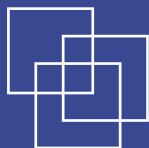


Protection of migrant workers in the recruitment and third party employment process:

**International standards and guiding
principles given by the Private Employment
Agencies Convention, 1997 (No. 181)
and Private Employment Agencies
Recommendation, 1997 (No. 188)**



**Tripartite Action for the Protection and Promotion of the Rights of
Migrant Workers in the ASEAN Region (ASEAN TRIANGLE Project)**

Regional Office for Asia and the Pacific

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Foreword

Regionally and globally, the International Labour Organization (ILO) is placing increasing importance on the management of labour migration and the protection of migrant workers. Indeed, labour migration has taken centre stage in global policy agendas. Labour migration, which enables millions of workers to find jobs, and results in billions of dollars in remittances, clearly has a livelihoods and poverty alleviation dimension at its core. It potentially offers a triple-win; a win for destination countries who can support a level of economic activity (low and high skilled) that would be impossible without foreign labour, a win for countries of origin because it lowers unemployment while bringing in remittances and skills learned abroad, and a win for the migrants who can earn higher incomes and escape poverty.

While many migrant workers have positive experiences migration is still all too frequently associated with unacceptable labour abuses. Work should be a source of dignity and provide a route out of poverty for individuals and families. Benefits are not equitably shared among the three parties, and it is the migrants who are being short-changed. There is an urgent need to create a fairer migration system. One strategy to do so is to better regulate the recruitment of migrant workers.

This booklet provides readers with information about the key provisions of the Private Employment Agencies Convention, 1997 (No. 181) and the Private Employment Agencies Recommendation, 1997 (No. 188) which are legal instruments agreed on and developed by the International Labour Organization's (ILO) tripartite constituents (i.e. Governments, employers, and workers) that set out international minimum standards and guiding principles with regard to the regulation of private employment agencies and the protection of workers who use the services of these agencies. Private recruitment agencies play a vital role in international labour migration in Asia when matching job seekers and employers. They account for a majority of workers placed abroad from the Philippines, Indonesia, India, Pakistan, Sri Lanka, Bangladesh, Thailand and Viet Nam. However given that the supply of workers in lower wage countries far outstrips the demand and that there are far more workers intending to work abroad than there are jobs, migrant workers are highly vulnerable to abuses during recruitment. Such abuses include high fees and costs, misrepresentation, failure to meet placement obligations and contract substitution.

Labour migration governance is a regional priority of constituents of the ILO in the Asia-Pacific region. To respond to constituents' needs, the ILO has developed a strategy and actions on improving recruitment that are centred on six strategic pillars concerning both countries of origin and destination:

1. Promotion of ILO Convention No. 181 and putting in place national legislation to regulate recruitment.
2. Effective enforcement of legislation, ensuring that a complaints mechanism is in place and complementary support services are accessible.
3. Monitoring and development of reporting mechanism on migration and recruitment costs.
4. Increasing recruitment options, including through private recruitment agencies, public placement agencies and direct hire.
5. Awareness and empowerment of potential migrant workers and migrant workers.
6. Promoting self-regulation of private employment agencies.

It is hoped that the information contained in this booklet may be utilized by member States of the ILO to reinforce their efforts to regulate private employment agencies and protect migrant workers through the ratification of Convention No. 181 and the development of national policies and legislation to implement the principles of the Convention.

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Migrant workers protection in the employment process: An urgent call for the regulation of private employment agencies

There are enormous gains to be made by lowering costs related to migration, such as the transfer costs of remittances and fees paid to recruiters, especially by low-skilled migrant workers.

Member States [of the United Nations] should commit to the elimination of all forms of exploitation affecting migrants, especially trafficking in persons and other forms of modern-day slavery.

United Nations. v013. International migration and development, Report of the Secretary-General, General Assembly, 68th Session (New York), p. 21.

The very extensive involvement of private agencies in the recruitment of workers for employment in other countries has all too frequently been associated with serious abuses.

There is growing international concern about abusive and fraudulent recruitment practices affecting migrant workers in particular and issues of human trafficking and forced labour.

Ratification of Convention No. 181 will be promoted while working with stakeholders to put effective mechanisms in place regardless of ratification status.

International Labour Organization (ILO). 2014b. Fair migration: Setting an ILO agenda, Report of the Director-General I(B), International Labour Conference, 130rd Session (Geneva), pp. 22–23.

There were an estimated 244 million international migrants globally in 2015, up from an estimated 232 million in 2013 and 173 million in 2000 (UNDESA, 2015). This number is expected to rise to 405 million by 2050 (UNDESA, 2015). The 2015 ILO Global Estimates on Migrant Workers shows migrant workers account for 150.3 million of the world's migrants. The majority – 83.7 million – are men, with 66.6 million women migrant workers (ILO, 2015). Migrant workers contribute substantially to the national economies of both sending and destination countries. Migrant workers are also a vital workforce, as caregivers, for the social security systems of many destination countries.

By matching workers with jobs overseas, private employment agencies often play a predominant role in the process of recruiting and deploying migrant workers, especially those who are low-skilled.

On the one hand, the extensive involvement of private employment agencies in the employment process facilitates cross-border job matching. On the other hand, however, it also causes, under certain circumstances, various rights violations and poor, and sometimes inhumane, treatment of migrant workers, including human trafficking and forced labour in the most extreme cases.

To protect the rights and dignity of migrant workers, as well as to maximize their contribution to the economic and social development of sending and destination countries, effective governance of the employment process of migrant workers and strengthened regulation of private employment agencies are necessary.

The Private Employment Agencies Convention, 1997 (No. 181) and the Private Employment Agencies Recommendation, 1997 (No. 188) are legal instruments developed by the International Labour Organization's (ILO) tripartite constituents (i.e., governments, employers, and workers) that set out international minimum standards and guiding principles with regard to the regulation of private employment agencies and the protection of workers who use the services of these agencies.

This booklet provides readers with information about the key provisions of Convention No. 181 and Recommendation No. 188. The information may be utilized by member States of the ILO to reinforce their efforts to regulate private employment agencies and protect migrant workers through the ratification of Convention No. 181 and the development of national legislation.

2.1 The Convention and the Recommendation on private employment agencies: An overview

2.1.1 Private Employment Agencies Convention, 1997 (No. 181)

The Private Employment Agencies Convention, 1997 (No. 181) was adopted on 19 June 1997 by the 85th International Labour Conference in Geneva, Switzerland. The Convention entered into force on 10 May 2000. To date, 28 States have ratified the Convention.¹

Convention No. 181 intends to allow the operation of private employment agencies and to protect workers who use the services of these agencies (Article 2(3)).

Convention No. 181 revised the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96) and the Fee-Charging Employment Agencies Convention, 1933 (No. 34) (Convention No. 181, Article 16). As noted in the preamble, the adoption of Convention No. 181 reflected the General Conference's:

- awareness of the importance of flexibility in the functioning of labour markets;
- consideration of the very different environment in which private employment agencies operate, compared with the conditions prevailing when Convention No. 96 was adopted;
- recognition of the role that private employment agencies may play in a well-functioning labour market; and
- recalling of the need for protecting workers against abuses.

The Convention prescribes international standards, which shall be complied with by member States, for:

- regulation of the operation of private employment agencies;
- protection of workers;
- tripartite cooperation; and
- cooperation between the public employment service and private employment agencies.

¹ The 28 States to ratify Convention No. 181 are the following: Albania, Algeria, Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Ethiopia, Fiji, Finland, Georgia, Hungary, Israel, Italy, Japan, Lithuania, the Republic of Moldova, Morocco, Netherlands, Panama, Poland, Portugal, Serbia, Slovakia, Spain, Suriname, The former Yugoslav Republic of Macedonia, Uruguay, and Zambia.

Box 2.1**Practice of member States with regard to the ratification and implementation of Convention No. 181**

298. The Government of Poland stated that the technical assistance provided by the [International Labour] Office in 2002 resulted in the overall harmonization of Polish legislation with the requirements of the Convention, namely through the Act of 9 July 2003 on the employment of temporary workers, and finally in the ratification of Convention No. 181 on 15 September 2008.

Source: ILO, 2010, p. 74.

2.1.2 Private Employment Agencies Recommendation, 1997 (No. 188)

The Private Employment Agencies Recommendation, 1997 (No. 188) was also adopted on 19 June 1997 by the 85th International Labour Conference. The provisions of Recommendation No. 188 are supplementary to those of Convention No. 181 and should be applied in conjunction with them.

Recommendation No. 188 (Paragraph 2(1)) provides that tripartite bodies or organizations of workers and employers should be involved as much as possible in formulating and implementing provisions to give effect to Convention No. 181.

Recommendation No. 188 prescribes that technical standards, guidelines, codes of ethics, self-regulatory mechanisms or other means consistent with national practice should supplement, where appropriate, national laws and regulations applicable to private employment agencies (Paragraph 2(2)).

Recommendation No. 188 lists concrete measures to protect workers and to promote cooperation between the public employment service and private employment agencies.

2.2 Scope of the Convention**2.2.1 What are “private employment agencies”?**

Under Convention No. 181, private employment agency means “any natural or legal person, independent of the public authorities, which provide one or more of the following market services”:

- matching offers of and applications for employment;
- employing workers with a view to making them available to a third party; and/or
- other services related to job seeking, e.g. provision of information (Article 1(1)).

2.2.1.1 Commentaries on the scope of the Convention No. 181 concerning recruiters or direct service suppliers

In 2010, the Committee of Experts (“Committee”) on the Application of Conventions and Recommendations published a General Survey on Employment Instruments. The Committee made the following additional comments on the scope of Convention No. 181 concerning recruiters or public service suppliers:

The definition set forth in Article 1, paragraph 1, of Convention No. 181 generally encompasses any recruiter or direct service supplier outside the realm of public employment services. The Committee notes that, in order to best comply with the requirements of Convention No. 181, it is helpful if member States also set out a definition of “private employment agency” in their national legislation and other regulations to ensure that this term is applied consistently.

2.2.2 Who are “workers”?

Under Convention No. 181, the term “workers” includes jobseekers (Article 1(2)).

2.2.3 Who is covered by the Convention?

Convention No. 181 applies to all private employment agencies (Article 2(1)), except the agencies mentioned below.

Convention No. 181 applies to all categories of workers and all branches of economic activity (Article 2(2)), except the workers and branches of economic activity mentioned below.

2.2.4 Who is not covered by the Convention?

Convention No. 181 does not apply to the recruitment and placement of seafarers (Article 2(2)). The recruitment and placement of seafarers are prescribed by the Maritime Labour Convention, 2006.

After consulting the most representative organizations of employers and workers concerned, a member State may prohibit, under specific circumstances, the operation of private employment agencies in respect of certain categories of workers or branches of economic activity (Article 2(4a)).

After consulting the most representative organizations of employers and workers concerned, a member State may exclude, under specific circumstances, workers in certain branches of economic activity, or parts thereof, from the scope of the Convention or from certain of its provisions. In this case, the member State shall ensure the protection of the workers concerned by taking other adequate measures (Article 2(4b)).

2.2.4.1 Commentaries on the scope of the Convention No. 181 concerning private employment agencies

The Committee made the following additional comments on the scope of Convention 181 on private employment agencies:

321. ... The Committee recalls that ensuring the provision of adequate services that respond to the increasingly complex requirements of the labour market in some countries was one of the reasons for the adoption of Convention No. 181. Any prohibition or exclusion of private agencies therefore has to be examined by the competent authority, and the prior consultations of the social partners required by Article 2, paragraph 4, are a valuable input in this regard.

322. The Committee further notes that under Article 2, paragraph 4(a), of Convention No. 181, it is possible for governments to permit the operation of private employment agencies on a trial basis only, on condition that this serves the workers' interests and the social partners have been consulted. ...

323. By applying Article 2, paragraph 4(b), several countries have reserved the right to limit private employment agencies to certain activities to be determined by the authority responsible for labour matters.

324. Some ratifying States of Convention No. 181 have made use of the possibilities enumerated in Article 2, paragraph 4, and provided the relevant information. The Committee emphasizes that, in accordance with the Article 22 report form [of the ILO Constitution], countries having availed themselves of these possibilities are invited to include, as laid down in Article 2, paragraph 5, updated information on the exceptions authorized for the consideration of the Committee (ILO, 2010, p. 80).

Box 2.2

Practice of member States with regard to the scope of Convention No. 181

325. In Algeria, Act No. 04-19 of 25 December 2004 on the Placement of Workers and the Supervision of Employment and Executive Decree No. 07-123 of 24 April 2007 prohibit private employment agencies from engaging in mediation activities for the public sector, managers of companies and migrant workers.

326. In 2008, the Committee noted in relation to Belgium that the Flanders region had not yet invoked the provisions of Decree of 13 April 1999 enabling it to prohibit certain activities, in accordance with Article 2, paragraph 4, of Convention No. 181. The Committee further noted the indication by the Government of Wallonia that it may exclude certain categories of workers based on the structure of the national market and the development of specific sectors or the matching of labour supply and demand.

Box 2.2 Cont.

327. The Government of the Czech Republic initially indicated in 2003 that it intended to make use of Article 2, paragraph 4(a), of Convention No. 181. In 2006, the Committee noted the Government's statement that no recourse would be made to this provision.

328. Under section 1(2) of Government Decree No. 118/2001, Hungary has excluded art and theatre recruitment agencies, as well as placement activities exercised by local councils and education institutions, from the scope of the Convention.

329. The Government of Italy initially permitted the activities of private employment agencies in the agricultural sector and the construction industry on an experimental basis only. It indicated that under the terms of section 1(3) of Act No. 196 of 1997, this was in agreement with the social partners. In 2006, the Committee noted that agencies are now permanently allowed to place workers in employment in the agricultural sector.

330. In 2009, the Government of Morocco stated that, by virtue of section 477 of the Labour Code, the authorization granted to private employment agencies may be limited to certain activities determined by the government authority responsible for labour matters.

331. In Panama, section 6 of Executive Decree No. 105 of 26 December 1995 provides that private employment agencies, which are regulated by the Decree, are not allowed to place or recruit workers abroad, unless this is explicitly authorized by the General Employment Directorate based on the provisions contained in the Labour Code or any other acts in respect of working abroad.

Source: ILO, 2010, pp. 80–81.

2.2.4.2 Commentaries on the provision of Convention 181 of labour market services

The Committee made the following additional comments on the scope of Convention No. 181 on labour market services:

300. The Committee recalls that Article 1, paragraph 1(a) to (c), of Convention No. 181 enumerates the following three activities of private employment agencies:

1. provision of job-matching services without becoming a party to the employment relationship;
2. employment of workers in order to make them available to a third party (the “user enterprise”); and
3. provision of other services relating to jobseeking.

301. Based on Article 1, paragraph 1(a), of Convention No. 181, private agencies are allowed to provide the labour market service of matching offers of and applications for employment without becoming a party to the employment relationship. Private employment agencies performing this activity act as an employment mediator.

302. The following are examples of activities performed by private employment agencies acting as an employment mediator:

- Intermediaries. Although there are several sub-forms of intermediaries, they are the most typical and “traditional” type of private agencies, bringing together vacancies and jobseekers without becoming a party to an employment contract.
- Fee-charging employment agencies. Unless subsidized, these employment agencies compete among themselves and with public employment services and charge a fee for their general services either up front or after signing the employment contract. These agencies may specialize in a specific job market, region and type of work or economic sector, even worldwide and “online”.
- Overseas employment agencies and agencies for the recruitment and placement of foreign nationals. These agencies are mainly active in developing countries where they arrange for employment, and particularly on the Indian subcontinent, South-East Asia and, more recently, Central Europe. They specialize in selecting and recruiting national workers for overseas jobs. While they act as employers’ representatives from outside the country of operation, they may also sign employment contracts or act as intermediaries. As opposed to overseas employment agencies, agencies for the recruitment and placement of foreigners select and recruit workers abroad for local employers.
- Executive search agencies. Informally known as “head-hunters”, these agencies specialize in seeking talent in the managerial or consultancy field and in the professional field for strategic posts on behalf of the client employer.
- Training and placement institutes. Several training and placement institutes offering career-enhancing courses also provide job-search and placement services for their graduates. These services, which are not their main activity, are often outsourced to private agencies. The costs are frequently incorporated into the total of the course fees.

303. Based on Article 1, paragraph 1(b), of Convention No. 181, private agencies are further permitted to employ workers in order to make them available to a natural or legal third-party user, referred to in the Convention as the “user enterprise”. Under this provision, the private agency assumes the role of employer. It recruits workers, who are consequently employed by the agency, to make them available to a user enterprise which assigns the tasks to the workers and supervises them.

304. Temporary work agencies, which are also referred to as “skills providers”, are the classic example of agencies performing activities under Article 1, paragraph 1(b), of Convention No. 181. The employment relationships are usually governed by two types of contracts: an employment contract between the temporary work agency and the worker, and a contract between the temporary work agency and the user enterprise.

305. From the replies received to the questionnaire, the Committee notes that temporary work agencies within the meaning of Article 1, paragraph 1(b), are in operation in nearly all countries permitting the establishment of private employment agencies.

306. Other examples of agencies acting as skills providers include:

- Staff leasing agencies. Catering mainly for small enterprises, and only in jurisdictions where staff leasing without limitation is permitted by labour laws, the role of these agencies is to relieve user enterprises of the burden of personnel management in exchange for a comprehensive fee.
- Job shops. Job shops are spin-offs of specialized consultancies and services in which the persons in the consultancy market their services for varying lengths of time.
- Career management agencies. Career management agencies represent their clients in the entertainment business, the fashion industry, etc., vis-à-vis employers.
- Employment enterprises. Aimed at training and preparing partly long-term unemployed staff for entry or re-entry into employment, employment enterprises are mostly non-profit associations, partly established as public-private partnerships, and subsidized by governments.
- Outplacement agencies. Outplacement is defined as a package of services and consultation provided individually or collectively by an outplacement agency, at the request of and upon payment by an employer so that workers may, of their own accord and as quickly as possible, find employment with a new employer or develop a professional activity on a freelance basis.

3.1 Regulation of private employment agencies

The regulation of private employment agencies and of the recruitment and third party employment process is critical for the protection of migrant workers. When migrant workers use irregular employment channels, they are likely to be exposed to abuse and exploitation. If human smugglers or traffickers are involved in these irregular channels, the migrant workers become more vulnerable.

There is a wide consensus among members of the international community that the employment process of migrant workers should be regular and that actions should be taken to eliminate irregular practices. Convention No. 181 prescribes the following two primary measures to regulate private employment agencies.

3.1.1 Legal status of private employment agencies

Convention No. 181 requires a member State to determine the legal status of private employment agencies. This shall be done in accordance with national law and practice, and after consulting the most representative organizations of employers and workers (Article 3(1)).

3.1.1.1 Commentaries on the regulation of private employment agencies according to Convention No. 181

The Committee made the following additional comments on the regulation of private employment agencies according to Convention No. 181:

237. The Committee notes that the provision of information to the authority may be part of, but is not necessarily limited to, the licensing process under Article 3 of Convention No. 181. Article 3, paragraph 1, requires the legal status of a private employment agency to be determined in accordance with national law and practice, after consulting the most representative employers' and workers' organizations. ...

240. By virtue of Article 3, paragraph 2, of Convention No. 181, the conditions governing the operation of private agencies shall be determined under a licensing or certification system, but may also be otherwise regulated or determined by national law and practice. Therefore,

member States have to take action, either directly through the system of legislation, licensing or certification or, indirectly, by authorizing an existing national practice or one that is to be established (ILO, 2010, pp. 61–62).

3.1.2 Licensing or certification

Under Convention No. 181, the conditions governing the operation of private employment agencies shall be determined by a member State according to the system of licensing or certification, unless the conditions are regulated or determined by appropriate national law and practice (Article 3(2)).

3.1.2.1 Commentaries on the system of certification or licensing according to Convention 181

The Committee made the following additional comments on the system of certification or licensing according to Convention No. 181:

242. Certification under Article 3, paragraph 2, of Convention No. 181 requires existing private agencies to be registered with the government authorities, although it does not provide for a timeframe. Licensing requires natural or legal persons to acquire authorization before commencing private agency business. Both mechanisms require a regulatory framework. ...

246. The Committee notes that the national licensing and certification requirement for private agencies constitutes a means of ensuring the proper performance of private agencies and increases the transparency of the labour market. A system of licences or certification also allows government authorities to pre-screen applicants' capabilities and professional experience in job placement activities. The information obtained, such as who the actors are, the types of services offered by private agencies and the number of jobseekers employed by them or placed in employment, can assist the competent authority to determine the functioning of the private placement industry. As mentioned above, this information aids national authorities to direct their employment policies and thus improves the functioning of the labour market (ILO, 2010, p. 62).

Box 3.1

Practice of member States with regard to certification or licensing

44. Portugal [has] systems of licensing. In 2005, the Committee noted the information provided by the Government of Georgia that, despite having a system of registration under which 11 private employment agencies had been registered, 25 private employment agencies had not applied for registration as they were obliged to do under the law and that punitive sanctions were being applied. [...]

Box 3.1 Cont.

250. In the Netherlands, the requirement for employment agencies to hold a licence has been abolished and the temporary employment sector has since opted for a form of self-regulation by introducing a private system of certification supervised by the sector itself. Now, temporary work agencies are registered by the Dutch Labour Standards Foundation (SNA), but operate in accordance with a national code of conduct that is based partly on collective bargaining agreements. The compliance of these codes with national requirements is mainly controlled by the Foundation for Compliance with Collective Agreements in the Temporary Employment Sector (SNCU), a private organization of the social partners in the private employment agencies sector. These standards relate mainly to the payment of taxes, social insurance contributions and the minimum wage. To ensure compliance with these standards, certificate holders are inspected twice a year by certifying institutions that have been designated by the Council for Accreditation. The Dutch Labour Inspectorate concentrates on the inspection of uncertified temporary agencies, especially in sectors with a high risk of non-compliance. The Netherlands Trade Union Confederation (FNV) observes that the high number of mala fide [malicious] private employment agencies in the Netherlands can only be effectively eliminated through a system of permits.

Source: ILO, 2010, pp. 62–63.

3.1.2.2 Commentaries on alternatives to certification or licencing according to Convention No. 181

The Committee made the following additional comments on alternatives to certification or licensing according to Convention No. 181:

249. As an alternative to systems of certification or licensing, Article 3, paragraph 2, of Convention No. 181 allows for appropriate national law and practice to regulate or determine the conditions governing the operations of private employment agencies. Through this alternative, the Convention provides discretion to governments on how to regulate private employment agencies. This allows countries that already had a regulatory system other than licensing and certification in place prior to ratifying Convention No. 181 to retain these systems. Nevertheless, it remains crucial that legal provisions or national practices governing private agencies are properly and permanently enforced. For this, the legal provisions must be impartial, transparent and able to assist private agencies to deliver their services appropriately and adequately. ...

251. An example for an international code of conduct is the “Ciett members” commitment towards a well- functioning international labour market” of the International Confederation of Private Employment Agencies (Ciett) which, founded in 1967, consists of 37 national federations of private employment agencies and six of the largest staffing companies worldwide. In this code of conduct, Ciett members have established a charter in which they recognize that:

employment through private agencies should respect the international and national principles of non-discrimination on all issues linked to working conditions;

- private employment agencies should not charge directly or indirectly any fees or costs to workers for job-finding services;
- private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike;
- private employment agencies should facilitate access to training for the agency workers; and
- social dialogue and collective labour bargaining should be seen as an appropriate means to organize the private employment agency industry, when relevant and fitting.

Ciett further expresses its members' commitment to cooperation with the public employment services. In the code of conduct, Ciett also fully endorses Convention No. 181 and "supports its members in encouraging their respective countries to ratify this ILO instrument, in case they have not done so".

252. The Committee draws attention to the fact that the aspect of supervision, as outlined in Articles 10 and 14 of Convention No. 181, is especially important in countries where a significant number of the requirements of Convention No. 181 are implemented through national or international codes of conduct or other means (ILO, 2010, pp. 63–64).

3.2 Protection of workers

Widespread exploitation and ill-treatment of migrant workers has been reported in connection with the operation of private employment agencies. There are agencies that provide migrant workers with false information about the nature, pay, and labour condition of the jobs on offer; charge migrant workers excessive fees; and loan money to migrant workers at high interest.

Box 3.2

Practice of member States with regard to alternatives to the certification or licencing

The Committee highlighted ... in 2007 in regard to Albania, where the main instrument regulating the operation of private employment agencies, Resolution No. 708 of 16 October 2003, is significantly elaborated in a code of conduct. Assisted by the Office, this code was compiled by the Albanian Union of Private Employment Agencies (UPEA), a voluntary association of employment agencies.

Source: ILO, 2010, p. 63.

A significant number of migrant workers who use the services of private employment agencies end up with poor working and living conditions upon arrival in the country of destination. These workers will often have little or no means of redress.

Convention No. 181 prescribes protections for workers who utilize the services of private employment agencies, with regard to freedom of association and collective bargaining; discrimination; personal data and privacy; the charging of fees and costs; child labour; the machinery and procedures for investigation of complaints, alleged abuses and fraudulent practices; workers employed by private employment agencies; remedies, including penalties; and migrant workers.

These provisions, as well as the relevant provisions of Recommendation No. 188, are all crucial for protecting migrant workers throughout the employment process, from jobseeking in countries of origin, to the provision of social welfare in countries of destination.

3.2.1 Freedom of association and collective bargaining

A member State shall ensure workers' right to freedom of association and right to collective bargaining (Article 4).

3.2.1.1 Commentaries on the freedom of association and collective bargaining according to Convention No. 181

The Committee made the following additional comments concerning freedom of association and collective bargaining according to Convention No. 181:

310. The Committee emphasizes that the right of freedom of association and the right to collective bargaining are to be fully guaranteed to all workers placed by private agencies or employed by temporary work agencies, as highlighted in Articles 4 and 11 of Convention No. 181. ...

350. The Committee notes that the protective function of Article 4 of Convention No. 181 is not forfeited when workers leave the territory of the sending state. Even in a cross-border context, these rights and principles can be invoked in relation to the private employment agency in the sending country. This is also important in cases where these principles and rights are not adequately respected in the countries receiving workers placed by private employment agencies. This has been highlighted by the Government of Ethiopia, which refers to the problems arising due to the lack of readiness by employers and the legislation in some countries receiving Ethiopian workers placed abroad by private recruiters, as well as other cultural, demographic and economic factors that render it difficult to implement the fundamental principle of freedom of association and the right to collective bargaining. The Government intends to encourage Ethiopian workers abroad to form community associations aimed at enabling them to bargain with employers (ILO, 2010, pp. 76–77, 85).

3.2.2 Prohibition of discrimination

A member State shall ensure that private employment agencies treat workers without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice in order to promote equality of opportunity and treatment in access to employment and to particular occupations (Article 5(1)).

This provision in Article 5(1) does not prevent private employment agencies from providing special services or targeted programmes designed to assist the most disadvantaged jobseekers (Article 5(2)).

3.2.2.1 Measures concerning discrimination as prescribed by Recommendation No. 188

Prohibition on the drawing up and publishing of vacancy notices or employment offers that result in discrimination: Private employment agencies should be prohibited, or by other means prevented, from drawing up and publishing vacancy notices or offers of employment in ways that directly or indirectly result in discrimination on grounds such as race, colour, sex, age, religion, political opinion, national extraction, social origin, ethnic origin, disability, marital or family status, sexual orientation or membership of a workers organization.

Affirmative action: Private employment agencies should be encouraged to promote equality in employment through affirmative action programmes (Recommendation No. 188, Paragraphs 9–10).

3.2.2.2 Commentaries on the prohibition of discrimination according to Convention No. 181

The Committee made the following additional comments concerning the prohibition of discrimination according to Convention No. 181:

357. The Committee notes that measures which are intended to eradicate discrimination are therefore encouraged through this provision. Nevertheless, measures aimed at preventing discrimination must not impede special services or targeted programmes, such as those provided by employment enterprises to assist workers facing disadvantages. Under Article 22 of the Constitution [of the ILO], member States are invited to report whether special services or targeted programmes exist (ILO, 2010, pp. 86–87).

Box 3.3**Practice of member States with regard to the prohibition of discrimination**

358. The Committee notes that in several countries, such as the Netherlands, public employment service agencies provide targeted programmes with the involvement of private agencies. ...

Source: ILO, 2010, p. 87.

3.2.3 Personal data protection and privacy

For the purposes of Convention No. 181, the term “processing of personal data of workers” means the collection, storage, combination, communication or any other use of information related to an identified or identifiable worker (Article 1(3)).

The processing of personal data of workers by private employment agencies shall be done in a manner that protects the personal data of workers and respects the privacy of workers in accordance with national law and practice (Article 6(a)).

The processing of personal data of workers by private employment agencies shall be limited to matters related to the qualifications and professional experience of the workers concerned and any other directly relevant information (Article 6(b)).

3.2.3.1 Measures concerning data protection and privacy as prescribed by Recommendation No. 188

Prohibition on the recording of unnecessary data of workers: Private employment agencies should be prohibited from recording, in files or registers, personal data which are not required for judging the aptitude of applicants for jobs for which they are being or could be considered.

Protection of personal data of workers: Private employment agencies should store the personal data of a worker only for so long as it is justified by the specific purposes for which they have been collected, or so long as the worker wishes to remain on a list of potential job candidates.

Measures should be taken to ensure that workers have access to all their personal data as processed by automated or electronic systems, or kept in a manual file. These measures should include the right of workers to obtain and examine a copy of any such data and the right to demand that incorrect or incomplete data be deleted or corrected.

Unless directly relevant to the requirements of a particular occupation and with the express permission of the worker concerned, private employment agencies should not require, maintain or use information on the medical status of a worker, or use such information to determine the suitability of a worker for employment (Recommendation No. 188, Paragraphs 11–12).

3.2.3.2 Commentaries on personal data and privacy according to Convention No. 181

The Committee made the following additional comments concerning personal data and privacy according to Convention No. 181:

316. The Committee notes that, although personal data is needed by private agencies to exercise their functions, as outlined in Article 1, paragraph 3, of Convention No. 181, the processing of such data entails risks for workers if shared with third parties without the workers' consent. The gathering of a large amount of data and the many different uses to which these data are put not only multiply the dangers of abuse, but might also permit close monitoring of the workers concerned by third parties. Article 6 of Convention No. 181 ... therefore requires not only that data collection be kept to a minimum, but also highlights the role of national law and practice in safeguarding workers' privacy.

318. In this context, the Committee notes that, while in most countries national laws exist for the general treatment of personal data, not all of these address the specific requirements of the processing of workers' personal data. The Committee therefore wishes to refer to the code of practice on the protection of workers' personal data [i.e., Protection of workers' personal data (ILO, 1997, p. 8)], approved by the Governing Body in November 1996 following a meeting of experts on workers' privacy. The purpose of this code of practice is to provide guidance on the protection of workers' personal data. It can be used in the development of legislation, regulations, collective agreements, work rules, policies and practical measures at the enterprise level (ILO, 2010, p. 79).

Box 3.4

Practice of member States with regard to personal data protection and privacy

317. ... The Committee notes that in Portugal the protection of workers' data is enshrined in the Labour Code. Section 17 of the Labour Code limits the scope of employers to collect personal data from an employee or jobseeker to the necessary minimum. Section 492 allows the employer to process data related to the employee's trade union affiliation only for the purpose of collecting trade union membership fees.

Source: ILO, 2010, p. 79.

3.2.4 General prohibition on the charging of fees or costs

Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers (Article 7(1)).

However, even though the provisions of Article 7(1) prohibit private employment agencies from charging any fees or costs to workers, in the interest of the workers concerned, and after consulting the most representative organizations of employers and workers, the competent authority of a member State may authorize exceptions to the provisions of Article 7(1) in respect of certain categories of workers, as well as specified types of services provided by private employment agencies (Article 7(2)).

A member State which has authorized exceptions under Article 7(2) shall, in its regular reports to the International Labour Office under Article 22 of the Constitution of the International Labour Organization, provide information on such exceptions and give the reasons therefor (Article 7(3)).

3.2.4.1 Commentaries on the general prohibition on the charging of fees or costs according to No. Convention No. 181

The Committee made the following additional comments concerning the general prohibition on the charging of fees or costs according to Convention No. 181:

332. The Committee recalls that Article 7, paragraph 1, of Convention No. 181 contains a general prohibition on the charging of fees or other costs, directly or indirectly, in whole or in part, to workers. However, paragraph 2 of Article 7 does permit exceptions. Through this device, member States may allow private employment agencies to charge fees or other costs for certain categories of workers, as well as specified types of services (ILO, 2010, p. 81).

3.2.4.2 Commentaries on exemptions allowing the charging of fees or costs according to Convention No. 181

The Committee made the following additional comments concerning exemptions allowing the charging of fees or costs according to Convention No. 181:

334. The Committee notes that making use of [Convention No. 181, Article 7, paragraph 2] is subject to:

- Consultation. Prior to the authorization of the exceptions to charge fees or costs, the most representative organizations of employers and workers have to be consulted. This ensures that the social partners can express their views and share their experiences and concerns regarding the use of this provision.

- **Transparency.** Member States are required to create an appropriate legal framework indicating that the authorization is limited to certain categories of workers, or specific types of services, and that it constitutes an explicit exception. Additionally, it is necessary for the fees and costs to be disclosed. This not only includes the actual service fees, but also other expenses related to recruitment, such as visa fees.
- **Reporting.** Article 7, paragraph 3, of Convention No. 181 requires member States, as part of their reporting obligations under article 22 of the ILO Constitution, to provide to the [International Labour] Office with information and give the reasons for making use of the exceptions.

335. The Committee therefore notes that, when it is ensured that the national practice for the charging of fees and costs to workers is in compliance with the requirements of Article 7, paragraph 2, this practice does not constitute an impediment to the ratification of the Convention (ILO, 2010, p. 81).

Box 3.5 **Discussion of migration costs and recruitment fees**

Convention No. 181 contains a general prohibition on private employment agencies charging workers for any fees or costs (Article 7(1)), but there is no formal definition of fees or costs in Convention No. 181 or other ILO instruments.

In general, fees are understood to be a payment in exchange of services where there is a profit margin for the service provider; whereas as costs are related to a fixed item for which the service provider is not directly responsible.

In any case, for private employment agencies to legally collect costs (e.g., for buying a worker's air ticket, for securing a worker's visa, etc.), such exceptions to Article 7(1) of Convention No. 181 should:

- 1) be specified in the legislation or regulation;
- 2) have been discussed through tripartite consultation;
- 3) be transparent and clear;
- 4) be subject to the reporting obligation in Article 7(3);
- 5) be in the interest of the workers; and
- 6) be allowed to specified types of services.

If all six criteria are not fulfilled, under Convention No. 181, it is strictly forbidden to collect any payment, be it a fee or a cost, from workers.

For example, Ethiopia amended its regulation in 2009 through the Employment Exchange Services Proclamation No. 632/2009 to clarify what costs private employment agencies can legally charge to migrant domestic workers. Article 15 of the Employment Exchange Services

Box 3.5 Cont.

Proclamation No. 632/2009 of Ethiopia prescribes the following:

1. An employer shall, through the private employment agency, be responsible for the payment of the following costs in relation to the employment of a worker:
 - a) visa fee of the country of destination; b) round trip ticket;
 - c) residence and work permit fees;
 - d) embarkation fee;
 - e) insurance coverage.
2. The worker shall be responsible to cover the costs of:
 - a) issuance of passport;
 - b) authentication of documents within the country; c) medical examination;
 - d) vaccination;
 - e) birth certificate;
 - f) skill testing; and
 - g) certificate of clearance from any crime.
3. The cost of medical examination referred to in sub-article (2) of this Article shall be covered by the agency if conducted for more than once.
4. Unless the worker fails to be deployed for work for reasons attributable to himself, the agency shall refund all the worker's expenses referred to in sub-article (2) of this Article.
5. Where the worker fails to be deployed for work for unjustified reasons after all necessary conditions are fulfilled, he shall cover all the expenses incurred by the agency in accordance with sub-article(1) of this Article.

The Committee of Experts on the Application of Conventions and Recommendations views paragraph 2 of Article 15 above to be a valid application of the fees and costs exception in Article 7(2) of Convention No. 181:

Article 7. Fee charging. The Government indicates that the Employment Exchange Services Proclamation prohibits private employment agencies from charging any fee directly or indirectly from workers. The Committee notes that section 25(1) (b) of the Proclamation provides that it is unlawful for a private employment agency to charge a worker payments in cash or in kind other than provided for in section 15(2) of the Proclamation. Section 15(2) provides that a worker shall be responsible to cover the costs of: issuance of passport; authentication of documents within the country; medical examination; vaccination; birth certificate; skill testing; and certificate of clearance for any crime. Section 15(4) further provides that unless a worker fails to be deployed for work for a reason attributable to himself or herself, the agency shall refund all the worker's expenses referred to in section 15(2). The Committee therefore notes that the Government has made use of the flexibility device for payment of costs in relation with the workers abroad. It requests the Government to report on the application of these provisions of the Employment Exchange Services Proclamation in practice, and to provide more detailed information on the costs of skill testing (ILO, 2012).

Box 3.6

Practice of member States with regard to fee charging

336. While only some countries that have ratified Convention No. 181 have made use of the possibilities enumerated in Article 7, paragraph 2, and provided the respective information, the Committee emphasizes that it has invited countries having availed themselves of this possibility to include in subsequent reports, as laid down in Article 7, paragraph 3, updated information on the exceptions authorized.

337. In 2007, the Committee noted that in Albania, section 4 of Resolution No. 708 allows private employment agencies to charge workers for necessary administrative expenses. The Committee invited the Government to specify the kind of administrative services for which agencies may require workers to pay fees and to indicate the reasons for authorizing such expenses and whether there is any control over the amount of fees under Resolution No. 708.

338. The Government of Belgium stated in 2008 that the authorities could determine, in the interest of the workers concerned or with a view to improving the matching of labour supply and demand, and following an opinion of the Economic and Social Council of the region or community, the categories of workers and services for which private employment agencies may charge a fee to workers. The Committee further notes that in the regions Brussels-Capital, Flanders and Wallonia, private employment agencies exercising placement activities for remunerated sports persons or artists can charge fees, commissions, contributions, access or inscription fees and specified compensation in the following circumstances:

- the compensation is indicated in the agreement between the agency and the employer or user;
- the sports person or artist receives a copy of this agreement;
- the compensation is limited to a certain amount of the performer's gross income.

In Wallonia, private employment agencies which seek vacancies on behalf of jobseekers are further allowed to charge compensation if the amount has been fixed in an agreement with the jobseeker. The Committee invited the Government to provide updated information on the exceptions made or planned to be made.

339. In 2006, the Government of Ethiopia indicated that, by virtue of the Private Employment Agencies Proclamation No. 104/1998, no categories of workers or types of service exist for which private employment agencies can charge a fee directly or indirectly. Yet the Committee found that illegal fee-charging of workers is practiced by some agencies and noted that some private employment agencies had requested legislative amendments in order to allow fee-charging, and that the issue had also been discussed between representatives of the Government, the social partners and other stakeholders.

340. With regard to Japan, the Committee noted in 2005 that collecting fees from jobseeking housekeepers, cooks and waiters had been maintained as a transitional measure. The Government of Japan further indicated that private employment agencies were allowed to charge fees to technologists, administrative executives and experienced technicians with an annual income exceeding 7 million yen.

Box 3.6 Cont.

341. The Government of Lithuania stated in 2007 that, under the Procedure for the Issue of Licences to Intermediaries for the Employment of Lithuanian Citizens Abroad, mediation services for employment abroad can either be charged for or may be free of charge. The Government reported that consultations on this matter were being held with agencies engaged in foreign employment mediation services.

342. In reply to the Committee's comments, the Government of the Republic of Moldova reported in 2009 that national legislation bars private employment agencies operating domestically or in a transboundary context from charging any fees to jobseekers.

343. In the case of Morocco, the Committee noted that costs could be deducted from the salaries of jobseekers placed in employment abroad by private employment agencies. The maximum amount to be charged is regulated by Decree No. 338.05 of 9 February 2005. The Committee requested the Government to indicate whether it had made use of this possibility.

344. In 2005, the Committee noted that in Portugal, sections 12 and 13 of Act No. 124/89 permit private employment agencies established with a view to profit to charge fees to jobseekers. Agencies may also request certain amounts from candidates placed in posts through their intervention, but these fees are limited by a ceiling set by national legislation. Following the Committee's request to provide further information on this authorization, the Government stated in its 2009 report that it is currently redrafting its national legislation. The aim of the current procedure is the abolition of fee-charging to workers.

345. The Government of Spain indicated that the successful placement of workers with employers at the request of the workers would justify payment for the services provided by private employment agencies. The Government further indicated that the most representative organizations of employers and trade union associations have been informed and consulted in this respect and also refers to the opinion of the national Economic and Social Council in relation to Royal Decree No. 735/1995. Consequently, the Committee has requested the Government to provide information, as laid down in Article 7, paragraph 3, of the Convention.

346. In a report received in August 2009, the Government of Uruguay indicated that consultations on the subject had already taken place with the social partners but that the respective legislative provisions had not been enacted. The Committee intends to pursue the examination of this matter under the regular examination of the application of the Convention.

Source: ILO, 2010, pp. 82–84.

3.2.5 Measures against the use or supply of child labour

A member State shall take measures to ensure that child labour is not used or supplied by private employment agencies (Article 9).

3.2.5.1 Commentaries on the measures against the use or supply of child labour according to Convention No. 181

The Committee made the following additional comments concerning the measures against the use of child labour according to Convention No. 181:

Article 9 of Convention No. 181 requires member States to ensure that private agencies do not use children or place them in employment. The scope of this provision is similar to that of the Worst Forms of Child Labour Convention, 1999 (No. 182). The Committee recalls that member States have to prohibit child labour in the context of the conditions for awarding licences to private agencies, especially in a migratory context, as indicated in the Conclusions on a fair deal for migrant workers in a global economy, adopted at the 92nd Session of the [International Labour] Conference (2004) (ILO, 2010, p. 87).

Box 3.7

Practice of member States with regard to the measures against the use or supply of child labour

360. The Committee recalls ... its comments to the Republic of Moldova, in which it noted that Act 451-XV of 30 July 2001 on the authorization of certain activities by private employment agencies does not prohibit their use of child labour. Trade unions are authorized to ascertain that child labour is not used by private employment agencies at the enterprise level. The Committee referred to its comments on the Minimum Age Convention, 1973 (No. 138), and emphasized that the professional qualification required to obtain a licence was not enough to guarantee in practice the absence of the use of child labour by private employment agencies. In reply to the Committee, the Government stated that, after having consulted the social partners, it strengthened its monitoring mechanisms and adopted Act No. 100-XVI of 27 May 2005 amending the provisions respecting private employment agencies and prohibiting private employment agencies from offering their services to young persons.

361. The Committee also recalls its 2006 comments addressed to Ethiopia, in which it noted that efforts are being made to put in place a national plan of action against the commercial sexual abuse, exploitation and trafficking of children.

Source: ILO, 2010, p. 87.

3.2.6 Machinery and procedures for investigation

The competent authority of a member State shall ensure that adequate machinery and procedures, involving as appropriate the most representative employers and workers organizations, exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies (Article 10).

3.2.7 Protection of workers “employed” by private employment agencies (third party employment)

Article 1(1b) of Convention No. 181 notes that a private employment agency may provide labour market services by employing workers with a view to making them available to a third party referred to as a “user enterprise”. A user enterprise is defined as a natural or legal person that assigns workers their tasks and supervises the execution of these tasks.

A member State shall, in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by private employment agencies as described in Article 1(1b) in relation to:

- Freedom of association;
- Collective bargaining;
- Minimum wages;
- Working time and other working conditions;
- Statutory social security benefits;
- Access to training;
- Occupational safety and health;
- Compensation in case of occupational accidents or diseases;
- Compensation in case of insolvency and protection of workers claims;
- Maternity protection and benefits, and parental protection and benefits (Article 11).

3.2.7.1 Measures to protect migrant workers during third party employment as prescribed by Recommendation No. 188

Written contract of employment for workers “employed” by private employment agencies: Workers “employed” by private employment agencies (as defined in Article 1(1b) of Convention No. 181) should, where appropriate, have a written contract of employment specifying their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment (Paragraph 5).

Private employment agencies providing the services referred to in Article 1(1b) of Convention No. 181 (i.e., employing workers with a view to making them available to a user enterprise) should not:

- (a) Prevent the user enterprise from hiring an employee of the agency assigned to it;
- (b) Restrict the occupational mobility of an employee;
- (c) Impose penalties on an employee accepting employment in another enterprise (Paragraph 15).

3.2.7.2 Commentaries on the protection of the workers “employed” by private employment agencies according to Convention No. 181

The Committee made the following additional comments concerning the protection of the workers “employed” by private employment agencies according to Convention No. 181:

308. Articles 11 and 12 of Convention No. 181 provide additional protection for workers in temporary work agencies working for user enterprises within the meaning of Article 1, paragraph 1(b), namely employing workers with a view to making them available to a third party. ...

310. The Committee emphasizes that the right of freedom of association and the right to collective bargaining are to be fully guaranteed to all workers placed by private agencies or employed by temporary work agencies, as highlighted in Articles 4 and 11 of Convention No. 181. ...

313. The Committee wishes to highlight the need to have a clear legal framework in place to secure adequate protection in the areas enumerated in Articles 11 and 12 of the Convention. Given the particularities of working arrangements in which employees work for a user enterprise that assigns and supervises the execution of the work and the indeterminacy of responsibility, it is necessary for member States to address these particularities through measures that ensure that in each case effective responsibility is determined. The adequacy of the measures must be evaluated against the criterion of whether they provide effective recourse for employees in respect of the matters listed in Article 12 (ILO, 2010, pp. 76–77).

3.2.8 Responsibilities of private employment agencies and user enterprises

A member State shall determine and allocate, in accordance with national law and practice, the responsibilities of private employment agencies that employ workers with a view to making them available to user enterprises and the responsibilities of user enterprises in relation to:

- (a) Collective bargaining;
- (b) Minimum wages;
- (c) Working time and other working conditions;
- (d) Statutory social security benefits;
- (e) Access to training;
- (f) Protection in the field of occupational safety and health;
- (g) Compensation in case of occupational accidents or diseases;
- (h) Compensation in case of insolvency and protection of workers claims; and
- (i) Maternity protection and benefits, and parental protection and benefits (Article 12).

3.2.9 Remedies, including penalties according to Convention No. 181

Convention No. 181 provides that in case of violations of the Convention, adequate remedies, including penalties where appropriate, shall be prescribed and effectively applied under national law and regulations of a member State (Article 14(3)).

Box 3.8

Practice of member States with regard to remedies

254. In the Netherlands, the industry itself has established a mechanism for the investigation of complaints through the SNCU [Foundation for Compliance with Collective Agreements in the Temporary Employment Sector]. This Foundation offers employers and employees the opportunity to lodge complaints, which it then examines. The Government reported in 2007 that the SNCU had investigated an increasing trend for small temporary employment agencies to consistently infringe the law. According to the FNV, 5,000 to 6,000 *mala fide* [malicious] private employment agencies were operating in the Netherlands in 2009. Consequently, the Government has introduced a package of measures to enforce the applicable laws, and the Labour Inspectorate, together with the SNCU has intensified its inspections of non-certified temporary employment agencies and of user enterprises hiring staff through such agencies. In this regard, as of 2009, the SNCU conducts 200 inspections per year. In Lithuania, the Ministry of Social Security and Labour accepts and examines complaints in accordance with national laws and a procedure established by the Minister.

255. The Committee recalls that as a prerequisite for the lodging of complaints, workers placed in employment or hired by private agencies have to be informed of their rights and the procedures to assert them. In the Netherlands, the SNCU informs affiliated and non-affiliated employers and workers about the content and application of the legally binding Collective Labour Agreement for Temporary Workers through its web site, an email service and telephone assistance in Dutch, English, German and Polish. In addition, the SNCU also organizes lectures and provides instruction on collective bargaining agreements through promotional activities at job fairs aimed at economic migrants.

Source: ILO, 2010, pp. 64–65.

Box 3.9

Practice of member States with regard to the supervision of the Convention and penal measures

259. The Committee further notes the observations of the Uruguayan Inter-Union Assembly of Workers National Convention (PIT-CNT), which in 2007 reported serious deficiencies in the monitoring of private employment agencies under Convention No. 181. In particular, workers experienced difficulties in receiving their wages and some were not working under satisfactory conditions. In the view of the PIT-CNT, the action taken in relation to the supervision of third party recruitment is also inadequate. In response to these comments, the Government stated in 2009 that it was drafting a decree for the implementation of Act No. 183620 and remedying the deficiencies in monitoring.

Source: ILO, 2010, pp. 65–66.

3.2.9.1 Commentaries on the supervision of Convention No. 181 and penal measures

The Committee made the following additional comments concerning the supervision of Convention No. 181 and penal measures:

256. [Article 14 of Convention No. 181] provides that the provisions of the Convention shall be applied by laws or regulations or by any other means consistent with national practice, such as court decisions, arbitration awards or collective agreements. It further entrusts the labour inspection service or any other competent public authority with supervision of the implementation of the Convention and requires member States to establish adequate remedies, including penalties, in case of violations. Consequently, Article 14 of Convention No. 181 provides for a variety of means for the implementation of the provisions of the Convention. Nevertheless, while a member State, depending on national circumstances, is free to choose how it implements the Convention, it must establish an effective supervisory mechanism operated by a competent authority and provide for adequate remedies and penal measures (ILO, 2010, p. 65).

3.2.10 Protection of migrant workers according to Convention No. 181

Convention No. 181 specifically prescribes protection for migrant workers. To protect migrant workers recruited or placed in its territory by private employment agencies, a member State shall, after consulting the most representative organizations of employers and workers, adopt all necessary and appropriate measures (both within its jurisdiction and, where appropriate, in collaboration with other member States) which include laws or regulations providing for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses (Article 8(1)).

3.2.10.1 Commentaries on the protection of migrant workers according to Convention No. 181

The Committee made the following additional comments concerning the protection of migrant workers according to Convention No. 181:

369. ... Article 8, paragraph 1, of Convention No. 181 requires member States to establish a legal framework, including adequate penalties, such as fines or the closure of private agencies, to protect migrant workers against abuses committed by private agencies. The Committee notes in this context the Ciett code of conduct, which stipulates that any regulation on private employment agencies should enhance the fight against illegal practices and human trafficking (ILO, 2010, p. 89).

364. The protection of migrants recruited or placed in the territory of a member State is a pivotal point for the Convention and is laid down in Article 8 of Convention No. 181. ...

365. The Committee notes that Article 8 of the Convention draws on the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 18 December 1990, which fosters respect for the human rights of migrants. The UN Convention, which entered into force on 1 July 2003, aims to guarantee equal treatment, including the same working conditions for migrants and nationals, and the same access to a protective mechanism.

366. The Committee emphasizes that these references show the importance of including private agencies in the protection of workers in the transboundary mediation of labour. Such importance is already recognized in the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), which, unlike the Migration for Employment Convention (Revised), 1949 (No. 97), no longer tries to remedy the problems of migrant workers by relying only on public employment services. The Preamble to Convention No. 143 considers “that the migration of workers due to conditions in labour markets should take place under the responsibility of official agencies for employment or in accordance with the relevant bilateral or multilateral agreements”. Governments were already called upon to set up the legislative framework regulating the “recruitment, placing and conditions of labour for migrants recruited otherwise than under government-sponsored arrangements for group transfers” in Annex I to Convention No. 97.

367. In demanding concrete action from the governments, Part I of Convention No. 143 complements Convention No. 97. It requires ratifying States to adopt all necessary measures, including penal provisions, to suppress the illegal employment of migrants and to act against organizers of illicit or clandestine movements of migrants for employment. This requirement entails the monitoring of recruitment agencies within an effective migration policy and constitutes an important tool to combat trafficking for labour purposes. In addition, capacity building among workers recruited across borders is necessary (ILO, 2010, pp. 88–89).

371. The ILO Multilateral Framework on Labour Migration, published in March 2006, compiles non-binding principles and guidelines for a rights-based approach to labour migration and explicitly refers to Convention No. 181. It also comprises international guidelines on best practices, including guidelines on the licensing and supervision of recruitment and contracting agencies for migrant workers, as set out in Convention No. 181 and Recommendation No. 188. ... [T]he Framework further provides that workers shall be given clear and enforceable contracts by those agencies before departure and should be provided with contact details of their nation's diplomatic missions in the receiving country (ILO, 2010, pp. 89–90).

372. The Committee further recalls the case studies of the 2005 “Labour migration policy and management: Training modules”, prepared for the ILO–Korea Partnership Programme on “Enhancing national migration management in Cambodia, Lao People’s Democratic Republic, Mongolia and Thailand”². These highlighted the fact that government intervention in both sending and receiving countries through transparent and appropriate regulatory institutions and measures is essential if labour markets are to function in a way that is efficient and equitable.

373. The training modules focused on the Philippines³ as an illustration of how foreign employment should be supervised by the State. The Philippines Government had initially established the Overseas Employment Development Board (OEDB) to serve as the main channel for recruiting and placing Filipino workers abroad. The OEDB was intended to serve as the central authority empowered to negotiate labour agreements with foreign employers in relation to workers other than seafarers. In agreement with the private employment agency sector, the Government authorized private employment agencies to meet the growing demand for placement services and established a new agency, the Philippine Overseas Employment Administration (POEA), as the supervisory authority. The POEA was given powers to regulate recruitment and protect migrant workers. Subsequently, the OEDB was absorbed by the POEA. Now, any entity recruiting workers for jobs outside the Philippines has to obtain prior authorization from the POEA. The POEA’s mandate includes:

- licensing and monitoring recruitment agencies;
- accrediting foreign employers and evaluating employment offers;
- reviewing employment contracts to ascertain compliance with minimum standards;
- adjudicating disputes concerning employment contracts and recruitment standards;
- worker registration and job-placement facility;
- programme to combat illegal recruitment;
- pre-departure documentation and briefing of workers;
- market research and development;
- developing recruitment and employment standards; and
- legal and welfare assistance to distressed migrants.

² The Republic of Korea, Cambodia, Lao People’s Democratic Republic, Mongolia, and Thailand are not member States of Convention No. 181.

³ The Philippines have not ratified Convention No. 181.

374. The Committee also draws attention to several technical assistance programmes implemented by the ILO to help member States develop the respective regulatory framework. In Nepal,⁴ the Office has assisted in the revision of the Foreign Employment Act and Regulations and has initiated a project aimed at strengthening the capacities of recruiting agencies and at developing a monitoring mechanism. To protect workers, Nepal has made it a requirement to have specific insurance. The Government has also established a separate welfare fund for workers sent abroad.

375. The Committee also wishes to highlight the ILO–Japan project on managing the cross-border movement of labour in South-East Asia, which commenced in 2005 and is intended to contribute to the promotion of rights and gender-based governance with a view to creating a regulatory framework for labour migration and protecting Asian migrant workers from exploitative and abusive treatment. To achieve this, it is essential that, by the end of the project in 2010, countries have established efficient, safe and low-cost remittance systems and new initiatives for support services for the development of micro-enterprise in migrant workers' communities. The project is aimed at helping governments to formulate and implement coherent labour migration policies and programmes which respect the fundamental rights of migrant workers and are beneficial to employment, economic growth and development in both sending and receiving countries. For this, it is necessary to strengthen the capacity of governments, the social partners and other specific target groups to provide good governance for migration processes (ILO, 2010, pp. 90–91).⁵

Box 3.10

Practice of member States with regard to bilateral agreements for migrant worker protection

380. ... The Committee wishes to recall that the information provided by governments concerning Article 8, paragraph 2, should describe the content of such agreements and how they are able to secure adequate protection for migrant workers. In its 2009 report on Convention No. 181, the Government of Morocco provided copies of the bilateral agreements it has concluded with France, Italy and Spain. ...

383. The National Employment Strategy of the Republic of Moldova for 2007–15 aims to improve bilateral cooperation with host countries and includes the design of measures to facilitate temporary employment abroad. In order to cater for workers returning to the Republic of Moldova, the Strategy also envisages the enactment of measures to simplify their return home. In 2001, Colombia [non-member State of Convention No. 181] and Spain [member State] signed an agreement on migration under which the provision of information on vacancies in Spain, inter alia, through the Embassy in Bogota, is administered by the Colombian National Training Service.

Source: ILO, 2010, pp. 92–93.

⁴ Nepal has not ratified Convention No. 181.

⁵ Japan has Convention No. 181, but South-East Asian countries have not.

3.2.10.2 Measures concerning the protection of migrant workers prescribed by Recommendation No. 188

Provision of information to migrant workers: Private employment agencies should inform migrant workers, as far as possible in their own language or in a language with which they are familiar, of the nature of the position offered and the applicable terms and conditions of employment (Paragraph 8b).

Other measures prescribed by Recommendation No. 188 to protect workers: Eliminating unethical practices: Member States should adopt all necessary and appropriate measures to prevent and to eliminate unethical practices by private employment agencies. These measures may include laws or regulations which provide for penalties, including prohibition of private employment agencies engaging in unethical practices (Paragraph 4).

Prohibition of the replacement of workers who are on strike: Private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike (Paragraph 6).

Box 3.11

Practice of member States with regard to the protection of migrant workers

With regard to national requirements for sending workers abroad, the Committee has noted that, in some cases, countries prohibit private agencies from placing national jobseekers abroad or placing foreign workers in the national territory. In Algeria, for example, the Committee noted that section 2 of Executive Decree No. 07-123 of 24 April 2007 prohibits private agencies from placing national jobseekers abroad. In Panama, Article 6 of Executive Decree No. 105 of 26 December 1995 prohibits private employment agencies in the country from placing or recruiting workers abroad, unless this is explicitly authorized by the General Employment Directorate, which supervises compliance with the Labour Code or any other act respecting the employment of foreigners.

To ensure that foreign nationals working in Bulgaria are not exploited, the Government requires all foreign nationals wishing to work in the country to be in possession of a work permit. This work permit is issued by the National Employment Agency only if the conditions of work and pay offered are no less favourable than the conditions available to Bulgarian citizens for the relevant work category and if the remuneration enables such persons to maintain themselves adequately in Bulgaria.

Source: ILO, 2010, pp. 91–92.

3.2.11 Bilateral agreements for migrant worker protection according to Convention No. 181

Convention No. 181 requires the member States concerned to consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement, and employment of migrant workers (Article 8(2)).

3.2.11.1 Commentaries on bilateral agreements for migrant worker protection according to Convention No. 181

The Committee made the following additional comments concerning bilateral agreements for migrant worker protection according to Convention No. 181:

380. To improve the protection of workers in a cross-border context, Article 8, paragraph 2, of Convention No. 181 encourages, but does not require, the conclusion of bilateral agreements to prevent abuses and fraudulent practices. Most of the countries that have ratified Convention No. 181 have concluded such agreements. The Committee wishes to highlight that if such agreements have not yet been concluded this does not constitute an impediment to the ratification of Convention No. 181 (ILO, 2010, p. 92).

3.3 Cooperation between the public employment service and private employment agencies

Cooperation between the public employment service and private employment agencies is important for the functioning of labour markets, including cross-border matching of labour demand and supply. Convention No. 181 and Recommendation No. 188 prescribe international standards that facilitate cooperation between the two parties.

3.3.1 Commentaries on cooperation between the public employment service and private employment agencies according to Convention No. 181

The Committee made the following additional comments cooperation between the public employment services and private employment agencies according to Convention No. 181:

221. ... As concerns the services provided, public employment services and private agencies are both actors in the labour market and should therefore mutually benefit from cooperation as their common aim is to ensure a well-functioning labour market and the achievement of full employment. However, the Committee wishes to emphasize that, under ... Article 13, paragraph 2, of Convention No. 181 ... public authorities retain final authority for formulating labour market policy and determine the utilization or control the use of public funds earmarked for implementation of this policy (ILO, 2010, pp. 57–58).

3.3.2 Member State obligations regarding the formulation, establishment, and review of conditions promoting cooperation

A member State shall, in accordance with national law and practice and after consulting the most representative organizations of employers and workers, formulate, establish and periodically review conditions to promote cooperation between the public employment service and private employment agencies (Article 13(1)).

The conditions from Article 13(1) referred to above shall be based on the principle that the public authorities retain final authority for (a) formulating labour market policy and (b) utilizing or controlling the use of public funds earmarked for the implementation of that policy (Article 13(2)).

3.3.2.1 Measures concerning the establishment of bodies for the cooperation as prescribed by Recommendation No. 188

To implement a national policy on organizing the labour market, bodies may be established that include representatives of the public employment service and private employment agencies, as well as of the most representative organizations of employers and workers (Paragraph 16).

3.3.3 Submission of information by private employment agencies

Private employment agencies shall provide to the competent authority the information required by it:

- (a) to allow the competent authority to be aware of the structure and activities of private employment agencies;
- (b) for statistical purposes (Article 13(3)).

The competent authority shall compile the above-mentioned information and make it publicly available (Article 13(4)).

3.3.3.1 Commentaries on the obtaining and dissemination of information according to Convention No. 181

The Committee made the following additional comments concerning the obtaining and dissemination of information according to Convention No. 181:

235. To exercise its mandate, the competent authority responsible for the formulation and implementation of labour market policies has to be informed of the activities of private employment agencies. Article 13, paragraph 3, of Convention No. 181 therefore requires private agencies to provide the information requested by the competent authority, at intervals to be determined by the authority⁶ (ILO, 2010, p. 60).

⁶ Member States are also asked to provide examples of the information provided as part of their reporting obligation under Article 13, paragraph 3, of Convention No. 181.

3.3.3.2 Measures concerning the promotion of cooperation as prescribed by Recommendation No. 188

To promote cooperation between the public employment service and private employment agencies, the following measures are recommended:

- (a) Pooling of information and use of common terminology so as to improve transparency of labour market functioning;
- (b) Exchanging vacancy notices;
- (c) Launching of joint projects, for example in training;
- (d) Concluding agreements between the public employment service and private employment agencies regarding the execution of certain activities, such as projects for the integration of the long-term unemployed;
- (e) Training of staff; and
- (f) Consulting regularly with a view to improving professional practices (Paragraph 17).

Box 3.12

Practice of member States with regard to the obtaining and dissemination of information

235. ... Most member States which have ratified Convention No. 181, such as the Czech Republic, have an annual reporting requirement. In regard to the content of the information that private employment agencies are required to provide, the competent authority in Portugal requires information on their structure and activities. In addition, private employment agencies conducting international mediation also have to provide further specific information to the Portuguese Ministry of the Interior and the General Directorate for Consular Affairs.

Source: ILO, 2010, pp. 60–61.

3.4 Tripartite cooperation

Convention No. 181 and Recommendation No. 188 emphasize the cooperation among a member State, the most representative organization of workers, and the most representative organization of employers. This tripartite cooperation is vital for regulating private employment agencies and protecting migrant workers who use the services of private employment agencies. Migrant workers typically have little or no means to have their voices heard during the process of formulating and implementing these regulatory frameworks and worker protection measures. This is especially true with regard to protection of migrant workers in countries of destination.

Box 3.13**Practice of member States to secure effective cooperation**

226. In Poland ... cooperation with private agencies may include the outsourcing of mediation services by the local authority responsible for public employment services. ...

228. The Government of Italy states that in order to ensure effective employment policies and improve the employability of jobseekers, close partnerships between the public employment service and private employment agencies are necessary. To this end, it has envisaged the establishment of a public-private network to match labour supply and demand. The Italian Confederation of Workers' Trade Unions (CISL) observes that, although public and private actors are operating in a competitive environment, the public services indeed exercise functions in collaboration with private agencies. ...

231. In Finland, the Government reports that the Ministry of Labour launched a partnership project in 2005 with the Private Employment Agencies' Association, which aims to find new forms of cooperation between public and private employment services.

Source: ILO, 2010, pp. 58–60.

3.4.1 Tripartite consultation

Convention No. 181 requires a member State to consult with tripartite bodies or the most representative organizations of employers and workers in advance to formulate and implement provisions or measures in the relation to the scope of the convention, regulation of recruitment agencies, and protection of workers.

3.4.1.1 Commentaries on tripartite consultation according to Convention No. 181

The Committee made the following additional comments concerning tripartite consultation according to Convention No. 181:

209. The Committee further recalls ... that the social partners are an additional source of information for the government when formulating employment policies. Their involvement instils a sense of ownership, which is necessary for the effective implementation of employment policies. The importance of consultations with the social partners is re-emphasized in [other ILO Conventions], which also include consultations with the representatives of other persons affected. [These] provisions indicate that consultations enable the government to benefit from the experience and views of the social partners and other persons affected and permit it to secure full cooperation of these groups in formulating and enlisting support for the policies adopted (ILO, 2010, p. 55).

3.4.2 Tripartite consultation with respect to the scope of applying Convention No. 181

Convention No. 181 requires a member State to consult with the most representative organizations of employers and workers in advance to:

- determine the “other services relating to jobseeking” that some private employment agencies provide. Agencies that provide the “other services” concerned will be subject to the Convention (Article 1(1c));
- prohibit private employment agencies from operating in respect of certain categories of workers or branches of economic activity in the provision of one or more services (Article 2(4a));
- exclude workers in certain branches of economic activity, or parts thereof, from the scope of the Convention or from certain of its provisions (Article 2(4b)).

3.4.3 Tripartite consultation for the regulation of the agencies according to Convention No. 181

Convention No. 181 requires a member State to consult with the most representative organizations of employers and workers in advance of determining the legal status of private employment agencies (Article 3(1)).

3.4.4 Tripartite consultation for protecting the workers concerned according to Convention No. 181

Convention No. 181 requires the competent authority of a member State to consult with the most representative organizations of employers and workers in advance to authorize the exceptions to the provisions of Article 7, paragraph 1, of the Convention, which generally prohibits private employment agencies to charge any fees or costs to workers (Article 7(2)).

Convention No. 181 requires a member State to consult with the most representative organizations of employers and workers in advance of adopting all necessary and appropriate measures –including laws or regulations providing for penalties – in order to provide adequate protection for and prevent abuses of migrant workers (Article 8(1)).

Convention No. 181 requires a member State to consult with the most representative organizations of employers and workers in advance to formulate, establish, and periodically review the conditions

that promote cooperation between the public employment service and private employment agencies (Article 13(1)).

Box 3.14**Practice of member States with regard to the tripartite cooperation**

210. The Committee notes that, in addition to the participation of the government and social partners, other stakeholders can also be invited to take part in the consultations. In Algeria, the National Employment and Poverty Reduction Observatory was created in 2005 and, in addition to representatives of the administration, employers and unions, includes participants from research and study institutes and representatives of community-based associations. ...

212. In the case of the Republic of Moldova, the Committee noted with interest in 2005 that the tripartite Administrative Council of the National Population Employment Agency is actively involved in addressing the problems of the organization and operation of public employment agencies and, that advisory councils have been established at the local level. ...

214. In 2000, the Ministry of Labour and Social Welfare in Panama (MITRADEL) signed a collaboration agreement with the Labour Foundation. This agreement aims at strengthening social dialogue. Accordingly, various measures have been adopted to this end: the promotion of the Labour Foundation at the national and international levels, the setting up of workshops on its role at the international level and the nomination of the Labour Foundation to assist the Ministry of Labour and Social Welfare in the area of social dialogue.

Source: ILO, 2010, pp. 55–56.

3.4.5 Involvement in the machinery and procedures for investigation

Convention No. 181 also provides for the involvement, as appropriate, of the most representative organizations of employers and workers in the machinery and procedures for the investigation of complaints, alleged abuses, and fraudulent practices concerning the activities of private employment agencies (Article 10).

3.5 Cooperation among member States

Since migrant workers are recruited, placed, and/or employed internationally, cooperation among a sending country, receiving country, and other relevant countries (e.g., transit countries) is critical for the protection of workers.

As mentioned above with regard to the specific provisions of Convention No. 181 for the protection of migrant workers, the Convention prescribes the international cooperation among member States to protect migrant workers who use services of private employment agencies.

3.5.1 International measures to protect migrant workers

A member State shall adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other member States, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies (Article 8(1)).

3.5.1.1 Measures concerning the International exchange of information and experiences as prescribed by the Recommendation No. 188

Member States should exchange information and experiences on the contributions of private employment agencies to the functioning of the labour market and communicate this to the International Labour Office (Paragraph 3).

3.5.2 Bilateral agreements

Where workers are recruited in one country for work in another, the member States concerned shall consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement, and employment (Article 8(2)).

Where to get more information

This brochure was prepared by the ILO Regional Office for Asia and the Pacific.

Additional information on the regulation of private employment agencies, as well as on the employment process of migrant workers, is available on various ILO web pages, including:

Labour migration

<http://www.ilo.org/global/topics/labour-migration/lang--en/index.htm>

International Labour Standards on Migrant workers

<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrantworkers/lang--en/index.htm>

Forced labour, human trafficking and slavery

<http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>

Domestic workers

<http://www.ilo.org/global/topics/domestic-workers/lang--en/index.htm>

Equality and discrimination

<http://www.ilo.org/global/topics/equality-and-discrimination/lang--en/index.htm>

Working conditions

<http://www.ilo.org/global/topics/working-conditions/lang--en/index.htm>

Labour administration and inspection

<http://www.ilo.org/global/topics/labour-administration-inspection/lang--en/index.htm>

Tripartism and social dialogue

<http://www.ilo.org/global/topics/workers-and-employers-organizations-tripartism-and-social-dialogue/lang--en/index.htm>

The texts of Convention No. 181 and Recommendation No. 188 are available at:

Private Employment Agencies Convention, 1997 (No. 181)

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312326:NO

Private Employment Agencies Recommendation, 1997 (No. 188)

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312526:NO

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Protection of migrant workers in the recruitment and third party employment process: International standards and guiding principles given by the Private Employment Agencies Convention, 1997 (No. 181) and Private Employment Agencies Recommendation, 1997 (No. 188)

The Private Employment Agencies Convention, 1997 (No. 181) and the Private Employment Agencies Recommendation, 1997 (No. 188) are legal instruments developed by the International Labour Organization's (ILO) tripartite constituents (i.e., governments, employers, and workers) that set out the international minimum standards and guiding principles with regard to the regulation of private employment agencies and the protection of workers who use the services of these agencies.

This booklet provides readers with information about the key provisions of Convention No. 181 and Recommendation No. 188. The information may be utilized by member States of the ILO to reinforce their efforts to regulate private employment agencies and protect migrant workers through the ratification of Convention No. 181 and the development of national legislation.

ILO Regional Office for Asia and the Pacific

United Nations Building, 10th Floor
Rajdamnern Nok Avenue
Bangkok 10200, Thailand
Tel.: +66 2 288 1234
Fax.: +66 2 280 1735
Email: BANGKOK@ilo.org
www.ilo.org/asia

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