

The Five Corridors Project:

Exploring Regulatory and Enforcement Mechanisms
and their relationship with Fair Recruitment

Key recommendations

JULY 2021



ABOUT THIS DOCUMENT

The Five Corridors Project is an initiative led by FairSquare Projects, which aims to identify key measures that governments can take to ensure that migrant workers can migrate safely and with dignity. FairSquare Projects is a non-profit human rights organisation that tailors rigorous research with communication and advocacy work to promote systemic change. The Five Corridors Project is supported by Open Society Foundations, Humanity United and Porticus. The organisations that funded this project played no role in the design or execution of the research, and our conclusions and recommendations may not necessarily reflect the viewpoints of Humanity United, OSF or Porticus.

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A meeting of a domestic worker union, Taipei. © Lennon Ying-Dah Wong / Flickr

Recommendations to destination states

3. Ensure that laws and practices do not discriminate against migrant workers, or between different categories of migrant workers, in their access to essential worker protections including the right to freedom of association.

Fair recruitment is undermined where migrant workers do not enjoy adequate legal protection in destination states. In many destination states, migrant workers, or workers in low-wage sectors of the labour market that disproportionately employ migrant workers, are excluded from elements of core labour laws. This may remove workers' rights to, for example, join trade unions, minimum wage protections, maximum working hours, days off, and overtime payment. Workers in the agriculture, domestic work, and fishing sectors are often excluded from legislative protections or subject to parallel regulatory regimes, and these are sectors where migrant workers are often heavily and disproportionately present. Ensuring that non-national populations in low-paid sectors of the economy have the same fundamental rights as nationals is an indispensable buffer against racialized social exclusion and attendant discriminatory attitudes that make

migrant workers even more vulnerable, and which have particularly come to the fore in the context of the Covid-19 pandemic.

In many destination countries, migrant workers, either by dint of their nationality or the sectors in which they work, are unable to form or join trade unions, a fundamental human and labour right. Agricultural workers are unable to unionise in several of Canada's provinces. A legal challenge to this policy in Ontario, where the 2002 Agriculture Employees Protection Act stresses "the unique characteristics of agriculture", was upheld by Canada's Supreme Court in 2011 but invoked public criticism from the International Labour Organization.¹⁵³ The UFCW union, which represents agricultural workers and brought the case against Ontario, told us that, "once they are in Canada, these workers are totally voiceless."¹⁵⁴ Because so many

153. ILO, "Interim Report - Report No 358, November 2010: Case No 2704 (Canada)"

154. Remote interview, with Santiago Escobar, UFCW, 21 February 2021.

workers from Mexico and Caribbean countries employed under the Seasonal Agricultural Worker Program (SAWP) are not able to unionise, unions are also excluded from the SAWP annual review process, meaning there is a lack of worker representation in discussions relating to their conditions and the contents of the standardised contract.

Qatari law bars any migrant workers from forming or joining trade unions. As part of its technical cooperation with the ILO, the labour ministry has however established joint worker-employer committees in 20 companies and has engaged closely with international trade unions.¹⁵⁵ These positive measures have however so far been limited to public bodies and major companies and stop short of full freedom of association. Smaller companies, where abuse is known to be widespread and protections are weaker, lack worker representation of any kind.¹⁵⁶ In Kuwait, unions are permitted but only Kuwaiti nationals can form them, and the Kuwait Trade Union Federation's activities are closely supervised by the government. Migrant workers can join, but only once they have resided in Kuwait for a minimum of five years, and there is no right provided for domestic workers to join unions.¹⁵⁷ There is some allowance for migrant worker and diaspora organisations to operate, but within strict limits. One expert told us that in reality, "freedom of association in Kuwait exists only on paper [...] especially so for migrant workers."¹⁵⁸

In Thailand, public sector, informal, temporary, and seasonal agriculture and sub-contracted workers (between them about 80% of the workforce) are not permitted to form or join unions.¹⁵⁹ Migrant workers have a right to join an existing union, but under the Labour Relations Act, not the right to establish or lead one. As most migrants work in the fishing, seafood processing and construction sectors, where there are few Thai workers, there are few such possibilities. Even where

Thai unions might exist in sectors where migrants work, there are significant language and cultural barriers. The cumulative effect of this is that migrant workers lack access to labour unions in Thailand. A 30-year-old factory worker told us: "I have never heard of labour organizations inside the factory. Maybe there's a worker union among Thai workers but I never heard of one with Burmese workers."¹⁶⁰ When there are problems in their workplace, migrant workers rely on unregistered organizations or civil society advocacy groups to highlight their interests. The ILO Committee has called on the Thai Government "to eliminate, without delay, the restrictions placed on the freedom of association rights of migrant workers."¹⁶¹

Taiwan offers a more positive example, having reformed its Labour Union Act in 2011 to allow foreign nationals to serve as supervisors or directors of unions. As a result, three labour unions in Taiwan have been established by and for migrant workers, representing fishers and domestic workers.¹⁶²

According to the ILO, only about 10% of domestic workers worldwide are covered by labour legislation to the same extent as other workers, while more than 25% are completely excluded. As a result, they "very often lack recognition as real workers, and constitute one of the most vulnerable categories of workers."¹⁶³ In Taiwan, foreign domestic workers are excluded from the protection of the Labour Standards Act. The Taiwanese International Workers Association told us that the workplace exploitation that they endure is in large part related to this exclusion, since there are no limitations on their working hours.¹⁶⁴ A representative of Migrant Workers Concern Desk told us that Taiwan's domestic workers are the most vulnerable category of workers due to the circumstances of their employment.¹⁶⁵ A government-commissioned report in 2012 found average working hours of 17 hours per day.¹⁶⁶ Migrant domestic workers we spoke to told us of chronic overwork and

155. ILO Governing Body, "Progress report on the technical cooperation programme agreed between the Government of Qatar and the ILO", (October 2020): 9

156. Additionally, the May 2021 arrest and detention of Malcolm Bidali, a Kenyan security guard and blogger on worker rights, raised new questions about the risks to migrant workers who express their opinions publicly, prompting the Uniglobal union to raise concerns. See: UniGlobal, *In Qatar, UNI demands the immediate and unconditional release of Kenyan security guard Malcolm Bidali*, (21 May 2021).

157. See ILO Committee Observation (CEACR) adopted in 2017, published 107th session (2018)

158. Remote interview with GCC labour expert, July 2020.

159. Human Rights Watch, "Statement on the U.S. Government Decision to Suspend Thailand's Trade Preferences Due to Worker Rights Issues," (10 December 2019).

160. Remote interview, 29 September 2020.

161. ILO Committee, "Case No 3164 (Thailand) - Complaint date: 07-OCT-15 - Follow-up," (October 2016): para 1052.

162. Andi Kao, "Keelung Migrant Fishermen Form Union, Second of its Kind in Taiwan." *The News Lens*, 22 February 2021.

163. ILO, *Snapshot: ILO in Action: Domestic Workers*, (undated)

164. Remote interview with Xiu-Liang Chen, Taiwan International Workers Association, (1 July 2020).

165. Remote interview with Leoni Pascual Ngo, Migrant Workers Concern Desk, (27 June 2020).

166. The report is referenced in Davina Tham, *Taipei Times*, "No rest for domestic helpers", (25 December 2019).

of being denied any days off work.¹⁶⁷ The Taiwanese Ministry of Labour has said that the government's decision to exclude domestic workers from the Labour Standards Act is because "their duties, work hours and rest hours are clearly different from workers of business entities, making it hard to draw a clear line between what is work and what is not." In 2014, the Ministry of Labour said that it had finished drafting a "Domestic Workers Protection Act" that would give domestic workers one day off every week and would include provisions on the termination of work contract, wage standards, working hours and the filing of complaints.¹⁶⁸ The act has yet to pass through the Executive Yuan.

Both Kuwait and Qatar exclude domestic workers from their national laws. Facing criticism over this, in recent years they have passed specific legislation - Kuwait in 2015 and 2016, Qatar in 2017 - to provide legal protections for certain entitlements, and access to grievance mechanisms, for domestic workers. There remain substantial discrepancies between protections offered to domestic and other workers. For example in Kuwait, the maximum working day is 12 hours, compared to eight for other workers and, unlike the national labour law, lacks sick pay provisions.¹⁶⁹ In Qatar, domestic workers can work longer than the stipulated maximum 10 hours, "if there is an agreement".¹⁷⁰ They are also excluded from the Wage Protection System, designed to ensure regular salary payment.¹⁷¹ While in Kuwait the domestic worker law is actually stronger on recruitment than the 2010 Private Sector Labour Law, overall the fact that domestic workers remain subject to a parallel legal and enforcement regime reinforces the sense among employers that they are not truly "private sector workers". In this context it is not surprising that in both countries enforcement of the new laws has until now been weak, and domestic workers continue to face great difficulty in claiming their rights.¹⁷² A 30 year old Nepali woman told us she was working 16 hour days for a Kuwait family and was desperate to go back home

to look after her sick mother, but her employers were refusing to return her passport. She said that, "they took it away after I got to the house, the owner of the house has it. If I had it I would have left the country some time ago. My mother is sick but they keep on postponing dates for me to leave."¹⁷³

Thai labour law makes a distinction between rights of workers in the formal and informal sectors. Those working as domestic workers, seasonal agricultural workers, and fisher workers are not covered by the Labour Protection Act per se, but by industry-specific ministerial regulations on labour protection. Under these regulations, domestic workers are not entitled to the national minimum wage: an ILO 2016 study showed that more than 90% of domestic workers were paid less than minimum wage, while working an average of 13.5 hours per day.¹⁷⁴ Similarly, a 2014 Ministerial Regulation recognised only limited labour protection rights for seasonal agricultural workers, a sector characterised by informal working arrangements.¹⁷⁵

Agricultural workers are often excluded from labour laws. In Canada, where a number of provinces implement this policy, this has been termed "farm worker exceptionalism".¹⁷⁶ In Ontario, the province that hosts Canada's largest population of migrant workers, agricultural workers are not entitled to receive: daily and weekly limits on hours of work, daily rest periods, time off between shifts, weekly/bi-weekly rest periods, or overtime pay. With few exceptions, agricultural workers are also not entitled to eating periods, public holidays or public holiday pay.¹⁷⁷ Unions argue that this means that workers can be coerced into working exceptionally long hours in circumstances that are technically within the law, and told us they have assisted migrants who have worked for several months without a day-off. Raising concerns about the persistent exemption of agricultural workers from labour laws, the ILO has noted that this may explain why such jobs are often unpopular among

167. Two remote interviews, August 2020.

168. "The Ministry of Labor Endeavors to Protect the Rights of Domestic Workers through Pragmatic Approaches", *Taiwan Ministry of Labour news release* (1 August 2014).

169. Human Rights Watch, *Kuwait: New Law a Breakthrough for Domestic Workers*, (30 June 2015).

170. *Law No. 15 of 22 August 2017 which relates to domestic workers*, Section 12.

171. Migrant-Rights.org, *Qatar's Domestic Worker Law: A step in the right direction, but weakened by exclusions*, (25 August 2017).

172. See for example Amnesty International, *Domestic workers share harrowing accounts of abuse in Qatar*, (20 October 2020), and Human Rights Watch, *World Report 2021: Kuwait*.

173. Remote interview, 11 August 2020.

174. ILO and UN Women, "Worker, Helper, Auntie, Maid?" (2016): xviii

175. *Ministerial Regulation concerning Labour Protection in Agricultural Work*, 2014. United Nations Thematic Working Group on Migration in Thailand, "Thailand Migration Report 2019" (2019): 65.

176. See for example, Vosko, Leah F.; Tucker, Eric & Casey, Rebecca. 'Enforcing Employment Standards for Temporary Migrant Agricultural Workers in Ontario, Canada: Exposing Underexplored Layers of Vulnerability'.

177. Government of Ontario, "Agriculture, growing, breeding, keeping and fishing"

citizens, and in the context of Covid-19, has highlighted the discrepancy between societies' acknowledgement of the importance of agricultural workers for the food chain, and the lack of labour protection for the workers in the sector: "recognizing these workers as essential implies the need to address their exemption from labour laws."¹⁷⁸

The impact of Taiwan's fishers being subject to a separate regulatory regime from other workers is significant. Like domestic workers - although for different reasons - they are not covered by the Labour Standards Act and therefore earn lower wages than those set out in Taiwanese Labour Law. The nature of their work in international waters, often thousands of miles from Taiwan, makes inspections and regulation difficult and this is compounded by the fact that they are regulated by Taiwan's Fisheries Agency. Greenpeace told us that unlike the Ministry of Labour, the Fisheries Agency is small and does not have either the skills or the resources to effectively regulate a sector that presents so many regulatory challenges.¹⁷⁹

Undocumented migrant workers face multiple forms of discrimination. In Taiwan, manufacturing and fisheries workers who become undocumented are excluded from the protection of Taiwan's Labor Standards Act. The Employment Service Act empowers the Ministry of Labour to annul the employment permit of foreign workers who have been "unjustifiably absent from his/her work and not in contact for three days."¹⁸⁰ In Thailand, all workers - regardless of their legal status - are officially covered by Thailand's Labour Protection Act (LPA) and the 2019 Labour Protection in Sea Fishery Work Act, but in practice, the country's irregular migrants (estimated to number more than one million) can find it difficult to receive support and remedy.¹⁸¹ While the government-run Migrant Worker Assistance Centres have a responsibility to support all migrant workers, including those with irregular status, they also work with the Department of Employment

to oversee the implementation of the Foreign Workers Ordinance, which explicitly provides for the imposition of penalties on irregular migrant workers.¹⁸² In Canada, undocumented workers are less likely to file complaints than other workers. A study of employment standards in Ontario found that, "workers with insecure immigration status who face substandard conditions of employment are rarely in a position to complain due to implicit or explicit threats that they will be penalized by the immigration system (e.g., with deportation)."¹⁸³ In both Kuwait and Qatar, undocumented workers - who face multiple serious human rights risks - have generally been perceived as a social and security challenge for the state. They face criminal charges, normally resulting in deportation, for "absconding", heavily reducing their protections from abuse.¹⁸⁴

Migrant workers are in many cases at greater risk of discriminatory hiring practices due to the transnational nature of the recruitment process. Women can for example be under-represented in some temporary migration programmes. In Canada, where (unlike many other destination countries) the government requires that gender-based analysis is part of program and policy development, women continue to make up less than 4% of participants in the Mexico-Canada Seasonal Agricultural Worker Program, a rate lower than in the agricultural sectors of either country.¹⁸⁵ This discrepancy is because employers tend to request male workers. Due to the relatively small number of women working in agriculture in Canada, the living facilities provided for them can be seriously inadequate. Additionally, because places for women on the programme are so limited, women may feel under particular pressure not to complain about poor working and living conditions, for fear of losing their jobs. One study found that women "often do not seek attention for illness, injuries or pregnancies and do not complain about working conditions or harassment by employers because of the risk of being sent back to Mexico if they are fired."¹⁸⁶

178. ILO, 'Seasonal Migrant Workers' Schemes: Rethinking Fundamental Principles and Mechanisms in light of COVID-19', May 2020: 6

179. Remote interview with Peiyu Chen and David Chiu, Greenpeace Taiwan, 22 September 2020.

180. *Employment Service Act*, article 72

181. Workers in agriculture and domestic work are not directly covered by the LPA, but by additional Ministerial Regulations.

182. ILO, "Ensuring migrant workers access to justice: An assessment of Thailand's Migrant Workers Assistance Centers," (2020): 13.

183. Leah F. Vosko, "Rights without Remedies": Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs, *Osgoode Hall Law Journal* 50.4 (2013): 857.

184. See for example, Kuwait Times, Absconding, (23 November 2019) and Migrant-Rights.org, "The System is Down": Entrapment and the Arbitrary Power of Absconding Reports, (21 August 2016).

185. INEGI, "National Survey of Occupation and Employment (ENOE), population aged 15 years and older", (March 2021), Statistics Canada, "Labour force characteristics by industry, annual (x 1,000)", and UFCW Canada, UFCW Canada reaches historic agreement with Mexico to eliminate gender discrimination under the SAWP, (26 April 2016).

186. Kerry L. Preibisch and Evelyn Encalada Grez. "The Other Side of 'El Otro Lado': Mexican Migrant Women and Labor Flexibility in Canadian Agriculture" *Signs*, volume 35, no 2, (2010).

Specific recommendations

Combined with tied visa schemes, blanket restrictions on migrant workers' access to fundamental labour protections - as well as discrimination between migrant workers on the grounds of gender or job - reduce the agency of migrant workers and make it far more difficult for governments to ensure fair recruitment practices. Governments should:

- 3.1.** Ensure that all workers, regardless of nationality, migration status or economic sector, are covered by core labour laws.
- 3.2.** Ensure that all workers, regardless of nationality, migration status or economic sector, are able to access effective grievance mechanisms.
- 3.3.** Ensure that all workers, regardless of nationality, migration status or economic sector, are able to

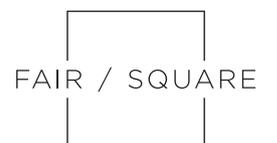
form and join trade unions and enjoy their full right to freedom of association - and provide mechanisms to protect migrant workers from harassment or retaliation for activity related to unions or worker organisations

- 3.4.** Prohibit employers or recruiters from requesting migrant workers of a specific gender or nationality, and require employers to ensure that working and living conditions do not discriminate on the basis of gender.
- 3.5.** Ensure that migration policies are underpinned by the principle of non-discrimination, and develop policies and action plans, and implement preventive measures, to foster greater harmony and tolerance between migrant workers and national populations, including in specific regard to programmes to increase the labour force participation of nationals.

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