explained that the fees might cover specialized career orientation, coaching, or access to selected job offers. The legislation and policies reviewed provided much less clarity on the related recruitment costs that could be charged to the workers.

26 República Oriental del Uruguay (2016) Decreto No. 137. 9 de mayo de 2016 Artículo 19.

27 Goldfuss W., S. (2014) Documento de Trabajo No. 294 OIT. Las agencias de empleo privadas en Argentina, Chile y Uruguay.

28 República de Ecuador (2004) Decreto Ejecutivo No 2166, Artículo 2. 14 de octubre de 2004.

29 Government of Jamaica (1957) Employment Agencies Regulation. Article 10.

Regarding international recruitment, most of the regulations do not include a specific reference to migrant workers or do not differentiate between national and international recruitment processes. Although typically the legislation recognizes equality of treatment for all persons and workers, and states that PEAs should not discriminate against workers based on their nationality.

During the interviews, interviewees clarified that legislation covers national workers as well as migrants in a regular situation in the country. This clarification is critical as it could be understood that migrants in an irregular situation are not covered by the recruitment-related national legislation of the country of destination. Furthermore, analysis into the different types of irregular situations in which migrant workers find themselves and the possibilities they have for regularizing their status should be undertaken. Typically, there is no specific treatment for internal migrants, unless the place of work is not the same as the place of residence. Legislation from Guatemala and Mexico state that the employer should bear transport costs.

National legislation on the operation of PEAs is diverse and intermittent. For example, the most recent law or decree might not include all the valid decisions on a specific issue. If a national legislation is reformulated or derogated, the institution in charge of this process should verify the coherence with the National Labour Law and should also consider the implications on labour migration. The existence of loopholes and different perspectives on the interpretation of the law is a key challenge for developing a standard definition on recruitment fees and related costs.

3.3.1 Regulations regarding international recruitment

The next section of the study assesses three countries' regulations regarding PEAs and experience participating in international recruitment processes. The assessment did not consider how these regulations are or are not aligned with national migration policies. A further study may investigate means of greater coherence between employment and migration policies, specifically in terms of regulating private recruitment.

▶ **Table 3. National legislation on private employment agencies participating in international recruitment processes: The case of Colombia, Honduras and Peru**

	Colombia Resolution 1481, 2014	Honduras STSS-252-2008	Peru Decree No. 020-2012-TR, 2012
Fee charging to workers permitted?	No. They cannot charge a fee to workers for any of the following: job placement, collection and preparation of documents for the selected worker, evaluation or testing for specific skills, medical exams or vaccination, passports or visas, and airport tax.	Charging fees to workers is prohibited unless authorized by the Employment Secretariat and provided that they do not exceed 20% of the net salary of the three first months of the contract. The regulation does not apply to seafarers, professionals, and high-skilled technicians.	No. Workers must not pay for services by PEAs. Footballers and high-skilled professionals are excluded from this rule.
Further guidance on fee-charging outlined in the legislation	The legislation prohibits PEAs from the following: <ul style="list-style-type: none"> ▶ Charging workers for obtaining a job opportunity ▶ Promoting fraudulent job offers abroad ▶ Failing to comply with labour migration policies in origin and destination countries ▶ Offering employment opportunities in illegal activities ▶ Offering job placements in surveillance and security abroad ▶ Promoting vacancies in countries who are not UN or ILO members ▶ Child labour, forced labour and human trafficking 	The legislation states that the recruitment process should take place according to the following additional rules: <ul style="list-style-type: none"> ▶ If an employer or a recruitment agency is not established in Honduras, the Employment Secretariat will lead the process ▶ Authorized PEAs must have the economic capacity for covering all recruitment expenses in order to guarantee that these costs would not be borne by the worker or the employer ▶ The regulation includes the following definition of recruitment: the phase previous to hiring/contracting, in which workers are called, registered, orientated, evaluated and selected for working abroad 	The legislation states that PEAs are prohibited from: <ul style="list-style-type: none"> ▶ Providing placement services for children, unless authorized by law ▶ Conducting activities related to human trafficking, smuggling of migrants, forced labour or child labour

► **Table 3. National legislation on private employment agencies participating in international recruitment processes: The case of Colombia, Honduras and Peru (continued).**

	Colombia Resolution 1481, 2014	Honduras STSS-252-2008	Peru Decree No. 020-2012-TR, 2012
Requirements for provision of information for international recruitment	PEAs must outline the following information: <ul style="list-style-type: none"> ▶ International labour dynamics including the need to have a valid work permit ▶ The need to avoid using the services of labour brokers ▶ That workers are not liable for paying any placement fee (including that costs related to visa, passport and airport tax should be borne by the employer once the contract has been signed). The information should be reviewed and approved by the MoL 	PEAs must ensure the following: <ul style="list-style-type: none"> ▶ Provide the worker with a copy of the job contract in Spanish ▶ Employment conditions should be provided without any discrimination due to national origin and according to ILO standards ▶ Information for workers must cover labour rights and obligations, social and cultural context of the country of destination, contact details of the closest consular representation abroad, basic language information, and recommendations on worker's economic obligation with his/her family in Honduras 	PEAs must provide the following information: <ul style="list-style-type: none"> ▶ Employer contact details ▶ Country and workplace address ▶ Period of work ▶ Conditions regarding transport to and from the country ▶ Travel, housing and subsistence conditions ▶ Cultural orientation information such as language, living costs, labour market information, and weather ▶ Job activities and conditions ▶ Causes for dismissal ▶ Contact details of the closest Peruvian consular representation abroad ▶ Rights of labour migrants in the country of destination
Further requirements of the PEA	Provide information about geographic, social and labour aspects in the country of destination, in particular about the process for getting a valid working permit and any migratory document (such as passport). Register the placements and signed contracts at the MoL and PES.	Register the signed contracts at the Employment Directorate. Provide workers with the Employment Directorate movement certificate.	<ul style="list-style-type: none"> ▶ Provide a presentation letter to the worker for visa procedures ▶ Register the job placement offer and inform MoL of all signed contracts (period and date of travel)
Sanctions/penalty for breach of the legislation	Sanctions will apply if the PEA fails to comply with any of the requirements stated in the resolution.	Temporary suspension, sanctions or definitive cancellation will apply if PEAs fail to comply any of the requirements stated in the resolution.	PEAs will be subject to penalty if any of the following occurs: <ul style="list-style-type: none"> ▶ Charging fees, money or in-kind payment to job seekers before, during or after job placement ▶ Retention of passports or identity documents ▶ Promoting offers linked to human trafficking, smuggling of migrants, forced labour or child labour

Source: Compiled by the author based on national legislation.

Colombia, Honduras and Peru have taken measures to regulate the activity of PEAs who place workers abroad, as presented in table 3. Colombia has a specific Resolution for these cases (Resolution 1481, 2014), in addition to other regulations that govern national labour intermediation. Honduras issued the Agreement STSS-252-2008 in 2008,³⁰ and Peru includes the regulation of national and international recruitment within the same instrument (Decree No. 020-2012-TR).

In Colombia and Peru, PEAs who participate in international job placement are required to register at the Ministry of Labour or the Employment Directorate. The agencies must submit periodic information to the Ministry of Labour about the job placements they facilitate. This serves not only as a monitoring mechanism for the protection of labour rights of migrants but also, as stated by the

³⁰ While regulations in the South American countries are very recent, for instance, 2012 in Peru, and 2014 in Colombia, Honduras is interesting because its regulation for international recruitment was issued in 2008, whereas the regulation of the operation of PEAs in national recruitment took place in 2015 and 2016. This could be explained, in part, because Honduras is mainly a country of origin for international migrants.

Peruvian legislation, as a way to understand the dynamics of international labour markets in which Peruvian citizens participate.

The Honduran legislation aims to ensure that working conditions for their citizens abroad are equal to those of nationals in the country of destination and in accordance with ILO labour standards. The regulation defines recruitment as “the phase previous to hiring/contracting, in which workers are called, registered, orientated, evaluated and selected for working abroad.”³¹ Honduras has adopted two Agreements to regulate the operation of PEAs in the country: STSS-141-2015 and STSS-155-2017. Although they share a common objective – to provide the regulatory framework in which PEAs operate – their perspective highlights important differences around the role of PEAs in the functioning of the labour market and the protection of workers. The 2015 Agreement (STSS-141-2015) contains an article on prohibition of charging of fees to workers. However these provisions were derogated by the subsequent amendments introduced by the 2017 Agreement (STSS-155-2017) which states that private employment agencies can charge up to 50 per cent of the first monthly salary for permanent jobs, and for temporary jobs the fee will vary depending on the duration of the contract: 30 per cent of the first monthly salary for a three-month contract, 20 per cent of the first monthly salary for a two-month contract and 10 per cent of the first monthly salary for a one-month contract. The measure of agreeing on charging a fee according to the duration of the contract acknowledges the fact that several positions managed by PEAs in the country are of a temporary nature and therefore the maximum fee authorised should not be available for all cases (STSS-155-2017).³² Fees can only be charged after the recruitment took place.

The 2017 Agreement highlights that PEAs serve to help find job opportunities for workers as a means to reduce unemployment in the country – thereby serving as a rationale for allowing agencies to charge fees to workers for their services.

Although there is not a direct definition of what recruitment fees and related costs are, Colombia and Peru have advanced their legislation by prohibiting the charging of fees and explaining in detail what recruitment services might entail. The Colombian legislation specifically prohibits charging any fees or related recruitment costs for collecting and preparing documents for the selected worker, evaluating or testing for specific skills, medical exams or vaccinations, passports or visas and airport tax. The Honduran legislation prohibits charging fees to workers, but it also states that an exemption could be authorized by the Employment Directorate. Both Colombia and Honduras clarify that any possible recruitment fee should be borne by the employer once the contract has been signed.

In Mexico, the 1970 Federal Labour Law, Articles 28 and 539 are of interest regarding recruitment of Mexicans abroad. Article 28 establishes the minimum labour standards to be guaranteed by employers and private employment agencies in contracts for nationals working abroad. The Article states that employers are responsible for providing repatriation expenses, decent living conditions, access to health services, and information about consular assistance. For workers hired under Bilateral Labour Agreements (BLAs) or Memorandums of Understanding (MoUs), employers should also guarantee equal treatment and access to social protection services in the destination country. If a PEA is responsible for the recruitment process, it should be registered and authorized, and in addition to the above-mentioned conditions it must check that the worker has the right documentation and permit for working abroad. If a worker is subject to fraud in working conditions in a job abroad, the PEA will be responsible for repatriation costs.³³

Article 539 of the Federal Labour Law states that the Secretariat of Labour and Social Welfare will authorize, register and supervise the operation of PEAs in the country. In 2006 the Secretariat issued the Recruitment Regulation (2006) to govern national and international recruitment processes. The regulation contains different provisions for different entities involved in the recruitment process including National Employment Services (NEEs), non-profit PEAs and for-profit PEAs. Regarding

31 Secretaria de Trabajo y Seguridad Social (2008) Acuerdo No. STSS-252-08, Article 7, June 30, 2008.

32 Secretaria de Trabajo y Seguridad Social (2009) Análisis de la Actuación de las Agencias de Empleo Privadas y Servicios Conexos en el Mercado de Trabajo Hondureño.

33 Estados Unidos Mexicanos (1970) Ley Federal del Trabajo. Article 28.

licensing the Regulation stipulates that PEAs interested in facilitating the collective recruitment of Mexicans for work abroad should request authorization from the Government Secretariat (Article 12).³⁴ Regarding fees, it stipulates that job placement services are free of charge for workers and potential workers (Article 5 and 10). However for-profit PEAs might request permission to charge a fee (Article 23) and non-profit PEAs might solicit the reimbursement of administrative costs (Article 21).³⁵

A 2014 regulation modified and included additional obligations for PEAs. Within the 2014 regulation, charging fees in cash, services or in kind, directly or indirectly is prohibited; and access to PEAs' services should be provided in a non-discriminatory manner. Furthermore, the regulation also stipulates that if the final workplace of a worker is 100 kilometers away from his/her current residency, the PEA should adopt measures to guarantee that transport, accommodation and food are provided free of charge for the worker (Article 9).

Further research is needed to compile all the legal and policy instruments that could be used to regulate international labour migration processes, and also to understand how recruitment is defined and regulated in each country.

3.4. Ratification of ILO Conventions related to private employment agencies

The ILO Private Employment Agencies Convention, 1997 (No. 181) (C181) seeks to provide standards for regulating PEAs, acknowledging their importance in matching job offers with demand, while providing guidance on the protection of migrant workers' rights against any abusive practices. The Convention was adopted in a context where many governments had reduced the budget for financing PESs and employers relied more on the capacities of PEAs because they were perceived as more competent and flexible in meeting their needs.³⁶ ILO C181 updates the international viewpoints taken in the ILO Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), and the Fee-Charging Employment Agencies Convention, 1933 (No. 34) – Part II of C096 concerns “progressive abolition of fee-charging employment agencies conducted with a view to profit and regulation of other agencies”.

Article 7 of C181 states that PEAs “shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.” Exceptions to this statement are only to be made through consultation with social partners and when in the interest of the workers concerned. The authorized exception should be reported to the ILO, and detailed information on the process and reasons behind the decision should be provided. Article 8 makes reference to migrant workers, calling on Governments to “provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies.” Relevant laws and regulations should provide for penalties for those agencies, which engage in fraudulent practices or abuses. Article 8 also encourages countries to conclude bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment.

Table 4 presents the state of ratification of ILO Conventions related to PEAs in the Americas. Panama, Uruguay and Suriname are the only countries that have ratified C181. The three countries have issued national laws to guarantee the adoption of the principles included in that Convention.

³⁴ In the 1982 regulation PEAs were not allowed to participate in the recruitment of foreigners willing to work in Mexico or Mexicans willing to work abroad (Article 12, Recruitment Regulations, November 23, 1982).

³⁵ Secretaría del Trabajo y Previsión Social (2006) Reglamento de Agencias de Colocación de Trabajadores Febrero 28, 2006.

³⁶ ILO (2011) Agencias de empleo privadas, promoción del trabajo decente y mejora del funcionamiento de los mercados de trabajo en los sectores de los servicios privados.

▶ Table 4. Ratification of ILO Conventions related to private employment agencies

Country	Convention	State of ratification	National legislation application
Private Employment Agencies Convention, 1997 (No. 181)			
Panama	C181	In force	Law No. 18, 1999 Executive Decree No. 23, 2016
Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96)			
Argentina	C096. Part III	In force	
Bolivia	C096. Part II	In force	
Costa Rica	C096	In force	
Cuba	C096	In force	
Guatemala	C096. Part II	In force	
Mexico	C096. Part III	In force	
Fee-Charging Employment Agencies Convention, 1933 (No. 34)			
Chile	C034	In force	

Source: Compiled by the author based on ILO NORMLEX and national legislation.

After reflecting C181 in its national law through adoption of Law No. 18 in 1999, Panama issued Executive Decree No. 32 in 2016 for regulating the activities of PEAs in the country. The Decree prohibits charging any fees, directly or indirectly, to jobseekers, and includes sanctions for violations.³⁷ There is no additional reference to migrant workers employed in the country or seeking employment abroad. In comments submitted to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Panama reported its interest in monitoring, with the leadership of the Labour Inspection Department, PEAs' compliance with the current regulation to safeguard labour standards for workers and jobseekers.³⁸

Uruguay issued Law No. 17,692 in 2013 to bring national legislation in line with C181. In 2016, following a period of tripartite consultation, Decree No. 137 was issued to regulate the operation of PEAs. The Decree stipulates the authorization requirements for PEAs and the type of information they should provide to the Ministry of Labour, and promotes the coordination of activities with the PES. Article 13 prohibits charging any direct or indirect fees to workers for services related to intermediation, application, or placement, as well as the imposition of exclusivity clauses.³⁹ Article 18 puts emphasis on protecting migrant workers recruited through these agencies, preventing any abuses, and applying sanctions if the conditions are not fulfilled.

In Suriname, the Private Employment Agencies Act was prepared in 2008 by a Ministerial commission and was discussed with representatives of workers' and employers' organizations. The Act aims to bring national legislation in line with C181, which is reflected in Articles 6, 7, and 10-13. PEAs in Suriname are permitted to operate once they have received authorization from the Ministry of Labour and can charge fees for providing their services. However, in comments submitted to the ILO CEACR, the government suggested that it aims to eliminate any registration fees charged to

37 República de Panamá (2016) Decreto Ejecutivo No. 32 (15 de Abril de 2016).

38 ILO (2015a) CEACR Observation to Panama about the implementation of C181.

39 República Oriental de Uruguay (2016) Decreto No. 137/2016 (17 de Mayo de 2016).

workers or jobseekers in the country.⁴⁰ In 2017, Law No. 42 on the determination on the placement of the labour force by intermediaries was made public. The law regulates the recruitment process carried out by intermediaries, with a particular focus on the placement of temporary workers. The law seeks to improve the guarantee of labour conditions for workers, reduce the risk of exploitation, and creates a registry and monitoring mechanism for PEAs. PEAs are expected to deliver their activities on a non-profit basis.⁴¹ Art 13.1 states that it is forbidden for an agent to ask for any kind of fee or compensation from the worker for finding them a job.

Other countries in the region are still implementing ILO Conventions No. 34 or 96, although in some cases their national legislations include more up-to-date norms that are orientated to protect the rights of workers and reduce fraudulent or abusive practices. The ILO Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) is still in force in Argentina, Bolivia (Plurinational State of), Costa Rica, Cuba, Guatemala and Mexico. The ILO Fee-Charging Employment Agencies Convention, 1933 (No. 34) is outdated, however it is still in force in Chile, because Chile is yet to ratify C181 and C96 (which provided updated guidance).

Although not all countries in the region have ratified the Conventions related to PEAs, they have relied on some of the principles outlined in these instruments to regulate the private agencies acting within their territories. C181 aims to create a national regulatory framework through tripartite social dialogue. In many countries, this proves to be challenging, particularly in countries with complex labour market dynamics, few options for creating jobs or difficulties in matching supply and demand, or in contexts where PESs are inexistent or weak.

40 ILO (2014) CEARC Observation to Suriname about the implementation of C181.

41 Staatsblad van de Republiek Suriname (2017) Wet Ter Beschikking Stellen Arbeidskrachten door Intermediairs.



4

**Recruitment fees and
related costs in BLAs and
MoUs in the Americas**

▶ 4. Recruitment fees and related costs in BLAs and MoUs in the Americas

BLAs and MoUs are legal instruments devised by countries involved in international labour migration corridors. They are designed as a means to provide a regular pathway for migrant workers to be employed in jobs and sectors with specific shortages. BLAs and MoUs typically include several references to migrant workers' pre-departure, travel, residence and return, and provide guidance on how to access and promote the human and labour rights of migrant workers. In most cases, countries agree to rely on their PESs in coordination with employers for processing applications, selecting candidates and supporting pre-departure and even return.

Although the BLAs and MoUs surveyed do not have an explicit definition of what recruitment fees and related costs are, analysing their contents provides information on how governments have agreed upon and defined recruitment activities and costs and the responsible party, and which explicit prohibitions in relation to abusive practices are included. This study focuses on the BLAs of Mexico-United States (1942), known as the Braceros Agreement, Costa Rica-Nicaragua (1993), Spain-Colombia (2001), Spain-Dominican Republic (2002) and Spain-Ecuador (2001).

▶ Table 5. Bilateral labour agreements on labour migration in the region

Bilateral agreement on labour migration	Mexico – United States	Costa Rica – Nicaragua	Spain – Colombia	Spain – Ecuador	Spain – Dominican Republic
Instrument	Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers (Braceros Agreement)	Migrant labour agreement between the government of Costa Rica and the government of the Republic of Nicaragua	Provisional application of the Agreement between Spain and Colombia regarding regulation and management of labour migration flows	Provisional application of the Agreement between Spain and Ecuador regarding regulation and management of labour migration flows	Provisional application of the Agreement between Spain and the Dominican Republic regarding regulation and management of labour migration flows
Issuance date	July 1942	January 1993	May 2001	May 2001	February 2002
Additional legislation	N/A	N/A	Order ESS/1/2012, of January 5, regulating the collective management of contracts at source for 2012 (BOE Spain, 2012; Order TMS/1426/2018, of December 26, which regulates the collective management of hiring at origin for 2019 (BOE Spain, 2018))		

► Table 5. Bilateral labour agreements on labour migration in the region (continued).

Bilateral agreement on labour migration	Mexico – United States	Costa Rica – Nicaragua	Spain – Colombia	Spain – Ecuador	Spain – Dominican Republic
Objective of the agreement	To make Mexican agricultural labour available in the United States while protecting workers	To regulate labour migration of Nicaraguans working temporarily in the agriculture sector in Costa Rica	To regulate migratory flows from Colombia to Spain	To regulate migratory flows from Ecuador to Spain	To regulate migratory flows between Spain and the Dominican Republic
Medical exams	Mexican health authorities will certify necessary physical conditions	N/A	Undertaken before travelling, cost borne by the worker	Undertaken before travelling, cost borne by the worker	Undertaken before travelling, cost borne by the worker
Training courses	N/A	N/A		Only if required by the job offer, cost borne by the worker	Only if required by the job offer, cost borne by the worker
Pre-departure orientation	N/A	N/A	Yes	Yes	Yes
Transportation costs	Employers in the United States will pay for transportation both at the entrance and exit	Employers in Costa Rica will pay for transportation both at the entrance and exit	Employers are required to arrange and pay for at least the first travel expenses	Employers are required to arrange and pay for at least the first travel expenses	Employers are required to arrange and pay for at least the first travel expenses
Documents costs	Expenses incurred in the fulfilment of any documents of migratory nature shall be borne by the employer	Nicaragua and Costa Rica will negotiate for providing passports, migration documents and visas free of charge to workers participating in this scheme	Visas and residence permits will be processed with urgency by authorities in the country of destination. No explanation is given on who covers that cost	Visas and residence permits will be processed with urgency by authorities in the country of destination. No explanation is given on who covers that cost	Visas and residence permits will be processed with urgency by authorities in the country of destination. No explanation is given on who covers that cost
Housing	Housing conditions for workers under the agreement shall be identical to those enjoyed by other agricultural workers	The Government of Costa Rica will ensure that housing conditions offered to Nicaraguan workers are in line with international provisions on hygiene and safety	Employers should provide or secure housing for the worker	Employers should provide or secure housing for the worker	Employers should provide or secure housing for the worker
Other costs	Personal belongings up to 35 kilos per person shall be transported at the expense of the employer	N/A	Job offer should include information on who will cover other administrative costs	Administrative processes related to travelling will be borne by the migrant or otherwise by the employer	Administrative processes related to travelling will be borne by the migrant or otherwise by the employer

Source: Compiled by the author based on national legislation.

The Braceros Agreement (1942-1964) between the United States and Mexico is one of the first examples of bilateral agreement on migratory issues. It was conceived as a means to address labour supply shortages in the agricultural sector in the United States, while protecting the labour rights of Mexicans participating in the scheme. Firstly, contracts were to be written in Spanish with the supervision of the Mexican Government. Secondly, all transportation costs (from the place of origin to destination and return), living costs, transport of personal belongings up to 35 kilos per worker, and any expenses of migratory nature were to be covered by the employer. Thirdly, workers were required to have access to health services and occupational safety in equal conditions as local workers in the agriculture sector. The agreement explicitly stated that charging any fee or commission to the

worker was illegal.⁴² The labour conditions were agreed to according to Mexican Labour Law in force at the time. The Braceros Agreement ended in 1964, following a series of public denunciations by civil society organizations and the media about the precarious working conditions experienced by the workers.⁴³ Low skilled temporary labour migration between the two countries is currently managed using H-2A visas for workers in the agricultural sector, and H-2B visas for workers in other sectors. These visas, meant to facilitate the participation of workers in sectors with labour shortages, can be issued once an employer obtains authorization from the Departments of Labour and Homeland Security.⁴⁴ This scheme is managed unilaterally by the United States and establishes a series of requirements to be filled by workers and employers on a repeated basis, although they are linked to seasonal job vacancies.

The BLAs that Spain has signed with Latin American countries are meant to provide legal pathways for the immigration of Colombians and Ecuadorians into Spain as temporary workers, usually in the agriculture sector. The Agreement with the Dominican Republic is reciprocal and facilitates the migration of both Spaniards and Dominicans into both countries. Costs that are required to be borne by the worker (not the jobseeker) include the required medical exam given in the country of origin before departure, training courses if required by the job placement, and administrative processes related to travelling, if not borne by the employer (except in the case of the agreement with Colombia). Costs borne by the employer include the first transportation costs⁴⁵ from and returning to the country of origin, and the provision or procurement of housing.⁴⁶ Governments facilitate the procedure for obtaining visas and work permits, but it is not clear who pays for these costs. Pre-departure orientation is required, but the agreements are not clear on which party is responsible for providing this service.

Spain has concluded two further regulations on labour migration that also apply to BLAs with Latin American countries. Order ESS/1/2012 regulates the collective management of hiring in the countries of origin. The details of the Order are revised yearly according to an occupational forecast and are applied specifically to temporary positions. The Order establishes that job offers will be posted through the PES, workers will not be charged at any stage of the selection process, and employers shall guarantee accommodation and at least the first return travel arrangement for workers. Workers are asked to sign a 'return commitment' when their contract finishes. Employers will pay the visa application fees. Workers' documents such as passport, criminal record and medical certificate should be included in the visa application process, however, the Order does not clearly state who covers these costs.⁴⁷

Order TMS/1426/2018 (Spain) regulates the collective management of hiring in the countries of origin and its provisions also apply to the BLAs with Colombia, Ecuador and the Dominican Republic. This Order reiterates that workers will not be charged with any fees during the selection process and dictates the responsibility of employers in terms of accommodation, travelling arrangements and visa application process. The main difference in comparison with Order ESS/1/2012 is that the 2018 Order also includes options for non-temporary vacancies according to labour market needs, as well as employment for children and grandchildren of Spanish origin/descent.⁴⁸

42 "There shall be considered illegal any collection by reason of commission or for any other concept demanded of the worker." Agreement between the United States of America and Mexico regarding the temporary migration of Mexican agricultural workers. August 4, 1942.

43 Ancheita, A. and Bonnici, G. (2013) *¿Quo Vadis? Reclutamiento y contratación de trabajadores migrantes y su acceso a la seguridad social: dinámicas de los sistemas de trabajo temporal migratorio en Norte y Centroamérica.*

44 Ibid.

45 BLAs are meant to regulate temporary or seasonal job placements. In some cases, and if requested by the employer, a worker might return to the country of destination for the next season.

46 This fact is not explicitly contained in the texts of the agreements, but it is included in a later regulation issued in 2012 (Orden ESS/1/2012) that applies to all BLAs in which Spain takes part and complements information about responsibilities of the parties.

47 Boletín Oficial del Estado Español – BOE (2012) Orden ESS/1/2012, de 5 de enero, por la que se regula la gestión colectiva de contrataciones en origen para 2012.

48 Boletín Oficial del Estado Español – BOE (2018) Orden TMS/1426/2018, de 26 de diciembre, por la que se regula la gestión colectiva de contrataciones en origen para 2019.

In the case of Ecuadorians travelling to Spain for work through the agreement, the Global Knowledge Partnership on Migration and Development (KNOMAD) research found that the existence of these instruments and the effective enforcement of Spanish regulations do have an influence in lowering recruitment costs assumed by migrant workers.⁴⁹ Employers are responsible for covering the travel costs from Ecuador to the workplace in Spain. However, employers are permitted to make a monthly deduction of the worker's salary to cover the cost of airfare.

The BLA between Costa Rica and Nicaragua (1993) regulates the participation of Nicaraguans in the agricultural sector, specifically coffee and sugar cane plantations. Workers are not meant to bear any cost, as employers are responsible for travel costs, and both governments provide passports and visas free of charge. Employers are also required to facilitate health and occupational safety access for workers. However, the Agreement is not clear about who is responsible for housing costs, and there is no information about medical exams, pre-departure orientation or training courses. Considering that the BLA was established in 1993, action has long been needed to clarify who is responsible for covering the different costs incurred as part of an international recruitment process. Addressing the presence of loopholes with detailed information is one of the improvements that could be made to provide better mechanisms for protecting labour rights of workers.

The Canadian Seasonal Agriculture Worker Program (SAWP) is another example in the region. In the framework of this programme, Canada established MoUs with different countries in the region, in particular, with Mexico, and Caribbean countries, to fill vacancies not covered by Canadians and permanent residents. The SAWP allows employers to hire Temporary Foreign Workers (TFW) in activities related primarily to agriculture. Mexico began to participate in the program in 1974. The competent authorities are Employment and Social Development Canada (ESDC) and the NES in Mexico. Under this programme, fees are not to be charged to the worker, as the recruitment process in Mexico is carried out by the NES.

When applying to the programme, workers who meet the selection criteria must provide a valid identification document and a certificate of residence. Once the documentation is verified, the worker takes a test for validating their knowledge in agriculture. If the test is passed, the worker should procure a passport, medical exam, an authorization letter and visa. The ESDC has developed a template of an employment contract in Spanish and English. The working conditions included in the contract and the explanation of deductions constitutes another source of information for what could be considered as recruitment fees and related costs.

Documentation costs, understood as passports and visas, are borne by the worker, and therefore all specific requirements and any additional costs for procuring these documents are also to be borne by the worker. Employers must always arrange and pay for the round-trip transportation (for example plane, train, boat, car, bus) of the TFW to the location of work in Canada, and back to the TFW's country of residence. A portion of these costs can be recovered through payroll deductions in all provinces, except in British Columbia. The maximum amount that can be deducted is specified in the employment contract entitled "Agreement for the employment in Canada for SAWP".

Employers must provide to the TFWs, where required, no-cost transportation to and from the on-site/off-site housing location to the work location. Employers must provide TFWs with adequate, suitable and affordable housing as defined by the Canadian Mortgage and Housing Corporation. Employers are responsible for any costs that may be associated to having the housing inspected. Employers cannot recover these costs from the TFW.

49 Abella, M. and Martin, P. (2014) Migration costs of low skilled labour migrants. Draft: Key findings from KNOMAD Pilot Survey in Korea, Kuwait, and Spain.

▶ **Box 3. Employment contract for Mexican workers in the Canadian Seasonal Agricultural Workers Program (2018)**

- ▶ Duration of the contract: six weeks to eight months.
- ▶ Trial period: 14 days.
- ▶ Return is mandatory. Return can only be delayed in extraordinary circumstances (for example, medical emergencies).
- ▶ Workers can be transferred between employers at no cost to the workers.
- ▶ Lodging is to be provided by the employer at no cost to the worker (except in British Columbia where employers can deduct for accommodation – up to 826 Canadian dollars). Employers may recover costs to maintain lodging in a safe state from workers' wages. Employers may deduct an agreed amount from workers' wages to cover utility costs.
- ▶ Meals and cooking facilities may be provided by the employer at no cost or may be deducted from wages if agreed.
- ▶ Insurance is provided by the employer, but a percentage may be deducted from workers' wages.
- ▶ Repatriation costs should be borne by the employer or by the Government of Mexico.
- ▶ Employers are required to arrange return air transportation from Mexico City to Canada. Employers may deduct up to 50 per cent of the costs from the workers' wages. For workers in British Columbia, employers must cover all transportation costs. Employers may cover return transportation costs from the point of arrival in Canada to the place of employment.
- ▶ Visa costs may be deducted from the worker on a one-time basis, except for workers in British Columbia.
- ▶ Temporary foreign workers must not pay any recruitment fees.

Source: ESDC Canada. Contract for the employment in Canada of seasonal agricultural workers from Mexico – 2018

Although the template for the contract is publicly available, workers might not be aware of the conditions set in the document, and employers might add some modifications to the different clauses, resulting in different working conditions or deductions for the workers. The lack of knowledge of labour conditions and protection mechanisms for migrant workers and the different conditions offered in each Canadian province are factors that contribute to the existence of abuses and vulnerabilities for workers. Workers' organizations have recorded complaints about abuse of labour rights including wage deductions – which may constitute a form of recruitment fees and related costs.⁵⁰ A further factor to be considered is that despite the existence of an employment contract template, there is a possibility that the conditions may be interpreted differently, and that parties may agree to different conditions.

Further research could analyse how BLAs are aligned with changes in legislation regarding the operation of PEAs as well as the employment and migration dynamics in the countries involved.

50 Global Workers Justice Alliance (2012) Article 28 of Mexico's Federal Labour Law: Does it protect Mexican workers abroad?



5

Case study: The United States Federal Acquisition Regulation (FAR) proposed and adopted definition of recruitment fees

▶ 5. Case study: The United States Federal Acquisition Regulation (FAR) proposed and adopted definition of recruitment fees

This section of the study will consider the US Federal Acquisition Regulation (FAR) proposed and final adopted definition of recruitment fees, as well as the complementary Executive Order 13627 of 2012 which addresses specific considerations on transport costs.

In the United States, the Department of Defence, the General Services Administration and the National Aeronautics and Space Administration jointly proposed to amend the Federal Acquisition Regulation (FAR) to provide a definition of recruitment fees. The definition aims to initially cover workers in US Government contracts, and then to be progressively applied to all workers. The definition is as follows:

▶ Recruitment fees, according to the proposed amendment, means the following:

(1) Recruitment fees include, but are not limited to, fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process, regardless of the manner of their imposition or collection— help prevent human trafficking and forced labour;

- (i) For soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, testing, training, providing new-hire orientation, recommending, or placing employees or potential employees;
- (ii) For covering the cost, in whole or in part, of advertising;
- (iii) For any activity related to obtaining permanent or temporary labour certification;
- (iv) For processing petitions;
- (v) For visas and any fee that facilitates an employee obtaining a visa such as appointment and application fees;
- (vi) For government-mandated costs such as border crossing fees;
- (vii) For procuring photographs and identity documentation, including any nongovernmental passport fees;
- (viii) Charged as a condition of access to the job opportunity, including procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; additional certifications;
- (ix) For an employer's recruiters, agents or attorneys, or other notary or legal fees; and
- (x) For language interpreters or translators.

► **Recruitment fees, according to the proposed amendment, means the following:**

(2) Any fee, charge, cost, or assessment may be a recruitment fee regardless of whether the payment is in property or money, deducted from wages, paid back in wage or benefit concessions, paid back as a kickback, bribe, in-kind payment, free labour, tip, or tribute, remitted in connection with recruitment, or collected by an employer or a third party, including, but not limited to

- (i) Agents;
- (ii) Recruiters;
- (iii) Staffing firms (including private employment and placement firms);
- (iv) Subsidiaries/affiliates of the employer;
- (v) Any agent or employee of such entities; and
- (vi) Subcontractors at all tiers.⁵¹

The definition includes the items or processes that might imply a cost, and the different methods in which the different actors involved could charge a fee to a worker. The definition considers all activities within the entire recruitment process (from advertisement to signature of the contract); as well as the costs associated with international recruitment (related to documentation, transport, the need for translation etc.). The definition aims to discourage any practice in which a worker pays for getting access to an employment opportunity and/or for being considered as a priority candidate. The definition acknowledges that a recruitment fee could be charged in different forms (in cash, in kind, or deducted from the salary), and the payment might be claimed before, during or after the job placement takes place. The definition also aims to include all the known actors that might intervene in matching supply and demand in the labour market, specifically in a labour migration process.

5.1 Comments on the proposed definition

The proposed definition was made public and received a series of comments from different actors, reviewed by the Federal Acquisition Regulatory Council. The responses received point to the challenges in creating a single definition that considers the human and labour rights of migrants; labour migration policies of countries of origin and destination; labour intermediation or procurement policies; and the interests of employers and private employment agencies. Table 6 summarizes the main challenges regarding the definition's scope, coverage, explicitness, potential additional fees, and costs that could be borne by the worker.

⁵¹ Proposed amendment for the Federal Acquisition Regulation FAR definition on recruitment fees.

► **Table 6. Comments to the proposed amendment for the US Federal Acquisition Regulation (FAR) definition on recruitment fees**

	Context of application	Concerns	How to address concerns
Scope of the definition	Broad enough in time, term and form. All costs associated with bringing a worker on board should be treated as recruitment fees.	Broad language might include practices that are not fraudulent or prohibited at the national level.	Ensure coherence with international recommendations and national legislation. Draft a road map of the recruitment process and associated fees.
Skill level, industry/sector, geographic location	All workers.	Costs in hiring high-skilled workers. Vulnerable workers are meant to be prioritized.	Minimum standards for all workers. Further guidance for specific cases.
Clear language	Include a list of what could be considered as recruitment fees, and what costs should not be charged to workers.	Stating specifically who is responsible for each cost is crucial. Responsibilities might change in different national contexts.	Include a list of recruitment fees, who is responsible for their payment and highlight the fees that cannot be charged to workers.
Main additional fees to be considered	Breach of contract fees, transportation expenses, training, insurance, medical exams and coverage, payments made to governments in the country of destination, collateral requirements.	Different national legislation and different requirements according to the type of visa.	Each additional fee should be examined in detail. Contracts could establish fairer breach of contract fees when a worker fails to fulfil the notice period. Specific entry medical exams could be negotiated between countries. Health access is a social protection right that applies to all workers.
Costs to be paid by the worker	Documentation costs such as procuring photographs, identity documents, and non-governmental passport fees.	Minimal fees can be borne by a worker or a job seeker. Obtaining a passport might imply additional costs for some workers. Concerns raised: <ol style="list-style-type: none"> 1. Provision adds confusion and implies that it is not allowed to require provision of an identity card for employment. 2. Minimal expenses (small costs, incidentals) should be the responsibility of the worker. 	Many respondents recommended keeping these cost items in, though the FAR Council revised the wording slightly. The FAR Council clarified that employers can ask that the job applicant provide a valid form of identification as part of the application process, but they cannot charge or seek reimbursement from an employee or applicant for fees associated with acquiring photographs and identity or immigration documents. For example, an employer cannot charge a new hire employee for a new passport required for the position. Final definition does not include a “de minimis” exception when a fee is associated with the recruitment process.

Source: Compiled by the author based on the comments received to FAR Case 2015-017; Combating Trafficking in Persons—Definition of “Recruitment Fees,” Proposed rule.

The comments received⁵² on the proposed definition make it clear that civil society organizations (CSOs), trade unions and think tanks have studied the phenomenon of international labour migration linked to trafficking in persons, forced labour and unethical recruitment, and have agreed to a minimum set of standards that should be considered when approaching fees paid by prospective workers or workers. Their main objective is aligned with the view that workers should not be charged for accessing an employment opportunity and that employers should assume the costs related to procure their industries with the workforce and skills they demand.

Employers and recruiters consulted in the process also agree on the need to protect migrant workers from exploitation and incurring debt for accessing an employment opportunity, nonetheless they recognize that labour intermediation implies costs that need to be covered by the interested parties, and that protecting labour and human rights of migrants should be aligned with reasonable costs for hiring a migrant worker. The comments and responses of the FAR Council also clarified that certain

⁵² Comments were sent by different organizations and individuals including human rights organizations, think tanks, employers’ organizations, recruitment agencies, firms of immigration lawyers, trade unions, and coalitions of migrants, labour and anti-trafficking and modern slavery organizations, and academics.

costs should only be borne by the employer when they are clearly associated with the recruitment process.⁵³

All parties consulted recognized that an internationally agreed definition of recruitment fees is necessary to understand which costs are to be covered by the worker and by the employer, however they note that definitions need to be assessed according to the local context to ensure coherence with national legislation. They also suggested that the definition should be aligned with labour migration policy, particularly in countries of destination, and with the procedures and costs for obtaining a valid visa,⁵⁴ work permit and any other documentation as required by national law.

Employers and CSOs suggested that defining a timeframe for the recruitment process will provide a greater understanding of what fees are not directly related to the process, and therefore subject to general prohibition. For example, costs related to training for skills that are required for a specific vacancy. In their view, the recruitment agency cannot charge the candidate for specific courses or training, rather workers can improve their skills for participating in the labour market at their own expense. However, after workers are selected and hired for a given vacancy, if there are skills to learn or improve, such costs should be borne by the employer.

Understanding all the stages of the recruitment process, the responsibilities of the different actors, and the situation in which fees could appear and be charged to the worker is crucial for minimizing the risks for migrants and improving monitoring mechanisms.⁵⁵ Those commenting suggested including a breakdown of all the potential costs feasible within the recruitment process, as making this information clear and available to all parties constitutes a basis for negotiations on a standard definition. All the stakeholders agreed on having a list of prohibited recruitments fees and related costs so they could guarantee that these items are not charged to workers.

In addition, respondents highlighted the importance of using a functionalist approach for better defining recruitment fees and who is responsible for them. For example, it is important to understand why a worker is willing to pay for accessing a job opportunity (personal and familiar context, or poor local employment conditions, for example).⁵⁶

The discussion around transport costs and who is responsible for covering them in an international recruitment process is highly complex due to differences that arise according to visa categories and specificities that have been agreed upon through BLAs. The FAR proposed definition does not include a specific mention regarding transport costs; nonetheless this is one aspect that received several comments from consulted stakeholders. Most of the comments suggested that employers should cover return transportation costs from the place of origin to the final workplace, including any repatriation costs in case of a work-related accident.

Some actors highlighted the fact that intermediaries are charging workers excessive transportation costs from their place of origin to sites where passports and visas are processed and suggested that these (internal) transportation costs should be considered recruitment costs.

The Executive Order 13627 of 2012 provides measures for Strengthening Protections Against Trafficking in Persons in Federal Contracts. The Order provides guidance to government employees and contractor personnel for avoiding any practice that could lead to trafficking in persons. Given this, the Order obliges FAR to amend the Trafficking Victims Protection Act to guarantee that return

53 In its response, the FAR Council states "Recruitment fees include costs to acquire photographs and identity or immigration documents such as passports, which are associated with the recruiting process. Were there to be a situation of an individual who is not involved with a recruiting process but chooses to acquire a passport, such fees not associated with the recruiting process would not fall under the definition. Similarly, renewal of a passport if for leisure travels, for example, and not associated with a recruiting process, would not fall under the definition."

54 Depending on the type of work visa, requirements might be different in every country. The cost of the visa should consider not only the processing fee paid but also the fees workers spend in procuring all the other documents or requirements defined by migratory policy.

55 Once the definition is set, interested parties could receive general guidelines on how to operationalize its application in the recruitment process.

56 People might be willing to pay an additional amount of money for being considered as a priority candidate in a recruitment process or for accessing a better employment opportunity in another country.

transportation costs, upon the end of the employment contract, are covered by employers within US contracts and subcontracts (Section 2, 1.A.iv.I). This Order also highlights the prohibition of charging recruitment fees to workers (Section 2, 1.A.iii).⁵⁷

5.2 Final FAR definition for recruitment fees

In December 2018, following the period of consultation highlighted above, the US Government produced a final definition of recruitment fees:

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

(1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for—

- (i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;
- (ii) Advertising;
- (iii) Obtaining permanent or temporary labor certification, including any associated fees;
- (iv) Processing applications and petitions;
- (v) Acquiring visas, including any associated fees;
- (vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;
- (vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;
- (viii) An employer's recruiters, agents or attorneys, or other notary or legal fees;
- (ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;
- (x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;
- (xi) Transportation and subsistence costs—
 - (A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and
 - (B) From the airport or disembarkation point to the worksite;
- (xii) Security deposits, bonds, and insurance; and
- (xiii) Equipment charges.

⁵⁷ US Government Executive Office of the President (2012) Strengthening Protection Against Trafficking in Persons in Federal Contract.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is—

- (i) Paid in property or money;
- (ii) Deducted from wages;
- (iii) Paid back in wage or benefit concessions;
- (iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or
- (v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to—
 - (A) Agents;
 - (B) Labor brokers;
 - (C) Recruiters;
 - (D) Staffing firms (including private employment and placement firms);
 - (E) Subsidiaries/affiliates of the employer;
 - (F) Any agent or employee of such entities; and
 - (G) Subcontractors at all tiers.⁵⁸

The final definition is more precise than the initial proposed definition and makes reference to fees that might be charged in a specific period when the recruitment process is taking place. Nonetheless the definition leaves room for other types of fees that could be charged beyond the recruitment process. Regarding visa-associated costs, the definition includes these costs as fees that should be prohibited to charge to a worker as part of the recruitment process. This serves to reaffirm that employers should bear this cost, but also serves to separate employment related costs from recruitment related costs. This same aspect is highlighted when the definition mentions immigration documents and passports.

Transportation and subsistence costs are incorporated, as recommended by most of the actors who commented on the proposed definition and in following the direction of Executive Order 13627/2012. Transportation costs are considered to include return travel from the country of origin to destination, and between the airport or port of arrival and the final workplace. Most BLAs also include this point. Security deposits, bonds, insurance and equipment charges are also incorporated, and are meant to discourage debt bondage in international labour migration processes.

⁵⁸ FAR: Combatting trafficking in persons-Definition of "Recruitment Fees".



6

Towards a regional understanding of recruitment fees and related costs

▶ 6. Towards a regional understanding of recruitment fees and related costs

The governance of labour migration in the Americas has produced different policy and operational initiatives seeking to meet employers' needs and provide job opportunities for workers while ensuring decent work conditions.

6.1 Perspectives from workers, recruiters and governments on a definition of recruitment fees and related costs

In order to complement the information collected through the desk review, fifteen interviews were carried out with different actors in the region. Interviewees include eight workers' representatives and civil society organizations, four government officers, two ILO officers, and one recruiter. Unfortunately, the author was not able to agree to a time to meet with employers' representatives. A list of guidance questions can be found in Annex 2, and Annex 3 includes information about the interviewees.

The interviews provided information about the challenges of implementing national legislation on PEAs, promoting decent work and fair recruitment in international and national labour migration, and served to highlight the importance of having a definition on recruitment fees and related costs. Interviewees highlighted that there was not a clear understanding on what recruitment fees constituted, and this was the main challenge in setting a definition. This section of the study shares some of the practical examples cited by the interviewees to illustrate the different challenges in agreeing to a definition.

Of those interviewed, only the interviewees from the United States and Mexico were able to provide detailed answers to most of the guiding questions. This was due, in part to the different state of development of national legislation in the region, enforcement and monitoring mechanisms capacities, and a general lack of awareness on the costs which migrants incur for accessing a job opportunity in many countries. Mexico, the United States and Canada also provided a richer context for analysing recruitment fees and related costs due to the amount of publicly available information and research, and the existence of migrants' rights advocacy groups and initiatives.

6.1.1 Recruitment regulation and monitoring

Countries in the region have advanced in regulating national and international recruitment processes, and the conditions under which PESs and PEAs must comply with. PESs are regaining an important role in the dissemination of job vacancies and implementing policies to adjust labour demand and supply to benefit countries of origin and destination. While there are specific roles and activities performed by PEAs and PESs, it is also necessary to improve the coordination mechanisms between them to guarantee free access to employment opportunities for all.

Governments should continue to strengthen the role of PESs, grant continuous funding for their operation and provide clear guidance for workers and employers on the services they provide. Each country needs to revise its laws on the operation of PESs and PEAs, as loopholes and lack of information could be avoided with a thorough assessment of current legislation. Liaising between PESs in the countries of origin and destination is key to effectively monitoring and managing fair recruitment processes and to prohibiting payment of recruitment fees and related costs by workers.

PEAs are required to inform the government about the placements they have facilitated, and to provide migrants with information and training on their labour rights in the country of destination. This regulation applies to both nationals and migrant workers with a regular status in the country, leaving irregular immigrants uncovered. In these cases, additional measures should be sought to link or, if possible, to bind these regulations with national legislation in countries of destination. Further activities should be taken to cover migrants in an irregular situation and facilitate their access to the regularization processes and to protection mechanisms against unfair recruitment practices.

The development of national laws for regulating recruitment processes and the participation of PEAs varies across the region, and three different means of regulation were determined:

1. PEAs are regulated in the Labour Law
2. PEAs are regulated through a separate national legislation⁵⁹
3. PEAs are regulated through the ratification of C096 and C181.⁶⁰

However the existence of legal frameworks does not guarantee an adequate functioning of the private recruitment process. Elements such as tripartite dialogue on the regulation of PEAs, enforcement measures, monitoring and evaluation mechanisms, publicly available information for jobseekers and workers on the operation of PEAs, and coherence with migration law, are all key elements for securing fair recruitment processes. Collaboration between PESs and PEAs could provide a framework for monitoring PEAs' activities with job placement at the national and international level. PESs and labour inspection agencies could create monitoring parameters to oversee that workers are not charged any fees during the recruitment process.

Informal recruiters are key actors to be considered and monitoring their role in international migration processes needs to be improved. Informal recruiters offer a service for both employers and workers, and they know how to address bottlenecks or offer alternatives in recruitment and migratory issues in countries of destination and origin. In a complex and usually unknown international recruitment process, informal recruiters might be seen as the most appropriate or cheapest option for securing a job abroad or for hiring qualified workers. The level of trust that workers and employers have in informal recruiters needs to be analysed in comparison with regulated services, to include considering factors like the length and the cost of recruitment processes. Informal recruiters, such as sub-agents, should also be invited to discussions around international fair recruitment.

6.1.2 Migration-related costs

A key aspect of determining a definition of recruitment fees and costs is to consider the interplay with labour migration-related costs in the region. International recruitment implies additional recruitment-related costs – for example passport, work or residence permit, as well as recognition of skills or training, and medical certificate.

All interviewees agreed that documentation costs related to passports should be borne by the worker. The interviewees suggested that to avoid extra costs related to the issuance of passports, it is important that the national institution in charge of this process facilitates access for all (particularly those from rural and remote areas, low-skilled migrants and people from areas with a high emigration rate). Furthermore, migration authorities should explore the possibility of reducing costs and implementing more flexible requirements where possible.

Knowledge of relevant legislation in countries of origin and destination, the responsibilities of different actors, and an ongoing oversight of migration and employment dynamics is required. There

59 Countries who have included PEAs in their Labour Code or countries with specific legislation for these agencies recognize that they have considered ILO principles and Conventions for agreeing on the documents that apply for the regulation of PEAs.

60 Application of ratified Conventions are monitored through the regular reports that countries send to the CEACR. These reports allow the ILO and governments to develop further measures that could improve how the ratified Conventions are applied.

is also a need to clarify the activities that could be performed by PESs, PEAs and other recruitment actors.

6.1.3 Availability of information on recruitment fees and related costs

To date, there are no national public monitoring systems of recruitment items and costs borne by migrant workers. The main sources of information available were (a) PES and PEA internal documents outlining placement costs for specific positions at the national level (for example PEA Adecco and the Colombia PES); and (b) evidence collected by CSOs and workers' organizations (through case studies or complaints mechanisms). This information is generally not public as it constitutes part of a penal investigation (such as ProDesc in Mexico).

During the interviews, when asked about data available on recruitment items and their estimated costs, some interviewees were able to provide information for costs of passport issuance, medical exams, criminal or police records, and recognition of skills and qualifications according to national legislation. They also suggested visiting official webpages to gain accurate information on these costs.

Countries should collect more information about recruitment costs paid by national or international migrants and they should analyse the extent to which these costs are fair, or if they constitute a violation of labour rights. There are several sources of information, including recruiters, PESs, CSOs and workers' organizations, who have all gathered data on the issue. It is important to study how fees are being charged at the national level to provide reference information for workers, so they can make an informed decision. Even when charging fees is authorized, workers should understand why a fee is charged so as to compare the cost with other available options.

6.1.4 Preventing and remedying abuse

Fair recruitment contributes to reducing migrant workers' vulnerability to human trafficking and forced labour. Understanding the recruitment process, implementing monitoring mechanisms for supply chains and sub-contractors, and promoting social dialogue are key factors for achieving this goal.

Three key challenges were identified by the research. Firstly, it was viewed that the responsibility for monitoring of fair recruitment processes relies on countries of origin – particularly in the case of informal recruiters. Representatives from countries of destination interviewed for this study expressed concern about their inability to investigate and collect data from the cases in which migrants have paid informal recruiters in their countries of origin. Secondly, countries of destination are only able to provide labour protection for migrants with a valid work permit or with a contract. Thirdly regarding access to remedy, although there are legal measures for providing protection for migrants, strong evidence must be presented. In cases even where there is proof of charging illegal recruitment fees and related costs, national legislation and practice may only catalogue these cases as human trafficking, and not full investigate the recruitment-specific abuses.

Fair recruitment needs to be promoted and guaranteed in countries of origin and destination and throughout all levels of the supply chain where labour migrants participate. Countries of origin and destination working together to monitor and improve recruitment processes, reduce migration and recruitment related costs, and provide better information for migrants looking for work abroad, are vital not only for guaranteeing fair recruitment but also for reducing the occurrence of human trafficking.

6.1.5 Ensuring equality and non-discrimination

The interviews ascertained several scenarios in which workers are charged different fees based on their skill level/occupation, their country of origin, and whether or not they already have a passport. Workers' and government representatives interviewed for the study agreed on the need to set a definition that applies to all workers regardless of their skill level. Even so, there are specific occupations that seem to be associated with different recruitments costs and labour conditions. For example, nurses in the United States, seafarers in Honduras and Chile, and temporary agricultural

workers in Canada clarify that different requirements, migratory conditions, and standard labour contracts imply specific procedures and related costs.

Interviewees from the United States expressed that there are differential recruitment costs based on the country of origin of the worker. For example, differences in transportation costs for the worker to travel from the country of origin to the work site may be explained by the distance/length of the journey. Another factor that may result in different recruitment costs based on nationality, may be country-specific migration costs, such as costs of an emigration clearance certificate. These different factors may add up to different overall recruitment costs for workers from different countries, migrating to the same worksite. A sound justification must be provided for these cost differentials, and fair recruitment practices must focus on the elimination of discriminatory practices.

A further area that may result in discriminatory recruitment costs is the issue of passports. Interviewees expressed that medium- to high-skilled migrant workers were more likely to already have passports and other required documentation. This assumption surfaces at least two main concerns: the first is that documentation costs should not be considered as recruitment related costs because not all workers pay for this item when they apply for a vacancy. Secondly, measures should be taken to facilitate access to required documentation for low skilled migrants who are not familiar with the process and who live in rural or remote areas in countries of origin, as it is reported that migrants pay excessively for recruiters or intermediaries who offer this service.

6.1.6 Gender differentials in available job opportunities and payment of recruitment fees

The interviews identified gender differentials in the job opportunities available to women and men. Depending on the type of work performed, women and men are preferred to a larger or lesser extent. For instance, it is more likely to find female workers as nurses, domestic workers or seafood processors, while it is more common to find male workers in the agricultural sector, as seafarers, and at construction sites. Female workers, particularly in the US, seem to be preferred over male workers as they are perceived to be more docile and more willing to accept poorer working conditions.

The interviews did not identify any specific differences in recruitment fees paid by female and male migrants. However interviewees did suggest that in some cases women provide sexual favours to informal recruiters as a type of fee to secure a priority place, for themselves or for relatives, in the recruitment waiting list. This information is only available when complaints are recorded due to workers' fear of losing the job opportunity.

6.1.7 Coverage of national/internal migrant workers

Typically the national legislation regulating the operation of PEAs in the Americas includes a definition stating which workers are the subject of the legislation and what activities are considered as recruitment. In the regulations examined, there was no reference to internal migrants, except in the case of Mexico and Guatemala where employers are required to cover transportation costs if the migrant worker's place of employment exceeds a given distance from the place of residence or recruitment.⁶¹

During the interviews, the only interviewee who provided details on recruitment fees being charged to national workers was from Mexico. The interviewee explained that internal labour migrants in the agriculture sector were hired in the southern states and authorities were not aware that they incurred costs for financing transportation and accommodation costs. This fact seems to contradict the regulation stating that PEAs need to guarantee that transport, accommodation and food are provided free of charge for the worker if the final workplace is 100km away from the current place of residency. All other interviewees declared that according to national legislation, no fees are charged to internal migrant workers. Recruiters explained that internal migrant workers are aware of the costs

⁶¹ Labour Code in Guatemala, Decree 1441, 1961, Article 33: For workers with a contract away for their place of residence or abroad, the agency or employer should bear costs related to return travel. PEAs regulation in Mexico: if the workplace is 100 kilometres away from the place where recruitment took place workers are entitled to receive free of charge transport, lodging and meals (Article 9, PEAs regulation 2014).

they will assume if they are selected for a position in another city different to their place of residence. These costs are not seen as recruitment fees or related costs.

This study demonstrates that countries need to analyse in the detail the recruitment process of internal labour migrants to identify if fees and related costs are paid, in what cases, under which categories and if excessive charges are being made. With this information, it would be easier to set a definition on recruitment fees and related costs which also applies to internal migrants. The participation of PESs in processes of internal labour migration could guarantee labour standards for workers while avoiding the charge of any fees or related costs.

6.2 A definition of recruitment fees and related costs: Considerations from the Americas

This regional study has assessed laws and policies regulating recruitment and payment of recruitment fees and costs and has provided an overview of the challenges of implementing or enforcing relevant law. This study has also sought to identify the perspectives of governments, employers, workers and recruiters to provide a comprehensive panorama of key areas of consensus and dissent around the definition of recruitment fees and related costs.

A list of proposed recruitment fees and costs was prepared to support the discussions in the interviews with them to seek their perspectives. A selection of the most relevant findings are outlined below. While there are more areas of dissent than consensus, this should not be seen as a barrier to constructing a definition, but as a sign that more discussion is needed at the national and regional level to address the challenges for ensuring fair recruitment and protection of migrant workers' rights.

1. **Referrals, commissions and advertising costs.** There was no consensus among stakeholders regarding recruitment costs as represented in PEAs' services, sub-agents' referrals and commissions, and advertising costs. Nonetheless fees are only applied to workers if national legislation allows it.
2. **Personal documentation costs.** All stakeholders agreed that passport costs should be borne by the worker. If further documents are required for passport issuance it is understood that workers will cover those costs. If documents are required for applying for a visa, interviewees suggested that employers or governments cover that cost.
3. **Skill and language certification.** It was suggested that skills and language certification could be borne by the employer or by the country of destination if an agreement is set.
4. **Qualification test costs.** It was suggested that these could be borne by the employer. Costs associated with specialized interviewing and selection process should be borne by the employers. The different parties agreed on this point.
5. **Pre-departure training in countries of origin.** The training should be borne by employers or countries of destination. Some national legislation provided that PEAs participating in international recruitment are responsible for this service too.
6. **Social security, health and other national insurance.** These costs should be applied according to country of destination's national law and by setting a percentage to be paid by the employer and also by the worker.
7. **Medical exams.** Interviewees noted that it was the worker who usually pays for pre-departure medical exams required by employers in the country of destination.
8. **Employer-specified tests and training requirements** could be borne by the employer or by the worker; there was no consensus on this issue. National regulations should propose a clear guideline on this matter.
9. **Requirements by countries of destination.** There was a degree of disagreement among stakeholders in relation to these costs, as the costs are considered related to migration. The definition should aim to differentiate between recruitment related costs and migratory

related costs, aiming to secure the conditions that employers have agreed to cover as part of BLAs.

10. Travel and transportation costs represented another area of dissent. In some BLAs and in the final FAR definition for recruitment fees, employers cover these costs; this aspect was widely commented on by CSOs, trade unions and human rights organizations. In other labour agreements, such as the Ecuador-Spain BLA and the Canada-Mexico SAWP, workers and employers share the cost.

11. Security bonds and collaterals. These costs should be borne by PEAs. This includes Breach of Contract clauses, which should be applied according to national law and be understood as a permanence clause. Alternative measures should be considered if the deposit/collateral is used to coerce workers to remain in a job.

The scope of the definition of recruitment fees and related costs must be specified. In other words, the definition should apply to workers starting a recruitment process in countries of origin, through a formal channel, including a bilateral or temporary agreement, or through the operation of regulated PEAs. The definition should apply to specific cases in which migratory and employment regulations from countries of origin and destination are taken into consideration.

There is also a need to formulate a definition that takes into account cases falling outside of typical recruitment processes starting in the country of origin. For example, migrant workers with an irregular status in the country of destination who are looking to access employment; or migrants who are on a tourist, study or other type of visa who are looking for a job, including those who participate in the informal economy. Furthermore, informal recruiters should be invited to participate in the dialogue on recruitment fees at the national and local level. Evidence suggests that employers and workers place a large amount of trust in informal recruiters – and this should be analysed in order to reflect lessons in national regulation and practice.

Building a shared definition and promoting its adoption by different stakeholders is necessary to further dialogue and develop a work plan towards fair recruitment practices. In addition, a shared definition is a foundation from which progressive measures that address other issues in labour recruitment processes can be considered.

Agreeing on a definition is only the first step; two main activities should take place in parallel. Firstly, promotion of the adoption of the definition by employers, governments, recruiters, CSOs and workers' organizations. Secondly, information channels must be established for migrants so they understand how the recruitment process should take place, its associated costs, and how to recognize potential abusive practices by recruiters or employers. The definition should also promote that any labour conditions agreed upon follow and are compliant with ILO labour standards.

6.3 Adoption of the ILO definition on recruitment fees and related costs

The Tripartite Meeting of Experts on Defining Recruitment Fees and Related Costs was held in Geneva from 14 to 16 November 2018. It was attended by eight experts nominated after consultations with the Government group, eight experts nominated after consultations with the Employers' group and eight experts nominated after consultations with the Workers' group. The meeting was chaired by an independent Chairperson, Mr Pietro Mona (Switzerland). The Vice-Chairpersons were Ms Annemarie Muntz (Employer, Netherlands), Ms Shannon Lederer (Worker, United States), and Mr Iskandar Zalami (Government, United Arab Emirates). There were Government observers from seven countries (Belgium, Brazil, Chile, Indonesia, Panama, the Philippines and the Republic of Korea), as well as representatives from the International Organisation of Employers and the International Trade Union Confederation and from the following intergovernmental organizations and international non-governmental organizations: the European Union, the International Organization for Migration, the World Bank, the Alliance of Asian Associations of Overseas Employment Service Providers, the Migrant Forum in Asia, the New York University Stern Center for Business and Human rights, and Verité. The meeting focused on the negotiation of the draft definition of recruitment fees and related costs. This definition was included in the background paper prepared by the Office on the basis of

a global comparative research, which analysed different member States' national laws and policies, bilateral labour agreements, and international voluntary codes and guidance on recruitment fees and related costs. The experts clarified that the definition should be read and disseminated together with the General Principles and Operational Guidelines for Fair Recruitment, which clearly recognize the principle that workers shall not be charged directly or indirectly, in whole or in part, any fees or related costs for their recruitment. Furthermore, the definition should support the implementation and enforcement of laws, policies and measures aimed at the protection of workers' rights, and also support delivery of effective regulation of recruitment to combat non-compliance, provide transparency of recruitment practices and enhance the functioning of labour markets.

The agreed definition of recruitment fees covers all types of recruitment, in all sectors and for all workers, regardless of whether they were recruited nationally or internationally. Experts determined that related costs were expenses integral to the recruitment and placement process within and across borders, taking into account that the widest set of related recruitment costs were incurred for international recruitment. Identified recruitment related costs were consequently listed in the definition. The experts found it important to include the possibility of further definition of cost categories at national level, and allowed flexibility to determine exceptions to their applicability, consistent with international labour standards and the conditions identified in the definition. The experts also agreed to include a specific subsection that identified the illegitimate, unreasonable and undisclosed costs that should never be charged to any actor in the recruitment process.

The experts also discussed the possible modalities of dissemination and implementation of the agreed definition, within the broader umbrella of the ILO Fair Recruitment Initiative. They recommended that the definition should be translated into the official ILO languages, published online, and always distributed together with the General Principles and Operational Guidelines for Fair Recruitment. The experts also suggested that the dissemination of the definition should be pursued through partnerships. These could include multi-stakeholder initiatives and partnerships within the United Nations Network on Migration, which was established to support implementation of the Global Compact for Safe, Orderly and Regular Migration. Other avenues include the Global Alliance to Eradicate Forced Labour, Modern Slavery, Human Trafficking and Child Labour (Alliance 8.7), the International Organization for Migration's International Recruitment Integrity System and the World Bank's Global Knowledge Partnership on Migration and Development. The experts requested the ILO to collaborate with the social partners to identify priority regions and countries for the promotion of fair recruitment and practical implementation of the General Principles and Operational Guidelines for Fair Recruitment, thereby disseminating and utilizing the adopted definition. The development and updating of practical tools and provision of capacity-building to constituents in this area was also discussed as a means to disseminate and promote the effective application of the definition. The outcome of the meeting, the document entitled "Definition of recruitment fees and related costs", is presented in Annex 4.

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▶ ANNEX 1

Relevant legislation, policies and labour agreements at the national and bilateral level

1. National level

Antigua and Barbuda

Government of Antigua and Barbuda (1941) The Recruiting of Workers Act.

Argentina

República de Argentina (2001) Decreto 489/2001 Apruébase a Reglamentación del artículo 1 de la Parte I y los artículos 10, 11 y 12 de la Parte III del Convenio O.I.T. N° 96 sobre las citadas Agencias, aprobado por la Ley N° 24.648.

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Brazil

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Colombia

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Ecuador

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El Salvador

Asamblea Legislativa de la República de El Salvador (1996) Ley de Organización y Funciones del Sector Trabajo y Previsión Social.

Guatemala

Ministerio de Trabajo y Previsión Social de Guatemala (2016) Servicio Nacional de Empleo (SNE) de Guatemala. Documento Base.

República de Guatemala (1961) Decreto 1441. Código de Trabajo.

Guyana

Ministry of Legal Affairs Guyana (1943) Recruiting of Workers Act.

Honduras

Secretaría de Trabajo y Seguridad Social de Honduras (2008) Acuerdo No. STSS-252-08. Julio 30, 2008.

Secretaría de Trabajo y Seguridad Social de Honduras (2017) Acuerdo No. STSS-155-2017. Junio 20, 017. Reforma del Reglamento para el Funcionamiento de las Agencias Privadas y Servicios Conexos.

Jamaica

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Mexico

Estados Unidos Mexicanos Ley Federal del Trabajo. Abril 1, 1970.

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Panama

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Congreso de la Nación Paraguaya (1993) Ley No. 213 (29 de octubre de 1993) que establece el código del trabajo.

Peru

República de Perú (2012a) Decreto Supremo No. 001-2012-TR (9 de febrero de 2012) Decreto Supremo que aprueba la creación de la “Ventanilla Única de Empleo”.

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Spain

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Ministerio de Asuntos Exteriores de España (2001a) Acuerdo entre España y Colombia relativo a la regulación y ordenación de los flujos migratorios laborales.

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United States

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US Government (2018) Federal Acquisition Regulation: Combating Trafficking in Persons-Definition of “Recruitment Fees”.

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Uruguay

República Oriental de Uruguay (2013) Ley No. 17692 (Promulgación: 26/09/2003, Publicación: 07/10/2013) Ratificación del Convenio Internacional del Trabajo No. 181. Agencias de colocación.

República Oriental de Uruguay (2016) Decreto No. 137/2016 (17 de Mayo de 2016) Reglamentación del Funcionamiento de las Agencias de Empleo Privadas y Derogación del Decreto 384/979.

Bolivarian Republic of Venezuela

Asamblea Nacional de la República Bolivariana de Venezuela (2005) Ley del Régimen Prestacional de Empleo. Gaceta Oficial No. 38.281 de 27 de septiembre de 2005)

Presidencia de la República Bolivariana de Venezuela (2012) Ley Orgánica del Trabajo, las trabajadoras y los trabajadores. (Decreto No. 8.938)

2. Bilateral labour agreements

Agreement between the United States of America and Mexico respecting the temporary migration of Mexican agricultural workers. August 4, 1942.

Gobierno de la República de Costa Rica y Gobierno de la República de Nicaragua (1993) Convenio de Mano de Obra Migrante entre el Gobierno de Costa Rica y el Gobierno de la República de Nicaragua para regular el ingreso y permanencia de trabajadores migrantes no residentes.

ANNEX 2

Orientating questions for the interviews in Spanish⁶²

Durante el último trimestre de 2018, la OIT celebrará una reunión tripartita de expertos con el objetivo de discutir y acordar una definición sobre tarifas/costos de contratación/colocación y costos conexos. En preparación a esta reunión la OIT está realizando un estudio comparativo a nivel regional y global sobre lo que los países de la región de las Américas consideran los aspectos más relevantes en dicha temática.

Este estudio tiene como objetivo el mapeo e identificación de los diferentes enfoques y definiciones que se utilizan actualmente en la región, analizando las áreas de consenso y los posibles desafíos que tienen los diferentes actores (Gobiernos, Empleadores, Agencias de empleo, Migrantes) en la definición de tarifas/costos de contratación/colocación y costos conexos.

El estudio se está realizando a partir de una revisión documental, que incluye la legislación nacional vigente sobre el tema, estudios e informes que sobre el tema se realizan, y entrevistas semi-estructuradas a actores relevantes en la región. Para esto hemos diseñado un cuestionario que pretende dirigir la conversación con la consultora que está elaborando el estudio para la región de las Américas.

Las preguntas orientadoras son las siguientes:

1. Qué se entiende por tarifas/costos de contratación/colocación en la legislación de su país? Qué tipo de ítems se incluyen y quién los asume? (empleador, trabajador/buscador de empleo, agencia de empleo)
2. Existe un consenso entre la definición y legislación nacional, los acuerdos regionales y convenios bilaterales de migración laboral en los que participa su país?
3. Qué costos son asumidos por los trabajadores migrantes en el proceso de contratación que no estén incluidos en la legislación sobre tarifas/costos de contratación/colocación? Demuestran los trabajadores migrantes estar de acuerdo con asumir dichos costos?
4. Qué entidades participan en los procesos de contratación/colocación y en el proceso de determinar los costos y gastos conexos?
5. Cuáles son los consensos y diferencias entre los actores (gobierno, empleadores, agencias de empleo y trabajadores) sobre lo que son las tarifas/costos de contratación/colocación y sobre los costos que deben ser asumidos por los trabajadores?
6. Considerando la legislación y la práctica de los procesos de contratación, cuáles son los aspectos que más le preocupan sobre los costos que asumen los trabajadores migrantes en su país?
7. Existen diferencias en la definición y legislación sobre tarifas/costos de contratación/colocación para migración laboral interna y migración laboral internacional? Entre sectores o nivel de cualificación del trabajador migrante?

⁶² The same questions and information orientated the interviews held in English.

▶ ANNEX 3

List of interviews

Name	Position and Department	Organization	Country	Interview date
Valter Bittencourt		CSA-TUCA (Confederación Sindical de Trabajadores de las Américas – Trade Union Confederation of the Americas)	Brazil	25-May-18
Amalia Pereira		CUT (Central Unitaria de Trabajadores)	Chile	19-Jun-18
Pablo Vilches		UNT (Unión Nacional de Trabajadores)	Chile	19-Jun-18
Carol Varela	Monitoring and Evaluation	Public Employment Service	Colombia	01-Jun-18
Julio Arenas	Migration Officer	CTC (Confederación de Trabajadores de Colombia)	Colombia	25-Jun-18
Juan Felipe Barrera	Lawyer	Employment Agency Adecco	Colombia	14-Jun-18
Daniel Parra	Permanent Placement Manager	Employment Agency Adecco	Colombia	16-Jun-18
Ana María Méndez	Migration National Officer	ILO Guatemala	Guatemala	01-Jun-18
Patricia Canales, Nohelia Canizales, Bertha Martínez, Christian Patricia Lagos	Employment Directorate, Labour Migration Department, PEAs Regulation Department.	Employment Secretariat	Honduras	29-May-18
José Joel Navarrete		CUTH (Confederación Unitaria de Trabajadores de Honduras)	Honduras	14-Jun-18
Georgina Vázquez de los Reyes	Migration National Officer	ILO Mexico	Mexico	18-May-18
Marion Krumkalns; Elena Villafuerte	Radar Program Coordinator; Analysis and Incidence Program Coordinator	Prodesc (Proyecto de Derechos Económicos, Sociales y Culturales A.C.)	Mexico	05-Jun-18
Christina García	International Cooperation – Private Employment Agencies regulation	Ministry of Labour	Panama	30-May-18
Isabel Guzman		Convergencia Sindical	Panama	19-Jun-18
Amy McGann	Office of International Labor Affairs – Bureau of Democracy, Human Rights, and Labor	U.S. Department of State	United States	17-May-18
Shannon Lederer	Director of Immigration Policy	AFL-CIO (American Federation of Labor and Congress of Industrial Organizations)	United States	05-Jun-18
Ana Aguilera		PIT-CNT (Plenario Intersindical de Trabajadores - Convención Nacional de Trabajadores)	Uruguay	20-Jun-18

▶ ANNEX 4

ILO adopted definition of recruitment fees and costs

I. Scope

1. The definition of recruitment fees and related costs is guided by international labour standards and should be read together with the ILO General Principles and Operational Guidelines for Fair Recruitment. As such, it recognizes the principle that workers shall not be charged directly or indirectly, in whole or in part, any fees or related costs for their recruitment.
2. The definition is based on the findings of the ILO's global comparative research which analysed different member States' national laws and policies and international voluntary codes and guidance on recruitment fees and related costs. It takes into account the practical realities and context-specific conditions that workers, labour recruiters, enterprises and employers face.
3. The definition identifies fees and related costs in recruitment practices. It is intended to support the development, monitoring, implementation and enforcement of laws, policies and measures aimed at the protection of workers' rights, including that workers should not be required to pay for access to employment. It is also intended to support the delivery of effective regulation of recruitment practices, notably of public and private employment agencies, to combat non-compliance,⁶³ provide transparency of recruitment practices and enhance the functioning of labour markets.
4. It is also recognized that costs for workers recruited internationally can be significantly higher than those for workers recruited nationally due to a range of factors, including a lack of consistency and transparency on what these costs constitute in different national contexts. Furthermore, workers who are recruited across borders may find themselves in situations of particular vulnerability.
5. For the purpose of this definition of recruitment fees and related costs, the definitions of the General Principles and Operational Guidelines apply. The term "workers" includes jobseekers.⁶⁴

II. Definition of recruitment fees and related costs

6. The terms 'recruitment fees' or 'related costs' refer to any fees or costs incurred in the recruitment process in order for workers to secure employment or placement, regardless of the manner, timing or location of their imposition or collection.
7. Recruitment fees or related costs should not be collected from workers by an employer, their subsidiaries, labour recruiters or other third parties providing related services. Fees or related costs should not be collected directly or indirectly, such as through deductions from wages and benefits.
8. The recruitment fees and related costs considered under this definition should not lead to direct or indirect discrimination between workers who have the right to freedom of movement for the purpose of employment, within the framework of regional economic integration areas.

63 Reference: A.6.1 of Guidelines.

64 This is in line with the ILO Private Employment Agencies Convention, 1997 (No. 181), Art. 1, and the ILO General Principles and Operational Guidelines for Fair Recruitment which define the term "recruitment" as applicable "to both jobseekers and those in an employment relationship".

A. Recruitment fees

9. Recruitment fees include:

- a. payments for recruitment services offered by labour recruiters, whether public or private, in matching offers of and applications for employment;
- b. payments made in the case of recruitment of workers with a view to employing them to perform work for a third party;
- c. payments made in the case of direct recruitment by the employer; or
- d. payments required to recover recruitment fees from workers.

10 These fees may be one-time or recurring and cover recruiting, referral and placement services which could include advertising, disseminating information, arranging interviews, submitting documents for government clearances, confirming credentials, organizing travel and transportation, and placement into employment.

B. Related costs

11. Related costs are expenses integral to recruitment and placement within or across national borders, taking into account that the widest set of related costs are incurred for international recruitment. These costs are listed below and may apply to both national and international recruitment. Depending on the recruitment process and the context, these cost categories could be further developed by the governments and the social partners at the national level. It is recognized that the competent authority has flexibility to determine exceptions to their applicability, consistent with relevant international labour standards, through national regulations, and after consulting the most representative organizations of workers and employers. Such exceptions should be considered subject, but not limited, to the following conditions:

- i. they are in the interest of the workers concerned; and
- ii. they are limited to certain categories of workers and specified types of services; and
- iii. the corresponding related costs are disclosed to the worker before the job is accepted.

12. When initiated by an employer, labour recruiter or an agent acting on behalf of those parties; required to secure access to employment or placement; or imposed during the recruitment process, the following costs should be considered related to the recruitment process:

- i. Medical costs: payments for medical examinations, tests or vaccinations;
- ii. Insurance costs: costs to insure the lives, health and safety of workers, including enrolment in migrant welfare funds;
- iii. Costs for skills and qualification tests: costs to verify workers' language proficiency and level of skills and qualifications, as well as for location-specific credentialing, certification or licensing;
- iv. Costs for training and orientation: expenses for required trainings, including on-site job orientation and pre-departure or post-arrival orientation of newly recruited workers;
- v. Equipment costs: costs for tools, uniforms, safety gear, and other equipment needed to perform assigned work safely and effectively;
- vi. Travel and lodging costs: expenses incurred for travel, lodging and subsistence within or across national borders in the recruitment process, including for training, interviews, consular appointments, relocation, and return or repatriation;
- vii. Administrative costs: application and service fees that are required for the sole purpose of fulfilling the recruitment process. These could include fees for representation and services aimed at preparing, obtaining or legalizing workers' employment contracts, identity

documents, passports, visas, background checks, security and exit clearances, banking services, and work and residence permits.

13. Enumeration of related costs in this definition is generalized and not exhaustive. Other related costs required as a condition of recruitment could also be prohibited.

14. These costs should be regulated in ways to respect the principle of equality of treatment for both national and migrant workers.

C. Illegitimate, unreasonable and undisclosed costs

15. Extra-contractual, undisclosed, inflated or illicit costs are never legitimate. Anti-bribery and anti-corruption regulation should be complied with at all times and at any stage of the recruitment process. Examples of such illegitimate costs include: bribes, tributes, extortion or kickback payments, bonds, illicit cost-recovery fees and collaterals required by any actor in the recruitment chain.

- ▶ This report was produced with the contribution of the Global Action to Improve the Recruitment Framework of Labour Migration project (REFRAME), supported by the European Union. The REFRAME project aims at preventing and reducing abusive and fraudulent recruitment practices, and maximizing the protection of migrant workers in the recruitment process and their contribution to development.

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