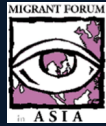


Ethical Recruitment¹

Open Working Group on Labour Migration & Recruitment Policy Brief #5



This project is funded by the European Union.

Issue

Over the last few decades, the governance of international labour migration has shifted from a primarily state-driven system to a market-driven system.² Where governments once regulated the cross-border movement of migrant labourers through legally binding bilateral agreements and managed the recruitment of workers and administration of migrant labour programs, many countries of destination have, in more recent years, allowed for the privatization of such functions.³ In this context, private recruitment agencies have flourished in the market, taking on the role of linking prospective migrant workers with employers or other intermediaries abroad, and providing services to facilitate travel arrangements for workers and obtain necessary documents.

The shift to private, market-driven recruitment has given rise to a number of human and labour rights concerns. Recruiters are, ultimately, profit-driven actors. They occupy a particularly favourable place in the market, wherein their client pool—prospective migrant workers, many of

whom work in low skilled jobs and who come from developing countries—is seemingly limitless, and the number of jobs available abroad is finite. In addition, governments find the practices of private recruiters difficult to regulate and monitor. This creates conditions in which recruiters charge workers exorbitant fees, putting them into debt and opening them up to exploitation and rights violations in the workplace and throughout the course of their migration process.⁴

Migrant communities, migrants' rights advocates, and trade unions have strongly articulated the need for countries of origin and destination to urgently address the regulatory gaps in the recruitment industry, and, more importantly, to reconsider the workings of labour migration governance as a whole to ensure that it is based on a human rights framework with migrants at the centre. These efforts have sought to hold governments to account for their abdication of responsibility to uphold and protect the rights of migrants. Governments have largely failed to create the conditions in which migration is a *choice* rather than a *necessity* and to ensure that migrants are able to fully realize their status as rights holders in the process of migration. On

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

² Wickramasekara, P. (2012). "Something is Better than Nothing: Enhancing the Protection of Indian Migrant Workers through Bilateral Agreements and Memoranda of Understanding."

³ Open Working Group on Labour Migration & Recruitment. (2015). "Government-to-Government Recruitment: Benefits & Drawbacks."

⁴ Specific human and labour rights concerns for migrant workers that are associated with recruitment processes have been well documented in a number of publications, and while important and relevant, these are unnecessary to cover in detail here. For reference, see www.RecruitmentReform.org.

recruitment, governments point to the regulations they have put into place and cite the difficulty of regulating informal networks of recruiters, as well as challenges of jurisdiction, as recruiters operate across borders and monitoring and regulation is difficult as a result.

In recent years, corporate social responsibility (CSR) and the obligations of businesses in upholding the human and labour rights of workers throughout their supply chains—and in respecting human rights in general—have been highlighted at the international level.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) released its Guiding Principles on Business and Human Rights in 2011, which remind states of their duty to “respect, protect, and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises.”⁵ These Guiding Principles were accepted unanimously by the UN Human Rights Council, and have been positively received by the business community globally.

The European Commission followed up with the publication of a sector-specific guide for employment and recruitment agencies on how to apply these guiding principles.⁶ The International Confederation of Private Employment Services (CIETT), a body representing recruitment and employment agencies globally and a partner in the International Labour Organization’s Fair Recruitment Initiative, has also adopted this guidance.

⁵ OHCHR (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*

⁶ European Commission. “Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights.”

Migrant workers are rights holders and the governments of their countries of origin, transit, and destination are duty bearers with the responsibility of upholding and protecting their rights. Private recruitment agencies and their representatives wield considerable power over the migration process and are increasingly seen to occupy a position of moral or ethical duty bearers, responsible for respecting, protecting, and upholding migrants’ rights. This framing has given rise to the concept of “ethical recruitment”—i.e., industry standards, often set out in formal codes of conduct, that promote fairness and respect for migrant worker rights.

Analysis

Grounded in CSR and human rights principles, ethical recruitment initiatives have emerged in the industry self-regulation of global supply chains in recent years. There is no official definition of “ethical recruitment,” but the term is used broadly to describe those recruitment agencies that do not charge fees to workers—a cornerstone of ethical recruitment practices—and that adhere to codes of conduct that strive to protect workers in the recruitment process and throughout the supply chain.

Ethical recruiters apply these standards across all of the markets for which they recruit, not just in select markets in which they derive some particular advantage for good practices—i.e., agencies recruiting for multiple industries will apply the same ethical standards across those industries.⁷

Current Ethical Recruitment Initiatives

A number of ethical recruitment standards and codes of conduct have been introduced to

⁷ Marie Apostol, Fair Hiring Initiative / Presentation, “Ethical Recruitment,” Regional Conference on Recruitment Reform, 17 December 2014, Amman, Jordan.

guard against forced labour and exploitative practices in labour recruitment. Most of these initiatives have foundations in ILO standards. Notable initiatives include:

ILO Fair Recruitment Initiative⁸

This multi-stakeholder initiative involves governments, employers' and workers' organizations, the private sector, and other key partners. It focuses on enhancing global knowledge on recruitment practices; improving laws, policies, and enforcement mechanisms to promote fair recruitment practices; promoting fair business practices; and empowering and protecting workers.

IOM International Recruitment Integrity System

The IOM's IRIS is a voluntary multi-stakeholder certification system based on ethical recruitment principles. This online system promotes transparency in the recruitment relationship by publishing a roster of "bona fide intermediaries."⁹

Electronic Industry Citizenship Coalition Code of Conduct

This code of conduct entered into effect on 1 April 2015, setting standards on "social, environmental, and ethical issues in the electronics industry supply chain"¹⁰ that are based on international norms and standards, including the Universal Declaration of Human Rights, the ILO's core labour standards, the OECD Guidelines for Multinational Enterprises, and others.

International Confederation of Private Employment Agencies (CIETT) Code of Conduct

This code of conduct was adopted on 27 November 2006 by the CIETT membership, which consists of private recruitment and employment agencies globally. The code sets out principles, including respect for transparency in terms of engagement, zero fees for workers, and respect for worker rights among others. The code also endorses ILO C181—the Private Employment Agencies Convention—and encourages members to lobby for its ratification and implementation in their respective countries.¹¹

Fair Labour Association Code of Conduct

Covering clothing, footwear, electronics, and agricultural products manufacturers, the Fair Labour Association code of conduct seeks to protect workers in production supply chains. This code is primarily based on ILO standards and concentrates on ensuring fair wages and safe and healthy workplaces.¹²

World Health Organization Global Code of Practice on the International Recruitment of Health Personnel

In May 2010, this innovative instrument was adopted by World Health Organization member states to "establish and promote voluntary principles and practices for the ethical international recruitment of health personnel and to facilitate the strengthening of health systems."¹³ In addition to

⁸ ILO (2016). "Fair Recruitment." <<http://www.ilo.org/global/topics/fair-recruitment/lang--en/index.htm>>

⁹ IOM (2016). "What is the International Recruitment Integrity System?" <<https://iris.iom.int/what-international-recruitment-integrity-system>>

¹⁰ EICC (2015). "Code of Conduct." <<http://www.eiccoalition.org/standards/code-of-conduct/>>

¹¹ CIETT (2006). "CIETT Members' Commitment Towards a Well Functioning International Labour Market."

<http://www.ciett.org/fileadmin/templates/ciett/docs/ciett_code_conduct.pdf>

¹² FLA. "Workplace Code of Conduct."

<http://www.fairlabor.org/sites/default/files/fla_code_of_conduct.pdf>

¹³ World Health Organization (2015). "Managing health workforce migration - The Global Code of

promoting fair and ethical recruitment practices, the code stipulates that member states should discourage the recruitment of health professionals from developing countries that face critical shortages of health workers.¹⁴

The Open Working Group on Labour Migration and Recruitment has developed a set of rights-based criteria to assist migrant communities, migrants' rights advocates, and trade unions to identify ethical recruiters at the national level and to raise awareness among recruiters of what constitute ethical practices in migrant labour recruitment. In the absence of more effective labour migration governance, this list can be helpful in the development of recruiter "whitelists," and can serve as a starting point for advocacy for higher standards across the recruitment industry.

Grounded in Human Rights

Beyond a CSR initiative, ethical recruitment is grounded in human rights principles enshrined in international law. The ILO's Conventions and Recommendations form the basis of ethical recruitment initiatives, and are reiterated in other statements of principles, including the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

As stated in the UN Guiding Principles on Business and Human Rights: "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure."¹⁵ This commitment is reiterated in the OECD Guidelines for Multinational

Enterprises: "Respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations, and does not diminish those obligations."¹⁶

These statements of principles and the growing attention paid to ethical recruitment demonstrate the acknowledgement that protecting the rights of migrants in the recruitment process is not just the obligation of states. The private enterprises involved in and profiting from global labour migration also have legal and ethical obligations towards their clients, as do all enterprises operating across borders. As articulated in Article 39 of the OECD Guidelines:

In all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.

In addition to a strong grounding in human rights principles, the Open Working Group on Labour Migration & Recruitment has set out ethical recruitment criteria that businesses, governments, civil society organizations can use to assess adherence to ethical recruitment principles.

Practice."

<http://www.who.int/hrh/migration/code/practice/en/>

¹⁴ Ibid.

¹⁵ OHCHR (2011). "Guiding Principles on Business & Human Rights."

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁶ OECD (2011). "Guidelines for Multinational Enterprises."

<http://www.oecd.org/daf/inv/mne/48004323.pdf>

Open Working Group on Labour Migration & Recruitment: Ethical Recruitment Criteria

Respect for the laws of the countries in which the agency operates

- Must be licensed / accredited in all countries of operation (origin, transit, and destination)
- If working with other recruitment or employment agencies, these must also be properly licensed/accredited
- Recruited workers must have appropriate legal documentation to work abroad (exit clearances from countries of origin, where required) and all valid visas / entry permits / work permits for work in the country of destination
- Must not have been suspended, charged, or disciplined in any way for non-compliance with the laws of any of the countries in which it operates
- Owners, investors, and employees of the agency must never have been affiliated with agencies that have been suspended or shut down for non-compliance with laws or regulations

No Fees for Workers

- Workers may incur some costs associated with their eligibility for the job (e.g., training courses) or for items that will become their personal property (e.g., identity documents such as passports). However, any costs associated with their recruitment once they have been formally hired are to be borne by the employer.
- Once a worker has been hired, the agency must not charge any fees; all fees associated with the worker's recruitment and deployment are to be borne by employers
- The agency must not require workers to post a bond, in cash or in kind, for reimbursement at the end of the worker's contract
- Workers should be informed of their right to recruitment without fees

Transparency in hiring process

- Must provide accurate details, in writing, on the nature, scope, and conditions of work for every employee hired
- Employment contract must be provided in a language the worker can understand, and the worker must be provided with a hard copy of the signed contract
- If changes are required for the terms of the contract, the employee must be informed and given the opportunity to consent to or decline the changes without penalty or threat of penalty

Transparency in wages and deductions

- Wages must reflect the terms set out in the worker's written contract
- Wages must be paid accurately and on time
- Workers must receive a statement accurately reflecting the worker's pay (hourly pay, overtime, piecework, etc.) and any legally permitted deductions (allowed by law, and as set out in the worker's contract)
- Workers are to receive equal pay for equal work, without discrimination on the grounds of nationality, sex, religion, ethnic origin, etc.

Job Safety

- The agency must be aware of and disclose any risks associated with the job for which the worker is being hired
- Workers must be provided with job-specific occupational health and safety training prior to commencing work on the jobsite
- Contingency measures must be in place for those who become ill or who get injured on the job

No Document Confiscation

- The agency must not retain the worker's personal documents—e.g., passports, visas, ATM cards, etc.—for any reason. These are the personal property of the worker.

Standards of Behaviour for Recruitment Agency Staff and Contracted Agents

- Workers must never be subject to verbal or physical abuse of any kind
- Workers must never be subject to threats or intimidation of any kind
- Workers must never be coerced or threatened to accept disadvantageous conditions of employment or be charged fees of any kind
- Any such incidents are documented and investigated, and corrective disciplinary actions taken

Critique

Despite the emergence of ethical recruitment initiatives and the development of industry codes of conduct to guard against forced labour, trafficking, and exploitation in global supply chains and that complement existing robust human and labour rights frameworks, migrant labour recruitment remains rife with rights abuses.

While the Open Working Group on Labour Migration & Recruitment welcomes and supports ethical private sector initiatives, we recognize that there are pervasive structural problems in global migration governance that ethical recruitment initiatives alone cannot resolve.

Limitations of Ethical Recruitment Initiatives

The profit motive and a lack of decent work opportunities at home

The primary function of recruitment agencies, like all businesses, is to generate profit. However, the profit motive does not absolve them of their obligation to engage in fair and ethical business practices. Thus far, the move towards the widespread adoption of ethical standards in the recruitment industry has been slow. Recruitment agencies earn profits while engaging in unethical practices such as deception, contract substitution, and excessive fee charging.

Recruiters engaging in unethical practices can remain profitable, because their client base is so large. The urgency of many prospective migrant workers to find a job abroad results in a willingness to accept lower standards of fairness in their interactions with recruitment agencies. For instance, many cases have been documented in which recruiters have engaged in contract substitution, knowingly misleading migrant workers about the terms of employment and

charging them unauthorized fees for their services.¹⁷ In such cases, recruiters privilege their profit motive over the interests of their clients—a clear breach of ethics and principles of fairness.

Unethical practices like this are particularly pervasive in countries in which there is a persistent lack of opportunity for decent work. The demand for and the expectation of fair practices are largely absent. Where governments have implemented regulations to guard against recruiter malpractices without corresponding initiatives to provide decent work opportunities, workers sometimes view these regulations as additional impediments to securing a livelihood. Thus, workers not only agree to substandard ethical practices, but sometimes collude with recruiters in circumventing the rules.¹⁸ The lack of decent work opportunities at home not only impels labour migration, but also creates the conditions in which unethical recruitment practices are the *accepted* norm rather than the exception.

In addition, the profit motive of actors in the private recruitment industry further exacerbates the precarious working status of migrant workers, in that it encourages turnover of workers rather than worker retention. Because their role is to earn money by placing workers in jobs abroad, recruiters have less incentive to ensure that the worker is placed with a decent employer and in a job for which their skills and ambitions are well-suited. This is particularly important to consider in the context of destination countries that restrict the ability of a worker to change employers or to seek work in another sector. Where

¹⁷ Open Working Group on Labour Migration & Recruitment (2015). “Zero Tolerance for Contract Substitution.”

¹⁸ Center for Migrant Advocacy (Philippines), Submission to the UN Committee on Migrant Workers, 2012.

employers take kickbacks from recruiters for employing new workers, this problem is even more pronounced.

Lack of ethical recruitment options

States have an obligation to protect and uphold the rights of workers, including protection from the actions of third parties. While countries of origin tend to enact some barriers to entering the market to guard against unethical recruitment, these barriers tend not to be informed by ethical recruitment standards or robust industry research. As such, we see many recruitment agencies legally authorized to enter the market yet that do not adhere to any kind of ethical standard, ranging from large businesses to individual agents operating at the village level. These authorized agencies operate alongside the many unauthorized recruiters to which many governments are ill equipped to shut down. Ethical recruiters have to compete for space in the market with well-established recruitment agencies that are built on the unethical practice of charging fees to migrant workers.

As a direct result of lax regulatory frameworks and monitoring activities on the part of states, unscrupulous recruiters operate with impunity, often pushing ethical recruiters out of the market. Thus, workers do not have many ethical recruiters to choose from. In addition, recruiters are often politically influential and, in some cases, operate in collusion with government officials, using these lax systems to their advantage.

Voluntary standards may be more effective for major brands

Ethical recruitment initiatives represent voluntary standards. Principles of CSR and ethical recruitment promote self-regulation and compliance with national/international norms of responsible business practices. As with many CSR initiatives, the motivation to

act ethically is often tied to public reputation, which can directly influence profits—i.e., consumers can choose *not* to do business with companies acting unethically, creating a profit-based incentive, in addition to a moral imperative, for good corporate citizenship.

This kind of reputational concern seems more relevant for major global brands that have much to lose from negative public opinion regarding rights violations in their supply chains—e.g., for electronics and clothing manufacturers¹⁹—than for smaller operations employing migrant workers. Recruiters are likely to be less worried about the application of ethical standards in recruiting for households (e.g., domestic workers, drivers, gardeners) and small- and medium-sized enterprises whose labour forces and supply chains are much less likely to come under direct scrutiny.

Responsibility for Migrant Worker Rights Lies with the State

Governments are desperate to deploy migrant workers, as the main countries of destination have an oversupply of labourers that cannot be absorbed into their labour markets. Recruiters present a solution, and their profit motive combined with the desperation of the state to deploy allows recruiters to wield significant power in the relationship. Migrant workers get caught in the middle and their rights and interests are sidelined in the process.

Governments commonly cite a lack of resources to police the activities of so many recruiters and sub-agents and a lack of

¹⁹ In a recent example, Apple Inc. forced its suppliers to reimburse more than 4,500 contract workers who were charged recruitment fees, amounting to more than \$4 million US. See PC World (2015). “Apple ends system of recruitment fees that tied labor to contractors” <<http://www.peworld.com/article/2883512/apple-ends-system-of-recruitment-fees-that-tied-labor-to-contractors.html>>

capacity to ensure policy coherence between countries of origin and destination. Their inability and unwillingness to take concrete actions to protect migrant worker rights represents a significant failing on the part of states. Meaningful involvement of trade unions and civil society organizations could help to remedy these shortcomings, but this has remained a blind spot for many states.

In advocating for the creation of an enabling environment for the establishment and growth of private sector ethical recruitment agencies, civil society does not absolve the state of its responsibility to address the underlying cause of rights violations: the neoliberal economic system that commodifies workers and labour migration policies that view migrants tools for development rather than as rights holders.

Recommendations

The Open Working Group on Labour Migration and Recruitment welcomes private sector ethical recruitment initiatives and the development of the business case for rights-respecting practices for private recruitment agencies. We urge governments to consider the following recommendations:

Create Enabling Environments for Ethical Recruitment Initiatives

- Work with ethical recruiters, civil society, and trade unions to create policies that support the sustainable entry of ethical recruiters into the market.
- Create favourable legislative environments that encourage and incentivize the establishment of more ethical recruitment agencies while crowding out unethical recruiters.
- Support ethical recruiters by building databases of eligible employees,

employers, certifying agencies, and ethical recruiters to facilitate ethical recruitment practices.

- Involve civil society organizations, trade unions, and migrant workers in review mechanisms to ensure private sector compliance with ethical recruitment standards.

Adhere to Ethical Recruitment Standards in Government Activities

- Develop standards of ethical recruitment, based on international human and labour rights standards, to inform the regulation and monitoring of private recruiters and government-to-government labour recruitment agreements.
- Demand compliance with ethical recruitment standards and respect for labour rights in their procurement processes.

Raise Public Awareness of Ethical Recruitment Standards

- Inform prospective migrant workers of their rights and of recruitment practices that are illegal within their jurisdictions, encouraging workers to demand higher standards from recruiters.
- Consider publishing “whitelists” of ethical recruiters in addition to “blacklists” of recruiters that violate laws and regulations.
- Normalize ethical recruitment standards in the public discourse by discrediting the practices of unethical recruiters and denouncing exploitative and underhanded practices.

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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.