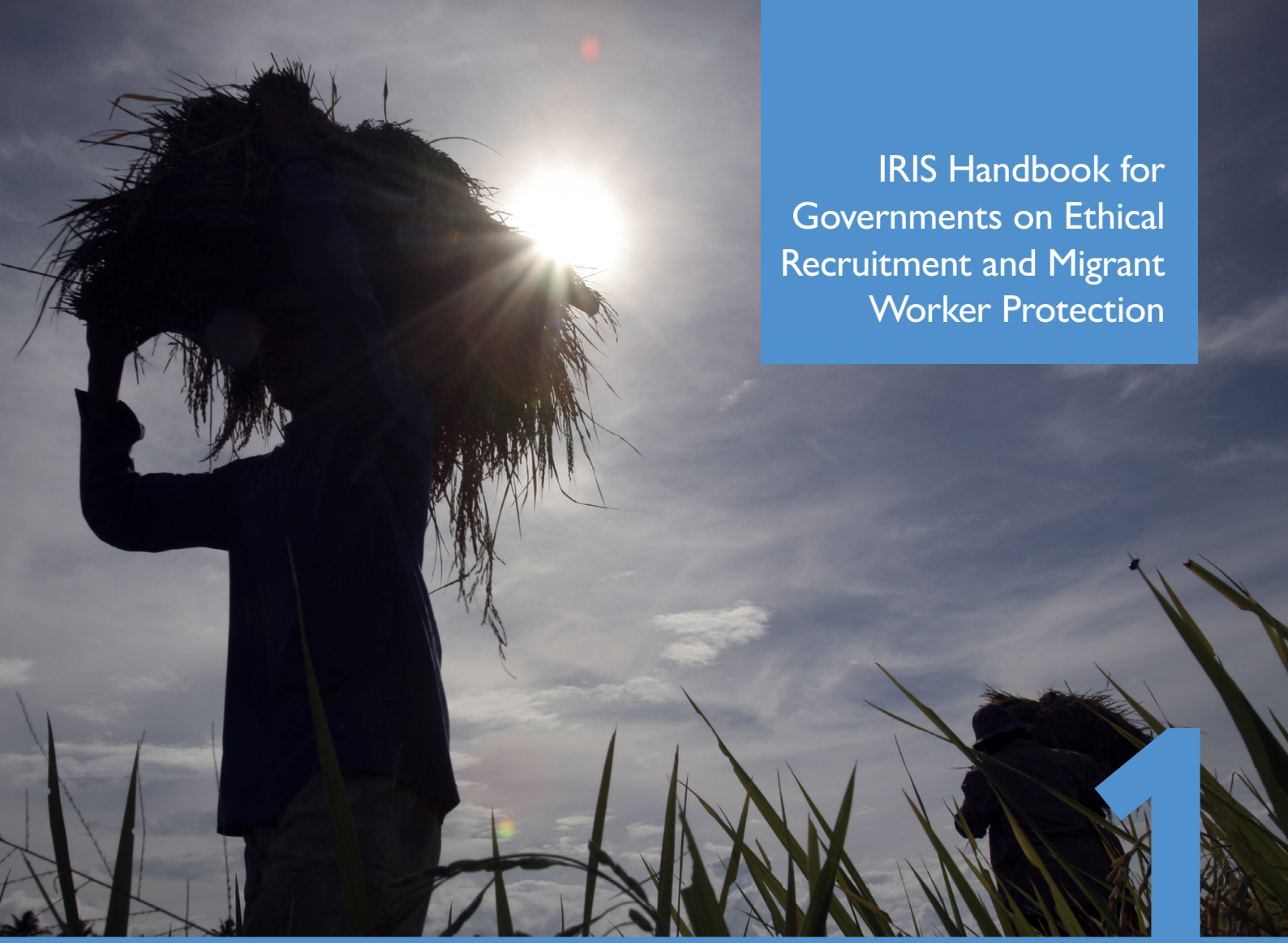

IRIS Handbook for Governments on Ethical Recruitment and Migrant Worker Protection

1

ADOPTING A RIGHTS-BASED REGULATORY APPROACH TO INTERNATIONAL LABOUR RECRUITMENT

Ensuring the protection of migrant workers through ethical recruitment regulation

IOM
UN MIGRATION

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IRIS ETHICAL RECRUITMENT

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Purpose and scope

This publication provides global guidance to governments on how to adopt and strengthen statutory measures to promote fair and ethical international labour recruitment in the private sector and protect migrant worker rights, in line with international law. It is one chapter of the broader *IRIS Handbook for Governments on Ethical Recruitment and Migrant Worker Protection* (hereafter the IRIS Handbook). Guidance is intended for government officials in their capacities as regulators at various levels of administration (national, subnational) and across relevant portfolios (immigration, labour, foreign affairs, etc.). For the most part, it can be applied in countries of origin, transit, and destination; targeted guidance is otherwise noted.

It is important to note that there is no perfect regulatory prescription; statutory and policy approaches to recruitment are vast and diverse. As such, this publication does not propose a one-size-fits-all solution as countries face distinct challenges and opportunities and authorities have varied levels of capacity and resources. Rather, it is intended to provide global guidance on regulatory options and levers as they relate to international labour recruitment and migrant worker protection,[1] none of which are specifically recommended to any one region or country. While the focus of the guidance explores effective regulation of the private recruitment industry, where applicable, relevant roles and responsibilities of employers of migrant workers are also discussed. Case study examples are primarily highlighted to demonstrate the global nature of the issues and the practical ways in which different governments are taking concrete action in the area. Operational considerations will be explored and captured in relevant forthcoming chapters of the IRIS Handbook. Where relevant, the IRIS Handbook references existing available complementary training materials such as the ILO training toolkit on Establishing Fair Recruitment Processes.[2]

The IRIS Handbook builds on The Montreal Recommendations on Recruitment: A Road Map towards Better Regulation,[3] a set of 49 practical and targeted recommendations for governments on recruitment and migrant worker protection.[4] The Montreal Recommendations were co-created by 100 regulators from over 30 countries at the Global Conference on the Regulation of International Recruitment in Montreal, Canada in June 2019. Grounded in international law, this chapter draws attention to select recommendations and expands on each by providing more detailed measures for governments to consider.

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1 "Migrant worker protection" is used throughout the guidance as a blanket term to encompass not only protection of migrant worker rights, but also matters of access, fulfilment, and respect of rights.

2 Available at: www.ilo.org/global/topics/labour-migration/publications/WCMS_682737/lang--en/index.htm.

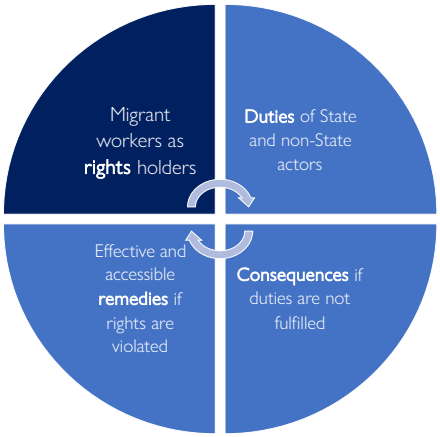
3 Available at https://publications.iom.int/books/montreal-recommendations-recruitment-road-map-towards-better-regulation.

4 The Montreal Recommendations also include 6 recommendations to IOM and the international community (see policy area: "Maintaining the momentum on regulation") for a total of 55 recommendations.

Introduction

The international labour recruitment landscape is complex. Private labour recruiters in countries of origin and destination operate as intermediaries between employers and migrant workers; relationships between them often span multiple jurisdictions, global supply chains, and long periods of time. Recruiters perform the crucial function of matching labour demand and supply across borders, and do so by leveraging extensive networks of brokers, subagents, and travel and immigration expertise. In some cases, prospective migrant workers come to depend on recruiters to navigate complicated migratory and employment processes and gain employment abroad. This dependence, combined with competitive pressures within the recruitment industry, can create conditions where recruiters may act unethically. Unethical recruitment practices include misrepresenting terms and conditions of employment contracts, fee charging to workers, confiscating passports and more. This can directly cause conditions in which migrant workers experience exploitation and abuse. Where decent work safeguards are not in place and effectively enforced, employers of migrant workers can also contribute to these dynamics. As such, international labour recruitment is not only characterized by its complexity but often by the widespread misconduct observed across the industry.

Figure 1. Duty bearers and rights holders



In this context, governments bear the responsibility (as **duty bearers**) to ensure that recruitment takes place in a way that respects, protects, and fulfils the rights of all persons within their jurisdiction, including migrant workers. Migrant workers have the dignity inherent in all human beings and are entitled (as **rights holders**) to the full range of universal human rights enshrined in international law, without discrimination.[5] However, in many migration corridors, weakness in rights and enforcement mechanisms can result in a failure to protect migrant workers from violations of those rights, often resulting in unsafe and exploitative conditions during the recruitment process. States must create legal systems that implement migrant worker rights and that protect them in case of violation.

The primary mode of governmental activity through which State duty manifests is **regulation**, and in this case, of private international labour recruitment actors. In its most basic terms, State-led regulation involves establishing a binding set of rules (legal norms and frameworks) in a deliberate and designed manner to influence behaviour. Regulation can be restrictive or preventive, enabling or facilitative, or both.

[5] On non-discrimination, see for example Article 7 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPRMW)*: "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

Montreal Recommendation

1. Governments at relevant levels should adopt or, where necessary, strengthen laws and regulations to promote fair and ethical recruitment in compliance with international standards.

If not already done, States should ratify and enact into law all international human rights instruments, as well as relevant labour standards protecting migrant workers. In their capacities as regulators, governments should enact laws that ensure fair and ethical recruitment; laws and regulations should be adopted or amended to **align with relevant international standards and guidelines**. Depending on the context, applicable continental, regional, and national frameworks may also be relevant. This global guidance chapter explores recommended approaches to regulation to achieve this objective, grounded in relevant binding and non-binding instruments.

Relevant international instruments concerning migrant worker rights and fair and ethical recruitment

Binding

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989
- International Convention on the Protection of the Rights of Migrant Workers and Members of their Families, 1990
- United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 2000
- ILO Forced Labour Convention, 1930 (No. 29) and the 2014 Protocol to the Forced Labour Convention, 1930
- ILO Migration for Employment Convention (Revised), 1949 (No. 97)
- ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
- ILO Private Employment Agencies Convention, 1997 (No. 181)
- ILO Domestic Workers Convention, 2011 (No. 189)

Non-binding

- United Nations 2030 Agenda for Sustainable Development
- United Nations Global Compact for Safe, Orderly and Regular Migration, 2018
- ILO Multilateral Framework on Labour Migration, 2006
- ILO General Principles and Operational Guidelines for Fair Recruitment, 2016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1 Overarching recommendations to guide the regulatory process

Montreal Recommendation

2. The principal aim of recruitment regulation should be to protect all migrant workers, regardless of their legal status.

While this guidance makes a wide range of individual recommendations, it is worth stating that any regulatory development process – including its implementation and administration – should be broadly guided by the following **overarching tenets**:

(1) Clear and coherent objectives

Effective legal and policy frameworks rely on clear and coherent objectives. The main objective of recruitment regulation should be to **protect all migrant workers**. Clear, transparent, and effectively enforced laws that ensure fair and ethical recruitment practices should all flow from this objective. Regulators may also consider including identifying and articulating other related objectives, such as promoting the integrity of the private labour recruitment industry.

(2) Meaningful stakeholder consultation and dialogue

Governments should undertake **meaningful consultation** before adopting and amending relevant recruitment regulation, including consulting migrant workers, recruiters (businesses and individuals, as applicable), civil society organizations, employers, national employment agencies, industry associations, trade unions, relevant experts from the research community, and international organizations. Ensuring dialogue with such actors is crucial during the design, adoption and monitoring of relevant regulatory provisions. It may be useful to obtain input from relevant foreign governments (e.g. key origin or destination States, as relevant) through bilateral means or multilateral dialogue platforms facilitated by intergovernmental agencies. The content, design, and implementation of relevant laws should be informed by the realities and concerns brought forward through consultation. In particular, as migrant workers typically have little or no means to have their experiences formally acknowledged and amplified, governments should take intentional steps to ensure that migrant worker lived experience and input is reflected in the formulation and implementation of relevant law. Civil society organizations that support migrant workers can provide access to these experiences and identify key issues, evidence, and government interventions towards better regulation.

(3) Commitment to data collection and evaluation

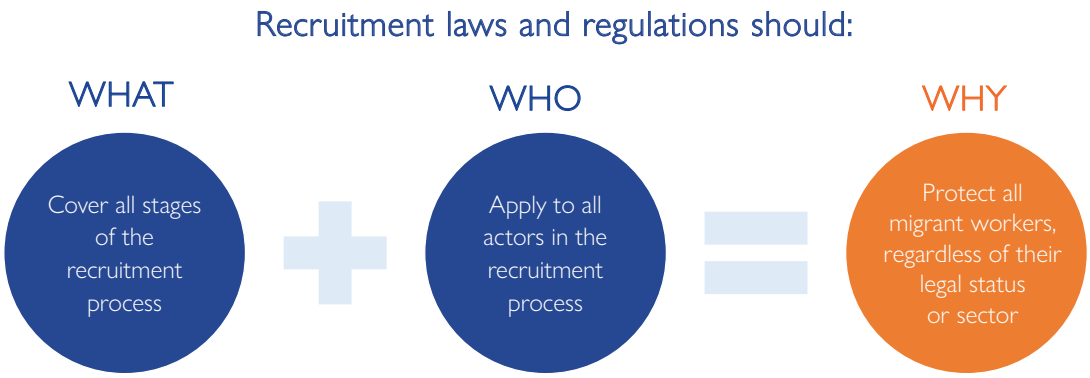
Governments should be committed to making evidence-based policy decisions and improving laws through **rigorous monitoring and evaluation** on an ongoing basis. Data collection is of paramount importance in the administration of law; without strong evidence, governments cannot determine what works well (or not) towards achieving policy objectives. It should never be assumed that regulatory approaches will operate perfectly and, as such, regulatory solutions must be measured and anticipate unintended consequences. This includes a commitment to shining light on policy gaps after implementation of law, including any discrepancies between the letter of the law and how it functions in practice. Analysis of relevant judicial practices and court decisions is also important, for example where they interpret and clarify how certain norms shall be understood and applied. These combined measures can determine whether regulatory responses need to be adjusted, bolstered, or replaced.

2 Regulatory measures

This section provides an overview of regulatory measures that governments can adopt to ensure fair and ethical recruitment. For clarity, guidance is aimed at the regulation of private recruitment activities of international migrant workers.

Laws governing international labour recruitment should be universal in nature, where rights apply to all migrant workers, without exception. Obligations on relevant businesses, recruiters, and employers should also be universal. Legal or policy exemptions that restrict application can lead to a patchwork of associated protections for workers, creating the risk of discrimination and leaving some groups less protected than others despite moving along the same corridor and even into the same jobs.

Figure 2. Universality of recruitment laws



Defining key terms

As such, carefully drafting comprehensive legal definitions of key terms like *migrant workers, recruitment services, labour recruiters, and employers* (where applicable) is the foundation of good governance. In order to ensure legal interpretation is not left to a high degree of discretion and inconsistent application, definitions should be clear and precise.

The following guidance provides some standard international definitions to work from, as well as notes for domestic adaptation.

Migrant worker

A person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which that person is not a national.[6]

The definition should:

- include **prospective** migrants (i.e. jobseekers "to be engaged") whether they become employed or not; and
- be inclusive of all sectors and skill levels.

In countries of destination, relevant immigration law may be referenced for clarity purposes only. The definition should not prescribe or imply that regular immigration status or any particular visa is required.

Recruitment services

The advertising, information dissemination, selection, transport, placement into employment and – for migrant workers – return to the country of origin where applicable. This applies to both jobseekers and those in an employment relationship.[7]

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[6] United Nations, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (2220 UNTS 3, adopted 18 December 1990, entered into force 1 July 2003), art. 2(1).

[7] ILO, *General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs*, Geneva, 2019. Available at www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536755.pdf. For more information on the ILO definition of the **employment relationship**, see https://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang--en/index.htm.

The definition should:

- include activities that support **finding work for migrants and finding migrants for work**, such as those captured above, and
  - attempts to do so,
  - assisting another person or entity to do so, and
  - referring a migrant worker to another person or entity to do so.
- specify that it applies **whether or not** services are provided for a fee or consideration.

> **Uganda: The Employment (Recruitment of Ugandan Migrant Workers Abroad) Regulations, 2021**
>
> Article 3: *"Recruitment and placement"* means canvassing, contracting, transporting, utilising, hiring, or procuring workers, and includes referrals, contract services, and advertising for employment for migrant workers, whether for profit or not.

Due to the highly complex and multifaceted nature of the recruitment industry, the level of detail describing what *recruitment services* practically entail is an important drafting consideration. It can be valuable for governments to publish explanatory policy guidance pursuant to legal provisions to clarify intent and interpretation.[8]

Regulators may also consider specifying what does **not** constitute recruitment services if there is a desire to restrict the types of activities that recruiters can legitimately engage in or profit from. For example, if certain related business services are classified as "non-recruitment" (e.g. immigration advice or travel assistance), regulators should consider defining these services distinctly. This enables regulators to prescribe special conditions, such as conflict of interest provisions or requirements, as necessary. Related guidance on prescribing rules of ethical conduct, including prohibited acts, are explored below.

International labour recruiter[9]

While the term *labour recruiter*, as expressed in the International Labour Organization (ILO) *General Principles and Operational Guidelines for Fair Recruitment*, refers to both private and public entities that offer labour recruitment and placement services, the scope of this document (and thus the definitional guidance below) is limited to private entities.[10] The labour recruiter definition should encompass:

- Any natural or legal person in the private sector that provides recruitment services, as defined.

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[8] As an example, see Ontario's Employment Protection for Foreign Nationals Act Policy and Interpretation Manual. Available at www.ontario.ca/document/employment-standard-act-policy-and-interpretation-manual.

[9] The term "recruiter" is used as shorthand for international private labour recruiter throughout the guide.

[10] For clarity, the scope of this guidance does not cover "private employment agencies" that perform services consisting of employing workers with the view of making them available to a third party. Thus, the "labour recruiter" definition and broader guidance is limited to those that provide recruitment services **without** becoming a party to the employment relationship that may arise therefrom.

It is worth highlighting that the international recruitment industry is immensely heterogenous and labour recruiters can take many forms and sizes. Enforcing activities of subagents and other traditionally informal intermediaries largely depends on if and how regulators capture them in the prescribed definition (further considerations on recognizing subagents are explored on page 13). If any distinctions between private recruitment agencies (service enterprises/businesses), intermediaries and/or subagents are necessary, regulators should adapt the relevant definition accordingly.

Employer

A person or entity that engages or has engaged migrant employees or workers, either directly or indirectly.

As the regulation of employers generally falls under the jurisdiction of domestic labour legislation in countries of destination, defining and mandating rules on employers may not be applicable for all regulatory frameworks.[11]

Based on foundational definitions, regulators must then determine the legal status of international labour recruiters, that is, who is allowed to operate in the market.

Determining the legal status of labour recruiters

There are three basic regulatory models that governments can choose from when establishing the legal status of private labour recruiters: prohibition, licensing, and registration.[12] These models are not necessarily exclusive of each other; governments sometimes adopt a mixed approach where regulations require recruiters in certain sectors to be licensed, while either requiring others to be registered or prohibiting their activity altogether.

[11] Adapted for **migrant** worker employers from the definition expressed in the *ILO General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs*.

[12] The terms **registration** and **licensing** are often used interchangeably. For clarity, the terms are distinguished in this guide by a strict interpretation of both: where licensing requires authorization before providing services, and registration is a non-conditional requirement to simply register with a government authority.

Prohibition

Montreal Recommendation

8. All actors that engage in recruitment, whether individuals or enterprises, should be registered either through licensing or a registration scheme.

Regulators can make it illegal for private labour recruiters to operate, at all, or in certain services, corridors and/or sectors.[13] Prohibition of this kind may mean that recruitment can only be carried out by government authorities, typically in the form of public job matching and placement services.[14] Total State management of international labour recruitment is an uncommon model in the global context, however. This is largely due to the relatively limited State capacity to manage global demands for migrant labour compared to the private sector. As such, government-managed recruitment tends to be selectively performed in certain corridors (e.g. where bilateral labour agreements exist).

Governments are encouraged to give careful consideration to the feasibility of public recruitment in specific categories of workers or sectors where evidence demonstrates that migrants face increased risk of abuse in the recruitment and employment process (e.g. via government-to-government bilateral or multilateral agreements). Direct government intervention of this kind and its impacts on migrant outcomes should be closely monitored.

Licensing

Licensing is one of the most important instruments that governments can use to promote ethical recruitment practices. At its core, licensing is a proactive mechanism to legally authorize who can and cannot engage in the recruitment and placement of migrant workers. Under this model, labour recruiters must apply for and be issued a licence before providing recruitment services. Authorities assess applicants against specific criteria through a screening process and licences are only issued if authorities are satisfied that requirements are met. Licences can be suspended, cancelled, and refused at renewal in case of non-compliance with prescribed rules of conduct or other applicable provisions. Any recruiter operating without a valid licence is deemed unauthorized and can face consequences and sanctions for their illegal recruitment activities in accordance with applicable domestic law.

Eligibility and requirements for licensing

Determining eligibility criteria is a key step in setting up a recruiter licensing regime. In general, regulations can prescribe a range of criteria to ensure competence in the following areas: personal background and professional qualifications, financial capacity, and management and marketing capabilities. In the global comparative context, licensing criteria vary widely, particularly between countries of origin, transit, and destination.

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[13] Governments may also explicitly ban certain **types** of labour recruiters, for example, individual subagents.

[14] Article 66 of the *ICPRMW* sets out the parameters of public and private recruitment operations as follows:
"1. Subject to paragraph 2 of the present article, the right to undertake operations with a view to the recruitment of workers for employment in another State shall be restricted to: (a) public services or bodies of the State in which such operations take place; (b) public services or bodies of the State of employment on the basis of agreement between the States concerned; (c) a body established by virtue of a bilateral or multilateral agreement.
2. Subject to any authorization, approval and supervision by the public authorities of the States Parties concerned as may be established pursuant to the legislation and practice of those States, agencies, prospective employers or persons acting on their behalf may also be permitted to undertake the said operations."

Potential eligibility criteria[15]	
Personal criteria	Age and reliability of the licence holder as demonstrated by previous lawful behaviour, background checks, and criminal record
Professional competence	Proof of experience and knowledge of legal regulations, ethical standards, and the labour market to ensure quality of services and respect and protection of migrant workers, according to applicable laws
Management capability	Competence to organize and manage a business, informed by tax and bankruptcy history, and adequate equipment and facilities
Marketing capability	Competence in looking for and identifying employment opportunities for workers and negotiating contracts that benefit workers

The main aim of criteria setting should be to ensure that licensees are **competent and capable** of providing ethical recruitment services. **Refusal grounds** can be prescribed in this vein: if the applicant has not complied with relevant obligations, provided false or misleading information in their application, or if there is evidence that they will not act with integrity based on past conduct. The screening process also enables authorities to collect reliable **data and records** on active recruiters and their services (i.e. who is doing what, where, and for whom). This can help inform targeted inspections, risk indicators, and related regulatory undertakings.

In terms of requirements, regulators are encouraged to oblige recruiters to **deposit a bond with the government as a security**. In addition to verifying the financial capacity of an applicant, this requirement also serves as a safeguarding measure to protect migrant workers. The deposit can be used, if necessary, to reimburse migrant workers who incur illegal recruitment fees or costs, or to compensate workers in case of loss or damage due to recruiter non-compliance with the law. Application and/or licence **fees** can also be required to offset the cost of resourcing the licensing regime, however the fee should be set at a reasonable rate so that (1) it does not discourage recruiters from applying, and (2) the amount is not so high that recruiters are more likely to download it on to migrant workers.

In light of complex labour supply chains where recruiters operate in connection with other formal and informal brokers and subagents across international borders, adopting laws that enhance transparency and enable accountability across these networks is essential. Regulators are strongly encouraged to require that applicants **disclose the names and addresses of all their partners, affiliates or agents, regardless of location** (i.e. in country of origin and destination). This broadens due diligence on recruitment activity beyond domestic jurisdiction. Collecting this information through proactive disclosure in the licensing process can also ensure more effective enforcement of Joint and several liability[16] clauses (e.g. when contraventions are committed by a licensee's subagent).

[15] Adapted from ILO Training Toolkit on Establishing Fair Recruitment Process: Public Employment Services and Private Employment Agencies in a Changing Landscape, 2021.

[16] See Joint and several liability on page 22.

Licence features

Recruiter licences must be prescribed as **time limited**. This guarantees periodic verification of licensee competence and compliance, reassessed when a licence expires and is up for renewal. Renewals create a clear incentive for recruiters to maintain compliance with legislative provisions over time. Regulations should also specify that licences are **non-transferable**, ensuring that they cannot be used by anyone or any other entity than to whom it was issued.

Public register and classification

Licensing can afford a high degree of **transparency and accountability** when paired with a public register. A public register is a valuable tool for migrant workers and employers to distinguish between legal and illegal recruiters, verifying legitimacy ahead of engagement. Regulations should accordingly enshrine the government's responsibility to publish the names and contact details of all licensed recruiters and to regularly update information in an accessible manner.[17] Regulations should also specify that details of licensees under investigation for non-compliance and whose licences have been suspended and cancelled, including the reasons for this, are included in the public registry. According to compliance history, governments should also consider **grading or ranking** licensees and including this information in the public register. The criteria by which licensees are evaluated should be published as well.[18]

Recruiter licensing requirements in origin and destination contexts

Sri Lanka

Sri Lanka, among its counterparts in South Asia (India, Bangladesh, Nepal, Pakistan and Bhutan), requires recruiters to obtain a licence prior to sending workers abroad. Foreign employment agencies are regulated under the *Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985* and its Amendment Acts *(No. 04 of 1994 and No. 56 of 2009)*.

Prescribed eligibility criteria include Sri Lankan **citizenship** (individual: must be a citizen; firm: all partners must be citizens; company: majority shareholders must be citizens); being of **good repute** (evidenced by two character references); and having **suitable premises**. Applicants must enter into an **agreement with the Bureau** to carry on the business in a morally irreproachable manner and to take all steps as are reasonably possible to ensure that the terms and conditions of any employment contract are observed by the employer. In terms of financial requirements, applicants must pay a licence **fee** (200,000 Sri Lanka rupees (USD 990)), enter into a **bond** with the Bureau with two sureties, and furnish a **bank guarantee** (750,000 Sri Lanka rupees (USD 3,720)). A licence **application fee** is also required (5,000 Sri Lanka rupees (USD 25)). While the request for licensing is made in writing with subsequent submission of the requested documentation, applicants must also participate in an interview with the Bureau.

If issued, a licence is valid for **one year** and the Bureau must be satisfied that the licensee has remained in compliance for renewal. **Cancellation grounds** are also prescribed including if a licensee has: contravened any provision of the Act, regulations thereunder, or any agreement or bond entered into; been convicted of an offence under the Act; not complied with directions from the Bureau; failed to pay any cess (tax) required or pay any person any sum directed by the Bureau; or provided false or incorrect information.

[17] For example, in the United Kingdom, the Gangmasters and Labour Abuse Authority (GLAA) maintains an online public register where one can search for a labour provider by entering their business name, location or unique reference number. In case of revocation, a press release may also be published. The GLAA also manages an "active check" alerts service, which notifies subscribers of any changes to a labour provider's licence as they are updated publicly.

[18] The recruiter licensing model is explored in greater detail in the IRIS Handbook Chapter 2: Implementing and improving licensing frameworks (forthcoming).

The Bureau maintains an online public registry of recruitment agencies, including respective licence numbers, contact information, and validity details.

British Columbia (Canada)

British Columbia, like several other provinces in Canada (Alberta, Saskatchewan, Manitoba, Quebec, and Nova Scotia), requires recruiters to obtain a licence prior to engaging in the recruitment of migrant workers to the province, regardless of where the recruitment services are provided. Foreign worker recruiters are regulated under the *Temporary Foreign Worker Protection Act* and its *Regulation*.

According to the Act, a licensee must be an **individual**. There is no application or licence fee, however, a licensee must post a **security bond** (CAD 20,000 (USD 15,710)) which can be drawn upon to reimburse migrant workers who incur fees or costs in violation of the Act, or to cover fines imposed on the recruiter if found in violation with the Act.

If issued, a licence is valid for an initial period of **one year**, after which the Act provides a renewal period of up to three years. Renewal is approved if authorities are satisfied that the licensee has remained in compliance. **Amendment, suspension and cancellation grounds** are also prescribed including if a licensee has: not complied with the Act or the regulations; provided false, misleading or inaccurate information or has failed to provide any information required; failed to meet any qualification or satisfy any requirement of the Act or the regulations; or there are reasonable grounds to believe that the licensee is not acting or will not act in accordance with the law, or with integrity, honesty or in the public interest, while carrying out the activities for which the licence is required.

Registration

Finally, governments can require labour recruiters to be registered, a relatively lighter model than the licensing approach. In simplest terms, recruiter registration involves entering business information in an official government list or registrar. This typically entails a declaration of operations with basic business details, followed by the issuance of a registration certificate or number. Under this model, registered recruiters may be subject to prescribed rules (page 14) and can be monitored (page 19) periodically, similar to what can be done in licensing regimes. Registration is generally less resource intensive and less administratively burdensome than licensing; the notable trade-off being that the former has far fewer touchpoints to ensure compliance at the front end and over time.

Complementary regulatory measures for employers of migrant workers

Governments with jurisdiction over both labour recruiters and employers of migrant workers (i.e. in countries of destination/employment) are encouraged to consider complementary regulatory approaches where possible. This may include prescribing laws that require employers to only engage licensed recruiters and consequences if they do not comply; employer joint and several liability with recruiters in case of violations with rules of conduct and other prescribed laws; employer registration requirements ahead of hiring migrant workers; prohibiting employers from recovering recruitment costs through wages; and legislating the employer pays principle (discussed below). These can create strong incentives for employers to conduct necessary due diligence in their own business and hiring practices, ultimately reinforcing the broader regulatory approach to ethical recruitment in the industry.

Recognizing informal intermediaries

In many countries, significant volumes of informal recruiters operate outside or on the margins of regulatory frameworks. This includes individual "subagents" in countries of origin who act as intermediaries at the village level and in loose partnership with regulated private recruitment agencies. Formal recruitment agencies tend to solely operate in major cities, leaving prospective migrants outside metropolitan areas with few options but to depend on subagents to access the former. As such, subagents are often the first, and sometimes only, point of contact for many migrant workers. They play a critical role in the recruitment process, a bridge to recruitment agencies, government, and migration more generally. Without any transparency and oversight mechanisms on their activities, the effectiveness of broader recruitment governance is compromised.

Accordingly, governments are strongly encouraged to explore ways of bringing informal intermediaries into their regulatory frameworks, beyond outright banning their activities in law.

Potential measures for consideration include:

- Requiring subagents to be **registered under licensed recruitment agencies**, with sanctions on licensees if they engage an unregistered subagent, alongside
  - Condition on licensees to carry out **due diligence** on affiliated agents; and
  - Conditions on licensees to **sign formal contracts with subagents** and **disclose** copies of contracts between parties to government authority.
- Requiring subagents to be **licensed as individuals**, like formal business entities.

Given the relatively nascent global regulatory experience with accountability mechanisms over informal intermediaries, governments may consider formalizing these actors, even on a pilot basis, to test and determine the most effective model in their context. At the very least, regulators should explore interventions that require the **establishment of a legal business relationship** between formal recruiters and the subagents with whom they work. This approach supports important liability provisions, discussed in Section 2 (page 22).

Establishing fair and ethical rules of conduct

Unethical recruitment practices can have serious implications on the human rights of migrant workers. Therefore, regulators must prescribe rules to ensure ethical conduct.[19] The conditions governing recruitment activities are generally mandated in the form of positive and negative legal obligations on recruiters. Countries of destination may also prescribe relevant obligations on employers under their domestic labour legislation. This section explores key thematic areas to ensure migrant workers are protected from abuse and exploitation during the recruitment process.

Recruitment fees and related costs

Montreal Recommendation

3. Governments should take measures to eliminate the charging of recruitment fees and related costs to workers and jobseekers, using the ILO definition as a guide.

Prohibiting the charging of recruitment fees and related costs to migrant workers is the cornerstone of a robust ethical recruitment framework.[20] Moreover, legislation should reflect the "employer pays principle", whereby fees and costs are required to be covered by the employer. According to the relevant ILO definition, recruitment fees and 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.[21] If employers fail to pay these fees and costs, recruiters pass them on to prospective workers. Globally, monetary amounts vary enormously, though they are regularly reported to amount to several months of wages, and in some cases, require migrants to take out loans at high interest rates.[22] Fee charging and cost recovery can occur at multiple times – before departure and upon employment – and the resulting debt bondage can compel workers to stay in their job regardless of the working conditions, increasing the risk of forced labour and human trafficking.

In the global regulatory context, approaches to regulating fees and related costs vary significantly.[23] Various destination countries have adopted legislation to prohibit the charging of recruitment fees, while some origin countries have established "fee ceilings" (such as the equivalent of one month's salary) or have imposed fee prohibitions in high-risk sectors. While the latter approaches are aimed at preventing the worst extremes of debt bondage, they introduce regulatory unevenness in the global market and disadvantage recruiters who attempt to implement the employer pays principle.

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[19] It is worth noting that even in the absence of licensing or registration requirements, prescribing conditions on recruitment activities is still strongly recommended.

[20] See ILO operational guidelines to governments: 6. Governments should take measures to eliminate the charging of recruitment fees and related costs to workers and jobseekers and 6.2 Prospective employers, public or private, or their intermediaries, and not the workers, should bear the cost of recruitment. The full extent and nature of costs, for instance costs paid by employers to labour recruiters, should be transparent to those who pay them. ILO, *General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs*, 2019.

[21] ILO, *General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs*, 2019.

[22] For more information, see ILO publications regarding Statistics for SDG indicator 10.7.1: Measuring recruitment costs. Available here: www.ilo.org/global/topics/fair-recruitment/WCMS_726736/lang--en/index.htm.

[23] See ILO Global Study on the Definition of Recruitment Fees and Costs and related country database here: www.ilo.org/global/topics/labour-migration/publications/WCMS_761729/lang--en/index.htm.

Consistency of fee prohibition across jurisdictions and corridors is one of the most crucial areas of inter-State cooperation to ensure the protection of migrant workers. At minimum, regulators in countries of origin and destination should **uniformly prohibit labour recruiters from charging recruitment fees and related costs to workers** and, where applicable, prohibit employer cost recovery through wage deductions. Going further, regulators in destination countries should require employers of migrant workers to pay the full cost of recruitment.

Employment contracts

Employment contracts play an important role in providing workers with a basis for recourse when rights are violated. However, a range of unscrupulous activities regarding employment contracts can occur during the recruitment process: the worker not being provided a copy; the contract not being in a language the worker understands; the contract terms being misrepresented; the absence of a written contract entirely; or changes to the initially agreed nature or conditions of work through a "substituted" contract. Regulators should, at minimum, oblige recruiters to provide migrant workers with written employment contracts in a language they understand and prior to their departure. Regulations should specify the terms and conditions to be included, such as wages, occupation and working conditions.

Standard contract should include:

- position of worker
- job description
- job site
- commencement and duration of contract
- transportation details
- details of accommodation
- meals provided under the contract
- name and address of the employer
- wages and frequency of pay
- working hours and days of rest
- overtime rates, vacation, other leave entitlements
- all lawful deductions from pay
- benefits
- conditions of termination, including conditions for return to country of origin as applicable

Regulators in countries of origin may also consider requiring recruiters to supply the relevant government authority with a copy of the employment contract for review and approval. Under this approach, the contract must meet minimum standards according to applicable domestic and international norms. This enables more effective enforcement if contracts are misrepresented or substituted after approval, accompanied with sanctions against the recruiters involved.

Similarly, governments may take the approach of mandating standard employment contracts in law, with provisions such as minimum periods of rest, prohibitions on salary deductions, and so on.[24] However, the effectiveness of this approach relies on equal commitment between countries of origin and destination to mutually agree and prescribe compatible standards.

[24] It is also worth noting that Article 25 of the *ICPRMW* provides migrant workers with the right to equal treatment with nationals of the State of employment (specifically regarding terms and conditions of employment) and stipulates that it is not lawful to derogate in private contracts of employment from this principle.

Mauritius: Model employment contracts and recruiter requirements

In Mauritius, any person recruiting for employment abroad or in Mauritius is required to apply for a licence and if issued, bears certain duties prescribed in the Recruitment of Workers Act (Act 39 of 1993). This includes the requirement for licensees to submit a copy of the employment contract to the licensing authority, signed by the employer and the worker, before the latter leaves Mauritius. Recruiters must also notify the licensing authority of any change in the terms and conditions of the contract within 15 days of any such change being brought to their notice.

The law also provides for prescribed terms and conditions of employment. The Ministry of Labour, Human Resource Development and Training publishes model employment contracts for employers and migrant workers online, adapted for various sectors including domestic work, baking, and construction. The contents range from basic job title, location and contract duration clauses to sick leave, transport benefits, and termination and repatriation conditions, among others. For the time being, the model contracts of employment are in English only but the Ministry intends to have them translated into other languages such as Bangla, Hindi, Malagasy, and French.

Freedom from deception and coercion

Migrant workers' agreement to the terms and conditions of their recruitment and employment must be voluntary; their consent should be informed, expressed, and free from deception and coercion. This includes voluntary consent to the terms and conditions of the employment contract, as discussed above.

To support this principle, regulators should prescribe a positive obligation on recruiters to require them to obtain consent from workers before recruitment service provision through **written service agreements**. Regulations should prescribe the conditions of this agreement, including specific elements to include, such as:

- itemized list of recruitment services to be provided;
- respective responsibilities and obligations;
- contact information of the recruiter and any authorized agents; and
- any relevant recruiter obligations such as the fee charging prohibition.

Regulators can also consider requiring recruiters to provide workers with a **disclosure and declaration document** that states the ethical conduct they should expect from the recruiter, including the legal protections provided under the relevant regulatory framework, prohibited practices, and the process to make and submit a complaint. Similar to employment contract provisions, recruiters should be obliged to ensure that migrant workers understand the content of all documentation before signing, including taking reasonable measures to translate or interpret if language or literacy is a knowledge barrier for the migrant worker.

Regulators should also prescribe clear negative obligations, or prohibited practices, to ensure that migrant workers are protected from deceptive and coercive recruitment and employment practices. These include prohibiting the recruiter from:

- giving, supplying, producing, or distributing **misleading, false, or deceptive information**; and
- **misrepresenting** job opportunities or terms and conditions of employment (including in the written employment contract).

Freedom of movement

Respect for freedom of movement in and out of a foreign country necessitates the retention of relevant identity documents by the worker, particularly a passport. The confiscation of travel or identity documents has a significant impact on freedom of movement and constitutes a clear obstacle to leaving an employment relationship. Recruiters, and employers must be prohibited from taking possession of migrant workers' personal property, clearly specifying a passport is property that migrant workers are entitled to possess.[25] Threatening deportation should also be prohibited in law, as doing so can coerce migrant workers into exploitative conditions.[26]

Access to information

Finally, governments bear the essential duty of ensuring that migrant workers have access to free, comprehensive, and accurate information about their prescribed rights and legal protections, including how to file a complaint (page 28). Accordingly, regulators should enshrine government responsibility to publish and provide up-to-date information to migrant workers on their rights and remedy processes. Governments may wish to consider different mediums as appropriate, ranging from information sheets to video materials. Countries of destination should proactively translate information products in the most commonly spoken languages of migrant workers in their jurisdiction. With these products published, regulators can choose to require recruiters, or employers if applicable, to share these products directly with migrant workers as a condition of their recruitment activity.

In countries of origin, governments may develop pre-departure orientation and training programmes for outbound migrant workers and mandate worker participation as part of the migration process. In these frameworks, regulators may consider requiring that recruiters guarantee that the migrant workers they engage attend. Post-arrival orientation programmes in countries of destination can also be leveraged; establishing linkages with recruiter and employer requirements in law is likewise encouraged. More generally, governments should consider holistic and aligned information and orientation programming throughout the labour migration cycle.[27]

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[25] Article 21 of the *ICPRMW* states that it is unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits.

[26] Article 16 of the *ICPRMW* entitles migrant workers and their family members to effective protection by the State against violence, physical injury, threats, and intimidation of any kind.

[27] For example, the Comprehensive Information and Orientation Programme (CIOP) currently implemented in the context of the Abu Dhabi Dialogue (ADD) is an interregional initiative that helps operationalize a coordinated management system for the provision of tailored pre-employment, pre-departure, and post-arrival orientation services for migrant workers in the Gulf Cooperation Council States. With technical support from IOM, governments work towards developing a CIOP regional guide and a corresponding management system, to be tailored to operations in the specific country contexts of ADD Member States. This approach aims to enhance transparency of information, protect workers from risks of exploitation and abuse, support prospective workers' informed decision-making, and reduce barriers at the workplace while promoting social integration.

Ghana: Recruiter involvement in pre-departure orientation and training

Many country-of-origin governments invest in pre-departure orientation and training programmes for migrant workers to mitigate the risk of exploitation in the recruitment and migration process. These programmes disseminate information to migrant workers on working and living conditions in the destination country and their rights at home and abroad. Some programmes also provide skills and language training. The way in which recruiters are involved in these programmes equally differs across the globe. In Ghana, for example, the Labour Department is responsible for providing pre-departure orientation to recruited migrants which focuses on work and country expectations and ensuring the worker understands their contract. The orientation also aims at providing migrants with relevant emergency contact details both in country of destination and origin. Licensed recruitment agencies are required to send migrant workers to this mandatory training.

3 Strengthening enforcement through regulation

The part of the law that provides for its enforcement is as important as the law itself. As such, governments must be aware that efforts to regulate recruiters, their conduct, and sanctions and remedies in case of non-compliance, are only as good on paper as they can be in practice. It is also worth reiterating that the principal aim of recruitment regulation is the protection of migrant workers; enforcement should never be used as action against migrant workers, particularly those with irregular immigration status, nor should it be economically or criminally punitive on migrant workers. This section explores recommended regulatory levers to ensure that ethical recruitment laws can be effectively enforced.[28]

[28] Relevant operational considerations (e.g. resource capacity, specialized training) to ensure effective enforcement are explored in the IRIS Handbook chapter 3: Strengthening the effectiveness of inspectorates (forthcoming).

Mandating authorities

Institutional framework

First and foremost, governments must designate an institution responsible for the administration (i.e. the monitoring and enforcement) of the law. In many contexts, this is often an inspection entity under the labour ministry, though a separate government department may be established and assigned relevant responsibilities as well.[29]

Inspection powers

Inspectorates must then be delegated the necessary authorities to ensure that they can carry out enforcement with the best toolbox. The main objective is to be able to effectively verify compliance with rules in a comprehensive set of circumstances. Devising the right tools involves broadly prescribing:

- **Circumstances** to exercise powers or inspection "triggers" (e.g. can initiate an inspection for any reason to verify compliance, known past non-compliance, random selection, reason to suspect non-compliance, receipt of complaint);
- Powers of **entry** (e.g. authority to enter business premises on site and unannounced, ask questions, require and remove documents found in the premises for examination, take photographs and video recordings, examine any items including electronic devices);
- Powers to **compel information** and **order disclosure** of related matters under oath or affirmation;
- Appropriate **inspection period** (e.g. the authority to initiate an inspection for a long enough amount of time after recruitment services rendered).

It is worth highlighting that entry and inspection powers should not be limited to the receipt of a complaint; the enforcement body must have the authority to conduct **proactive** inspections on recruiters and their conduct. Regulators may also prescribe **inspection conditions**, which are specific inspection-related requirements that recruiters, and employers if applicable, must abide by. Non-compliance would be subject to consequences, similar to violations with the various conduct rules discussed in Section 2 (page 14). Inspection conditions may include requiring actors to answer questions and provide documents, appear at inspections, and so on. These ensure an incentive for recruiters to cooperate with inspections. Regular and ad hoc **reporting requirements** can also be prescribed to monitor compliance on an ongoing basis. Regulators should accordingly prescribe the duty of recruiters to keep records for an appropriate period, and for these records to be kept at a location where they can be accessed by the appropriate authorities.

Enabling collaboration

Given the multisectoral and global nature of the recruitment industry, regulators must ensure that cooperation mechanisms are enabled within their jurisdictions and internationally. Powers to share relevant information and inspection findings with appropriate bodies should be enshrined in law and supported by any necessary information sharing protocols and procedures.

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[29] For example, the *Law on the organisation of the exercise of the activities of placement of Tunisians abroad by private agencies*, 2019 is monitored and enforced by an inspectorate specifically dedicated to inspecting private recruitment agencies placing Tunisians abroad. For more on this, see ILO Brief: Promising practices for fair recruitment/Tunisia – Formation of a new body of inspectors for the recruitment industry (April 2021); ILO Conditions of Work and Equality Department. Available at www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_778828.pdf.

Intra-State cooperation

Montreal Recommendation

20. Governments should facilitate the introduction of information-sharing protocols between relevant departments and levels of government to maximize the potential for increasing intelligence about the international recruitment industry.

Depending on the context, various interdepartmental coordination mechanisms should be adopted to ensure relevant governmental bodies within a country can share information during the enforcement process (e.g. police, tax authorities, labour ministries). These mechanisms should be provided for in law given that information sharing entails, in most cases, the transfer of information and data, including personal data. This is of particular importance in federal States where national and subnational governments have distinct jurisdictions and need to coordinate as a result. For example, recruiter licensing authorities may require information on a licensee applicant that is held by another government department. Such information exchange gateways should be accordingly established in applicable legislation.

Queensland (Australia): Inter-agency compliance activities

In Queensland, Australia, the *Labour Hire Licensing Act 2017* (the Act) requires labour hire providers to be licensed and labour hire users to only use licensed labour hire providers. In addition, the Act's unique requirements for compliance with a range of relevant laws (including employment, taxation and superannuation, and health and safety laws) presents a picture of the labour hire provider's overall levels of compliance, encourages information sharing and joint activities between regulators, and leverages the compliance efforts of those regulators. The capacity to share intelligence and outcomes of compliance activities about non-compliant labour hire providers between agencies is fundamental to the operation of the Act. Where permitted by relevant legislation, this has enabled the Labour Hire Licensing Compliance Unit (LHLCU) to share intelligence and data and undertake joint activities with Commonwealth, State, and local government regulators across all industry sectors, including over 800 instances of referrals and intelligence sharing between regulators in relation to applicants and licensees. Data from the scheme is shared with the Australian Taxation Office, Australian Border Force, WorkCover Queensland, the Fair Work Ombudsman and the Victorian Labour Hire Licensing Authority as permitted by law.

One example of joint agency cooperation is a recent campaign conducted by Workplace Health and Safety Queensland (WHSQ) aimed at reducing the risk of injury to workers, including labour hire and migrant workers, in the poultry processing industry. WHSQ inspectors visited 14 poultry processing workplaces, issuing 49 notices regarding unsafe processes, equipment, and training of workers. During the workplace inspections, WHSQ inspectors obtained information about labour hire providers who were contracted by the facility. Where those providers could not be verified as licensed labour hire providers, referrals were made to LHLCU, which provided education to the poultry processing businesses and contractors about their obligations under the Act. As a result, one poultry processor terminated its contract with an unlicensed labour hire provider and engaged a licensed provider. Additionally, three poultry processors terminated their contracts with five unlicensed providers and directly employed the workers. Warnings were issued to all of the businesses about the need to only engage licensed labour hire providers in the future. Several successful prosecutions under the Act followed with the Beenleigh Magistrates Court issuing a total of AUD 370,000 in related fines.

For more details see: Second anniversary report of Queensland's labour hire licensing scheme and Third anniversary report of Queensland's labour hire licensing scheme, Queensland Government

Inter-State cooperation

No one State can end unethical recruitment practices independently as international recruitment, by definition, spans multiple countries. International cooperation is critical, enabled through powers to share information and intelligence with foreign governments, conduct joint investigations, enforce national court decisions, and cooperate on civil, administrative, and criminal cases, including mutual legal assistance. This cooperation can be supported by designating specialized authorities to labour attaches to play a coordination role between monitoring and enforcement bodies in both countries of origin and destination.

Where government-to-government agreements (either binding or non-binding) are negotiated to facilitate this cooperation, such frameworks should include information sharing provisions and review mechanisms. Agreements should specify roles and responsibilities, including areas of cooperation, towards the explicit objective of ensuring ethical recruitment and protecting migrant workers. For example, specific provisions may include commitments to regularly exchange updated information on licensed and ineligible recruiters in either country, among others.

Establishing firewalls

Montreal Recommendation

24. Governments should establish a firewall between immigration authorities and regulatory bodies responsible for recruitment to encourage reporting while protecting migrant workers.

It is well documented that migrants, particularly those with irregular immigration status, fear approaching authorities and using public services where they may be required to identify and confirm their immigration status. When migrant workers perceive or know that institutions cooperate with immigration or border enforcement authorities, they are unlikely to exercise their rights. Migrant workers in exploitative situations should be able to go to the authorities, report rights violations, and participate in relevant inspections or investigations without fear that doing so will increase their chance of being detained or deported.[30] As such, regulators should prescribe in law that no information gathered for the purpose of administering or enforcing recruitment legislation can be shared or used for immigration enforcement for removal reasons.

Joint and several liability

As discussed in the Introduction (page 1), there are often multiple businesses and individuals involved in the recruitment of migrant workers; actors span countries of origin, destination, formal and informal sectors, and more. This makes illegal recruiter or employer conduct incredibly challenging for inspectorates and migrant workers alike: where to enforce consequences and against which business(es) to seek remedy?

In response, regulators are strongly encouraged to adopt joint and several liability clauses, where multiple actors can be held liable for the same act and can be held jointly responsible for reimbursement

[30] The same principle should apply for migrant workers accessing a range of public services such as health care, education, local police, social services, and so on.

and compensation. Migrant workers can collect awarded damages from one, several, or all of the legally liable parties involved (further discussion on migrant access to remedy in Section 4, page 27). Establishing joint and several liability provides for accountability along the entire labour migration process and creates clear incentives for parties to conduct due diligence, for example by choosing to work with subagents that follow the rules. Regulators can strengthen their ability to enforce these provisions by requiring that recruiters have service agreements in place with users, including employers and other recruitment partners.

Montreal Recommendation

18. Governments should consider the development, adoption and implementation of programmes to hold employers and recruiters to account, either individually or jointly, such as joint liability schemes.

For example, regulators that prescribe licensing provisions are strongly encouraged to make licensed recruiters liable for violations of their associated unlicensed partners such as informal intermediaries. They can also prescribe joint and several liability between employers and recruiters in case of non-compliance. Employer liability for unlicensed recruiter engagement is another recommended measure for jurisdictions that concurrently regulate employer conduct in countries of destination. Some examples are provided below.

British Columbia (Canada) Temporary Foreign Worker Protection Act, 2018

> **Section 25.** Foreign worker recruiters liable for partners, affiliates or agents. A foreign worker recruiter must ensure that partners, affiliates or agents of the foreign worker recruiter, who in partnership with or on behalf of the foreign worker recruiter provide recruitment services to a foreign worker, comply with this Act and the regulations.

Bangladesh Overseas Employment and Migrants Act, 2013

> **Section 22.** Employment contract.
>
> (1) The recruitment agent shall cause to be concluded an employment contract between the recruited worker and the employer, in which stipulations concerning the worker's wages, accommodation facilities, duration of employment, compensation amount in the event of death or injury, cost of emigration to and return from the foreign country, and so on shall be stated.
>
> (2) For the purpose of the contract mentioned in the Subsection (1), the recruitment agent shall be deemed to be a representative of the overseas employer, and as regards liabilities arising from the contract, the said recruitment agent and the employer shall be liable jointly and severally.

Sanctions

Montreal Recommendation

21. Governments should consider the effectiveness of the current range of criminal, civil and administrative penalties available to inspectorates, prosecutors and judges and consider whether additional penalties should be introduced.

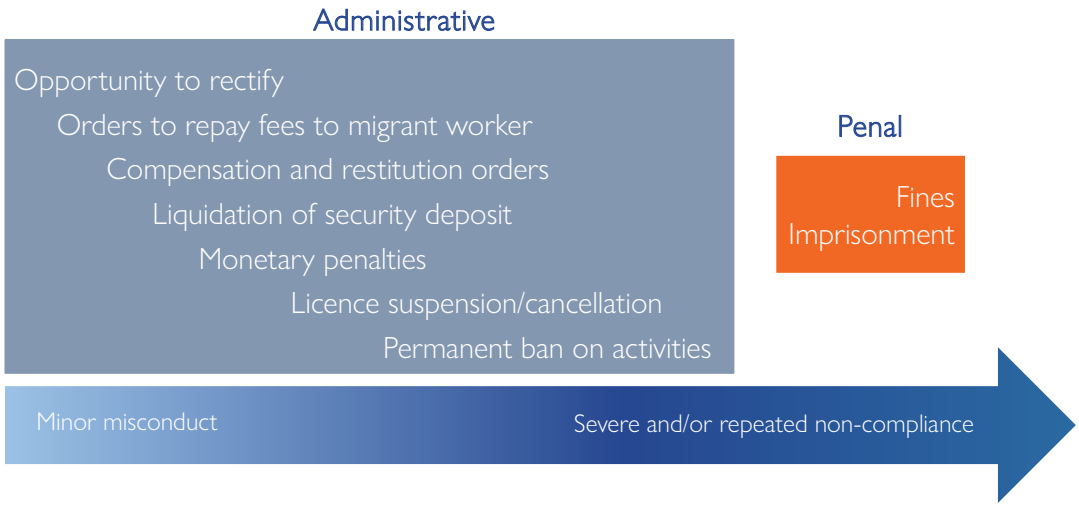
A robust sanction framework must be available to authorities if recruiters are found to have engaged in exploitative (i.e. illegal) activities through the inspection process. This must involve a series of consequences and sanctions that serve as deterrents against contravening the law, effectively discouraging recruiters from unethical conduct. As a reminder, prohibited conduct (page 14) should include charging recruitment fees to migrants, misrepresenting job opportunities, confiscating passports, deceiving migrant workers about their contracts, and if a licensing regime is in place, operating without a licence, among others.

When developing consequences for non-compliance, regulators should consider the range of administrative and penal sanctions against the type and severity of various violations (see Figure 3 for options).[31] Sanctions should be **proportionate** to the contravention, accounting for considerations like:

- the impact of the violation on affected migrant workers;
- the scale of economic benefit derived from the violation;
- if the recruiter made reasonable efforts to remediate the violation; and
- the compliance history (e.g. first or subsequent violation).

The form and severity of the consequence should reflect the nature of the violation. Sanctions must also act as **adequate** deterrents from illegal conduct, for example, if fines are imposed, they must be large enough to be effective.

Figure 3. Sanctions for non-compliance with recruitment legislation



[31] It is worth noting the distinction between administrative and criminal sanctions with respect to individual and criminal liability; in some jurisdictions, only individuals may be held liable for criminal offences. Regarding application of law, designated agencies have the authority to issue administrative orders, such as compliance orders or monetary penalties, while only the courts have the power to levy criminal penalties.

As a good measure of transparency, regulators should also ensure that non-compliance findings and the associated sanctions imposed are published. **Sharing inspection outcomes publicly** has multiple benefits, including:

- acting as an additional incentive for recruiters to follow the rules; being captured on an ineligibility list is not in the best interest of their business;
- serving as a tool for users such as migrant workers and employers to avoid engaging sanctioned recruiters;
- strengthening public opinion of legitimacy of the enforcement regime;
- instilling migrant worker confidence in the system, particularly for migrant workers who filed complaints and are afforded transparency with outcome publicized; and
- reducing the administratively burdensome information sharing procedures because external domestic and international enforcement agencies are more easily able to verify the legitimacy of recruiters.

4 Empowering migrant workers to access justice

Montreal Recommendation

34. Migrant worker empowerment is a vital measure to ensure that the rights of migrant workers are respected at all stages of the recruitment and migration process. This includes the availability of grievance and other dispute resolution mechanisms, which should be widely publicized.

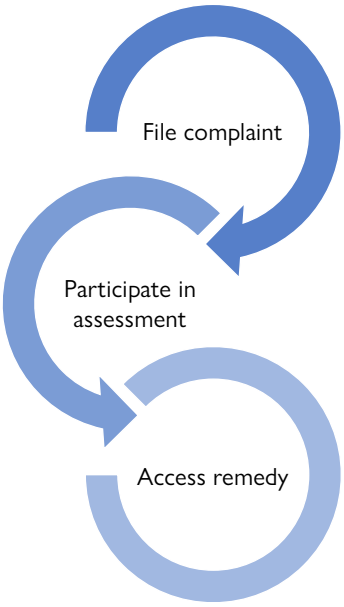
While deterrence from and consequences for unethical recruitment practices are important, regulatory frameworks must, most crucially, **ensure that migrant workers impacted by violations are empowered and able to access remedy**. This means that enforcement cannot solely focus on "cracking down" on bad actors; governments must ensure that viable **complaint and grievance mechanisms** are established for migrant workers who have experienced mistreatment or abuse. Improving access to justice can also be seen as a preventative measure; if recruiters see the material consequences of unethical conduct (e.g. being ordered to repay fees), they are more likely to improve their behaviour from the outset. This section provides an overview of access to justice barriers for

migrant workers and some mitigating regulatory features for governments to consider towards this important objective.

Mandating complaint mechanisms

An effective complaint mechanism should ensure that migrant workers are entitled to **file a claim** for recourse for alleged rights violations; viably **participate** in the decision process; and that suitable **remedies** are enforced where violations are found. As such, regulators should mandate the relevant authority with the duty to receive and assess complaints as they relate to violations of recruitment rules and migrant worker rights (e.g. fee charging, passport seizure). The law should also ensure that relevant decisions and orders are enforceable.

Figure 4. Effective complaint mechanism components

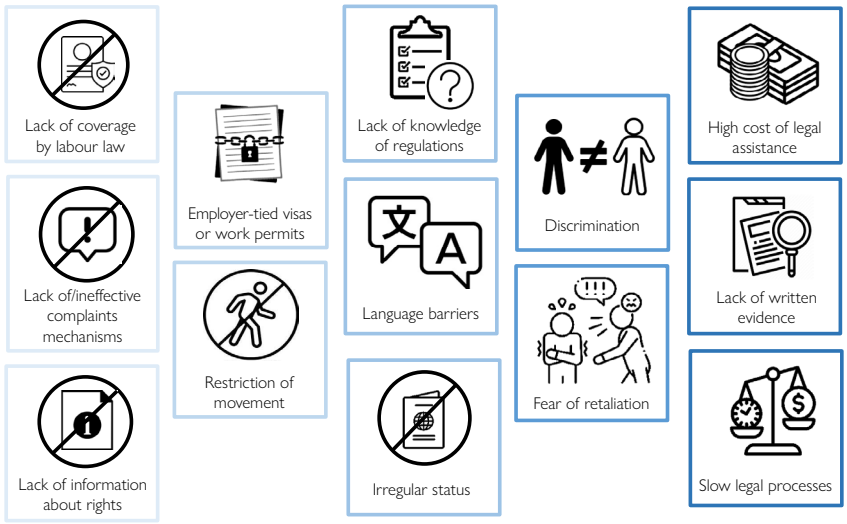


Barriers to accessing recourse

In the global context, many jurisdictions have both judicial and administrative mechanisms to address illegal conduct of recruiters and migrant worker rights violations. However, very few migrant workers make use of these mechanisms because of the structural barriers that impact their ability to do so at every step of the process. If migrant workers complain, they fear the risk of deportation, losing their job and livelihood, and other related forms of reprisal as exacerbated by the employer-tied nature of their visa and work permit. They find it difficult or impossible to file if they are about to leave their country of employment or have already returned home. Furthermore, they are often unaware of their rights and how to seek recourse, nor can they access free or affordable legal representatives to assist them. In some jurisdictions they may not be able to pay the required fee to file a complaint. Lack of language proficiency compounds these challenges. For many migrants, access to justice is fully contingent on access to resources of time, money, and legal expertise.

If migrant workers manage to file the complaint, they may not be able to participate if the authorities are too slow to respond. The burden of proof often lies on them and requires evidence that they cannot compile due to language and/or literacy barriers. Finally, if a finding is in fact made in their favour and their recruiter is subject to a compensation or restitution order, the recruiter may disappear or refuse to pay, instilling distrust in legal protections.

Figure 5. Barriers to accessing justice for migrant workers[32]



Responsive design features

Regulators must consider these barriers as a starting point in conceptualizing effective complaint mechanisms, with the view of designing **features that overcome these barriers and mitigate related risks**. Accordingly, regulators should ensure that administrative complaint mechanisms have the following components prescribed in legislation:

- **Clear grounds** to file a claim or complaint **at no cost**
  - The law should prescribe that any person may complain that another person has contravened one or more of the relevant provisions, including recruiter conduct rules.
- Extended **statute of limitation**
  - Workers should have **longer time limits to file a claim**, than for example, what may be considered a reasonable period of time to expect a domestic (non-migrant) national to file a labour standards claim.
- Right to file and participate from **anywhere**
  - To enable migrant worker involvement in mechanisms after they have returned home, no physical location requirements should be prescribed (particularly for regulatory frameworks in countries of destination).[33]
- **Burden of proof** on recruiter
  - In most legal proceedings, the person who alleges a fact has the burden of proof. Migrant workers face clear barriers in proving rights violations, particularly when required to compile written evidence to prove their recruiter's non-compliance. Since violations often relate to lack of transparency, producing documentary proof is challenging. Designating the burden of proof to rest with the recruiter, or employer if applicable, is one way to mitigate this issue.

[32] Adapted from Harkins, B and Åhlberg, M. 2017. Access to justice for migrant workers in South-East Asia. International Labour Organization. Bangkok.

[33] The European Union (EU) *Directive 2009/52/EC providing minimum standards on sanctions and measures against employers of illegally staying third-country nationals* (also known as the *Employer Sanctions Directive*) is worth noting here. Article 6(4) stipulates that Member States shall ensure that the necessary mechanisms are in place to ensure that remuneration can be received by third country nationals, including in cases **where they have returned to their country of origin**. As a result of this directive, all statutory frameworks among EU Member States, except for one, do not require that the migrant physically resides in the country to request back pay.

Ethiopia: Overseas Employment Proclamation (Proclamation No. 923/2016)

> **Article 72.** Burden of Proof
> Whenever a worker deployed for overseas employment institutes a court case pertaining to work conditions and if the employer or the Agency objects the proceeding, the burden of proof lies on the Agency or the employer to show that the action does not have a legally valid ground.

- **Right to withdraw** from process
  - Migrant workers take huge risks in coming forward with allegations, particularly as it relates to their livelihood and safety. As such, the right to withdraw should be prescribed to ensure their ongoing and voluntary consent to participate in the process.
- Protection from **reprisal or retribution**
  - Often referred to as "whistle-blower protection", legislation should prohibit recruiter retaliation, reprisal, and retribution against a migrant worker when workers file complaints or participate in inspections. Sanctions should be prescribed for violations.
  - Building on the firewall discussion in Section 3 (page 22), regulators should ensure that firewalls are established between complaint mechanisms and immigration enforcement.
- State responsibility to **publish** complaints referred and resolved, as well as decision outcomes for accountability and transparency

Complementary measures

Legal assistance

Migrant workers should have access to free legal assistance and advice to support any complaint and recourse process. This may require amending law to ensure migrant workers (e.g. non-nationals), regardless of migration status, are eligible to obtain legal aid or creating entities with the express purpose of supporting migrant workers in these situations.

The Philippines: Funded access to legal assistance abroad

On 30 December 2021, the *Department of Migrant Workers Act (Republic Act 11641)* was signed into law. Section 14 of the Act established the "Agarang Kalinga at Saklolo para sa mga OFWs na Nangangailangan [Urgent Care and Assistance for Overseas Filipino Workers in Distress] (AKSYON) Fund." It was created to provide legal and other forms of assistance to Filipino migrant workers, including "repatriation, shipment of remains, evacuation, rescue, and any other analogous help or intervention to protect the rights of Filipino nationals" (Section 3a). This fund is explicitly made separate from the Assistance to Nationals (ATN) and Legal Assistance Funds managed by the Department of Foreign Affairs (DFA). These two existing Funds shall be retained by the DFA "for the benefit of other Filipinos overseas and for consular assistance services".

The Department of Migrant Workers Act took effect on 3 February 2022. As of this writing, a Secretary has yet to be appointed for the new Department, who shall issue guidelines on the use of the AKSYON Fund.

Facilitation of immigration status

Montreal Recommendation

17. Governments should provide a means for migrant workers to safely and meaningfully participate in all stages of the inspection and enforcement process, including – where necessary – the extension of migrant residency and work permits to enable them to participate in relevant court proceedings against alleged perpetrators.

Perhaps one of the most significant barriers that migrant workers face in filing a complaint is their immigration status in the country of destination; they often hold visas and work permits tied to one employer. Migrant workers who have limited or no regular mobility options are much less likely to speak out or be able to access support services in case of abuse and exploitation. Regulators in countries of destination should work with immigration authorities to ensure that laws are prescribed to issue appropriate residency and work permits to mitigate this issue. This enables migrant workers to safely exit abusive situations and encourage their voluntary participation in any relevant inspection processes. These measures also protect against migrant workers falling out of legal status and mitigate the risk of reprisal in case of complaints. As this type of facilitation is often provided for in anti-human trafficking regimes (e.g. through the issuance of a temporary residence visa), ethical recruitment frameworks should likewise incorporate this complementary measure to better protect migrant workers and improve their access to recourse when rights are violated.

New Zealand: Migrant Exploitation Protection work visa

In July 2021, the Migrant Exploitation Protection work visa was introduced to provide migrant workers with a pathway to leave exploitative situations quickly while remaining lawfully in New Zealand, and to encourage people to report migrant exploitation through the dedicated reporting tools.

Migrant workers on employer-supported work visas and experiencing exploitation can submit a claim to Employment New Zealand for consideration and based on their assessment, a Report of Exploitation Assessment Letter may be issued to support their application for a Migrant Exploitation Protection work visa. The Migrant Exploitation Protection work visa application is free and if approved, the migrant may be granted a work visa for up to six months which allows them to work for any employer anywhere in New Zealand.

For clarity, Employment New Zealand provides guidance on "common types of exploitation" and includes circumstances where workers do not have a written employment contract, have paid a fee to get a job, and where the employer has threatened them or taken their passport.

The work visa, among other measures, was introduced following the Ministry of Business, Innovation and Employment's Temporary Migrant Worker Exploitation Review.

Incentives through sanctions

Finally, authorities often face practical challenges enforcing decisions that relate to migrant worker recourse. Recruiters may refuse to cooperate, declare insolvency, or even disappear when an order for reimbursement and compensation is made. Regulators should clearly link their sanctions framework to compel recruiter cooperation with compensation orders to pay migrant workers for harm or loss, and reimbursement orders for fees charged. This could range from imposing monetary penalties on an accrual basis to compel cooperation and payment, licensing consequences (suspending or revoking licence), liquidating security deposits and seizing assets.

Resources

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- ILO, 2019. *General principles and operational guidelines for fair recruitment and Definition of recruitment fees and related costs*.
- ILO, 2011. *Establishing Fair Recruitment Processes: An Online Training Toolkit*.
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