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► **Enhancing standard employment contracts for migrant workers in the plantation and domestic work sectors in Malaysia**





# **Enhancing standard employment contracts for migrant workers in the plantation and domestic work sectors in Malaysia**

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First published 2020

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ISBN: 978-92-2-032168-3 (web pdf)

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## Acknowledgements

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This paper was prepared for the International Labour Organization (ILO) by Jenna Holliday. A draft of the paper was presented at a consultation workshop on Enhancing Standard Employment Contracts for Migrant Workers in the Plantation and Domestic Work Sectors in Malaysia, which took place in Kuala Lumpur, Malaysia on 13-14 November 2019.

Thanks are due to the ILO team who reviewed the report and supported the meeting, in particular Nilim Baruah, Catherine Laws, Josh Man Fatt Hong, and Florida Sandanasamy.

This study has been undertaken within the framework of the ILO technical cooperation “Improving Migration Governance (IMG): Protecting the rights of migrant domestic workers and plantation workers through improved labour migration governance” funded by the US State Department, for whose support the ILO is grateful.

Views expressed in this report are those of the author, who assumes responsibility for any errors and omissions.



## Abbreviations and acronyms

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<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ASEAN Consensus</b>	ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers
<b>G2G</b>	Government-to-government
<b>ILO</b>	International Labour Organization
<b>IMG Project</b>	Improved Migration Governance Project
<b>MGSC</b>	Malaysian Government Standard Contract
<b>MOHR</b>	Ministry of Human Resources
<b>MOU</b>	Memorandum of understanding
<b>OSH</b>	Occupational Safety and Health
<b>RM</b>	Malaysian Ringgit [currency]
<b>SOCSSO</b>	Social Security Organization
<b>SPIKPA</b>	Skim Perlindungan Insurans Kesihatan Pekerja Asing (Foreign Workers Hospitalization and Surgical Scheme)



## 1. Introduction and background

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It is estimated that migrant workers make up over 20 per cent of Malaysia's labour force (UN, 2018). While Ministry of Home Affairs data indicated that there were about 1.76 million migrants working in Malaysia in 2018 (split approximately 21 per cent women and 79 per cent men), the figure is thought to reach a possible 4 million, when undocumented migrants are taken into account (Department of Statistics Malaysia, 2018). In the plantation sector, migrant labour accounts for over 70 per cent of the workforce; there are an estimated 300,000–400,000 migrants working as domestic workers (UN, 2018).

The provision and enforcement of rights-based employment contracts is key to ensuring that migrant workers understand and are able to exercise their labour rights. This is as identified in international standards that set out the key features of standard contracts, including the International Labour Organization (ILO) Migration for Employment Recommendation (Revised), 1949 (No. 86); the Plantations Convention, 1958 (No. 110); and the Domestic Workers Convention, 2011 (No. 189). At a regional level, the Association of Southeast Asian Nations (ASEAN) Consensus on the Protection and Promotion of the Rights of Migrant Workers ("ASEAN Consensus") provides obligations of ASEAN Member States to establish a number of rights for migrant workers, including the right to an employment contract.

Malaysia has made progress in the protection of migrant workers in recent years. Positive policy decisions have included:

- ▶ the phasing out of outsourcing companies;
- ▶ the enactment of a minimum wage law that applies equally to migrant workers (albeit to the exclusion of domestic workers); and
- ▶ the acceptance of memoranda of understanding (MOUs) attaching standard employment terms that are more favourable than state law.

Positive steps also include the development of a general standard contract for migrant workers, and one for migrant domestic

workers, as well as the establishment of the Employer Undertaking Policy.

It remains the case, however, that inequitable application of labour rights across migrant work sectors (in particular in relation to domestic and casual work) and gaps in the provision and enforcement of standard contracts have left migrant domestic and plantation workers without adequate protection. In addition, there remain fundamental elements of these standard contracts that do not meet international norms, in particular, the absence of provision for working hours, annual leave, or overtime pay for domestic workers. Many migrant workers are not provided with a copy of their contract or understand the terms under which they are being employed. This makes it difficult for workers to identify situations of labour exploitation and hold their employers to account, particularly in relation to the regularity of wage payments and allowable deductions.

Improving standard contracts, through the strengthening of legislation, enforcement, and improved industry practice, is needed in order to ensure that migrant workers understand the terms of their employment, can manage their expectations, and can seek support where their rights are not being respected.

The Improved Labour Migration Governance (IMG) Project of the ILO works to ensure that migrant workers in the domestic work and plantation sectors in Malaysia are better protected through strengthened standard employment contracts. In this regard, the IMG Project facilitated a consultation workshop to look into the use and application of standard contracts for migrant workers in the domestic and plantation sectors, and to identify areas where the use and application of standard contracts could be strengthened to better protect workers. The consultation workshop was an opportunity to discuss these findings and for stakeholders to identify key priorities in strengthening the use and application of standard contracts for migrant workers in these sectors. This paper was presented and discussed at the consultation workshop.



## 2. Protection challenges facing migrant workers in the domestic work and plantation sectors

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Levels of exploitation and abuse are disproportionately high in both the plantation and domestic work sectors, largely due to the physical isolation of the workplaces (i.e., in remote worksites or in households), restrictions on movement, and inadequate mechanisms established to ensure accountability of employers (UN, 2018; Anderson, 2016). The most common complaints filed in Malaysia by migrant workers are directly coercive in nature: withholding of legal documents, inability to take leave from work, and excessive overtime (Harkins, Lindgren, and Suravoranon, 2017).

In a 2018 study of forced labour indicators in the plantation sector in Malaysia, a lack of communication of terms and conditions, and document retention were identified as key (FLA, 2018). Similarly, an ILO study found that 43 per cent of the migrant workers surveyed had had their identification withheld (Harkins, Lindgren, and Suravoranon, 2017).

Lack of contractual agreements is also highlighted as a prevalent indicator of forced labour in the plantation sector (FLA, 2018). In the domestic work sector, research indicates that while employers are aware of the need for contracts, a quarter of workers surveyed did not know that they had a contract. This has been seen as indicative of the argument that the provision of an employment contract is used more as an immigration mechanism than as a labour mechanism (Anderson, 2016). In addition, few workers benefit from collective bargaining, as domestic workers do not benefit from a union in Malaysia,

and plantation workers face challenges in physically accessing unions (FLA, 2018).

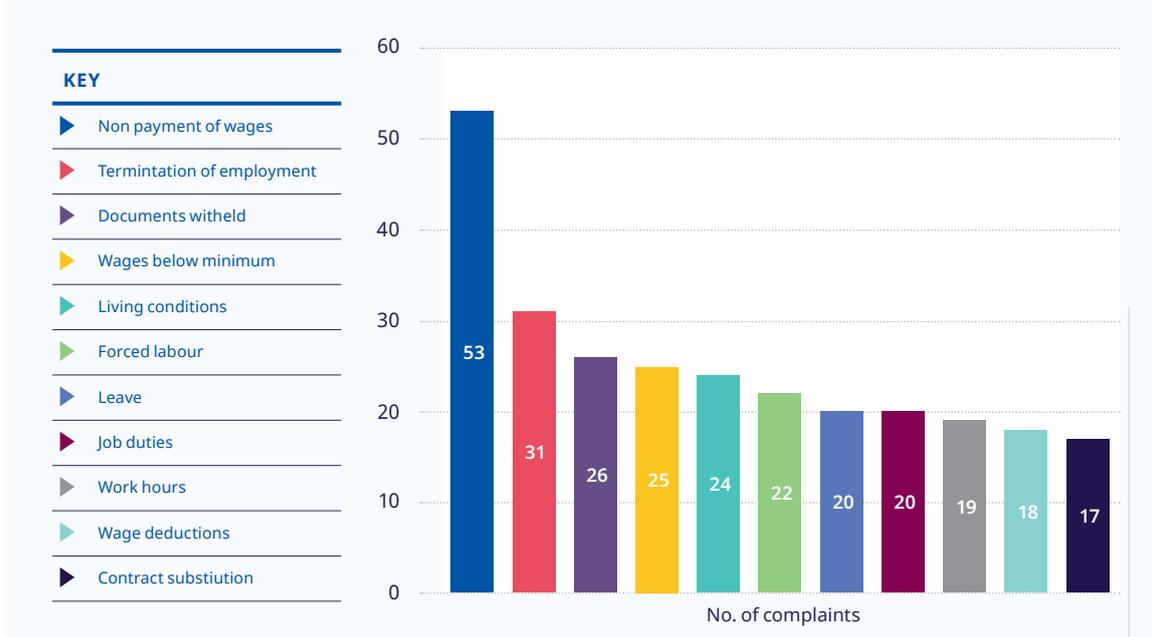
ILO baseline data finds that the average migrant in Malaysia works long hours (10 hours/day), nearly every day (6.2 days/week) for pay that is below the minimum wage (US\$286) when overtime is considered (Harkins, Lindgren, and Suravoranon, 2017). An ILO study found that on average, working hours for domestic workers in Malaysia were 14 hours per day, with many workers being on “call” or “stand-by” 24 hours per day; only one in five employers studied thought that domestic workers should have a full, consecutive 24 hours of rest per week (Anderson, 2016). The same study found that only 10 per cent of the 400 migrant domestic workers surveyed (from Malaysia and Thailand) were paid above the minimum wage.

Tenaganita data from 2011 to 2015 demonstrate that the majority of complaints made by migrant domestic workers relate to contractual terms (see figure 1 below). Data from 2019 finds the majority of claims relate to unpaid wages, withholding of the worker’s passport, and lack of a contract.<sup>1</sup>

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<sup>1</sup> Intervention from Tenaganita provided at the consultation workshop.

Figure 1. Subject of complains received by Migrant Worker Resource Centres, 2011–15 (%)



Source: Tenaganita and Malaysian Trade Union Congress (2016), compiled by the ILO TRIANGLE in ASEAN Project.

Key labour protection issues for migrant workers in the plantation sector include: access to adequate protective equipment and clothing at no cost, the provision of adequate housing, and the ability to work reasonable hours and/or claim overtime (Ong, 2017). Where migrant workers are living and working on site, the application of overtime can be a challenge, with many workers being forced to accept that overtime work does not attract overtime wages.<sup>2</sup> The use of workers for casual labour, in particular women, also compound these issues, with workers unable to access the benefits of permanent full-time workers (Pye et al., 2016). Dangerous pesticides, banned in Europe and the United States, continue to be used in Malaysia, with a study on the health impact of sprays finding that workers experiences symptoms of, “fatigue, back pain, giddiness, difficulty in breathing, skin problems, nausea, eye irritation, headache, tight feeling in the chest and swelling” (Tenaganita and PAN Asia Pacific, 2002).

The levels of undocumented workers remain a concern in Malaysia. In the plantation sector, there is a significant route between Indonesia and Sabah. Undocumented workers on

plantations in Sabah live in camps without adequate electricity or sanitation and without benefit from any regulation over their labour rights or access to health insurance (Mulyadi, 2017). In the case of domestic workers, reports indicate that migrants travel over on a tourist visa, expecting to receive their contract and work visa on arrival; instead, however, they are used by the agent and contracted out as part-time cleaners, with no documentation (Kouba and Baruah, 2019). It is thought that another key reason for the number of undocumented workers is the restriction on the ability of workers to change their employer (UN, 2019). This restriction – coupled with poor recruitment and placement practices and the risk that a formal complaint may result in losing income, status, and lodgings – can result in workers feeling they have no option but to seek alternative employment arrangements as an irregular worker (Anderson, 2016). The illegal practice of employers keeping a migrant worker’s passport and immigration papers also contributes to the likelihood that a migrant worker will be rendered undocumented and irregular upon leaving their employment (Migrant Workers Right to Redress Coalition, 2019).

<sup>2</sup> Key informant interview, October 2019.



## 3. International standards and good practices

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### 3.1 International labour standards

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Malaysia has ratified a number of international conventions and labour standards relevant to labour migration, including the:

- ▶ Convention on the Elimination of all Forms of Discrimination Against Women (1979);
- ▶ Forced Labour Convention, 1930 (No. 29);
- ▶ Equality of Treatment Convention (Accident Compensation), 1925 (No. 19); and
- ▶ Minimum Wage Fixing Convention, 1970 (No. 131).

It has not ratified the labour standards specific to migrant workers, or workers in the domestic or plantation sectors, namely the:

- ▶ Migration for Employment Convention (Revised), 1949 (No. 97), which includes the ILO Migration for Employment Recommendation (Revised), 1949 (No. 86);
- ▶ Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143);
- ▶ Plantations Convention, 1958 (No. 110); and
- ▶ Domestic Workers Convention, 2011 (No.189).

Recommendation No. 86, Convention No. 110, and Convention No. 189 each include specific guidance on the terms to be included in employment contracts for migrant workers, and workers in the plantation and domestic work sectors. The inclusion of such guidance is a reflection of the importance placed on the role of contracts for such workers. Table 1 below sets out the key terms of employment that these three instruments recommend be included in standard terms of employment.

▶ Table 1. International standards

Key terms	R086	C110	C189
Name and address of worker/employer	●	-	●
Address of workplace	●	-	●
Start date and duration	●	-	●
Type of work to be performed	●	-	●
Remuneration: rate, regularity, method	●	-	●
Overtime provisions	●	-	-
Permitted deductions	●	●	-
Normal hours of work and rest	●	●	●
Weekly rest (24 hours)	●	●	●
Annual leave and public holidays	●	●	●
Maternity leave	-	●	●
Social security/insurance; medical provisions	-	●	●
Occupational safety and health (inc. training)	●	●	●
Food and accommodation	●	●	●
Right to join trade unions	-	●	●
Terms of termination	●	-	●
Terms of repatriation	●	-	●

**Note:**

• = Convention recommends clause be included in standard employment contract.  
 - = Clause not addressed in Convention.  
 R086 = Migration for Employment Recommendation (Revised), 1949 (No. 86);  
 C110 = Plantations Convention, 1958 (No. 110);  
 C189 = Domestic Worker Convention, 2011 (No. 189).

## 3.2 Regional standards

The ASEAN Consensus provides (non-legally-binding) obligations of ASEAN Member States and establishes a number of rights for migrant workers and members of their family (also as non-binding principles). These include, among others, the right to an employment contract with clear and basic terms of employment subject to national laws, regulations, and policies. The ASEAN Consensus includes in

article 36, a (non-exhaustive) list of suggested contract terms, including: wages; employment benefits; working conditions; health and safety; employment dispute mechanisms; and repatriation. The Consensus specifies that the contract be written in a language the migrant worker understands and that it be provided to the worker.

## 3.3 Good practices – Normative standards

In addition to the standards established in international law and at the regional level by the ASEAN Consensus, normative standards have been established by key partners, which are displayed in table 2 below:

▶ The International Domestic Workers Federation (IDWF) have developed a Standard Contract for Domestic Work in Thailand (represented in column “IDWF”);

- ▶ UN Women have developed a Template on Standard Terms of Employment for Women Migrant Domestic Workers (represented in column “UNW”);
- ▶ the ILO developed a suggested draft Domestic Workers Bill for Malaysia (represented in column “ILO”); and

- ▶ the US Department of Labor developed a Model Contract for Employment (represented in column “USDOL”).

The key terms in bold represent those that, in addition to the international standards above, are recommended by these normative standards. All key terms are defined in section 3.3.1 below.

▶ Table 2. Good practice – Normative standards

Key terms	IDWF	USDOL	UNW	ILO
Name and address of worker / employer	•	•	•	•
Address of workplace	•	•	•	•
Start date and duration	•	•	•	•
Type of work to be performed	•	•	•	•
Remuneration: rate, regularity, method	•	•	•	•
Overtime provisions	•	•	•	•
Permitted deductions	-	•	•	•
Normal hours of work and rest	•	•	•	•
Weekly rest (24 hours)	•	•	•	•
Annual leave and public holidays	•	•	•	•
<b>Sick pay</b>	•	•	•	•
Maternity leave	-	-	•	•
Social security/insurance; medical provisions	•	•	•	•
Occupational safety and health	-	•	•	-
Food and accommodation	•	•	•	•
<b>Environment free from abuse and violence</b>	•	•	•	•
Right to join trade unions	-	-	•	•
<b>Freedom of movement</b>	•	•	•	•
<b>Access to communications</b>	-	•	•	•
<b>Right to keep passport and documentation</b>	•	•	•	•
Terms of termination	•	•	•	•
Terms of repatriation	-	•	•	•
<b>Dispute resolution procedure</b>	•	•	•	•

**Note:**

• = Normative standard recommends clause be included in standard employment contract.

- = Clause not addressed in normative standard.

IDWFED = The International Domestic Workers Federation;

USDOL = US Department of Labor;

UNW = UN Women

ILO = International Labour Organization

### ▶ 3.3.1 Explanation of normative standard terms

Below is a brief explanation of what each of the standard terms in table 2 means. At all times, standard employment/contract terms should not be less favourable than the national minimum required by law, and be equal to those terms applicable to national workers. worker understands and that it be provided to the worker.

- ▶ **Name and address of worker/employer:** this information also commonly requires passport and ID details and has the dual role of identifying the parties and assisting to track either party in the event of a dispute.
- ▶ **Address of workplace:** provides clarification as to the place of work and is particularly useful to be able to contest requests to perform employment tasks at another address.
- ▶ **Start date and duration:** the start date is commonly the date the worker arrives with the employer.
- ▶ **Type of work to be performed:** either included in the contract or as an annex, this term provides the parties with a clear list of expectations as to the tasks that fall within the scope of the employment.
- ▶ **Remuneration:** rate, regularity, method: the rate of pay, how often to expect payment, and whether payment will be paid in cash or into a bank account in the worker's name (advised).
- ▶ **Overtime provisions:** specifying the amount of overtime permitted; the circumstances in which it is permitted; and the rate of pay for overtime.
- ▶ **Permitted deductions:** clarification around any legally permitted deductions to be made from the worker's wages, and at what rate the deductions will be made.
- ▶ **Normal hours of work and rest:** how many hours the worker is expected to work in total; regularity and length of breaks.
- ▶ **Weekly rest (24 hours):** provision of a day's rest in every seven days; including the terms and conditions relating to the ability to waive the day's rate, restrictions on waiver, and overtime applicable where waived
- ▶ **Annual leave and public holidays:** number and dates of public holidays; number of days of annual leave and increases per year; overtime provisions in the event that the worker works on these days.
- ▶ **Sick pay:** provision for the number of sick days that can be taken on full pay.
- ▶ **Maternity leave:** provision for the number of maternity days that can be take on full (and/or half) pay.
- ▶ **Social security/insurance; medical provisions:** details of the social and health insurance (public and private) schemes that the worker will benefit from, and the provision of the employer's responsibility to enable access to such schemes.

#### What is an employment contract?

All employees have an employment contract with their employer. A contract is an agreement that sets out:

- ▶ employment conditions;
- ▶ rights;
- ▶ responsibilities; and
- ▶ duties

for BOTH employer and employee.

These are called the "terms" of the contract.

The rights set out in a contract of employment are in addition to the rights established in law (statutory).

The employer and employee cannot agree to contractual terms that give the worker less rights than are established in law.

- ▶ **Occupational safety and health:** minimum occupational safety and health requirements, including adequate training and access to protective equipment and clothing.
- ▶ **Food and accommodation:** safe and decent accommodation, along with sufficient number and quality of meals provided for free.
- ▶ **Environment free from abuse and violence:** a commitment to take proactive steps to create an employment environment that contains no risk or threat of violence, exploitation, or abuse.
- ▶ **Right to join trade unions:** provisions on the right to join trade unions and engage in collective bargaining.
- ▶ **Freedom of movement:** clarification of the right to freedom of movement and the prohibition of restrictions.
- ▶ **Access to communications:** clarification of the right to access communication and technology to be able to freely contact persons outside of the workplace.
- ▶ **Right to keep passport and documentation:** provision that the worker has the right to hold and have control over their passport and documentation at all times.
- ▶ **Terms of termination:** provisions on the conditions under which either party can terminate the contract with or without notice, and the consequences of each scenario.
- ▶ **Terms of repatriation:** provisions over the obligation to pay the costs of repatriation.
- ▶ **Dispute resolution procedure:** details on national systems for logging complaints; agreements as to seeking third party mediators; and rights to access national justice systems.



## 4. Standard employment terms and contracts in Malaysia

### 4.1 Standard terms of employment in legislation

Any employment in Malaysia which lasts more than one month must be formalized through a written contract. The Employment Act 1955 provides that a contract should specify the key terms of the employment relationship, including location of work, scope of work, wage rates, wage period, holidays, benefits, and matters relevant to preserving health and safety. Many of the contract provisions have their minimum terms expressed in, and governed by Malaysian legislation, primarily the Employment Act, 1955.

Note that, while the Employment Act does not differentiate between migrants and non-migrants, domestic workers (called “domestic servants”) are excluded from many of the basic labour protections. This includes the articles within the law related to work hours, rest days, public holidays, annual leave, sick leave,

maternity leave, and severance benefits. In addition, minimum wage rules, social security coverage, mandatory medical insurance, and workers’ compensation benefits do not apply to domestic workers. In its 2018 concluding observations the Committee on the Elimination of Discrimination against Women (CEDAW Committee) expressed concerns that domestic workers continue to be denied equal rights under the labour laws. The Committee identified that the lack of legal guarantees of the labour rights of migrant domestic workers leaves them vulnerable to exploitation and abuse.

Below is a brief overview of standard terms of employment as defined in national legislation.

**Remuneration: rate, regularity, method:** The Minimum Wage Order, 2016 provides

for a national minimum wage that is equally applied to migrants and nationals. **Domestic workers are excluded from the national minimum wage**, meaning provisions related to wage in the standard contracts of domestic workers are currently unregulated. The Employment Act provides that wages must be paid monthly.

**Overtime provisions:** The overtime payment provisions in the Employment Act are included in the sections relevant to weekly rest, public holidays, and annual leave. **Note that overtime provisions do not apply to domestic workers.**

**Permitted deductions:** The Employment Act provides for permitted deductions, and restricts deductions over 50 per cent of the monthly wage.

**Normal hours of work and rest:** The Employment Act provides that the normal hours of work are a maximum of eight hours per day, with no more than five hours continuous at a time, and hours worked over a maximum ten-hour period. **Normal hours of work and rest do not apply to domestic workers.**

**Weekly rest (24 hours):** The Employment Act provides that employees shall be allowed a rest day in each week with the right to double time overtime pay if the worker opts to work on this day. **Domestic workers do not have a right to this rest day in law.**

**Annual leave and public holidays:** The Employment Act provides for a minimum of ten public holidays and between eight and 16 days of annual leave (depending on service). The Act provides that workers received three times overtime pay when they choose to work on such days. **The provisions relating to public holidays and annual leave do not apply to domestic workers.**

**Sick pay:** The Employment Act provides that employees have the right to between 14 and 22 days of paid sick leave. **Domestic workers are not covered by provisions related to sick pay.**

**Maternity leave:** The Employment Act provides all female employees an entitlement to paid maternity leave of no less than 60 days. Malaysia currently imposes medical test requirements on migrant workers, by way

of enforcement of its policy of prohibiting work permits for pregnant temporary migrant workers in certain sectors (including domestic work and plantations). Workers who get pregnant are liable for breach of contract and required to cover the costs of their immediate deportation (UN, 2018). The restriction of migrant workers being pregnant effectively denies migrant women access to the paid maternity leave provision. In their 2018 concluding observations, the CEDAW Committee expressed concern that women domestic workers continue to be prohibited from getting pregnant during their contract of service.

**Social security/health and medical insurance:** Employees under the Employment Act are entitled to Employee's Provident Fund Act 1991 (EPF Act), Employee's Social Security Act 1969 (SOCSO Act), and Employment Insurance System Act 2018 (EIS Act) contributions. Prior to 2019, migrant workers were excluded from the SOCSO system; effective 1 January 2019, however, employers of migrant workers (excluding domestic workers) are obliged to register their employees with SOCSO and contribute to the Employment Injury Scheme. Employers are mandated to enrol migrant workers under the Foreign Workers Hospitalization and Surgical Scheme (SPIKPA). The coverage of RM20,000 has been contested as being too low to reasonable cover standard hospital care requirements (UN, 2018).

**Occupational safety and health (OSH):** The Occupational Health and Safety Act 1994 provides "for securing the safety, health and welfare of persons at work", to protect others from unsafe work practices. The OSH Master Plan is an action plan that supports and strengthens OSH-related legislative frameworks through 29 designated programmes. The Department of Occupational Safety and Health implements the Master Plan to achieve Malaysia's long-term vision of safety culture. The 2010–2015 Master Plan emphasized enforcement by nurturing a culture of self-regulation in all workplaces. It aimed to achieve self-regulation by engaging the business community, industry leaders, and workers to build strong partnerships. It makes no reference to migrant workers, women, or gender-responsive elements.

**Food and accommodation:** The Minimum Standard of Housing and Amenities Act 1990 prescribes the minimum standards of housing for estate/farm and mine workers. In 2016, the provisions of this Act were extended to migrant workers in all other sectors through the Guidelines on the Minimum Standards of Housing for Foreign Workers.

**Environment free from abuse and violence:** An amendment of the Employment Act 1955 introduced criminal offences specific to sexual harassment in the workplace, aiming for the protection of women. The amendments have been enforced with effect beginning 1 April 2012. The changes still remain inadequate in terms of coverage due to the fact that working relationships based on contract and sub-contract work (which largely involves women workers) are ignored in the definition. There are proposals to amend the Employment Act that may address this definition. These are supported by the Guideline in Handling Sexual Harassment in the Workplace in the Public Service and the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace.

**Right to join trade unions:** The Employment Act states that contracts of service should not restrict the rights of employees to join, participate in, or organize trade unions. The Trade Union Act states that migrant workers are allowed to join a union but not hold official position or form their own unions. There are currently no registered domestic worker unions, notwithstanding that the Malaysian Trade Union Congress has twice applied to register one (Anderson, 2016).

**Right to keep passport and documentation:** While the Passport Act 1986 provides that it is an offense for any person to have another's passport in their possession, some MOUs provide that an employer may hold an employee's passport and documents with the employees' permission. This provides scope for the employer to argue that withholding a passport is done with consent (ILO, 2018).

**Terms of termination:** The Employment Act provides that in every written contract of service a clause shall be included setting out the manner in which such contract may be terminated by either party, specifying four

weeks' notice for an employee that has been employed for less than two years, and with the amount of notice rising with the years of service.<sup>3</sup> **This provision is not applicable to domestic workers, who are subject to a termination provision of 14 days.**

**Dispute resolution procedure:** The official mechanism for migrant workers with labour grievances is to lodge a complaint with the Labour Department – or with the Industrial Relations Department for cases of unlawful dismissal. The number of cases pursued under these mechanisms is reported as being low in comparison to the number of violations being committed (ILO, 2016).

## 4.2 Standard employment contracts

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There are two key standard contracts that have been issued by the Malaysian Government for migrant workers: one is for general workers, and the other is for domestic workers. Each of these contracts include terms that reflect the current labour laws as well as additional contract provisions. Table 3 below sets out an analysis of these standard contracts, taking into account those contractual terms implied by national legislation as detailed above, and compares them against the international and normative standards established in table 2:

- ▶ (●) show where the clause is present in the standard contract;
- ▶ "L" indicates where the clause is not present in the standard contract, but is implied in the contract by law;
- ▶ "X" indicates areas where the standard contract could be strengthened to meet normative standards.

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<sup>3</sup> If an employer terminates an employee's contract without providing the necessary notice, the employer must then pay the employee the equivalent wages they would have received if given notice. An employer may terminate an employee without proper notification in the case of misconduct – though the employer must conduct due inquiry into any alleged case of misconduct. The Employment Act does not comprehensively define what misconduct can and cannot entail. As such, labour contracts should be very clear about what kinds of actions may constitute misconduct, as well as the repercussions.

▶ Table 3. Malaysian standard contract terms

Key terms	IDWF	USDOL
Name and address of worker / employer	●	●
Address of workplace	L <sup>1</sup>	●
Start date and duration	●	●
Type of work to be performed	L <sup>1</sup>	●
Remuneration: rate, regularity, method	●	● <sup>2</sup>
Overtime provisions	●	X
Permitted deductions	●	●
Normal hours of work and rest	●	X <sup>3</sup>
Weekly rest (24 hours)	●	● <sup>4</sup>
Annual leave and public holidays	●	X
Sick pay	●	X
Maternity leave	X	X
Social security/insurance; medical provisions	●	●
Occupational safety and health	L	L
Food and accommodation	●	●
Environment free from abuse and violence	X	X
Right to join trade unions	L	L
Freedom of movement	X	X
Access to communications	X	●
Right to keep passport and documentation	●	●
Terms of termination	●	●
Terms of repatriation	●	●
Dispute resolution procedure	X	●

**Notes:**

MGSC = Malaysian Government standard contract for employment of general workers.

MGSC (DW) = Malaysian Government standard contract for employment of domestic workers.

● = Clause is present in the standard contract.

L = Clause is not present in the standard contract, but is implied in the contract by law.

X = Area where the standard contract could be strengthened to meet normative standards.

<sup>1</sup>Included as a requirement of employment contracts in the Employment Act, 1955;

<sup>2</sup>Domestic workers are excluded from the national minimum wage (set by the Minimum Wage Order, 2016), meaning provisions related to wage in the standard contracts of domestic workers, are currently unregulated.

<sup>3</sup>There is a reference to “sufficient rest” but no provision on work hours or the rest hours.

<sup>4</sup>This contract provision is currently not supported by the law.

In relation to the contracts for general workers, the majority of the international standards have been met. Many of the normative standards are not included in this contract. The contract could be significantly strengthened by including these provisions, in particular in relation to ensuring the environment is free from violence; establishing the right to freedom of movement and communications; and setting out the dispute resolution procedure.

The standard contract for domestic workers includes some provisions that are missing from the general contract; these are: access to communication, and information about

the dispute resolution procedure. There are many terms present in the general contract that are not present in the domestic workers' contract. These differences largely illustrate where the Malaysian law excludes domestic workers and departs from the international standards. In particular, the domestic worker contract includes no provisions on working hours, overtime, holidays, or sick pay. While the provisions make reference to an agreed wage, this is not the national minimum wage. The contract does, however, refer to weekly rest, but this provision is not supported by the current law, which excludes domestic workers from such rest.



## 5. Standard terms/contracts in MOUs

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Bilateral MOUs relating to labour migration have been negotiated by Malaysia with multiple countries, notably Nepal, Sri Lanka, Bangladesh, Pakistan, India, Viet Nam (2015), Indonesia (amended in 2011), and Cambodia (2017) (UN, 2018). The majority of these agreements include standard contract terms to be used for workers sent under the agreements.

In table 4, the standard employment contract for general workers as contained in the MOU with Nepal is compared as against the Malaysia standard contract. The Nepal MOU contract is slightly more favourable in requiring that the contract include a provision on the type of work to be performed, and provides that the workplace be free from violence. Overall, however, the Nepal MOU contract follows the general order and provisions of the Malaysian standard.

In relation to the contracts for the domestic workers, the contract in the MOU with Cambodia follows the Malaysian standard, with the addition of a provision for sick pay. The contract attached to the MOU with the Philippines, however, features significant additions. Domestic workers from the Philippines benefit from a contract that includes provisions for daily hours and eight hours of daily rest, 15 days of annual leave, and

public holidays; these provisions specifically address the areas of the Malaysian law that currently exclude domestic workers. In addition, the Philippines have set a minimum wage of US\$400/month, which is higher than the minimum national wage (RM1,100 – approx. US\$260), and significantly higher than that paid to most domestic workers in Malaysia.

While the contracts attached to these MOUs appear to include standard terms that meet more of the international and normative standards than the Malaysian standards, this does not necessarily equate to better conditions for those workers. MOUs are not necessarily effective in ensuring wages are paid in accordance with agreements, with data showing domestic workers in Malaysia from both the Philippines and Indonesia being paid under the amounts agreed upon in the MOUs (Anderson, 2016). In addition, research in the Greater Mekong Subregion has found that MOUs have “limited success in reaching their objectives” and do not result in fundamental changes to working conditions for migrants (ILO, 2015).

▶ Table 4. Standard contracts in MOUs

Key terms	MGSC	Nepal MOU	MGSC (DW)	POEA (DW)	Cambo (DW)
Name and address of worker / employer	●	●	●	●	●
Address of workplace	-	-	●	●	●
Start date and duration	●	●	●	●	●
Type of work to be performed	-	●	●	●	●
Remuneration: rate, regularity, method	●	●	●	● <sup>1</sup>	●
Overtime provisions	●	●	-	-	-
Permitted deductions	●	●	●	●	-
Normal hours of work and rest	●	●	-	●	-
Weekly rest (24 hours)	●	●	●	●	●
Annual leave and public holidays	●	●	-	●	-
<b>Sick pay</b>	●	●	-	-	●
Maternity leave	-	-	-	-	-
Social security/insurance; medical provisions	●	●	●	●	●
Occupational safety and health	●	●	●	●	●
Food and accommodation	●	●	●	●	●
<b>Environment free from abuse and violence</b>	-	●	-	-	-
Right to join trade unions	●	●	●	●	●
<b>Freedom of movement</b>	-	-	-	-	-
<b>Access to communications</b>	-	-	●	-	●
<b>Right to keep passport and documentation</b>	●	●	●	●	●
Terms of termination	●	●	●	●	●
Terms of repatriation	●	●	●	●	●
<b>Dispute resolution procedure</b>	-	-	●	●	●

**Notes:**

MGSC = Malaysian Government standard contract for employment of general workers.

Nepal MOU = standard employment contract for general workers contained in Nepal-Malaysia MOU

MGSC (DW) = Malaysian Government standard contract for employment of domestic workers.

POEA (DW) = standard employment contract for domestic workers in Philippines-Malaysia MOU

Cambo (DW) = standard employment contract for domestic workers in Cambodia-Malaysia MOU

● = Clause is present in the contract.

- = Clause is not present in the contract.

<sup>1</sup> The Philippines have set a minimum wage of US\$400/month, which is higher than Malaysia's minimum national wage (1,100 ringgit (RM) – approx. US\$260), and significantly higher than that paid to most domestic workers.



## 6. The role of recruitment in the use and application of employment contracts

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Both private recruitment agencies and labour outsourcing agencies are present in Malaysia. The former are regulated under the Private Employment Agencies Act (1981), which was amended in 2018 and is administered by Ministry of Human Resources. The latter are regulated by the Ministry of Home Affairs.

Whereas employment agents facilitate the contractual arrangement between worker and employer, outsourcing agents engage in separate contracts with both the employer and the worker, often without there being any contract between the employer and worker themselves. In the case of plantation workers, outsourcing companies often provide accommodation and transport to the principal employer. In the case of domestic workers, the outsourcing agent may outsource a worker to multiple houses (ILO, 2018). The labour outsourcing system was originally established as a flexible and effective means of recruiting migrant workers, however the addition of the outsourcing agent as a party in the employment contracts was found to have detrimental impacts, in particular as the agent maintains some control of the employee (UN, 2018). Civil society organizations and workers' representatives contested that the contractual relationship with the outsourcing agent protected employers from accountability to their employees, and restricted worker access to company grievance procedures. In response, the Government is phasing out the use of outsourcing agents, and as at 2018, fewer than 70,000 workers were employed under outsourcing arrangements. ILO data indicates that 279 outsourcing companies held licenses as of May 2018. The target for phasing out the system of outsourcing is 2021 (ILO, 2018).

Private employment agencies still remain in Malaysia, but under regulations as amended in 2018. These amended regulations include increased deposits, stricter controls over the business' incorporation, and different licenses (with higher fees) for the deployment of foreign domestic workers and migrant

workers. At the end of December 2018, the number of licensed private employment agencies had significantly reduced to 453. It is thought this reduction is connected to the change in regulation (Sivanandam, 2018). Private employment agencies in countries of origin and Malaysia can still have disruptive impacts on the employment contract between the worker and the employer. In particular, civil society reports that it is common for agents to deploy domestic workers on the basis that they have waived their right to a day off and will not have access to a phone. On investigation, it is commonly found that workers are not told of any of the standard contract terms, or are misinformed about them; in particular it is common that they are not informed that there is an option to have one day off a week. Similarly, deceptive communication about terms and conditions of work have been linked to forced labour in plantations in Malaysia. Misinformation about contract terms is prevalent, as contracts are rarely provided to migrant workers in a language they understand (FLA, 2018).

The employment contract itself is an immigration requirement, and must be provided in order for the Ministry of Home Affairs to issue a work visa to a migrant worker. As such, employers and employment agents must present an employment contract in order to get the immigration documents necessary to bring in regular, documented workers. There are also similar requirements in embassies of countries of origin in Malaysia, who also require sight of a contract of employment. Reports from civil society indicate, however, that the use of such contracts is often limited to their role in immigration, and bear little relation to the ultimate labour conditions of the worker, or the expectations of the employer. Indeed, in both the case of the employers of domestic workers and employers of smaller, sub-contracting plantations, there is a high likelihood that the employers will not have a clear understanding of their statutory

obligations to their workers, and may not have an understanding of the contents of the contracts that their workers have signed. Where the workers also do not know the contents of the contract that they have signed, this leaves the employer in a position of being able to dictate terms. Contract substitution is also present, with some employers insisting on the worker signing a new contract on arrival, which can be on the basis of standards lower than Malaysian law and/or those agreed under MOU-compliant contracts required by countries of origin.

With the phasing out of the use of outsourcing companies, many stakeholders are promoting direct recruitment and the use of government-to-government (G2G) agreements.

Direct recruitment provides a platform through which employers can directly seek a worker from a country of origin. The new domestic worker online platform – the Maid Online System – being an example of a government-promoted system. This online-based system was identified in the 2018 Universal Periodic Review of Malaysia as responsible for reducing the financial burden on parties and for ensuring the rights and protections of foreign domestic workers – including enforcement of standard employment contracts – were in accordance with the law (Human Rights Council, 2018).

G2G arrangements include government-to-government agreements on the number of workers, and the use of public placement agents facilitating the recruitment and placement on both sides. In the case of the G2G agreement with Bangladesh, this shift in the labour migration system in the plantation

sector has been identified as the reason for a significant reduction in costs (from between US\$3,000–4,000 down to US\$400) (UN, 2018). The key to this success, however, is the operational improvements on the part of the country of origin as well as on the Malaysian side, without which, indications are that G2G agreements alone do not eliminate the risk of poor recruitment. Ultimately, in order to ensure that workers are recruited and placed in knowledge and agreement of the terms and conditions of their employment, the recruitment and placement process needs to be fully regulated and accountable.

As part of efforts to improve the protection of migrant workers, the Eleventh Malaysia Plan (2016 – 2020) provided that employers should take full responsibility for the recruitment process, all expenses involved, welfare, and housing for workers until they return home. The introduction of the “Employer’s Undertaking” for employment of foreign workers in Malaysia is part of the implementation of this commitment, and was introduced as a method by which employers are ensured to understand their obligations. A pledge sets out a set of compulsory terms and conditions that employers need to adhere to in order to employ a migrant worker, including signing a contract, paying wages and overtime, granting holidays, and not withholding passports. All provisions are in line with the different acts in the law relevant to the hiring of migrant workers. There is an intention that the implementation will include inception of the employer after six months, however such implementation has yet to commence (UN, 2018).



## 7. Enforcement of employment contracts

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The official mechanism for migrant workers with labour grievances is to lodge a complaint with the Labour Department – or with the Industrial Relations Department for cases of unlawful dismissal. The number of cases pursued under these mechanisms is reported as being low in comparison to the number

of violations being committed (ILO, 2016). Where migrant workers do file complaints, there can be difficulties in identifying their employer; in producing sufficient evidence to prove the claim; and regarding the time it takes to resolve the case. These grievance mechanisms are seen as weak in terms

of enforcing labour rights (FLA, 2018). An effective dispute resolution system is critical to ensuring that employment contracts are considered credible and enforceable. Reports indicate that enforcement of contracts is more stringent against employees than against employers. In particular, where domestic workers are caught breaching a term of the contract, the employer has the authority to report them to the Immigration Department, with the worker facing sanctions that might place their migration status in jeopardy. While employers are also subject to sanctions, the focus is primarily on enforcing sanctions against the worker, with the method for enforcement of sanctions against the employer being considered as more opaque (Kouba and Baruah, 2019).

In general terms, it is considered that unresponsive grievance procedures, alongside issues around the lack of law enforcement personnel and the isolation of employees, render labour laws largely ineffectual (UN, 2018). ILO research identifies that the vulnerability of migrant workers to labour abuses is intensified by the lack of fair, efficient, and accessible means to resolve complaints, reinforcing migrant workers' status as a

group of workers to which a largely different set of rules apply (Harkins, Lindgren, and Suravoranon, 2017). Similarly, the CEDAW Committee (2018) also expressed concern about the obstacles in accessing justice faced by women in disadvantaged situations, including migrant women, particularly undocumented migrant workers.

There have, however, been recent judicial decisions that have favoured the rights of migrant workers. In particular, recent cases have found that the mere fact of being an undocumented worker does not restrict you from claiming labour rights. In the first instance, this decision affirmed the basic tenet that contracts do not have to be written down to be enforceable (CEDAW Committee, 2018); it also confirmed that an undocumented worker has labour rights (and in this instance a right to money owed) where their status as undocumented was not in their power to change (Bedi, 2019). This builds on the legal position that, where a worker has committed to a contract without its contents being made fully clear, or where agreement has been achieved through mis-representation of the terms, the worker may have the right to seek remedy in the civil courts (ILO, 2018).



## 8. Conclusions and recommendations for standard terms in Malaysia

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For migrant workers in the domestic work and plantation sectors, levels of labour exploitation and abuse are disproportionately high. Claims made by migrant workers include those related to restrictions on movement, non-payment of wages, excess working hours, withholding of passports, and inadequate safety and health equipment. Many of these claims relate to elements of their employment that should be protected under labour laws and through their employment contracts.

International and normative standards set out a number of terms that should be included in standard terms/contracts of employment in order to benefit both the worker and the employer by making the conditions and

expectations of employment clear. Many of these terms are present in Malaysian law and are included in the standard contracts issued by the Ministry of Human Resources. However, there are significant gaps between the international normative standards and those included in Malaysia's current standard contracts, particularly in relation to the contracts for domestic workers. One significant gap is related to maternity leave, which does not apply to migrant workers, who are prohibited from holding a working permit while pregnant. Other gaps are related to provisions around commitments to an environment free from abuse and violence; provisions on freedom of movement and access to communications;

and clearly set out provisions on dispute resolution. For domestic workers, gaps also include terms that protect working hours, access to leave, and sick pay.

While some MOUs seeks to fill these gaps with standard contracts that include terms not included in the Malaysian contracts, studies show that MOUs have limited success and do not result in a fundamental change to working conditions for migrants. In any event, reports indicate that recruitment and employment practices do not place much weight on the contents of employment contracts, which are used more as an immigration mechanism than a labour rights mechanism. This is particularly the case given that many workers and employers will enter their employment relationship without knowing the contents of their employment contract. While G2G agreements and direct employment may address some of the misleading practices in recruitment, efforts are still required in order to ensure that both workers and employers are aware of their minimum rights and contracted agreement.

Three key areas of focus are needed in order to strengthen the role of employment contracts for migrant workers in the plantation and domestic work sectors:

- ▶ 1. Strengthen standard terms of employment:
 

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  - a. Strengthen the standard contracts themselves, so that provisions comply with international and normative standards (see table 5 on recommended key standard employment terms below), as it is the standard terms themselves that need to be strengthened.
  - b. Bring the labour rights of domestic workers in line with all workers under the law.
  - c. Bring the rights of migrant workers in line with national workers in terms of access to social security and health services, and maternity rights.
- ▶ 2. Ensure that both employers and workers receive and understand their contracts:
 

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- a. Ensure that both employers and workers understand the contract. This can be facilitated through:
    - i. pre-departure/post-arrival orientation;
    - ii. introduction of standard information campaigns for employers and workers that communicate the minimum employment terms applicable in Malaysia, making clear that some contracts may include favourable terms; and
    - iii. addressing the need for interpretation and translation support to ensure that contracts are in the language of the worker and also that workers have access to a third party to explain contracts terms where the worker cannot read.
  - b. Improve transparency of recruitment and placement processes.
- ▶ 3. Strengthen mechanisms for enforcement and oversight:
- 
- a. Establish an easy to access and easy to understand advice, grievance, and dispute service for migrant workers.
  - b. Include a standard grievance and dispute resolution provision in the contract, that provides easy to understand information for both the employer and the worker on the procedure in the event of a dispute.
  - c. Introduce and formalize a system for tripartite-plus oversight of the issuance and enforcement of employment contracts.

▶ Table 5. Recommended areas for inclusion in an employment contract

Recommended terms for inclusion in an employment contract	
<ul style="list-style-type: none"> <li>• Name and address of worker / employer (including id information)</li> <li>• Address of workplace</li> <li>• Start date and duration of contract</li> </ul>	
Type of work to be performed	<ul style="list-style-type: none"> <li>• Include an annex of specific duties</li> <li>• Be specific about the difference between domestic and care duties</li> </ul>
Remuneration: rate, regularity, method	<ul style="list-style-type: none"> <li>• Minimum wage</li> <li>• Paid monthly</li> <li>• Into worker's bank account</li> </ul>
Overtime provisions	<ul style="list-style-type: none"> <li>• As per EA for all workers (including DW)</li> </ul>
Permitted deductions	<ul style="list-style-type: none"> <li>• As per EA; no agency fees</li> </ul>
Normal hours of work and rest	<ul style="list-style-type: none"> <li>• As per EA for all workers;</li> <li>• DW: specify a break every 5 hrs; with the maximum of 8 hours work to worker over a period not exceeding ten hours.</li> </ul>
Weekly rest	<ul style="list-style-type: none"> <li>• 24 hours</li> <li>• Workers can agree to waive but must not work more than fourteen days without a break</li> </ul>
Annual leave and public holidays	<ul style="list-style-type: none"> <li>• As per EA for all workers</li> </ul>
Sick pay	<ul style="list-style-type: none"> <li>• As per EA for all workers</li> </ul>
Maternity leave	<ul style="list-style-type: none"> <li>• Equal to national workers</li> </ul>
Social security/insurance; medical provisions	<ul style="list-style-type: none"> <li>• Equal access to FWCS; SOPIKPA; SOSCO</li> </ul>
Occupational safety and health	<ul style="list-style-type: none"> <li>• Specify the provision of training for work and commitment to OSH</li> </ul>
Food and accommodation	<ul style="list-style-type: none"> <li>• Safe, private and reasonable accommodation;</li> <li>• Three meals in line with religious requirements.</li> </ul>
Environment free from abuse and violence	<ul style="list-style-type: none"> <li>• Specify commitments to creating a safe and fair working environment.</li> </ul>
Right to join trade unions	<ul style="list-style-type: none"> <li>• As per the national law</li> </ul>
Freedom of movement	<ul style="list-style-type: none"> <li>• Specify the right of the worker to freedom of movement outside the workplace outside of working hours.</li> </ul>
Access to communications	<ul style="list-style-type: none"> <li>• Specify the right to keeping and using communications equipment.</li> </ul>
<ul style="list-style-type: none"> <li>• Right to keep passport and documentation</li> </ul>	
• Terms of termination	<ul style="list-style-type: none"> <li>• Termination without notice by either party with just cause (e.g. serious misconduct; maltreatment) – the terminated party pays for repatriation.</li> <li>• Termination with a month's – the terminating party pays for repatriation.</li> <li>• Termination due to illness – employer pays repatriation</li> </ul>
• Terms of repatriation	<ul style="list-style-type: none"> <li>• Employer pays at the conclusion of the contract; to cover a round-trip should the contract be renewed.</li> </ul>
• Dispute resolution procedure	<ul style="list-style-type: none"> <li>• Contact information for filing complaints.</li> <li>• Clear information about rights to access to justice.</li> </ul>



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# Enhancing standard employment contracts for migrant workers in the plantation and domestic work sectors in Malaysia

Malaysia has made significant strides in the protection of migrant workers in recent years. For migrant workers in the domestic work and plantation sectors, however, levels of labour exploitation and abuse remain disproportionately high. Claims made by migrant workers include those related to restrictions on movement, non-payment of wages, excess working hours, withholding passports and inadequate safety and health equipment. The use and application of rights-based employment contracts is a key factor in ensuring that migrant workers understand and are able to exercise their labour rights. In Malaysia, however, whilst standard contracts have been developed by the government, gaps in their current use and application have left migrant domestic and plantation workers without adequate protection.

This paper was prepared for a multi-stakeholder dialogue on the use and application of standard contracts for migrant workers in the domestic and plantation sectors. The paper identifies areas where use and application of standard employment contracts could be strengthened to better protect workers, and includes recommended terms for inclusion in an employment contract.

The report has been produced with the financial assistance of the United States Department of State, Bureau of Democracy Human Rights and Labor.

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ISBN: 978-92-2-032168-3