

# A Study on Legislative Strategies for Ensuring Gender Equality on the Viet Nam's Law on Vietnamese Guest Workers

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## INTRODUCTION

Global trade liberalization has led to freer flows of labor worldwide, created new opportunities for human resource development of many countries, including a favorable labor movement between countries to meet their skills shortages, increase incomes, and improve new working experiences for their workers. For the Association of South-East Asian Nations (ASEAN) Member States, the year of 2015 marked a milestone when the ASEAN Economic Community (AEC) was established. It is suggested that Vietnam can reap huge benefits from integration into the AEC with golden-age population and booming economic growth.

Vietnam has long formulated development strategy on labor export with a view to address unemployment rate and advance skills of its citizens. The number of Vietnamese guest workers in 2017 was over 134,700, exceeding the target by 28.3%, including a growing proportion of female workers.<sup>1</sup> It is estimated that 540,000 Vietnamese guest workers are working overseas remitting more than 3 billion U.S. dollars annually.<sup>2</sup> Taiwan, Japan, South Korea, and Malaysia, among others, are major countries of destination for Vietnamese guest workers.<sup>3</sup> Between 1992 and 2010, the Republic of Korea (hereinafter referred to as Korea) has received more than 120,000 Vietnamese workers, the majority of whom working in manufacturing sectors, and some others in agriculture, fishing, construction, etc.<sup>4</sup> In 2017, more than 4,300 guest workers from Vietnam travelled to Korea for employment, and 10% of them were female workers.<sup>5</sup>

In general, the number of Vietnamese women migrating has increased steadily over the last decade, from less than 20% in the mid-1990s to 30-35% of the total outgoing labor force since 2010.<sup>6</sup> It could signify a positive, albeit slow, towards a more gender-balanced shift in Vietnam's labor export industry.

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<sup>1</sup> Vietnamnet, Labor Minister clarifies guest worker issues at NA session, *available at* <http://english.vietnamnet.vn/fms/government/201862/labour-minister-clarifies-guest-worker-issues-at-na-session.html> (visited Oct. 1, 2018).

<sup>2</sup> ILO, TRIANGLE in ASEAN Quarterly Briefing Note: Viet Nam April-June (2018); Vietnamet, *Id.*

<sup>3</sup> According to the estimates by Department of Overseas Labor, Ministry of Labor, Invalids and Social Affairs, the number of Vietnamese migrant workers in major destination countries as follows: Taiwan (China): 170,000, Japan: 60,000, Republic of Korea: 50,000, Malaysia: 50,000, Thailand: 50,000, *See Id. See also* Saigon Times, Vietnam workers sent to Taiwan, Japan rise sharply, *available at* <http://english.thesaigontimes.vn/58198/Vietnam-workers-sent-to-Taiwan-Japan-rise-sharply.html> (visited Oct.1, 2018).

<sup>4</sup> Futaba Ishizuka, International Labor Migration in Vietnam and the Impact of Receiving Countries' Policies, 8,10 (Discussion Paper, Institute of Developing Economies 2013).

<sup>5</sup> According to the Department of Overseas Labor, Ministry of Labor, Invalids and Social Affairs, the number of female guest workers is 427 among 4,393 migrant workers sent to South Korea in 2017 in total (November 2017).

<sup>6</sup> Ruth Bowen and Do Van Huong, Women in International Labor Migration from Vietnam: A Situation Analysis (DOLAB and UN Women 2012)

However, it should be noted that Vietnamese guest workers, particularly women, are still faced with various issues in all migratory stages in countries of origin, transit, and destination. Gender-related discriminatory practices, such as forced marriage, domestic violence, may drive women to leave their country of origin. Exorbitant informal fees and limited access to information on migration are two among numerous difficulties faced by guest workers. Women's situation is worsened given their financial dependency and vulnerability in Vietnam's social construction. In countries of destination, Vietnamese women are more likely to be employed for factory work, domestic work and caregiving, in which gender-based discrimination and stereotypes are pervasive. Such jobs are accorded low status and underpaid and especially are not under labor protection in certain countries and territories. Further, women often face violations of their right to maternal protection during their time working abroad under contract.<sup>7</sup>

Vietnam has demonstrated a strong commitment to promoting gender equality in all aspects. This is evidenced in Vietnam's ratifications of various human rights treaties, including the Convention on the Elimination of all Forms of Discrimination Against Women, International Labor Organization (ILO) Equal Remuneration Convention and Discrimination (Employment and Occupation) Convention. In 2006, the National Assembly of Vietnam adopted the Law on Gender Equality<sup>8</sup> and the 2006 Law on Vietnamese Guest Workers No.72 (hereinafter the Law No. 72), which governs activities of sending Vietnamese workers abroad under contract as well as rights and obligations of those guest workers.<sup>9</sup> One of the fundamental statutory principles on gender equality is to ensure the mainstreaming of gender equality issue in law formulation and implementation.

However, since its implementation, the Law No.72 and related by-laws have shown inadequacies in addressing quick changing practical issues on labor export. There is a lack of focus on female migrant workers in Vietnam's legal documents. They may include negative family perception towards females working abroad, discrimination based on gender during the recruitment process and in workplaces, psychological, and physical abuse by recruiters and employers, labor exploitation, pregnancy discrimination as well as difficulties in re-integration and access to public services and employment when they return home.<sup>10</sup> Indeed, the Committee on the Elimination of

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<sup>7</sup> Institute of Labor Science and Social Affairs and UN Women, National Report on Social Protection for Women and Girls in Vietnam (2013).

<sup>8</sup> Law on Gender Equality (Law No.73/2006/QH11).

<sup>9</sup> Law on Vietnamese Guest Workers (No. 72/2006/QH11).

<sup>10</sup> As for pregnancy discrimination against migrant female workers. See Fair Labor Association (FLA), Triple Discrimination: Woman, Pregnant, and Migrant, *available at* [http://www.fairlabor.org/sites/default/files/documents/reports/triple\\_discrimination\\_woman\\_pregnant\\_and\\_migrant\\_march\\_2018.pdf](http://www.fairlabor.org/sites/default/files/documents/reports/triple_discrimination_woman_pregnant_and_migrant_march_2018.pdf) (visited Oct. 5, 2018).

All Forms of Discrimination Against Women (CEDAW) in 2015 stated in its recommendation to Vietnamese government that female migrant workers are at a high risk of exploitation, often victimized by fraudulent labor export service enterprises (*hereinafter referred to as service enterprises*) and brokers.

Therefore, it is in interest of this research paper to revise overarching legal framework for labor export of Vietnam, including but not limited to the Law No.72, with a view to ensure gender sensitivity and responsiveness to the specific needs of Vietnamese female migrant workers.



## METHODOLOGY

This research paper is based on a combination of desk review and interviews with key informants and focus groups. The selection of interviewees and participants of focus groups from certain ministries and public departments was on a sampling basis in order to fill the gap in the literature regarding gender equality in labor migration.

### *Desk review*

The desk review analyses how international standards on the protection of migrant worker's rights and the promotion of gender equality could be integrated into Vietnam's domestic law. It also analyses the available research on Vietnamese workers working abroad as well as information collected from the mass media in order to gather appropriate evidence on the needs and aspirations of workers working abroad, especially female workers.

### *Interviews*

Interviews were convened at the Department of Overseas Labor, Ministry of Labor, Invalids and Social Affairs; United Nations Entity for Gender Equality and the Empowerment of Women; Department of Labor, Invalids and Social Affairs in provinces of Vinh Phuc, Thai Binh and Nghe An. All interviews with female workers those worked in South Korea, are taken face to face method.

### *Focus group discussions (FGD)*

The FDGs were conducted through two technical workshops in Hanoi to learn more about key issues emerging from the available literature and to reconfirm emerging issues through this review and analysis.

The participants consisted of: (i) officials from state management agencies for the implementation of Vietnam's laws on labor migration; (ii) representatives from trade unions, including the Vietnamese General Confederation of Labor (VGCL) and branch trade unions; (iii) researchers from research institutes in Hanoi and other provinces; (iv) representatives from other organizations such as the Vietnamese Women's Union, the International Labor Organization and the International Organization for Migration in Hanoi.

The FDG covered the following topics: (i) awareness of agencies/organizations on gender and gender equality, which would be served as a ground for the assessment and revision of Vietnam's relevant laws; (ii) the advantages and disadvantages of agencies/organizations in sending

male or female migrant workers abroad; and (iii) their suggestions for the revision of relevant laws from the perspective of protecting migrant worker's rights, especially women. Comments and suggestions by participants were taken into account to make final recommendations more feasible and practical.

### ***Limitations and research gaps***

The research was faced with the lack of gender-aggregated information and statistical data on migrant workers, and in particular, workers working abroad under contracts. Therefore, the assessment of relevant laws and policies is qualitative, so are the related recommendations. In addition, the returnees live in different areas, many of them have moved to other regions, so that make the empirical study last for long time.

# Chapter 1: International standards on gender equality in labor migration

## 1.1. International labor migration and gender equality

Human migration is an age-old phenomenon that sets forth not only opportunities but also challenges to States and people. In 2015, there were 243.7 million international migrants in the world, about 3% of the global population (compared with 172.7 million in 2000); 48.2% of migrants globally are women (compared to 49.1% in 2000).<sup>11</sup> The main driver of migration continues to be employment related.<sup>12</sup> 72% of international migrants in 2015 were of working age (from 15 years).<sup>13</sup> Of these, there were 66.6 million women migrant workers.<sup>14</sup>

It is crucial to contextualize the relationship between gender and migration. Although both men and women migrate, migration is not a gender-neutral phenomenon. The position of women migrants may differ from men's in respects of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof. A variety of factors, such as globalization, poverty, gendered cultural practices, and gender-based violence in countries of origin, natural disasters, armed conflicts, add up to the worldwide feminization of poverty and labor migration. Beside, sexual violence may also impact migrant women and young girls along migration routes. On top of that, women are significantly at risk of being recruited for forced labor in the sex trade or as domestic or caregiving sector in which they are faced with more risks of being abused in the country of destination.

On the other hand, migration can contribute to the empowerment of women. First, women are able to access to education and careers that might not be available in their countries of origin. Empirical study shows that, upon their return, women can play a more active role in the dissemination of behavioural norms and practices that improve the position of women in their society.<sup>15</sup> Second, women guest workers are more likely to earn better incomes, enjoy greater degrees of autonomy and freedom, and exercise new leadership roles.<sup>16</sup> Third, a great number of

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<sup>11</sup> UN Department of Economic and Social Affairs, Trends in international migration, 1 (UN 2015).

<sup>12</sup> International Labour Office - Geneva, World of Work Report: Developing with jobs, 181 (International Labour Organization 2014)

<sup>13</sup> United Nations Department of Economic and Social Affairs, *supra* at 1.

<sup>14</sup> International Labour Office - Geneva, Global estimates on migrant workers - Results and methodology, Special focus on migrant domestic workers, 5-6 (International Labour Organization 2015).

<sup>15</sup> Suzan van der Pluijm-Luscuere, The Effects of Female Return Migration on Gender Equality Within the Vietnamese Household, MA Thesis (Utrecht University, 2017).

<sup>16</sup> See Ruth Bowen and Do Van Huong, *supra*; The UN Migration Agency, Migration in the 2030 Agenda, 64 (International Organization of Migration 2017).



women migrant workers provide steady flows of remittances to their countries of origin. The act of sending money to family back home *per se* can open up a window of opportunity for women to redefine their role of dependency prior to departure for employment, acquiring a new capital of influence and authority.<sup>17</sup>

Gender equality has remained high profile on international, regional and national policy agendas. The term refers to the enjoyment of equal rights, opportunities, responsibilities, and treatment by men and women of all ages and gender identities in all spheres of life and work.<sup>18</sup> The United Nations General Assembly sets a specific time frame to achieve gender equality through its Sustainable Development Goal (SDG) No. 5: achieve gender equality and empower all women and girls by 2030.<sup>19</sup> Gender equality is not only stand-alone SDG but also closely related to achieving other SDGs. It is invoked that we must integrate gender across all the SDGs and include gender considerations in all sustainable development work including law and policy development in order to effectively work towards achieving SDGs by 2030. Gender equality is indisputably a fundamental human right, yet the fact that gender inequality is rampant in almost all regions in the world, should boggle every policy-maker's mind, considering that women and girls still suffer disproportionately from discriminatory practices and violence worldwide.

In the field of labor migration, it is usually the case that women migrant workers are faced with two-fold discrimination, firstly as women, and secondly as immigrants, let alone differences in language, nationality, ethnicity, age, and other status. This situation leads to the fact that employment rates of women migrant workers are below those of native-born women and men and foreign-born men.<sup>20</sup> SDG5 reminds policymakers and practitioners how important gender-sensitive approaches are to achieving migration governance. The integration of a gender perspective is, therefore, key to the analysis of the position of women migrants and the development of policies to counter discriminatory exploitation and abuse.

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<sup>17</sup> *Id.* at 65.

<sup>18</sup> There is a need to differentiate gender from sex, which refers to the biological differences between women and men. Gender is not about women only, but about both women and men. Each group of sex has dissimilar life experiences related to roles, attributes, and behaviors that societies deem socially appropriate for them. Gender refers to the socially constructed differences and relations between men and women that change over time and may vary widely within and across cultures. *See more* ILO - Bangkok, Gender Equality in Labor Migration Law, Policy and Management - GEM Toolkit, 13-15 (International Labour Organization 2016).

<sup>19</sup> UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution A/Res/70/1 (2015). 17 Sustainable Development Goals (SDGs) is a core of the 2030 Agenda for Sustainable Development which was adopted by all United Nations Member States in the UN General Assembly in 2015.

<sup>20</sup> OECD, The Pursuit of Gender Equality: An Uphill Battle, 247-60 (OECD Publishing 2017).

## **1.2. Forms of discrimination facing women migrant workers**

For the purposes of this chapter, migrant worker is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”<sup>21</sup> The scope of this definition extends to “frontier worker”, “seasonal worker”, “project-tied worker”, “itinerant worker”, “seafarer” and “self-employed worker”, which have been excluded from other international standards developed in the past, including ILO Conventions specific to the rights of migrant workers.

Gender (in)equality runs as a common thread through all phases of migration process, in countries of origin, countries of transit, and countries of destination. It is worthwhile to look more specifically at issues faced by women migrant workers in such circumstances in order to shine a light on states’ international obligations accordingly.

### ***1.2.1. In countries of origin before departure and upon return***

Gender-related discrimination in relation to migration in countries of origin can be categorized into two groups. First, gender-related discriminatory practices may push women to migrate as they pursue liberties they are deprived of. For instance, forced marriage, dowry deaths, domestic violence or female circumcision may drive women to leave their country of origin. Beside, many studies find that women are more likely to suffer poverty than their male counterparts; this phenomenon is normally conceptualized as the feminization of poverty.<sup>22</sup> Poverty and unemployment force many women into forced labor, prostitution, sexual exploitation, domestic labor, which are potential sources of danger to them. Another limiting factor is that restricted access to education leaves young girls dependent on male relatives or acquaintances and forced to turn to them for important life choices. Conversely, research indicates that discriminatory social institutions have limited effects on male migration.<sup>23</sup>

Second, discrimination may undermine women’s ability to freely and independently determine whether they want to migrate or not. This type of discrimination takes place in shapes and sizes. Many countries impose bans or restrictions on women’s out-migration based on sex or

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<sup>21</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, §2(1).

<sup>22</sup> Lynne Casper et. al., *The Gender Poverty Gap: What Can We Learn From Other Countries?*, 59 *American Sociological Rev*594–605 (1994); Robert Wright, *Women and Poverty in Industrialized Countries*, 5 *J. of Income Distribution* 31–46 (1995); Steven Pressman, *Explaining the Gender Poverty Gap in Developed and Transitional Economies*, 36 *J. of Eco. Issues* 17–40 (2002); Martha Chen et. al., *Progress of the World’s Women: 2005 Women, Work and Poverty*, (UN Women 2005)

<sup>23</sup> CEDAW Committee, *General Recommendation No. 26 on Women Migrant Workers*, CEDAW/C/2009/WP.1/R (2008).

sex combined with age, marital status, pregnancy, occupation-specific restrictions or other requirements. For example, Article 29 of the Constitution of the United Arab Emirates guarantees all citizens, whether men and women, freedom of movement and residence within the limits of the law. However, women must have the authorization of their male guardians to travel abroad. An Emirati man has the right to seize the passports of his wife and daughters and can even request that the Immigration authorities prohibit their departure out of the UAE.<sup>24</sup> Under Article 71 of the Personal Status Code of the UAE, women who leave their husbands can be ordered to return to the marital home.

Women are more likely to be subject to financial, physical, sexual or psychological abuse during the pre-departure course. Exorbitant fees charged by intermediary agents may cause women, who generally have fewer properties than men, to suffer greater hardships, resulting in increasing dependency. Further, limited access to education, training, and reliable information on migration leave women more vulnerable in relation to employers.

Upon their return, some countries require women migrant workers to undergo mandatory HIV/AIDS testing or moral “reintegration”, which is, in CEDAW’s standing point, a violation of the principle of substantive equality.<sup>25</sup> In many cases, women find disintegration of the family, whereas men are more likely to return to a stable family situation. It is also the case that women returnees lack adequate gender-responsive employment advice and skills development.<sup>26</sup>

### ***1.2.2. In countries of transit***

As the CEDAW Committee has pointed out in General Recommendation, many hurdles may stand in the way of women migrant workers when transiting through foreign countries.<sup>27</sup> Women face more risks of sexual and physical abuses by agents and escorts when travelling in countries of transit. Further, they may be abandoned if the agent encounters problems in transit or upon arrival in the country of destination.

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<sup>24</sup> International Federation for Human Rights, Women’s Rights in the United Arab Emirates (Note submitted to the 45th session of the CEDAW Committee on the occasion of its first examination of the UAE 2010), available at [https://www.fidh.org/IMG/pdf/UAE\\_summaryreport\\_for\\_CEDAW.pdf](https://www.fidh.org/IMG/pdf/UAE_summaryreport_for_CEDAW.pdf) (visited Oct. 4, 2018).

<sup>25</sup> CEDAW Committee, *supra*.

<sup>26</sup> UNWomen and DOLAB, *supra*.

<sup>27</sup> CEDAW Committee, *supra*.

### ***1.2.3. In countries of destination***

Reaching destination does not necessarily guarantee safety for women migrant workers; in many cases, it is quite the other way around. Female migrant workers may encounter multiple forms of *de jure* and *de facto* discrimination. Women are restricted or even banned from working in particular sectors. Whatever the situation, women migrant workers face additional hazards compared to men because of gender-insensitive environments that do not allow mobility for women, and that give them little access to relevant information about their rights and entitlements.

Because of discrimination on the basis of sex and gender, women migrant workers may experience non-payment of wages, underpayment, or transfer of wages into accounts that are not accessible to them. Workers in female-dominated sectors may not be paid for weekly days of rest or national holidays. Or, if they are heavily burdened by debt from recruitment fees, women migrant workers may not be able to leave abusive situations since they have no other way to repay those debts.

Women migrant workers often suffer from inequalities that may have negative impacts on their health. They may be unable to access health services, including reproductive health services, because insurance or national health schemes are not available to them, or they may have to pay unaffordable fees. Discrimination may be especially acute in relation to pregnancy. Women migrant workers are required to undergo mandatory pregnancy tests; if the result is positive, they may be faced with numerous risks of deportation, irregular immigration status, coercive abortion or lack of access to safe reproductive health and abortion services; absence of, or inadequate, maternity leave and benefits and absence of affordable obstetric care, resulting in serious health risks.

Women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where women predominate. Domestic workers are particularly vulnerable to physical and sexual assault, food and sleep deprivation and cruelty by their employers. Sexual harassment of women migrant workers in other work environments, such as on farms or in the industrial sector, is a problem worldwide.<sup>28</sup>

Gendered perception of appropriate work for women results in job opportunities that reflect familial and service functions ascribed to women or that are in the informal sector. Hence, women-dominated sectors are, in particular, domestic work or certain forms of entertainment. However, such occupations may not be covered within legal definition of work, thus excluding women from requisite legal protections.<sup>29</sup> Women who find themselves in that situation often have to work for

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<sup>28</sup> UN Secretary-General, Report on Violence Against Women Migrant Workers, E/CN.4/1998/74/Add.1 (1998).

<sup>29</sup> CEDAW Committee, Concluding Observations: UAE, CEDAW/C/ARE/CO/2-3, 10-11 (2015).

long hours without overtime payment or a guarantee of minimum wage, have trouble with access to labor courts, and run a risk of facing charges of “absconding” if they want to change employer.

### **1.3. International standards on gender equality and labor migration**

At the heart of international human rights law lie the principles of equality and non-discrimination. They affirm that every human being has fundamental rights. Equality and non-discrimination are fundamental concepts under international human rights law which are considered two sides of the same coin.<sup>30</sup> The principle of non-discrimination is affirmed by all the core international human rights instruments and by the Charter of the United Nations. According to the Universal Declaration of Human Rights, “all human beings are born free and equal in dignity and rights” (Art. 1) and “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind” (Art. 2),<sup>31</sup> which is emphasized in Article 2 of the International Covenant on Civil and Political Rights of 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) as Common Articles 2 under the International Bill of Human Rights.<sup>32</sup> Other international agreements sometimes contain ‘equality’ provisions that inherently prohibit certain kinds of discrimination. The duty to ‘ensure the equal rights of men and women’ logically prohibits state-imposed sex discrimination.<sup>33</sup> Moreover, the obligations in the United Nations Convention on Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) are often framed in terms of ‘same rights’ and ‘equal treatment’,<sup>34</sup> thus, while the treaty is primarily aimed at eliminating discrimination against women, many of its provisions protect males just as much as they protect females, a fact that is often overlooked.

Speaking of equality, no one believes that all human beings should be treated in the exact same way. The Secretary General’s study, *The Main Types and Causes of Discrimination*, addressed the misunderstanding about equal treatment. The bedrock requirement is ‘equality in

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<sup>30</sup> A. Lester and S. Joseph, *Obligations of Non-Discrimination*, 565 (D. Harris and S. Joseph ed., *The International Covenant on Civil and Political Rights and the United Kingdom*, Oxford Clarendon Press 1995); W. McKean, *Equality and Discrimination under International Law*, 288 (Oxford Clarendon Press 1983).

<sup>31</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> (last visited 25 November 2018).

<sup>32</sup> This includes Article 2 of the Universal Declaration of Human rights of 1948, Article 2 of the International Covenant on Civil and Political Rights of 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).

<sup>33</sup> ICCPR §3; ICESCR §3.

<sup>34</sup> *E.g.*, CEDAW §11(1) and §11(1)(d).

dignity’, rather than ‘material equality’.<sup>35</sup> In particular, gender equality should aim to compensate for women’s historical and social disadvantages that prevent women and men from otherwise operating on a level playing field.<sup>36</sup>

The right to equality and non-discrimination goes hand in hand with the other rights in the agreement of which it is a part: it is seen as an umbrella right that adds protection to sectoral rights.<sup>37</sup> Many scholars recognize the interconnection, even though they normally use other terminology, like ‘accessory right’ and ‘substantive right’, respectively. However, it is suggested that ‘accessory’ implicates inferiority, and ‘substantive right’ is best reserved as a contrast to ‘procedural right’.<sup>38</sup> Umbrella right, on the other hand, indicates that Article 2(1) attaches to, or forms a part of, the other rights, each of which pertains to some sphere or sector of life, like education, health, and self-expression.

To put it in the context of labor migration, the right to equality and non-discrimination, as an umbrella right, forms a part of the other rights enjoyed by both sexes in the pre-, during, and post-migration process.

### ***1.3.1. International frameworks addressing gender equality and labor migration***

International law renders multi-layered protection to migrant workers. It is widely recognized that while borders and migration matters are fully under States’ control, there are international obligations, either treaty-based or customary, to which States shall adhere. This includes but not limited to the right to life, the right to personal liberty and security, the right to be free from torture, degrading and inhumane treatment, and the right to be free from discrimination on the basis of sex, race, nationality, language, religion or other status. Such fundamental rights are enshrined in the Universal Declaration of Human Rights of 1948<sup>39</sup>, the International Covenant on Civil and Political Rights of 1966 (ICCPR)<sup>40</sup>, the International Covenant on Economic, Social and

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<sup>35</sup> United Nations Secretary-General, *The Main Types and Causes of Discrimination*, UN Doc. E/CN.4/Sub.2/40/Rev.1, 14-30 (1949).

<sup>36</sup> UN Population Fund, *Frequently asked questions about gender equality*, available at <https://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality>, (visited Oct. 4, 2018).

<sup>37</sup> Bruce Abramson, *Article 2: The Right of Non-Discrimination*, 7 (Andre Alen et. al. ed., *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publisher 2008).

<sup>38</sup> *Id.*

<sup>39</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III),

<sup>40</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, at 171.

Cultural Rights of 1966 (ICESCR)<sup>41</sup>, and the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 (CAT)<sup>42</sup>.

For example, ICESCR guarantees to “everyone” the rights it contains, including the rights to work, to just and favorable conditions of work, to trade union freedoms, to social security, to an adequate standard of living, to health, and to education. Articles 6, 7 and 8 of the ICESCR guarantee respectively the right to work, the rights of workers to just and favorable conditions in work, and to form and join trade unions.<sup>43</sup> Also, article 8 of the ICCPR prohibits forced labor and article 22 guarantees trade union freedoms. It should be noted that International human rights law has increasingly developed to recognise the need for a gender perspective, including on torture and other ill-treatment. The CAT has increasingly addressed violence against women at the hands of private actors within the scope of its work. The CAT published General Comment No. 2 in January 2008 which makes clear the applicability of the Convention to non-official or private conduct where the State acquiesces or fails to exercise due diligence and it eliminates long-standing discrimination in the norm against torture by clearly situating gender based violence and abuse. In 2016, then Special Rapporteur on torture Juan Méndez repeated in his report dealing with gender perspectives on torture and other cruel, inhuman and degrading treatment or punishment (UN Doc. A/HRC/31/57).

Other two key human rights instruments have direct relevance to gender equality and labor migration, namely the United Nations Convention on Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW)<sup>44</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (ICRMW).

CEDAW as a gender-specific instrument, acknowledging the shortcomings of other human rights regimes, is seen by optimists and constructivist feminist legal scholars as the equality and non-discrimination regime with the greatest potential to ensure substantive gender equality for

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<sup>41</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, at 3.

<sup>42</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, at 85.

<sup>43</sup> The Committee on Economic, Social and Cultural Rights has defined discrimination as: “any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.” General comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 7.

<sup>44</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 26 on women migrant workers*, 5 December 2008, CEDAW/C/2009/WP.1/R.

women.<sup>45</sup> CEDAW requires States Parties to take all necessary steps to embody the principle of the equality between men and women, and eliminate discrimination against women by any actors.<sup>46</sup> Although the Convention does not have a specific article on migration, women guest workers are entitled to protection from discrimination on the basis of CEDAW's principles of substantive equality, non-discrimination and state obligation. Furthermore, CEDAW issued the General Recommendation No. 26 on Migrant Women Workers in 2008 aiming to elaborate the circumstances that contribute to the specific vulnerability of many women guest workers and their experiences of sex- and gender-based discrimination as a cause and consequence of the violations of their human rights.<sup>47</sup> The General Recommendation No.26 enriches the analysis of migration through a critical lens of gender and sheds light on states' obligations to ensure that women migrant workers are able to exercise and enjoy *de jure* and *de facto* rights on an equal basis with men in all fields. It also should be noted that they issue General Recommendations No. 19 on Violence against Women in 1992 and the 2017 General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19, which broadened the accentuation of human rights law to issues of concern to women and girls.

For the sake of migrant workers, the ICRMW acknowledges the vulnerability of migrant workers in countries of origin and employment, and provides international framework for the protection of the rights of migrant workers. With regard to employment, all migrant workers are entitled to treatment no less favourable than that applying to nationals in respects of pay and working conditions, such as working hours, overtime, weekly rest and holidays with pay, occupational safety and health, and termination of the employment relationship. All migrant workers enjoy the right to trade union and activities thereof, to receive emergency medical care, and to transfer their earnings out of the country upon the termination of their stay.

In addition to international human rights treaties, the ILO has established another layer of protection of the rights of migrant workers within its framework. ILO instruments provide the minimum standards that are agreed by governments, employers' and workers' organizations within the tripartite governance structure of the ILO. These standards are prescribed in the forms of ILO Conventions or Protocols with legally binding force, and Recommendations providing guidelines on how to implement the former. The standards will be examined further in the next section.

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<sup>45</sup> Anne Hellum, Henriette S. Aasen, *Women's Human Rights – CEDAW in International, Regional and National Law*, 1-24 (Cambridge University Press 2013).

<sup>46</sup> CEDAW §2.

<sup>47</sup> CEDAW Committee, *supra*.



### ***1.3.2. Key international standards on protection of migrants workers***

In addition to the UN human rights treaties, migrant workers derive protections from other international instruments, including the core ILO Conventions. The core ILO Conventions are the Forced Labour Convention, 1930 (C29), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87), the Right to Organise and Collective Bargaining Convention, 1949 (C98), the Equal Remuneration Convention, 1951 (C100), the Abolition of Forced Labour Convention, 1957 (C105), the Discrimination (Employment and Occupation) Convention, 1958 (C111), the Minimum Age Convention, 1973 (C138) and the Worst Forms of Child Labour Convention, 1999 (C182).

Several ILO and UN Conventions are specifically relevant to migrant workers, particularly the Migration for Employment Convention, 1949 (C97), the Migrant Workers Convention, 1975 (C143), the Private Employment Agencies Convention, 1997 (C181), the Domestic Workers Convention, 2011 (C189). Here are several rights protected under those instruments.

➤ Decent work

“Decent work” is a highly contextual concept that was first introduced in 1999, in the Report of the Director General to the International Labor Conference meeting in its 87th Session.<sup>48</sup> The report stated that the primary goal of ILO today is to promote opportunities for women and men to obtain decent and productive work, within conditions that provide them freedom, equality, security and human dignity.

The notion of decent work emphasizes four elements: employment creation, social security, workers’ rights and social dialogue. The component of employment covers the full range of work including both formal and informal sector work of all kinds, self-employed and home workers, opportunities for work, remuneration, and working conditions. The social security component of decent work is intended to protect against the risk of losing income.

While the first two components of decent work refer to opportunities, remuneration, security and conditions of work, the last two emphasize the “social relations of workers”. Workers’ rights are concerned if the work assures the fundamental rights of workers including abolition of forced labor, child labor, discrimination and exploitation at work. The component of social dialogue brings in yet another important aspect with regard to work, participation and freedom of association, freedom of speech for workers or the ability of the workers to present their views, to facilitate

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<sup>48</sup> ILO Director-General, Report on Decent Work, 3 (Geneva 1999).

discussions and to negotiate in work-related matters. It is the means by which rights are defended, employment promoted and work secured.

➤ Fundamental principles and rights at work

All core ILO labor rights are enshrined in the ILO Declaration on Fundamental Principles and Rights at Work of 1998 concerning:

- Freedom of association and the right to collective bargaining;
- The elimination of all forms of forced or compulsory labor;
- The effective abolition of child labor; and
- Freedom from discrimination on the ground of race, colour, sex, religion, social origin, etc.

These fundamental principles and rights at work are recognized universally and shall be respected even in ILO States parties whose governments have not ratified the Conventions concerned.<sup>49</sup> The principles and rights aim to promote sustainable development and prevent a downward spiral in labor conditions. It is noted that member States must respect the fundamental rights at work for all migrant workers, including irregular migrants, in particular those who are embodied in the ILO fundamental Conventions and recognized in universal and regional human rights instruments.<sup>50</sup>

On this basis, ILO has incorporated its objectives into eight fundamental conventions stated above.

➤ Labor Migration-specific Regulations

The ILO has approved two major conventions specifically on the rights of migrant workers:

- Migration for Employment Convention of 1949 (C97)
- Migrant Workers (Supplementary Provisions) Convention of 1975 (C143).

These conventions are supplemented by two ILO recommendations that provide further guidance on how the rights of migrant workers can be protected in practice, namely Migration for Employment Recommendation (Revised) of 1949 (R86), and Migrant Workers Recommendation of 1975 (R151).

The C97 Convention deals with international migration for employment and focuses on the recruitment of migrants and conditions of work in the receiving country. Its major provisions

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<sup>49</sup> ILO-Bangkok, GEM Toolkit, *supra*.

<sup>50</sup> International Labour Office - Geneva, Promoting Fair Migration: General Survey Concerning the Migrant Worker Instruments, 98 (Report of the Committee of Experts on the Application of Conventions and Recommendations 2016).

include non-discrimination in wages, union activities and benefits and social security (article 6). The Annexes deal with private and public recruitment, stressing that there should be a no-fee public option, the need to provide contracts for prospective migrant workers and that “any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties” (Annex II, article 13).

The C143 Convention is the very first treaty to explicitly extend protection to the rights of migrants in irregular situations. It addresses in detail issues in relation to “migrations in abusive conditions” and the “promotion of equality of opportunity and treatment of migrant workers”. States parties are required to “seek to determine whether there are illegally employed migrant workers on its territory” and sanction traffickers for the illegal employment of migrant workers.<sup>51</sup> The Convention also requires states parties to guarantee equality of opportunity and treatment for documented migrant workers in terms of employment and occupation, social security, trade unions, cultural rights and individual and collective freedoms.<sup>52</sup>

➤ Forced labor

The Protocol of 2014 (PO29) to the Forced Labor Convention of 1930 is the most recent instrument, recognizes that migrants have a higher risk of becoming victims of forced or compulsory labor. Article 2 of the Protocol provides the protection for migrant workers from possible abusive and fraudulent practices during the recruitment and placement process. Further, migrant victims of forced or compulsory labor should have access to appropriate and effective remedies, such as compensation.

➤ Trade union rights

The right to organize should be guaranteed to all workers, whether or not they have a residence permit, without any distinction based on nationality or discrimination of any kind. This means that all migrant workers should be entitled to form, organize trade union and access to assistance thereof, for example, in the case of labor disputes. It is noted that national legislation remains unclear as to whether migrant workers irrespective of their status, can form and join trade unions in some countries.<sup>53</sup> For example, in Hong Kong (China) only migrant workers who are “ordinarily residents” (that is, are lawfully in the country and have residence status) can form and join trade unions.

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<sup>51</sup> ILO C143 Convention §3, 5.

<sup>52</sup> ILO C143 Convention §10.

<sup>53</sup> International Labour Office - Geneva, *supra* at 94-95.

➤ Access to information

Recruitment agencies can be of great help to migrants in terms of simplification of paperwork, job placement, and preparatory services. However, as indicated in section 1.2, the practices of such intermediaries have been subjected to serious criticisms. High placement fees, contracting workers under false conditions, physical abuse and sexual exploitation of women migrant workers are some of main concerns. From gender perspective, women migrants are more likely to be dependent on services provided by recruitment agencies, thus are more affected than men by such abuse of employment agencies in the recruitment and placement processes.<sup>54</sup>

Article 8 of ILO Convention No. 181 (C181) of 1997 on Private Employment Agencies requires States parties to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. Bilateral agreements between sending and receiving states are needed to prevent abuses and fraudulent practices in recruitment, placement and employment.<sup>55</sup> In its Recommendation (R188), private employment agencies are recommended to 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.<sup>56</sup>

Articles 2 and 3 of the ILO C97 Convention requires States parties to maintain an adequate and free information service to assist migrants for employment, and take all appropriate steps against misleading propaganda relating to emigration and immigration. Further, States parties are required to take all appropriate measures to disseminate information on rights of migrant workers and the conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State. Such adequate information shall be provided free of charge upon request to migrant workers

Article 37 of the ICRMW also provides that the State of origin or the State of employment is required to provide migrant workers, prior to their departure or at the latest at the time of their admission to the State of employment, full information relating to all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage.

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<sup>54</sup> Organization for Security and Co-operation in Europe (OSCE), Guide on Gender Sensitivity Labor Migration Policies (2009)

<sup>55</sup> ILO C181 Convention §8(2).

<sup>56</sup> ILO R188 Recommendation, para. 8.

➤ Informal costs

In general, international standards on informal costs borne by migrant workers are obscure and ambiguous. ILO C97 Convention provides that information service to assist migrants for employment shall be free. CEDAW Committee also emphasizes that States of origin must deliver or facilitate free or affordable gender-based and rights-based pre-departure information and training programmes.<sup>57</sup>

ILO Convention No. 181 (C181) of 1997 on Private Employment Agencies prohibits private employment agencies from charging workers directly or indirectly for their services. However, since employment agencies are more likely to charge migrants a fee for their services, governments should identify a reasonable rate commensurate with the earnings of female migrant workers.<sup>58</sup>

➤ Equal remuneration for work of equal value

In practice, the fundamental rights of migrant workers are often curtailed on the basis of sex and origin. For example, migrant workers must enjoy equal pay for work of equal value, but migrant workers are often underpaid much lower than the minimum wage guaranteed to national counterparts, and women migrant workers often receive even lower wages than men migrant workers.

The ILO Equal Remuneration Convention of 1951 (C100) and the Discrimination (Employment and Occupation) Convention of 1958 (C111) provide the fundamental standards for the promotion of equality in all workplaces. Under these two Conventions, both nationals and non-nationals enjoy protection against discrimination on the seven grounds explicitly prohibited, including sex-based discrimination. According to the C111 Convention, it is prohibited to pay migrant and national domestic workers – a profession traditionally dominated by women – substantively less than male nationals working in jobs of comparable value. In same vein, irregular or undocumented migrant workers should be entitled to equal treatment in terms of rights arising out of past employment, such as remuneration, social security, and other benefits.<sup>59</sup> The Government of the Republic of Korea, for example, indicated that regardless of the status of migrant workers who leave the country, any foreign worker who provided labor and is entitled to wages had the right to receive unclaimed wages for the service period.<sup>60</sup>

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<sup>57</sup> CEDAW Committee, General Recommendation No. 26, at 9.

<sup>58</sup> OSCE, Gender and Labor Migration Trainer's Manual, 81 (OSCE 2011).

<sup>59</sup> DWT for East and South-East Asia and the Pacific Regional Office for Asia and the Pacific, Equality and Non-Discrimination at Work in East and Southeast Asia: Guide (International Labour Organization 2011).

<sup>60</sup> International Labour Office – Geneva, *supra*.

In this respect, article 7 of the ICESCR provides the right of everyone to the enjoyment of just and favourable conditions of work, including fair wages and equal remuneration for work of equal value without distinction of any kind. The Committee on Economic, Social and Cultural Rights (CESCR Committee) produced General Comment No. 23 (2016) for further elaboration of this provision. The extent to which equality is being achieved requires an objective assessment of whether the work is of equal value and whether the remuneration received is equal. Objective job assessment is key to avoid indirect discrimination when determining rates of remuneration and comparing the relative value of different jobs. For example, a distinction between full-time and part-time work, such as the payment of bonuses only to full-time employees, might indirectly discriminate against women employees if a higher percentage of women are part-time workers.<sup>61</sup> The evaluation should be made based on certain factors, such as skills, responsibilities and effort required by the worker, as well as working conditions. It could be based on a comparison of rates of remuneration across organizations, enterprises and professions.<sup>62</sup>

➤ Working time and overtime limits

Working time policies should facilitate both men and women to reconcile work and family responsibilities in order to make great contribution to achieving gender equality at work. ILO Conventions No. 1 and No. 30, though varying slightly in scope and application, were implemented to reduce the negative effects of excessive hours on workers' lives. The restrictions on excessive weekly hours were enhanced through the ILO Forty Hour Week Convention, 1935 (No. 47), which established the possibility of the 40-hour week in such a manner that the standard of living was not reduced as a consequence.

Overtime refers to all hours worked in excess of normal hours, unless they are taken into account in fixing remuneration in accordance with custom, as defined in the ILO Reduction of Hours of Work Recommendation, 1962 (No. 116). The ILO standards addressing weekly working hours (Convention No. 1 and No. 30) have provisions which address overtime remuneration. According to Article 6(2) of ILO Convention No. 1 and Article 7(4) of ILO Convention No. 30, the rate of pay for the additional hours of work permitted under paragraph 2(b), (c), and (d) shall not be less than one and one-quarter times the regular rate. This consideration is important to ensure workers are properly compensated for overtime work and to limit the dependency on its usage by enterprises.

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<sup>61</sup> ILO Part-Time Work Convention of 1994, §5.

<sup>62</sup> ICESCR Committee, General Comment 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the ICESCR), E/C.12/GC/23, 4 (2016).

The ILO Holidays with Pay (Revised), 1970 (No. 132) Convention establishes the right of every person to whom it applies to an annual paid leave of at least 3 working weeks for every one year of service. The time at which the holiday is taken is determined by the employer after consultation with the employed person concerned. Workers must receive (in advance of this leave) at least their normal or average remuneration for the corresponding period.

➤ Workplace-related violence against women migrant workers

Women migrant workers are vulnerable to violence during all phases of the migration process. The more precarious their legal status and the greater dependency on employer, the more vulnerable women migrant workers are. In some cases, employers put them in isolation, confiscate their passports, or evoke fear in them that any complaint will result in job loss or deportation.

CEDAW Committee resolutely condemned gender-based violence against women, including sexual harassment, wherever it occurs. It is considered as a form of discrimination that seriously impairs or nullifies women's ability to enjoy rights and freedoms on a basis of equality with men.<sup>63</sup> It violates the right to liberty and security of person protected under Article 9 of the ICCPR. Further, the CEDAW Committee observed that the prohibition of gender-based violence against women has evolved into a principle of customary international law.<sup>64</sup> Sexual harassment is deemed a form of sex discrimination also outlawed under the Discrimination (Employment and Occupation) Convention of 1958.

➤ Social security rights

It is often the case that migrant workers, particularly women, are excluded from social security schemes in their countries of employment. Various reasons have been brought to light by the ILO, including overrepresentation in the informal sector, discrimination and lack of equality of treatment with other workers, denial of participation in trade union activity, difficult access to justice.<sup>65</sup>

The ICESCR Committee's General Comment No. 19 (2008) reaffirmed that everyone has right to social security without discrimination. The Committee also noted that implementation of article 3 in relation to article 9 requires, inter alia, equalization of the compulsory retirement age for both men and women; ensuring that women receive equal benefits in both public and private pension schemes; and guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women. Article 27 of ICRMW protects the right to social

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<sup>63</sup> CEDAW Committee, General Recommendation No. 19 on Violence Against Women, 1-6 (1992).

<sup>64</sup> CEDAW Committee, General Recommendation No. 35 on Gender-based Violence Against Women, 1 (2017).

<sup>65</sup> ILO, Extension of Social Protection of Migrant Domestic Workers in Europe (ILO Geneva 2013).

security of migrant workers from discrimination by the State of employment. In cases of migrant workers are denied of certain benefits granted under a legislation, the States concerned shall “examine the possibility of reimbursing interest persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.”<sup>66</sup>

Article 27 of the ICRMW provides that all migrant workers shall enjoy social security rights. The Social Security (Minimum Standards) Convention, 1952 (No. 102) is the flagship convention as it defines the nine classical social security contingencies (medical care, sickness, old age, unemployment, employment injury, maternity, family, invalidity and survivors) and establishes a minimum set of qualitative and quantitative parameters including: definition of the contingency, persons protected, type and rate of benefit, length of the qualifying period, duration of benefit and waiting period. Equality of Treatment (Social Security) Convention, 1962 (No. 118) covers nine branches of social security; for each branch accepted under the Convention, a ratifying State undertakes to grant within its territory equality of treatment to nationals of other ratifying States (and their dependents) with its own nationals (including refugees and stateless persons, if specifically accepted). It applies to the provision of benefits during periods of work abroad if such dispositions exist for nationals.

Maintenance of Social Security Rights Convention, 1982, (No. 157) and accompanying Recommendation No. 167: covers all nine contingencies and provides the obligation to States parties to the Convention to maintain long-term benefits and employment injury benefits for nationals of all other ratifying States (including refugees and stateless persons, irrespective of their place of residence) for all the branches of social security in which each State has legislation in force. The Recommendation proposes model provisions for the conclusion of bilateral or multilateral social security agreements regarding all contingencies and provides rules on maintaining social security rights and exporting benefits. It also proposes a model agreement for the coordination of bilateral or multilateral social security instruments.

➤ Reproductive health of women

One of the glass ceilings to women’s employment is their reproductive function. Women’s reproductive function of childbearing is a main cause of discrimination against female workers, including women migrant workers, who may face instant dismissal upon pregnancy and have to undergo pregnancy testing upon entry and regularly thereafter. According to Article 11(2) of CEDAW, States parties undertake to prohibit dismissals of employment on grounds of pregnancy

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<sup>66</sup> ICRMW §27(2).



or maternity leave. Further, the commitment is to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances. Article 10 of the ICESCR expressly provides that “working mothers should be accorded paid leave or leave with adequate social security benefits”. Paid maternity leave should be granted to all women, including those involved in atypical work, and benefits should be provided for an adequate period. Appropriate medical benefits should be provided for women and children, including perinatal, childbirth and post-natal care and care in hospital where necessary.

The ILO C111 Convention does not directly prohibit discrimination based on maternity. However, considering that only women become pregnant, discrimination based on maternity can be considered to amount to discrimination based on sex. The minimum standards on maternity protection are covered in the ILO Maternity Protection Convention of 2000 (C183) under which workers are not excluded from migration on the basis of real or perceived pregnancy. It is prohibited to terminate women’s employment during pregnancy, maternity leave or the period following their return from work. Pregnant and breastfeeding women must not carry works that harm their health or that of their child. In same vein, the ILO C111 Convention also prohibits mandatory periodical pregnancy testing for women migrant and national workers alike.

In its General Comment, The ICESCR Committee also noted that in the formulation of employment-related policies and laws, States parties should take into consideration the different requirements of male and female workers. For example, specific measures might be necessary to protect the safety and health of pregnant workers in relation to travel or night work; Day-care services in the workplace and flexible working arrangements can promote equal conditions of work in practice. Workers benefiting from gender-specific measures should not be penalized in other areas.<sup>67</sup>

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<sup>67</sup> ICESCR Committee, General Comment No. 23, 11 (2016).

➤ Decent work for domestic workers

It is estimated that there are around 53 to 100 million domestic workers, the vast majority of whom are women and girls.<sup>68</sup> Migrant workers make up a large proportion of domestic workers and their earnings represent a significant proportion of remittances to developing countries. Migrant domestic workers can be at high risk of exploitation and abuses. Partly because domestic work is “invisible”, domestic workers are undervalued, overworked and unprotected.

The ICRMW has identified forms of discrimination faced by migrant domestic workers, as well as gaps in legal and practical protection in its very first General Comment of 2011. The Committee recommended States parties to extend labor protection to migrant domestic workers, and mobilize for change of perception that domestic work as tasks associated with unpaid work in home performed by women and girls.<sup>69</sup> States parties are required to address the lack of social security benefits by migrant domestic workers, and especially of gender-sensitive health care coverage. Due to the fact that domestic workplaces are normally behind closed doors and informal, domestic workers face more risks of violence and abuses. Therefore, States parties are recommended to include provisions for monitoring mechanisms of the working conditions of migrant domestic workers in national legislation and strengthen labor inspection services to carry out such monitoring and to receive, investigate and address complaints of alleged violations.<sup>70</sup>

The Domestic Workers Convention of 2011 (C189) is considered a landmark standard that aims to protect and improve the lives and working condition of domestic workers worldwide. In giving legal recognition to domestic work as “work”, the Convention deems domestic workers possess the same rights as other workers, such as reasonable hours of work, adequate rest, and clear information on terms and conditions of employment. It also includes provisions regarding fundamental principles and rights at work, including freedom of association and the right to collective bargaining, and that a written work contract is provided before the migrant travels to the country of destination. States parties are also required to provide clear rules and regulations on private employment agencies to prevent fraudulent and abusive practices.

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<sup>68</sup> ILO, Global and Regional Estimates on Domestic Workers, available at [https://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@travail/documents/publication/wcms\\_155951.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_155951.pdf) (visited Oct 4, 2018);

<sup>69</sup> CMW, General Comment No. 1 on Migrant Domestic Workers, CMW/C/GC/1, 5 (2011).

<sup>70</sup> *Id* at 8-9.

➤ Effective enforcement of rights and access to justice

It is pointless if migrant workers, particularly women, have rights, yet these are not enforceable or culprits can get away with impunity under municipal jurisdiction. Albeit various differences, such as nationality, status, languages, migrant workers should be able to access legal proceedings and have their rights enforced effectively. Article 14 of the ICCPR guarantees that all persons, without distinction, are equal before the courts and tribunals, and entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The CEDAW also requires States parties to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.<sup>71</sup>

In this regard, ILO's non-binding Multilateral Framework on Labour Migration provides a comprehensive set of rights-based guidelines and principles developed through tripartite global consensus. Principle 10 of the Framework concerns the effective application and enforcement of national laws and regulations to protect guest workers. Governments are recommended to create effective and accessible channels for all migrant workers to lodge complaints and seek remedy without discrimination, intimidation or retaliation.<sup>72</sup> Adequate sanctions should be available and stringent in respect of labor migration in abusive conditions. Principle 11 of the Framework concerns measures designed to prevent abusive practices towards guest workers.<sup>73</sup>

As for effective complaint mechanism, while its application is not limited to migrant workers, ILO C189 is also a relevant standard given the growing number of migrant workers who undertake domestic work abroad. Pertinent to the establishment of complaint mechanisms, Article 17 of ILO C189 provides that: 1. each Member shall establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers; and 2. each Member shall develop and implement measures for labor inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations.

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<sup>71</sup> CEDAW §2(c)(f), §3.

<sup>72</sup> ILO, 2006. ILO multilateral framework on labour migration (Geneva), at 20.

<sup>73</sup> ILO, 2006. ILO multilateral framework on labour migration (Geneva), at 21-22. 11.3. implementing effective and accessible remedies for workers whose rights have been violated, regardless of their migration status, including remedies for breach of employment contracts, such as financial compensation; 11.4. imposing sanctions and penalties against individuals and entities responsible for abusive practices against migrant workers; 11.5. adopting measures to encourage migrant workers and trafficking victims to denounce abuse, exploitation and violation of their rights, taking account of the special circumstances of women and children and to this effect establishing mechanisms for migrant workers to lodge complaints and seek remedies without intimidation or retaliation.

ILO C189's accompanying Recommendation, the Domestic Workers Recommendation of 2011 (R201) provides further guidance on the implementation of complaint mechanisms under Article 7(a), namely that Members should consider "establishing accessible complaint mechanisms for domestic workers to report cases of abuse, harassment and violence". The non-binding Private Employment Agencies Recommendation of 1997 (R188) supplements the provisions of ILO C181. Practical guidance regarding the implementation and application of ILO C181 and R188 are found in the ILO's 2007 Guide to private employment agencies: Regulation, monitoring and enforcement, which also notes that migrant workers should be informed of possible complaint procedures.

➤ Policies for workers after returning home

A clear policy for reintegration of migrant workers back into their community and family would enhance positive impacts of migration on development and for better protection of legitimate rights and interests of workers, particularly women.

Article 67 of the ICRMW provides that concerning migrant workers and members of their families in a regular situation, and States Parties concerned "*shall co-operate as appropriate, on terms agreed upon by those States, with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin.*" For women migrant workers, States should design or oversee comprehensive socio-economic, psychological and legal services aimed at facilitating the reintegration of women who have returned. Good practices should be shared among States to speed up the resettlement process of women migrant workers.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers states that all ASEAN Member Countries commit to establish and implement human resource development programmes and reintegration programmes for migrant workers in their countries of origin.

#### **1.4. Responsibilities of states in relation to gender equality and international labor migration**

Previous sections have elaborated legal basis for the rights of women migrant workers, aiming to contribute to gender equality in pre-, post-departure for, and during their employment. The above analysis of gender-insensitive working environment of women migrant workers begs a question of responsibilities of states in relation to promote gender equality in this particular field.

International law requires States to cooperate in the realization of all human rights.<sup>74</sup> In particular, States have the obligation to respect rights and refrain from interfering with their enjoyment; to protect rights against violations, including through ensuring adequate and accessible avenues of redress when rights are infringed; and to fulfil these rights by taking positive steps, including through appropriate legislative and administrative action, policies and the allocation of resources.<sup>75</sup>

From a gender perspective, to promote fair migration, States of origin, transit, and destination are recommended to implement the following measures:

- Adopt and implement effective measures to promote equal rights between women and men, in particular address the underlying causes of gender-based violence against women; Ensure that all forms of gender-based violence against women in all fields are sanctioned proportional to the gravity of the offence, as well as civil remedies available for the victims.
- Formulate a comprehensive gender-sensitive and rights-based policy: for this purpose, international human rights treaties and ILO's Conventions as well as their accompanying comments and recommendations are highly useful to promote equality and non-discrimination in the regulation and administration of all stages of migration. States are encouraged to ratify all international instrument related to the protection of human rights of women migrant workers.
- Education, training, awareness-raising: States should deliver or facilitate free or affordable gender- and rights-based pre-departure information and training programmes that raise prospective women migrant workers' awareness of potential exploitation; and provide information on methods and procedures for female workers who wish to migrate independently of recruitment agencies.<sup>76</sup>
- Monitoring systems: States of origin and employments should design monitoring mechanism to oversee recruitment activities by employment agencies and agents in accordance with human rights of all women migrant workers. Any violation of the rights of women migrant workers shall be prosecuted in accordance with the law.
- Access to services: States of employment should ensure that linguistically and culturally appropriate gender-sensitive services for women migrant workers are available, including

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<sup>74</sup> See the Preamble of UN Charter, the International Bill of Human Rights.

<sup>75</sup> Office of the High Commissioner on Human Rights (OHCHR), What Are Human Rights?, available at <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> (visited Oct 4, 2018).

<sup>76</sup> CEDAW Committee, General Recommendation No. 26, at 9.

language and skills training programmes, emergency shelters, health-care services, police services, recreational programmes, etc.

- States of origin shall put no onerous burdens on women who wish to return to their countries. Further, States should design or oversee comprehensive socio-economic, psychological and legal services aimed at facilitating the reintegration of women who have returned.
- Bilateral, regional agreements and memorandum of understanding between sending and receiving States are highly recommended for better protection of the rights of women migrant workers.
- Research, data collection and analysis: Quantitative and qualitative research, data collection and analysis are critical to identify the issues and needs faced by women migrant workers in every phase of the migration process in order to formulate relevant policies and contribute to gender equality.



## **Chapter 2. Vietnam's laws and policies on Vietnamese guest workers and gender equality**

### **2.1. Socio-economic and political context of Vietnam**

Since the transition from a centrally planned economy to a “socialist-oriented market economy” in 1986, Vietnam emerged as a new economy with full of potentials. Since then, it has attracted a great deal of foreign direct investment flow, paving the way for the emergence of the private sector as well as the opportunity to access the global economy in trade and commercial activities, especially after Vietnam joined the World Trade Organization in 2007. As a result, for more than 30 years, the political and economic reform process has lifted Vietnam from being among poor countries in the world to a country with average income in 2009. The average per capita income has risen from under 100 USD to about 1,596 USD in 2012 and currently is about 2,385 USD<sup>77</sup>. The poverty rate dropped sharply from 58% to 9.8% in 2016<sup>78</sup>. For the Millennium Development Goals (MDG), Vietnam had completed a number of goals prior to 2015 and improved the majority of the development indicators<sup>79</sup>. Regarding the social context, with a population of 96 million people<sup>80</sup> of 54 different ethnic groups, Vietnam is a country with a large work force and a diverse culture. In the attempt to improve the living standard of its people, Vietnam has also continuously improved its development indicators as well as the ability to access to services such as education, medical and social safety net for people from all classes of society.

Along with its achievements, Vietnam is also facing a number of challenges. Poverty rate has dropped sharply, but many ethnic minorities or rural dwellers or many other groups are at risk of falling back into poverty and being excluded from the positive effects of the economy<sup>81</sup>. Further poverty reduction efforts will be met with difficulties due to the domestic macroeconomic instability and the reform process of the economic model to an economy with more sustainable growth. In addition, although the results of human development in Vietnam still show signs of

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<sup>77</sup> General Statistics Office, Press release on socio-economic situation in 2017, *available at* <http://www.gso.gov.vn/default.aspx?tabid=382&idmid=&ItemID=18667> (visited Oct. 31, 2018)

<sup>78</sup> World Bank, *Climbing the Ladder: Poverty Reduction and Shared Prosperity in Vietnam*, 7 (2016)

<sup>79</sup> Vietnam, *National report: 15 years of achievements of the Millennium Development Goals of Vietnam* (2015)

<sup>80</sup> <https://danso.org/viet-nam/> (visited Oct. 31, 2018)

<sup>81</sup> UNDP, *Overview of the socio-economic situation of 53 ethnic minorities* (2017)



growing in recent years, it tends to slow down<sup>82</sup> due to the effect of factors, such as climate change, environmental degradation, depletion of natural resources, corruption, social inequality and rapid urbanization, which require urgent measures. On the other hand, although Vietnam has achieved most of the MDG prior to 2015, more efforts are still needed to achieve the MDG No. 7 on sustainable environment and MDG No.8 on Global Partnership for Development<sup>83</sup>. In addition, rapid growth in the economy and major social changes have raised growing concerns that Vietnam is now facing enormous challenges, and without proper management, these challenges will severely affect the sustainable development process of Vietnam. Currently, Vietnam will continue to focus on maintaining and enhancing the MDGs, while at the same time moving forward a more sustainable and comprehensive development model. In 2017, Vietnam and UN developed a general strategy to integrate Sustainable Development Goals (SDGs) with Socio-Economic Development Strategy (2011- 2020) and the Socio-Economic Development Plan (2016-2020). Vietnam also sets up its own Vietnam Sustainable Development Goals (VSDG). They are published in 2017 with 17 general goals and 115 specific objectives (Decision No. 622/QĐ-TTg on the issue of the National Action Plan for implementation of the 2030 programme on sustainable development dated on 10<sup>th</sup> May 2017). As of 2018, Vietnam has achieved certain results related to SDG. However, in order to improve SDGs, Vietnam needs to promote awareness of the whole society, mobilize the participation of all stakeholders; perfecting institutions and policies on sustainable development; enhance coordination among government, business, domestic organization and international community in implementing SDG; issuing a set of monitoring and evaluation indicators for SDG and strengthening statistical capacity; integrate SDG into the main development policies; strengthen resource mobilization, especially resources from the private sector for implementation SDGs)<sup>84</sup>.

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<sup>82</sup> According to the statistics in UNDP reports on human development, the average increase in HDI in Vietnam from 1980 to 1990 was 0.28% (UNDP, Human Development Report 2014, at 165); From 1990 to 2000, the average increase in HDI in Vietnam increase sharply to 1.92%, but from 2000 to 2010, the average increase was only 1.29% and dropped to 0.47% from 2010 to 2014 (UNDP, Human Development Report 2015, at 213).

<sup>83</sup> Vietnam, National Report: 15 years achieving the Vietnam Millennium Development Goals (2015)

<sup>84</sup> Vietnam, National voluntary reviewing Report: Implementation of Sustainable Development Goals in Vietnam (2018)

## 2.2. Gender equality in Vietnam

### 2.2.1. Changes in the awareness of gender equality in Vietnam

The issue of gender equality has been truly recognized and aware internationally since the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was instituted in 1981. The Preamble of the Convention has noted that “*extensive discrimination against women continues to exist*”. The world has hitherto been strenuously working for this noble goal.

In Vietnam, the awareness of gender and gender equality has changed over historical times. Before Confucianism was introduced into Vietnam, Vietnamese society had already had positive ideas about gender equality, reflected in the importance of the role of women in the family and society. Evidence from range of aspects such as history, culture and way of life of the Vietnamese people reflects the tradition of respecting women who had great contributions to society and the family<sup>85</sup>.

However, Confucianism was introduced in Vietnam in the early of Common Era and spread rapidly in the 8th century, it then had a profound influence in the society through the governance regime and education system of the Tran Dynasty<sup>86</sup>. Since the introduction of Confucianism in Vietnam, its ideology and philosophy of “value man above woman”<sup>87</sup> had displayed gender inequality. There were cases where women were treated unequally, were not respected, could not hold any significant role or status in the family and society<sup>88</sup>. Women in this period of time were not allowed to have adequate education, to attend any economic, social activities. Their only role was to become wives, mothers and doing various houseworks. This is a period of time displaying great gender inequality in the Vietnamese society.

Until the early twentieth century, gender equality in Vietnam was restored, and the role of women was reconsidered with more recognition in a new society. The Political Theses of 1930 had stated the missions of the Vietnamese revolution were to liberate the nation, classes, and women. Vietnamese Constitution of 1946 had affirmed the equality of man and woman in every aspect.

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<sup>85</sup> See Tran Thi Quy, *Bình đẳng giới ở Việt Nam hiện nay (Gender equality in Vietnam today)*, Institute for Gender and Development Studies, available at <http://www.vjol.info/index.php/khxhvn/article/viewFile/24775/21198> (visited Nov. 18, 2018)

<sup>86</sup> Doan Chinh and Nguyen Sinh Ke, *Ve qua trinh Nho giao du nhap vào Viet Nam tu dau cong nguyen den the ky XIX (About the development of Confucianism in Vietnam from the early Common Era to the 19th century)*, available at <http://philosophy.vass.gov.vn/nguyen-cuu-theo-chuyen-de/Phuong-Dong/Ve-qua-trinh-Nho-giao-du-nhap-vaio-Viet-Nam-tu-dau-cong-nguyen-den-the-ky-XIX-108.html> (visited on November 18, 2018).

<sup>87</sup> Chu Manh Hung, *Anh huong cua Nho giao den viec dam bao quyen binh dang cua phu nu o Viet Nam (Impact of Confucianism on the guarantee of equality for women in Vietnam)*, 3 *Jurisprudence Journal* (2008).

<sup>88</sup> Hoang Thu Trang, *Anh huong cua quan niem dao duc Nho giao den doi song dao duc o Viet Nam hien nay (Impact of moral conception of Confucianism on the moral in Vietnam today)*, 7 *Vietnam Journal of Social Sciences* (2017).

Since then, gender equality and the effort to change social awareness of gender equality, the fight for gender equality have always been a high priority.

The Vietnamese government has always prioritized the goal of gender equality. The Constitution of 1946 had noted that<sup>89</sup>: “... *All military forces in the country belong to the people of Vietnam, regardless of race, gender, rich or poor, social status, religion; All Vietnamese citizens are equal before the law, and are entitled to participate in the government and the construction of the nation, depending on their talents and virtues*”.

The Constitution of 2013 continues to recognize the equality of the people before the law, the gender equality and forbid any form of gender discrimination<sup>90</sup>.

With this, it can be affirmed that there has been a remarkable progress in the awareness of gender and gender equality throughout the history in Vietnam. These changes are reflected through an improved legal system, titling closer to standards of the international legal system on gender equality. Also, these positive changes in gender equality can be found in the Vietnamese cultural, social and economic display.

### ***2.2.2. Vietnam positive manifestations on gender equality***

Vietnam is one of the first countries to join the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>91</sup>. Among Asian-Pacific countries, Vietnam is also within the group of countries with average gender index and with great efforts in regulating the law to be in conformity with CEDAW.

It can be seen that the awareness of gender equality and the implementation of policies to ensure gender equality in Vietnam have made some success over the years. These efforts have been recorded by international reviews. Specifically, the Human Development Report in 2016 shows that the gender inequality index (GII) of Vietnam was 0.337, ranked 71 out of 188 countries; gender gap index (GGI) was 0.700, ranked 65 out of 183 countries; and the gender develop index (GDI) was 1.010, placed in the first group out of 5 groups (from 188 countries) that rank gender equality through human develop index.

Over that past years, Vietnam has made great efforts in gender equality and can be displayed through these aspects.

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<sup>89</sup> Constitution of Vietnam, §1 and §7 (1946)

<sup>90</sup> See also Constitution of Vietnam, §16, §26, §36, §38 and §59 (2013)

<sup>91</sup> Vietnam ratified CEDAW in 1981 and CEDAW entered into force in Vietnam from 19/3/1982.

- Gender equality in participating in the political system and social management:

The participation of women in the political system and social management in Vietnam in recent years has some positive changes as more Vietnamese women have increasingly undertaken social management role. Regarding the representation in Communist Party: a statistic in 2001-2016 shows that the proportion of women participating in organizations of Communist Party has increased, specifically: proportion of women in Political Bureau in 2001-2011 was 0%, and in 2011-2016 was 7%; proportion of woman in the Central Committee of the Communist Party in 2001 was 8.6% and in 2011 was 9%<sup>92</sup>.

As for the management of local governments, the statistic from 1994 to 2016 has shown some changes in the increase of women in charge. Specifically, the percentage of women elected in the People's Council of province, rural district and commune is shown in the following table:

	1994-2004	2004-2011	2011-2016
<b>Province</b>	22,3	23,80	25,70
<b>Rural district</b>	20,12	22,94	24,46
<b>Commune</b>	16,10	19,53	27,71

Source: UNDP, *Su tham gia cua phu nu trong vai tro lanh dao va quan ly o Viet Nam (Women's Representation in Leadership in Vietnam)*, 12/2012.

Vietnam is the second in ASEAN region and ranked 43 out of 143 countries in the world in terms of the percentage of women participating in political work (Deputy of National Assembly, course of 2011-2016). In addition, recently, women have taken hold of many important positions such as: Chairperson of the National Assembly, Vice President, Minister, and Vice Minister<sup>93</sup>.

In the election the 14th National Assembly and the People's Council deputies at all levels for the 2016-2021 tenure, the percentage of women elected as deputy of the National Assembly course XIV was 133 out of 496 people, at 26.8%<sup>94</sup>; the percentage of women elected as People's

<sup>92</sup> UNDP, *Su tham gia cua phu nu trong vai tro lanh dao va quan ly o Viet Nam (Women's Representation in Leadership in Vietnam)*, available

at [http://www.vn.undp.org/content/vietnam/vi/home/library/womens\\_empowerment/Womens-representation-in-leadership-in-Viet-Nam.html](http://www.vn.undp.org/content/vietnam/vi/home/library/womens_empowerment/Womens-representation-in-leadership-in-Viet-Nam.html) (visited November 18, 2018).

<sup>93</sup> Women Leadership Development, *Binh dang gioi o Viet Nam: Thanh tuu va thach thuc (Gender equality in Vietnam: Achievements and Challenges)*, available at <https://moha.gov.vn/congtaccanbonu/binhdanggioi/binhdang-gioi-o-viet-nam-thanh-tuu-va-thach-thuc-36243.html>, (visited Oct. 1, 2018).

<sup>94</sup> See Summary report on the election of deputy of the National Assembly course XIV and deputy of the People's Council at all level course 2016-2021, available at

Council deputies at all level in the localities has exceeded all expectation: The People's Council deputies of Ho Chi Minh city was 43% and nearly 45% in Cau Giay district, Hanoi<sup>95</sup>.

In general, the fact that women has taken hold of many high positions and played important roles in the State apparatus as well as various economic, social organizations has displayed some positive changes in the social awareness of gender equality; also showing that women have gradually gained their status, and can exercise their political and social rights more freely.

- Gender equality in economic opportunities and access to resources for economic development

It can be seen from both legal policies and in practice that there has been some promising result in approaching economic opportunities. Vietnamese women have moved on from their natural roles such as caring and housework to become more actively involved in economic development.

According to a research by the Asian Development Bank in 2016 on small and medium enterprises owned by women in Vietnam, the percentage of women to own an enterprise was 9.6% in 2009; in 2011 was 24.9%; in 2013 was 25%<sup>96</sup>; and in 2015 was 22% in small and medium enterprises. Currently, the percentage of female-owned enterprises is estimated around 31%, and is considered to be the highest in South-East Asia<sup>97</sup>.

The above figures have shown that the percentage of female-owned enterprises in Vietnam has increased significantly, asserting the importance of women's role in economic development.

In addition to the result from business activities, gender equality in accessing to other market resources such as finance, land for economic activities has seen some positive changes. Through various lending programs for farmers, poor households, the opportunity to access to finance is equal for both men and women. The land law and land ownership also have some positive changes. The ownership has been recognized for both spouses instead of just the head of the

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[http://baochinhphu.vn/Uploaded/nguyensexuanhong/2016\\_07\\_19/Bao%20cao%20tom%20tat%20Tong%20ket%20bau%20cu.doc](http://baochinhphu.vn/Uploaded/nguyensexuanhong/2016_07_19/Bao%20cao%20tom%20tat%20Tong%20ket%20bau%20cu.doc) (visited Oct. 2, 2018)

<sup>95</sup> Tran Quoc Cuong, Tang ty le phu nu tham gia lanh dao, quan ly dap ung yeu cau hoi nhap phat trien dat nuoc (To increase the percentage of women participate in leading, managing to meet the requirements of integration and development of the country), available at <http://www.tapchicongsan.org.vn/Home/xay-dung-dang/2017/45580/Tang-ty-le-phu-nu-tham-gia-lanh-dao-quan-ly-dap.aspx> (visited Oct. 2, 2018)

<sup>96</sup> Le Quan Canh and Nguyen Vu Hung, Women-owned small and medium-sized enterprises in Vietnam: Situation analysis and policy recommendation (Mekong Business Initiative 2016)

<sup>97</sup> Bao Lao dong, Tang cuong quyen cho phu nu la xu huong cua the gioi hien dai (Sustainable development associated with equality), available at <https://laodong.vn/thi-truong/tang-quyen-cho-phu-nu-la-xu-huong-cua-the-gioi-hien-dai-618826.lido> ( visited Oct. 2, 2018).

household (which usually is the male spouse); women now have the ability to access other resources with ease through activities such as: capital contribution, loan capital... for business opportunities.

- Gender equality in accessing to education

The Confucianism ideology of “value man to woman”<sup>98</sup> has been existing the Vietnamese society for a long time , thus the access to proper education of women was limited before the Doi Moi (in 1986), especially in rural areas, or areas far away from economic and political centers.

However, after the reform in 1986, the State has made various policies to create education and training opportunities for women. In the past years, Vietnam has made some remarkable progress in education, specifically in gender equality, to ensure every child can go to school regardless of their gender. Every child at the age of 6 can go to school, and also with the increase in the percentage of female students at higher education.

According to statistics<sup>99</sup>, Vietnam has made great progress in achieving gender equality. Vietnam has been very successful in raising the percentage of female students in primary and secondary level. Currently, the percentage of female and male students enrolling in primary school is 91.5% and 92.3% respectively. The percentage of female students enroll in secondary school is 82.6% and 80.1% for male students. The percentage of female students enroll in high school is 63.1% and 53.7% for male students. The percentage of female graduates is 36.24%, master: 33.95%, PhD: 25.69%. These figures have shown that Vietnam has made great results in ensuring equal access to education from a gender perspective.

- Gender equality in accessing to employment opportunity and labor field

Gender equality in accessing to employment opportunity and labor field are notable issues, not only in Vietnam but also in the world. With continuous improvements in the legal framework and awareness of gender equality to ensure equal opportunities for both male and female workers in employment, Vietnam has achieved some impressive results.

Achieving equality in access to education has enabled women to improve their knowledge, skills and their chances for employment.

In the labor field, the percentage of women entering the workforce has increased as more and more women are working in various fields, including fields that previously were dominated by men, such as industrial work, mining. According to statistics from a study focusing on the

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<sup>98</sup> Ho Thi Ha, Anh huong cua dao duc Nho giao doi voi phu nu o nong thon (Impact of Confucianism moral on women in rural areas), 389 Tap chi Van hoa Nghe thuat (2016)

<sup>99</sup> Vietnam Women’s Union, Promoting gender equality and empowering women status and power, available at <http://hoilhpn.org.vn/print.asp?newsid=20353> (visited Oct. 2, 2018).

participation in fields such as agriculture, industry, service, mining and construction made by the ILO, the percentage of female workers in Vietnam is higher than that of male workers in many fields (excluding mining and construction). For example, in 2012 the percentage of female worker in agriculture was 51.7%, industry: 54.7%, service: 51.7%, mining and construction: 14.2%<sup>100</sup>. However, the issue of ensuring gender equality in employment opportunity still faces some major challenges, which will be presented in detail in later parts.

- Gender equality is also reflected in the perception of society, which includes the State, the people and both genders positive perception on this matter. Up to present, men have helped doing some of the housework, and domestic violence has decreased significantly<sup>101</sup>.

### ***2.2.3. Challenges to gender equality in Vietnam***

Beside the achievements above, Vietnam is still facing certain challenges to gender equality.

*First*, gender gap still exists in Vietnam. This can be seen through the role of women in society has not been comparable to men. For example, the participation of women in politics has been increase but not significantly, especially for higher managerial positions in base unit administration, or minorities. The principle reason for this is due to the limited access to education and economic status of ethnic minority women, resulting in lower skills and qualifications to meet with the requirement of the managerial position<sup>102</sup>. According to UNDP, two group of indicators lag behind in Vietnam are minority and rural-urban migrant<sup>103</sup>; the percentage of women deputies in the National Assembly has not meet with that of the National Strategy for gender equality till 2010 (at least 33% or above) and the National Strategy for gender equality from 2011 to 2020(at least 30% ny 2015 and at least 35% by 2020).

*Second*, the opportunities for women to access to high income jobs and economic resources are still lower than that of men. In practice, some gender biases still persist in the economy. Women

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<sup>100</sup> ILO, Gender equality in employment and promotion in Vietnam, available at [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms\\_349673.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_349673.pdf) (visited Oct. 1, 2018).

<sup>101</sup> Nguyen Huu Minh, Bao dam quyen binh dang gioi o Viet Nam trong giai doan hien nay (Ensuring gender equality in Vietnam in the current period), available at <http://www.tapchiconsan.org.vn/Home/PrintStory.aspx?distribution=28500&print=true> (Visited Oct. 1, 2018).

<sup>102</sup> UN Women, Briefing Note on the situation of ethnic minority women and girls in Vietnam, (UN Women 2015)

<sup>103</sup> UNDP, The disadvantaged groups still fall behind in development priorities, available at <http://www.vn.undp.org/content/vietnam/vi/home/presscenter/articles/2017/04/26/b-o-c-o-c-a-undp-c-c-nh-m-y-u-th-v-n-b-t-t-h-u-trong-c-c-u-ti-n-ph-t-tri-n.html> (visited Oct. 2, 2018)

usually work in a limited range of occupations, and even though some have the same work as men, their income is still lower<sup>104</sup>.

According to the General Statistics Office, the percentage of female rural worker under the age of 45 with vocational training and technical skills was 11.8% in 2013, only nearly half of the planned target.

For employment opportunity: Through the employment process in Vietnam, most of the jobs that prioritize men usually require higher skills and with better income than most jobs prioritize women<sup>105</sup>. In job advertisements, employers usually prioritize male worker with jobs that require higher skills and with better income. Thus, the employment process still has some gender barriers, denying them of their employment opportunities.

Study results from UN Women have also pointed out that Vietnamese women tend to engage in more vulnerable jobs than men<sup>106</sup>, including self-employed job and unpaid family worker, according to the definition of the ILO. This is also common practice in many countries in the world.

The employment rates of women and men are around 73% and 82% of the workforce respectively. This figure shows that there is a 9% different in the percentage of male to female worker, lower than the average of 25% in the world<sup>107</sup>. However, the percentage of female worker in managerial position is lower. According to ILO report in 2015, “Women in business and management: Gaining momentum”, Vietnam was ranked 76 out of 108 countries in the percentage of women in managerial positions.<sup>108</sup>

*Third*, in terms of health care, access to reproductive health service of rural and ethnic women is still limited. The maternal death rate is still high in comparison with some countries in the region. The reduction of maternal death in the last 10 years is still slow, especially in the remote and isolated areas. The percentage of women with health insurance has increased over the years, but still lower than that of men. According to the Vietnam household living standard survey in 2010, about 64.5% of women have health insurance compare to 69.4% of men who have health insurance.

*Fourth*, the matter of violence against women still exists. The legal awareness of officials and people on domestic violence prevention is still limited. The sanctions under the Law on

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<sup>104</sup> UN Women, Toward gender equality in Vietnam: Marking inclusive growth work for women, (UN Women 2016).

<sup>105</sup> This result is derived from surveys, job advertisement review and employers. See ILO, “Gender equality in employment and promotion in Vietnam, available at [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/--ilo-hanoi/documents/publication/wcms\\_349673.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/--ilo-hanoi/documents/publication/wcms_349673.pdf) (visited Oct. 1, 2018).

<sup>106</sup> See UN Women, Toward gender equality in Vietnam: Marking inclusive growth work for women, *supra*.

<sup>107</sup> Government Statistics Office of Vietnam, Vietnam Labor force survey 2013 (2014).

<sup>108</sup> ILO, Gender equality in employment and promotion in Vietnam, *supra*.



Protection, Prevention of domestic violence are not strict enough to punish these acts of domestic violence.

*Fifth*, from the legal perspective, some legal documents to provide instructions or institutionalize the law relating to gender equality are slowly being promulgated. The implementation of regulations integrated with gender equality issue and the assessment of this integration and appraisal of draft legislative documents has not yield positive results<sup>109</sup>.

### **2.3. Current situation of sending Vietnamese workers abroad for employment**

In this study, we conducted a survey of data from 2014 to 2017 to clarify the contents related to the matter of sending Vietnamese workers to work abroad, specifically: the number of laborers throughout the years, the labor market (countries receiving Vietnamese labors), the jobs of Vietnamese workers abroad, their qualifications and incomes. These figures are referenced from the following sources: The Department of Labor Management, Ministry of Labor – Invalids and Social affairs, the Standing Committee of the National Assembly, and various other science reports.

#### ***2.3.1. The number of Vietnamese workers abroad***

According to the data from the Ministry of Labor – Invalids and Social affairs<sup>110</sup>, from 2014 to 2016, the total number of Vietnamese workers abroad is about 350,000 people. In 2016, there were more than 126,000 workers working abroad, mainly in Taiwan (68,000), Japan (approximately 40,000), Korea (more than 8,000) and Saudi Arabia (more than 4,000)<sup>111</sup>.

According to reports of service enterprises in 2010-2017, the total number of Vietnamese workers abroad was 821,862, of which 293,932 female workers<sup>112</sup>. In the period of 2014 and 2017, the total number of guest workers increased significantly compared to the previous period. While there were around 85,546 - 88,155 workers/year in 2010-2013, the number of guest workers

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<sup>109</sup> Women Leadership Development, *Binh dang gioi o Viet Nam: Thanh tuu va thach thuc* (Gender equality in Vietnam: Achievements and Challenges), available at <https://moha.gov.vn/congtaccanbonu/binhdanggioi/binh-dang-gioi-o-viet-nam-thanh-tuu-va-thach-thuc-36243.html>, (visited Oct. 1, 2018).

<sup>110</sup> Democracy and Law Review, *Nhan dien mot so bat cap cua Luat Nguoi lao dong Viet Nam di lam viec o nuoc ngoai theo hop dong va cac de xuat, kien nghi hoan thien* (Identify some shortcomings of the Law on Vietnamese labors working abroad under contract and recommendations), available at <http://tcdcl.moj.gov.vn/qt/tintuc/Pages/xay-dung-phap-luat.aspx?ItemID=361> (visited Oct. 2, 2018).

<sup>111</sup> The Standing Committee of the National Assembly, *Report on the result of monitoring the implementation of policies and Law on Vietnamese labors working abroad under contract* (2010).

<sup>112</sup> Ministry of Labor – Invalids and Social Affairs, *Report No.993/BC-BLDTBXH* dated 24 September 2018 on Vietnamese guest workers in 2010-2017.

increased from 106,840 – 130,427 workers/year in 2014-2017. Particularly in 2016 and 2017, the number of guest workers rose sharply in certain countries such as Taiwan, Japan, Korea and Saudi Arabia. In 2017, according to the data from the Department of Overseas Labor (Ministry of Labor – Invalids and Social affairs)<sup>113</sup>, this figure has exceeded 28.3% of the annual plan and equal to 106.7% number of Vietnamese workers abroad in 2016. Especially, in Japan, there was a remarkable growth of 54,504 workers (24,502 female workers). Other labor markets: Taiwan: 66,926 workers (23,530 female workers), Korea: 5,178 workers (473 female worker), Saudi Arabia: 3,626 workers (3,447 female workers), Malaysia: 1,551 workers (794 female workers), Algeria: 760 workers (31 female workers), Romania: 683 workers (11 female workers). Some markets have the need to recruit a number of new occupation that only Vietnamese labors are qualified and in demand, such as nursing, homemaker and labor in some fields of agriculture, aquaculture, and skilled labors creating more employment opportunities for Vietnamese labors when choosing an option to work abroad. These are positive signals in maintaining, developing traditional markets while expanding new oversea labor markets.

The number of Vietnamese guest workers is gradually increasing, showing the potential demands for Vietnamese workers in oversea markets and proving that Vietnamese labors are capable and can meet the criteria of international labor market.

In recent years, the annual total number of Vietnamese guest workers is around 80,000 to 100,000 people, with 30% are female. Female workers working abroad tend to be employed as family helpers, elderly carers, manufacturing workers, nurses and etc. Countries such as Macau, Republic of Cyprus, Saudi Arabia, Korea, and Malaysia have the highest rate of Vietnamese female workers, especially Macau, which account for more than 80% of female worker for the period of 2012 to 2016<sup>114</sup>.

In 2018, Vietnam expects to have 110,000 guest workers (with 40% of which are female)<sup>115</sup>. These figures show the number of Vietnamese guest workers is gradually increasing, and the role of women in the labor, economic field is being promoted through the higher percentage of female workers in the oversea labor markets.

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<sup>113</sup> Department of Overseas Labor, *Tong ket cong tac nam 2017 (Review the work in 2017)*, available at <http://www.molisa.gov.vn/vi/Pages/chitiettin.aspx?IDNews=27543> (visited Oct. 18, 2018).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

### 2.3.2. Receiving countries of Vietnamese workers

Vietnamese workers are accepted in many countries around the worlds. From 2014 to 2017 , the number of countries receiving Vietnamese labors is around 30 countries, with 29 countries in 2014, 22 in 2015 and 28 in 2016<sup>116</sup>.



Source: Department of Overseas Labor, Ministry of Labor – Invalids and Social Affairs

According to the Vietnam Association of Manpower Supply (VAMAS), of the 28 countries receiving Vietnamese labors in 2017 , only 5 markets receive on a great scale of more than 1,000 workers, including Taiwan, Japan, Korea, Malaysia, Saudi Arabia and Algeria. Additionally,Algeria is the latest market to increase the number of Vietnamese labors since 2015 and there were 760 guest workers in 2017. Other markets receiving a large amount of Vietnamese labors are still in the Northeast Asian regions, with the increase in Taiwan and Japan. While the Middle East markets have displayed increase in demand compare to 2015, demands from markets from Southeast Asian countries have declined significantly, especially the Malaysian market.

Countries that receive Vietnamese labors are as follows<sup>117</sup>:

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

+ Taiwan: in 2016, the number of Vietnamese workers working in Taiwan was 68,244 labors, account for 58.35%; in 2017 was around 69,000 workers (23,530 are female), account for 50% of Vietnamese labor working in other markets in the same year.

+ Japan: in 2016, Japan had received 39,938 Vietnamese workers , making an increase of 47.86% compare to the number of workers sent in 2015; in 2017, the number of workers are 54,504 (24,502 are female ), making an increase of 36.47% compare to 2016, increase the total number of Vietnamese trainees in Japan to over 100,000 people (the highest number of trainees out of 15 countries with trainees in Japan).

+ Korea: in 2016, Korea had received 8,442 Vietnamese workers , and 5,178 labors in 2017, including over 3,000 workers from the employment permit system (EPS); around 2,000 workers working onshore, offshore, technical workers. Also, to continue to implement the memorandum of understanding and receive labor under the EPS program and following the roadmap to reduce illegal workers in Korea, the Department of Overseas Labor has conducted Korean language examinations in the field of manufacturing, construction, fishery and agriculture under the 2017 ESP program for 18,140 workers. The results were high with 75% pass out of 647 candidates.

+ Algeria received 760 Vietnamese workers in 2017.

+ The Macau market: 266 workers, Hong Kong: 11 workers .

+ South East Asia market: only Malaysia and Singapore with a total of 2,109 workers , accounted for 1.67% of the total number of workers abroad, and declined 71.45% compare to 2015

+ Also in 2016, Middle East market had received 5,641 workers , accounted for 4.46% of the total number of workers abroad, increased 10.08% compare to last year.

+ In 2016, some enterprises sent labor into new markets such as: Turkey with 136 workers and Germany with 78 workers .

Through these figures of countries receiving Vietnamese labors, it can be seen that Vietnamese guest workers mainly involved in Asian labor markets such as: Taiwan, Japan, Korea and etc. with Taiwan having received the most Vietnamese workers and 35% of the Vietnamese workers are female. In addition, Vietnamese labor also present in some European countries but not as popular.

### ***2.3.3. Jobs for Vietnamese workers working abroad***

Vietnamese workers depart for work according to the needs of receiving countries, particularly the needs of enterprises/employers of receiving countries.

For South East Asian countries such as Malaysia, Thailand, Vietnamese labor mostly engage in the field of agriculture, aquaculture and seafaring. Vietnam and Thailand have signed a memorandum of understanding (MOU) on cooperation allowing workers to work in fishery and construction, but the actual number of workers in these 2 fields is at a minimum. This indicates that the actual job of labor after arriving in the receiving country has changed or there is illegal labor migration<sup>118</sup>.

Meanwhile, Singapore's market requires skilled labor with language proficiency higher than that of other markets in the region. Singapore only provides working permit in forms of S Pass visa – Working permit for mid-level skilled labors, technical workers and E pass visa – Working permit for professionals, managers and executives to Vietnamese labors.

In Japanese market, Vietnamese labor participates in jobs such as trainees, nursing, and in some fields of agriculture, aquaculture.

Vietnamese labor in Taiwan working in industrial production accounts for 87%, and 13% in social services.<sup>119</sup>

Vietnamese guest workers in Korea mainly work in fields such as manufacturing, aquaculture. According to the memorandum of understanding on sending and receiving Vietnamese labors in Korea under the EPS program between Vietnam and Korea, in 23/3/2018, Korea had chosen 6,300 Vietnamese workers to go to Korea and work in manufacturing and 1,600 labors working in fishery.<sup>120</sup> The majority of Vietnamese guest workers in Korea are unskilled workers doing workers that do not require high level of technical skills and are often retrained before starting their jobs in the host country. The survey conducted by the research team in Bac Giang province and Vinh Phuc province shows that 100% of the surveyed female workers who returned from Korea were non-professional and low-skilled workers.

#### ***2.3.4. Qualification and income of Vietnamese workers working abroad***

Currently, a large percentage of Vietnamese workers abroad do not meet the job and skills requirements. Most of them undergo training to meet the requirements of the employers. For example, when Vietnamese workers go to work in Korea, very few can have a job related to their

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<sup>118</sup> Benjamin Harkins, Daniel Lindgren, and Tarinee Suravoranon, Risks and rewards: Outcomes of labour migration in South – East Asia, 28 (International Labour Organization and International Organization for Migration 2017).

<sup>119</sup> Department of Oversea Labor, Review the work in 2017, *supra*.

<sup>120</sup> Ministry of Labor –Invalids and Social, available at <http://www.molisa.gov.vn/vi/Pages/chitiettin.aspx?IDNews=27921> (visited Oct. 2, 2018)

previous job in Vietnam. An average worker need 64.4 days to master their job in Korea; with some exceptions require 180 days of training<sup>121</sup>.

Many enterprises providing services to send workers to work abroad under contract have been actively searching for oversea markets, while investing in training skilled workers with language qualification before sending abroad, as well as improving the working discipline and sense of discipline when working abroad, for example, sending workers to practice their skills, nursing and homemaker in Japan. Other enterprises have also focused on investing more on improving the quality of staff who directly work in labor export.

In terms of income, the majority of workers abroad have higher income than that in Vietnam.

According to the statistic of average income of Vietnamese guest workers, the countries with high income such as: Australia, Germany, Korea, Italia, Japan, and Russia ranging from 700-4,000 USD/month. The highest income is in Australia with an average of 4,000 USD/month (101 workers); follow by Japan with 1,400 USD/month, Korea with 1000 USD/month<sup>122</sup>.

The number of Vietnamese workers working in Korea is higher than that of other countries (except Taiwan). According to a survey result of migrant workers in Vietnam in 2010 for migrant workers to Korea, 47% of them want to make more money, 41% want to save some money to send back home, and 26% want to find a better job<sup>123</sup>. From the survey results,<sup>124</sup> most of the Vietnamese workers in Korea all remit their incomes back to their family, with each worker sending an average of 251 million VND.

In addition, the lowest average income of Vietnamese guest workers ranges from 250 – 400 USD/month<sup>125</sup>, specifically 300 USD/month in Laos, Malaysia, 250 USD/month in Cambodia, 400 USD/month in the US, 440 USD/month in Poland. This level of income is not high, however, it still solves the matter of unemployment for unskilled and under qualified workers in Vietnam.

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<sup>121</sup> Luu Quang Thuan and the research team of the Korean Labor Institute – KLI, Khảo sát hoạt động kinh tế của lao động di cư đã trở về nước: Nghiên cứu trung hợp lao động Việt Nam đi làm việc tại Hàn Quốc theo chương trình cap phep (Survey on economic activities of migrant workers returning to the country: Study on Vietnamese labors working in Korea under the EPS), available at <http://ilssa.org.vn/vi/news/khao-sat-hoat-dong-kinh-te-cua-lao-dong-di-cu-da-tro-ve-nuoc-nghien-cuu-truong-hop-lao-dong-viet-nam-di-lam-viec-tai-han-quoc-theo-chuong-trinh-cap-p-207> (visited Oct. 2, 2018).

<sup>122</sup> Department of Oversea Labor, Ministry of Labor – Invalids and Social, Statistics of 2014 (2015).

<sup>123</sup> Dang Nguyen Anh, Labour Migration from Vietnam to the Republic of Korea: Policy Challenges and Responses, International workshop (International workshop on Gender and migration – Assessing Labor Export Policies – sharing Vietnamese and international experiences on rights-approaches and gendered dimensions, Institute of Sociology, Vietnam 2013).

<sup>124</sup> Luu Quang Thuan and the research team of the Korean Labor Institute – KLI, *supra*.

<sup>125</sup> Department of Oversea Labor, Ministry of Labor – Invalids and Social, Statistics of 2014 (2015).

## 2.4. Vietnamese legal and policy framework on Vietnamese guest workers from gender equality perspective

### 2.4.1. Policy framework on sending Vietnamese guest workers and gender equality

#### 2.4.1.1. Legal and policy framework on sending Vietnamese guest workers for abroad employment

The trend of sending workers abroad has started since 1980 in Vietnam in the form of labor cooperation with other socialist countries to counter Vietnam's economic difficulties. The results have brought about many benefits. Ever since, at the beginning of the "Reform" (Doi moi) of 1986, overseas labor has grown substantially and expanded to many new labor markets.

Currently, sending workers abroad is seen as an important economic activity in terms of remittance, job growth, skills upgrading, poverty alleviation, and promotion of economic growth in Vietnam. Therefore, the Government has paid much attention for many years to improving legal framework relating to the policies on overseas working, making it a key objective through enacting numerous legal documents in this field.

Initially, the policy on sending workers abroad is limited to expert exchange among socialist countries under Direction No. 41/CT-TU on overseas labor and expert issued in 1998. Afterwards, overseas labor policy was integrated in policies on poverty alleviation (Decision No. 71/2009/QĐ-TTg), the Government's project on "Support for communes in poverty to boost overseas labor for sustainable poverty alleviation from 2009 – 2020". Yet only till 11<sup>th</sup> National Party Congress, sending workers abroad was directed more clearly with the purpose to "improve quality and efficiency of activities of sending Vietnamese workers abroad for employment" under the Strategy on Socio – Economic Growth of 2011-2020.<sup>126</sup> For that purpose, the Department of Overseas Labor, Ministry of Labor, Invalids and Social Affairs (MOLISA) evaluates annual quota of guest workers. It is estimated 110.000 Vietnamese guest workers in the period of 2015 – 2020,<sup>127</sup> even though it is not huge leap comparing to the number in the period of 2011 – 2015, which is 100,000 workers.<sup>128</sup>

Legal framework on the management of guest workers and protection of their rights came into the picture later after the enactment of the Law No. 72 and a series of guiding by-laws on labor

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<sup>126</sup> Communist Party of Vietnam, Instruments of 11th National Congress of Communist Party of Vietnam: Strategy on Socio – Economic Development of 2011 – 2020 (2011).

<sup>127</sup> Department of Overseas Labor, Tong ket cong tac nam 2017 trien khai nhiem vu nam 2018 (Concluding Conference of 2017 with orientation for 2018), available at <http://www.molisa.gov.vn/vi/Pages/chitiettin.aspx?IDNews=27543> (visited Oct 1, 2018).

<sup>128</sup> Ruth Bowen and Do Van Huong, *supra*.

contract, labor issues, fees for sending workers abroad, state management, administrative sanctions, etc.

The Law No. 72 provides the sending of Vietnam workers abroad under contracts, rights and obligations of guest workers, sending companies and organizations, and concerned organizations and individuals. The Law No. 72 provides four forms of sending Vietnamese workers abroad for employment<sup>129</sup>, three of which are concerned intermediary companies. Workers can independently engage in contractual relationship with overseas employers. These contracts shall be registered with state authorities, however, for individual contracts, it is difficult to monitor the registration since it depends mainly on workers' voluntariness. These types of contracts are applicable to Vietnamese workers with different skills levels, including skilled and low-skilled labor.

*i) Regarding rights of workers working abroad under contracts*

Article 44 of the Law No.72 recognizes and ensures fundamental rights of guest workers, including (i) the right to request outbound-investing companies, career organizations, organizations and individuals to provide information on Vietnam's policies and laws regarding guest workers; information on policies and laws relating to customs and traditions of receiving countries; rights and obligations of related parties during the employment; (ii) The right to wage, remuneration, and other incomes, healthcare, social insurance and other benefits provided under the contracts, treaties and agreements; (iii) Entitled to protection of legitimate rights and interests by outbound-investing companies, career organizations, organizations and individuals, Vietnam's overseas representative bodies in accordance with international custom and law, and laws of Vietnam and receiving countries during the employment; entitled to counseling and support to exercise rights and enjoy benefits under the labor contracts, internship contracts; (iv) Entitled to send wage, remuneration, income and other personal assets back to home country in accordance with laws of Vietnam and receiving countries; (v) Entitled to benefits from the Fund on Support for Overseas Labor in accordance with the law; (vi) Complaint and denunciation or initiation of lawsuit against violations of laws on sending guest workers abroad.

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<sup>129</sup> Article 6 of the Law No. 72 provides 4 forms of work overseas as follow:

- (i) Under contracts signed with enterprises providing guest worker services or with non-business organizations licensed to send workers abroad;
- (ii) Under guest worker contracts signed with contract-winning or -receiving enterprises or with offshore-investing organizations or individuals that send workers abroad.
- (iii) Under guest worker contracts in the form of skill-improvement internship contracts, signed with enterprises sending workers abroad for internship to improve their skills;
- (iv) Under individual contracts.



*ii) Regarding education and orientation for workers*

MOLISA issued Decision No. 18/2007/QD-BLDTBXH on necessary pre-departure education programmes for guest workers. Accordingly, sending organizations must put in place pre-departure orientation programme of 74 lessons. The content shall include knowledge on national culture, customs and traditions, criminal, civil, administrative and labor laws of Vietnam and receiving countries; terms and conditions under the contracts signed by workers and outbound-investing companies, career organizations, organizations and individuals; labor disciplines, safety and sanitation; lifestyle and conduct; use of transport means, trade in basic equipment for daily use; other preventative issues while living and working abroad.

*iii) Regarding financial support*

To untangle financial difficulties for workers, the Law No. 72 provides the Fund on Support for Overseas Labor; Decision No. 144/2007/QD-TTg provides the establishment, management and use of the Fund with the view to develop and expand foreign labor markets, improve quality of workers, support risk-management for workers and companies. Beside, Decree No. 61/2015/ND-CP has provided (i) preferential loans from the Bank of Social Policy to potential guest workers who belong to households of poverty, withdrawal of rural land, ethnicity; (ii) 100% free interest loan from the National Fund on Employment to workers who belong to households of pro-poverty or relatives of those who have contributed to the country revolution. In addition, for protection of guest workers' rights and prevention of mandatory excessive deposits, MOLISA issued Circular 21/2013/TT-BLDTBXH setting the deposit ceiling that can be imposed by the sending companies on guest workers.

*iv) Regarding protection of rights and interests of guest workers*

Article 27 of the Law No. 72 provides responsibility of sending companies in management and protection of legitimate rights and obligations of workers; collaboration with concerned foreign actors to handle issues arisen when the workers passed away, suffered labor accidents, occupational risks and sickness, abused and damaged on life, health, reputation, dignity, and assets, and labor dispute settlement. In addition, sending companies have responsibility to report and collaborate with Vietnam's diplomatic and consular missions overseas to manage and protect legitimate rights and interests of guest workers during their employment. Companies shall be liable for damages for workers and guarantors at their fault.

Under Vietnam's investment and business laws, sending workers abroad is a type of conditional business. Therefore, the establishment of companies doing this type of business requires certain registration procedures. MOLISA issued Circular No. 21/2007/TT-BLDTBXH guiding the

granting of license to companies sending guest workers in order to ensure the sending is legal and safe.

In addition, the Decree No. 95/2013/ND-CP provides certain violations in respect of sending guest workers abroad do not amount to criminal nature may be handled administratively. The detection of violations is assigned to Labor Inspectorate in their professional activity. Further, MOLISA is responsible for inspection, supervision and handling of violations, settlement of dispute, complaint, and denunciation in respect of sending guest workers abroad. In particular, Vietnamese diplomatic missions (labor management sections) are responsible for protection of rights and interests of workers, and handling violations by workers while working abroad.

Further, there are legal documents on complaint mechanism for workers, such as the Decree No. 119/2014/ND-CP dated 17/12/2014 providing the settlement of complaint in many aspects, including sending guest workers abroad, and other acts of relevance to guest workers specifying competence in handling complaint and denunciation, including the 2011 Law on Complaint, the 2011 Law on Denunciation, the 2015 Criminal Code, the 2012 Law on Handling administrative violations, etc.

- v) *Regarding labor agreements on seeking, investing in, and opening new labor markets, high income markets, high labor receiving markets*

Since 1992, Vietnam has signed agreements and MOUs on labor cooperation with 22 countries and territories worldwide, including North-East, South-East, Middle East and North Africa countries. To implement these agreements and MOUs, MOLISA issued numerous documents to guide companies and workers to implement related contents.

#### *2.4.1.2. Legal and policy framework on gender equality*

Gender equality is not a novel issue in Vietnam. In actuality, Vietnam has not encountered many hurdles in incorporating CEDAW into national law at the point of favorable socio – economic conditions. Prior to the incorporation of CEDAW, gender equality had proliferated under basic laws of Vietnam, including the 1946 Constitution with Article 9: “*Women enjoy equal rights with men in all spheres*”; the 1959 Constitution reaffirms: “... *For equal work, women enjoy equal pay with men. The State ensures that female workers and office employees have fully paid periods of the leave before and after childbirth. The State protects the mother and child and ensures the development of maternity hospitals, crèches, and kindergartens. The State protects marriage and*

*family.*” Both social perception and orientation ideology on gender equality have been lifted up to a new level, become a guiding principle of the Vietnam Communist Party.<sup>130</sup>

In 2006, the Law on Gender Equality was enacted. The objective of the Law was to eliminate all forms of gender discrimination and formulate gender equality in all spheres of social and family life. The Law provides measures to promote gender equality (Article 19) influenced by Article 4 of CEDAW on special measures to accelerate gender equality. These measures are provided on the recognition of biological and social differences between women and men. For example, women bear and breed children at their early stage of life; customs and traditions of discriminatory nature against women result in their limited access to education, harder works, yet they enjoy less outputs. Therefore, the State should have affirmative action policies in place for women in terms of healthcare, pregnancy and childcare, access to education, promotion, and participation in social activities.

An important issue is prevention of gender-based violence. The Law on Combating Domestic Violence of 2007 marked a milestone for such as specialized law on education, prevention and handling of domestic violence, which had been ignored in the patriarchal system of Vietnam previously.

Gender equality in numerous laws has brought about significant changes in this respect in Vietnam. The changes include prohibition of sexual harassment at work, protection of workers and establishment of minimum wage to employers under the Labor Code of 2012; emphasis on equality among family members, abolition of prohibition on homosexual marriage, recognition of domestic work as paid work in division of shared property under the 2014 Law on Marriage and Family; provision on minimum 35% of female candidates to be nominated in final vote at all levels under the 2015 Law on the Election of Deputies to the National Assembly and the People’s Councils; integration of gender equality principle in the drafting and spending of state budget under the 2015 Law on State Budget; widening the scope of definition on serious psychological and physical violence suffered by family members amounting to criminal responsibility under the 2015 Criminal Code. A number of important legal documents were enacted with support from the United Nations, such as the National Assembly’s guide on the application of CEDAW in the formulation of legal documents and Toolkit for gender impact assessment of the Ministry of Justice with a view to assist lawmakers in integrating gender equality into legal framework.

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<sup>130</sup> Decree No. 11-NQ/TU dated 27/4/2018 by Politburo on women movement in the context of promotion of national industrialization and modernization.

Besides legal recognition, attention is also paid to the implementation of such policies to accelerate substantive gender equality, deter formalistic gender equality (in other words, *de facto* gender equality is yet to be materialized, thus women are still faced with injustices). Vietnam's issues not only revolve around the laws but also long standing customs and traditions. The Government of Vietnam formulated “*National Strategy on Gender Equality of 2011-2020: Strengthening Women Status in Decision-making and Leadership; promotion of empowerment of women; minimizing and preventing gender-based violence*”, and issued criteria for gender equality.<sup>131</sup> In addition, national action programme on gender equality was issued with purpose to bridge the gender gap and empower women in many fields, sectors, regions and provinces, which suffer high gender inequality and at risk thereof, contributing to the success of national strategy on gender equality of 2011 -2020.<sup>132</sup>

As a result, Vietnam's laws and policies on gender equality are relatively clear, yet in order to ensure that gender equality issue is not formalistic but substantive in daily social life, it is required to have stringent and effective enforcement of laws and education in place.

#### ***2.4.2. Ensuring gender equality for female workers before job employment abroad***

Guarantees of gender equality for female workers before migration for overseas employment are guarantees of equal in work, opportunity for migration for legal employment for female workers, including:

##### ***2.4.2.1. Guarantee of equality in opportunity for overseas employment***

Vietnam's substantive law recognizes equality in migration for overseas employment through the lens of equality in work and the right to work of female workers. Accordingly, the principle of equality in opportunity to work and income, non-discrimination at work and occupation is provided in the Law on Employment of 2013.<sup>133</sup> In addition, the State is under responsibility to ensure equality regarding the right to work of female workers.<sup>134</sup> There are no regulations of

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<sup>131</sup> Decision No. 2351/QĐ-TTg dated 24/12/2010 by the Prime Minister on approval of the National Strategy on Gender Equality of 2011 – 2020; Decision 800/QĐ-TTg by the Prime Minister on adjustment of and supplementation to the National Strategy on Gender Equality of 2011 – 2020.

<sup>132</sup> Decision No. 1696/QĐ-TTg dated 01/10/2015 by the Prime Minister on approval of the National Strategy on Gender Equality of 2016 – 2020.

<sup>133</sup> Law on Employment, Law No. 38/2013/QH13, §4 and §9 (2013)

<sup>134</sup> Labor Code, Law No.10/2012/QH13, §53(1) (2012)

discriminatory nature against migrant women for overseas employment, yet neither are any priorities for female workers to migrate for such purpose. Even though equal access to overseas work does not necessitate priority regulation for female workers (this policy is often taken advantage by intermediary agents to attract more women for recruitment), it is clear that the law on equality in opportunity to work has yet to materialize detailed guiding provisions. Therefore, inequality in opportunity to overseas employment of female workers still exist together with traditional custom, social attitudes, and perceptions against women, which are not adequately addressed by the current law in the following aspects:

*i) Inequality in opportunity to overseas employment due to unpaid care work of vulnerable female workers*

Currently in Vietnam, policies have contributed to alleviate the burden of unpaid care work of women. For example, the 2014 Law on Marriage and Family of Vietnam provides responsibility of husbands to share and carry out domestic works (Article 19), the 2014 Law on Social Insurance (amended and supplemented) provides that men are entitled to 5 to 14 day leave in case their wife gives birth. Although there is no practical impact assessment of such provisions, put in the context mentioned above, such provisions play little role in alleviating burden of unpaid work of women. Vietnamese women still have to carry out domestic works without or with little support or orientation from the Government. Their absence in the family creates instant impacts on others and the stability and security of family, as a cell of the society.

Public investment in unpaid domestic work has never arisen on the agenda of the Government of Vietnam lately. Even though investment in and provision of public products and services are a part of public investment<sup>135</sup>, a strategy or action plan of the Government has yet to materialize in respect of domestic work service. The market of domestic workers in Vietnam has been in shape, yet it is not easy to select an ideal helper. The majority of domestic workers in Vietnam are undervalued, low quality<sup>136</sup> and not ideal for long-term help.

Public services, such as education, healthcare, etc., have not eased the tension for women in the implementation of domestic work, in particular some even cause harder situation for women. For example, school selection and registration for children remain confusing and disorderly; women do not receive any official advices or support from the Government. Although the Strategic

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<sup>135</sup> Law on Public Investment, Law No. 49/2014/QH13, §5 (2013).

<sup>136</sup> Dao Thi Mai Ngoc, Lao dong giup viec gia dinh o Viet Nam (Domestic Workers in Vietnam), 6(103) Vietnam Journal of Social Sciences 56-64 (2016).

Development Programme for 2016 – 2020 has been issued,<sup>137</sup> social assistance system in this Programme is restricted in scope, aiming at addressing domestic violence (temporary absence), abandoned children (adoption with term), addressing needs for job from disadvantaged and vulnerable groups.<sup>138</sup>

As a result, female workers, at the crossroads of overseas employment, are faced with opposition from families, relatives and society<sup>139</sup> due to the impacts of unpaid domestic work. It is suggested that women should not migrate for work because family are more likely to disintegrate, children left uncared, ubiquitous domestic work, etc.

*ii) Inequality in opportunity to overseas employment due to women's low status in owning, using and determining properties, common income in the family*

In order to improve economic rights of women, Vietnam's laws and policies put a focus on the creation of jobs with income, thereby women can own and use such incomes; as well as recognize and formulate legal basis for property rights, value of unpaid works. For example, the Law on Marriage and Family realizes value of unpaid domestic works, accordingly, in cases of divorce, common properties will be divided equally taken into account that domestic works are deemed paid works.<sup>140</sup> In addition, the law on marriage and family provides equal share even in case wife and husband agree on personal and shared properties before or during the marriage,<sup>141</sup> with a view to ensure the property right of women taken into consideration that women's properties have been spent on family consumption, whereas husband's properties are personal. It is the ground to protect personal property of each individual, and the agreement on property between wife and husband can sustain the marriage relationship because two are on the same page on the use and management of money, property.

The law on marriage and family recognizes name registration of both wife and husband for shared properties, including land use. Shared property of wife and husband are legally required registration, the certificates of property and land use shall show names of wife and husband unless otherwise provided.<sup>142</sup> In case wife or husband establishes, implements and terminates a transaction with a third party in violation of regulations on wife/husband representative, the transaction may be found invalid. In addition, land law provides procedures for re-issuance of certificate of land use

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<sup>137</sup> Decision No. 565/QĐ-TTg dated 25/4/2017 by the Prime Minister on Approval of Targeted Programme on Development of Social Assistance System of 2016 – 2020.

<sup>138</sup> *Id.*

<sup>139</sup> Ruth Bowen and Do Van Huong, *supra* at 37 (2012).

<sup>140</sup> Law on Marriage and Family, Law No.52/2014/QH13, §59 (2.b) (2014)

<sup>141</sup> Law on Marriage and Family, Law No.52/2014/QH13, Section 3 on Matrimonial Property Regime (2014).

<sup>142</sup> Law on Marriage and Family, Law No.52/2014/QH13, §26 and §34 (2014).

right, which is shared property of wife and husband. Accordingly, in case where land use right and land-related right are shared property of wife and husband, if certificate of such rights show only the name of wife or husband, upon the request, a new certificate can be issued to recognize names of both.<sup>143</sup>

The allocation of property between wife and husband deems to benefit women, however, in practice, the agreement on shared or personal property during marriage is a novel issue for Vietnamese families, especially in rural areas. Therefore, in practice, it is rare to witness property agreement between wife and husband. Given this fact, women tend to encounter more difficulties in self-determination of using family fund to finance their departure for overseas employment, or in case of preferential loan from the Government, it is difficult for them to use family assets as mortgage.

- Inequality in opportunity to overseas employment due to prejudices against women working abroad

To address gender-related prejudices against women in general as well as female guest workers in particular, the Government has viewed communication on gender equality as a main target within the scope of nationwide action plans on gender equality. Accordingly, communications to raise awareness, change behaviors in respect of gender equality are one of main concerns of the Government.<sup>144</sup> In particular, propaganda on gender equality puts focus on communication agencies, reporters, correspondences, editors, grassroots informants; to establish pilot model to apply Gender Equality Index and communication in press. In addition, it is noted to broaden forms of communications in line with particularities of subject groups, residence. At local level, to implement aforementioned Action Plan, provinces have issued action plans on gender equality, however, the content thereof mainly adopts content mentioned in action plans and policies of the central government,<sup>145</sup> in which it emphasizes communication on gender equality.

Public media are carried out through the Government's institutions, such as State media, press, television, electronic websites of departments, sectors, associations, public cadres, under responsibility to propagate State policies and laws<sup>146</sup>. Achievements have been made, however,

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<sup>143</sup> Decree No. 43/2014/ND-CP detailing the implementation of provisions of the 2013 Law on Land, §76 (2014)

<sup>144</sup> Decision No. 1696/QĐ-TTg on approval of national action programme on gender equality of 2016 – 2020.

<sup>145</sup> See Decision No. 58/KH-UBND dated 13/4/2018 on the 2018 Implementation Plan of Gender Equality and For the Development of Women at the Province.

<sup>146</sup> See provisions under the Law on Gender Equality in terms of responsible subjects for legal propaganda, proliferation, education, and awareness-raising on gender equality.

efficacy of public media is limited, ceremonial, and too wide in scope.<sup>147</sup> Regarding female guest workers, there is no regulation on media to abolish perceptions and prejudices against female guest workers in international labor environment.

Media in the private sector have shown positive development towards the protection of female guest workers, however, there are shortcomings to be considered. For example, exaggeration of risks, consequences and impacts of migration on female guest workers without providing direction to address the issue<sup>148</sup>. Clearly, the products of media are sometimes prejudiced against gender when offering opinions on female guest workers.

#### 2.4.2.2. *Guarantee of equality in quality of overseas employment*

- Domestic regulations on decent work of vulnerable groups

Current regulations on labor relation through which to identify sustainable nature of labor sectors are integrated into different laws, including the Constitution, the Labor Code (Section 5, Chapter XI on domestic workers), and other sector-specific regulations.

For types of guest workers, Vietnam already has specific regulations on domestic workers<sup>149</sup>; accordingly, the naming, contract form, wage, social and health insurance, labor safety and sanitation for domestic workers are provided adequately.<sup>150</sup> However, such regulations are general, not gender-specific, although the majority of domestic workers are women. Further, the implementation of regulations is the greatest hurdle given the vulnerable position of domestic workers in practice in relation with employers in terms of awareness of rights, contractual provisions, choices, etc.

Contract template on domestic workers receives attention from the Government with a view to improve status of female workers. However, there are no regulations on contract template in place yet.<sup>151</sup>

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<sup>147</sup> See Centre for Communication Research and Department of Gender Equality (MOLISA), Workshop on Communication Work of State Authorities on Gender Equality, Hanoi, March 2018.

<sup>148</sup> CSAGA and Oxfam, *Cong bang gioi cho nguoi di xuat khau lao dong (Gender Equality for Guest Workers)*, 5 (2010).

<sup>149</sup> Decree No. 27/2014/ND-CP detailing the implementation of provisions of the Labor Code on domestic workers.

<sup>150</sup> Le Thi Hoai Thu, *Lao dong giup viec gia dinh – Nhin tu giac do phap ly (Domestic Workers – From Legal Perspective)*, available at <http://tcdcl.moj.gov.vn/qt/tintuc/Pages/xay-dung-phap-luat.aspx?ItemID=282> (visited Oct. 2, 2018).

<sup>151</sup> Centre for Gender, Family and Community Development Studies, Department of Labor Relation and Wage (MOLISA), and ILO have formulated contract template on the basis of international standards and norms and related countries' templates.



- Level of realization of job criteria of vulnerable group under international and regional instruments

Decent work for female workers working abroad not only requires legal recognition of national laws but also commitment to international and regional standards on decent work.

Within ASEAN region: for domestic works, Vietnam have called ASEAN countries to ratify the ILO Convention on Domestic Workers, and formulated agenda for protection of vulnerable groups. Recommendations include bilateral agreement on complaint mechanism to protect documented and undocumented workers, develop national legal framework on decent work for domestic workers, and formulate criteria for country capacity on domestic work. In addition, Vietnam calls ASEAN countries to formulate standard contract for domestic workers and minimum social security for those, design textbooks for vocational training programmes for domestic workers. However, these efforts need common determination from all Member States.<sup>152</sup>

Memoranda of Understanding (MOU) on receiving workers between Vietnam and other countries: Those are legal documents enshrining requirements of Vietnam's partner countries on certain job categories in specific sectors, such as construction. However, the terms mostly make mention of requirements of workers from the partner, rather than description of work carried out by guest workers after their immigration. In particular, description of jobs for vulnerable groups is absent. In other words, it is difficult to reach consensus on job criteria in bilateral agreements between Vietnam and other countries.

#### *2.4.2.3. Guarantee of equality in access to information and advice on overseas employment*

Access to information on overseas employment, information in all stages of migration for work is provided in the form of entitlement of workers and obligations of related organizations in return. The Law No. 72 provides that service enterprises are under obligation to cooperate with local governments in public declaration, provision of full information to workers regarding number of and qualification for recruitment as well as other requirements under the contract to send workers abroad for work.<sup>153</sup>

Information and advice on overseas employment fall within the scope of "job service" provided by job service organizations.<sup>154</sup> Workers are charged fees by the organizations to enjoy

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<sup>152</sup> Up to now, only the Philippines has ratified this Convention, available at [https://www.ilo.org/hanoi/Informationresources/Publicinformation/comments-and-analysis/WCMS\\_558647/lang-vi/index.htm](https://www.ilo.org/hanoi/Informationresources/Publicinformation/comments-and-analysis/WCMS_558647/lang-vi/index.htm) (visited Oct .2, 2018).

<sup>153</sup> Article 27.2(c) the Law No. 72 (2013).

<sup>154</sup> Law on Employment, Law No. 38/2013/QH13, §36 (2013).

such access. On the other hand, job consultation puts focus on unemployed workers, yet unemployed status is conditioned on history of employment through registration of previous labor contracts; in other words, its focus is on formal labor.<sup>155</sup> Workers in informal sector are not entitled to job consultation. Besides, policies on support for taking workers abroad for employment under contracts do not have any provisions related to free information and advice for workers in need of working abroad.<sup>156</sup>

Center of Overseas Labor (COL) is a career unit under the Ministry of Labor, Invalids and Social Affairs, has mandates of recruitment, training and sending workers abroad for employment under contracts.<sup>157</sup> Workers want to work abroad may seek job advices at COL on labor receiving programmes overseen by COL. COL also has online registration system for overseas employment, however, information provided is limited within the cooperation framework agreed by Vietnam and other countries.

Pilot Office for Migration Information (Office for Supporting Overseas Employment) (Department of Overseas Labor and International Organization for Migration in Vietnam) focuses on providing information, connecting issues faced by those who migrated, migrating and about to migrate, through hotline +84439366633 and website: hotrolaodongngoainuoc.org, giving workers full information to decide on overseas employment, providing legal advices for better protection of their own rights and optimizing benefits from the international migration process. The circulation of accurate information at grassroots level requires much help from local governments and specialized cadres. However, limited capacity of grassroots cadres results in restricted access to information on overseas employment.

It can be observed that the provision of information and advices on overseas employment depends heavily on quality of services provided by job service centers. Yet, their capacity is another issue. Network of job service centers at local level are not well conditioned to satisfy workers' need for information. These centers lack of specialized consultant, data source on overseas employment and labor market, as well as policies of Vietnam and receiving countries. It is noted that these centers lack of experiences in handling issues of workers arising while working abroad, there is no line network to help protect legitimate rights and interests of workers.

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<sup>155</sup> *Id.*; See also Decree No. 28/2015/NĐ-CP detailing the implementation of the Law on Employment in respect of Unemployment Insurance, §14 (2015).

<sup>156</sup> Decree No. 61/2015/ND-CP on Support Policies for Job Creation and National Fund for Employment, Chapter 3 (2015)

<sup>157</sup> Decision No. 531/QĐ-BLĐTBXH on mandates, competence, and organization of Centre for Overseas Labor.

In the perspective of gender equality, Vietnam has social organization system for women at different levels, which is Vietnam Women's Union. The Union has job service center to provide job information with a fee. Job service centers of the Union are under provincial Women's Union, independent from commune and ward Women's Union. Ward Women's Union lacks information on overseas employment. Obviously, current regulations do not make a good use of women's representative organization from central to grassroots levels in order to facilitate women's access to relevant information. Access to information and advice is characterized as top down approach yet to be complete and adequate, resulting in wide gaps between those in need of information and those who provide information.

#### *2.4.2.4. Ensure equality in recruitment for overseas employment*

Currently, Vietnamese law has recognized equality in recruitment, accordingly, "men and women are equal in terms of qualifications and age in recruitment"<sup>158</sup>. The application of different qualifications in recruiting male and female workers to the same job that both male and female workers are qualified and have the same level and ability to perform the job is deemed a violation.<sup>159</sup> However, procedures for recruitment of workers working abroad are relatively different from casual recruitment relation. During the process, workers take part in two types of relations: one with employers and one with service enterprises. Therefore, one national legal system embodies gender equality is not sufficient nor effective if no regional or international legal institution is in place.

Inequality in recruitment may stem from employers by imposing gender-based occupation, gender-based discriminatory qualifications, or from intermediary agencies by using gender card to disadvantage female workers going abroad for employment (for example, female workers are indeterminate, not likely to question contents of the contracts compared to men)<sup>160</sup>.

- i) Regulations on imposing gender-based employment, requirements of gender discriminatory nature

The Law No. 72 does not have any provisions on the prohibition of imposition of gender-specific jobs in recruitment; actually, it falls outside the scope of the law. MOUs on receiving foreign workers between Vietnam and other countries do not mention this issue. It is suggested that the issue is too trivial and detailed to be included in such general agreements. This is also a change

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<sup>158</sup> Law on Gender Equality, Law No. 73/2006/QH11, §13 (2006).

<sup>159</sup> Law on Gender Equality, Law No. 73/2006/QH11, §40 (2006).

<sup>160</sup> Oxfam, *supra*.

of perception and adjustment of each labor market (supply and demand). Therefore, change of prejudice on gender-specific job is not adequately addressed in Vietnam and worldwide.

Gender discriminatory requirements for recruitment fall outside the scope of national law as imposition of gender-specific jobs. For example, female workers are not pregnant prior and during overseas employment; Recruitment process requires pregnancy test; in case of pregnancy female workers are faced with loss and termination of labor contracts and deportation. Vietnam's labor law has regulations on prohibition of termination of labor contracts based on pregnancy, however, these regulations are out of effect to govern labor relation arising outside Vietnam's territory.

Vietnam's lists of prohibited sectors and jobs<sup>161</sup> for employment abroad pose a risk of pushing female workers into unequal situation as warned in CEDAW's General Recommendation No. 26.<sup>162</sup> Inconsistency among countries in terms of forbidden sectors and works nationally and abroad may push female workers into illegal recruitment process or illegal work, deprive them of legal protection. For example, in Vietnam, dancers, singers, massage workers at restaurants, hotels or entertainment centers may be prohibited to migrate for overseas employment, whereas labor market in Thailand is in increasing demand for such workers.

- ii) Regulations on ensuring the prevention of intermediaries taking gender-related advantages against female workers for overseas employment during recruitment process (financial abuse, limited access to education and training, shortening of education process, unreliable information, fraud, exploitative fees, etc.)

The prevention of taking gender-related advantages against guest workers in general and female guest workers in particular is shown in following aspects:

- Regulations on recruitment process  
(relating to recruitment requirements, fees, procedures)

In principle, the transparency and openness of recruitment process is an important guarantee for the protection of legitimate rights and interests of workers in general. Regulations on recruitment process for overseas employment are dispersed in many provisions in the Law No.72 without a standard process. Based on that, service enterprises set forth their own procedures and

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<sup>161</sup> Decree No. 126/2007/ND-CP detailing and guiding the implementation of provisions of the Law on Vietnamese Guest Workers.

<sup>162</sup> UNIFEM, Collection of CEDAW General Recommendations, at 111 (2009).

process. Currently, recruitment process applied by service enterprises is relatively uniform,<sup>163</sup> yet it is voluntary, not mandatory.

- Licensing and credit assessment system on service enterprises

In Vietnam, sending workers abroad for employment is conditional business sector. Service enterprises and companies must meet business requirements during their operation. Companies have license on sending workers abroad for employment (hereinafter license) are those established under the Law on Enterprises and have 100% authorized capital from Vietnamese organizations, individuals. Legal capital of such companies in this sector is 5 billion Vietnam dongs<sup>164</sup>; managers must have bachelor degree at minimum, with three years of experience in international cooperation and relation, requirements on security deposit, etc. The conditions for this business on service enterprises aim to ensure quality of services provided to workers. List of licensed service enterprises is public on the electronic portal of Department of Overseas Labor. However, weak mechanisms of compliance oversight lead to the fact that licensing system cannot oversee practical operation of service enterprises in terms of business conditions.

- System for detection and handling of violations by service enterprises

The Law No. 72 has specific regulations on obligations of service enterprises in relation with workers, including prohibition on sending Vietnamese abroad in disguise of guest workers, taking advantage of send workers abroad to organize recruitment, training and charging workers for fees.<sup>165</sup>

Regarding mechanism to detect violations, Article 69(8) of the Law No. 72 provides State management on workers working abroad, including responsibility of MOLISA, in particular Department of Overseas Labor and MOLISA Inspectorate. The inspection takes 2 forms: periodic check and spot check. However, inspection only aims to handle and withdraw licenses without providing any advices for better compliance and preventative measures, especially in sensitive sectors and works. Even in respect of handling violations, inspection activities remain limited.

Regarding handling violations, detected violations may be sanctioned in accordance with administrative law with the maximum fine of up to 200 million Vietnam dongs.<sup>166</sup> In more severe cases, violations against interests and bodily integrity of workers can be held responsible

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<sup>163</sup> Vietnam Association of Overseas Workers, Code of Conduct For Vietnamese Companies Sending Guest Workers Abroad (2010)

<sup>164</sup> Decree No. 126/2007/NĐ-CP, §2 and §3 (2007).

<sup>165</sup> The Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §7 (2006).

<sup>166</sup> Decree No. 93/2013/ND-CP on Handling Administrative Violations in the Field of Labor, Social Insurance, and Sending Vietnamese Guest Workers Abroad, Chapter IV (2013).

criminally.<sup>167</sup> Forms of penalties are warning, fine, compensation or withdrawal of license.<sup>168</sup> Albeit regulations on penalties in place, light penalties do not have preventative impact, rewards do not go together with inspection and check outcomes, thus authorities are not motivated to work their best.<sup>169</sup>

Regarding types of violations by service enterprises, the law has provided unambiguously types of violations, namely, non-disclosure of business license for sending workers abroad for employment, use of business license of other enterprises, let other enterprises use business license, taking workers abroad for employment without labor contract, traineeship contract without approval of the authority, failure to publicly disclose, provide workers with full information on the number of and qualification for recruitment as well as other conditions under the contract, non-commitment to workers on pending duration for immigration after being recruited for overseas work, enterprises' failure to organize, manage, protect legitimate rights and interests of workers in accordance with the law, taking advantage of sending workers abroad to charge fees on workers, taking advantage of sending workers abroad to organize illegal sending of citizens abroad, sending workers for overseas works that are prohibited under the law of Vietnam and receiving countries.

Regarding types of violations by workers or individuals, a number of violations include illegal overstay after the expiration of labor contract, residence permit, fleeing from workplace under the contract, failure to show up at the workplace under the contract after immigration, inciting, encouraging, forcing, deceiving Vietnamese workers into illegal overstay.

- Complaint system for workers

Regarding complaint system, workers working abroad under contracts may complain, denounce, or bring a lawsuit against legal violations in respect of sending worker abroad for employment, parties to be complained are not limited to this activity.<sup>170</sup> This right is not provided specifically to those who migrate for work under individual contracts, yet workers working abroad of this type can claim diplomatic protection from Vietnam representative bodies in receiving countries.<sup>171</sup> Complaint includes review of decision, conduct of send workers abroad for employment upon worker's request. The complainants may be workers working abroad under contracts, or organizations, individuals concerning sending those abroad. Complaint can be lodged

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<sup>167</sup> Criminal Code, Law No. 100/2015/QH13, §150 on Human Trafficking (2015).

<sup>168</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §74 (2006).

<sup>169</sup> Doan Thi Yen, Nguyen Thi Minh Hien, *Giai phap quan ly hoat dong xuat khau lao dong cua cac doanh nghiep xuat khau lao dong o Ha Noi (Measures for Management of Sending Guest Workers Abroad by Sending Companies in Hanoi)*, 12(1) J. Scie. and Dev. 116-123 (2014).

<sup>170</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §46 (2006).

<sup>171</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §14 (2006).

against organizations, individuals who send worker abroad for employment.<sup>172</sup> Practice has shown that violations prior to departure for work in relation to service enterprises range from change of contract (20%), charging fees higher than legally provided (15%), failure to obtain visas for workers, failure to send workers abroad after charging fees, payment to illegal intermediaries and organizations.<sup>173</sup> However, regulations on complaint process have shown limitations and legal loopholes, resulting in difficulties and ineffectiveness in handling complaints. This puts workers at disadvantage but also pave the way for unethical service enterprises to thrive.<sup>174</sup>

- Provision on prohibiting sham marriage

The Marriage and Family Law provides for the prohibition of sham marriage in order to take advantage of marriage for the purpose of departing, entry, residence, acquisition of Vietnamese nationality or foreign nationality, and enjoyment of preferential treatment of State or for other purposes that are not intended for the purpose of family reunification.<sup>175</sup> Accordingly, if the State agencies detect that the registration is sham marriage, the State refuses the registration of marriage or refuses to grant the status of marriage for Vietnamese citizens and foreigners<sup>176</sup>. If the marriage is registered, then it is found that the marriage is sham, the marriage registration will be canceled.

- Provisions on prohibiting human trafficking

Vietnam's law provides prohibition on trafficking in persons. Specifically, the 2011 Law on Combating and Prevention of Human Trafficking has regulations on recruitment, transport, harboring of persons for sexual exploitation, forced labor, brokering for human trafficking, etc. The Criminal Code of 2015 provides prohibited conducts and supplements circumstances for penalty regarding human trafficking, paves the way for combating and prevention operation against general crimes and human trafficking (Articles 150, 151). Accordingly, the recruitment, transport, harboring of persons for human trafficking purpose shall be deemed crime and held accountable criminally. However, trafficking in persons domestically and internationally has complicated developments. According to Report of the Government's Steering Committee on Combating and Prevention of Crimes, from 2012 to 2017, the special force has rescued and received 7.500 people, of which 90% are women and children. The majority of victims are women tricked and sent abroad into forced marriage with foreigners, and sexually abused (almost 80%).

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<sup>172</sup> Decree No. 119/2014/NĐ-CP detailing provisions of the Labor Code, the Law on Vietnamese Guest Workers in terms of complaint and denunciation (2014)

<sup>173</sup> Regional Office for Asia and the Pacific, Complaint Mechanism for Vietnamese Guest Workers Working Abroad: Overview of laws and practices, 30 (International Labour Organization 2015).

<sup>174</sup> *Id.* at xv.

<sup>175</sup> Law on Marriage and Family, Law No.52/2014/QH13, §59 (2.b) (2014)

<sup>176</sup> Decree 126/2014/ND-CP detailing some provision of the Law on Marriage and Family 2014, § 29 (2014).

#### *2.4.2.5. Ensure equality in education, training and orientation for social inclusion*

According to the 2006 Law on Gender Equality, female workers in rural areas are supported with vocational training in accordance with the law.<sup>177</sup> In general, migrant workers have to undergo education and training pre-departure programmes. However, the content of programmes is not gender-specific. Accordingly, for female workers, the content should take in account gender difference. Female workers need to aware of and be instructed skills to tackle sexual abuse, bodily violence, self-defense of health and body.

Inequality in pre-departure orientation for social inclusion: education and training programmes only focus on vocational skills but guidance for workers to integrate into new living and working environments. Especially for female workers, the understanding of local customs and traditions does not receive much attention (for example labor market in Middle East perceives of women differently).

#### *2.4.2.6. Ensure equality in pre-departure finance and costs*

The 2006 Law on Gender Equality provides: “Female workers in rural areas shall be given financial support”.<sup>178</sup> The Decree No. 61/2015/ND-CP provides that “workers in households of poverty, withdrawal of rural land, ethnic workers shall be entitled to loan from Bank of Social Policies to migrate for work under contracts in accordance with the law”.<sup>179</sup> However, it lacks of specific affirmative actions applicable to female workers; those are only covered within the ambit of general regulations.

To meet financial need for working abroad, women often seek approval from family to deposit, mortgage valuable properties in exchange for cash at commercial banks. Gender inequality in this case stems from the vulnerability of women in terms of property rights within the family in Vietnam.

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<sup>177</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §14 (2006).

<sup>178</sup> Article 12.2(b) of the 2006 Law on Gender Equality

<sup>179</sup> Article 11.1 of the Decree No. 61/2015/ND-CP.



### ***2.4.3 Ensuring gender equality for female workers during job employment abroad***

#### ***2.4.3.1. Legal basis for the protection of Vietnamese guest workers during job employment abroad***

During job employment abroad, the employment relation is governed by the laws of the receiving country with regard to wage, working hours, break time, and settlement of disputes between employees and employers and etc., however, in cases where there is a violation of the rights of guest workers, the State shall protect them by protection measures for Vietnamese citizens residing abroad. Article 17 (3) of the 2013 Constitution provides that, “Vietnamese citizens residing abroad shall be protected by the Socialist Republic of Vietnam”. In addition, the Law No.72 clearly defines the responsibility of the sending country in protecting the legitimate rights and interests of workers who are sent to work in another country<sup>180</sup>. These are important legal basis for protecting the rights of Vietnamese guest workers while they are working abroad. However, it should be noted that the Law No.72 only applies to guest workers who work abroad under 4 forms of contract as provided by the Article 6 of the Law. Thus, the obligation of the State in protecting the rights and interests of Vietnamese guest workers during job employment abroad as stated in the Law No.72 is applied to those who work abroad legally and under a contract. Vietnamese laborers working abroad illegally or through other channels shall be protected by general protection measures for citizens residing abroad.

In case where Vietnamese laborers are sent to work abroad due to deception, coercion, or where working conditions in a receiving country constitute labor exploitation or forced labor, such actions shall be regarded as human trafficking under the Law on Human Trafficking Prevention and Combat of 2011. This law applies to both migrant workers working under contracts or through illegal channels. This is also the legal basis for protecting Vietnamese guest workers from labor exploitation and forced labor abroad.

#### ***2.4.3.2. Rights of Vietnamese guest workers during job employment abroad***

The Law No.72 specifies the rights of Vietnamese guest workers such as: the right to request information on laws and policies of the receiving country; the rights to enjoy salary and remittance, to have their rights and legitimate interests protected while working abroad

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<sup>180</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §5(1) (2006).

and etc.<sup>181</sup> However, in practice Vietnamese guest workers, especially female workers, are vulnerable and face difficulties in the course of employment. This is because the majority of Vietnamese guest workers go to work overseas because of financial difficulties, and thus they hope to have higher income and support the family by seeking jobs abroad. In addition, the educational level of most of the low-skilled female guest workers is limited. Most of the jobs that workers are employed in a receiving country are low-skilled and non-professional. Therefore, there are risks of poor working conditions, unfair treatment, and labor exploitation. For these reasons, although the rights of Vietnamese guest workers during their employment abroad are recognized by laws, are very difficult to secure.

- Right to information in the course of working abroad:

According to the current laws of Vietnam, the provision of information to employees prior departure has been implemented, but does not take into account gender-sensitive consideration. Guest workers are obliged to participate in necessary training courses before going to work abroad<sup>182</sup>, however specific information and knowledge related to female workers are not compulsory. In addition, the law does not provide for post-arrival training programs. Some receiving countries, such as the Republic of Korea, require that foreign workers who enter the country must complete a training course at the employment training center before starting their work. However, this does not ensure that the contents of cultural orientation, information on rights and welfare regimes for female workers are provided in the training course. Meanwhile, some labor sending countries such as the Philippines and Indonesia, conduct post-arrival training programs at their embassies in Hong Kong and Taiwan, which include information on cultural orientation, rights and obligations of the female employees and of employers.<sup>183</sup> This is a good practice that Vietnam should consider in order to protect the rights of female guest workers.

- Right to enjoy salaries, wages and other incomes: Vietnamese guest workers receive salaries, wages and other incomes according to the law of the receiving country and the labor contract. However, the vast majority of Vietnamese workers abroad experience wage-related problems, for example wages are lower than the amount provided under labor contracts, or wages are cut off arbitrarily by employers.

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<sup>181</sup> *Id.* at §44

<sup>182</sup> *Id.* at §45(3).

<sup>183</sup> ILO-Bangkok, *supra* at 83.

- The right to safe working conditions.
- The right to enjoy medical and social insurance: The Law No.72 stipulates that guest workers are entitled to medical examination and treatment, and social insurance in accordance with the laws of Vietnam and receiving countries<sup>184</sup>
- Right to remittance of salary, remunerations, incomes and other personal properties in accordance with the laws of Vietnam and receiving country. Right to lodge complaints, denouncements, or file a lawsuit against violation of the rights and legitimate interests of Vietnamese guest workers: This is an important right because it is “a right to protect other rights”. The content of Article 44(6) of the Law No.72 does not impose any restriction on parties who can be sued for illegal acts in sending of workers abroad. Regarding guest workers working under individual contracts, the Law No.72 provides that guest workers while working abroad shall have their rights and legitimate interest protected by Vietnam’s diplomatic mission or consulate<sup>185</sup>. Thus, in principle guest workers working abroad under individual contract have the right to lodge a complaint to Vietnam’s diplomatic mission.

The Decree No. 126/2007/ND-CP holds the Ministry of Labor-Invalids and Social Affairs responsible for handling complaints, denouncements related to acts in sending of workers abroad as prescribed by laws<sup>186</sup>; the Ministry of Foreign Affairs responsible for directing and guiding diplomatic missions, consulates to carry out consular protection, protection of rights and legitimate interests of Vietnamese guest workers abroad<sup>187</sup>. The law also provides for obligation of enterprises providing guest worker service (hereinafter referred to as “service enterprises”) to protect the rights and legitimate interest of guest workers and coordinate with Vietnam’s diplomatic missions or consulates in protecting Vietnamese workers during their employment abroad<sup>188</sup>. The Ministry of Labor – Invalids and Social Affairs have established labor management sections attached to Vietnamese embassies in several receiving countries in order to support Vietnamese guest workers while working abroad. In addition, some service enterprises appoint their staff residing in major receiving countries where there are a large number of Vietnamese guest workers. These are channels

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<sup>184</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §44(2) (2006).

<sup>185</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §53(1.b) (2006).

<sup>186</sup> Decree Detailing and Guiding the Implementation of a number of Articles of the Law on Vietnamese Guest Workers Working abroad under Contract 2006, Decree No.126/2007/ND-CP, §8(9) (2007).

<sup>187</sup> *Id.* at §9(2).

<sup>188</sup> Law on Vietnamese Guest Workers, Law No. 72/2006/QH11, §27(2.dd,e) (2006)

for Vietnamese guest workers to lodge complaints against violations of their rights and legitimate interests in the course of employment abroad.

The grounds for settling disputes between Vietnamese guest workers and foreign employers include: (1) agreements signed between parties and laws of the receiving country; (2) international treaties to which Vietnam is a contracting party; (3) international agreements concluded by Vietnamese ministry, ministerial-level agencies or government-attached agencies and foreign parties.<sup>189</sup>

In summary, the current laws of Vietnam provide for a number of mechanisms for guest workers to lodge complaints about issues arising during their employment abroad.

#### *2.4.3.3. Major actors involved in protecting the rights and legitimate interests of guest workers*

- The Ministry of Labor – Invalids and Social Affairs take responsibilities:<sup>190</sup> to handling complaints and denouncement; to inspect, investigate and handle violations of the rights and legitimate interests of guest workers; to organize and implement specialized inspection for activities in sending of workers abroad; to coordinate with Ministry of Foreign Affairs in organizing and directing the management and handling issues related to Vietnamese guest workers during their employment abroad; to organize labor management section attached to Vietnamese diplomatic missions and overseas-based consulate in receiving countries where a large number of Vietnamese workers are employed; to regulate and instruct annual and irregular reporting of service enterprises; to report annually to the Prime Minister on the situation of Vietnamese guest workers.

- The Ministry of Foreign Affairs take responsibilities:<sup>191</sup> to direct and guide Vietnamese diplomatic missions and overseas-based consulates to perform consular protection and protection of the rights and legitimate interests of Vietnamese guest workers residing in a receiving country in conformity with the laws of Vietnam, the laws of the receiving country and international treaties to which Vietnam is a contracting member; to coordinate with domestic competent agencies in dealing with issues related to Vietnamese guest worker during job employment in the receiving country.

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<sup>189</sup> *Id.* at §73(2).

<sup>190</sup> Decree Detailing and Guiding the Implementation of a number of Articles of the Law on Vietnamese Guest Workers Working abroad under Contract 2006, Decree No.126/2007/ND-CP, §8 (2007)

<sup>191</sup> *Id.* at §9.

- The Ministry of Public Security take responsibilities:<sup>192</sup> to coordinate with Vietnamese diplomatic missions and overseas-based consulates and the Ministry of Labor - Invalids and Social Affairs in directing the competent agencies to promptly investigate and handle suspected violations as prescribed by laws; to coordinate with the Ministry of Labor - Invalids and Social Affairs, Vietnamese diplomatic missions and overseas-based consulates in receiving country when Vietnamese guest workers are deported or forced to return home country; to prosecute and investigate organizations and individuals committing violation in the sending of workers abroad as prescribed by laws.

- Vietnamese diplomatic missions and overseas-based consulates have responsibilities:<sup>193</sup> to protect the rights and legitimate interests of Vietnamese guest workers working abroad; to guide and inspect activities of representatives of Vietnamese service enterprises in a receiving country in managing and handling issues related to guest workers; To submit reports and recommendations to Vietnamese competent state agencies to settle cases of a serious violation of Vietnam's laws; to coordinate with offshore-investing agencies, enterprises, organizations and individuals and agencies and organizations of the receiving country in repatriating guest workers committing violations.

The protection of the rights of workers working overseas may be impeded since guest workers fail to register citizenship with the Vietnamese representative office in a receiving country. This causes the Vietnamese representative office to take a certain time to conduct verification upon receiving the request for help and protection from guest workers in case of accident or other risks.

- People's committees of provinces and cities have responsibilities:<sup>194</sup> to coordinate with service enterprises in managing local people who go to overseas; to handle complaints and denunciations of organizations and individuals involved in sending workers abroad as provided by laws; to inspect, inspect and promptly handle violations in the sending of workers abroad by local service enterprises; to report periodically and irregularly to the Ministry of Labor-Invalids and Social Affairs on the situation of local people who go to work abroad.

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<sup>192</sup> *Id.* at §10.

<sup>193</sup> Law on Vietnamese Guest Workers, Law No. 72/2006/QH11, §71 (2006).

<sup>194</sup> Decree Detailing and Guiding the Implementation of a number of Articles of the Law on Vietnamese Guest Workers Working abroad under Contract 2006, Decree No.126/2007/ND-CP, §14 (2007).

- Organizations and enterprises providing services for sending workers abroad have responsibilities:<sup>195</sup> to management and protect the rights and legitimate interests of guest workers; to coordinate with foreign parties in dealing with situation where guest workers suffer from accidents, have their health, honor and dignity infringed; to coordinate with foreign parties in settling disputes related to guest workers; to report and coordinate with Vietnamese diplomatic missions and overseas-based consulates in managing and protecting the rights and legitimate interests of guest workers while working abroad.

#### *2.4.3.4. Cooperation mechanism between Vietnam and receiving countries.*

Vietnam has signed labor cooperation agreements with many countries such as Korea, Malaysia, Japan, Laos, Qatar, Russia and Taiwan in order manage Vietnamese guest workers working in these countries. These cooperation agreements provide the basis for facilitating Vietnam to supervise and handle issues arising in the course of employment of Vietnamese workers in receiving countries. Cooperation agreements establish a regular contact between the parties to ensure the rights and legitimate interests of guest workers within the framework of the agreements. In addition, labor management section attached to Vietnamese diplomatic missions have been established in several major importing labor countries such as Korea, Malaysia, Japan, Taiwan, the UAE, Saudi Arabia, and the Czech Republic are also a form of coordination between the Vietnamese authorities and the receiving countries in protecting Vietnamese guest workers working in these countries.

#### *2.4.4. Ensuring gender equality for female guest workers upon return*

The objective of labor policies is to ensure social reintegration for female guest workers upon return after a long period of working abroad. Reintegration policy is meant to deter undocumented workers in receiving countries and re-impooverishment upon return. Reintegration policy for guest workers, particularly women, should focus on issues as follow: job security, access to vocational training, financial support, and access to psychological, marriage and family support.

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<sup>195</sup> Law on Vietnamese Guest Workers, Law No. 72/2006/QH11, §38(2) (2006).

#### 2.4.4.1. Regulations on job security

The Law No.72 has provided policy to support guest workers upon return in job seeking or self-employment; however, such provisions are rather general, not gender-specific for female guest workers. As a result, job security for guest workers upon their return shall be governed under other legal documents relating to gender equality and workers.

##### *(i) Access to employment service (employment counseling and support)*

To access to employment service, there is a need to collect and manage all information on guest workers. Up to now, the responsibility to collect and update information on guest workers lays on various stakeholders:

- Employment service centers shall be responsible for “collecting data on labor market, bridging the gap between labor supply and demand system, and forecasting labor market of provinces, regions, and sectors”<sup>196</sup>.

- Sending companies shall update to the database personal information of guest workers, and information thereof while under training, working abroad, and after termination of employment<sup>197</sup>.

- Provincial and City Departments of Labor, Invalids and Social Affairs shall update to the database via approved accounts information on guest workers on the section of “Guest Workers Info”, personal information of guest workers, contracts, internships for skill-upgrading with term of under 90 days.

- Overseas labor centers shall update to the database via approved accounts information on guest workers.

Beside, the Law No.72 provides Provincial Departments of Labor, Invalids and Social Affairs are responsible for providing information, job counseling service to guest workers upon their return.<sup>198</sup> In addition, employment service centers<sup>199</sup> and enterprises<sup>200</sup> have a role in providing information and job counseling service to guest workers. Vietnam Women’s Union, a socio – political organization for women, also has job service center system at provincial level. The mandate of such centers and enterprises is to counsel workers in finding

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<sup>196</sup> Decision No. 1833/QĐ-TTg dated 28 October 2015 of the Prime Minister stipulating networks for job service centers of 2016-2025.

<sup>197</sup> Circular No. 35/2017 / TT-BLĐTBXH regulating the operation of the database on Vietnamese guest workers.

<sup>198</sup> Law on Vietnamese Guest Workers, Law No. 72/2006/QH11, §59(1) (2006).

<sup>199</sup> Established by state agencies or socio-political organizations.

<sup>200</sup> Private enterprises doing business in providing job services.

a job compatible with their ability and desire, in skills for job examination, in self-employment, job seeking domestically and abroad,<sup>201</sup> organize education and training courses for capacity building in job seeking<sup>202</sup>. Also, overseas labor centers have a mandate to refer workers to overseas and domestic jobs. However, under the law, job service support for guest workers does not lay exclusively on one stakeholder. Therefore, workers can access to all stakeholder aforementioned for job service. These provisions are applicable to both sexes workers.

*(ii) Regulations on encouragement for enterprises to receive and recruit female workers*

General principles on equality between men and female workers in recruitment and labor relation with employer are provided adequately under laws on labor, employment and gender equality. Beside, the law also has a number of provisions to encourage enterprises to recruit female workers in general, including those worked abroad.

The Law No.72 provides: “*the State encourages enterprises to receive and recruit former guest workers or send them to work abroad*” (Article 59.2). However, by-laws have failed to detail and guide the implementation of this provision, and there is no gender-specific provision on this issue.

Labor law stipulates preferential policies for female workers, whereby the State encourages employers to prioritize the recruitment and employment of female workers when they meet the conditions and qualifications for a job suitable for both men and women.<sup>203</sup> In addition, enterprises employing many female workers are also supported by the State to reduce corporate income tax under the Law on corporate income tax. At the same time, additional expenses for female employees are attributable to the deductible expenses when determining corporate income taxable income;<sup>204</sup> in other words, additional expenses for female employees are considered as reasonable expenses for business activities of the enterprise before tax calculation. As a result, the tax amount of the business will be calculated corresponding to the total business expenses that the enterprise has spent.<sup>205</sup>

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<sup>201</sup> Decree No. 196/2013/ND-CP, §5(2) (2013).

<sup>202</sup> *Id.* at §5(4).

<sup>203</sup> Decree No. 85/2015/ND-CP dated 01 October 2015 of the Government guiding the implementation of the Labor Code on policies for female workers, §5(2) (2015).

<sup>204</sup> *Id.* at §11.

<sup>205</sup> Circular No. 78/2014/TT-BTC guiding the Government's Decree No. 218/2013 / ND-CP dated 26 December 2013 regulating and guiding the implementation of the Law on Corporate Income Tax (2013).



*(iii) Regulations on start-up incentives for women-owned enterprises*

Regarding female workers, the Government has issued the project “*Supporting women start-up for the period of 2017-2025*”<sup>206</sup> with the objective of raising women's awareness on the guideline and policies of the Party and State on start-up, to promote the materialization of business ideas, to contribute to the national business development goals and the National Strategy on Gender Equality. However, the measures in this project are rather general and there are no specific guidelines. Therefore, the regulations on starting up businesses for women are integrated in the general policies on start-up and support for small and medium enterprises in Vietnam. In principle, in case many small and medium enterprises meet the conditions for support in accordance with this Law, priority shall be given to small and medium enterprises owned by women<sup>207</sup>.

- Access to business start-up services

There are no separate regulations on training services for female workers, which are integrated in other subjects, as shown in the project “*Support poor communes to boost labor export to contribute to sustainable poverty reduction for the period of 2009-2020*”<sup>208</sup>. Accordingly, upon return, guest workers can take part in start-up training courses. However, access to business start-up training courses with financial support on participation from the State must be for small and medium enterprises. Accordingly, the state budget shall support at least 50% of the total cost of a training course on start-up and business administration for small and medium enterprises.<sup>209</sup> In other words, to receive financial support for costs on start-up enterprise training, workers must set up enterprises that have to meet the criteria for receiving support.

- Access to start-up credit

Small and medium enterprises (SMEs) may receive support from agencies, organizations and individuals to work out feasible production and business plans, to strengthen management capacity, skills, and financial transparency of enterprises to improve

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<sup>206</sup> Decision No.939/QD-TTg dated 30 June 2017 approving the project “Supporting women for start-up in the period of 2017-2025”

<sup>207</sup> The 2015 Law on Support for Small and Medium Enterprises, §5 (2017).

<sup>208</sup> Decision No. 71/2009/QD-TTg of the Prime Minister dated 29 April 2009 on approval of the scheme on supporting poor communes to boost labor export to contribute to sustainable poverty reduction for the period of 2009-2020 (2009).

<sup>209</sup> Decree No. 39/2018/ND-CP guiding the implementation of the Law on Support for Small and Medium Enterprises, §14 (2018).

accessibility to credit. SMEs are granted credit guarantees by the Small and Medium Enterprise Credit Guarantee Fund.

*(iv) Policy on public employment*

Accordingly, Commune People's Committees shall draw up a list of laborers wishing to participate in public employment policies; and post it publicly at headquarters, community places and announcements on communal media. Commune People's Committees shall coordinate with contractors (if any), socio-political organizations, and representatives of population communities benefiting from the project. To participate in the public employment policy on the list of employees registered in order of priority:

- Ethnic minorities; poor households, near-poor households or households with agricultural land withdrawn; the unemployed or underemployed.
- Household workers are primarily engaged in agricultural production.
- The employee is lawfully resident in the locality where the project is being implemented.

Employers who employ workers on the list of public employment policies must enter into labor contracts with workers and ensure working conditions in accordance with the labor law. Public employment is a temporary remunerated employment that is created through the implementation of projects or activities using state budget in association with socio-economic development programs in communes, wards and towns.

Selected projects and activities to implement public employment policies include: Projects and activities to protect, manage and use land, water and forest resources; prevention of natural disasters, response to climate change; Project and activities to preserve and develop culture and tourism; Projects and activities for construction, renovation and maintenance works: Roads, schools, kindergartens, medical stations, marketplaces and works for cultural and sport activities; water resource works, irrigation, dykes; works for electricity generation, clean water supply, environmental sanitation; Projects and other community service activities.

*2.4.4.2. Female workers' access to vocational training service*

The 2006 Law on Gender Equality stipulates equality in training and fostering the capacity of female workers; And that men and women are equal in terms of school age, training and fostering; Equality in the selection of disciplines, education, and occupation;

Equality in the access and enjoyment of policies on education, training, professional fostering.<sup>210</sup> This is also reflected in the 2014 Law on Vocational Education.

In addition, the 2014 Law on Vocational Education contains a number of vocational preferences for women. If the learners are women, rural workers, when participating in basic training programs and training programs of less than 3 months, shall be supported with training expenses as prescribed by the Prime Minister's guideline.<sup>211</sup> However, this regulation has not been detailed for implementation yet. Before the inception of the Law on Vocational Education in 2014, the Prime Minister also promulgated the project "*Supporting Women in Vocational Training and Employment Creation for the period of 2010-2015*" with a view to increase opportunities in vocational training and job creation for women, especially rural women, middle-aged women, ethnic minority women in extremely difficult areas, relocated and cleared areas, however, this project has run out of effect.

In addition, vocational training for female workers is integrated into general vocational training support policy. For example, the project "*Vocational training for rural workers up to 2020*" aims to improve the quality and effectiveness of vocational training, to create jobs and increase incomes of rural workers; To contribute to the restructuring of labor and economic structure in service of industrialization and modernization of agriculture and rural areas, learners are provided with financial supports.<sup>212</sup> Decree No. 61/2015 /ND-CP on the policy of job creation from the National Fund for Employment provides that the beneficiaries are provided with vocational training support: "*Youth completed military service, police duties, youth volunteers completed the task under programs and projects for socio-economic development, are supported with vocational training*" (Article 14). Decision No. 899/QD-TTg dated 20 June 2017 of the Prime Minister: "Approve the Targeted Programme on Vocational and Employment Training and Labor Safety in the period of 2016-2020" with a view to support and develop vocational education; to promote the development of the labor market; improving the efficiency of labor supply and demand; To create jobs, increase labor export, labor safety and hygiene to meet the requirements of national construction and development and international economic integration; to promote decent work, and increase productivity, improve working conditions, increase income and prevention of work accidents.

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<sup>210</sup> Law on Gender Equality, Law No.73/2006/QH11, §14 (2006).

<sup>211</sup> Law on Vocational Education, Law No.74/2014/QH13, §62(3) (2014).

<sup>212</sup> Decision No 1956/QD-TTg dated 27 November 2009 of the Prime Minister of the Government (2009)

In general, the current vocational training policy does not focus on gender-sensitive feature, particularly the need to upgrade female workers' skills to work abroad with a view to land better jobs. Female workers group predominates in the sector for low-skilled occupations, and there is a need to shift the negative view of the community towards female workers upon their return.

#### *2.4.4.3. Access to financial service*

In addition to the start-up credit mentioned above, the Law No.72 provides: "*The State creates favorable conditions and encourages workers to invest in production, business and employment for themselves and for others. Workers in difficulty are entitled to preferential loans for the creation of job in accordance with the law*" (Article 60). Specifically, workers have the right to borrow funds from the National Fund for Employment to support job creation, maintenance and expansion.<sup>213</sup> In case of borrowing capital for job creation, the maximum loan amount is VND 50 million.

In addition to funding from the National Fund for Employment, women also have access to the following official sources:

- *The Fund for Supporting Women in Economic Development* (under the provincial Women's Union established by local authorities):<sup>214</sup> The Women's Economic Development Fund aims to provide capital for women in family economic development, to increase income, to help overcome poverty, to improve living standards, and to contribute to the implementation of poverty reduction.

- *Fund for supporting poor women*: The fund is set up by the Presidium of the Central Vietnam Women's Union<sup>215</sup> in order to contribute to the achievement of the national poverty reduction and employment, and social justice objectives; to improve livelihoods, enhance economic status for women and promote gender equality; as a result, to strengthen and develop the Union.<sup>216</sup> Targeted subjects entitled to loans from the Fund are poor women from poor households under the regulations on poverty threshold.

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<sup>213</sup> Law on Employment, Law No.38/2013/QH13, §12 (2013).

<sup>214</sup> Decision No. 230/2003/QĐ-UB of the Chairman of the People's Committee of Ho Chi Minh City on the establishment of the Fund for Economic Support for Women under the City Women's Union (2003).

<sup>215</sup> Decision No. 132/QĐ-ĐCT dated 6 March 2007 of the Presidium of the Central Vietnam Women's Union on the establishment of the Fund for Poor Women (2007).

<sup>216</sup> Decision No. 66/2007/QĐ-BTC promulgating the Regulation on operation of the Fund for Supporting Poor Women of the Vietnam Women's Union (2007).

#### *2.4.4.4. Access to psychological, marriage and family support*

The Law No.72 and other legal documents guiding the implementation of Law No.72, we cannot find any regulations on support for workers in general and women in particular in respect of social and family reintegration. At present, reintegration is carried out by labor export programmes. For example, the organization of successful repatriated EPS Labor Competition in 2018, from June 6 to July 6, the Overseas Labor Center coordinated with the HRD Office in Vietnam called for entry papers for the contest “Successful repatriated EPS Labor Competition of 2018”. Targeted subjects for the contest include workers working in Korea under the E-9 visa have returned home in due time and have never won a prize in the similar previous contest. Theme: Presenting the story of successful reintegration in homeland after working in Korea with E-9 visa upon return; for example, find a stable job in Korean companies in Vietnam, start successful local business based on knowledge learned abroad, or other successful reintegration cases.

In addition, female workers are not subject to regulations on social work and social assistance services, which are very limited in Vietnam currently.

## **Chapter 3: Legal and policy framework on foreign workers working in Korea**

### **3.1. Introduction**

There have been many challenges faced by migrant workers, while and after getting a job in a foreign country. Migrant workers often enjoy little social protection, face inequalities in the labor market and are vulnerable to exploitation and human trafficking. Among those, female migrant workers, more vulnerable and at a higher risk of discrimination, exploitation and abuse, are facing further barriers. Risks faced by female migrant workers are varied, from labor exploitation, physical abuse, to sexual harassment and non-payment.

Even though the systematic changes of worldwide politics and economics have led women to become a large part of the guest worker labor, they are still treated as a minority group with minimum visibility. This circumstance compels the society to be passive in protecting the rights of female guest workers, and to treat their labors consumable as a secondary resource. The relationship between the immigration and gender was acknowledged rather late compared to that of immigration and social hierarchy. The awareness of understanding the social and historical meaning of female labor and treating the value of their labor same as that of men is expanding with the advent of various regulations. In this process, new concepts appeared including feminization of immigration, feminization of poverty, politicization of immigration, etc.

By the end of 2010, 49% of immigrants in the world were women.<sup>217</sup> Women account for almost half of all immigrant workers, but their status in the host country is structurally suppressed due to gender, social hierarchy, and ethnicity. This suppressive structure is more obvious in the types of business these female guest workers are engaged in, such as labor in the isolated rural regions, labor in illegal business such as sex industry, or service industry with low wages, etc.

The phenomenon of feminization of guest work mainly happens in the industry with low wages. As the employment of women in the host country increases and the quality of life of women gradually changes, women in the host country decide to leave the domestic chores to other people

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<sup>217</sup> United Nations Department of Economic and Social Affairs/Population Division International Migration Report 2011, at 10.

to join the labor market. Korean women are in need of foreign housekeepers since they are faced with the problem of the work-family balance as their participation in Korea economy increases.

In particular, female workers are often paid less than male workers while working in less prestigious industries or even while performing the same job. The female workers are sexually discriminated during employment, and their maternity is not properly protected at workplace as they are unfairly treated due to pregnancy and childbirth. The workers are also susceptible to sexual harassment and sexual assault.

Female guest workers suffer from multiple discrimination as women, immigrants, and workers. They often cannot properly respond to sexual harassment and sexual assault because of difficulties in communications.

To protect the legitimate rights and interests of the migrant workers and to promote gender equality, the host country's efforts are also important as the situation during the labor condition of the migrant workers greatly depends on the overseas labor management machine. This chapter aims to analyze capabilities of Korea's legal system to accommodate guest workers and situation of Vietnamese guest workers in Korea.

## **3.2. Development of women's labor laws in Korea**

### ***3.2.1. Historical overview of women's labor laws in Korea***

The Constitution of the Republic of Korea ("The 1948 Constitution") was first adopted and promulgated on July 17, 1948. The 1948 Constitution, among other things, provided for all citizens' right to work and special protection for working women and juveniles,<sup>218</sup> and non-discrimination in political, economic, or social life on the basis of gender, religion or social status.<sup>219</sup> Gender equality in the labor market and special protection for female workers are key elements of the international labor standards set by the International Labour Organization (ILO), a United Nations agency, and Korea, in principle, implemented them into the 1948 Constitution, the supreme law of Korea.

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<sup>218</sup> The 1948 Constitution, Art. §17.

All citizens shall have the right and duty to work. Standards of working conditions shall be determined by Act. Special protection shall be accorded to working women and children.

<sup>219</sup> The 1948 Constitution, Art. §8.

The 9th Amendment to the Constitution of the Republic of Korea in 1987 (“The 1987 Constitution”)<sup>220</sup> has separately provided for special protection for working women from special protection for working juveniles.<sup>221</sup> In addition, the 1987 Constitution added new provisions providing for promotion of the welfare and rights of women<sup>222</sup> and protection of motherhood.<sup>223</sup> To put it differently, Korea proclaimed special protection for women and motherhood, and women’s right to equality and non-discrimination in the 1987 Constitution.

Such constitutional principles have been primarily codified into the Labor Standards Act and the Equal Employment Opportunity and Work-Family Balance Assistance Act (formerly known as “Gender Equality Employment Act”).<sup>224</sup>

### 3.2.1.1. Labor Standards Act

The Labor Standards Act was enacted in 1953 to promote employee welfare and to contribute to the national economy by establishing the standards for terms and conditions of employment and the morality of labor.<sup>225</sup> The Act has been amended numerous times since its enactment, and major amendments that have been made to substantive provisions of the Act in relation with female employees are as follows.<sup>226</sup>

- **Labor Standards Act of 2001: amended as Act No. 6507<sup>227</sup>**

The amendment was introduced to implement the international labor standards into the Labor Standards Act, to prevent female employees’ career changes due to pregnancy and childbirth,

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<sup>220</sup> The Constitution was amended nine times and six republics were established. Korea adopted its current democratic Constitution on October 29, 1987.

<sup>221</sup> The 1987 Constitution, Art. §32.

(4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages, and working conditions.

(5) Special protection shall be accorded to working children.

<sup>222</sup> The 1987 Constitution, Art. §34.

(3) The State shall endeavor to promote the welfare and rights of women.

<sup>223</sup> The 1987 Constitution, Art. §36.

(1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

(2) The State shall endeavor to protect motherhood.

<sup>224</sup> The revision of the Act in December 21, 2007 has changed the title of the Act from “Gender Equality Employment Act” to “Equal Employment Opportunity and Work-Family Balance Assistance Act”.

<sup>225</sup> Bill No. 020207, Draft of the Labor Standards Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=000730> (last visited Oct. 31, 2018).

<sup>226</sup> Labor Standards Act of 2018, §1.

The purpose of this Act is to establish the standards for terms and conditions of employment in conformity with the Constitution, thereby securing and improving the fundamental living standards of workers and achieving a well-balanced development of the national economy.

<sup>227</sup> Bill No. 160880, Draft of a Partial Amendment to the Labor Standards Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=016994> (last visited Oct. 31, 2018).



and to promote the employment of female workers. The Act prohibited assigning work detrimental to morality or health, or any dangerous work to a female employee in pregnancy or a female employee who is a nursing mother.<sup>228</sup> Also, it prohibited assigning night work or holiday work to a female employee and required an employer to grant a total of a 90-day maternity leave to a pregnant employee before and after childbirth.

- **Labor Standards Act of 2005: amended as Act No. 7566<sup>229</sup>**

This amendment required an employer to grant a miscarriage/stillbirth leave to a pregnant employee who had a miscarriage or stillbirth. In addition, the amendment prohibited dismissing a female employee before and after childbirth during a maternity leave and for next 30 days immediately thereafter even if the employment contract had expired.

- **Labor Standards Act of 2008: amended as Act No. 8960<sup>230</sup>**

The Labor Standards Act of 2008 requires an employer to grant pregnant employees a time off for a periodical medical examination under Article 10 of the Mother and Child Health Act.

- **Labor Standards Act of 2008: amended as Act No. 9038<sup>231</sup>**

With this amendment, employers are required to assign the same work or a work with the same amount of wages, or an easy type of work to a female employee who has returned from a maternity leave.

- **Labor Standards Act of 2014: amended as Act No. 12527<sup>232</sup>**

The Labor Standards Act of 2014 was proposed to make work environment friendlier to pregnancy and childbirth. Under the Act, a female employee who has been pregnant for not more than 12 weeks or for not less than 36 weeks can request a reduction of work hours (2 hours per day), and the employer should permit such reduction of work hours and should not reduce the female employee's wages for reason of the work hours reduction.

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<sup>228</sup> In this report, a 'nursing mother' means a woman for whom one year has not passed since childbirth.

<sup>229</sup> Bill No. 171539, Draft of a Partial Amendment to the Labor Standards Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=030309> (last visited Oct. 31, 2018).

<sup>230</sup> Bill No. 178213, Draft of a Partial Amendment to the Labor Standards Act, *available at* [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_U0L7E1F1T1O9L2L1H4D7C0K5W0R3J5](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_U0L7E1F1T1O9L2L1H4D7C0K5W0R3J5) (last visited Oct. 31, 2018).

<sup>231</sup> Bill No. 178286, Draft of a Partial Amendment to the Labor Standards Act, *available at* [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_C0B8X0W2C1K3U2L3K0H6M0Y5L7B8W9](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_C0B8X0W2C1K3U2L3K0H6M0Y5L7B8W9) (last visited Oct. 31, 2018).

<sup>232</sup> Bill No. 1909544, Draft of a Partial Amendment to the Labor Standards Act, *available at* [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_J1E4I0D2V2N0J1A1A1B1V2U0T7K9B0](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_J1E4I0D2V2N0J1A1A1B1V2U0T7K9B0) (last visited Oct. 31, 2018).

3.2.1.2. *Equal Employment Opportunity and Work-Family Balance Assistance Act*  
(“*Equal Employment Opportunity Act*”)

The Gender Equality Employment Act was enacted as Act No. 3989 on December 4, 1987 with the aim of “contributing to the improvement of the status of working women and promotion of their welfare by securing equal opportunity and treatment between men and women in any employment in conformity with the ideal of equality in the Constitution, protecting the maternity and developing their vocational ability.”<sup>233</sup> The Gender Equality Employment Act of 1987, among other things, provides for: 1) the granting of an equal opportunity to women in terms of recruitment and employment; 2) the prohibition of discrimination on grounds of gender in relation with the retirement and dismissal of an employee; and 3) the granting of a childcare leave to a female employee before and after childbirth.<sup>234</sup> The Act has been amended 21 times since its enactment, and major amendments which have been made to substantive provisions of the Act are as follows.

- **Gender Equality Employment Act of 1989: amended as Act No. 4126<sup>235</sup>**

This amendment defined the term “discrimination” and introduced the doctrine of equal pay for equal-valued work. Under the Gender Equality Employment Act of 1989, a female employee on a childcare leave is considered to be as employed, and the period of a childcare leave is counted and included in the period of employment.

- **Gender Equality Employment Act of 1995: amended as Act No. 4976<sup>236</sup>**

The amendment was made to modify provisions concerning discrimination on grounds of gender and to improve the childcare leave system. The Gender Equality Employment Act of 1995, among other things, provided for the prohibition of discrimination on grounds of gender in providing welfare, e.g., goods, loan of funds, etc., aside from wages. Also, under this Act, male employees can apply for a childcare leave.

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<sup>233</sup> Equal Employment Opportunity Act of 2018, §1.

The purpose of this Act is to contribute not only to realizing equal employment for both genders by guaranteeing equal opportunities and treatment in employment between men and women in accordance with the principle of equality proclaimed in the Constitution of the Republic of Korea, by protecting motherhood, and by promoting the employment of women, but also to improving the quality of all the people’s lives by assisting work-family balance of workers.

<sup>234</sup> Bill No. 120512, Draft of the Gender Equality Employment Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=010540> (last visited Oct. 31, 2018).

<sup>235</sup> Bill No. 130492, Draft of a Partial Amendment to the Gender Equality Employment Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=011154> (last visited Oct. 31, 2018).

<sup>236</sup> Bill No. 140950, Draft of a Partial Amendment to the Gender Equality Employment Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=013053> (last visited Oct. 31, 2018).

- **Gender Equality Employment Act of 1999: amended as Act No. 5933**<sup>237</sup>

The Gender Equality Employment Act of 1999 was proposed to secure the effectiveness of equality between men and women and to protect female employees from sexual harassment at work. In this regard, the Act provided that the term “discrimination” should also include “where the employer sets the standards or conditions for personal affairs which either men or women find very difficult to meet.” It also codified that employers should not take any disadvantageous measures against an employee who has suffered from sexual harassment.

- **Gender Equality Employment Act of 2001: amended as Act No. 6508**<sup>238</sup>

The main purposes of the amendment were to tighten up the prohibition and prevention of sexual harassment at work and to improve the childcare leave system in a way to support work-family balance. With this amendment, the scope of application of the law has been extended from a business entity having 5 or more employees to all business entities regardless of the number of employees. The Gender Equality Employment Act of 2001 imposes an administrative fine of 10 million KRW on employers who have committed any sexual harassment against employees. It also prohibits the dismissal of an employee on a childcare leave during the period of the leave.

- **Equal Employment Opportunity Act of 2007: amended as Act No. 8781**<sup>239</sup>

The amendment was made to reflect the shift in employees’ consciousness from “work” to “work-family balance” and policies supporting work-family balance. The title of the Act changed from “Gender Equality Employment Act” to “Equal Employment Opportunity and Work-Family Balance Assistance Act” by this amendment. The Equal Employment Opportunity Act of 2007 introduced a paternity leave and the reduction of working hours for childcare. The Act also introduced the concept of sexual harassment by clients, etc. who are closely related to an employee’s duties.

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<sup>237</sup> Bill No. 151762, Draft of a Partial Amendment to the Gender Equality Employment Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=015282> (last visited Oct. 31, 2018).

<sup>238</sup> Bill No. 160878, Draft of a Whole Amendment to the Gender Equality Employment Act, *available at* <http://likms.assembly.go.kr/bill/billDetail.do?billId=016995> (last visited Oct. 31, 2018).

<sup>239</sup> Bill No. 1807236, Draft of a Partial Amendment to the Gender Equality Employment Act, *available at* [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_P0D7A1X1W1J5E2K1Z2T4R4T3J614A1](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_P0D7A1X1W1J5E2K1Z2T4R4T3J614A1) (last visited Oct. 31, 2018).

- **Equal Employment Opportunity Act of 2010: amended as Act No. 9998<sup>240</sup>**

The Equal Employment Opportunity Act of 2010 eased the application requirement of a childcare leave. Previously, an employee fostering a child under 3 years old could apply for a childcare leave, but with this amendment, employees fostering a child under 6 years old can apply for a childcare leave.

- **Equal Employment Opportunity Act of 2012: amended as Act No. 11274<sup>241</sup>**

This amendment was made to implement policy measures supporting work-family balance into the Equal Employment Opportunity Act. The 2012 Act required an employer to grant male employees a paternity leave for at least 3 days (up to 5 days). It also required an employer to grant employees a leave for family care for up to 90 days unless it causes serious harm to normal operation of the business.

- **Equal Employment Opportunity Act of 2014: amended as Act No. 12244<sup>242</sup>**

The Equal Employment Opportunity Act of 2014 eased the application requirement of a childcare leave to better support work-family balance, and as a result, an employee fostering a child under 8 years old can apply for a childcare leave under the Act. In addition, it required the preventive sexual harassment education programs at the workplace for both employers and employees.

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<sup>240</sup> Bill No. 1807236, Draft of a Partial Amendment to the Equal Employment Opportunity Act, *available at* [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_C0C9E1W2T1R6G2C1M5K2X2I2F1J4X7](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_C0C9E1W2T1R6G2C1M5K2X2I2F1J4X7) (last visited Oct. 31, 2018).

<sup>241</sup> Bill No. 1814296, Draft of a Partial Amendment to the Equal Employment Opportunity Act, *available at* [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_A1Z1Z1W2H2T3L2M2X0C4B0Q0U3Q1L7](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_A1Z1Z1W2H2T3L2M2X0C4B0Q0U3Q1L7) (last visited Oct. 31, 2018).

<sup>242</sup> Bill No. 1908773, Draft of a Partial Amendment to the Equal Employment Opportunity Act, *available at* [http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC\\_U1W3A1V2E1Z8P1V6L5C6Y1V8E5K7D0](http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_U1W3A1V2E1Z8P1V6L5C6Y1V8E5K7D0) (last visited Oct. 31, 2018).

### 3.2.2. Major provisions of women's labor laws in Korea

Major provisions of Korea's current women's labor laws can be broken down into the following three categories: 1) prohibition of discrimination on the basis of gender; 2) protection of motherhood and support for work-family balance; and 3) prohibition and prevention of the sexual harassment of women at work.

#### 3.2.2.1. Prohibition of gender-related discrimination

Although there are several pieces of legislation explicitly providing for prohibition of discrimination on grounds of gender in Korea,<sup>243</sup> the Labor Standards Act and the Equal Employment Opportunity Act are the two key laws which contain important substantive provisions.

The Labor Standards Act has provided for the equal treatment doctrine, i.e., no discrimination on the basis of gender and no discriminatory treatment in relation to the terms and conditions of employment on grounds of nationality, religion or social status, since its enactment in 1953.<sup>244</sup> Additionally, the Act has required an employer not to discriminate against employees on the basis of gender in dismissing an employee for an urgent managerial necessity.<sup>245</sup>

The Equal Employment Opportunity Act is the Korea's first law enacted as a result of women's fight for gender equality and solely seeking gender equality.<sup>246</sup> The Act defines and details the term "discrimination"<sup>247</sup> and specifically provides for prohibited discriminating acts throughout all stages of employment from recruitment to retirement. The following are prohibited under the Act:

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<sup>243</sup> For instance, the National Human Rights Commission of Korea Act, the Framework Act on Gender Equality, the Framework Act on Employment Policy, the Employment Security Act, the Act on the Protection, etc. of Temporary Agency Workers, and the Trade Union and Labor Relations Adjustment Act also regulate prohibition of discrimination on the basis of gender.

<sup>244</sup> Labor Standards Act, §6.

<sup>245</sup> *Id.* at §24(2).

<sup>246</sup> Kang-Bun Moon, "Current State and Reality of Women Labor Related Laws", *Women Labor*, 2008.12, Vol. 1, at. 18.

<sup>247</sup> Equal Employment Opportunity Act, §2(1).

1. The term "discrimination" means that an employer discriminates against a worker in employment or working conditions, or takes any other disadvantageous measures without any justifiable reason, on grounds of gender, marriage, status within family, pregnancy or childbirth, etc. (including where, even if the employer equally applies employment or working conditions, the number of men or women capable of satisfying such conditions is remarkably fewer in comparison with the opposite gender, thus putting the opposite gender at a disadvantage, and the said conditions may not be attested to be justifiable): Provided, That this shall not apply to any of the following cases:

(a) Where a specific gender is inevitably requested in view of the characteristics of duties;  
(b) Where measures are taken for protecting motherhood, such as pregnancy, childbirth and lactation of female workers;  
(c) Where proactive employment improvement measures are taken under this Act or other Acts.

- Discrimination on grounds of gender in recruiting or employing a worker is prohibited;
- Discrimination on grounds of gender in paying equal-valued work and providing welfare, e.g., money, goods or similar, and loan of funds, to subsidize the living of employees aside from wages is prohibited;
- Discrimination on grounds of gender in training, work assignment, and promotion is prohibited; and
- Discrimination on grounds of gender in retirement age, retirement, and dismissal of employees is prohibited.

The Equal Employment Opportunity Act also provides for a strict penalty for each violation of the prohibited discriminating acts. The Act, through its revision in 2005, has introduced “proactive employment improvement measures” which allow a specific gender preferential treatment to eliminate existing employment discrimination and which can eventually promote and lead to equal employment.<sup>248</sup>

**Table 1. Major Provisions on Discrimination on the Basis of Gender<sup>249</sup>**

<b>Title of Act</b>	<b>Relevant Provisions</b>	<b>Penalties / Administrative Fines</b>	<b>Applicability</b>
Labor Standards Act	Prohibition on discriminating against employees on the basis of gender [Art. §6]	Criminal money penalty up to 5 million KRW	Business entity having 1 or more employees
	Prohibition of discrimination on the basis of gender in dismissing an employee for managerial reasons [Art. §24(2)]	N/A	Business entity having 5 or more employees
Equal Employment Opportunity Act	Prohibition of discrimination on the basis of gender in recruiting or employing workers [Art. §7]	Criminal money penalty up to 5 million KRW	Business entity having 1 or more employees

<sup>248</sup> *Id.* at §17-3.

<sup>249</sup> The Table has been reprinted from Kang-Bun Moon, *supra* at 19.

	Equal pay for equal-valued work [Art. §8]	Imprisonment with labor for up to 3 years or money penalty up to 30 million KRW	Business entity having 5 or more employees
	Prohibition of discrimination on grounds of gender in providing money, goods, etc. other than wages [Art. §9]	Criminal money penalty up to 5 million KRW	Business entity having 5 or more employees
	Prohibition of discrimination on grounds of gender in terms of training, work assignment, and promotion [Art. §10]	Criminal money penalty up to 5 million KRW	Business entity having 5 or more employees
	Prohibition of discrimination on grounds of gender in retirement age, retirement, and dismissal [Art. §11]	Imprisonment with labor for up to 5 years or money penalty up to 30 million KRW	Business entity having 5 or more employees
	Establishment, etc. of implementation plans for proactive employment improvement measures to eliminate discriminatory employment practices and systems [Art. §17-3(3), (4)]	Administrative fine up to 3 million KRW	Business entity having 500 or more employees
National Human Rights Commission of Korea Act	Prohibition of an act of favorably treating, excluding, discriminating against, or unfavorably treating a particular person regarding employment on the grounds of gender, marital status, pregnancy, childbirth, etc. as a “discriminatory act violating the equal right” [Art. §2(3)(a)]	N/A	Business entity having 1 or more employees

### 3.2.2.2. Protection of motherhood and support for work-family balance

The Labor Standards Act and the Equal Employment Opportunity Act provide for matters relating to the protection of motherhood in relation with employment.<sup>250</sup>

<sup>250</sup> Other laws such as the Infant Care Act and the Mother and Child Health Act also provide for the protection of motherhood in a broad sense.

In terms of the protection of motherhood, the following are either prohibited or required by the Labor Standards Act:

- A menstrual leave (1 day per month) should be granted to any female employee;
- Assigning of work detrimental to morality or health and night work or holiday work to a female employee in pregnancy or a female employee who is a nursing mother is prohibited;
- Assigning of overtime work – exceeding 2 hours per day, 6 hours per week, or 150 hours per year – to a female employee who is a nursing mother is prohibited;
- Assigning of any work inside a pit to a female employee is prohibited;
- Taking time off for a medical examination should be granted to pregnant employees;
- A total of a 90-day maternity leave (a 120-day maternity leave in case of pregnancy of twin babies) should be granted to a pregnant employee before and after childbirth;
- Dismissing a female employee before and after childbirth during a maternity leave and for next 30 days immediately thereafter is prohibited;
- The same work or a work with the same amount of wages or an easy type of work should be assigned to a female employee returning from a maternity leave; and
- Paid nursing hours should be granted to a female employee who is a nursing mother.

The Equal Employment Opportunity Act has supplemented the protection of motherhood and support for work-family balance. The following are either prohibited or required by the Act:

- A paternity leave should be granted to a male employee on grounds of his spouse's childbirth;
- A childcare leave – not exceeding 1 year – should be granted to employees parenting a child younger than 8 years old;
- Dismissing an employee or taking any other disadvantageous measure against an employee on account of a childcare leave is prohibited;
- Dismissing an employee during the period of a childcare leave is prohibited;
- If requested, a reduction of working hours – not exceeding 1 year – should be granted to an employee who is eligible to apply for a childcare leave;
- Dismissing an employee or taking any other disadvantageous measure against an employee on account of a reduction of working hours is prohibited; and
- The same work or a work with the same amount of wages should be assigned to an employee returning from a childcare leave.



Under the Equal Employment Opportunity Act, the State may partially subsidize the living expenses of an employee on a childcare leave or on a reduction of working hours and the expenses incurred to the employer in order to maintain the employee’s employment status.

**Table 2. Major Provisions on the Protection of Motherhood and Support for Work-Family Balance<sup>251</sup>**

Title of Act	Relevant Provisions	Penalties / Administrative Fines	Applicability
Labor Standards Act	Restrictions on dismissing a female employee before and after childbirth during a maternity leave and for next 30 days immediately thereafter [Art. §23(2)]	Imprisonment with labor for up to 5 years or money penalty up to 50 million KRW	Business entity having 1 or more employees
	Exceptions for the application of flexible work hours to pregnant employees [Art. §51(3)]	N/A	Business entity having 5 or more employees
	Restrictions on assigning work detrimental to morality or health or any dangerous work to a female employee in pregnancy or a female employee who is a nursing mother [Art. §65]	Imprisonment with labor for up to 3 years or money penalty up to 30 million KRW	Business entity having 1 or more employees
	Restrictions on assigning night work or holiday work to a female employee in pregnancy or a female employee who is a nursing mother [Art. §70(2)]	Imprisonment with labor for up to 2 years or money penalty up to 20 million KRW	Business entity having 1 or more employees
	Restrictions on assigning overtime work to a female employee who is a nursing mother [Art. §71]	Imprisonment with labor for up to 2 years or money penalty up to 20 million KRW	Business entity having 1 or more employees

<sup>251</sup> Table has been reprinted from Kang-Bun Moon, *supra* at 17; The contents have been modified from its original version to reflect recent revisions to the Act.

	Restrictions on assigning overtime work to a pregnant employee [Art. §71(5)]	Imprisonment with labor for up to 2 years or money penalty up to 20 million KRW	Business entity having 1 or more employees
	Restrictions on assigning work inside a pit to a female employee [Art. §72]	Imprisonment with labor for up to 3 years or money penalty up to 30 million KRW	Business entity having 1 or more employees
	Granting of a monthly menstrual leave [Art. §73]	Criminal money penalty up to 5 million KRW	Business entity having 1 or more employees
	Granting of a total of a 90-day maternity leave (a 120-day maternity leave in case of pregnancy of twin babies) to a pregnant employee before and after childbirth [Art. §74]	Criminal money penalty up to 5 million KRW	Business entity having 1 or more employees
	Assigning the same work or a work with the same amount of wages to a female employee returning from a maternity leave [Art. §74(6)]	Criminal money penalty up to 5 million KRW	Business entity having 1 or more employees
	Granting of time off for a medical examination to pregnant employees [Art. §74-2]	N/A	Business entity having 5 or more employees
	Granting of nursing hours to a female employee who is a nursing mother (1) [Art. §75]	Imprisonment with labor for up to 2 years or money penalty up to 20 million KRW	Business entity having 5 or more employees
Equal Employment Opportunity Act	Prohibition of disadvantageous measures, etc. against a worker on childcare leave [Art. §19]	Imprisonment with labor for up to 3 years or money penalty up to 30 million KRW	Business entity having 1 or more employees
	Prohibition of disadvantageous measures, etc. against a worker on	Imprisonment with labor for up to 3 years	Business entity having 1

	grounds of reduction of working hours for period of childcare [Art. §19-2]	or money penalty up to 30 million KRW	or more employees
	Prohibition of applying unfavorable working conditions to a worker during reduction of working hours for period of childcare [Art. §19-3]	Imprisonment with labor for up to 3 years or money penalty up to 30 million KRW	Business entity having 1 or more employees
	Other measures for supporting childcare [Art. §19-5]	N/A	Business entity having 1 or more employees
	Support by employers for workers' reinstatement to work [Art. §19-6]	N/A	Business entity having 1 or more employees
	Assistance for work-family balances [Art. §20]	N/A	Business entity having 1 or more employees

### 3.2.2.3. Prohibition and prevention of the sexual harassment of women at work

The Equal Employment Opportunity Act is a main legal instrument that provides for prohibition and prevention of the sexual harassment of women at work.<sup>252</sup> The Act defines the term “sexual harassment at work” as follows: “an employer, a superior or a worker causes another worker to feel sexual humiliation or repulsion by sexual words or actions by utilizing a position in the workplace or in relation with duties, or providing any disadvantages in employment on account of disregard for sexual words or actions or any other demands, etc.”<sup>253</sup>

The Equal Employment Opportunity Act requires employers, superiors or workers not to commit any sexual harassment at work.<sup>254</sup> The Act also requires an employer to provide its employees with preventive education programs on sexual harassment at work each year.<sup>255</sup> Under

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<sup>252</sup> The Framework Act on Gender Equality and the National Human Rights Committee Act also cover prohibition of sexual harassment, but the scope of application of the Acts is somewhat broad and is not limited to sexual harassment in the workplace.

<sup>253</sup> Equal Employment Opportunity Act, §2(2).

<sup>254</sup> *Id.* at §12.

<sup>255</sup> *Id.* at §13.

the Act, employers should take, without delay, disciplinary measures against an employee who has committed sexual harassment at work and should not dismiss or take any other disadvantageous measures against the employee who has suffered from sexual harassment at work or who has claimed that sexual harassment at work occurred.<sup>256</sup> An amendment to the Act in 2007 has included a provision preventing sexual harassment by clients.<sup>257</sup>

**Table 3. Major Provisions on Prohibition and Prevention of the Sexual Harassment of Women at Work<sup>258</sup>**

Title of Act	Relevant Provisions	Penalties / Administrative Fines	Applicability
Equal Employment Opportunity Act	Prohibition of sexual harassment at work [Art. §12]	Administrative fine up to 10 million KRW (if employer commits any sexual harassment)	Business entity having 1 or more employees
	Preventive education programs on sexual harassment at work [Art. §13]	Administrative fine up to 5 million KRW	Business entity having 1 or more employees
	Disciplinary measures, etc. when sexual harassment occurred at work [Art. §14(1)] and no disadvantageous measures to the victim of sexual harassment at work [Art. §14(2)]	Administrative fine up to 5 million KRW for a violation of Art. 14(1) / Imprisonment with labor for up to 3 years or money penalty up to 30 million KRW for a violation of Art. §14(2)	Business entity having 1 or more employees
	Prevention of sexual harassment by clients, etc. [Art. §14-2]	Administrative fine up to 5 million KRW	Business entity having 1 or more employees

<sup>256</sup> *Id.* at §14.

<sup>257</sup> *Id.* at §14-2.

<sup>258</sup> Table has been reprinted from Kang-Bun Moon, *supra* at 20.

National Human Rights Commission of Korea Act	Prohibition on an act of sexual harassment as a “discriminatory act violating the equal right” [Art. §2(3)(d)]	N/A	Business entity having 1 or more employees
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### 3.2.3. Concluding observation

Women’s labor laws in Korea have been developed in earnest since the 1987 Constitution proclaimed special protection for women and motherhood, and women’s right to equality and non-discrimination. Over the past several decades, women’s labor laws in Korea have been developed under the principle of strengthening gender equality and the protection of motherhood and reducing special protection for working women other than the protection of motherhood.<sup>259</sup>

In the 1980s, women’s labor laws and policy measures focused on prohibiting discrimination in employment on the basis of gender and promoting female employment.<sup>260</sup> In the 1990s, women’s labor laws and policy measures were developed in a way to reinforce gender equality in employment, to prohibit and prevent sexual harassment at work, and to support the protection of motherhood and work-family balance.<sup>261</sup> Women’s labor laws in Korea have worked their way to reach a more developed stage since the early 2000s.<sup>262</sup>

## 3.3. Current situation of guest workers in Korea

### 3.3.1. Influx of foreign workers and changes to the related systems in Korea

In 1992, Industrial Training System, the official system of obtaining foreign manpower in Korea, was introduced to resolve the labor shortage and eradication of illegal immigrants. However, the system was deemed a failure as the shortage of manpower was even worsened in small and medium-sized manufacturing, construction, agriculture, coastal fishing, restaurant, and personal service, etc. and the number of illegal immigrants increased up to 300,000 after its introduction.

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<sup>259</sup> Kwi-Cheon Park, “Change and Development of Women’s Labor Law: Focusing on the Change since 2001”, *Ewha Journal of Gender and Law*, 2010.09, Vol. 1, No. 2, at 39.

<sup>260</sup> El-Lim Kim, “The Reflection on 60 Years History of Korean Labor Law regarding Female Labor”, *Journal of Labour Law*, 2013.09, Vol. 47, at 67-72.

<sup>261</sup> *Id.* at 72-77.

<sup>262</sup> *Id.* at 77-81.

Training and Employment system, designed to grant a 2 year employer status to the industrial trainee who have been trained for one year, was implemented since April, 1998. However, this system also failed to resolve fundamental problems including illegal immigrants, violation of human rights, and corruption in the process of sending the foreign workers. Therefore, in 2004, Korean government introduced the Employment Permit System (EPS), which clarifies that guest workers are treated as “employees” under Labor Standards Act rather than industrial trainees.

Through the EPS, the companies get employment permit and foreigners get work permit within certain quota, which enables them to freely recruit, seek jobs, and participate in economic activities in Korea. Guest workers are granted the status of employees in the system, and therefore are guaranteed the three Constitutional labor rights including “right to independent association”, “right to collective bargaining” and “right to collective action”, etc. Also, they are subject to Industrial Accident Compensation Insurance Act and Minimum Wage Act, retirement benefit and work bonus, and social insurance benefits. Due to the introduction of EPS, guest workers are obligated to pay income tax and resident tax.

EPS was introduced to allow employment especially in the industries such as manufacturing, construction, agriculture, fishing, service, etc. where it is relatively difficult to employ Korean workers. In order to make this system successful, the system was designed so that the number of the employment permit would be dependent on the trend of supply and demand of domestic manpower.

**Table 4. Legislation and Policy History of the Employment Permit System (EPS)**

<b>Year</b>	<b>Legislation/Policy</b>	<b>Misc</b>
1991	Introduction of the Industrial Skill Trainee Program for Overseas-invested Firms	
1993	Introduction of the Industrial Skill Trainee Program for Overseas-invested Firms to Small and medium-sized manufacturing; less than 300 employees	
1994	Entry of the first trainee of 20,000	
1999	Enactment of Act On The Immigration and Legal Status of Overseas Koreans	
2000	International marriage started to increase by more than 10,000 per year	

2004	Introduction of the EPS	
2004	Establishment of the Support Center For Foreign Workers	10 Support Center For Foreign Workers
2004	Financial Support to the Shelter for Female Immigrants by Korean Government (2 Centers)	
2006	Pilot Project - Support Centers for Employment of Marriage Immigrant (21 Centers)	217 Multicultural Family Support Centers
2006	Establishment of Emergency Support Center for the Migrant Women 1577-1366	Multicultural Family Helpline 1577-1366, 24 hours in operation
2007	Introduction of the Special EPS (Work and Visit Visa)	for Korean heritages in China and the former Soviet Union.
2007	Enactment of the Framework Act of Treatment of Foreigners Residing in the Republic of Korea	
2007	Enactment of the Marriage Brokers Business Management Act	
2008	Enactment of the Multicultural Families Support Act	
2013	Enactment of the Refugee Act	

### ***3.3.2. Foreigners based on the Type of Visa***

The following table shows the types of visas that foreigners in Korea must obtain to legally work in Korea and the status of foreigners who hold such visas.

**Table 5. Visa Types of Foreigners**

<b>Type of Visa</b>	<b>Total number of visa holders</b>	<b>Explanation</b>
<p>E9 (Non-professional Employment Visa)</p>	<p>280,000</p>	<ul style="list-style-type: none"> <li>• Non-professional Employment visa (E-9) is granted to foreign workers who are citizens of countries signing MOUs on sending and receiving labors with Korea.</li> <li>• Non-professional employment visa was introduced as a part of the Employment Permit System (EPS). The objective of signing the MOUs is to strengthen transparency during the process of introduction and selection of labors, and prevention of corruption in sending labors to work in Korea. Accordingly, these selection and introduction processes are managed by the MOUs without intermediation by recruitment agencies.</li> <li>• It allows employment in the manufacturing, construction, service, enrichment and fishery sectors only, up to 4 years 10 months maximum .</li> <li>• 8% women (30% women in agricultural sector)</li> </ul>
<p>H2 (Work and Visit Visa)</p>	<p>240,000</p>	<ul style="list-style-type: none"> <li>• This is a work visa for Korean heritages in China and the former Soviet Union.</li> <li>• It allows employment in service industry</li> <li>• The majority are Korean-Chinese. 45% women (Service Staffs at restaurants or motels, cleaning ladies, caregivers, housekeepers etc.)</li> </ul>
<p>F6 (Marriage Migrant Visa)</p>	<p>160,000</p>	<ul style="list-style-type: none"> <li>• 85% women</li> <li>• This type of visa is almost the only potential visa for settlement in Korea.</li> <li>• Marriage by brokers 60%,</li> <li>• Economic difficulties, difficulties due to age gap, sexual / racial discrimination, child education difficulties</li> <li>• Increased the number of single immigrant parent by death or divorce</li> </ul>
<p>F5 (Permanent Residency Visa)</p>	<p>140,000</p>	<ul style="list-style-type: none"> <li>• The majority are Chinese-Korean.</li> </ul>



F4 (Visa for People of Korean Heritage)	420,000	<ul style="list-style-type: none"> <li>The majority are Korean-Chinese. 50% women</li> </ul>
D2 (Student Visa)	80,000	<ul style="list-style-type: none"> <li>50% women</li> </ul>
E6 (Art/Entertainment Visa)	5,000	<ul style="list-style-type: none"> <li>The majority are Philippines. This visa is being used by foreign female prostitutes.</li> </ul>

### 3.3.3. Gender status in industries with employment permit

Under the EPS, gender status differ among industries. Male invited workers are mainly engaged in manufacturing industries and construction industries, while female invited workers are reported to be employed mainly in agricultural industries, fishing industries, service industries, and tourism industries, as shown in Table 3.

**Table 6. Gender Status of Non-professional Employment by sectors (Unit: Person)**

Sectors	Total	Male	Female
Manufacturing (E-9-1)	211,941	199,992	11,949
Construction industry (E-9-2)	12,631	12,625	6
Agricultural industry (E-9-3)	30,582	20,255	10,327
Fishing industry (E-9-4)	10,931	10,918	18
Service industry (E-9-5)	152	151	1
Tourist Hotel (E-9-6)	5	5	0

Source: Korea Immigration Service, "Status of detailed type of stay by registered foreigner" (as of December 31 2017)

### 3.3.4. Gender status of countries with employment permit MOUs

In non-professional employees, the number of male invited workers is significantly higher than the number of female invited workers. Even in the countries with high female labor force

inflows into Korea, the number of female invited workers is at least 1.5 times to 3 times lower than the number of male invited workers, as shown in Table 4.

**Table 7. Gender Status of Non-professional Employment by countries (Unit: Person)**

Countries with high female labor force inflows			Countries with high male labor force inflows		
Sending states	Female	Male	Sending states	Male	Female
Cambodia	8,391	29,904	Vietnam	34,950	3,472
Thailand	3,864	20,014	Cambodia	29,904	8,391
Vietnam	3,472	34,950	Indonesia	27,543	1,226
Philippines	2,796	23,653	Sri Lanka	23,689	262
Nepal	1,848	2,825	Philippines	23,653	2,796

Source: Korea Immigration Service, Monthly Statics, Vol. 2018 – February (as of February 28, 2018)

### 3.3.5. Status of Vietnamese migrant workers in Korea

Republic of Korea, the third largest country in accepting Vietnamese workers,<sup>263</sup> has received more than 120,000 Vietnamese workers between 1992 and 2010.<sup>264</sup> Among them, the share of Vietnamese women migrant workers is maintained at a low rate.<sup>265</sup> According to the UN Women’s report in 2016, the number of Vietnamese male or female migrant workers of each receiving country reflects its market demand.<sup>266</sup> In 2011, the share of Vietnamese women migrant workers in the Republic of Korea was 13%, but it decreased to 7% by 2015<sup>267</sup> and around 10% of

<sup>263</sup> South Korea recruited over 5,100 Vietnamese guest workers in 2017. Saigon Times (25 Jan 2018) at <http://english.thesaigontimes.vn/58198/Vietnam-workers-sent-to-Taiwan-Japan-rise-sharply.html> (last visited 3 July 2018).

<sup>264</sup> Ishizuka, Futaba. (2013). “International Labor Migration in Vietnam and the Impact of Receiving Countries’ Policies.” *Institute of Developing Economies Discussion Paper* at 10.

<sup>265</sup> UN Women and Department of Overseas and Labour, Labor-Social Affairs Publishing House, RESEARCH REPORT REVIEWING LEGISLATION ON VIETNAMESE WORKERS WORKING ABROAD UNDER CONTRACTS: FROM A GENDER PERSPECTIVE, 2016.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

the total of more than 4,300 migrant workers in 2017.<sup>268</sup> The majority of the migrant workers from Vietnam to Korea work in manufacturing sectors, and some others in agriculture, fishing, construction etc.<sup>269</sup> The proportion of women and men workers in each occupation or area is also various in destinations. It is reported that Vietnamese migrant workers often apply for the jobs that are tied to traditional gender roles. Women tend to work in manufacturing, textile, domestic work, caregiving, nursing, services, electronic assembly and agricultural occupations.<sup>270</sup> Men work mainly in the fields of construction and fishing.<sup>271</sup> Moreover, women appear to have fewer opportunities than men to enter the higher wage paying destinations of the Republic of Korea.<sup>272</sup>

However, as we see in the table below, there are many other ways for female migrant than through formal employment system. Marriage migrant between Korea and Vietnam is a significant number. According to the newspaper, “the number of international marriages in Korea soared in the 2000s to a peak of over 40,000, or 13.5%, of all marriages in 2005. The figure has since declined, but remained at a significant 7.3% in 2016.”<sup>273</sup> In 2018, “marriages between a Korean husband and a foreign wife accounted for 65.7% of marriages, significantly higher than those between a foreign husband and a Korean wife, at 19.4%.”<sup>274</sup> It is conducted through international matchmaking agencies often for Korean men in rural areas who have been unable to find local wives to marry with women from elsewhere in Asia, who come and settle in the Korean countryside. Those “wives” often engage in agricultural work in rural area, it can be sometimes alternative of formal migrant worker system. That “informal migrant worker” system is not within the scope of the analysis in this chapter. However, it is important to think over the migration system in holistic viewpoints as they are all connected together.

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<sup>268</sup> According to the Department of Overseas Labour, Ministry of Labour, Invalids and Social Affairs (November 2017), number of female guest workers is 427 among 4,393 migrant workers sent to South Korea in 2017 in total.

<sup>269</sup> In Japan, women workers only make up about 23 per cent in these areas. Ishizuka, Futaba. (2013). “International Labor Migration in Vietnam and the Impact of Receiving Countries’ Policies.” *Institute of Developing Economies Discussion Paper* at 8, 10.

<sup>270</sup> UN Women Viet Nam and Department of Overseas Labour, Ministry of Labour, Invalids and Social Affairs, Viet Nam, *Women in International Labour Migration from Viet Nam: A Situation Analysis*, 2012 at 8.

<sup>271</sup> UN Women and Department of Overseas and Labour, Labor-Social Affairs Publishing House, 2016. In South Korea, women workers make up 98 per cent of the total number of Vietnamese migrant workers in manufacturing and textiles.

<sup>272</sup> UN Women Viet Nam and Department of Overseas Labour, Ministry of Labour, Invalids and Social Affairs, Viet Nam, *Women in International Labour Migration from Viet Nam: A Situation Analysis*, 2012 at 8.

<sup>273</sup> SOTARO SUZUKI, Foreign wives in rural South Korea struggle to fit in Men in areas with falling populations find matches in Southeast Asia, 8 July 2018. Available at <https://asia.nikkei.com/Life-Arts/Life/Foreign-wives-in-rural-South-Korea-struggle-to-fit-in>.

<sup>274</sup> *Id.*

**Table 8. Status of Vietnamese Immigrants in Korea**

Type of Stay	Male	Female	Misc
Non-professional Employment	35,381	3,470	EPS
Seafarers	6,872	2	
Marriage Migrant	1,723	37,741	No limit on the employment (not include marriage naturalization)
Permanent Residency	23	1,478	No limit on the employment
Visiting or Joining Family	12,969	20,596	No employment allowed
Student Visa	2,991	3,595	Allows work within 20 hours a week

\* Source: Korea Immigration Service, Annual Statistics of Immigrants in 2017

### ***3.3.6. Status of female guest workers in Korea***

According to “2016 Foreigner Labor Force Survey” by the Statistics Korea (KOSTAT), as of May 2016, there were 962,000 guest workers staying in Korea.

When categorized according to nationalities in descending order, the female guest workers included Korean Chinese (441,000, 45.9%), Vietnamese (72,000, 7.4%), Non-Korean Chinese (64,000, 6.6%), and North Americans (45,000, 4.7%), etc.

There were 32,400 female guest workers, which correspond to 33.7% of the total number of foreign workers, and the number of female guest workers had steadily increased.

1) When categorized according to industries in descending order, the female guest workers worked in accommodations, restaurants and wholesale and retail businesses (128,000, 39.5%); sole proprietorship and individual and public service businesses (89,000, 27.4%); and manufacturing (86,000, 26.5%). The industrial distribution of female guest workers posed a contrast to that of male guest workers, a majority (54.9%) of whom worked in manufacturing.

2) When categorized according to the status of stay in descending order, the female guest workers worked as visiting workers (87,000, 26.9%), Koreans from overseas (83,000, 25.6%), marriage immigrants (46,000, 14.1%), permanent residents (44,000, 13.5%), and non-specialized workers (23,000, 7.0%).

According to the Survey of Human Rights Status of Female Guest Workers in Manufacturing (hereinafter “Commission Survey”), conducted by the National Human Rights Commission in 2016, 31.4% of female guest workers entered Korea under manufacturing employment visas (E-9-1), and 47.5% worked in the manufacturing sector after entering Korea under marriage immigration, permanent residency, and long-term residency visas (F-6, F-5, and F-2, respectively).

1) 68.1% of female guest workers (262 out of 385) were married (including cohabitation), and 58.7% said that they had children (226 out of 385). 60.2% of the 226 respondents answered that they were living with their children in Korea.

2) In general, female guest workers were responsible for assembly (home appliances, mobile phones, automobiles, etc.), packaging, plastic processing, and sewing clothes. A majority of the female guest workers (74.2%) worked in small and medium sized businesses having less than 50 workers.

3) When categorized according to nationalities in descending order, the female guest workers were from Vietnam (117, 30.4%), the Philippines (90, 23.4%), China (71, 18.4%), and Indonesia (41, 10.6%).

### **3.4 Legal framework of foreign worker employment in Korea**

#### ***3.4.1 Domestic laws***

Female guest workers are female workers who are immigrants staying in Korea. Although there are legislations regarding immigrant workers and female workers, respectively, there is no separate legislation for female guest workers.

Current legislations regulating the employment and treatment of immigrant workers include the Immigration Act, the Act on the Employment, etc. of Foreign Workers (hereinafter, “Foreign Workers Act”), and the Framework Act on Treatment of Foreigners Residing in the Republic of Korea.

Legislations that have provisions that specifically protect female workers include the Labor Standards Act, the Equal Employment Opportunity and Work-family Balance Assistance Act (hereinafter, “Equal Employment Opportunity Act”), and the Framework Act on Gender Equality.

**Table 9. Legislations Related to Female Guest Workers**

<b>Legislation</b>	<b>Provisions Regarding Employment and Treatment</b>
<b>Immigration Act</b>	<ul style="list-style-type: none"> <li>·Article 18 places restrictions on employment of aliens based on their status of stay.</li> <li>·Article 25-3 provides special protection for victims of sexual crimes.</li> <li>(1) Where an alien, in whose case a trial in a court, an investigation by an investigative agency, or procedures for remedying an infringement of his/her right under other Acts due to the sexual crime defined in subparagraph 1 of Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes is proceeding, applies for an extension of his/her period of stay, the Minister of Justice may grant an extension of the period of stay until such procedures for remedying an infringement of his/her are completed.</li> <li>(2) Where the Minister of Justice deems it necessary for an alien to recover from an injury, etc. even after the expiration of the period of stay extended under paragraph (1), he/she may grant an extension of the period of stay.</li> </ul>
<b>Act on the Employment, etc. of Foreign Workers</b>	<ul style="list-style-type: none"> <li>·Article 2 defines “foreign worker” as “a person who does not have the nationality of the Republic of Korea and who provides or desires to provide his/her labor in return for wages in any business or place of business situated within the Republic of Korea.” The enforcement decree of the Act stipulates foreign workers excluded from application of the Act.</li> <li>·Chapter IV (Protection of Foreign Workers) of the Act include Article 22 (Prohibition against Discrimination), Article 23 (Subscription for Guaranty Insurance, etc.), Article 24 (Subsidization to Organizations, etc. related to Foreign Workers), Article 24-2 (Councils for Protection of Rights and Interests of Foreign Workers), and Article 25 (Permission for Change of Business or Place of Business).</li> <li>·There are no penalty provisions for employers who violate Article 22 (Prohibition against Discrimination).</li> </ul>
<b>Framework Act on Treatment of Foreigners Residing in the Republic of Korea</b>	<ul style="list-style-type: none"> <li>· The term “foreigners in Korea” means those who do not possess the nationality of the Republic of Korea and who legally stay in Korea for the purpose of residing in Korea.</li> <li>· Article 10 stipulates responsibilities of the State and local governments to take necessary measures, such as education and publicity activities, to prevent unreasonable discrimination against foreigners in Korea and their children and to safeguard their human rights.</li> </ul>

<p><b>Labor Standards Act</b></p>	<ul style="list-style-type: none"> <li>· Under the Act, a “worker” means a person who offers labor to a business or workplace for the purpose of earning wages. Foreign workers, regardless of their status of stay, are protected by Article 6 (Equal Treatment) of the Act.</li> <li>· Chapter V (Women and Minors) stipulates special protection of women in Articles 65, 70, 71, 73, 74, and 75.</li> <li>· According to Articles 11 and 63, with respect to a business or workplace in which not more than four workers are ordinarily employed and an agricultural and cattle breeding business, respectively, some provisions of Chapter V of the Act may not apply.</li> </ul>
<p><b>Equal Employment Opportunity and Work-family Balance Assistance Act</b></p>	<ul style="list-style-type: none"> <li>· In accordance with the principle of equality proclaimed in the Constitution, the Act stipulates equal employment for both genders and maternity protection in all aspect of employment including hiring, dismissal, and retirement.</li> <li>· The Act is applied to all businesses or workplace that employ one or more workers.</li> </ul>
<p><b>Framework Act on Gender Equality</b></p>	<ul style="list-style-type: none"> <li>· Article 33 stipulates that the State and local governments should take measures necessary to promote the welfare of women from vulnerable social groups including international marriage immigrants, etc., as prescribed by the relevant Acts.</li> </ul>

Article 23 of the Enforcement Decree of the Immigration Act differentiates among aliens entering Korea to engage in job-seeking activities, aliens not subject to restrictions on job-seeking activities in Korea, and aliens who cannot engage in job-seeking activities.

- Among these aliens, non-professional job-seekers (E-9) and work and visit job-seekers (H-2), both of which may enter Korea to engage in job-seeking activities, are subject to the Foreign Workers Act and thereby have restrictions in job-seeking activities under the EPS.
- Overseas Koreans (F-4), permanent residents (F-5), and marriage immigrants (F-6), who may engage in job-seeking activities without being subject to the Foreign Workers Act, are still subject to employment legislations including the Labor Standards Act.

Four major social insurances (employment insurance, industrial accident compensation insurance, health insurance, and national pension) are automatically applied to a business or workplace in which one or more workers are employed. With respect to aliens staying in Korea, each individual legislation stipulates the scope of application as shown in Table 7.

**Table 10. Scope of Application of Four Major Social Insurances for Guest Workers**

	<b>Industrial Accident Compensation Insurance</b>	<b>Employment Insurance</b>	<b>Health Insurance</b>	<b>National Pension</b>
<b>Scope of Application</b>	Worker (including unregistered immigrant)	Not applicable in general. May be applied to certain status of stay.	May be insured based on workplace or as an individual	May be insured based on workplace or as an individual
<b>Legislation</b>	Industrial Accident Compensation Insurance Act (Articles 1 and 5)	Enforcement Decree of the Employment Insurance Act (Article 3)	National Health Insurance Act (Article 109)	National Pension Act (Articles 126 and 127)

### ***3.4.2 International treaties and agreements<sup>275</sup>***

There are a number of international instruments that provide guidance regarding the effective protection of the rights of migrant workers. Korea is a party to a number of those international conventions to protect the rights of all workers in the country regardless of their status or national origin. In considering the operation of mechanisms on migrant workers from Vietnam to Korea and assessing areas for improvement, it is important to refer to the broader international context, in particular relevant international standards as there are a range of such standards and initiatives that countries can use to develop and to implement rights protection mechanisms for migrant workers. This includes both binding standards and non-binding guidance materials or recommendations. Also, it is more important than ever to see these standards as workplace trends associated with globalization are reshaping the employment relationship including legal contours of its regulations regarding increased female migrant workers and the behavior of business actors.<sup>276</sup>

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<sup>275</sup> This chapter is written based on the consultant with Ayako Hatano.

<sup>276</sup> See Roger Blapain et al., *The Global Workplace* 8-17 (Cambridge University Press 2007).



### 3.4.2.1 International human rights conventions

International human rights law provides that everyone, without discrimination between citizens and non-citizens or between different groups of non-citizens, must have access to the fundamental human rights provided in the international bill of human rights. The Constitution of Korea provides that treaties promulgated in accordance with the Constitution and generally recognized rules of international law have the same effect as domestic laws.<sup>277</sup> Human rights treaties are legally binding on ratifying countries, and those countries which have ratified the conventions agree to put it into practice and report on progress.

Korea is the member of six core human rights conventions. When Korea fulfills its obligations as a party to these treaties, these are important international instruments that provide legal basis to protect the rights of immigrants and their families in general. Following are the six core human rights conventions that Korea ratifies:

- The International Covenant on Economic, Social and Cultural Rights (ICESCR) (ratified in 1990);
- The International Covenant on Civil and Political Rights (ICCPR)(ratified in 1990);
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (ratified in 1979);
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (ratified in 1995);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified in 1985);
- The Convention on the Rights of the Child (CRC) (ratified in 2004).

As is mentioned previously, a range of worker's rights is covered in the International Bill of Rights, which includes the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), all other conventions are important tools to protect migrant workers in their specific areas. In particular, CEDAW focuses on mainstreaming a gender perspective.

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<sup>277</sup> Brown, Ronald C. *East Asian labor and employment law: International and comparative context*. Cambridge University Press, 2012.

### 3.4.2.2 ILO fundamental conventions

In addition to the UN human rights treaties, guest workers derive protections from other international instruments, including the core ILO Conventions. The core ILO Conventions are the Forced Labour Convention, 1930 (No.29), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), the Right to Organise and Collective Bargaining Convention, 1949 (No.98), the Equal Remuneration Convention, 1951 (No.100), the Abolition of Forced Labour Convention, 1957 (No.105), the Discrimination (Employment and Occupation) Convention, 1958 (No.111), the Minimum Age Convention, 1973 (No.138) and the Worst Forms of Child Labour Convention, 1999 (No.182). Several ILO and UN Conventions are specifically relevant to migrant workers, particularly the Migration for Employment Convention, 1949 (No.97), the Migrant Workers Convention, 1975 (No.143), the Private Employment Agencies Convention, 1997 (No.181), the Domestic Workers Convention, 2011 (No.189). Korea ratified following 4 of 8 ILO fundamental conventions;

- ILO Convention No.100: Equal Remuneration Convention (ratified in 1997);
- ILO Convention No.111: Discrimination (Employment and Occupation) Convention (ratified in 1998);
- ILO Convention No.138: Minimum Age Convention (ratified in 1999);
- ILO Convention No.182: Worst Forms of Child Labour Convention (ratified in 2001).

Like above-mentioned international human rights conventions, ratified convention of ILO are legally binding at the national level.

**[Table 8] Situation of Ratification of ILO Conventions of Korea**

ILO Convention	Ratification (Korea)
<b>Eight core conventions</b>	
C29 Forced Labour Convention (1930)	
C87 Freedom of Association and Protection of the Right to Organize Convention (1948)	
C98 Right to Organize and Collective Bargaining Convention (1949)	
C100 Equal Remuneration Convention (1951)	08 Dec 1997
C105 Abolition of Forced Labour Convention (1947)	
C111 Discrimination (Employment and Occupation) Convention (1953)	04 Dec 1998
C138 Minimum Age Convention (1973)	28 Jan 1999

C182 Worst Forms of Child Labour Convention (1999)	29 Mar 2001
<b>Other relevant conventions</b>	
C81 Labour Inspection Convention (1947)	09 Dec 1992
C97 Migration for Employment Convention (Revised) (1949)	
C143 Migrant Workers (Supplementary provisions) Convention (1975)	
C181 Private Employment Agencies Convention (1997)	
C156 - Workers with Family Responsibilities Convention (1981) (No. 156)	29 Mar 2001
C183 - Maternity Protection Convention (2000) (No. 183)	
C189 - Convention Concerning Decent Work for Domestic Workers (2011) (No. 183)	

Sources: ILO Database of International Labour Standards (ILOLEX)

### 3.4.2.3 Conventions on the rights of migrant workers

Korea has not ratified most of the conventions related to the rights of migrant workers and their families, including International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) though it ratified the following international treaties regarding human trafficking and smuggling: United Nations Convention against Transnational Organized Crime (ratified in 2015)<sup>278</sup>; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (ratified in 2015)<sup>279</sup>; and Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>280</sup>, supplementing the United Nations Convention against Transnational Organized Crime (ratified in 2015)<sup>281</sup>.

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<sup>278</sup> UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25.

<sup>279</sup> UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

<sup>279</sup> UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25.

<sup>280</sup> UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000.

<sup>281</sup> UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25.

Also, Korea has not yet ratified the migrant worker related ILO Conventions such as the Migration for Employment Convention, 1949 (No.97), the Migrant Workers Convention, 1975 (No. 143), the Private Employment Agencies Convention, 1997 (No.181), the Domestic Workers Convention, 2011 (No.189) as well as the ILO Forced Labour Convention 1930 (No.29), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), the Right to Organise and Collective Bargaining Convention, 1949 (No.98), and the Abolition of Forced Labour Convention 1957 (No.105).

The fact that Korea is not a member of conventions on the rights of migrant workers, especially the ICRMW convention hinders the protection of the rights of foreign workers in Korea. For example, the right to organize unions of foreign workers, in particular the registration of representative organization of illegal migrant workers has been refused by competent agencies. However, the Korea's Supreme Court in 2015 ruled that illegal migrant workers are subject to the scope of the Trade Union and Labor Relations Adjustment Act, and this complies with international standards on protection of migrant workers.<sup>282</sup>

#### *3.4.2.4 Conventions on gender equality and protection of women workers*

Korea ratified the Convention No.156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers with Family Responsibilities in 2001,<sup>283</sup> but has not ratified the Convention No.183 concerning Maternity Protection.<sup>284</sup> In line with the ratification of the Convention No.156, Korea introduced the Act on the Promotion of the Economic Activities of Career-Break Women in 2008 and the Act on Equal Employment and Support for Work-Family Reconciliation in 2011. This reflects Korea's gender-sensitive approach in developing labor law and policy as well as its efforts to enhance women's access to employment in order to address labor shortage in the economy.

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<sup>282</sup> International Trade Union Confederation, available at <https://www.ituc-csi.org/korea-supreme-court-affirms-right> (visited Oct. 4, 2018).

<sup>283</sup> C156 - Workers with Family Responsibilities Convention, 1981 (No.156): *Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (Entry into force: 11 Aug 1983).

<sup>284</sup> C183 - Maternity Protection Convention, 2000 (No.183): *Convention concerning the revision of the Maternity Protection Convention (Revised), 1952* (Entry into force: 07 Feb 2002).

### ***3.4.3 Memorandums of understanding on sending and receiving migrant workers***

The EPS is implemented through signing bilateral memorandums of understanding on sending and receiving labor (MOUs) between Korea's Government and Government of exporting labor country. The EPS is a Korean government-operated work scheme for a non-seasonal temporary labor migration program in Korea that operates under bilateral government-to-government memoranda of understanding (MOU) that Korea has signed with other countries including Vietnam.<sup>285</sup> MOUs specify the introduction, selection, job matching, guarantees and employment-related rights of foreign workers in Korea. This means that Korea only accepts foreign workers who satisfy certain requirements and work in industries designated in the MOUs. Industry sectors that faces Labor shortage and need to employ non-professional foreign workers include: manufacturing, construction, agriculture and stockbreeding, fishery and services. MOUs also provides for validity period and need to be renewed upon their expiration.

Korea has signed MOUs with 16 sending countries including: Indonesia, Vietnam, Thailand, Philippines, Sri Lanka, Mongolia, Uzbekistan, Pakistan, Cambodia, China, Bangladesh, Kyrgyzstan, Nepal, Myanmar, Timor-Leste, and Laos.

Vietnam has signed MOUs with Korea six times to send Vietnamese workers to Korea. These MOUs were signed in 2004, 2006, 2010, 2012, 2016 and the latest MOU was signed in March 2018. The latest MOU is valid in 2 years, after that Vietnam and Korea shall consider to renew it.

## **3.5 Legal and practical issues on female guest worker's employment in Korea**

### ***3.5.1 Challenges and problems of the employment permit system under domestic laws***

#### ***3.5.1.1 General principles***

Currently, Korea has signed MOUs with a total of sixteen countries (*see above*), and adopted a policy of supplying foreign labor force through EPS. Most guest workers enter Korea with non-professional work visas, and they can work for maximum four years and ten months. This

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<sup>285</sup> It was implemented in August 2004 through the enactment of the Law Concerning the Employment Permit for Migrant Workers ("EPS Act"), which was approved by Korea's National Assembly on 31 July 2003.

period can be extended once, and for the extension the employee must reside in the home country for at least 6 months.<sup>286</sup>

Supply of foreign workers through EPS has fundamental limitations in that the employment is only allowed in certain industries including manufacturing, construction, agriculture, fishing, service industries such as frozen product storage, and livestock industry.<sup>287</sup>

These guest workers are granted the status of sojourn depending on the industry sector (manufacturing E-9-1, construction E-9-2, agriculture E-9-3, etc) before entering Korea, and the status of sojourn cannot be changed after entering Korea (impossible to switch to different industry, impossible to switch to another business in principle).<sup>288</sup>

### *3.5.1.2 Limitation on freedom to choose occupation: limitation on change of workplace*

Guest workers under EPS are fundamentally limited on their freedom to choose on occupation. Also, EPS does not allow guest workers to change their workplaces during the employment permit period in principle. Guest workers may change their workplaces three times during the first three years of employment, twice during one year and ten months of re-employment period only when there are statutory causes. However, change of workplaces is exceptionally allowed when there are violations of labor law and regulations by the employer, suspension or closedown of business, delay in payment of wages, violations of basic human rights due to assaults, injuries or disease. In case of causes which employees are not responsible for such as suspension or closedown of business, cancellation or restrictions on employment permit, and injuries, guest workers may change their workplaces up to four times.<sup>289</sup>

Migrant workers also risk losing their legal status to stay in Korea if they lost their job and did not find a new employer within three months.<sup>290</sup> If a migrant worker is not able to get a job within three months, authorities could cancel his/her work permit, forcing the worker to return

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<sup>286</sup> Youngsook, Heo-Oh, "General Introduction on Vietnam Migrant Women Workers Statistics", *Heo-Oh, Youngsook, "General Introduction on Vietnam Migrant Women Workers Statistics" in The 2nd Workshop for the Study on Legislative Strategies for Ensuring Gender Equality on the Viet Nam's Law on Vietnamese Guest Workers, Korea Legislation Research Institute (Oct. 2018)* at 44.

<sup>287</sup> Kyuyong Lee, "Analysis and Evaluation of the Current Employment Permit System", in the 2nd Workshop for the Study on Legislative Strategies for Ensuring Gender Equality on the Viet Nam's Law on Vietnamese Guest Workers, Korea Legislation Research Institute (Oct. 2018), at 14

<sup>288</sup> Youngsook, Heo-Oh *supra* at 44.

<sup>289</sup> Kyu-young Lee, *supra*, at 14-15.

<sup>290</sup> Hong-Yop Choi, "Report on Employment Alteration Related to a Migrant Worker and Restriction of Fair Dismissal", *Journal of Labor Law, 2015.09*, Vo. 55, at 303-307.

home or remain in the country illegally. This situation was particularly difficult for seasonal workers, such as those involved in agriculture or construction. Migrant workers did not have access to lists of companies that were hiring when they wanted to change jobs, which made it more difficult for these workers to change jobs freely, while employers effectively controlled the list of job-seeking workers and had the right to contact the person they choose.<sup>291</sup> While an EPS employer can terminate a migrant's contract without having to justify the decision, migrants who want to leave their jobs must obtain an employer-signed release form in order to seek a new job (article 25(1) of the EPS Act). Amnesty International's research found that employers are extremely reluctant to sign release forms and would only do so in exchange for a high amount of bribe on some occasions.<sup>292</sup> Without the release, migrants run the risk of being reported as "runaways" to the immigration authorities, subjecting the migrants to arrest and deportation. However, regardless of the background of "runaway," employers responsible for exploiting migrant agricultural workers rarely face any sanctions.

In the 2016 survey, Ministry of Employment and Labor did not separately count the number of sexual assaults or harassment as the cause of change of workplaces.

※ The National Human Rights Commission of Korea (Oct. 10, 2018) made recommendation to the minister of Employment and Labor Δ to allow the change of workplace in the event of sexual violence, Δ to monitor and support the sexual harassment and sexual violence prevention education for female guest workers, Δ to enhance the expertise of victim counseling, Δ monitoring the compliance of Labor Standards Act and Equal Employment Opportunity Act at workplaces with a large number of female migrant workers Δ mandatory training for employers.

The National Human Rights Commission of Korea made recommendation to Ministry of Gender Equality and Family Δ to establish a comprehensive professional counseling center for the protection of women's human rights and Δ to establish a plan for counseling and support services.

The Ministry of Health and Welfare announced that it would implement the recommendations of the National Human Rights Commission of Korea. In particular, it is pushing for the revision of a decree and introduction of a new system that allows the change of workplace if an employer provides accommodation below the standards of living or if a female worker is unable to continue working due to sexual harassment, sexual assault, assault, verbal abuse from the employer and his/her spouse, lineal ascendant and descendant. (Money Today, Oct. 10, 2018.)

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<sup>291</sup> *Id.* at 307-312.

<sup>292</sup> Amnesty International, 2014. Bitter Harvest: Exploitation and forced labour of migrant agricultural workers in South Korea. at 7.

### 3.5.1.3 Exclusion from application in Article 63 of Labor Standards Act

The industries allowed to introduce foreign workforce in 2015 included crop planting and livestock related services in agricultural and dairy industries, coastal fishing, fish farming and salt collecting in fishing industry.<sup>293</sup> There is an escape clause for agricultural guest workers under the EPS. It stipulates that every guest worker is protected by the labor legislations of Korea and is entitled to the same wages as Korean workers, but the agricultural industry is still an evaded field since the application of Labor Standards Act on work, vacation, paid vacation, etc. is practically difficult.<sup>294</sup>

#### Article 63 (Exclusion from Application)

The provisions pertaining to work hours, recess, and holidays referred to in this Chapter and Chapter V shall not apply to a worker who falls under any one of the following subparagraphs:

1. A worker engaged in cultivation or reclamation of land, seeding, cultivation, or collection of plants, or other agricultural and forestry work;

In those industrial sectors, where the proportion of female guest workers is overwhelmingly high, the provisions pertaining to work hours, recess, and holidays stipulated in Labor Standards Act does not apply to those workers, according to Article 63. This article eventually justifies overtime work with minimum holidays.

As of July, 2014, the number of foreign workers in agricultural and dairy industry is 17,653 8,544 Cambodian (48%) and 3,450 Vietnamese (19%). Especially, women working in the agricultural industry are up to 6,025 (34%). Since the application of Labor Standards Act is difficult, there are many disputes on working hours.<sup>295</sup> These industries are faced with poor work environment, dormitory facilities, and lack of protection of human rights. These workers are assigned to more isolated areas, which further puts them into blind spots of human rights.<sup>296</sup>

In a survey for sexual assaults on female guest workers in the agriculture industry in 2016, more than 50% of respondents answered that they worked more than 10 hours a day in average,

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<sup>293</sup> Dong-hoon Seol, "International Migration and the Citizenship of Migrant Workers-A Comparison of Germany, Japan and Korea", *Journal of Democracy and Human Rights*, 2007.07, Vol. 7, No. 2, at 386-391; Kyu-young Lee, *supra*, at 9-15.

<sup>294</sup> Kyu-young Lee, *supra*, at 11-15.

<sup>295</sup> Kyung Ock Chun, "Women Migrant's Rights under International Human Rights Norms and Domestic Laws in Gender Perspective", *The Journal of Multicultural Society*, 2016.02, Vol. 9, No. 1, at 87.

<sup>296</sup> Hyang-Hee Yun, "Protection of Human Rights of Unregistered Foreign Workers: Focusing on Improvement on Improvement of Immigration", *Contemporary Society and Social Policy* 2016.12, Vol. 6, No. 2, at 135-141

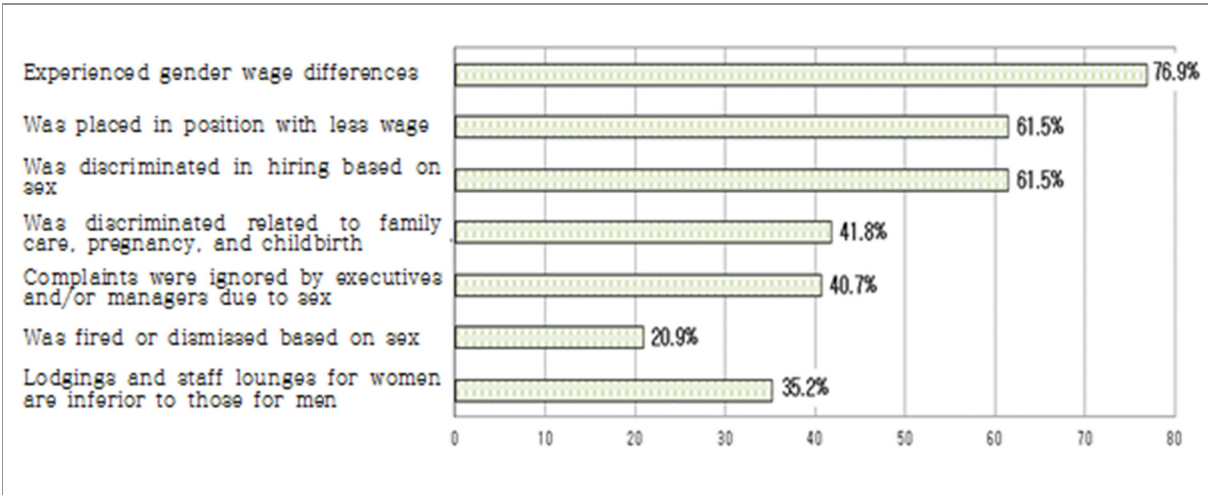


holidays were less than two days a month, and average wages per month was less than 1,300,000 Won.<sup>297</sup>

**3.5.2 The Issues on the treatment and protection of female workers**

*3.5.2.1 Workplace discrimination against women*

According to National Human Rights Commission’s Survey, workplace discrimination against women included, in descending order, gender wage difference (76.9%), discrimination in hiring and placement (61.5% for each), and discrimination related to family care, pregnancy, and childbirth (41.8%).<sup>298</sup>



\* Source: Korea National Human Rights Commission, Survey of Human Rights Status of Female Guest Workers in Manufacturing, 2016.<sup>299</sup>

During in-depth interviews of female guest workers, many female guest workers answered that they had experienced workplace discrimination against women including gender wage difference, remarks related to pregnancy and childbirth, treatment based on stereotypes about women, and hostile treatment of women.

In a questionnaire survey for officers providing aids to foreign workers, the officers responded that the manufacturing sector shows a high degree of sexual discrimination, such as

<sup>297</sup> Sun-Young Lim, “Vietnamese Female Migrant Wokers”, *The 3rd Workshop for the Study on Legislative Strategies for Ensuring Gender Equality on the Viet Nam’s Law on Vietnamese Guest Workers*, Korea Legislation Research Institute (KLRI) at 32-38

<sup>298</sup> Sun-Young Lim, *supra* at 17.

<sup>299</sup> The table has been reprinted from Sun-Young Lim, *supra* at 18.

preference of male workers to female workers and discrimination against women related to pregnancy, childbirth, and family care.

### *3.5.2.2 Sexual harassment and sexual assaults*

#### (A) Sexual Harassment and Sexual Assaults in the Manufacturing Sector

According to the Commission Survey, 11.7% of female guest workers (45 out of 385) working in domestic manufacturing sites experienced sexual harassment and/or sexual assaults. The victims answered that they had experienced sexual harassment and/or sexual assaults more than once.

The specific details of the sexual harassment incidents (multiple responses) include “telling a sexual joke or an obscene and vulgar story” (55.6%, 25 cases), “forcing to drink alcohol or to serve alcohol in a company dinner” (48.9%, 22 cases), and “unwanted bodily contact, such as holding hands, hug, kisses, etc.” (40.0%, 18 cases).

Sexual harassment and/or sexual assault perpetrators were “employers or managers” (15.6%), “Korean co-workers” (15.6%), and “foreign co-workers” (11.1%). This shows that many sexual harassment and sexual assault incidents were perpetrated by colleagues.

According to in-depth interviews, sexual harassment occurred in a form of sexual behaviors such as making advances to a victim, watching a pornographic video in front of her, looking at her with furtive eyes, or bumping into her body.

In a questionnaire survey for officers providing aids to foreign workers on “status of sexual harassment and sexual assaults to female guest workers in the manufacturing sector,” 74.0% of the officers answered “sexual harassment involving sexual behaviors” is the most serious or prevalent problem (“serious” and “very serious”). 48.0% of the officers replied that “sexual assault (rape)” is also a serious problem.

#### (B) Sexual Harassment and Sexual Assaults in the Agriculture and Livestock Sectors

According to the Survey on Sexual Assaults against Female Guest Workers in the Agricultural Sector, conducted by the Gonggam Human Rights Law Foundation in 2016, 12.4% of female guest workers (25 out of 202) working in agriculture experienced sexual harassment and/or sexual assaults.

Sexual harassment and/or sexual assault perpetrators were, in descending order, employers or managers (64.0%), foreign co-workers (20.0%), Korean co-workers (8.0%), and employer’s family members and/or relatives and Korean neighbors (8.0%).

A majority of sexual harassment and/or sexual assault occurred at a farm or its surrounding areas (80.0%, at work and in break time). Time and place of sexual harassment and/or sexual assault incidents included, in descending order, victim's lodging (8.0%, in break time), perpetrator's lodging (4.0%, after work), and adult entertainment establishment (4.0%, company dinner). In all of the sexual assault cases that occurred in victim's lodging, the victim was living in a container that was provided by her employer and could be accessed by any outsider.

### *3.5.2.3 Residential safety vulnerabilities*

In survey of 2016, 55.9% of respondents were provided with containers or vinyl greenhouses for dormitories.

- Places where container or vinyl greenhouse dormitories were installed were mostly desolate, isolated places in the middle of field far from villages.
- No indoor toilets, only squat toilets.
- Despite these poor conditions, fees for dormitories were still deducted from their wages.
- Bedrooms and bathrooms were not blocked from outside or there were no locks. There were cases where (male) employers can enter the facilities.

According to a section of the Commission Survey related to residential safety and privacy protection for female guest workers entering Korea with work visas, female guest workers replied, in descending order, that “they feel scared because their accommodations are in a sequestered place” (40.5%); “bathrooms are not separated between men and women” (33.3%); “lodgings are not separated between men and women” (24.3%); “any outsiders can easily access to lodgings” (20.7%); and “there are no reliable locks in toilets and bathrooms” (9.9%).

According to the Survey on Sexual Assaults against Female Guest Workers in the Agricultural Sector, conducted by the Gonggam Human Rights Law Foundation in 2016 among female guest workers living in a lodging provided by their employer, 55.8% were concerned that they were living in a temporary building such as a container and a vinyl greenhouse, and 30.6% replied that they were sharing a lodging with one or more male guest workers.

Especially, 16 (10.1%) female guest workers replied that “lodgings are not separated between men and women.” The non-separation of lodgings between men and women was also confirmed in the Research for Reestablishment of Human Rights Guidelines for Immigrants, authored by the Commission.

### 3.5.2.4 Lack of education on sexual harassment prevention

Many female workers pleaded that they were sexually threatened in residential environments or work environments.

- In survey of 2016, 12.4% experienced sexual assaults, 36.2% heard other worker's experiences.
- Only 23.8% received education on countermeasures for sexual assaults. Most of these educations were conducted by non-governmental organizations, and they never received any education from the public route according to EPS.

According to the Monitoring Report on Status of Workplace Sexual Harrassment of Female Guest Workers in Gyeonggi Province, authored by Gyeonggi Institute of Research and Policy Development for Migrants' Human Rights in 2015, 74.6% of female guest workers replied that they had not received any sexual harassment prevention education. 85.2% of guest workers with work visas answered that they had not received any sexual harassment prevention education, although it is part of their employment education program.

<b>Educational Institution</b>	<b>Cambodia</b>	<b>Vietnam</b>	<b>Church, NGO, etc.</b>	<b>Korean government (employment center, etc.)</b>	<b>Current place of business</b>	<b>No response</b>
Respondents	25	1	8	3	1	7

According to the Survey on Sexual Assaults against Female Guest Workers in the Agricultural Sector in 2016, 76.2% of female guest workers answered that they had not received, in Korea or their home country, any education regarding how to respond to sexual assaults. For those who did receive the education, there seemed to be little sexual harassment prevention education hosted by Korean government agencies and/or workplace.<sup>300</sup>

After the sexual assaults, many victims failed to cope with the situation due to lack of support and information: they could not actively cope with the situation since they were having trouble communicating in Korean and lack of information, and they did not know where and how

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<sup>300</sup> Sun-Young Lim, *supra* at 16-17.

to report it.<sup>301</sup> Cases where reports were made were very rare. The problem after reporting the situation was the difficulty of communication, lack of connections between the support systems, lack of legal support. Article 39 of the Equal Employment Opportunity Act imposes administrative fines for the sake of prevention of workplace sexual harassment. The Ministry of Employment and Labor conducts a yearly workplace inspection on businesses hiring a number of female workers.<sup>302</sup>

However, a majority of businesses whose workplace sexual harassment was caught were subject to a mere corrective action.

(Unit: place, case)

	No. of Businesses	No. of Violations	Corrective Action	Administrative Fine
<b>2014</b>	652	201	181	20
<b>2015</b>	455	142	135	7
<b>until 2016. 10.</b>	118	53	51	2

3.5.2.5 Maternal protection

The Labor Standards Act and the Equal Employment Opportunity Act stipulates protection of pregnancy, childbirth, and childcare and guarantee a vacation and/or leave for such protection. The Employment Insurance Act and the National Health Insurance Act have bases for supporting maternity.

Recommendations in the Human Rights Guidelines for Immigrants made by the Commission in 2012 suggested “substantive protection of maternity of all female guest workers. The Ministry of Employment and Labor reported that as the Labor Standards Act and the Equal Employment Opportunity Act are applicable to guest workers, the workers can enjoy maternity leave and childcare leave benefits.

However, the Commission Survey confirmed cases in which basic human rights related to pregnancy, child labor, and childcare (e.g., rights based on Articles 65 (Prohibition of Employment), 70 (Restrictions on Night Work and Holiday Work), 74 (Protection of Pregnant Women and

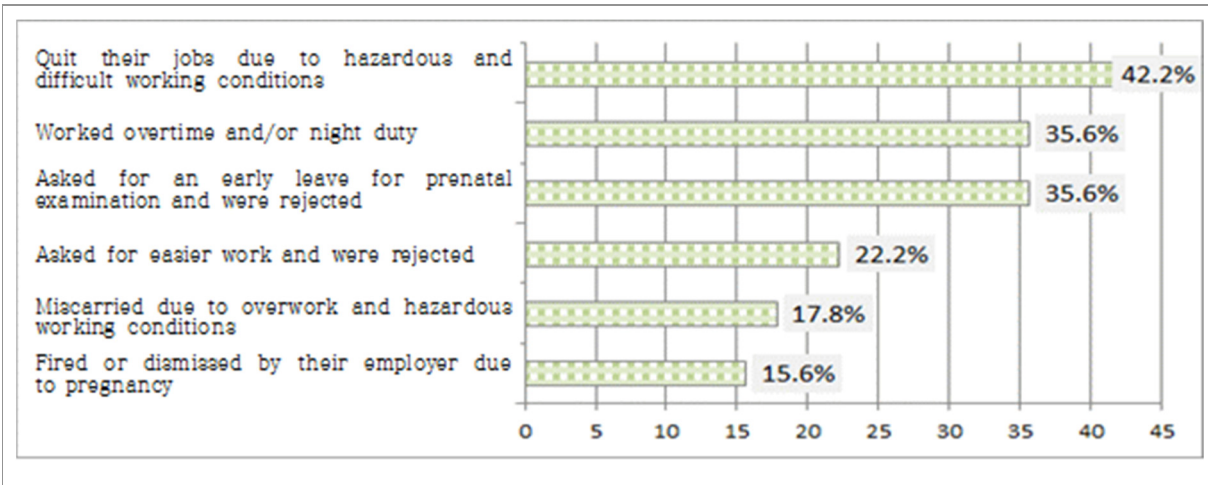
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<sup>301</sup> In-Kyung Lee, “Current Situation of Female Migrant Workers in Manufacture Industry in Busan and Kyungnam Area in Korea”, in *The 3rd Workshop for the Study on Legislative Strategies for Ensuring Gender Equality on the Viet Nam’s Law on Vietnamese Geust Workers*, Korea Legislation Research Institute (Nov. 2018), at 23-54.

<sup>302</sup> *Id.*

Nursing Mothers), and 74-2 (Permission, etc. for Time for Medical Examination of Unborn Child) of the Labor Standards Act and Articles 18 (Support for Maternity Leave) and 19 (Childcare Leave) of the Equal Employment Opportunity Act) are not substantively applied to female guest workers.<sup>303</sup>

11.7% of female guest workers (45 out of 385) experienced pregnancy during work at domestic workplace. These female guest workers responded in relation to working conditions during pregnancy that they quit their jobs on their own due to hazardous and difficult working conditions (42.2%); they worked overtime and/or night duty (35.6%); and they asked for an early leave for prenatal examination and were rejected (35.6%).<sup>304</sup>



\* Source: Korea National Human Rights Commission, Survey of Human Rights Status of Female Guest Workers in Manufacturing, 2016.<sup>305</sup>

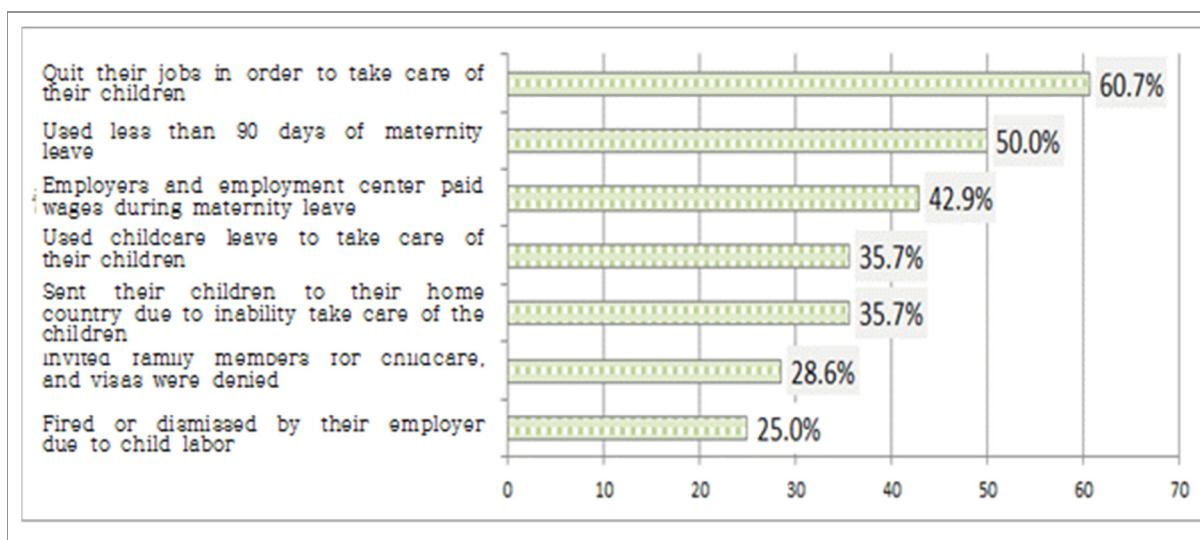
7.3% of the female guest workers (28 out of 385) experienced child labor. These female guest workers responded in relation to maternity leave and childcare leave that they quit their jobs in order to take care of their children (60.7%); they used less than 90 days of maternity leave (50.0%); and their employers and the employment center paid wages during maternity leave (42.9%).<sup>306</sup>

<sup>303</sup> Sun-Young Lim, *supra* at 19.

<sup>304</sup> *Id.*

<sup>305</sup> The table has been reprinted from Sun-Young Lim, *supra* at 19.

<sup>306</sup> Sun-Young Lim, *supra* at 20.



\* Source: Korea National Human Rights Commission, Survey of Human Rights Status of Female Guest Workers in Manufacturing, 2016.<sup>307</sup>

The reasons why the female guest workers used the maternity leave shorter than the number of days allowed by law (90 days) included that they were not eligible for employment insurance (27.3%); they did not know the existence of maternity leave (27.3%); and they were too busy with work to use maternity leave (9.1%).

Employment insurance for immigrant workers depends on voluntary registration of the workers, and the percentage of businesses hiring immigrant workers that have employment insurance is low. According to the Commission Survey, 44.7% of the female guest workers (172 out of 385) had employment insurance, and 28.5% answered that they did not know whether they had employment insurance or not, which indicates low awareness of the employment insurance system among female guest workers.

For female guest workers who are responsible for pregnancy, child labor, and childcare, low employment insurance registration rate means that they may be effectively excluded from maternal protection benefits provided by employment insurance, which may be more detrimental to securing and ensuring health and survival rights.

### ***3.5.3 Legal challenges and problems related to the implementation of international norms***

As mentioned in previous sections, Korea is a party to a number of international human rights treaties to protect migrant worker's rights including ICESCR, ICCPR, CEDAW, CAT, CRC and CERD. The recommendations of those human rights treaty bodies pointed out the necessity for

<sup>307</sup> The table has been reprinted from Sun-Young Lim, *supra* at 20.

the protection of the migrant worker's rights in Korea. All the human rights bodies show their concerns and recommendation on the migrant worker's rights in Korea with some highlighting in particular female migrant workers' situation.

For example, in the Concluding observations on the combined third to fifth periodic reports of Korea issued in 2017, the Committee against Torture shows strong concerns on the violence against migrant workers, female migrant workers in particular. The Committee states that "migrant workers suffer abuse, including sexual violence, and ill-treatment by employers, including the confiscation of their personal documents. It is concerned that migrant workers are not sufficiently informed or fear lodging complaints and that female migrant workers are unable to leave abusive employers who have not been judged guilty of abuse by a court."<sup>308</sup> They suggest this is a violation of CAT, in particular, Art.. 2, 12, 13,14 and 16 and urged the government of Korea to:

- (a) Provide legal protection to migrant workers, including female migrant workers, against exploitation, ill-treatment, abuse and confiscation of personal documents, and guarantee they have access to justice;
- (b) Consider amending labour legislation with a view to allowing migrant workers to change employment within a reasonable amount of time;
- (c) Ensure that migrant workers have access to a helpline in a language they understand and to interpreters, that they are provided with information regarding possibilities to lodge complaints against those responsible for violence, that they are able to change places of employment in cases of exploitation and abuse and that they have access to medical care, redress, including compensation, and government-funded shelters.<sup>309</sup>

As is mentioned above, gender has a considerable impact on the form of torture and other ill-treatment that women and girls are subjected to. Men and boys are also subjected to those ill-treatment and torture, but women and girls are disproportionately targeted with sexual violence and abuse. In particular, female victims of torture are confronted with major obstacles when they file a complaint or a reparation request as female migrant workers from Viet Nam are placed in very vulnerable position in a receiving country. Placing proper complains is more difficult for them due to the lack of appropriate legal system, complaint mechanism and psychological support adapted to the special needs of victims of sexual violence. Consequently, women and girls are frequently

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<sup>308</sup> Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the Republic of Korea, CAT/C/KOR/CO/3-5. 30 May 2017.

<sup>309</sup>*Ibid.*



reluctant to report torture or other ill-treatment and refrain from seeking justice. In this way, torture of migrant women and girls often goes unnoticed and perpetrators escape punishment in Korea.

Latest concluding observation of CERD issued in 14 December 2018 also showed concerns on the situation of gender based violence against migrant women in Korea as follows:<sup>310</sup>

### **Protection of foreign women**

19. The Committee is concerned that migrant women who are victims of gender-based violence still lack adequate redress, despite the revised Immigration Act and the Special Rules for Victims of Sexual Violence in 2014, which improve access to justice and support for these migrant women. The Committee is also concerned that while undocumented migrant women who are victims of gender-based violence are entitled to an extension of stay during the judicial procedure, they remain at risk of deportation after their case is closed, which discourages them from reporting abuses (arts. 5 and 6).

20. The Committee recommends that the State party:

- (a) Take measures to protect migrant women from gender-based violence and ensure that those who are victims are provided with adequate legal, medical and psychosocial assistance, regardless of their immigration status, and take measures to ensure that the perpetrators be held accountable;
- (b) Grant undocumented migrants who have been victims of gender-based violence the possibility to reside in the country after their case has been closed, and
- (c) Ensure that migrant women be provided with clear information, in a language they understand, about the services and remedies available to them, as victims of gender-based violence.

This reflects the vulnerable situation that female migrant workers are situated in Korea and the needs for gendered viewpoints to consider legal and policy mechanism on migration. As those female migrant workers are also vulnerable to the risk of trafficking, the CERD Committee also extend its concern to the issue of trafficking with special focus on female migrant workers:<sup>311</sup>

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<sup>310</sup> Concluding observations on the combined 17th to 19th periodic reports of Republic of Korea, CERD/C/KOR/CO/17-19. 14 December 2018. (Advance Unedited Version). Para.19-20.

<sup>311</sup> *Id.* Para.25-26.

## Trafficking in persons

25. The Committee is concerned that the State party still lacks a comprehensive law on human trafficking. It is also concerned about reports on the forced sexual exploitation of migrant women who entered the country with an E-6 visa as well as of those who are exempted from visa. The Committee is further concerned that despite the exemption regime, undocumented migrants, while being particularly vulnerable to human trafficking, remain reluctant to report out of fear of being expelled. Additionally, the Committee is concerned about the low percentage of those held accountable for human trafficking (arts. 2, 5 and 6).

26. The Committee recommends the State party to: (a) Adopt a comprehensive law on human trafficking, (in line with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children), and conduct awareness-raising campaigns to inform the public about the legislation; (b) Facilitate victims of human trafficking to lodge complaints to the authorities, provide protection to victims and grant them with a stable status of residence and basic livelihood at least until the remedy process ends; (c) Ensure that investigations of cases of human trafficking are conducted in a professional manner and that those responsible are held accountable. The Committee recommends that the State party ensure that victims of human trafficking have access to adequate redress, including rehabilitation.

In regards to the issue of migrant workers and trafficking, the Human Rights Committee, the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights, also showed the following concerns in 2015:<sup>312</sup>

### ***Migrant workers and trafficking for the purpose of forced labor***

40. The Committee notes with concern that, while the State party is a source, transit and destination country for human trafficking, traffickers are rarely prosecuted and convicted. It is also concerned that:

(a) A significant number of agricultural workers are trafficked into the State party for the purpose of exploitation, including forced labor, and migrant workers cannot change

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<sup>312</sup> Human Rights Committee, Concluding observations on the fourth periodic report of the Republic of Korea. CCPR/C/KOR/CO/4. 3 Dec. 2015, para 40-41.

employer without their existing employer's permission, under the Employment Permit System, or only under the particularly limited circumstances set out in article 25 of the Act on Foreign Workers' Employment etc.;

(b) Women entering the country on E-6 (Culture and Entertainment) visas are frequently trapped into prostitution;

(c) The State party does not have a mechanism in place to adequately identify victims of trafficking, which places them at risk of detention and deportation;

(d) The definition of trafficking as such in the Criminal Code criminalizes only the acts of buying and selling, which hinders the prosecution of persons who have recruited and exploited migrant workers through contractual deception (arts. 3, 7 and 8).

41. The State party should vigorously combat human trafficking, in particular by combating the demand for trafficked persons, and by:

(a) Allowing all migrant workers under the Employment Permit System to freely change their employer;

(b) Strengthening efforts to prevent forced labor, including by increasing the number of labor inspections;

(c) Regulating the use of E-6 (Culture and Entertainment) visas to ensure that they are not used to cover up trafficking for the purpose of prostitution;

(d) Bringing its definition of trafficking into compliance with international standards, establishing a mechanism to identify victims of trafficking and ensuring that they are treated as victims and have access to all the necessary support.

As we see the Human Rights Committee's recommendation above, the vulnerable situation of migrant female workers including the risk of trafficking is related to the current EPS system. CERD 2018 report also observed the need to amend the EPS system to solve those vulnerable situation of migrant workers,<sup>313</sup>

9. The Committee is concerned that, despite amendments to the Employment Permit System in 2012, migrant workers still face the following obstacles: a) restrictions in the number of

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<sup>313</sup> *Id.* Para.9-10.

times they can change workplace; b) restrictions to the maximum period of authorized stay in the territory of the State party; c) the impossibility of family reunification; d) the very limited possibility to change visa type, which hinders migrant workers' access to a long-term or a permanent residence permit and increases the risk of irregular stay (Art.. 5).

10. The Committee recommends that the State party further amend the Employment Permit System and other legislation applicable to migrant workers to: a) facilitate family reunification; b) remove restrictions which prevent them to change their workplace; c) extend their maximum period of stay and; d) allow them to obtain a different visa type.

Similar concerns and recommendations were shown by the Committee on Economic, Social and Cultural Rights in 2017 in its concluding observations on the fourth periodic report of the Republic of Korea the exploitation of migrant workers' rights:<sup>314</sup>

### ***Migrant workers***

36. Noting the information provided by the State party that a number of migrant workers do manage to change employment, the Committee remains concerned that the conditions set in the employment permit system, restricting and subjecting employment change to the authorization of employers, render migrant workers vulnerable to exploitation. The Committee is further concerned at reports of the exploitation of migrant workers in agriculture and fisheries that in many cases amounts to forced labor (arts. 6 and 7).

37. The Committee recommends that the State party abolish the restriction on the change of employment for migrant workers under the employment permit system. Furthermore, bearing in mind its recommendation on the coverage of the labor legislation, the Committee urges the State party to ensure that labor and social security rights are protected and respected in the fisheries and agricultural sectors, including by preventing the practice of passport confiscation, investigating reports of the exploitation, de facto detention and physical abuse of migrant workers, and bringing perpetrators to justice. The Committee encourages the State party to ratify the International Labor Organization (ILO) Forced Labor Convention 1930 (No. 29) and the Abolition of Forced Labor Convention 1957 (No. 105).

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<sup>314</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the fourth periodic report of the Republic of Korea. E/C.12/KOR/CO/4. 19 October 2017.

The EPS has been seen as an example of good practice in labor migration management, where migrant workers are recruited under a governmental agreement, standardized contracts are used, and migrant workers are given the same labor protections as national workers. Nevertheless, the high desertion (“runaway”) rate became a serious issue since its implementation and human rights violation of migrant workers has continued to be reported. According to Ishizuka, nearly 23,000 Vietnamese are working illegally in Korea, of whom more than 11,000 entered the country as legal worker under the EPS.<sup>315</sup> In 2012, the rate of Vietnamese workers overstaying in Korea reached about 50%, which made Korean government withhold renewal of MOU with the Vietnamese government.<sup>316</sup> Also, occasional media reports and CSO’s reports raise concerns about cases of hardship or injustice faced by Vietnamese migrants. This observations of the Committee shows the hardship still continues after the amendmend of EPS and it needs further revision.

The CERD Committee also points out the issue that domestic labour law in Korea is not applied to the migrant workers in specific sectors and in the same way as to Korean nationals:<sup>317</sup>

11. The Committee is concerned about reports that the Labour Standards Act does not apply in the agriculture and fisheries industries and are often not applied in practice in the manufacturing, construction and livestock industries, while working conditions of migrant workers in these sectors remain inadequate. The Committee is also concerned that migrants do not benefit from the same minimum wages as Korean nationals in the fisheries industry and that the profit is reportedly shared exclusively among Korean workers. Additionally, the Committee is concerned that such migrant workers face obstacles to report physical and verbal abuses, labour exploitation and harassment to which they are exposed (arts. 1, 5 and 6).

Korean labor laws including Korea’s Labor Standards Act (1997) generally provide foreign migrant workers the same legal protections as nationals, but the government has not effectively implemented the law. There was no comprehensive mechanism to enforce all these provisions if discrimination occurred. Moreover, it is reported migrant workers were particularly vulnerable to exploitation because the law excludes regulations on working hours, holidays, and benefits for the

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<sup>315</sup> Ishizuka, 2013 at 14.

<sup>316</sup> Id.

<sup>317</sup> Concluding observations on the combined 17th to 19th periodic reports of Republic of Korea, CERD/C/KOR/CO/17-19. 14 December 2018. (Advance Unedited Version). Para.11.

agricultural, livestock, and fisheries industries, which is operated with a large proportion of the low-skilled full-time labor provided by migrant workers.<sup>318</sup> Therefore, this exclusion is discriminatory in effect, as it disproportionately impacts on migrant workers. Other NGOs reported foreign laborers sometimes faced physical abuse and exploitation by employers in the form of longer working hours and lower wages than their local Korean counterparts. Moreover, workers also faced unexpected contract changes, such as the deduction of accommodation or meal expenses from wages. The Committee finally recommends to the Korean government to take legal measures to ensure the rights of migrant workers under the principle of non-discrimination as well as ensuring effective labour inspection;<sup>319</sup>

12. In light of its general recommendation No. 30 (2005) on discrimination against non-citizens, the Committee recommends that the State party make the necessary amendments to the legislation applicable to migrant workers to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices which may have discriminatory purposes or effect. It also recommends that the State party firmly combat discrimination between national and foreign workers, including by strengthening its labour inspections in industries employing migrant workers, without prejudice to their immigration status. It further recommends that the State party guarantee access to adequate remedies for migrant workers in cases where their rights are violated, and ensure that those responsible are held accountable and sanctioned with appropriate penalties. Finally, the Committee requests the State party to include in its next periodic report statistics on visits, violations, sanctions, remedies and penalties of the labour inspection or any other body.

It is also noteworthy that the CERD comments on undocumented migrants in Korea as well. It is important as migrant workers who enter in Korea as legal employee under EPS and another visa system often end up in becoming undocumented migrants who face a risk of detention and deportation. The committee states as follows;<sup>320</sup>

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<sup>318</sup> Though South Korea's Labour Standards Act (1997) is supposed to provide a regulatory framework to protect workers, article 63 of the Act specifically excludes some sectors, including agriculture, from protections relating to working hours, weekly paid rest days and daily breaks. While this exclusion applies to Korean and migrant workers alike, a large proportion of the low-skilled full-time labour in the agricultural sector is provided by migrant worker.

<sup>319</sup> *Id.* Para.12.

<sup>320</sup> *Id.* Para.15-18.

15. The Committee is concerned that undocumented migrants continue to endure repression in the State party and there are cases of violent crackdowns by immigration and police officers that frequently result in injuries and, in some cases, in deaths. The Committee is also concerned about crackdowns conducted against the Migrants' Trade Union (MTU), in some cases leading to the deportation of union leaders. The Committee is further concerned about reported acts of repression against human rights defenders, sometimes resulting in death. Moreover, the Committee is concerned that, due to their immigration status, undocumented migrants who have been victims of human rights violations are reluctant to report them to law enforcement authorities (arts. 5 and 6).

16. The Committee recommends that the State party take measures to prevent violence targeting undocumented migrant workers, including members of trade unions, and to intensify human rights training delivered to police and immigration officers, including on the protection of human rights defenders, the right to peaceful assembly, freedom of association and the right to organise. The Committee also recommends that the State party guarantee the right of all workers to participate in trade union activities without fear of deportation. The Committee further recommends that the State party take steps to ensure that victims can report violations without prejudice related to their immigration status and have access to adequate remedies. The Committee requests that the State party provide data on the number of migrants arrested and deported following crackdowns and, in cases where excessive force was used, the number of cases that have been investigated.

17. The Committee is concerned that under article 63 of the Immigration Act, the detention of immigrants who cannot be immediately deported could be indefinitely extended every three months based on an authorization granted by the Ministry of Justice. It is also concerned that while undocumented immigration detainees are entitled to submit an administrative appeal to challenge their detention, these appeals are reviewed by the Ministry of Justice and not by an independent body. The Committee is further concerned that the State party's immigration legislation allows the detention of children and does not consider their best interests (arts. 2, 5 and 6).

18. The Committee recommends that the State party amend article 63 of the Immigration Act to ensure that the lawfulness of the detention of immigrants who cannot be immediately deported be regularly reviewed by an independent mechanism. It also recommends that the detention of asylum seekers be considered a measure of last resort and for the shortest possible period of time and that the State party establish a time limit for the detention of

migrants and prioritize the use of alternative measures to detention. The Committee further recommends that the State party avoid the detention of children/minors and amend the Immigration Act to include provisions related to the best interests of the child.

It should be also noted that compared with men, women migrants are more likely to work in the undocumented sector.<sup>321</sup> They sometimes become pregnant and deliver a child in receiving country. Therefore, the protection of migrant women's rights is also related to their children rights. CEDAW in 2018 also pointed out human rights violation of undocumented migrant women and their children in Korea as:<sup>322</sup>

34. The Committee notes with concern:

(a) The absence of a universal, compulsory birth registration system in the State party, which puts children of undocumented migrant women, in particular undocumented unmarried migrant women, at risk of statelessness, owing to the persistent gender-discriminatory social stigma attached to single mothers, and the failure by the National Assembly to adopt a draft law on the registration of children born to foreign parents, for lack of social consensus;

(b) The difficulties faced by migrant women married to male nationals of the Republic of Korea and the length of the naturalization process;

(c) That immigration officers at times still require migrant female applicants to furnish a sponsorship letter from a citizen of the Republic of Korea for the extension of legal residency, despite the enactment of a legal amendment in 2012 removing such a requirement.

35. The Committee recommends that the State party:

(a) Adopt and implement the laws and procedures necessary for the registration of children born to foreign parents, including compulsory birth registration by hospitals and health-care professionals;

(b) Expedite the implementation of the measures necessary to ensure that the naturalization process for migrant women married to male nationals of the Republic of Korea is

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<sup>321</sup> Bélanger, Daniele. "Marriage with Foreign Women in East Asia: Bride Trafficking or Voluntary Migration?." *Population and Societies* 469 (2010): 1-4.

<sup>322</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of the Republic of Korea. CEDAW/C/KOR/CO/8. 14 March 2018.



significantly shortened and is, in any event, concluded within the maximum length of legal residency in the State party;

(c) Strictly enforce the abolishment of the legal requirement of a sponsorship letter from a citizen of the Republic of Korea when applying for extension of residency, including through capacity-building and training of immigration officers.

The Committee on the Rights of the Child also urged Korea to protect the rights of the children of migrant workers including children of illegal migrants, which leads of course to the protection of the female migrant workers as mothers.<sup>323</sup>

### *Undocumented migrant workers*

12. The Committee understands that one of the consequences of the inflexible system of time-limited permits and visas is that many migrant workers, who entered the country legally, become undocumented and that they and their families cannot enjoy their rights or access to services. Moreover, the Committee received information that the labor inspections carried out in the workplaces are aimed at identifying undocumented migrants, rather than checking working conditions, and that crackdowns have been strengthened and have resulted in a higher number of deportations.

The Committee urges the State party to protect the rights of undocumented migrant workers and requests information on the number of undocumented workers identified during labor inspections, their condition and length of detention, as well as the number of migrant workers who have been expelled. The Committee requests the State party to take all measures to ensure that migrant workers who entered the country legally do not become undocumented as a result of the inflexibility of the work-permit system.

In addition to the recommendations from international human rights treaty bodies above, both Korean National Human Rights Commission report in 2013 and Amnesty report in 2014 documented extensive abuse and exploitation of migrant workers in Korea, in particular, in agricultural industry.<sup>324</sup> Amnesty International in 2014 reported that migrant workers often faces

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<sup>323</sup> Committee on the Rights of the Child. Consideration of reports submitted by States parties under article 44 of the Convention, CRC/C/KOR/CO/3-4, 2 February 2012. Para 68-69.

<sup>324</sup> NHRCK, Fact-finding Report on the Human Rights Situation of Migrant Workers in Agricultural and Stockbreeding Industries, October 2013, p202, available at:

lack of a written contract in a language that migrant workers understand not received a copy of their new contract from their employers.<sup>325</sup> Under this condition, migrant worker's right to freely choose or accept work guaranteed by the Art.6 of ICESCR is significantly undermined when they do not receive a contract or if they receive a contract in a language they do not understand. This is also a violation of not only the requirements of the EPS standard labor contract but also article 17 of the labor Standards Act in Korea speculating that a written contract must be provided outlining basic terms and conditions, both at the beginning of a new employment relationship and following any change in a worker's terms and conditions of employment.<sup>326</sup>

Furthermore, the National Human Rights Commission of Korea report found that 84% of migrant workers surveyed felt that they experienced some form of discrimination, including regarding pay and benefits, type of work given, and working environment.<sup>327</sup> A NGO report also provided testimonies to reinforce the evidence documented in the National Human Rights Commission of Korea report in which respondents stated that they did not receive enough food (36%); did not have a proper toilet (40%); and that they could not stop their employer from freely entering their accommodation (53%).<sup>328</sup>

Also, Amnesty International's 2015-16 report stated the terms of the EPS make it difficult for migrant workers to seek alternative employment even if they experience exploitation or abuse by their employer including conditions indicative of forced labor. Workers under the EPS faced

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[http://www.humanrights.go.kr/common/board/fildn\\_new.jsp?fn=in\\_BB2013103111262611332591.pdf](http://www.humanrights.go.kr/common/board/fildn_new.jsp?fn=in_BB2013103111262611332591.pdf), accessed 10 November 2018. Amnesty International, 2014. Bitter Harvest: Exploitation and forced labour of migrant agricultural workers in South Korea.

<sup>325</sup> Amnesty International, 2014. Bitter Harvest: Exploitation and forced labour of migrant agricultural workers in South Korea, at 14. In the interview, a 33-year-old Vietnamese woman employed at a mushroom farm in Guri, Gyeonggi province (August 2012-present), recounted that: "I never received a contract for any of my subsequent jobs – the second, third or fourth ones. I asked my second employer for a copy of my contract but he refused, claiming that the job centre was keeping it for me. So, I thought this was normal and therefore didn't ask for it in my other jobs."

<sup>326</sup> Labour Standards Act (1997, last amended 21 January 2014, Act No. 12325).

<sup>327</sup> NHRCK, Fact-finding Report on the Human Rights Situation of Migrant Workers in Agricultural and Stockbreeding Industries, October 2013, p202, available at:

[http://www.humanrights.go.kr/common/board/fildn\\_new.jsp?fn=in\\_BB2013103111262611332591.pdf](http://www.humanrights.go.kr/common/board/fildn_new.jsp?fn=in_BB2013103111262611332591.pdf), accessed 10 November 2018.

<sup>328</sup> See NHRCK, Fact-finding Report on the Human Rights

Situation of Migrant Workers in Agricultural and Stockbreeding Industries, October 2013, at 153,162; See Amnesty International, 2014 at 26. According to the Amnesty report, a 40-year-old woman from Vietnam who works at a strawberry and tomato farm in Incheon city (August 2013-present), expressed anxiety about her living situation: "As there are no accommodation facilities at this farm, I'm staying at the dormitory of my boss's younger brother's farm. The living space is shared with the younger brother so he comes to the dorm whenever he wants to. This makes me feel very uncomfortable. My boss promised to build accommodation for me but seven months have passed and still nothing." See NHRCK, Fact-finding Report on the Human Rights Situation of Migrant Workers in Agricultural and Stockbreeding Industries, October 2013, at 153,162.

multiple restrictions on employment mobility. Such workers lose their legal status if they lost their job and did not find a new employer within three months. If a migrant worker is not able to get a job within three months, authorities could cancel his/her work permit, forcing the worker to return home or remain in the country illegally. Furthermore, while an EPS employer can terminate a migrant's contract without having to justify the decision, migrants who want to leave their jobs must obtain an employer-signed release form in order to seek a new job (article 25(1) of the EPS Act). Amnesty International's research found that employers are extremely reluctant to sign release forms and would only do so in exchange for a high amount of bribe on some occasions.<sup>329</sup> Without the release, migrants run the risk of being reported as "runaways" to the immigration authorities by their employers, subjecting the migrants to arrest and deportation, as well as the risk of not finding decent accommodation and foods. However, regardless of the background of "runaway," employers responsible for exploiting migrant agricultural workers rarely face any sanctions. Therefore, it should be emphasized again that the issues on undocumented workers are connected to the legal employment system. Amnesty International 2014 report states that in fact, half of migrant agricultural workers who spoke to Amnesty International were illegally subcontracted by their employers.<sup>330</sup> As the data suggest, though Vietnamese migrant workers enter in Korea as legal worker, they often end up in becoming undocumented workers in the system, which is more vulnerable situation including a risk of trafficking.

### **3.6. Analysis and Recommendations**

This chapter describes Korean national and international human rights and labor standards in relation to the guest workers'/migrant worker's rights and refer to several reports that document a range of exploitation, including intimidation and violence, squalid accommodations, excessive working hours, no weekly rest days and unpaid overtime in migrant workers in Korea in light of those national laws, regulations, and international conventions and standards on migrant worker's rights and gender equality.

International Laws and Standards on migrant workers include articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which guarantee respectively the right to work which includes the right to the opportunity to gain his living by work,

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<sup>329</sup> Amnesty International, *Bitter Harvest Exploitation and Forced Labour Migrant Agricultural Workers in South Korea*, October 2014, at 42.

<sup>330</sup> Amnesty International, *Bitter Harvest Exploitation and Forced Labour Migrant Agricultural Workers in South Korea*, October 2014, at 6.

which he freely chooses or accepts, the rights of workers to just and favorable conditions in work, and to form and join trade unions. Also, article 8 of the International Covenant on Civil and Political Rights (ICCPR) prohibits forced labor, and article 22 guarantees trade union freedoms. The current situation pointed out by several related international human rights conventions undermines these provisions of the treaties to which Korea is a party. As is reported in the observations of the Human Rights Committee as well as the Committee on Economic, Social and Cultural Rights, there were many reported cases that some migrant workers were subject to forced labor.<sup>331</sup> Migrant workers who traveled to the country for employment sometimes incurred thousands of dollars in debts, making them vulnerable to debt bondage. Some migrant workers in the agriculture, livestock, and fishing industries faced conditions indicative of forced labor, including deceptive recruiting practices, confiscation of passports, and nonpayment of wages. Despite those challenges, it is extremely difficult for migrant workers to make an effective complaint nor to seek alternative employment even if they experience exploitation or abuse by their employer including conditions indicative of forced labor, as workers under the EPS faced multiple restrictions on employment mobility, in particular migrant women.<sup>332</sup>

While the law prohibits discrimination and also requires equal pay for equal work when men and women do work of equal value in the same business, it has not been complied well. NGOs and the local media reported persons with HIV/AIDs, women, persons with disabilities and migrant workers were at greater risk for discrimination because of their status. Obviously, those who fall in more than two categories of these (for example, migrant women) face severer risk of exploitation. Therefore, we see legal exclusion in labour code is discriminatory in effect, as it disproportionately impacts on migrant workers, female workers in particular. It is important to note that women and girls often suffer different forms of human rights violations, since gender often intersects with other identity characteristics. These intersecting identities include age, ethnicity, national origin and religion *inter alia*, identities that also need to be taken into account. For this reason, as we see the recommendations above, it is imperative that human rights bodies in general use a gender and intersectional approach in developing jurisprudence, an approach that allows a deeper understanding of the multiple forms of discrimination that women and girls encounter, as well as the complexities of their needs, experiences and realities. Especially, sexual and gender based

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<sup>331</sup> United States Department of State Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices for 2017.

<sup>332</sup> As for complaint, for example, Amnesty described a 26-year-old woman from Vietnam told how her employer used this system to try and control her when she complained to a government-run job center about unpaid wages: "My boss told me that he will never release me and will use me for three years, after which he will not allow me to extend my contract in Korea." Amnesty International, 2014. Bitter Harvest: Exploitation and forced labour of migrant agricultural workers in South Korea. at 7.

violence and abuse is one of the most difficult issue to be reported. As is stated, there is a lack of gender-sensitive data and evidence, also court system and complaint mechanism focusing on the special needs of victim of sexual and gender based violence and abuse, including their access to justice, reparation and rehabilitation.<sup>333</sup>

It is true that Korean law requires that invited workers and Korean workers be treated equally and Korean government is actively participating in measures to protect the general human rights set by the international society, such as, embracing the international norms, joining international monitoring and improvement plan. There are also several effort to support Vietnamese guest workers funded by the Korean government, which includes pre-employment training to newly arrived foreign workers, workplace adaptation training to those who changed workplaces, and training to employers who hired foreign workers to prevent violations and improve working conditions for migrant and foreign workers as well as seminars on information and the introduction of business skills and occupational orientation for Vietnamese workers before returning home; and the provision of vocational training and vocational skills certifications; and for returned workers: provision of vocational training and employment introduction for the returned workers; and their rehiring in Korea. Also from gender perspective, collaborating with the Ministry of Justice and Ministry of Gender Equality and Family, Ministry of Employment and Labor (MOEL) established a number of Multicultural Family and Migrant Centers to provide foreign workers with relevant information as a one-stop service center (including immigration, welfare and education services). It would be more helpful if the information of the center is more disseminated and accessible for migrant workers and if it takes into account women's specific options and situations, as well as safe and effective complaint mechanism.

Nevertheless, the analysis here indicates that the exploitation and abuse of migrant workers is a significant problem in Korea and a number of issues need to be addressed to mainstream gender equality as stipulated by the international human rights laws and standards as well as domestic law relating to employment in Korea. In particular, gender aspects need to be considered in the revision of migration policy and system in Korea with a reference to the related international standards that have been ratified and not yet been ratified by Korea. Special attention should be paid to the international labour standards and recommendations from human rights treaties, which also closely related to the SDG5 on achieving gender equality and empowering all women and girls. international human rights standards require State parties to strive to ensure that all those within their jurisdiction, including migrant workers, have access to their rights to work, to just and

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<sup>333</sup> Even after they get back to their home country, those victims of sexual and gender based violence may be threatened with expulsion from their home or community, face severe stigma or worse, may be at risk of further violence.

favorable conditions of work, to trade union freedoms, to social security, to an adequate standard of living, to health, and to education. In this sense, the treaty bodies on Human Rights conventions have made a number of recommendations calling for States to ensure that all migrant workers have access on an equal basis as national workers to economic, social and cultural rights and to basic services regardless of their or their parents' migration status. They also have called for addressing the gender-specific impact of reduced access to services, such as sexual and reproductive health rights and security from violence. To align with those international human rights law and labor standards to protect migrant workers, a number of recommendation of the revision of policy and legal system from the perspective of non-discrimination and gender equality is suggested, as follows:

- The responsibilities of concerned parties, especially competent state agencies should be clearly stipulated to ensure the rights of employees, especially female workers with their gender characteristics such as pregnancy, being subject to sexual abuse or harassment and human trafficking. To address gendered aspect of abuse and exploitation, Korean government needs to set out the responsibilities of local labour administration, agencies and employers in developing and maintaining a sex-disaggregated database on incoming migrant workers in order to provide precise information for legal and policy change from gender perspective. It would protect migrant workers better under its labor migration governance framework and develop gender responsive policies and programs to leverage to potential of migrant workers to contribute to and benefit from economic and social development.
- Korea should ensure that the legal and policy protection of the rights of employee should equally be given to its citizen and non-citizen, particularly in consideration with special needs of migrant workers in terms of ensuring their rights on information access, including interpretation and translation. Information plays a very important role in ensuring safe migration and empowerment workers in general and female migrant workers in particular during their employment abroad. In this regard, article 63 of the Labour Standards Act should be repealed to ensure that the rights which the Act protects are extended to all workers, including migrant workers, irrespective of which sector they work in.
- Systemic change of EPS will be necessary so that migrant workers can seek alternative employment under the terms of the EPS if they experience exploitation or abuse by their employer. To end abuse and exploitation of migrant workers, the Korean government should remove restrictions and deterrents from the EPS, particularly in relation to the number of job changes, visa extensions and finding new employment in Korea. Job changes

should be allowed without having to obtain a release form from their employer and more information of alternative work should be provided.

- Closer monitoring of recruitment practices and regular inspection of all the employers with gender-sensitive approach should be conducted to ensure the proper implementation of Labour Standard Act and EPS contracts, along with more effective ways to reach the migrant community with information on safe and reliable channels. Once violation is identified through investigation, prompt actions should be taken to remedy the situation, including appropriate sanction against employers in breach of their obligations and compensation to the migrant workers. In this regard, effective complaint mechanism is also imperative.
- Pre-employment, during and after employment training programs should be developed and organized in close collaboration and coordination of various agencies from sending and receiving countries in gender responsive manners. Pre-employment orientation can assist in assessing prospective applicants' preparedness and qualifications for embarking on overseas employment. This can be an effective way to alert the applicants to the fact of illegal recruitment, the realities of working abroad and recruitment procedures, as well as complaint mechanism they can use.<sup>334</sup> Mid-employment and after employment trainings should also work as monitoring of human rights violations and abuse from employer. The programme of those trainings for potential and current migrant workers, especially female workers, should not only equip them with knowledge and skills, but also should help them protect themselves better and maximize the benefits gained from the time working abroad. Relevant information should be disseminated through various channels, such as leaflets, radio talk shows or television programs targeting women or community service as well as NGOs and local network or communities. Good practices can be learnt from some countries in which pre-departure programs have been put in place as a way of upgrading the skills and awareness of female migrants. Canada would be a good example in counselling potential Indonesian migrant workers about their rights before coming to the country.<sup>335</sup>
- Ratify and fully implement international human rights treaties and labour conventions which Korea has not ratified, including the UN International Convention on the Protection

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<sup>334</sup> It is suggested that women migrant workers can enjoy greater mobility and safer migration conditions if they can access to and utilize relevant information channels and services. International Organization for Migration, Gender Coordination Report 2008 (Conference Room Paper/26, 96th Session of the Council 2008).

<sup>335</sup> CEDAW Committee, States Parties Report: Canada, CEDAW/C/CAN/7, 20 (2007).

of the Rights of All Migrants Workers and Members of Their Families and related ILO Conventions.

The study also recognizes that labor migrants, particularly female migrant workers may face a high risk of human trafficking, the use of coercion or deception resulting in forced labor or exploitation, either when they migrate through documented or undocumented channels. However, this study does not address the issues of trafficking due to limited space and the focus here is at the migrant workers through regular (official) channels as employed labor. Furthermore, due to the same reason, this chapter does not address other forms of informal women migration including marriage migration, though these issues should be addressed in further studies considering the all forms of migration intertwined and inter-related in fact.



### ***Japanese Legislation on the Guest Workers from Gender Perspective***

Like Korea, Japan has also accepted a number of foreign workers from Viet Nam since 1990s. Japan suffers a labour shortage with big gaps between the country's rapidly shrinking and aging workforce as well as stubbornly low birthrate and labor demands, which places a significant burden on Japan's economy. Therefore, many small and medium sized companies, factories, as well as agricultural sectors highly depend on foreign workers. Unlike Korean EPS, employment of migrant workers for simple labour has mainly depended on Technical Intern Training Program. The program was intended to contribute to the economic development of the trainees' countries by teaching them job skills to take back home. The number of foreign workers under the Technical Intern Training Program, introduced in 1993, reached 258,000 as of October in 2017(The Japan Times, 21 November 2018). However, the program has been criticized as it is widely used for supplying cheap foreign labor to domestic sectors facing a manpower shortage rather than the capacity development of trainees, which often end up in abusive working condition of the foreign trainees. In practice, critics say, workers under the program are paid little, work incredibly long hours, and get little or no training.

The Japanese Health, Labor and Welfare Ministry found many problems such as unpaid or illegal overtime work in roughly 70 percent of around 6,000 employers across the country that hired the trainees last year (The Japan Times, 21 November 2018). Under such conditions, the number of trainees who flee their employers has been on the rise — from about 2,000 in 2012 to more than 7,000 in 2017, amounting to around 26,000 in total in 5 years since 2013 (Japanese Ministry of Justice, February 2018). A research of Justice Ministry including proved nearly 70 percent of those trainees to have fled their workplace cited low wages, often below the legal minimum and many were paid less than agreed on in their contracts. Many others reported physical abuse at the hands of their employers or long work hours. In 2016, the government enacted legislation that penalized employers' abuse of trainees and strengthened oversight of the businesses and farms that employ the trainees, which does not seem to have improved the working condition of the trainees much.

Among many plights of migrant workers in Japan, there are many gender-sensitive issues including pregnancy of migrant women. In some cases, pre-internship training organizations or employers forbid trainees from getting involved in romantic relationships and becoming pregnant, which are concerned to constitute human rights violations. Many pregnant foreign technical trainees are being forced to make a tough decision to have abortion or be sent back home with a massive debt unpaid. For example, in 2018, a 22-year-old technical trainee from Vietnam decided to flee her workplace after she was found pregnant and urged to choose abortion or leave Japan (Hirayama Ari, the Asahi Shimbun, 2 December 2018). Many women under the trainee program were also reported to suffer from mental illness because of their agony they went through resorting to having an abortion.

The Japanese Equal Employment Opportunity Law<sup>336</sup> prohibits business operators from firing female workers on the grounds of pregnancy and childbirth. The government also reiterate

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<sup>336</sup> The Equal Employment Opportunity Law is a Japanese labor law, passed in May 1985 and implemented in April 1986. Thw law prohibits gender discrimination with respect to employment including vocational training, fringe benefits, retirement and dismissal, and urges firms to try to equalize opportunity between man and women with regard to recruitment, hiring, job assignment, and promotion.

that it is illegal and unacceptable for supervisory organizations and employers to force foreign technical trainees to return to their home countries against their will on the grounds of pregnancy, childbirth and marriage. However, those laws and policies are not implemented well.

In this scrutiny to highlight the “dark side” of the foreign technical intern program, the amendment to the immigration control law in 2018 marks a turnaround in the government’s official policy on foreign workers. To address labor shortage and heightened competition with other neighboring countries to attract foreign workers, Japan’s parliament passed a law to revise the Immigration Control and Refugee Recognition Law, on 24 November 2018 that aims to attract 345,000 foreign workers over the next five years.<sup>337</sup> The legislation is designed to attract “semiskilled workers” across a range of industries with severest shortages. While the technical trainee program is also set to be kept as it is, the law introduced new visa categories for foreign workers which allow them to stay in Japan longer with a valid employment contract. Those workers under new visa status will be allowed in on an initial five-year visa, with the possibility to then qualify for a second type of visa for an additional five-year period. Under the new law, people who have undergone at least three years under the technical intern program will qualify for the first category of the new visa statuses. In that sense, the new foreign worker program will not be unrelated to the technical trainee program. But many details including rules to prevent labor abuses remain unclear both under the Technical Internship Training Program and new visa categories which are to be fleshed out in some ordinances.

In this sense, there is a concern over whether the nation has the infrastructure and environment to accommodate an inflow of foreign workers while the government has officially kept denying that the country will open the doors to immigrants. Critics say that opening more doors for foreign workers while turning a blind eye to existing problems under the trainee program would just make more abusive situations and human rights violatinons.

Good or bad, accommodating the demands of businessby permitting an influx of migrant laborershas causedand will cause significant demographic and socio-economic transformation.In Japanese society whichhas been changing to more multicultural and ethnically diverse. The govenment as well as employer and indivuduals in societyare facing urgent necessity to develop the infrastructure to accomodate multiethnic actors to work and live together.

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<sup>337</sup> Japan passes controversial new immigration bill to attract foreign workers, [https://www.washingtonpost.com/world/japan-passes-controversial-new-immigration-bill-to-attract-foreign-workers/2018/12/07/a76d8420-f9f3-11e8-863a-8972120646e0\\_story.html?noredirect=on&utm\\_term=.fcb0b0d0113d](https://www.washingtonpost.com/world/japan-passes-controversial-new-immigration-bill-to-attract-foreign-workers/2018/12/07/a76d8420-f9f3-11e8-863a-8972120646e0_story.html?noredirect=on&utm_term=.fcb0b0d0113d)



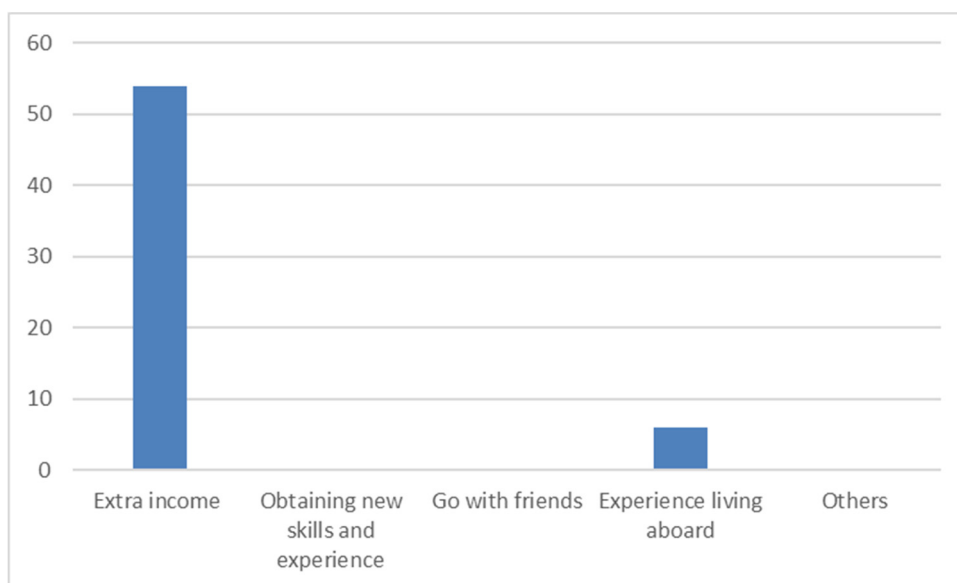
## Chapter 4. Key issues in ensuring gender equality in legal and policy framework on Vietnamese guest workers

### 4.1. Challenges and regulatory gaps during the recruitment process, before job employment abroad

#### 4.1.1. Motives and difficulties for female workers when deciding to work abroad

Published studies have shown that one of major drivers of Vietnamese workers for overseas employment is for better income compared to other works in the country or being underemployed/unemployed<sup>338</sup>. Survey of 60 female workers from provinces of Vinh Phuc, Nghe An, and Thai Binh used to work in South Korea in October of 2018 shows 54 out of 60 of those surveyed had migrated for economic reason.

**Figure 1. Motives for migration**



*Fact survey of October 2018 by the research team*

<sup>338</sup> ILO and Australian Aid, *supra*.

Returned workers had received a great deal of support from their families in order to have successful migration with the purpose of economic gains. The survey shows only one out of 60 cases had not received agreement from her family for migration purpose.<sup>339</sup>

For a long time, the burden of unpaid works has been an invisible barrier for female workers when entering the international labor market. Studies have shown that female workers are mainly doing housework and caring tasks (children, elderly, sick). Statistics of the 2000-2010 period have shown a significant difference in the number of hours spent in housework between male and female: Female tend to spend 2.3 hours/day doing housework and male spend 1.5 hours/day (in rural areas: 2.2 hours and 1.5 hours, respectively)<sup>340</sup>. The study of the Vietnam – Sweden Collaboration on Vietnamese rural families from 2004 to 2008 across the country also showed that women are always mainly the one to carry out housework (82-89%)<sup>341</sup>. These prejudices prevent and also demotivate women, discourage them from making decisions to work as guest workers.

Although female workers enter the international labor market due to economic reason, some families are still against the idea of letting women work abroad, especially in ethnic minority groups in Vietnam, causing a lot of disadvantages for women. Some cases even had already focused on learning foreign language, received their allowances but still turned down their chance to work abroad because their family did not agree<sup>342</sup>.

#### ***4.1.2. Access to information and employment counselling for low-skill work for female workers working abroad***

The main channels for information for workers to access are still through relatives and local officials. ILO's 2011 survey shows workers gather information on labor exporting from their friends and relatives (49%), from rural cadres (46,3%).<sup>343</sup> However, in areas with limited awareness on labor exporting, local officials have bigger roles than relatives, since the people there tend to trust the officials more with information about new jobs. In reality, rural or remote areas, with little to none access to services, are places with the most workers who want to work abroad, and usually they do not know where to get the necessary information. However, some studies have shown that

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<sup>339</sup> Fast survey October 2018 in Thai Binh, Vinh Phuc, Nghe An by research team

<sup>340</sup> General Statistics Office, Millennium Development Goals: Statistics in Vietnam from 2000 to 2010 (2012).

<sup>341</sup> Project No.VS- RDE-05 under the Vietnam – Sweden cooperation program from 2004 - 2008.

<sup>342</sup> ILO and Australian Aid, *supra* at 42.

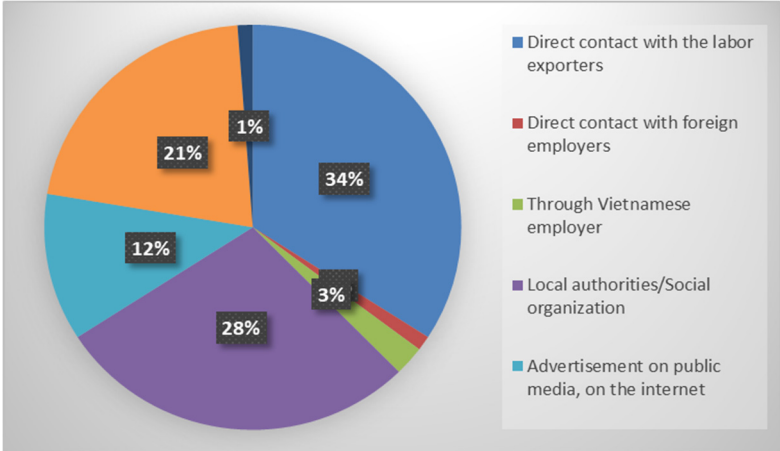
<sup>343</sup> ILO Handbook on Operationalization of Integrated Model for Consultation and Support for guest workers at Job service centres, Hanoi 2015, at 55.

the involvement of media and some practical projects has made some changes in the perception of labor exporting, also raised the awareness for female workers<sup>344</sup>.

Regarding gender, through a number of surveys conducted in Vietnam previously, it can be seen that in areas with limited awareness of labor exporting, female workers tend to be more cautious than male. They do not like taking risks and an unfamiliar job. Study has shown that, in Vietnam, male workers have higher rate of access to information than women (37% for male, 31% for female in a survey conducted on foreign labors in Asian countries on labor exporting information)<sup>345</sup>.

In some provinces, the research team’s survey shows numerous cases where Farmer’s Union and local governments are strenuous in searching for and providing information to workers. In Vinh Phuc province, the Farmer’s Union encourages children of poor households to go abroad for employment to improve economic life of the family and province. This activity helps workers access to more official, accurate information and thereby make appropriate decisions for themselves.

**Figure 2. Information Sources of Migration Works**



Fact survey October 2018 by the research team.

<sup>344</sup> For example, the project *ILO TRIANGLE Baseline Survey Viet Nam* conducted by the Institute of Labour Science and Social Affairs) conducted from 2011 to 2015 shows a change in the perception of workers when comparing the project area and non-project area.

<sup>345</sup> Benjamin Harkins, Daniel Lindgren, and Tarinee Suravoranon, *supra* at 28.

### ***4.1.3. The state of illegal working and transparency in employment market to work abroad.***

#### *4.1.3.1. Illegal brokerage*

The majority of workers trust and choose registered and licensed employment agencies/enterprises. However, personal brokerage is still quite common. There are many cases where workers listen to information from friends and family to choose and pay money to individuals who operate in illegal brokerage.

Many employment agencies have relied on the system of brokerage to penetrate localities. This, on one hand, increases transactional cost. On the other hand, it also causes fraud and appropriation of money from individuals who want to work abroad.

Although people have been cautious of employment agencies, fraudulent incidents of labor working abroad still occur now and then, more common when involving female workers as the employment agency do not have or impersonate license of another enterprise.

In an interview with the Chief Inspector of the Ministry of Labor – Invalid and Social Affairs (MOLISA) of the research group (10/2018), Mr. Nguyen Tien Tung said: “Through inspection, there are a lot of mistakes from enterprises, especially in over collection of workers fee. Secondly, enterprises do not comply with the conditions in the worker contract. When the workers are abroad, the enterprise abandoned them, refused to supervise and support the workers.

Also, burdensome fees to go working abroad when using services from employment agencies have made female workers opt for illegal methods or become victims of female trafficking.

#### *4.1.3.2. Sham marriage for overseas work*

Statistics show that in the Tam Di commune, Luc Nam district, Bac Giang province, there are 174 cases of sham marriages for the purpose of migration for work.<sup>346</sup> The marriage meets fully the conditions prescribed by the law, however, what purpose the marriage serves, only the workers know.

In many cases, many women marry foreigners mainly for the purpose of emigration for employment, earning some income to improve their home life.

According to the Bac Giang case study, sham marriages for overseas employment may be attributable to the lack of information and legal knowledge regarding mainstreaming labor export.

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<sup>346</sup> Report of Women’s Union and Division of Justice of Luc Nam District, Bac Giang Province (2014).

Therefore, workers have pushed themselves into difficult circumstances to be disentangled. Regarding the penalty, Vietnam's laws are too light in order to deter illegal brokerage or sham marriages for the purpose of emigration. The amount of VND 10-20 million (about \$900) is too low<sup>347</sup> compared to the fees a worker has to spend to become a guest worker. Currently, expenses for Korea's employment is 1.200 USD, including fees for Korean language examination, training, instruction, application, Visa, flight, bodily insurance, returning<sup>348</sup>; In addition, workers are required to deposit 100 million VND (approximately 4.700 USD) in a bank.<sup>349</sup> The amount of money may be refunded to them if they return in the due time, or lost if they overstay illegally in Korea.

#### *4.1.3.3. Trans-boundary Trafficking in Women*

In the last five years, Vietnam has been known as the country in which most women are victims of human trafficking for sex slave, forced labor. Vietnamese women migrate for overseas work independently or through recruiting companies of the State, private or joint-stock. A number of recruiting companies do not meet the needs of female workers in cases where they are exploited; others charge exorbitant fees push workers into forced labor for debt relief. Victims of forced labor are rampant in construction, aquatic, agricultural, mining, logging and manufacturing sectors in Taiwan, Malaysia, Korea, Lao, Angola, United Arab Emirates and Japan.<sup>350</sup>

This situation requires Vietnam to apply strict criminal penalties on those involved in fraudulent employment or labor exploitation; Measures are required in contracts signed by workers with state-licensed employers with a view to help them avoid falling into situations of forced labor, such as being travel documents withheld; Ensure that state-licensed recruitment companies shall not commit fraud or illegally collect fees; Broaden the process of identifying trafficked victims as workers in vulnerable groups, such as returning workers; Take measures to ensure that trafficked victims are not threatened or punished for demonstrating or leaving the place of labor exploitation both domestically and internationally; Implement and mobilize movements to raise awareness on prevention of trafficking for prostitution.

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<sup>347</sup> Decree No. 110/2013/ND-CP on sanction of administrative violation in the field of judicial assistance, judicial administration, marriage and family, civil judgment enforcement, enterprises and cooperative bankruptcy, §28.4 and §28.6 (2013).

<sup>348</sup> Fees for labor exporting to Korea in 2018: <http://vieclamhanquoc.vn/chi-phi-di-xuat-khau-lao-dong-han-quoc-116.htm> (visited Nov 12, 2018).

<sup>349</sup> Decision No. 1465/QĐ-TTg in 2013 on piloting deposit of guest workers to Korea under Authorized Program for Guest Workers of Korea, Article 1.1.a.

<sup>350</sup> General Embassy and Consulate of the USA in Vietnam (2018), 2018 Report on Human Trafficking, <https://vn.usembassy.gov/vi/tipreport2018/> (visited Nov 21, 2018).



#### ***4.1.4. Standards on occupation and on-the-job training for low-skilled guest workers***

In general, workers have a desire for wages without regard to working conditions, especially overtime work. For the purpose of working abroad for money to pay off the debts as soon as possible, a huge number of guest workers are willing and wish to work over 48 hours/week, that is, overtime work. This leaves guest workers vulnerable to exploitation and abuses by the employers.

In terms of gender equality, according to the UN Women and United Nations Food and Agriculture Organization (FAO) survey, more than 70% of rural female workers in Viet Nam do not have access to vocational training due to limited educational level, professional skills, etc. Interview with 10 women living in Ho Town (Thuan Thanh District, Bac Ninh Province) showed that, conservative thinking that girls should not study much results in loss of opportunities to access to vocational training programs for rural women, leading to lower rates of access to employment of women than men. Very few women hold decision-making positions in the agricultural sector. According to the statistics on Vietnamese guest workers abroad in 2016, the percentage of trained male workers is 23.8%, while the percentage of female workers is 18.9%.<sup>351</sup>

Workers, especially the low-skilled, desire for high wages but lack of awareness on training. Only 12.7% of workers intend to undergo vocational training before migration. The reason is that the jobs which do not require vocational training, no tuition fees and unqualified for vocational training, are mainly manual work.<sup>352</sup> Only 9% of the surveyed workers completed some skills training before leaving the country, and more than 50% of surveyed guest workers responded that training is provided in the country of destination. On-the-job training is the most common form given its direct link between the employer and the training programme. This form of training also helps reduce costs and time before departure of workers.<sup>353</sup> However, this type of training applies to low-skilled jobs such as housework, etc. given different training strategies and programmes of the place of employment or the place of residence of workers and the suitability of the training programmes with the requirements of the job and place of work.

Domestic work is the job attracting a great number of female workers in recent years, not only in the national labor market but also internationally. While Southeast Asian countries have formulated and developed strategies on export of high quality helper, there is no specific policy in Viet Nam for domestic helpers. In Vietnam, the qualifications for domestic workers have taken

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<sup>351</sup> General Statistic Office (GSO), Socio-economic dynamics and status of Vietnam in five year from 2011 to 2015 (Publishing House, Hanoi, 2016).

<sup>352</sup> International Labour Organization, *ILO TRIANGLE Baseline Survey Viet Nam*(Conducted by the Institute of Labour Science and Social Affairs), ILO Viet Nam,Hanoi (May 2015).

<sup>353</sup> Oxfam, *How Inequality Defines Women's Work in Asia* 27 (2016).

shape in research aspect, not in specific regulations.<sup>354</sup> Meanwhile, in bilateral agreements or multilateral international commitments, Viet Nam does not yet have a set of standards for housework. Vocational training programmes are mainly formulated and carried out by recruiting companies, yet the training duration is insufficient.

Domestic work is considered a job and will grow in the future, especially in big cities where a number of families with economic conditions increase. The perception that domestic work doing cooking and laundry and is simple is mistaken. Vocational training on domestic work is necessary, but at present vocational schools and training centers have failed to provide adequate training programmes because there is no standard textbooks in this field.

At present, the Law No. 72 and Decree No. 126/2007/ND-CP dated 1 August 2007 detailing the implementation of a number of articles of the Law No. 72 prohibit “works or sending workers to work in certain forbidden areas, fields, and occupations under the regulations of the Government or the receiving country”. This provision aims to protect workers from works involving hazardous or dangerous elements or sensitive to human dignity, especially female workers, such as “dancers, singers, massage workers at restaurants, hotels or entertainment centers”,<sup>355</sup> or dirty work requiring high sanitary standards, such as “shroud, death burial, cremation, grave removal”.<sup>356</sup> The promulgation of this list is in fact a limitation of human rights in access to employment. Article 14(2) of the Constitution 2013 provides that human rights limitation shall be expressed in legislation rather than in a government document. This would certainly be the point where the Law No. 72 and its guiding documents should be amended in order to comply with the new Constitution.

It could be argued that heavy work involving hazardous, dangerous elements or sensitive to human dignity, but not sexual slavery, should not be prohibited if the law of receiving country recognizes it as legal profession. The choice of job should depend on private autonomy of workers. It is important to note that, in recruitment process, employers in the host country and recruiters in Vietnam shall be transparent on hazards, toxic or sensitive factors to workers. False information on job placement must be prohibited and shall be penalized strictly if any violations occur.

Some jobs require more extensive training than ordinary ones. While both employers and workers desire to extend their labor contract, they are faced with a number of hurdles under Vietnamese law as well as receiving countries’. For example, in Korea, according to the survey

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<sup>354</sup> Institute for Vocational Science and Research Center for Gender, Family and Community Development, Standards on Vocational Capacity for Domestic Workers, available at [http://gfdc.org.vn/profiles/gfcdorgvn/uploads/attach/1445049581\\_tieuchuanknngvkd.pdf](http://gfdc.org.vn/profiles/gfcdorgvn/uploads/attach/1445049581_tieuchuanknngvkd.pdf) (visited Oct 11, 2018).

<sup>355</sup> Decree 126/2007/NĐ-CP (2013), Annex 1.

<sup>356</sup> *Id.* Annex 7.

conducted by our research team with returned female workers residing in Vinh Phuc province, when the contracts expired, the employers wanted to extend labor relationship with workers for longer than 2 years as provided legally. On the Vietnam's side, after the expiration of the contract, if not return, workers may be faced with loss of deposit money and sanctioned on the ground of illegal overstay. This affects greatly the autonomy and self-determination of parties.

#### ***4.1.5. Communication on gender equality for female guest workers***

It is necessary to put on warnings on the dangers encountered by female workers while working abroad, however, the risks could be exaggerated in an excessive way, as the message goes to people as follows: female workers should not migrate for work in order to avoid unpredictable consequences.<sup>357</sup> There are a number of articles short of gender sensitivity, inadvertently deepening gender stereotypes, attributing female workers working abroad to the root cause of harm on themselves and their families. In fact, the risks to both men and women are the same, not just for women. Although gender differences will create advantages and disadvantages for female workers involved in specific jobs, the fact that newspapers make one-sided statements will result in higher barriers set up by the family and society to the opportunity to work abroad of female workers. In addition to the phenomenon of exaggerating the risks faced by female guest workers, the domestic media often painted a picture of family problems arising from the cause of having a wife or mother working abroad.

Up to now, media's awareness on gender equality at workplace towards female guest workers has changed positively, however, there is still prejudice on the role of female workers. Many stories are raised in the way of dramatizing families in absence of women and causing negative impacts on the psychology of husbands and children of the female workers. Mutual suspicion may lead to emotional conflicts and divorce. On the other hand, the tragedies containing fake news affect workers who intend to migrate for work.

## **4.2. Challenges and regulatory gaps during job employment**

### ***4.2.1. Gender wage gap***

Wage gap for female guest workers working abroad reflects partly the gender gap in the receiving country; on the other hand, this is due to the nature of work that female workers undertake.

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<sup>357</sup> CSAGA and Oxfam, *supra* at 4.

Most of the female guest workers do jobs in industries that are closely linked with their gender identity such as domestic workers, nursing assistants, or in agricultural sector, among which domestic and care works only employ women. However, domestic works are generally not considered as a "job" or an "occupation" and skills are underestimated. This is due to traditional perceptions and social prejudice against the role of women and housework. Domestic and care works are not subject to occupations and sectors regulated by the national minimum wage framework in many countries. As a result, female guest workers who work as domestic workers often receive very low wage compared to other occupations. Whereas in the manufacturing or construction sectors, which is generally considered as male-dominated jobs, female guest workers may be employed but with low wages, even lower than the minimum wage.

A survey by the International Labor Organization showed that 100% of respondents said their wages were lower than those agreed in the labor contract<sup>358</sup>. For female guest workers, this problem is more serious because most of the female guest workers are employed to do housework or manual work, therefore employers can find different ways to fine and deduct salary.

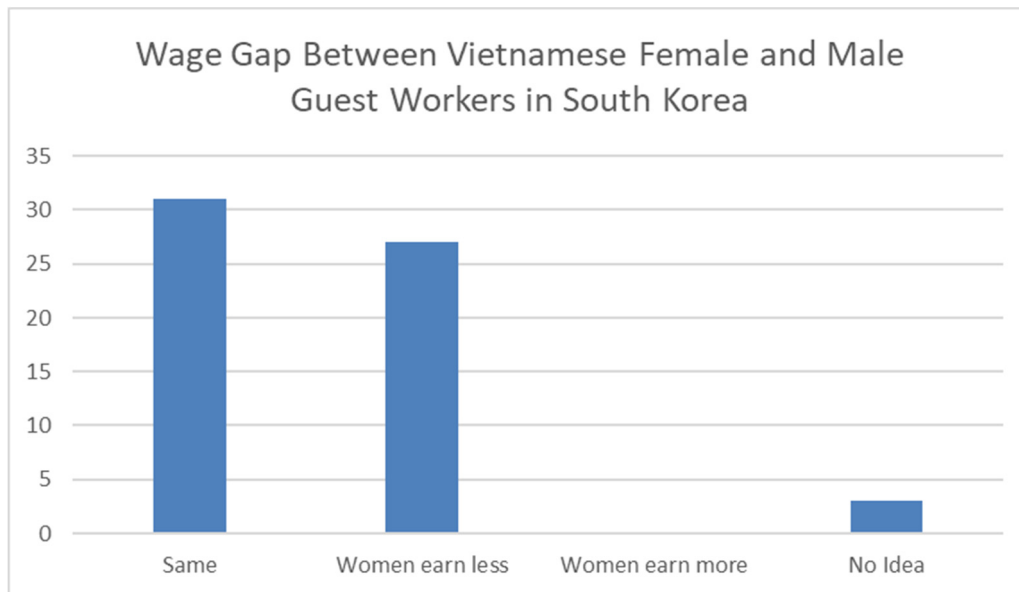
In Korea and other countries, according to a number of returned female workers, employers put their salaries in sealed envelopes. It is difficult to glimpse for whether it is high or low compared to others. They also do not know the minimum wage in order to do the comparison.<sup>359</sup> However, chat and talk between guest workers about their salary are quite regular. Findings of the research team's survey show that many female returnees think that they were paid less than male guest workers.

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<sup>358</sup> Regional Office for Asia and the Pacific, *supra* at 30.

<sup>359</sup> Research Team, Interview in Vinh Phuc (2018), Oct 2018.

**Figure 1. Gender Based Wage Gap**



It is difficult to verify this information, however, the transparency in payments, including salaries, bonuses and allowances for Vietnamese guest workers is necessary for employers.

Law No.72 does not address the issue of ensuring equal wage and payment between female guest workers and male guest workers. The Law stipulates neutrally that “guest workers have the right to receive wages, remunerations and other income”<sup>360</sup>. Guest workers working abroad under contracts are employed in to do the jobs that are in demand of receiving countries, and female guest workers’ jobs are often associated with their gender identity and risks of gender discrimination in wages. The provisions of the Law No.72 does not create legal basis to ensure equality in incomes for female guest workers in the process of recruitment and concluding labor contracts. In addition, the sending of workers is implemented on the basis of a Memorandum of Understanding (MOU) on the sending and receiving of labors between Vietnam and foreign partners, therefore the lack of a provision on equality in incomes under the Law does not provides legal basis for Vietnamese authorities to negotiate and conclude agreements that are more favorable for female guest workers.

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<sup>360</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §44(2) (2006).

#### ***4.2.2. Labor rights violations***

Risks that guest workers working abroad often face are poor working conditions, labor exploitation or labor abuse; restrictions of movement; restrictions on changing jobs in the labor market; and restrictions on freedom of association.

##### *4.2.2.1. Working conditions*

Occupational safety and working conditions directly affect the health and well-being of workers. Occupational health and safety are among the issues that workers are concerned about the most when working abroad<sup>361</sup>. For female workers, safety and working conditions are more specific than male workers due to their physical, psychological and physiological characteristics. In fact, female guest workers face numerous risks due to poor working conditions and the possibility of abuse. For example, female guest workers doing domestic work often have to work overtime without overtime payment, because the laws of a receiving country may not regulate the working hours of domestic workers. The majority of female guest workers are low-skilled workers with limited educational level and language proficiency, lack of information on local laws and customs, they are more vulnerable and have difficulty in self-protection. Regarding family carers, they do not participate in any trade unions and have little chance of interacting with other workers (isolated work environment), therefore in case the employer has abusive behaviors, it is difficult for the employee to seek help or make a complaint.

##### *4.2.2.2. Restrictions on movement*

For the reason of personal safety, guest workers must keep and carry their passports. However, a survey shows that 63.65% of guest workers do not know about this regulation<sup>362</sup>. There is especially high risk of restrictions on movement (including keeping a passport, restriction on going outside of workplace, and etc.) for female guest workers who are domestic workers or take care of the elderly or sick persons.

Findings of the research team's survey on female returnees from Korea in Vinh Phuc, Thai Binh and Nghe An show that the number of female workers whose passports were retained by employers accounts for 39%. It is not sufficient enough to conclude the main reason, yet it can be seen as a mean to prevent workers from fleeing. This should be addressed under national law of the

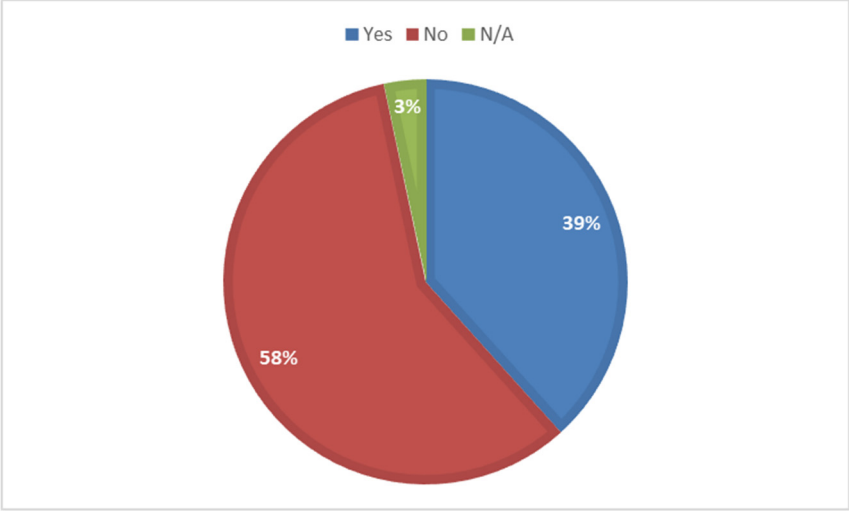
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<sup>361</sup> A survey showed that a half of total respondents said that they are concerned about safety and security of themselves, and 3 out of 4 respondents said that they had problems related to safety in the workplace while working abroad. *Id.*

<sup>362</sup> ILO and Australian Aid, *supra* at 77.

labor-receiving country. At the same time, Vietnam’s diplomatic missions should raise their voice so that local authorities can intervene to protect the rights of female guest workers.

**Figure 2. Passport Retained by Employers**



*Fast survey October 2018 by the research team.*

Freedom of movement is a human right protected by the Convention on Civil and Political Rights, and the UN Human Rights Commission has emphasized that respect and guarantee of this right are “very relevant for woman ”<sup>363</sup>. However, the practice shows that guest workers’ freedom of movement, especially female, is often restricted by their employers. The reason is that the service enterprises have not fulfilled the obligation to protect the rights and interests of guest workers during their employment abroad; female guest workers have limited knowledge and understanding, thus they cannot protect their rights and legitimate interests. They also fear losing their jobs or being forced to return their home country with debt burdens.

Article 7 of the Law No.72 stipulates prohibited acts in the sending of workers abroad. However, sending workers abroad is a complex process and guest workers are vulnerable to exploitation, therefore other acts need to be regulated by laws so as to prevent harms to guest workers while working abroad, specifically:

- Replacement or amendment of labor contract: There have been many cases where the contract has been signed and come into effect, but is replaced or amended to cause disadvantage to guest workers. Accordingly, guest workers have to do other job, or terms of working conditions, wages are lower than the agreed standards.

<sup>363</sup> ILO International Migration Program and Subregional Office for East Asia, *supra* at 113.

- Retaining passport and personal documents of guest workers: The law should prohibit the representatives of service enterprises or employers from keeping personal documents and passport of guest workers.

In August 2015, Vietnam and Malaysia signed a Memorandum of Understanding on Recruitment and Employment, which provides that guest works shall keep their passports and personal documents. This is an important legal basis to protect guest workers, especially female guest workers from being arrested, confiscating passports and cannot return their home country. This is a good practice for Vietnam to reach an agreement on the sending and receiving of labor with provisions that protect the rights of workers, especially female workers during their employment abroad.

#### 4.2.2.3. *Restrictions on Freedom to association*

Freedom of association and joining trade unions are generally recognized by countries in the world, however this right of migrant workers might be restricted. The practice shows that states can sign a bilateral agreement on sending and receiving workers, which includes restrictions on this right. Therefore, guest workers cannot establish their own representative organization so as to negotiate with employers in a receiving country<sup>364</sup>.

In addition, the majority of Vietnamese guest workers working abroad are not protected by trade unions . Meanwhile, trade unions can play a big role in supporting guest workers with difficulties during their employment abroad. Thus, the role of trade unions in protecting guest workers working abroad should be legalized. It is also necessary to strengthen cooperation between Vietnamese trade unions and trade unions of the receiving country. Vietnamese trade unions can protect Vietnamese guest workers by the following activities.<sup>365</sup>

- Establish a program for monitoring working and living conditions of guest workers and for protecting their rights, especially through activities of trade unions in the receiving country.
- Help guest workers organizing or obtaining trade union membership in trade unions in the receiving country.
- Establish links with communities of Vietnamese guest workers in the receiving country.

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<sup>364</sup> A good practice is that the Hong Kong Special Administrative Region allows migrant workers to establish their own unions so as to protect their rights and interests collectively. See ILO International Migration Program and Subregional Office for East Asia, *supra* at 89.

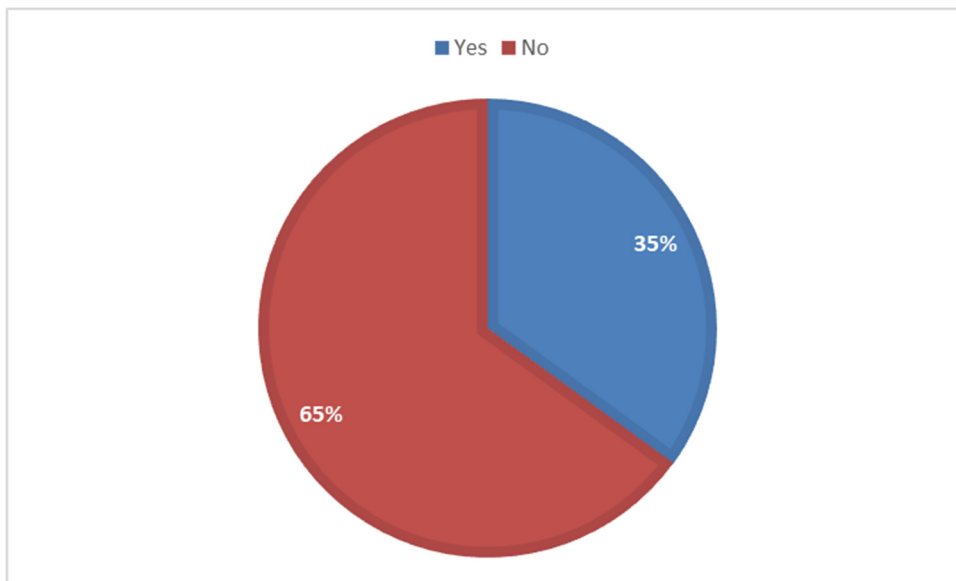
<sup>365</sup> *Id.* at 90.



- Provide counseling and referral services, particularly for guest workers suffering from abuse.
- Establish special programs for female guest workers working abroad, especially protection against discrimination and human trafficking.

The survey by the research team shows that 33% of the female returnees know about trade unions or similar organizations representing employees at workplace.

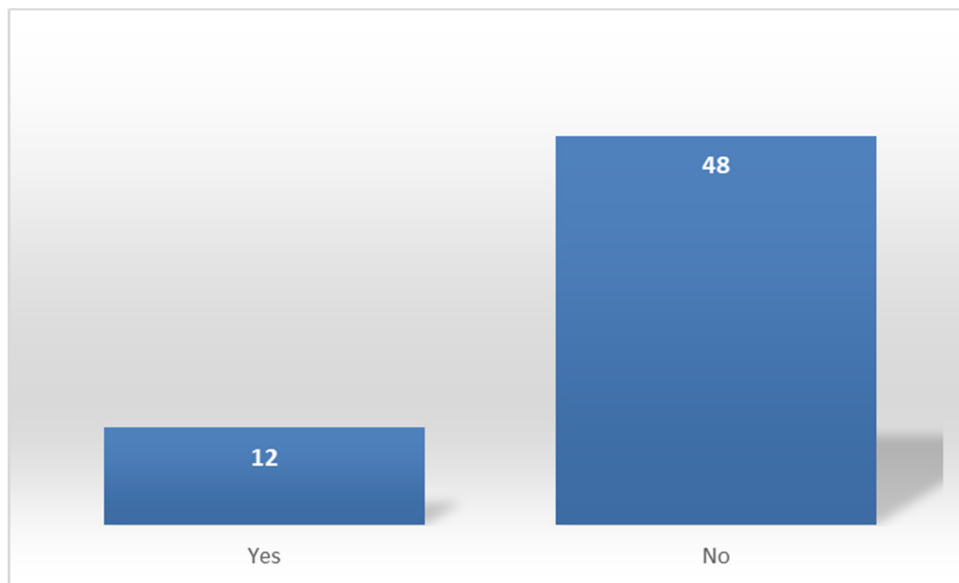
**Figure 3. Knowing of labor association at workplace**



*Fast survey October 2018 by the research team.*

However, only 20% of interviewees were members of trade unions at workplace. This, on the one hand, reflects the fact that female workers are not aware of the role of trade unions in protecting their rights and legitimate interests; on the other hand, the protection of female workers in case of disputes can be more difficult.

**Figure 4. Membership of Labor association at workplace**



*Fast survey October 2018 by the research team*

#### *4.2.2.4. Harassment and violence*

Female guest workers are particularly vulnerable to harassment and violence in the workplace due to the gender characteristics and nature of the work that female guest workers perform (for example, domestic workers).

Article 44 of the Law No.72 stipulates that guest workers have the right to request information, and Article 65 provides for the types of information to be considered as "necessary" for guest workers. However, gender-sensitive information which is essential for female guest workers to protect themselves (such as the most common gender issue /challenges, available channels and support service in case of violations, physical abuse) is not specified in detail by the Law. The Law does not stipulate that the training and capacity-building programs for female guest workers before going to work abroad are compulsory. In addition, there are no guidelines and regulations on training programs for staff who are responsible for supporting or assisting guest workers (including representatives of service businesses, staff of diplomatic missions and labor management sections in the receiving country) to handle requests for and complaints about sexual harassment and violence against female guest workers, and other supports such as interpreter, medical treatment, private psychological.

Article 27 of the Law No.72 provides for the obligation of service enterprises: (1) to coordinate with foreign parties in handling issues related to guest workers who have their health,

dignity, and honor infringed and in settling disputes related to guest workers; (2) to pay compensation to guest workers for damages caused by service enterprises' fault. However, the provision of labor dispute settlement through a service enterprise may make guest workers reluctant to lodge a complaint about the infringement of the employer in practice. This is because, on the one hand, the service enterprise does not have sufficient resources and personnel to carry out this role fairly and effectively; on the other hand, guest workers are afraid that the relationship between the service enterprise and the employer may be detrimental to them, for example, the employer forces them work overtime, pay, deduct payment and etc. In addition, cases involving sexual harassment are often difficult to prove, and thus difficult to identify and deal with offenses.

In summary, the current laws and policies on guest workers apply to both men and women, and there are no special policies for female guest workers, which has resulted in high risks female guest workers have faced while working abroad and difficulty in protecting their rights. Due to the absence of gender-sensitive regulations, there is no legal basis for mentioning specific protection measures for female guest workers when negotiating agreements on sending and receiving workers with foreign partners.

Findings of the survey by the research team in Vinh Phuc, Thai Binh and Nghe An does not show a high rate of female guest workers in Korea having bad experience regarding gender issues. 10 out of 60 interviewees said that they experienced sexual harassment by verbal abuse or touching.<sup>366</sup> In fact, the number of respondents are higher by they refused to complete the questionnaire because of questions relating to this bad experience.

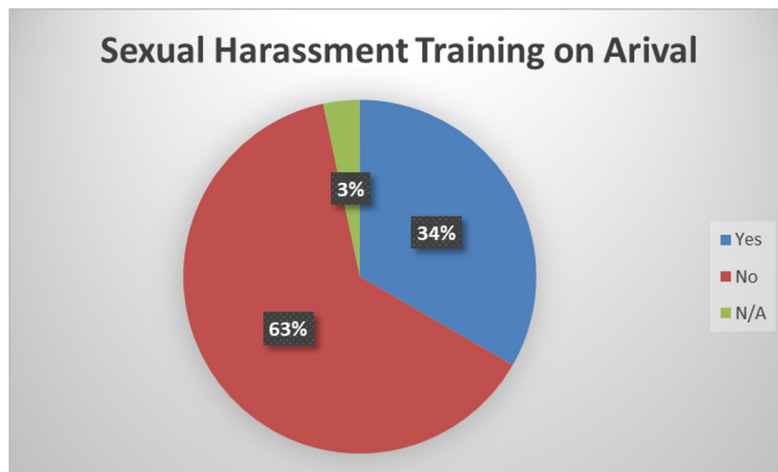
In addition to the support from competent agencies, the most practical measure is to improve self-protection skills. However, training and provision of information on sexual harassment to female workers are quiet limited and not yet effectively implemented in labor-receiving countries (post-arrival training). For example, Korea's laws provide that after immigration and before starting work for Korean employers, foreign workers must complete employment training at an Employment Training Centre in Korea.<sup>367</sup> However, only 34% of total respondents said that they participated in training program on preventing sexual abuse and harassment.

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<sup>366</sup> Fast survey October 2018 in Thai Binh, Vinh Phuc, Nghe An by the research team.

<sup>367</sup> Act on Foreign Worker Employment, Act No. 6967, *last amended by* Act No. 10339, §10 (2010)

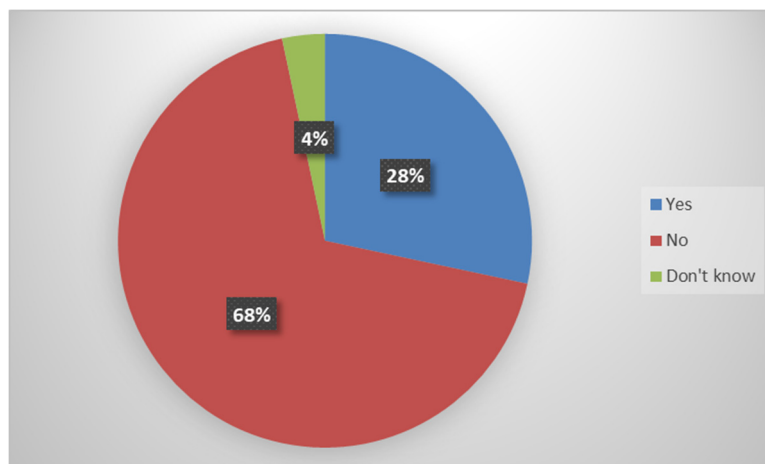
**Figure 5. Sexual Harassment Training Before Starting Work in the Receiving Country**



*Fast survey October 2018 by research team.*

Furthermore, only 28% of total interviewees said that they received training on preventing sexual harassment at workplace after starting work, while Article 13(1) of the Act on Equal Employment and Support for Work-Family Reconciliation stipulates that employers shall provide training to prevent sexual harassment at workplace.

**Figure 6. Sexual Harassment Training During Work Under Labor Contracts**



*Fast survey October 2018 by the research team.*

Certainly, training programs for workers to equip them with information, skills to combat sexual harassment and violence at workplace should be conducted seriously by both service enterprises of Vietnam and Korean enterprises employing Vietnamese guest workers.

#### 4.2.2.5. *Compulsory social insurance*

Guest workers are obliged to join social insurance as prescribed by Vietnamese laws and other forms of insurance provided by laws of the labor-receiving country<sup>368</sup>. The Law on Social Insurance of 2014 (set into effect on January 1, 2016) stipulated that Vietnamese guest workers regulated by the Law No.72 are the compulsory social insurance participants and are entitled to enjoy 2 insurance regimes, namely retirement and survivors' allowance<sup>369</sup>. For guest workers, who have paid compulsory social insurance in a certain period, the monthly contribution is equal 22% of their monthly salary on which social insurance premiums are based before working abroad. For those, who have not yet covered by compulsory social insurance or who have paid compulsory social premiums and have received a lump-sum social insurance allowance, the monthly contribution is equal 22% of 2 times the basic salary<sup>370</sup>. Meanwhile, workers working in domestic labor markets are required to pay the monthly contribution of 8% (the remaining paid by employers).

Under the current law, there is an inequality in social insurance enjoyment between those working abroad and those working in Vietnam. Accordingly, Vietnamese guest workers are entitled to only two social regimes, whereas workers employed in Vietnam are allowed to enjoy 5 insurance regimes, including sickness, maternity, occupational accidents and disease, retirement, and survivors' allowance. On the other hand, Vietnamese workers who go to work abroad must register for insurance regime in accordance with the laws of the receiving country. For example, Vietnamese guest workers working in Korea are obliged to register for casualty insurance, return cost insurance, national health insurance, employment insurance. Thus, they are paying two systems of social insurance at the same time, but the benefits are not equal to the monthly contribution paid. This inadequacy should be revised, not only in the Law No.72 but also in the Law on Social Insurance 2014.

In addition, female guest workers often lack guarantees for health insurance and social insurance while working abroad. The reason is that female guest workers are mainly employed under short-term contracts, therefore employers may not strictly provide welfare regimes for them. For domestic workers, monitoring the compliance of employers with regulations on health and social insurance is even more difficult.

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<sup>368</sup> Law on Vietnamese Guest Workers, Law No. 72/2006/QH11, §45(7) (2006).

<sup>369</sup> Law on Social Insurance, Law No.58/2014/QH13, §2(1,g) (2014).

<sup>370</sup> *Id.* at §85(2.a).

#### **4.2.3. Barriers for access to justice**

One of the reasons why workers in foreign countries find it difficult to protect their rights and interests is the lack of information and support to help them access to legal institutions in the receiving country when there are violations of the employers. For example, workers do not understand the laws and their rights protected under the law of the receiving country; language barriers bar the submission of complaints to the competent authority in the receiving country.

The Law on Vietnamese Guest Workers provides necessary knowledge for training and assigns the Minister of Labor - Invalids and Social Affairs to provide specific regulations on training programs.<sup>371</sup> However, there is no legal document to detail the content of training programs.

The Code of Conduct for Vietnamese Employers sending workers overseas for employment by the Vietnam Association of Manpower Supply (VAMAS) provides that workers are informed and updated with information on policies and laws of Vietnam and the receiving country;<sup>372</sup> Provided with guidance and support in the receiving country, including legal assistance from government agencies, trade unions and social organizations, and complaints and denunciations mechanisms;<sup>373</sup> Provided support by the sending enterprises, Vietnam representative agencies and foreign partners, especially female guest workers in the field of reproductive health, sexual harassment and violence.<sup>374</sup>

However, this is a Code of Conduct without compulsory effect and does not have a mechanism for inspecting and overseeing whether service enterprises fully comply with their obligations to support and protect workers abroad or not. As a result, workers end up lacking information on the addresses for support services they may request when facing difficulties in the receiving country.

In addition, Vietnamese diplomatic missions and representatives of service enterprises in the receiving country also face shortage of human and other resources to support and protect guest workers, especially cases of gender sensitive issues related to female workers. The establishment of labor management section in the receiving country also requires the consent of the receiving country.

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<sup>371</sup> Law on Vietnamese Guest Workers, Law No. 72/2006/QH11, §65 (2006).

<sup>372</sup> Vietnam Association of Overseas Workers, Code of Conduct for Vietnamese Companies sending workers overseas for employment, §5(4) (2010).

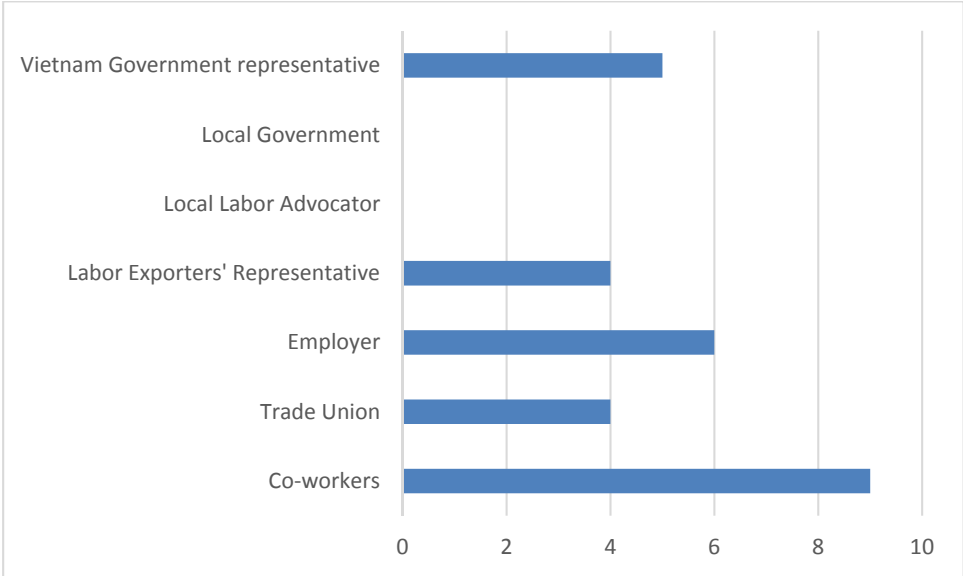
<sup>373</sup> *Id.* at §5(3).

<sup>374</sup> *Id.* at §7(10).

However, many said that they had made phone calls to diplomatic missions but received no reply. Out of twenty-one cases in Vinh Phuc province where workers used to work in Korea, twelve cases explicitly said that they had attempted to contact representative missions for help in personal documents, seeking help in cases of disputes against other workers, yet no one picked the phone or provided no further instruction.<sup>375</sup> This speaks directly to limited individual and institutional capability of representative missions of Vietnam overseas in protection of the nationals.

While Vietnamese diplomatic missions in receiving countries are not sound enough, NGOs have no significant role in supporting workers in case of disputes and difficulties. Some among 10 interviewees with bad gender experience tried to contact and seek help from Vietnam’s diplomatic missions, however the number of interviewees choose to seek help from Vietnam’s diplomatic missions and trade unions is not high.

**Figure 7. Who to call for help?**



*Fast survey October 2018 by research team.*

Vietnam should utilize other channels to better support and protect workers. The laws should encourage and promote the role of civil society organizations, support community/organizations of overseas Vietnamese to form a network to provide support services for guest workers. The Trade Union of Vietnam may also use this network to monitor the living and working conditions of workers abroad, establish support services and protective measures for

<sup>375</sup> Interview in Vinh Phuc (2018), Oct 2018.

female workers. A good practice of Thailand to help female workers' access to justice in the receiving country is to establish partnership with non-governmental organizations (NGOs) to provide "gender-responsive" services at the Migrant Worker Resource Center. NGOs may provide legal assistance to guest workers, informal workers, and effective support to female workers working in remote areas.<sup>376</sup>

The survey of October 2018 in Vinh Phuc, Nghe An and Thai Binh on female returnees from Korea shows that: a number of employers treated female workers very well, 4 out of 60 workers surveyed said that since the employers are nice and civilized, there is no need to take part in trade union activities. Others suggest that trade union activities are time wasting and unhelpful. This could draw an implication for association and cooperation between the Vietnam General Confederation of Labor and other trade union organizations in receiving countries for better protection of workers, including freedom of association at workplace.

The current laws of Vietnam provide for a number of mechanisms for guest workers to lodge complaints about issues arising during their employment abroad. However, the practice of handling complaints of Vietnamese guest workers while working abroad shows the following inadequacies:

- Regarding procedures for lodging and handling complaints, workers are not aware of the complaint procedures and competent agencies, thus in practice they often send lodge complaints to difference agencies. The agencies also have difficulty in handling the complaint because other agencies receive the same complaint from the employee. This shows that the regulations on complaints procedures are not clear enough for worker to understand and comply with. In addition, workers often find it difficult to collect evidence, especially in the case of damages claim. The main reason is that there is no Vietnamese translation of the contract, or there are differences in content between the contract signed in Vietnam and the contract is provided by the employer in the receiving country.
- Access to Vietnamese competent agencies, organizations and individuals in the receiving country is limited. Although the law stipulates that service enterprises must inform workers about the labor management section attached to Vietnamese diplomatic missions, most guest workers are unaware of the existence or function of this agency. In addition, labor management sections have only been established in some major markets where a large number of Vietnamese guest workers are employed, therefore there are a lack of institutions

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<sup>376</sup> Benjamin Harkins and Meri Åhlberg, *supra* at 22 .



supporting and protection the rights and interests of guest workers in other receiving countries.

- The mechanism for lodging and handling complaints by service enterprises is not effective in practice. Guest workers are often afraid to inform service enterprise about the difficulties or violations of the employer due to fear employers will react negatively. Workers also fear that if they complain to the service enterprise, the enterprise may refuse to pay the deposit fund after they return home country.
- Guest workers encounter numerous obstacles in exercising their right to complain due to insufficient legal knowledge and information about procedures for lodging and handling complaint, and information about competent agencies. This indicates that Vietnamese guest workers have not been fully equipped with legal knowledge before going to work abroad, and that the Vietnamese competent agencies based in foreign countries have not yet developed an effective mechanism to support guest workers to protect their legitimate rights and interests.
- The current law on complaints has not been assessed from a gender-sensitive approach. The results of a survey show that female guest workers were less likely to contact Vietnamese diplomatic missions to report difficulties encountered in the workplace. This may be because the issues and violations that female workers face are often sensitive such as sexual harassment, insulting, or offending human dignity.<sup>377</sup> In addition, interviews with government agencies show that although staff members of Vietnamese diplomatic missions have completed training programs on the rights and obligations of guest workers, they are not provided training in address gender-based issues, applying gender equality principles, counseling skills for gender-sensitive issues, and dealing with harassment and sexual violence cases.<sup>378</sup>

#### ***4.2.4. Ineffective management of guest workers in foreign countries***

The monitoring and management of the Vietnamese guest workers remain some shortcoming, inadequacies and inconsistency between central and local authorities (especially before 2014); delays in the installment and operation of the database on Vietnamese guest workers undermine the effectiveness in management and sharing of information among central and local

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<sup>377</sup> Ruth Bowen and Do Van Huong, *supra* at 53 (2012).

<sup>378</sup> *Id.*

authorities, and do not meet the need for information of enterprises and the people.<sup>379</sup> In order to effectively manage guest workers, the law should establish a mechanism to tie up interests and responsibilities of State authorities, service enterprises, and guest workers. In addition, it is necessary to develop an information system of overseas labor management in close collaboration with relevant stakeholders, such as labor management offices at all levels, service enterprises, immigration agencies etc.

The Law No.72 provides the making of report on the sending of workers abroad for service enterprise,<sup>380</sup> bid-winning and bid-taking enterprises to send workers abroad.<sup>381</sup> offshore-investing enterprises and individuals to send workers abroad for employment,<sup>382</sup> enterprises sending workers abroad for skills-upgrading internship,<sup>383</sup> and state agencies sending workers abroad for employment.<sup>384</sup> These reports must also be submitted to the consulates and diplomatic missions of Vietnam in foreign countries.<sup>385</sup> However, the law does not require these reports to have separate data broken down by sex. In addition, the current law does not provide that laborers going to work overseas must register with the Vietnamese representative office in the receiving country. Therefore, competent state agencies face difficulties in managing workforce abroad, as well as implementing gender-responsive measures for guest workers abroad.

#### ***4.2.5. Support for female guest workers before returning to their home country***

Guest workers employed on the basis of labor contracts shall comply with the agreements signed between Vietnam and labor-receiving countries. Due to characteristics of low-skilled jobs, guest workers usually work in relatively short term (from 3 to 5 years) and have to return their home countries after the expiration of the contract or after the of extended period of labor contracts provided by laws and/or agreement signed with foreign partners. Therefore, support for workers before returning home country is essential so that they can quickly rehabilitate and seek for new jobs after resettlement. For example, Korea's Government has launched Happy Return Program since 2011 providing free training for workers whose labor contracts are expired so as to assist them in finding a new job after resettlement in their home country.

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<sup>379</sup> Database on Vietnamese guest workers has been set up by the Ministry of Labor-Invalids and Social Affairs from 2003, however, until the end of 2017 the Ministry issued Circular No.35/2017/TT-BLDTBXH regulating the management, operation and use of the database on Vietnamese guest workers.

<sup>380</sup> Law on Vietnamese Guest Workers, Law No.72/2006/QH11, §26 (2006)

<sup>381</sup> *Id.* at §29.

<sup>382</sup> *Id.* at §32.

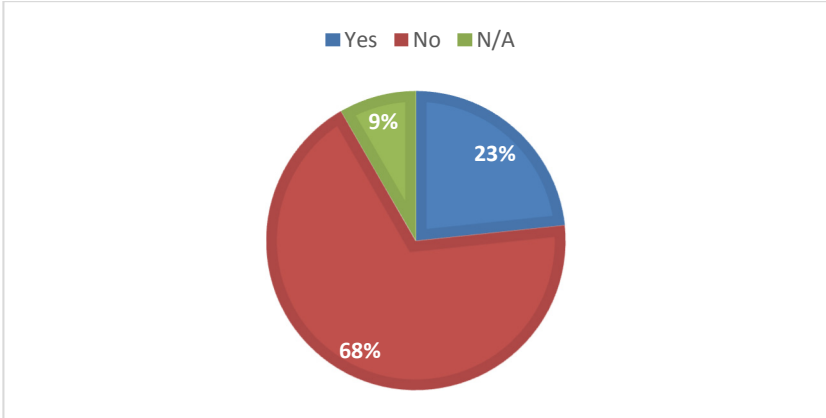
<sup>383</sup> *Id.* at §36.

<sup>384</sup> *Id.* at §41.

<sup>385</sup> *Id.* at §27, §30, §33, §38 and §41.

However, the survey conducted by the research team shows that only 23% of total respondents said that they know about Happy Return Program.

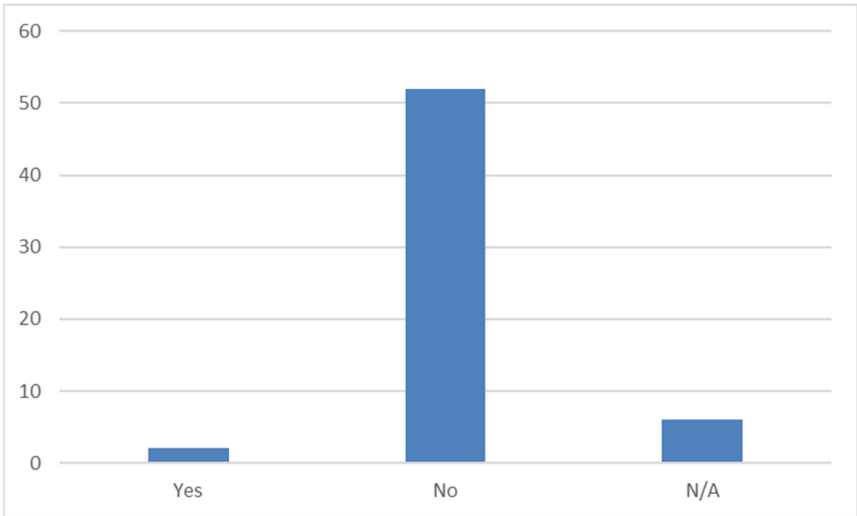
**Figure 8. Awareness of Happy Return Program**



*Fast survey October 2018 by the research team.*

Only 2 out of 60 respondents said that they participated in Happy Return Program in Korea. This figure suggests that the dissemination and provision of information about support programs for guest workers before their return to home country have not been effective. The percentage of workers participated in the Happy Return Program among those who know about the program is very low. This may be because the program is not practical and attractive enough to workers, or they chose to work to earn more instead of spending time joining in the program.

**Figure 9. Participation to Happy Return Program**



*Fast survey October 2018 by the research team.*

### **4.3. Challenges and regulatory gaps after job employment abroad**

Upon return, guest workers may encounter obstacles to reintegration into the community after a period of working in a different environment. In addition to psychological issues, social interaction, their employment is always also a huge issue.

Returning guest workers are often un- or underemployed, or have to work far from home, and therefore, there is a need to create employment opportunities in rural areas where most workers departed for work. At present, job placement centers have the function of advertising jobs in provinces, but it is necessary to improve capacity of these centers with a view to develop effective job placement programmes. Some provinces have organized employment counseling for returning workers through job exchanges, job fairs. As a result, many workers have found suitable jobs, and demonstrated their potential accumulated when working abroad. Yet the effectiveness of such activities is not high, thus returned workers tend to do the same jobs as they had done before migration, or those irrelevant to their overseas work experience.

The Law No.72 contains provisions on employment support and job creation for returning guest workers.<sup>386</sup> However, such provisions on this issue is formalistic, the implementation is not effective, and up to now there have been failures to provide guidance to implement employment support, incentive policy, and create favorable conditions for workers and members of their families to invest in production and business, and to efficiently use incomes earned while working in foreign countries.

In fact, most of localities do not perceive the number of returning workers (both those who completed contracts and those returned before the due time), as a result, they cannot carry out any significant support policies for these subjects, or provide guidance for workers and members of their families to efficiently use the income from working abroad; only a few returning workers are provided with favorable conditions, to demonstrate the experience and accumulation in the process of working overseas; most of the workers have to land their own jobs and create own jobs. This is the weakest link in the organization and implementation of the law on Vietnamese guest workers under contract.

Encouraging enterprises to receive and recruit returning workers is clearly prescribed under Article 59(2) of the Law No. 72. However, the incentives are not specified. The incentives for economic benefits should be provided, such as determining the costs of receiving, recruiting, or

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<sup>386</sup> *Id.* at §59 and §60.

even retraining returning workers are reasonable expenses to account in declaring enterprise income tax.

Enterprises have not utilized the potential of the returning labor force, causing waste of social resources, especially while many foreign invested enterprises operating in Vietnam have great demand for this source of labor, but cannot meet their demands; Many of returning workers are unemployed, do not find suitable jobs, not want to work due to low income, or be far from home, not apply the skills and experience they have learned abroad. Returning workers do not really integrate into society, lack of prompt information to be able to find suitable jobs; high expectation of salary compared to the salary level in Vietnam.

A challenge for Vietnam in recent years is to reduce the rate of contract cancellation and overdue stay. Such conducts swell the vulnerability of guest workers and cause major concern to the receiving country. The “return-to-pay” financial aid program in forms of grants, loans and other forms may encourage return after the expiration of the contract without imposing fines on those who are leaving before the due time might be a good suggestion. Korea's repatriation insurance scheme has worked for many workers, but it does not seem to have any effect on the intention of hiding after the expiration of labor contracts of some Vietnamese workers. Pre-departure deposit is also refunded, however, a number of workers have borrow for the deposit for labor exporting, thus their liabilities in many cases are too burdensome.

When guest workers return to Vietnam, they often only have jobs like those they did before they migrated, or land another contract of employment in another country. Evidence shows that many returning migrants will stay in Vietnam if their conditions allow.<sup>387</sup> Rotational migration should not be encouraged. The retention of returning skilled migrants and skills-upgrading programmes need to play a catalytic role in order to apply the skills learned abroad to a new job in Vietnam.

Pre-return skill training offers significant benefits, including psychological benefits with desire to self-fulfillment and an active sense of self-esteem, and ability to take part in and contribute to the community. The “Return to Happiness” programme of the Korean government, which provides skills training and job placement for returning workers at Korean companies in Vietnam. Receiving countries are very concerned about such initiatives as a way to reduce the state of overdue stay.

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<sup>387</sup> Futaba Ishizuka, *supra* at 15.

Even though the training of workers is only feasible for those who have a lot of time. This may not be suitable for the majority of Vietnamese workers when they have to deal with pressing immediate needs, such as finding part-time jobs to support their families and pay off their debts. Although The Law No.72 provides support for job creation, including the opening of private businesses and labor training. However, this is very vague and unworkable.

For female workers, the role of the associations is very important in education and vocational training for returning workers. In addition to encouraging vocational training and recruiting repatriating guest workers, the State needs to encourage women's unions to work more proactively to unite repatriating female workers and provide vocational training for them.



## **Chapter 5. Recommendations**

Sending workers for overseas employment, as a business activity contingent upon international integration context, aims to not only address the domestic thirst for jobs but also play key role in economic development strategy. Addressing employment in the climate of international economic integration sets forth more requirements and challenges than ever, demands governments to devise strategies and policies for labor exporting. Jobs are essential for guest workers for decent living, so is a safe working environment. Especially, for vulnerable female workers, ensuring a safe working environment free of abuses and exploitation is critical.

In the climate of globalization and deep international economic integration, migrant workers in general are inseparable part of economies. In fact, migrant workers have contributed largely to economic development of both labor exporting and importing countries. Yet the questions, whether migrant workers are treated fairly in global economy; Whether their rights posit centrally on the economic agenda of sending and receiving countries, still remain.

Further, fruits of the industrial revolution 4.0 may help bridge the gaps of international migration faced by female workers, yet at the same time, it also poses new challenges to ensuring legitimate rights and interests of migrant workers in general and female workers in particular. It is often the case that the primary concern of migrant workers revolves around salary and working conditions without consideration of insurance, work-related accidents, occupational diseases, etc. Notably, female migrant workers dominate in precarious labor sectors with low salary, such as helpers, carers, agricultural works, etc. This requires States to expeditiously take appropriate actions to raise awareness with a view to ensure rights and interests of migrant workers.

Analyses in previous chapters have pointed out that Vietnam's law on guest workers under contract, including the Law No. 72 and its guiding by-laws, need revision for amendment and update. General recommendation is to supplement regulations to formulate clear policies and legal frameworks with gender-sensitivity for female guest workers for purposes of safe and effective migration, promotion of gender equality in job seeking and employment. Recommendations as follow will make mention of issues under the Law No. 72 in consideration for amendment:



**(i) Ensuring the right to self-determination and autonomy of female guest workers through strengthening access to gender-related information**

Pre-migration information for female workers is the basis for the formulation of plans for all stages of migration process, not only before departure but also after return, thereby bolstering autonomy and right to self-determination of female workers. Therefore, it is vital to enhance access to information in the reliable, full and easy manner for female workers, especially in terms of gender-sensitive jobs before their decision on migration for overseas work.

Gender-related information should be concern of female workers, such as types of jobs, working conditions and environment, risks of abuses, exploitation, forced labor, safe means of transport for migration, contact points in cases of sickness, abused, authorities responsible for their protection, risks on social and familial relations at pre-departure, during employment, and returning stages.

The ‘reliability’ of gender-sensitive information is an important issue, therefore, filtering warning information on gender-related risks must be under control of and regulated by the State. In actuality, gender-sensitive information for female workers may stem from various sources. It can originate from the community, communication means, returned female workers, as well as service enterprises. However, service enterprises and intermediaries tend to ignore negative information relating to nature and types of the job, working condition, and costs at their convenience. Returned female workers often encounter difficulties in sharing their negative experiences on abuses and harassment at the workplace during their employment overseas. Information provided by male workers is short of relevance to the risks faced by female counterparts.

Given different sources of information with varied degree of gender-sensitivity and reliability, it demands enactment of regulations on State responsibility (specifically DOLAB) in provision of reliable gender-sensitive information to female workers in need in order to make their life-changing decisions. DOLAB offices should be based not only in big central cities but also in places where there is potential of mass labor migration for better access to information of female workers, especially in remote and mountainous areas. Beside, DOLAB specialists should undergo training in terms of awareness and skills related to giving advices, supporting, and providing information in the professional and effective manner.

Further, the State shall take full responsibility in monitoring the provision of gender-sensitive information to other subjects ( service enterprises, agents) through measures, such as explicit regulation on the content of gender-related information that the enterprises shall provide to workers, or sanctioning, or naming and shaming (for example public of list of reliable and violating enterprises).

Beside, DOLAB should stay in touch with Vietnam's Female Union, given their grassroots unit network in connection with female workers at local level, to collaborate and provide information, disseminate policies and laws on send guest workers for overseas employment. Thereby, it paves the way for better access to information of female workers. Therefore, it is necessary to legalize the role of Vietnam's Female Union in the implementation of the law on sending guest workers abroad. On the other hand, it is also critical to supplement regulations on the role of Vietnam's Fatherland Front and other socio – political organizations in social oversight and review, dissemination of policies and laws with regard to the sending Vietnamese guest workers abroad for work under contract, ensuring the implementation of Rules on Social Oversight and Review of Vietnam's Fatherland Front and socio – political organizations (issued with Decision No. 217-QD/TQ dated 12/12/2013 of the Politburo, the 2013 Constitution of the Socialist Republic of Vietnam, the 2012 Law on Dissemination and Education of Law.

**(ii) Necessity to review, assess and publish a list of high-risk jobs for female workers, thereby establishing safe working conditions.**

Vietnam needs to conduct a review, evaluation and classification of gender-sensitive work for female workers with a view to publish a list of gender-sensitive jobs, along with work conditions, welfare regime, contract duration, etc. On the basis of national legislation, Vietnam and its labor-receiving countries should accelerate the negotiation process, and standardize forms of work in the territories of both parties. This will ensure the similarity in legal provisions between Vietnam and the receiving country, thus ensuring rights and interests of female workers when abroad.

The issuance of lists on prohibiting or restrictive employing certain jobs also rings a bell of restricting human rights in access to employment. Pursuant to Article 14.2 of the 2013 Constitution, limitation of human rights shall be expressed in the legislation rather than in a by-law. Heavy, dangerous or sensitive to human dignity works, if the law of the receiving country is recognized as a legitimate occupation, should not be strictly prohibited. The Law No. 72, if amended, should prescribe for transparency of information on dangerous, toxic or sensitive elements as a factor for consideration of workers. Prohibition of misinformation on job placement is needed in order to address very serious violations. However, sex work or prostitution is normally banned in most countries. Even in the case where a country recognizes prostitution as a profession for its own nationals (such as Thailand), female migrant workers will not be allowed to work as sex workers unless they hold citizenship of such countries. Such risks need to be alerted to female workers.

**(iii) Compulsory gender-related knowledge and skills training for female workers before departure**

Accordingly, it is necessary to single out gender-related training and skills for female workers from general skills training programs. If the subject is a female, the content of gender-related knowledge and skills training will be provided as an independent program and must be provided to female workers before departure. In case it cannot be separated into a stand-alone program, it should at least be a separate and independent module within the comprehensive program of knowledge and skill development for female workers before migration.

Skills training programs related to gender during overseas employment should be standardized in order to avoid provision of inadequate content and lack of training time. Accordingly, DOLAB should coordinate with relevant stakeholders (service enterprises, Female's Unions, scholars, managers, etc.) to promulgate and develop an uniform program on requirements of gender-related knowledge and skills that female workers need to be provided.

Regarding organizers of the training, the State needs to identify who is fully qualified to provide training courses on gender at workplace, especially for overseas work, and clearly states the conditions for providing this service. Whether service enterprises are capable of providing such types of services while their main work revolves around employment contracts with foreign partners; Or should they only organize and coordinate the training courses for female workers before departure, and place the burden on service enterprises through sanctioning measures in cases where they fail to organize training and skills courses on gender for female workers before departure?

Regarding subjects in charge of teaching and fostering, the State should also determine who is qualified for teaching and fostering training courses on gender during employment.

**(iv) Mandatory terms in overseas employment contracts under which the subject is a woman worker or who is subject to sensitive work thereto**

Accordingly, national legislation needs to be supplemented with a provision stating mandatory specific content in labor contracts for which the subject is a woman worker or whose work is sensitive. These are contents related to information on reproductive health of female workers, guarantee of medical conditions, safe working conditions and working time. Yet this end can only be achieved through the implementation of the receiving country's laws, as a result, there is a strong need for consistency in guarantee of female-sensitive jobs between the country of origin and destination. At the highest level, countries can agree on a sample contract relating to certain

gender-sensitive work (for example: domestic worker) as a basis for protecting the rights and interests of female workers.

If said mechanism is yet to be materialized, the inspection and evaluation of labor-receiving contracts or labor contracts will be an important mechanism, which is currently applied by Vietnam. The State must play a major role in controlling and evaluating the level of protection of rights and interests of female workers under the terms of labor-receiving contracts or labor contracts. DOLAB must play a key role in providing legal advices to female workers before they sign a labor contract, assessing the risks of the work they will undertake, the level of protection of the terms in the contract, etc. All of the issues that female workers need must be consulted by DOLAB before they officially participate in labor relations.

**(v) Strengthening the compliance of serviceenterprises in the implementation of gender-related regulations**

In addition to sanctioning measures listed above, it is necessary to establish other mechanisms to enhance the compliance of serviceenterprises. The code of conduct for Vietnamese enterprises sending workers to work abroad has a number of behavioral standards stressing the gender factor in comparison with the law. Therefore, it is a great step for the enforcement of the law on sending female workers abroad if service enterprises strictly comply with the code of conduct. Hence, it is necessary to supplement a provision to emphasize the role of the Association of labor exporting enterprises in ensuring the effectiveness of the Code of Conduct for Vietnamese enterprises in the process of sending workers abroad for work.

Further, it is crucial to supplement regulations to require service enterprises to participate in awareness-raising programs and to help them become more sensitive to the rights of female migrant workers in terms of gender- and sex-based discriminatory practices, abuses and exploitation of female and the responsibilities of service enterprises towards female.

Supplementing regulations on advertising of service enterprises when it involves certain gender-sensitive jobs, the disclosure of information must be public, transparent and unambiguous with regard to the work abroad<sup>388</sup>.

**(vi) Incorporating sanctions and raising awareness to prevent sham marriage**

Sham marriage for the purpose of working abroad is a form of gender-based discrimination because female workers rather than male workers invovled in the majority of sam marriage cases.

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<sup>388</sup> ILO, Preventing Discrimination, Exploitation and Abuse of Female Migrant Workers - An Information Guide, 43 (Booklet 3 2003).

Taking advantage of gender characteristics for illegal migrant workers has brought a lot of risks for female workers while working abroad as well as legal consequences for themselves and their children. Therefore, measures should be taken to prevent this phenomenon.

Accordingly, the sanctions for illegal brokerage or sham marriage should be stricter in order to deter and prevent sham marriage. The sanctions under Vietnam's laws are not strict enough to deter illegal brokerage or sham marriage for the purpose of emigration. The fine is too low compared to the fee that a worker spends to become guest workers. In addition to stricter sanctions, measures to enhance awareness of workers should be taken. At the same time, the State, by its policies, should create safer and cost-saving migration channels for workers, thereby preventing female workers from choosing to engage in sham marriage – a less secured method.

Enhancing transparency of recruitment information is a measure to prevent sham marriage. The phenomenon of being cheated or paying too high brokerage fees creates a lot of pressure for workers and their families. The granting of licenses to enterprises providing labor-exporting services, and standards for agents should be more strictly defined. The role of local governments should also be strengthened to monitor local recruitment activities, ensuring timely detection and elimination of illegal brokerage.

#### **(vii) Ensuring gender equality in incomes between female and male guest workers**

The Law on Gender Equality 2006<sup>389</sup> and Law on Employment 2013<sup>390</sup> provide for equality in incomes between men and women. This is the legal basis to define the responsibility of the State in ensuring equality in incomes between male and female workers in sending Vietnamese workers abroad. The Law No.72 stipulates that labor contracts shall be registered with competent authorities, therefore it is necessary to strengthen the responsibility of state agencies in examining contents of the registered labor contracts in order to ensure that the agreement on payment complies with principle of equality in incomes. In addition, the Vietnam's diplomatic and consular missions overseas should collaborate with competent authorities of the labor-receiving country in inspecting and receiving complaint related to gender-based discrimination in payments.

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<sup>389</sup> Law on Gender Equality, Law No.73/2006/QH11, §13(1) (2006).

<sup>390</sup> Law on Employment, Law No. 38/2013/QH13,§4(2) (2013).

**(viii) Ensuring that service enterprises perform their obligations in case where changes in labor contract are disadvantageous for female workers during job employment abroad**

Compared to male workers, female workers are less likely to oppose in case where they are forced to do a job that is different from agreement in contract labors, or where due to certain reasons the employers do not perform their obligations under the labor contract so that female workers are resigned to another employer or are forced to breach the contract to find another job with better working conditions. In these case, the role of the the Vietnam's diplomatic and consular missions overseas is very important. As such circumstances occur, female workers should have access to support and consultant services provided by competent agencies and representatives of service enterprises.

In addition to the deposit, service contracts with service enterprises should provide for penalties and compensation if service enterprises fail to perform, or perform improperly their obligations in case where female workers cannot accomplish labor contracts or where changes of labor contract are disadvantageous for female workers.

**(ix) Strengthening capacities to address gender-sensitive issues for competent persons in charge of managing Vietnamese guest workers**

Vietnam's diplomatic missions in labor-receiving countries should have responsibility to monitor and report on the situation of Vietnamese guest workers. Reporting data should be arranged and analyzed by gender and be served as inputs for DOLAB to monitor the general situation of Vietnamese workers abroad.

Officials and staff who are responsible for monitoring, supervising and supporting female workers (i.e. staff of Vietnam's diplomatic missions in labor-receiving countries, staff of labor management sections should be equipped with knowledge and skills to deal with gender-sensitive issues or issues related to female workers such as wages, contractual changes, employment changes during job employment abroad. Legal aid services for female workers should be considered as a central task of these actors.

**(x) Ensuring the effective implementation of regulations on post-arrival training programs to prevent sexual harassment for female guest workers**

Post-arrival training programs can be organized by labor-receiving countries or by Vietnam's diplomatic missions in labor-receiving countries in case the law of the host country does not provide for such programs. International experience: Philippines and Indonesia, conduct post-

arrival training programs at their embassies in Hong Kong and Taiwan, which include information on cultural orientation, rights and obligations of the female employees and of employers<sup>391</sup>.

**(xi) Strengthening the role of Vietnam’s trade unions in protecting female workers during job employment abroad**

Vietnam’s trade unions have a constitutional role to represent workers and protect rights and legitimate interests of workers (Article 10 of the Constitution 2013), therefore it is necessary to strengthen the role of Vietnam’s trade unions in protecting workers engaging in labor-exporting activities. The role of trade unions in protecting guest workers has been mentioned in the recommendation of Director of ILO Vietnam that migrant workers should be managed through trilateral consensus including governments, trade unions and employers at national, regional and global levels<sup>392</sup>.

Vietnam’s trade unions can protect guest workers by providing information, counseling services and support for female workers to help them aware of and avoid risks of gender-based discrimination and human trafficking. In addition, Vietnam’s trade unions should strengthen its cooperation with trade unions of labor-receiving countries in protecting rights and legitimate interests of Vietnamese guest workers in labor-receiving countries. Cooperation with trade unions of the host countries helps to create channels for Vietnam’s trade unions to monitor working conditions of guest workers, especially working conditions of female guest workers during employment abroad. Vietnam’s trade union can also create and support the formation of networks of Vietnamese communities in labor-receiving countries, through which provide counseling services and support for female guest workers, particularly in case where they encounter gender-sensitive issues.

**(xii) Developing a comprehensive program to support female returnees**

Female returnees are more likely to experience gender-related issues compared to male returnees, such as issues related to family and community reintegration. Therefore, it is necessary to develop a comprehensive program to support female returnees in handling issues they may face, for example unemployment, access to employment services, use of acquired skills or finding a new job, legal services to deal with contract liquidation issues, disputes with employers, psychological support services, start-up support, counseling service for future planning, and etc. In particular,

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<sup>391</sup> ILO-Bangkok, *supra* at 83.

<sup>392</sup> Mr. Chang-Hee Lee – Director of ILO Vietnam, *available at* <https://dantri.com.vn/viec-lam/cong-doan-co-vai-tro-ra-sao-khi-nguoi-lao-dong-tham-gia-xkld-20180618184830843.htm> (visited Dec. 10, 2018).

there should be policies and regulations to support female workers who are victims of forced labor, sexual abuse, human trafficking, or forced to do “sex work”.

**(xiii) Facilitating female guest workers to participate and enjoy retirement insurance and survivor’s allowance upon their return to Vietnam**

Female guest workers are currently subject to compulsory social insurance. However, the law provide for different premiums between female guest workers and female workers participating in domestic labor relations. Female guest workers pay the premium of 22% of monthly salary for retirement and survivor’s allowance funds, which is equal to the premium of voluntary insurance regime. Whereas, domestic female workers pay the premium of 8% of monthly salary for retirement and survivor’s allowance funds. Thus, there is an inequality between female guest workers and female domestic workers in insurance premiums for retirement and survivor’s allowance benefits.

Therefore, there should be an adjustment in social insurance premiums so as to the reduce financial pressure for female guest workers. An alternative is to change the current mandatory insurance of guest workers to voluntary insurance so that they will be entitled to flexibility in premiums as well as State’s support for voluntary social insurance premiums.

**(xiv) Measures to propagate and disseminate policies and law on sending Vietnamese workers abroad should emphasize on gender-related issues**

The target audience is not only female workers but also their families, press and media in order to change their prejudice against women who go to work abroad. There should be measure to enhance public awareness of the costs and benefits of all forms of migration for women, as well as awareness of cross-cultural issues, highlighting the risks and opportunities of migration, rights of women to use the money that they earn for their financial security, and the need to maintain a balance work-family. Such programs can be conducted in form of formal or informal education. At the same time, it is necessary to encourage press agencies and media to participate in activities to raise awareness of migration issues, including the contribution of female migrant workers to the economy, the vulnerability of women to labor exploitation and discrimination.

Local governments and social organizations, especially women’s representative organizations or grassroots organizations of the Vietnam Women’s Union should organize activities to raise awareness of the role of husbands and relatives in undertaking family care; improve kindergarten system; facilitate husbands, whose wives work abroad, to exchange their experience



in caring and raising children so that they have opportunity to share their concerns about father's responsibilities in family<sup>393</sup>.

#### **(xv) Ensuring social reintegration of female returnees**

In their migration for work, female workers faced with various differences in the new land, tend to remain silent and stay in their bubble. Our legal framework lacks of the content on communication, proliferation and dissemination of knowledge of the migrants and their family members to build common understanding and sympathy for each other. Family conflicts arise as a consequence of a long period of drifting apart.

In addition, Vietnam's law is short of specific regulations on the role of State agencies, organizations and enterprises sending Vietnamese guest workers abroad with regards to giving advices, support to workers with psychological issues, especially in relation to their family members. Hence, there is a need to establish programs, clubs, and groups for support and burden sharing among returned female workers in the face of social problems. Good practice (such as the Philippines') can be witnessed in places where various returned guest workers help build training centers for gender-related training purposes.

Support for workers to return from the point of expiration of labor contract is necessary and helps tremendously in addressing the problem of illegal overstay of workers. Female tend to be placed more disadvantaged than their counterparts in familial and social reintegration, seeking for appropriate jobs upon return; Therefore, public policies must aim to attract workers upon the expiration of labor contracts to return taking into account of the gender element. Given limited time before the expiration of the contract, sending companies should cooperate with DOLAB or diplomatic missions to combine all necessary information, such as economic development in the home country, province, relevant laws and policies (personal and property rights, etc.), priority for groups, sectors in Vietnam labor market, into a small handbook for workers in order to avoid unfamiliarity and misdirection upon their return.

Policies should be put in place to support returned workers' start-up and business through preferential loans, reduction of tax for certain period of time. To achieve this end, there is a need to consider enactment of support policies for female workers upon return to start up their business rather than application of general support policies for small and medium enterprises.

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<sup>393</sup> Nguyen Huu Minh and Nguyen Thi Thanh Tam, *Phu nu nong thon di lao dong o nuoc ngoai – phan tich tu goc do gioi* (Women in rural areas go to work abroad – an analysis from gender perspective), 5(78) Vietnam Journal of Social Sciences (2014)

## Conclusion

Sending Vietnamese workers abroad for employment under contracts has been an important policy of the Party and the State for more than 30 years with the purpose to achieve sustainable employment in the context of undeveloped domestic labor market. This is a very critical area that has a direct impact on the socio-economic situation of all economic sectors, enterprises, organizations and workers.

In general, the system of legal documents on Vietnamese guest workers working abroad has been promulgated in a relatively comprehensive manner. It has established the legal basis for the activities of sending Vietnamese workers to work abroad in a timely manner, creating more favorable opportunities not only for workers but also for businesses. Licensed enterprises in this field have initially met the requirements of state management for sending workers to work abroad.

However, after several years of implementation, a number of issues have arisen, particularly those related to the protection of female guest workers, which require a thorough review of the entire regulatory system. In addition, the relevant regulatory system, such as the protection of human rights under the Constitution, Civil law, social insurance law, corporate bankruptcy law, has had significant changes. Therefore, the revision and amendment of the Law No. 72 and its guidelines in order to ensure the compatibility are becoming conspicuous. This is a task on which the Vietnamese Government, relevant agencies, and researchers need to join hands.

The promulgation of new regulations on gender equality in general and for protection of female workers in particular is not necessary, given adequate existing regulations under the 2006 Law on Gender Equality and the 2012 Labor Code. Research shows in many cases the problem lies in the implementation of the law. Therefore, Vietnam needs to stay focused on measures to improve the effectiveness of the implementation. It is the key for better protection of rights and interests of guest workers as well as female guest workers.

The biggest hurdle to ensuring gender equality in the sending of Vietnamese guest workers abroad is that labor relations are governed under foreign countries' laws, the Law No. 72 and its by-laws shall not take precedence. As a result, possible measures should direct at promotion of workers' rights at the stage of conclusion of labor contracts, primarily access to official and reliable information. In addition, workloads of administrative procedures need to be relieved in terms of compliance obligation of workers. The Law No. 72 needs to be supplemented with mechanism to oversee mandatory training and education courses for women before departure, including self-

defense and seeking for help in case where a gender-sensitive issue arises. The mechanism shall demand strict obligations of sending enterprises, training centers, and the State.

Diplomatic missions shall be responsible for the protection of abroad workers under specific regulations on obligation for protection of citizens abroad, especially contacting, exchanging with local authority in the host countries. This shall put an end to the situation of no responses while abroad workers relentlessly ask for help. Labor exporting is simultaneously social as well as economic policy of high importance of Vietnam, diplomatic missions shall be held liable for the promotion of such policy, starting with the cooperation of the authority of the host countries to place the protection of workers in the centre of their mission.

Further, a mechanism is needed to attract the participation of the private sector in ensuring the success of a policy. Worker's representative organizations, such as Trade Union, Vietnam Women's Union or other like-minded organizations need guidance and support to gather up and collaborate with non-governmental organizations for actions and protection of Vietnamese workers in the most effective manner.

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## Annex 1. Questionnaire for female returnees

Date: ..... Note number: .....

Interviewer: .....

Place of the interview: ..... Province: .....

### I. BASIC INFORMATION

1. Full Name:.....Date of Birth:.....

2. Ethnic

Cham     Khmer     Other:.....

Hoa     Kinh

3. Gender:                      Male      Female

4. Marital status:

Married

Single

Divorced/Separated

Widow/Widower

5. Number of children: .....

6. Academic level:

Illiterate                       Primary school

Secondary school               High school

University/College

7. Trained vocational skills:

- |                          |   |                              |                              |
|--------------------------|---|------------------------------|------------------------------|
| <input type="checkbox"/> | Untrained                               | <input type="checkbox"/>     | vocational<br>certifications |
| <input type="checkbox"/> | Some skills<br>without<br>certification | but <input type="checkbox"/> | University/College<br>any    |

8. Country working for:..... Under which program: .....

From..... To.....

## II. THE PERIOD BEFORE GOING TO WORK ABOARD

9. What was your previous job?

- |                          |                   |                          |  |
|--------------------------|-------------------|--------------------------|--|
| <input type="checkbox"/> | Labor service     | <input type="checkbox"/> | Self-employment/informal<br>employment |
| <input type="checkbox"/> | Worker            | <input type="checkbox"/> | Unemployed                             |
| <input type="checkbox"/> | Agricultural work | <input type="checkbox"/> | Other                                  |

10. Why did you decide to work aboard? (Choose the most important)

- Extra income (for debts, financial burdens ....)
- Obtaining new skills and experience from  
working aboard
- Go with friends
- Experience living aboard
- Other:.....

**11. Does your family (husband, children, parents and in-laws) fully approve of your decision to work aboard?**

- Yes
- No. Reason:.....  
.....  
.....

**12. How do you learn of the information on working aboard (can make more than one choice)**

- Direct contact with the labor export enterprises
- Direct contact with foreign employers
- Through Vietnamese employer
- Local authorities/Social organization
- Advertisement on public media, on the internet
- Brooker
- Could not remember
- Other source:.....

**13. How do you go to work aboard?**

- Through labor export enterprise
- Registration of individual contract
- Intern/trainee (ex: head office in a foreign country but having a branch in Vietnam)
- Vietnamese company conducting investment activity aboard
- Other:.....

**14. Were you entered in any training course for skills and knowledge before going to work aboard?**

- Yes
- No (Skip question 15)

**15. Which skill did you train?**

- Language
- Vocational skill
- Information about the laws and regulations of the destination
- Information about the rights of migrant workers
- Other: .....

**16. Did the labor export company provide you with any of the following information?**

- Reproductive health services and other gender related health issues when living aboard
- Life skills on self-protection when living aboard
- Information on how to deal with violence or sexual abuse
- Information on how to file a complaint about income or a breach of contract
- Detailed information on how to call for support from the Vietnamese oversea labor community

**17. Did the labor export company provide these following information accurately on the job aboard and the working conditions?**

- Job title, location: Accurate/Inaccurate/Not provided
- Income, payment method: Accurate/Inaccurate/Not provided
- Information on rewards, fines, overtime, working hours: Accurate/Inaccurate/Not provided
- Information on accommodation, diet condition: Accurate/Inaccurate/Not provided
- Other information:.....  
Accurate/Inaccurate/Not provided

**18. Which of the following export costs have you paid for?**

- Visa
- Plane ticket
- Service fee for the labor export company
- Brooker's fee
- Agency in the destination country
- Other expenses
- I do not know
- I do not remember



**19. Which of the following was used to cover the cost of labor export?**

- From your family and your own saving
- From the Social Policy Bank
- From the Commercial Bank
- From relatives, friends
- Other lenders

**III. THE PERIOD WHEN WORKERS WORKING ABOARD**

**20. Your experience when woring in Korea**

- 20.1. Salary             Satisfy             Normal             Unsatisfied
- 20.2. Working condition     Satisfy             Normal             Unsatisfied
- 20.3. Living condition         Satisfy             Normal             Unsatisfied
- 20.4. Personal safety         Satisfy             Normal             Unsatisfied

Reason for the satisfaction/dissatisfaction?.....

.....

.....

.....

.....

.....

**21. Does female and male worker (with the same job) in the enterprise where you work have the same income?**

- Yes
- No, female income is lower than that of male
- No, female income is higher than that of male

**22. Limit in freedom of travel**

22.1. Is your passport/identification paper being retained?

Yes                       No

22.2. Are you restricted or prohibited from going out of the workplace?

Yes                       No

22.3. Are you restricted or prohibited from contact with the outside?

Yes                       No

22.4. Are you prohibited from being in mass gatherings or other connection?

Yes                       No

Detail on your experience .....

.....

.....

.....

.....

**Information on joining a representative organization for workers**

23.1. Do you know of a union or any similar organization representing for workers at your workplace?

Yes                       No

23.2. Are you a part of the union or any similar organization representing for workers at your workplace?

Yes                       No

Reason for not joining? .....

.....

.....

.....

.....

.....

**24. Information and training on sexual harassment/harassment in the receiving country**

24.1 After entering and before starting work, did you participate in any sexual harassment/sexual assault training programs?

- Yes
- No

24.2. Are you aware of the risks of sexual harassment/harassment in the workplace?

- Yes
- No

24.3. Since you started working aboard, have you been trained in the content of sexual harassment/harassment in the workplace?

- Yes
- No

Detail about your training:.....  
.....  
.....  
.....  
.....

**25. Information on the experience of gender sensitive issues at work**

25.1. Did you experience any gender sensitive issues (ex: being teased by words or actions, sexual harassment) during your time working?

- Yes
- No

25.2. Did you seek for help when you have gender sensitive issues?

- Yes
- No

25.3. Where did you find help? (can make more than one choice)

- Colleague
- Union or other similar organization representing workers
- Employer
- Representative of the labor export enterprise
- Groups/Organizations assisting foreign workers in your living, working areas
- Competent Authorities of the host country
- Vietnamese diplomatic office in the host country
- Other:.....

Detail on your experience .....

.....

.....

.....

.....

.....

**26. Information on issues related to reproductive health care for female workers**

26.1. Do you have any needs for reproductive health services or counselling during your time aboard?

- Yes       No

26.2. Do you know of any service for reproductive health near your workplace?

- Yes       No

26.3. If yes, are you using any services for reproductive health care in your area where you live/work?

- Yes       No

26.4. If you have experienced the service, how would you rate it?

- Satisfy       Normal       Unsatisfied

Detail on your experience .....

.....

.....

.....

.....

.....

**27. Worker’s knowledge on agencies where they can seek for help when working aboard?**

27.1. Do you have the contact number, information of the Vietnamese diplomatic office in the area where you live and work?

Yes                       No

27.2. Do you have the contact number, information of the police in the area where you live and work?

Yes                       No

27.3. Do you know where can you file a complaint about disputes arise from work?

Yes                       No

27.4 Do you have the contact information of groups/organization supporting Vietnamese labors in the area where you live and work?

Yes                       No

27.5. Are you aware of any assistance service for female worker in the area where you live and work?

Yes                       No

.....

.....

.....

.....

.....

**28. Information on the use of salary, wage during the time working aboard?**

28.1. Did you manage to save some money from your salary, wage?

- Yes.       Yes but not much       No

28.2. Who are you saving the money for?

- Myself
- Brother/Sister
- Spouse
- Parent
- Children
- Other:.....

28.3. Are you satisfied with the way you transfer your money back home?

- Satisfy       Normal       Unsatisfied

Detail on your experience: .....  
.....  
.....  
.....  
.....  
.....

**29. Information on pre-departure training (For workers working in Korea)**

29.1. Are you aware of the information of the Happy Return program launched by the Korean Human resource development agency in 2011 that provided free training on startup skills and methods for foreign labors who have expired their working contract in Korea, and also introduce new job for returning workers

- Yes       No

29.2. Did you enter the Happy Return program before returning home?

- Yes       No

Reason for entering/not entering: .....

.....

.....

.....

.....

.....

.....

**30. Payment of repatriation expenses when contract expired and return home**

30.1. Were you instructed on how to pay for insurance when returning home?

Yes       No

30.2. Was the insurance payment procedure easy/convenient?

Yes       No

Detail on your experience: .....

.....

.....

.....

.....

.....

**31. Support from the labor export enterprise for workers during their time working aboard**

31.1. Did you have any dispute with your employer during your time of employment?

Yes       No

Detail on the dispute (if possible): .....

.....

.....

.....

.....

31.2. In the event of the dispute with your employer, did you (or your Vietnamese colleague) make any contact with the labor export enterprise or the representative of the enterprise to seek for help/resolve the dispute ?

- Yes                       No

31.3. If yes, was the labor export enterprise quick to respond?

- Yes                       No

Detail on the support activities of the enterprise (if possible): .....

.....

.....

.....

.....

**IV. THE PERIOD WHEN WORKERS RETURN TO HOME COUNTRY**

**32. Is the job aboard can be found in Vietnam?**

- Yes
- No

**33. What did you do after returning to home country? (can make more than one choice)**

- Work at factories, enterprises
- Self-employed
- Agriculture
- Other job, please list in detail.....

.....

.....

.....



**34. Does what you do after returning to home country related to your overseas job or skills trained aboard?**

Yes

No

**35. Which agencies provide assistance in job hunting when you return to home country? (can make more than once choice)**

Labor export service company

Local employment placement center

Organizations (ex: Women Union / Youth Union)

Family and friends

Other sources. Please list in detail.....

.....

.....

**36. Did you receive any assistance from agencies, organizations to reintegrate in to the family and society?**

Yes.

No (Skip question 37, 38)

**37. Which organizations have assisted in the reintegrate process for returnees?**

.....

.....

.....

**38. In what way did they provide support for the reintegrate process for returnees? (can make more than one choice)**

Visit from Women's Union/Youth Union after the return

Arrange a session to provide information on the local, share experience in child care during the nearest women/youth event

Provide information support and counselling if there are any conflicts in the family (due to the (mis)information about the infidelity of the spouse).

Other .....

**39. Have you ever planned to start a business? If yes, did you receive any financial support from the State to start your business when returning home country (Assist in access to credit services, preferential interest rates)?**

Yes

No

Why not: .....

.....

**40. Were the support for finance, job and reintegration enough?**

Yes

No

You would like to have other supports from the state/organization.

List in detail .....

.....

**41. Do you have any intention of another labor export?**

Yes.

Return to the previous country or go to another one. Why?

.....

.....

No

Reason : .....

.....

**42. After your return, did you have more voice in deciding important family issues?**

Yes

No

43. Did you have any difficulties after returning home, particularly with your relationship to your neighbors/ husband/ children/your decision in using the money you made during your time working aboard?

.....  
.....  
.....

*Thank you for your participation in the interview!*

## Annex 2. Questionnaire for labor export enterprises

Date: ..... Note number: .....

Interviewer: .....

Place of the interview: ..... Province: .....

### I. BASIC INFORMATION

#### 1. Enterprise information

Name of the enterprise:.....

Business registration: .....

Tax code:.....

Address: .....

Contact number: .....

Email: .....

#### 2. Information of the representative of the enterprise:

Full name: .....

Position: .....

### II. THE PERIOD BEFORE GOING TO WORK ABOARD

3. What types of jobs do foreign partners often employ female workers in? Why?

- Low skill jobs like house care, take care of the elderly and children
- Jobs require training and having a vocational certificate

College/University

Others:

Reason: .....

.....

.....

4. Do you believe female workers are having a harder time looking for a job aboard than male?

No, they are the same. Reason:.....

.....

.....

Yes. Reason:.....

.....

.....

Women have it more easily. Reason:.....

.....

.....

5. What are the difficulties enterprises are facing when employing female worker to work aboard? (Can make more than one choice)

- Female workers often meet with objections from their family
- No financial autonomy makes female workers difficult to make their decisions
- Can't actively control the source of qualified/trained female workers to match the criteria of the partners
- Difficulties in obtaining the general database from state management offices on labor.
- Other: .....  
.....  
.....

6. How should a labor export enterprise approach female workers?

- Cooperate with the local authorities at the base level to announce the employment
- Cooperate with the Women's Unions at all levels to announce the employment
- Announce the employment notice directly to the locals
- Announce through brookers, intermediaries
- Other:.....  
.....  
.....

7. What are the difficulties facing enterprises when checking and verifying the working conditions of foreign partners?

- Geographic distance
- Lack of information on the foreign partners/brookers

- No assistance from the Vietnamese office in the receiving country
- Other:.....  
.....  
.....

8. What are the difficulties often encounter when training skills for female worker before going aboard?

- Low level of education
- Training time is too short
- Difficulties in finding suitable training materials
- Having no linkage or support from vocational school/center
- Other:.....  
.....  
.....

9. In the training contents of enterprises, are there any contents related to risks and dangers warning for female workers?

- Yes
- Yes but not often
- No
- Other:.....  
.....

10. What are the common risks and dangers for female workers working aboard? (Can make more than one choice)

- Labor exploitation

- Sexual harassment
- Abuse
- Unpaid
- No maternity benefits and other gender-related matters
- Other:.....  
.....  
.....

11. Do you provide information on emergency address for female workers working aboard when they need help?

- Yes
- No

12. Do you provide information on the labor regulations of the receiving country for your female workers?

- Yes
- No

13. Do you provide information on how to send money home for your female workers?

- Yes
- No

**III. THE PERIOD WHEN WORKERS WORKING ABOARD**

**14. Management of workers working aboard**

14.1. Did your enterprise build a database on workers working aboard?

- Yes
- No (Jump to question 14.3)

14.2. Is your database on workers working aboard categorized base on gender?



Yes

No

14.3. How often do you update your database ?

Monthly

Quarterly

Annually

Other:.....

14.4. Do your enterprise have any difficulties in building database on workers working aboard and update it?

Yes

No

If yes, address your difficulties: .....

.....

.....

.....

.....

.....

.....

14.5 Do your enterprise send managerial official to the receiving countries with high rate of Vietnamese workers?

Yes

No (Jump to question 14.9)

14.6. Do your enterprise train the managerial officials before sending them to the receiving country?

Yes

No (Jump to question 14.9)

14.7. Do the training program for managerial official before sending to the receiving country include any of the followed contents?

Counseling skills on gender sensitive matters

How to resolve sexual harassment reports from female workers

14.8. Do your enterprise have any difficulties in appointing and maintaining managerial officials at the receiving country?

- Yes       No

If yes, address some of the difficulties:.....

.....

.....

.....

.....

.....

14.9. Do your enterprise keep in touch with workers working aboard?

- Yes
- No (Jump to question 15)

14.10. How do your enterprise keep in touch with your workers working aboard?

- Actively make regular contacts with the workers
- Request the employers to report periodically on the situation of the workers
- Request the workers to report periodically
- Other:.....

14.11. Do your enterprise have any difficulties in keeping in touch with the workers working aboard?

- Yes       No

If yes, address some of the difficulties:.....

.....

.....

.....

.....

**15. Helping workers working aboard sending money back home**

15.1. Do your enterprise receive any request for assistance from workers working aboard to send money back home?

Yes

No.

Reason: .....

.....

.....

.....

.....

.....

15.2. How do your enterprise help works send their money back home?

Provide information on remittance channels to workers

Directly help the workers to transfer the money back home

Other

**16. Complaints and other disputes settlement during the period working aboard**

16.1. What kind of complaint do you often get from female workers during the period working aboard?

Salary

Working hours

Working conditions

Living conditions

Personal safety

Seizure of identification papers

Sexual harassment

Maternity and other gender related matters of female workers

Other:.....

16.2. How do your enterprise settle the complaints of workers working aboard?

Exchange directly with the workers and the employers

Inform and request cooperation from competent authorities in Vietnam

Inform and request cooperation from the Vietnamese diplomatic representative office in the receiving country

Other:.....

16.3. Are there any difficulties when settling the complaint of the workers working aboard?

Yes

No

If yes, address some difficulties:.....

.....

.....

.....

.....

**17. From your experience, what is the percentage of female and male worker not fulfilling the contract term?**

Female is lower

The same

Female is higher

Reason:.....

.....

.....

.....

.....

**IV. THE PERIOD WHEN WORKERS RETURN TO HOME COUNTRY**

18. Do your enterprise keep a database on returning female guest workers?

Yes

No (Jump to question 20)

19. Do your enterprise keep contacts with female returnees?

Yes

No

20. What are the reasons for the return?

Contract expiration

Return due to violation of the law

Health reason

Other .....

.....

.....

21. How are the female workers performance of the contract when comparing to that of male workers?

Better

The same

Not as good

22. During the time of the contract, can you list some of the violation female workers often encounter?

.....

.....

.....

23. Do your enterprise have any free program to assist female workers in finding a new job after their return?

Yes

No (Jump to question 25)

24. What kind of supports do your enterprise provide to female workers returning to home country? (can make more than one choice)

Before returning home, inform about the status of the country, and some basic legal policies.

Counseling and provide support in training for a new vocation

Provide support in job hunting in Vietnam for workers

Provide support to receive deposit

Provide support to receive repatriation insurance if available

Making programs to connect returning female workers

Other.....

.....

.....

.....

25. Will your enterprise be willing to provide a paid service of job hunting for female returnees?

Yes

No.

Reason:.....

26. Do your enterprise receive any support/linkage from government/local state agencies in assisting female returnees?

Yes

No (Skip to question 28)

27. What are the forms of support/linkage between government/local state agencies in assisting female returnees?

Organize job fairs for female workers

Organize counseling sessions for female workers about startup

Organize counseling sessions for family and social reintegration

Other.....

.....  
.....  
.....

28. Do you have any suggestions, recommendations to support female returnees?

.....  
.....  
.....

***Thank you for your participation in the interview!***

법제교류 연구 18-16-①

A Study on Legislative Strategies  
for Ensuring Gender Equality on the Viet Nam's Law  
on Vietnamese Guest Workers

2018년 11월 12일 인쇄  
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