Zero Tolerance for Contract Substitution[1]

Open Working Group on Labour Migration & Recruitment
Policy Brief #4

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Issue

Malpractices in migrant labour recruitment have been well documented globally, with abuses particularly rampant in corridors dominated by private, for-profit recruitment agencies with little government oversight. Such malpractices too often result in labour and human rights violations that have significant and lasting negative impacts on migrant workers, their families, and their communities. The activities of recruitment agencies have proven particularly difficult for states to regulate, given their centrality to the labour migration process, their political influence, their decentralized and sometimes informally organized operations, and the general willingness of prospective migrant workers to accept the terms they offer—even if these terms are unfair or outside the law. The relative impunity with which recruitment agencies have been operating for the last few decades has led to the entrenchment of illegal practices that benefit recruiters and result in significant rights violations for migrant workers.

One such practice is contract substitution — the practice of changing the terms of employment to which the worker originally agreed, either in writing or verbally. Many governments, particularly those of major countries of origin, have put regulations in place to guard against this practice, sometimes complemented by public awareness campaigns to warn prospective migrant workers against signing more than one contract, or signing contracts that have not been vetted by competent authorities in the country of origin. Despite such policy initiatives, contract substitution remains a pervasive exploitative practice that puts migrant workers at considerable risk of rights violations with little recourse.

Analysis

Contract substitution occurs through a number of modalities:

Written contract in country of origin / new written contract in country of destination

The most straightforward modality of contract substitution is when the worker signs a contract in his/her country of origin, and on arrival in the country of destination he/she is asked/required/coerced to sign a new contract. The competent authorities in the country of origin (e.g., the POEA in the Philippines or the MOIA in India) approve the contracts if they meet the necessary criteria and standards for labour recruitment. New contracts often include provisions less favourable than their original contract, and in many cases are written in a language the migrant worker cannot read or understand.

[1] This policy brief is written based on contributions from members of the Open Working Group on Labour Migration & Recruitment.

When this occurs, legal questions arise with respect to which contract should be upheld. As the worker has signed both contracts, it is difficult to prove deception or fraud. Courts only have a mandate to look at the contract signed within their jurisdiction, as such, the terms of the contract signed in the country of origin are not generally considered.[2]

Complicating matters is the fact that migrant workers often do not have copies of the contracts they have signed — these documents are often held by the recruiters, making it difficult for migrant workers to seek redress.

In a variation of the same contract substitution modality, migrant workers collude with recruiters to engage in contract substitution. "Facing the prospect of unemployment at home, workers will often agree to enter into a 'false' employment contract that satisfies official [government] requirements, knowing well that a new employment agreement will be entered into upon arrival in the host country."[3] Such practices indicate an underlying attitude among both migrants and recruiters that the provisions put in place to migrants' rights are formalities to be circumvented or impediments to swift and easy labour migration arrangements.

Verbal contract in country of origin, written contract in country of destination

Deception is rampant in migrant labour recruitment, and the relationship between the recruiter and the migrant worker is often fairly informal, particularly when the worker deals with sub-agents at the village level. In these interactions, recruiters tell prospective migrants about the job on offer, describing the type of work, the salary and any benefits, requirements, etc. It is on this basis that the workers agree to move forward by paying fees charged by the recruiter, securing necessary documents, and embarking on their journey. Later, either once in the country of destination or when they are about to leave for the country of destination,[4] they are presented with a written contract. These contracts may differ considerably from that which they were promised verbally; aside from the wage, sometimes the sector is completely different than what the migrant worker was expecting, and in extreme cases even the country of employment is changed.

Migrants' rights advocates in Singapore report problematic provisions in such hastily signed contracts that can serve to discourage the worker from accessing legal remedy for illegal practices on the part of their employers and discourage dissent of any kind. As reported by TWC2[5]:

> One contract we saw said that: 'whilst in Singapore, the worker cannot make any public commentary that hurts the interests of the employer. He must not create trouble and tarnish the reputation of the employer by complaining to various departments and ministries of the Singapore government, failing which, the employer reserves the right to demand the worker to pay for any fees incurred by the employer, such as transportation fees (SGD$100 per trip) or for the attendance of meetings (SGD$300 per meeting) to address these complains.' […] Another contract provided that workers had to surrender their passports and work permits to the company for the duration of their employment in Singapore.

[2] Inputs from participants at a meeting of Lawyers Beyond Borders, 5-7 September 2014, Beirut, Lebanon
[3] Center for Migrant Advocacy (Philippines), Submission to the UN Committee on Migrant Workers, 2012.
[4] Many migrant workers report being presented with contracts at the airport, immediately prior to boarding the plane. At this point, the worker is very unlikely to reject the terms presented—even if they are unfavourable—as he/she has invested considerably in his/her migration decision.
[5] Gee, J. "Abuse of Contract and Contract Substitution"

Written contract in country of origin inconsistent with terms of visa/work permit

In this version of contract substitution, recruitment agencies deliberately process contracts that do not match the jobs on offer in the destination country. Thus, the work permits applied for and approved by the destination country government do not match the terms as set out in the worker's contract with the recruitment agency. This practice is also referred to as "reprocessing."

As reported by migrants' rights advocates in the Philippines, this occurs because the visas are approved by the country of destination and issued to the private recruitment companies, but the visas issued do not necessarily match the types of jobs employers demand. Center for Migrant Advocacy states, [6]

> Filipino migrants signed up for contacts that say they will work as janitors in a hospital or a building when in fact they will work as domestic workers. Agencies rationalize the practice by saying that the destination government approved the visas for janitors even if the visa applications were for domestic workers. In this case … they will promise the worker that they will 'correct' the situation once they reach the destination country. This correction rarely happens.

When workers arrive in the country of destination to jobs that do not match the terms of their work permits (or in some cases to non-existent jobs, leaving them unemployed), they have been effectively forced into an irregular migration situation, often with debts owed to recruiters or money-lenders back home. Many such cases have been documented in Canada, with workers learning of the contract substitution only upon arrival. "The Canadian-based recruiter or agent leverages the worker's now–irregular status to place the worker in employment with even more oppressive conditions."[7]

Written contract is respected, but renewed contract has less favourable terms

While this practice is not illegal, as long as the provisions of each contract are in line with the law, migrant workers are often frustrated to find that after working for the full term of their first contract without incident the terms on offer for contract renewal are less favourable than those they had originally enjoyed. In country contexts in which employer-tied visa systems are in place, changing employers is difficult even once a contract has been completed. If a worker decides not to accept the less favourable contract conditions, he/she will have to begin the entire recruitment process again—a gamble for the worker, as his/her next employment arrangement may be even less favourable. Thus, many workers accept the new terms without much pushback. Power dynamics between employer-employee and recruiter-employee are perpetually unbalanced to the disadvantage of the worker.

Critique

Governments are well aware of the issue of contract substitution, as this has been a problem consistently brought forward by workers and worker rights advocates to foreign missions and policy-makers in origin and destination countries. Countries of origin have been particularly active in developing responses to address this issue, as evidenced by the following initiatives:

[6] Insights from Ellene Sana, Center for Migrant Advocacy, Philippines. Contribution to Open Working Group on Labour Migration & Recruitment online discussion, June 2015.

[7] Faraday, F. (2014) "Profiting from the Precarious," p. 38

Sanctions and Licence Cancellations

It is fairly common practice in countries of origin for governments to cancel the licences of recruitment agencies found to be in breach of recruitment regulations. Some countries also go so far as to maintain blacklists of recruitment agencies whose licences have been revoked, and publicize suspensions or licence cancellations in the national media to inform prospective migrant workers and their families. However, in many cases licence cancellations are associated with the business rather than the business owner; as such, it is relatively easy for the business owner to register a new agency under a different company name and carry on with his/her unethical practices. Moreover, the governments of countries of origin cannot control the activities of recruiters operating in countries of destination.

That said, sanctions and licence cancellations remain necessary and should be stringently enforced as part of an overall response to recruitment abuses. Sanctions are useful tools in raising public awareness of the phenomenon of contract substitution and the other unethical practices of recruitment agencies that they might consider working with, and retain some power to deter unethical recruitment practices.

Implementation of Standard Contracts[8]

Among countries of origin, the Philippines has been a leader in pursuing standard contracts for migrant domestic workers. Standard contracts set out minimum wages and provisions for working conditions and rest days. Unless an employer signs onto this standard contract, the Philippine government will not approve the labour migration process.

However, due to problems of jurisdiction and uneven labour regulations across countries of origin and destination, it is extremely difficult for countries of origin to enforce compliance with standard contracts in countries of destination. When the country of origin includes provisions in the standard contract that are not required under the labour laws of the country of destination, it becomes unlikely that legal action taken against an employer would result in the upholding of those contract provisions. For example, Singapore does not have a minimum wage, but the Philippine standard contract requires that domestic workers receive a minimum wage of $400 US per month. This provision would not likely hold up in a Singapore court.

To secure compliance with the standard contract, Philippine embassy officials require workers to present copies of their contract and evidence of compliance, without which they will not issue the necessary documents and will be rendered undocumented and legally unemployable. Unfortunately, this practice frequently results in contract substitution—one of the very practices these rules attempt to remedy. As reported by TWC2, employers or recruiters will produce the appropriate standard contract to receive approval for hiring or contract renewal, but maintain a secondary contract with the worker. The second 'real' contract, which will set the actual terms of employment, is likely to be compliant with the laws of the country of destination, but will not include the more advantageous protections and entitlements of the Philippines document. As indicated above, workers are willing to collude with agents and employers in presenting false documents to avoid losing their employment opportunity.

[8] For a model contract and full analysis of standard contracts for domestic workers, see MFA Policy Brief No. 1 < http://mfasia.org/resources/publications/464-mfa-policy-briefs>

E-Recruitment Systems

The Indian government has recently experimented with e-recruitment—a systems whereby migrant worker contracts are logged electronically in the country of origin and referred to by authorities in the country of destination. Civil society and migrant communities largely see this system as a promising practice, aimed at enhancing bilateral cooperation on migrant labour recruitment and preventing contract substitution and other rights-violating practices. According to migrants' rights advocates in India, recruitment agencies are speaking out against the implementation of this system. As this system has only been newly implemented, its effectiveness in mitigating contract-related violations is as yet unknown, although the level of bilateral cooperation that it requires is promising.

Employer-Recruiter Co-Liability

In an attempt to ensure that migrant workers can access legal remedy in the case of contract substitution or other malpractices perpetrated by recruitment agencies and employers, some countries have implemented employer-recruiter co-liability, also called joint and solidary liability. When such a provision is in place, the worker can legally pursue the recruitment agency for damages from at home in the country of origin, as both the employer and recruiter are legally held liable for any malpractices. Such a provision is an attempt by governments to break the relationship of collusion that too often exists between employers and country of origin recruiters—a relationship that is often central to contract substitution.

Such provisions are widely seen as a promising practice. However, filing a claim and seeing it through to a successful resolution is often a time-consuming and difficult process. Few migrants have the time or resources to pursue such cases. When the courts find in favour of the migrant worker, compensation is not always possible, as the quasi-informal nature of many recruitment agencies means that the agency may have closed shop or disappeared by the time the court's decision is finalized. Improvements to access to justice and support for migrant workers pursuing such cases is required for co-liability to serve as an effective mechanism to combat collusion between employers and recruiters.

Awareness Raising Among Prospective Migrant Workers

Given the pervasiveness of contract substitution, some government-approved pre-departure orientations (PDOs) for migrant workers include information about contracts. Migrant workers should be informed about what information should be included in their contract and are warned against signing multiple contracts or contracts written in a language they cannot understand. The degree to which this content is emphasized varies across countries of origin, and the effectiveness and clarity of the presentation of this information also depends on the individual responsible for delivering this content to the worker.

However, even where such content is available in PDO curricula, many migrant workers remain uninformed about crucial information that must appear in their contract—e.g., the name of the employer, the location/address of the employer, work description, rest days, salary, mode of payment, duration of contract, etc. In addition, they are often uninformed about the relationship of the contract to their immigration status in the country of destination. Thus, they may not be aware that in colluding with employers or recruiters to submit false documents they may put their immigration status at risk in the country of destination.

An important challenge to consider in awareness raising is the fact that migrant

workers are often ready and willing to accept substandard conditions in their efforts to quickly secure work abroad. The demand for jobs is extremely high, and workers compete against one another for choice positions abroad. Also, the culture of migration is highly embedded in many migrant-sending communities. If, for example, a worker discovers at the airport that he/she has been duped by a recruiter after having gone through the process of paying recruitment fees (possibly having borrowed money to do so), having said goodbye to friends and family at home, and having psychologically prepared for his/her journey abroad, the prospect of turning back can be distressing. Feelings of embarrassment or shame at having been deceived, in addition to considerable financial constraints, can make it difficult for a worker to turn down a substituted contract, even when the terms are radically different than expected or promised, and even when he/she knows that the rules entitle him/her to better.

Recommendations

The Open Working Group on Labour Migration & Recruitment maintains that governments must take a zero-tolerance stance against the practice of contract substitution, and urges governments to implement the following recommendations:

Improve mandatory awareness-raising programs for migrant workers

- Pre-departure orientations for migrant workers should be mandatory, with curricula approved by the competent authorities in the country of origin. PDOs should educate workers about the provisions necessary in a valid contract, the importance of a valid contract in protecting their rights as workers, the link between a valid contract and his/her immigration status, and the potential repercussions for falsifying documents and/or colluding with employers and recruiters. Workers should be encouraged to keep copies of their contract documents (electronic copies and hard copies held by themselves and trusted family members/friends where possible).

- Countries of destination should provide mandatory post-arrival orientations for migrant workers to reinforce the information disseminated in PDOs and to provide additional country-specific information pertaining to contracts and labour laws.

- PDOs and post-arrival orientations must be facilitated according to a migrant-centred and rights-based approach, recognizing the pressures (monetary and otherwise) that migrant workers face that may lead them to accept substituted contracts and seek to assist them in problem-solving to deal with these pressures.

Ensure policy coherence between countries of origin and destination

- Contracts must, at minimum, be compliant with the laws of the country in which it is to be applied (i.e., the country of employment).

- Where the laws of the country of origin and destination are not aligned, to the disadvantage of the migrant worker, a government-to-government recruitment agreement that includes a standard contract with explicit provisions to ensure compliance should be pursued.

Ban the charging of fees to migrant workers

- Workers should never need to pay fees to secure decent work. If workers do

not have to pay fees and/or go into debt, it is far less likely that they will accept substitute contracts.

Align national laws on migrant worker contracts with the provisions of ILO C189 and global labour standards

- Following Articles 7 and 8 of ILO C189, governments must ensure that all migrant workers have written contracts that are enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment.

- In line with Article 7 of ILO C189, written contracts must include the name and address of the employer and the worker; the address of the workplace; the start and end dates of the contract; the type of work to be performed; remuneration and method of calculation and payment schedule; the normal hours of work; provisions for leave; and terms and conditions related to termination of employment and/or any probationary period.

- Contracts must be written in a language the migrant worker can read and understand.

- Countries of origin and destination should consider the use of electronic databases to log contracts and track compliance.

Improve monitoring mechanisms and access to justice

- The activities of private recruitment agencies must be carefully monitored, and strong sanctions applied for those who violate the law, including fines and agency closures.

- For cases in which contract substitution has resulted in irregular status for the migrant worker, governments must put mechanisms in place by which the worker can regularize his/her status and pursue work under a contract that properly protects his/her labour rights.

- Co-liability should be established such that employers in countries of destination and recruiters in countries of origin are jointly liable for rights violations against the migrant workers on their roster. Legal and financial support must be provided to migrant workers who decide to pursue such claims, and every effort must be made to expedite the process in the courts.

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NO WORKER SHOULD HAVE TO PAY RECRUITMENT FEES TO SECURE DECENT WORK!

Unscrupulous recruiters charge workers **high fees** to connect them with foreign employers. These fees result in **large debts** at **high interest rates**.

To pay their debts, workers accept substandard working and living conditions and are routinely subject to **rights violations**.

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With members from civil society organizations across the world, the Open Working Group is committed to knowledge sharing and collective advocacy to reform migrant labour recruitment practices globally. Building upon years of civil society advocacy on labour migration, human rights, and recruitment reform, the Open Working Group was initiated in May 2014 by Migrant Forum in Asia and the Global Coalition on Migration (GCM) together with other civil society organizations. The Working Group is coordinated by Migrant Forum in Asia and forms part of the Migration and Development Civil Society Network (MADE).

To learn more about the Open Working Group on Labour Migration & Recruitment and its Recruitment Reform Campaign, visit our website: RecruitmentReform.org.