

Policy Brief No. 11: JOINT AND SEVERAL LIABILITY OF RECRUITMENT/PLACEMENT AGENCIES WITH THE PRINCIPAL/ EMPLOYER UNDER PHILIPPINE LAWS



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INTRODUCTION

Access to justice is one of the principal challenges faced by migrant workers. In many cases, abused or illegally dismissed workers find it difficult or even outright impossible to file and prosecute labor complaints against their foreign employers. Once employment is terminated, the migrant worker has very limited options. Oftentimes, they are deported or opt to return to the home country without receiving their unpaid salaries, benefits and other monetary claims. Upon arrival in their home countries, migrant workers have no means to seek compensation from their abusive foreign employers.

Having this scenario in mind, Philippine policy makers embodied in its laws the joint and several liability of recruitment/placement agencies and the principal/employer for money claims of overseas Filipino workers to ensure that they can still prosecute their just claims against the foreign employer and the recruitment/placement agencies after they have returned to Philippines.

BACKGROUND

The Government of the Republic of the Philippines is acknowledged internationally as one of the leading pioneers in the development of state-managed overseas employment programs.

Taking advantage of the sudden wealth of oil producing countries in West Asia in the early 70's, the Philippine government incorporated in its 1974 Labor Code¹ a comprehensive legal infrastructure for the recruitment and placement of overseas contract workers and regulation of recruitment and placement activities of private recruitment/placement agencies. The twin objectives of the overseas employment program were to address the growing unemployment and underemployment problems of the country and to generate much-needed foreign exchange.²

Labor market development took precedence over welfare protection. Bilateral labor agreements forged by the Philippine government with receiving countries focused more on labor market development and less on welfare protection. Filipino workers were deployed to countries

whose local laws do not provide sufficient legal protection to migrant workers. Filipino domestic workers were allowed to work even in countries whose labor laws did not extend to domestic workers. While overseas Filipino workers earned incomes much more than what they could have earned in the Philippines, many of them came home in body bags or broken in body, mind and spirit. Thousands of workers also fell victim to illegal recruitment activities of both licensed and unlicensed agencies.

Innovative mechanisms to protect the welfare of overseas Filipino workers were also put in place by the Philippine Government. One of these policy initiatives is the inclusion in the "Rules to Implement the Labor Code"³ of a provision on the joint and solidary liability of foreign employers and the recruitment agencies for violations of overseas employment contracts.

THE POLICY

Section 10 of Rule V of the Rules to Implement the Labor Code provides:

“Section 10. Requirement before recruitment. – Before recruiting any worker, the private employment agency shall submit to the Bureau the following documents:

a) A formal appointment or agency contract executed by a foreign-based employer in favor of the license holder to recruit and hire personnel for the former duly authenticated or attested by the Philippine Labor Attache or duly authorized Philippine foreign service official, or in his absence by an appropriate official, agency or organization in the country where the employer conducts his business. In case any of the foregoing documents is executed in the Philippines, the same may be authenticated by the duly authorized official of the Ministry of Foreign Affairs or of the employer’s consulate or Embassy or of the Ministry of Labor and Employment official as may be appropriate. Such formal appointment or recruitment agreement shall contain the following provisions, among others:

1. *Terms of recruitment, including the responsibility of the parties relative to the employment of workers;*

2. ***Power of the agency to sue and be sued jointly and solidarily with the principal or foreign based employer for any of the violations of the recruitment agreement and the contracts of employment; (emphasis supplied)***

“x x x x x x x x x”

“Joint and solidary liability” in this context means that both the private recruitment/placement agency and the foreign principal/employer can be held individually liable for the entire amount of claim or obligation due to the overseas Filipino worker.

As early as 1988, the validity of this provision on joint and solidary liability was upheld in two (2) cases decided by the Supreme Court, namely: *Ambraque International Placement & Services v. NLRC* (G.R. No. 77970, 28 January 1988) and *Manuela S. Catan/M. S. Catan Placement Agency vs. The*

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National Labor Relations Commission, Philippine Overseas Employment Administration and Francisco D. Reyes (G. R. No. 77279 15 April 1988).

Under current rules, before a license to operate a private recruitment/placement agency for overseas employment may be granted by the Philippine Overseas Employment Administration (“POEA”), the applicant recruitment/placement agency is required to submit a verified undertaking stating, among others, that the applicant “shall assume joint and solidary liability with the employer for all claims and liabilities which may arise in connection with the implementation of the contract, including but not limited to payment of wages, death and disability compensation and **repatriations.**”⁴

In the case of corporations or partnerships, the officers, directors, partners are required to execute a verified undertaking that they will be jointly and severally liable with the company over claims arising from employer-employee relationship.⁵

In addition, Section 10 of Republic Act No. 8042, otherwise known as The Migrant Workers and Overseas Filipinos Act of 1995, as amended by Republic Act No. 10022, provides that the liability of the principal/employer and the recruitment/placement agency for any and all claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damage shall be joint and several. 6

¹ Presidential Decree No. 442 promulgated on 01 May 1974

² Catholic Institute for International Relations, *The Labour Trade: Filipino Migrant Workers Around the World*, p. 120 (1987) citing speech delivered by then President Ferdinand E. Marcos before the First National Congress on Overseas Employment held on 20 July 1982.

³ Promulgated on 19 January 1975

⁴ Section 1(f)(3) of Rule II, Part II of the “POEA Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Workers”

⁵ *Ibid.*, Section 1(g)

In the case of “Sameer Overseas Placement Agency, Inc. vs. Joy C. Cabiles”, (G. R. No. 170139, 05 August 2014), the Philippine Supreme Court explained the rationale for the joint and solidary liability provision in R. A. 8042 as follows:

“Section 10 of the Migrant Workers and Overseas Filipinos Act of 1995 provides that the foreign employer and the local employment agency are jointly and severally liable for money claims including claims arising out of an employer-employee relationship and/or damages. This section also provides that the performance bond filed by the local agency shall be answerable for such money claims or damages if they were awarded to the employee.

“This provision is in line with the state’s policy of affording protection to labor and alleviating workers’ plight.

“In overseas employment, the filing of money claims against the foreign employer is attended by practical and legal complications. The distance of the foreign employer alone makes it difficult for an overseas worker to reach it and make it liable for violations of the Labor Code. There are also possible conflict of laws, jurisdictional issues, and procedural rules that may be raised to frustrate an overseas worker’s attempt to advance his or her claims.

6 Section 10 of R. A. 8042 provides:

“SEC. 10. Money Claims. - Notwithstanding any provision of law to the contrary, the Labor Arbiters of the National Labor Relations Commission (NLRC) shall have the original and exclusive jurisdiction to hear and decide, within ninety (90) calendar days after the filing of the complaint, the claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damage. Consistent with this mandate, the NLRC shall endeavor to update and keep abreast with the developments in the global services industry.

“The liability of the principal/employer and the recruitment/placement agency for any and all claims under this section shall be joint and several. This provision shall be incorporated in the contract for overseas employment and shall be a condition precedent for its approval. The performance bond to be filed by the recruitment/placement agency, as provided by law, shall be answerable for all money claims or damages that may be awarded to the workers. If the recruitment/placement agency is a juridical being, the corporate officers and directors and partners as the case may be, shall themselves be jointly and solidarily liable with the corporation or partnership for the aforesaid claims and damages. (boldface supplied)

“Such liabilities shall continue during the entire period or duration of the employment contract and shall not be affected by any substitution, amendment or modification made locally or in a foreign country of the said contract.

“Any compromise/amicable settlement or voluntary agreement on money claims inclusive of damages under this section shall be paid within thirty (30) days from approval of the settlement by the appropriate authority.

“In case of termination of overseas employment without just, valid or authorized cause as defined by law or contract, or any unauthorized deductions from the migrant worker’s salary, the worker shall be entitled to the full reimbursement if his placement fee and the deductions made with interest at twelve percent (12%) per annum, plus his salaries for the unexpired portion of his employment contract or for three (3) months for every year of the unexpired term, whichever is less.⁶

“In case of a final and executory judgement against a foreign employer/principal, it shall be automatically disqualified, without further proceedings, from participating in the Philippine Overseas Employment Program and from recruiting and hiring Filipino workers until and unless it fully satisfies the judgement award.

“Noncompliance with the mandatory periods for resolutions of case provided under this section shall subject the responsible officials to any or all of the following penalties:

“(a) The salary of any such official who fails to render his decision or resolution within the prescribed period shall be, or caused to be, withheld until the said official complies therewith;

“(b) Suspension for not more than ninety (90) days; or

“(c) Dismissal from the service with disqualification to hold any appointive public office for five (5) years.

“It may be argued, for instance, that the foreign employer must be impleaded in the complaint as an indispensable party without which no final determination can be had of an action.

“The provision on joint and several liability in the Migrant Workers and Overseas Filipinos Act of 1995 assures overseas workers that their rights will not be frustrated with these complications.

“The fundamental effect of joint and several liability is that ‘each of the debtors is liable for the entire obligation.’ A final determination may, therefore, be achieved even if only one of the joint and several debtors are impleaded in an action. Hence, in the case of overseas employment, either the local agency or the foreign employer may be sued for all claims arising from the foreign employer’s labor law violations.

This way, the overseas workers are assured that someone — the foreign employer’s local agent — may be made to answer for violations that the foreign employer may have committed.

“The Migrant Workers and Overseas Filipinos Act of 1995 ensures that overseas workers have recourse in law despite the circumstances of their employment. By providing that the liability of the foreign employer may be ‘enforced to the full extent’ against the local agent, the overseas worker is assured of immediate and sufficient payment of what is due them.

“Corollary to the assurance of immediate recourse in law, the provision on joint and several liability in the Migrant Workers and Overseas Filipinos Act of 1995 shifts the burden of going after the foreign employer from the overseas worker to the local employment agency. However, it must be emphasized that the local agency that is held to answer for the overseas worker’s money claims is not left without remedy. The law does not preclude it from going after the foreign employer for reimbursement of whatever payment it has made to the employee to answer for the money claims against the foreign employer.

“A further implication of making local agencies jointly and severally liable with the foreign employer is that an additional layer of protection is afforded to overseas workers. Local agencies, which are businesses by nature, are inoculated with interest in being always on the lookout against foreign employers that tend to violate labor law. Lest they risk their reputation or finances, local agencies must already have mechanisms for guarding against unscrupulous foreign employers even at the level prior to overseas employment applications.”

In the earlier case of *“ATCI Overseas Corporation, et al. vs. Ma. Josefa Echin”*, (G.R. No. 178551, 10 October 2010), the Philippine Supreme Court held:

“In providing for the joint and solidary liability of private recruitment agencies with their foreign principals, Republic Act No. 8042 precisely affords the OFWs with a recourse and assures them of immediate and sufficient payment of what is due them. Skippers United Pacific v. Maguad explains:

‘. . . [T]he obligations covenanted in the recruitment agreement entered into by and between the local agent and its foreign principal are not coterminous with the term of such agreement so that if either or both of the parties decide to end the agreement, the responsibilities of such parties towards the contracted employees under the agreement do not at all end, but the same extends up to and until the expiration of the employment contracts of the employees recruited and employed pursuant to the said recruitment agreement. Otherwise, this will render nugatory the very purpose for which the law governing the employment of workers for foreign jobs abroad was enacted.’ (emphasis supplied)

“The imposition of joint and solidary liability is in line with the policy of the state to protect and alleviate the plight of the working class. Verily, to allow petitioners to simply invoke the immunity from suit of its foreign principal or to wait for the judicial determination of the foreign principal’s liability before petitioner can be held liable renders the law on joint and solidary liability inutile.”

Section 10 of Republic Act No. 8042 further requires that this joint and solidary liability provision “be incorporated in the contract for overseas employment and shall be a condition precedent for its approval.” On 07 March 1996, the POEA promulgated Memorandum Circular No. 14, series of 1996 which required the inclusion of a provision on solidary liability of principals/employers and the recruitment agency in the contract for overseas employment pursuant to Migrant Workers and Overseas Filipinos Act of 1995, particularly Section 60 of the Rules and Regulations implementing said Act.⁷ Notwithstanding the foregoing, the standard overseas employment contracts available online (for various skills and household service workers, for instance) have not yet been amended to include the contractual provision on joint and solidary liability of the foreign principal/employer with the private recruitment/ placement agency.

More recently, the POEA incorporated the provision on joint and solidary liability in the “Model Recruitment Agreement Between Saudi Recruitment Agencies (SRA) and Philippine Recruitment Agencies (PRA) Hiring Filipino Household Service Workers for Saudi Arabia”.⁸

⁷ POEA Memorandum Circular No. 14, series of 1996

⁸ POEA Memorandum Circular No. 13, series of 2012

The joint and several liability of the private recruitment/ placement agency with the foreign principal/employer may be enforced by the migrant worker by filing a complaint (arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damages) before the National Labor Relations Commission. The migrant worker can sue for: (a) actual damages (such as unpaid salaries/ wages actually earned plus salary for the unexpired portion of the contract and full reimbursement of placement fees and other expenses with 12% interest until fully paid); (b) moral damages; (c) exemplary damages; and (d) attorney's fees (maximum of 10% of total monetary award).

A judgment in favor of the migrant worker may be enforced against the following:

(a) *the appeal bond (equivalent to the monetary award excluding award of damages and attorney's fees) posted by the private recruitment/ placement agency required to be posted before its appeal may be given due course;*

(b) *the P1,000,000.00 escrow deposit and P 100,000.00 surety bond posted by the private recruitment/ placement agency as a prerequisite for the issuance of a recruitment license;*

(c) *the insurance coverage for money claims equivalent to at three (3) months for every year of the migrant worker's employment contract;*

(d) *property of the private recruitment/ placement agency such as cash in bank accounts, real estate, motor vehicles, office furniture and equipment, etc.; and*

(e) *real/personal property of the corporate directors/officers or partners who are likewise held solidarily liable with the private recruitment/ placement agency.*

CRITIQUE AND ANALYSIS

The legally mandated joint and several liability of the private recruitment/ placement agency with the foreign principal/ employer gives the migrant worker the opportunity to litigate his/her claims against the foreign employer and recruitment/ placement agency even after the migrant worker has returned to the Philippines.

Notwithstanding the noble intention of the law, challenges and difficulties are still encountered in enforcing this joint and several liability of the private recruitment/ placement agency with the foreign principal/ employer. These are the following:

(a) The legal process is a tedious process. Usually, the complaining migrant worker was abused/ illegally dismissed by his/her employer abroad, and thus, came back to the Philippines with little or no money at all.

If the recruitment agency will contest the worker's claim all the way up to the Court of Appeals or to the Supreme Court, it might take anywhere from three (3) to five (5) years, or even longer, before a judgment in favor of the worker becomes final and executory. Many complaining workers who are in dire need of money opt to settle with the recruitment agency for an amount smaller than the judgment award in order to avoid expenses and additional years of court litigation. There are also complaining workers who need money for their new overseas job applications and thus, opt for settlement.

(b) Security for money claims is insufficient. Notwithstanding the provisions for escrow deposit, surety bond, appeal bond and insurance coverage for money claims, there are cases where the judgment award in favor of the migrant worker can no longer be executed because the recruitment agency has already ceased its operations and it has no other known assets which the migrant worker

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may execute upon. This holds true in cases where there are numerous complaints filed against the recruitment agency or where the recruitment license of the agency has been revoked by the POEA.

(c) Access to effective and affordable legal assistance is limited. Under present rules, the migrant worker is allowed to file a complaint and to prosecute his/her labor complaint on his/her own even without the assistance of lawyer. Unfortunately, not all complainants know how to prepare a sworn affidavit or a position paper, thus, the migrant worker will need the assistance of a lawyer at some point especially if the case is elevated on appeal to the higher courts.

The Public Attorney's Office has a program that provides free legal representation to qualified clients based on the merit and/or indigency test. If the migrant-worker

complainant will qualify, he/she can avail of the services of the Public Attorney's Office. However, the PAO lawyers are limited in number so they cannot attend to all the migrant workers needing legal assistance.

(d) The foreign principal/employer is not held accountable for the violation of the rights of the migrant worker. It is the local recruitment/placement agency that usually pays off the judgment award in favor of the migrant worker. While it is true that the recruitment/placement agency has the right and means of recourse against the foreign employer for reimbursement of its share in the solidary liability, the recruitment/placement agency usually absorbs the loss without pursuing legal action against the employer in foreign courts. At most, abusive foreign employers can be disqualified from recruiting Filipino workers in the future.

RECOMMENDATIONS

Some possible solutions to overcome these problems are the following:

(a) simplification of the legal process for resolving worker's claims;

The first paragraph of Section 10 of R. A. 8042, as amended, requires the Labor Arbiters of the National Labor Relations Commission to "hear and decide, within ninety (90) calendar days after the filing of the complaint, the claims arising out of an employer-employee relationship or by virtue of any law or contract involving Filipino workers for overseas deployment including claims for actual, moral, exemplary and other forms of damage." Failure to comply with the foregoing legal directive may be punished by withholding of salary, suspension or dismissal from government service. Notwithstanding the foregoing, the rule is still not strictly observed on account of the heavy caseloads of labor arbiters. A monitoring mechanism should be implemented within the NLRC in order to ensure that the mandatory period for resolving cases involving overseas Filipino workers is observed. The appeal process for money claims should also be simplified in order to avoid delay in the administration of justice for the litigants.

(b) expand legal assistance of the Public Attorney's Office (PAO) to migrant workers by expanding the scope of assistance and increasing the number of lawyers for migrant workers;

(c) monitor and ensure that bonds and escrow deposits posted by the private recruitment/placement agencies are immediately replenished at all times;

(d) require foreign employers to post a cash bond in Philippine embassies/consulates to answer for the worker's claims against the employer; and

(e) forge bilateral agreements with the countries of destination of migrant workers to provide for on-site mechanisms for the equitable and expeditious resolution of labor claims of migrant workers.

In conclusion, the adoption of a policy on the joint and solidary liability of the private recruitment/placement agency with the foreign principal/employer is a positive development towards the protection of the rights and welfare of migrant workers and an important step in strengthening their access to justice. The Philippine experience in this regard however, illustrates that the intention of this policy can be frustrated by the existing systemic weaknesses of the judicial system. Nonetheless, important lessons can be drawn from the Philippine experience that may be considered by other labor-sending countries in protecting their own migrant workers.

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REcruitment reFORM.org

RecruitmentReform.org is an initiative of the civil society Open Working Group on Labour Migration and Recruitment. With members from civil society organizations across the world, the Open Working Group is committed to knowledge sharing and collective advocacy to reform migrant labour

recruitment practices globally. Building upon years of civil society advocacy on labour migration, human rights, and recruitment reform, the Open Working Group was initiated in May 2014 by Migrant Forum in Asia and the Global Coalition on Migration (GCM) together with other civil society organizations. The Working Group is coordinated by Migrant Forum in Asia and forms part of the Migration and Development Civil Society Network (MADE).

If you are interested in joining the *Open Working Group on Labour Migration & Recruitment*, please email us at mfa@mfasia.org to express your interest. Please check recruitmentreform.org/contribute-to-the-open-working-group/ to see how members can contribute to the working group!



Step It Up: Dignity, Rights, Development is the global campaign launched by the Migrant Forum in Asia network and affiliated civil society organizations, trade unions, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, and the International Labour Organization, which highlights the significance of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW / UN Migrant Workers Convention). 18 December 2015 marks the 25th anniversary of the adoption of the Convention that specifically guarantees the rights of all migrant workers and members of their families.

The 25th anniversary of the UN Migrant Workers Convention is the perfect occasion for the migrants' rights movement to magnify the unwavering advocacy for further ratification and implementation of this international human rights instrument, which looks after the human rights and labor rights of migrant workers and extends protection to members of their families.

Launched on 18 December 2014, the *Step It Up* campaign encourages all stakeholders – States parties, trade unions, employers' organizations, civil society organizations, migrant workers and members of their families to take part in this year long global initiative, beginning on 18 December 2014 to 18 December 2015. Activities relating to the promotion of the human rights of migrant workers and members of their families as well as engagements with States to ratify the CMW will find space here, in the online platform of the *Step It Up* campaign.

The online platform of the *Step It Up* campaign centers on the following themes: promotion of the ratification of the UN Migrant Workers Convention, children of migrant workers, particularly ending immigration detention of children, migrant domestic workers, contributions of migrant workers in the countries of origin and destination, and situations of forced labor, human trafficking and slavery-like practices that migrant workers experience. The campaign also links up with other ratification efforts, including the ILO Convention on Domestic Work No. 189 (C189), ILO Convention No. 97 (Migration for Employment Convention), ILO Convention No. 143 (Migrant Workers Convention) and the ILO Forced Labour Protocol. These themes and the ratification of international human rights and labor rights treaties directly impact the lives and the realization of the rights of all migrant workers and members of their families. The *Step It Up* campaign through the online platform strives to weave together these interrelated issues and underscores that migration is not an isolated matter but is tied to various dimensions of peoples' struggles for equality, dignity, decent work and human rights.

To know more about the campaign, please visit <http://cmw25.org>

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