

THE EMPOWERMENT OF MIGRANT WORKERS IN A PRECARIOUS SITUATION: THE ROLE OF LABOR INSPECTION

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Across the globe, transnational migrants who are doing low-paid work in precarious situations experience widespread rights violations. The structures that create precarity for migrant workers and enable their exploitation are well understood. Less attention, however, has been directed to how the institutional design of labor inspection systems also drives precariousness by making rights enforcement inaccessible and ineffective for workers. In the UN Global Compact on Safe, Orderly and Regular Migration, States have committed to enhance the ability of labor inspectorates to protect migrants' rights, making closer examination and reform both timely and necessary.

Context

Nearly one out of every twenty workers globally is a migrant: an individual who is working outside of their usual country of residence (UN/DESA 2021).

Workers who migrate from and into positions with greater economic and social privilege – more education, more specialized skills, and greater economic resources, social capital and social integration – are more likely to experience decent work and respect for their rights in the country where they work.

Migrants who are doing low-paid work in precarious situations, however, frequently experience widespread violations of their rights. This policy brief is concerned with the experience of these precariously situated migrants. They include individuals who are “undocumented” in that they have either lost or never had legal status to live and work in the state where they perform labor. They also include migrants who have only temporary status to live and work in the state such as: seasonal workers; workers on temporary time-limited permits; international students on temporary work

permits; and migrants working in states that do not permit them to acquire permanent residency status regardless of how long they live or work in the state.

Research has documented how global economic inequality, underdevelopment, environmental crises, political unrest, violence and other systemic factors create and sustain the poverty that drives many low-paid workers into transnational migration (Crépeau 2014). These structural factors are exacerbated by constraints imposed through work permits that typically restrict migrants in low-wage jobs to specific sectors, occupations and/or employers. The combination of these factors creates an extreme power imbalance that enables recruiters and employers to violate these workers' rights under national legislation with little risk of legal consequences.

Decades of country-specific and comparative research has also confirmed that migrants in low-paid work in precarious situations face strikingly similar patterns of rights violations across the globe. They face predatory recruitment practices and extortionate bribes or

“recruitment fees” to get jobs. Recruiters and employers may subject them to labor trafficking; debt bondage; contract substitution; withholding of passports, work permits and other identity papers; and coercion through threats of deportation. These migrants also face widespread wage theft; disproportionate deductions for rent and food; work in conditions with significant health and safety risks; and have their movement in society restricted (Faraday 2021).

Research has also documented how workers’ precariousness, combined with language barriers, isolation, poverty, lack of knowledge about or lack of coverage under national laws, lack of access to unionization and/or legal representation, reprisals from employers and other factors prevent low-paid migrant workers from enforcing their rights under national legislation.

Yet, when precariously situated migrants do try to enforce their rights as workers, they face significant barriers to justice because labor inspectorates are ill-designed in terms of structure, training, resources and remedial power to meet migrant workers’ needs.

The United Nations (UN) and International Labour Organization (ILO) have adopted a wide range of international covenants, conventions, and recommendations that commit States to enact labor standards that protect all workers, including migrant workers.

But labor standards have very little real meaning if they are not enforced and workers do not, in reality, experience their benefits and protection. As the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) observed: “Without full enforcement, a member State cannot be said to be ensuring effective implementation of international labour standards.” (CEACR 2006; ILO 2006).

For this reason, ILO Convention 81 – the *Labour Inspection Convention, 1947* – sets out international standards for effective state-based labour inspectorates (ILO 1947).

The UN Global Compact for Safe, Orderly and Regular

Migration (UNGA 2018) expressly commits States to “strengthen the enforcement of fair and ethical recruitment and decent work norms and policies by enhancing the abilities of labor inspectors and other authorities to better monitor recruiters, employers and service providers in all sectors, ensuring that international human rights and labour law is observed to prevent all forms of exploitation, slavery, servitude and forced, compulsory or child labour” (para. 22.f).

While labor inspectorates differ across states, interventions relating to six features in their design have proven critical to making them more or less accessible and effective in empowering migrants in a precarious situation. These critical points of intervention relate to labor inspectorates’ mandate, structure, resources, enforcement techniques, accessibility and remedial authority.

Firewalls

International labor standards apply equally to all workers, including those who are undocumented. But this promise is not met in reality.

Undocumented migrants experience particular exploitation by employers who are able to exert coercion, withhold wages or deny rights by threatening to contact immigration authorities if migrants protest their poor treatment. At times, recruiters and employers deliberately place workers in situations where they are working contrary to their work permits in order to gain this added leverage. (Faraday 2016).

In some states, working with undocumented status is criminalized and labor inspectorates have an explicit mandate to enforce immigration laws, and to collaborate with and share information with immigration authorities (Jinnah 2020; Bustamante 2011). Here, identifying and deporting undocumented workers is the primary focus of labor inspectorates in relation to migrant workers and inspectorates have the power to activate other state agencies to detect and deport undocumented migrants (Martin and Miller 2000; Keith and LeVoy 2020).

Where labor inspectorates have this fundamental

conflict in their mandate, undocumented migrants are unable to enforce their rights as the cost of doing so may be imprisonment, fines and deportation.

For this reason, the UN, ILO, European Commission against Racism and Intolerance of the Council of Europe (ECRI) have all directed that the mandates of labor inspectorates must be separated from immigration authorities and “firewalls” must be put in place to ensure that labor inspectorates do not disclose workers immigration status to other state agencies (CEACR 2018; ECRI 2016). The UN Committee on Economic, Social and Cultural Rights stated this position bluntly and unequivocally: “labour inspectorates should focus on monitoring the rights of workers and not be used for other purposes such as checking the migration status of workers.”

In the Global Compact for Migration, States have expressly committed to safeguard migrant workers rights by “ensur[ing] that migrants working in the informal economy have safe access to effective reporting, complaint and redress mechanisms in cases of exploitation, abuse or violations of their rights in the workplace, in a manner that does not exacerbate vulnerabilities of migrants who denounce such incidents and allows them to participate in respective legal proceedings whether in the country of origin or the country of destination” (para. 22.j), States have also committed to “ensure that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services or by unlawfully infringing upon the human rights to privacy, liberty and security of person at places of basic service delivery” (para. 31.b)

Firewalls are an established practice around the world, particularly at the municipal level, in order to ensure that undocumented people can access public services such as healthcare, education, and police safely. Firewalls also ensure that the mission of public services is not distorted from delivering key services to immigration enforcement. Unless this principle is applied to labor inspectorates, they will remain a greater danger than an aid for undocumented migrants.

Labor inspectorate structure and scope of mandate

In order to benefit from the protection of state-based labor inspectorates at all, migrant workers must first be protected under national law. The exclusion from legal protection is a particular issue in relation to domestic workers, agricultural workers and workers in the informal economy.

Accordingly, in the Global Compact for Migration, States have committed to “promote signature and ratification of, accession to and implementation of relevant international instruments related to international labour migration, labour rights, decent work and forced labour” (para. 22.a); to “enact and implement national laws that sanction human and labour rights violations” (para. 22.e); and to “provide migrant workers engaged in remunerated and contractual labour with the same labour rights and protections extended to all workers in the respective sector” (para. 22.i).

The structure of labor inspectorates and the scope of rights they are empowered to enforce is critical to determining their effectiveness for all migrants in a precarious situation.

ILO Convention 81 directs that “labour inspection shall be placed under the supervision and control of a central authority”, in order to ensure consistency and coordination of approach in monitoring and enforcing rights. (ILO 1947). In addition, the broader the scope of rights that a labor inspectorate has authority to enforce, the more robust protection will be available to migrants.

However, labor inspectorates often fall short of these standards. Enforcement of migrant workers’ rights is often decentralized geographically resulting in inconsistent implementation (EPSU 2012; Bachinger 2017). At the same time, different rights enforcement agencies may have the mandate to enforce only a narrow scope of rights – such as occupational health and safety but not rights to wages, employment standards, rights to unionize, or rights protecting workers from exploitation through recruitment and labor trafficking.

In these circumstances, some rights may fall outside the scope of labor inspectorates’ mandates altogether or

migrant workers may have to seek remedies across multiple different agencies, none of which will have a full picture of the nature and extent of their exploitation.

To ensure that labor inspectorates have the structure, mandate and expertise to effectively monitor and enforce the rights of migrant workers, the CEACR has long recommended that specialized labor inspectorates with expertise in the complexities of migrant labor be established to monitor and enforce migrants' rights: "Given the particular challenges of monitoring and enforcement of migrant workers' rights that the specificities of their situation create, the Committee considers that the creation of competent bodies specific to migrants workers to which these workers can present complaints or access particular advice or guidance may be particularly useful" (CEACR 2006).

Expertise and resources

To be effective, labor inspectorates must be staffed by a professional, trained staff of inspectors with security of tenure and decent pay that gives them the independence to pursue rigorous enforcement of migrants' rights, free of inappropriate pressure (EY and South Africa 2017; Malaysia 2017). They must also be adequately resourced, with resources deployed in the appropriate geographic areas and economic sectors where significant populations of migrants – especially those particularly at risk for exploitation – are located (CEACR 2017).

In particular, it is essential that labor inspectors are assisted by trained interpreters who are fluent in the languages most commonly spoken by migrant workers in the region. Labor inspectorates often lack access to such language interpretation which significantly impairs the ability to meet and communicate with migrant workers and accurately collect information about their treatment (CEACR 2016; Qatar and ILO 2019).

The level of resourcing that is required for labor inspectorates under ILO Convention 81 is significant. The Convention mandates that "workplaces shall be inspected as often and as thoroughly as necessary in order to ensure the effective application of the relevant provisions" (ILO 1947).

Even wealthier States have failed to meet that standard with the result that monitoring and enforcement of migrant workers' rights are not conducted regularly. This lack of enforcement and increasing reliance on employer self-reporting reinforces the imbalance of power which enables employers to violate migrants' rights (Hoffman and Rabe 2014; Mitchell and Murray 2017; Mojtehdzadeh 2019; Jinnah 2020).

Proactive enforcement

Migrant workers rarely have the security to file complaints when their rights are violated (CEACR 2021; Harkins and Åhlberg 2017). Migrants are typically terminated from their work immediately upon raising complaints and may as a result also lose their housing and their right to remain in the country.

As a result, it is well-established that proactive enforcement by labor inspectorates is the most effective way to both identify rights' violations and to ensure that migrant workers receive the redress that is owed to them (Faraday 2014). Proactive enforcement requires that greater resources be devoted to labor inspectorates. However, political will to make this investment is often lacking. In the absence of proactive enforcement, labor inspectorates offer little practical protection for migrants in a precarious situation.

Accessibility to migrant workers

In addition to ensuring that labor inspectorates are designed and resourced in a way that enables them to effectively monitor and enforce migrants' rights, state-based supports are also required to ensure that migrants can effectively access the protection of labor inspectorates.

Information about their rights, information about how to enforce their rights and language interpretation are all bedrock requirements to make labor inspectorates accessible. But migrants need other specific supports that depend on state action.

Without access to legal assistance, it is extremely difficult for migrant workers to secure protection of their rights. Recognizing this, States committed in the Global

Compact for Migration to “ensure that migrants have access to public or affordable independent legal assistance and representation in legal proceedings that affect them, including during any related judicial or administration hearing” (para. 23.g).

Migrant workers also cannot benefit from the protection of labor inspectorates if they are unable to remain and work in the state while proceedings relating to their rights remain ongoing. Legal proceedings to enforce migrants’ rights are typically lengthy and migrants’ work and residency permits often expire long before legal proceedings are completed. While migrants may be able to secure temporary residency permits in order to pursue legal proceedings, those permits typically have very short terms with limited renewals and are discretionary with the result that workers are often forced to leave the state before their disputes are resolved (Amnesty International 2019; Harkins and Åhlberg 2017; Canada 2001).

Remedial authority

Finally, the ultimate measure of whether labor inspectorates can adequately empower migrant workers in a precarious situation is whether they have the power to deliver remedies that are responsive to the actual circumstances and needs of migrants.

There is, however, often a mismatch such that the “remedies” granted by labor inspectorates effectively further penalize migrants. In some states, the primary remedy ordered when employers have violated migrants’ rights is to return the worker to their country of origin or to revoke the work permits. This “remedy” was designed to sanction the bad behaviour of abusive employers by depriving them of access to their migrant workforce but it does nothing to compensate the migrant. As the ILO has observed, “considering repatriation to be a ‘remedy’ may be a mischaracterization due to the loss of income, loss of opportunity and investment in migration costs” (ILO 2018). Moreover, where migrants’ “remedy” is to leave the state, labor inspectorates may not order compensation for the labor abuses that they actually experience (CEACR 2020).

Where labor inspectorates do order financial redress for migrant workers, they must be able to effectively enforce that order. However, labor inspectorates often do not invest resources to ensure that employers comply with the remedies ordered (FRA 2019; Jureidini 2019; Amnesty International 2019; Vosko 2017).

As a result, even in the most successful cases where migrant workers have sought formal adjudication of their rights and have receive an order in their favour, labor inspectorates are not adequately responsive to empower migrant workers in a precarious situation. Further action is required to ensure that the design of labor inspectorates is better able to empower migrants and reduce their precarity.

Conclusions

Meeting the commitments set out in the Global Compact for Migration inevitably requires the political will of States to address systemic barriers erected by the institutional design of their labor inspectorates. There exist numerous examples, principles and guidelines for practical action that States can follow to enhance the effectiveness of labor inspectorates. The policy objectives addressed in this brief suggest that States should:

1. Establish specialized national labor inspectorates with a mandate to enforce enforcing the comprehensive range of rights violations that migrant workers experience across the full arc of their migration journey.
2. Staff labor inspectorates with personnel hired specifically for their expertise in labor migration, labor rights of migrant workers and systemic understanding of how different dimensions of migrant worker precarity are constructed and interact.
3. Ensure members of labor inspectorates have security of tenure and are compensated at a level that ensures their independence.
4. Resource labor inspectorates at a level that enables them to engage in extensive strategic

proactive inspection and rights enforcement in the sectors where migrant workers are concentrated, and in sectors where migrant workers are at high risk of exploitation.

5. Staff labor inspectorates with interpreters who are experts in the languages of the largest populations of migrant workers and ensure access to other language interpreters as needed.
6. Design and audit labor inspectorates to ensure their accessibility to migrant workers, whether that access is through in-person engagement or through the use of technology that is easy, safe and readily available for workers to use.
7. Ensure that supports needed for meaningful access such as legal assistance, interpretation and continued authority to live and work in the state are implemented.
8. Empower labor inspectorates to issue and enforce remedies that are responsive to migrant workers' needs and that provide redress for violations of workers' rights.

Key references:

Amnesty International. 2019. *All Work, No Pay: The Struggle of Qatar's Migrant Workers for Justice*.

Bachinger, Almut et al. 2017. *The Role of Labour Inspection in Addressing Demand in the Context of Trafficking in Human Beings for Labour Exploitation*, DemandAT Working Paper No. 12, October 2017.

Bustamante, Jorge. 2011. *Report of the Special Rapporteur on the human rights of migrants – Mission to South Africa* 20 May 2011, UNHRC 17th Session, Agenda item 3, A/HRC/17/33/Add.4

Canada. 2001. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

CEARC. 2006. *Promoting Fair Migration: General survey concerning the migrant worker instruments*, ILC 105th Session, Report III, Part 1B

CEACR. 2017. Direct Request, *Labour Inspection Convention, 1947 (No. 81) – South Africa*, ILC 106th Session

CEACR. 2018. Direct Request, *Labour Inspection Convention, 1947 (No. 81) – Germany* ILC 107th Session

Crépeau, François. 2014. "Labour Exploitation of Migrants." In the *Report of the Special Rapporteur on the Human Rights of Migrants*, UN Human Rights Council, 26th Session, Agenda Item 3, A/HRC/26/35 (April 23, 2014).

European Federation of Public Service Unions. 2012. *A mapping report on Labour Inspection Services in 15 European countries*. Brussels: EPSU Secretariat.

European Union Agency for Fundamental Rights (FRA). 2019. *Protecting migrant workers from exploitation in the EU: workers' perspectives*. Luxembourg: Publications Office of the European Union.

EY and South Africa Department of Labour. 2017. *Adequacy of resources for effective inspections to be conducted within the South African labour market*.

Faraday, Fay. 2014. *Profiting from the Precarious: How recruitment practices exploit migrant workers* Toronto: Metcalf Foundation.

Faraday, Fay. 2021. *The Empowerment of Migrant Workers in a Precarious Situation: An overview*, KNOMAD Paper No 39. Washington, DC: World Bank.

Harkins, Benjamin and Åhlberg, Meri. 2017. *Access to justice for migrant workers in South-East Asia*. Bangkok: International Labour Organization.

Hoffmann, Ulrike and Rabe, Heike. 2014. "Severe forms of Labour Exploitation: Supporting victims of severe forms of labour exploitation in having access to justice in EU Member States – Germany, 2014". Berlin: German Institute for Human Rights.

ILO. 1947. Convention 81, *Labour Inspection Convention*, 11 July 1947 (entered into force 7 April 1950)

ILO. 2006. *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based*

approach to labour migration. Geneva: International Labour Organization.

ILO. 2018. *Situation and gap analysis on Malaysian legislation, policies and programmes, and the ILO Forced Labour Convention and Protocol*.

Jinnah, Zaheera. 2020. "Negotiated Precarity in the Global South: A Case Study of Migration and Domestic Work in South Africa 14:1 *Studies in Social Justice* 210-227.

Keith, Lilana and LeVoy, Michele. 2020. *A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice*. Brussels: PICUM.

Malaysia. 2017. Ministry of Human Resources, *Policy Briefing: Labour Inspection & Enforcement Series*, Vol. 1

Martin, Philip and Miller, Mark. 2000. *Employer Sanctions: French, German and US Experiences* ILO International Migration Branch Working Paper #30 Geneva: International Labour Organization.

Mitchell, C. Michael and Murray, John C. 2017. *The Changing Workplaces Review: An Agenda for Workplace*

Endnotes

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Mojtehedzadeh, Sara. 2019. "Labour ministry to reduce number of inspectors probing workplace abuse, union memo reveals," *Toronto Star* (10 June 2019)

Qatar Ministry of Administrative Development, Labour and Social Affairs (ADLSA) and ILO. 2019. *Assessment of the Qatar Labour Inspection System*. Doha: International Labour Organization.

United Nations/Department of Economic and Social Affairs, 2019. *International Migration 2019*. New York: United Nations.

United Nations General Assembly. 2018. "Global Compact for Safe, Orderly and Regular Migration." Resolution adopted by the General Assembly on December 19, 2018, 73rd Session, Agenda items 14 and 119, A/RES/73/195.

Vosko, Leah F., et al. 2017. *Closing the Employment Standards Enforcement Gap: An Agenda for Change*.

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