

Research and Policy Brief

Avenues for exploited migrant workers to remain in their country of employment to pursue labour remedies

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We hope this Brief will support the inspiring global community of practice working on reforms to enable migrant workers to access justice for wage theft, and will catalyse new models of emerging good practice.

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Executive summary

The problem

Migrant workers around the world are routinely subjected to wage theft and other forms of labour exploitation. Most are unwilling or unable to report abuse to the authorities or seek remedies during their employment because they fear jeopardising their job and their visa.

Many only feel safe to initiate a claim for the wages they are owed once their employment, work permit and residence come to an end. However, at that point, they are required to leave the country. Undocumented workers almost never raise labour violations for fear of detection by government authorities and possible immediate deportation. In general, it is extremely difficult for migrant workers to pursue a claim for unpaid wages from outside their country of employment. As a result, abusive employers are never held to account, and the vast majority of migrant workers never recover the wages they are owed.

How to effectively reform migration frameworks to enable access to justice: options and examples

To break the cycle of impunity for migrant worker exploitation, governments must amend migration frameworks that prevent migrant workers from taking action. Most importantly, these should include mechanisms for any migrant worker to leave exploitative work and stay in the country of employment for a period sufficient to pursue unpaid wages and other labour remedies. No government has established a migration framework that comprehensively achieves this. However, a number of countries have introduced laws that provide protections for some migrant workers under certain circumstances. This brief examines these examples which provide models – and cautionary lessons – on which governments and advocates may draw to design migration reforms that will meaningfully provide exploited migrant workers with access to justice.

Visa portability for employer-sponsored migrant workers

For employer-sponsored migrant workers, migration frameworks should provide visa portability that enables migrants to swiftly leave an exploitative position with a reasonable period of time to look for an alternative sponsor and bring a labour claim without being removed from the country of employment. Broad visa portability should be available for all sponsored workers, but sponsored workers experiencing workplace exploitation should have access to an extended portability period sufficient to leave their sponsored work, find a new sponsor and genuinely enable them to bring labour claims.

Several countries have established visa portability narrowly targeted to sponsored workers who encounter workplace exploitation. For example:

- Canada's Vulnerable Workers Open Work Permit provides a sponsored worker with a 12 month permit with unlimited work rights and waiver of application fee where an immigration officer has "reasonable grounds to believe that the migrant worker is experiencing or is at risk of experiencing abuse in the context of their employment in Canada". Advocates note that it is difficult for a worker to meet this threshold, especially without assistance.
- Finland provides a 12 month extended permit where a sponsored worker has experienced "exploitation" or "significant negligence" by an employer, including unreasonably long hours or wage theft. However, it is expensive and advocates report extensive processing delays. The permit cannot be renewed.

- In Ireland, the Reactivation Employment Permit is available to certain skilled migrant workers who encounter workplace exploitation, are still in Ireland, are now unemployed, and have a job offer in Ireland. Once this Permit is granted, the worker must generally stay with the new designated employer for at least 12 months but may then apply for a new visa for a different employer. It is costly and advocates report extensive processing delays.
- New Zealand's Migrant Exploitation Protection Work Visa provides up to six months stay with work rights to sponsored migrant workers who report workplace exploitation. This includes any breach of minimum employment standards other than minor infractions.

Protection from removal or extension of stay for undocumented workers

Undocumented workers subject to workplace exploitation should be able to obtain protection from removal or extension of stay (with work rights) for a period of time sufficient to pursue unpaid wages and other remedies for labour abuses.

Migrant workers who are undocumented or working outside of their work-related visa restrictions are often the most vulnerable to exploitation and the least likely to address it because coming forward may expose them to arrest, detention, and deportation. The U.S. and several European countries have established ways for undocumented workers who come forward to avoid deportation while they pursue labour claims:

- In 2023, the United States instituted a new process for exploited migrant workers, including undocumented workers, to avoid deportation and remain in the US to assist a labour investigation. The 'deferred action' grant is up to 2 years, available to victims and witnesses of labour exploitation, and can provide work authorisation not tied to a single employer. It is based on a letter of support from a local, state or federal government agency investigating the labour breach (who may be more accessible than the centralised labour agency) and visa decision-makers do not evaluate the merits of the labour claim.
- Under the 2009 EU Employer Sanctions Directive, numerous EU States allow undocumented workers who are subject to criminally exploitative working conditions to apply for temporary residence to pursue a civil labour claim, without a requirement of participation in criminal proceedings. Unlike the US model, labour abuses must rise to the level of criminal offences. In practice these protections are difficult to access due to a range of evidentiary and procedural hurdles and the need for substantial assistance.

A visa/permit to extend migrant workers' lawful stay to pursue a labour claim

For all migrant workers, including those who are not sponsored by an employer, migration laws should establish mechanisms to extend a worker's lawful stay -- with work rights -- at the end of their visa so they may lodge and progress a claim for wage theft or other labour violations.

Several countries allow migrant workers to use a general short-term permit for the purpose of extending stay to pursue a labour claim (without work rights), and a proposal is under consideration in Australia for a specific visa for this purpose:

- The Australian government is currently considering a proposal from Migrant Justice Institute and over 40 peak organisations for a new Workplace Justice Visa with work rights. The visa would provide 6 to 12 months of extended stay for migrant workers, including undocumented workers, who take action against an employer for a non-trivial violation of labour law. To be eligible, the worker must be: assisting a government agency investigation; pursuing a remedy through a trade union; or pursuing a private legal claim against the employer (certified by a court or specialist employment lawyer or non-profit lawyer). The worker must also report the contravention to the relevant government authority. Further visas are available if the worker demonstrates proceedings are ongoing.

- Israel sometimes permits migrant workers to stay on a tourist visa (without work rights) to pursue a labour claim. Hong Kong and Malaysia have 2 week/1 month short-term visas that may be used for a broad range of purposes, including to pursue labour claims. They enable some workers to stay long enough to collect evidence, file a claim, and possibly look for other employment, but their use is highly limited because they are expensive, very short in duration (with the same fees for each short renewal) and do not carry work rights.

Visas for victims of trafficking and criminal exploitation to pursue civil labour claims

Special visas and support for victims of trafficking and criminal exploitation should be extended to enable victims to remain in the country to pursue civil claims to recover unpaid wages.

Numerous countries offer temporary permission for an exploited worker to remain in the country of employment where the worker participates in a criminal case against the employer. Some specifically provide for a further extension of stay to a victim of crime to recover unpaid wages:

- In Germany, a victim of crime who has been issued a temporary residence permit may subsequently extend their stay beyond the criminal proceeding if they have not yet received the wages they are owed and if “it would represent particular hardship for the foreigner to pursue his or her claim from abroad”.
- In the Netherlands, a victim of criminal exploitation is eligible for a short-term residence permit if, once “the criminal investigation or prosecution has been completed, ... there is a wage claim procedure before the subdistrict court”.
- Hungary allows a residence permit to be granted “by initiative of the court, to third-country nationals who have been subjected to particularly exploitative working conditions”. This permit can be renewed (for up to six months each time) “until the definitive conclusion of proceedings” for outstanding wages brought by the migrant worker against their employer.

Governments should consider adapting their models for visas and support under trafficking and criminal exploitation framework to workers pursuing civil claims within a labour enforcement framework.

Conclusion

Governments must create migration frameworks that reduce the vulnerability of migrant workers who address exploitation, and enable large numbers to extend their stay for a short period in the country of employment to remedy wage theft and hold employers accountable for labour violations. A number of countries have introduced promising laws and policies to achieve this purpose. Some, such as the new U.S. deferral of removal policy and various visa portability options, hold potential to enable a significant number of migrant workers leave exploitative employers and recover the wages they are owed. Others, such as extensions of stay to pursue civil claims in the criminal context, are promising on paper, but implementation must be overhauled to fulfill their potential beyond the small numbers of migrant workers that currently benefit. Some examples, such as short term visas without work rights, suffer from fundamental design flaws that limit their effectiveness.

Governments seeking to develop an effective model must ensure application processes are swift, accessible and very low cost, without onerous evidentiary requirements. Visas/extensions must have work rights that are not tied to a single employer, and the visa duration should be sufficient to pursue a labour claim. Migrant workers should be adequately supported to apply for visa protections and pursue labour claims, including resourcing civil society organisations and trade unions that are generally essential for migrant workers to proceed. Visa/extension eligibility should not be contingent on government pursuing a criminal prosecution or workers acting as witnesses. Ideally, certification of a meritorious labour claim should be able to be provided by a diverse range of government agencies and accountable private actors.

Given the striking commonality of migrant worker exploitation and barriers to justice in all regions of the world, we encourage governments, advocates, trade unions and international organisations to continue to share developments and lessons learned as they work towards developing global best practice models that overcome migration-law and policy obstacles to migrant workers' access justice for wage theft.

Introduction

Migrant workers around the world are routinely subjected to wage theft and other forms of labour exploitation. Most are unwilling or unable to report abuse to the authorities or seek remedies during their employment because they fear jeopardising their job and their visa.

Many only feel safe to initiate a claim for the wages they are owed when their employment, work permit, and residence come to an end. However, at that point, they are required to leave the country. Undocumented workers almost never raise labour violations for fear of detection by government authorities and possible immediate deportation. In general, it is extremely difficult for migrant workers to pursue a claim for unpaid wages from outside their country of employment. As a result, abusive employers are never held to account, and migrant workers never recover the wages they are owed.

To break the cycle of impunity for migrant worker exploitation, governments must amend migration frameworks that prevent migrant workers from taking action. Most importantly, these should include mechanisms for all migrant workers to leave exploitative work and stay in the country of employment for a period sufficient to pursue unpaid wages and other labour remedies. No government has established a migration framework that comprehensively achieves this. However, a number of countries have introduced laws that provide protections for some migrant workers under certain circumstances, across four categories:

1. For employer-sponsored migrant workers, migration frameworks should provide visa portability that enables migrants to swiftly leave an exploitative position with a reasonable period of time to look for an alternative sponsor and bring a labour claim without being removed from the country of employment. Broad visa portability should be available for all sponsored workers, but sponsored workers experiencing workplace exploitation should have access to an extended portability period sufficient to enable them to bring labour claims and find a new sponsor.
2. Undocumented workers subject to workplace exploitation should be able to obtain protection from removal or extension of stay so that they may stay (with work rights) to seek remedies for labour abuses.
3. For all migrant workers, including those who are not sponsored by an employer, migration laws should establish mechanisms to extend a worker's lawful stay (with work rights) at the end of their visa so they may lodge and progress a claim for wage theft or other labour violations.
4. Special visas and support for victims of trafficking and criminal exploitation should be extended to enable victims to remain in the country to pursue civil claims to recover unpaid wages. These visas should be further extended where workers seek to pursue civil claims for substantial exploitation as determined by labour authorities, beyond the criminal justice framework.

This brief examines examples under each of these categories which provide models – and cautionary lessons – on which governments and advocates may draw to design migration reforms that will meaningfully provide exploited migrant workers with access to justice.

How to effectively reform migration frameworks to enable access to justice: options and examples

1. For sponsored migrant workers, visa portability enables migrant workers to leave an exploitative employer and extend their stay to pursue wage claims and find a new sponsor

In many countries, migrant workers who are sponsored by their employer cannot leave that employer without losing their visa – even if the employer engages in wage theft and other labour abuses. Those migrant workers generally will not bring claims for unpaid wages because they risk their employer retaliating and terminating their employment, resulting in termination of their visa. If those migrants wait until the end of their employment, they generally do not have an opportunity to pursue a labour claim before they are required to leave the country (generally a couple of weeks after their employment ends).

The ideal solution to this problem is to remove migrant workers' dependence on employers for their visa and make sponsored visas portable so that migrant workers can more easily change employers. This would substantially reduce employers' coercive power over migrant workers and enable migrant workers to hold abusive employers to account for wage theft and other labour violations.

There are currently few effective examples of visa schemes with broad portability for sponsored workers.¹ However, some countries provide all sponsored workers with a short window in which they may freely leave their employer -- for any reason -- and find a new sponsoring employer. For example, Australia allows migrant workers in its temporary skilled visa stream 60 days in which to find a new sponsoring employer before they are required to leave the country.² It is generally very difficult to find a new sponsor in such a short period. As a result, many exploited migrant workers are not willing to take the high risk that they will not find an alternative employer if they bring a wage claim against their current employer and will have their job terminated.

Recognising this, countries such as Canada, Ireland, Finland, and New Zealand have created forms of visa portability that are narrowly targeted to sponsored workers who encounter workplace exploitation. These regimes allow the migrants to leave an abusive employment relationship with sufficient time to find a new sponsor and bring claims for the wages they are owed and other labour abuses. These schemes vary based on the amount of time a worker is permitted in order to find new employment, the duration of the new visa, and whether the worker is restricted to working in the same sector or industry. In contrast to the other examples in this brief of mechanisms that allow migrant workers to stay for a period to pursue wage claims, these portability examples are more likely to result in claims being pursued because they allow the migrant to work and support themselves while their case continues and they look for a new sponsor.

A. Canada

Canada has introduced a promising new visa to enable migrant workers to leave an abusive employment relationship and find a new sponsor, with freedom from the risk of retaliation and time to bring a claim for unpaid wages and other labour abuses. In Canada, migrant workers may work under the Temporary Foreign Worker Program in which they are tied to a specific employer, or the Seasonal Agriculture Worker Program that provides workers with limited mobility between employers in the same sector.³ In June 2019, the government introduced the Vulnerable Workers Open Work Permit ("VWOWP"), which allows immigration officers to issue open work permits to migrant workers who are experiencing, or are at risk of experiencing, abuse in their workplace. This work permit, which usually lasts 12 months, gives workers the ability to escape an abusive arrangement and work while finding a new employer who will

support their application for an employer-sponsored visa. Migrant workers are eligible for the open work permit if they engaged in unauthorised work while on a valid work permit (but can be rejected if they disclose unauthorised work done prior to the issuance of a work permit).⁴ Applicants are exempt from paying the CAD 155 work permit processing fee and CAD 100 open work permit fee.⁵

In assessing the visa application, immigration officers “must have reasonable grounds to believe that the migrant worker is experiencing or is at risk of experiencing abuse in the context of their employment in Canada” and may look to the applicant’s sworn statement, a complaint to a law enforcement agency or other corroborating evidence submitted by the applicant.⁶ Officers first make a determination as to the credibility of the applicant’s information based on a “balance of probabilities” (a higher standard than “reasonable grounds”-- described as 50 + 1%) and then, if the claim is found to be credible, to assess the totality of the circumstances and evidence to determine whether they have reasonable grounds to believe that the migrant worker is experiencing or at risk of workplace abuse.⁷ Officers are not permitted to contact the applicant’s employer and have discretion to require a follow-up interview with the applicant.⁸

The VWOWP presents a promising framework that can enable migrant workers to leave abusive employers and pursue labour claims. However, advocates have noted several challenges in its early implementation. According to official data procured by the Migrant Workers Centre in British Columbia, officials received 2,481 applications from June 2019 to July 31, 2021; of the 2,345 processed, the approval rate was 57.1 percent. Migrant Workers Centre analysed decisions from 30 cases and found significant inconsistency and confusion around what officers consider to be evidence of abuse or risk of abuse and observed that officers “did not consider the evidence put forward in a flexible or sensitive manner.”⁹ Applicants appeared to fare better where they had assistance in filing the application, requesting the officers’ reasons for refusal, and requesting reconsideration. This suggests that workers with credible claims may be denied a permit if they lack assistance in the application process.

B. Finland

Finland has a novel and promising model to help migrant workers who have experienced labour abuses to leave an exploitative position, search for a new job, and bring a labour claim. Under this model, a migrant worker who has been exploited by their employer can apply for an extended permit or for a certificate of expanded right to work and change their employer.¹⁰ The permit is available both for “exploitation” and “significant negligence” by an employer which can include unreasonably long hours; pay below what was agreed in the employment contract; or conduct that threatens the person or their family’s health.¹¹

A Finnish government website provides information regarding the application process and factors considered. This permit lasts 365 days, regardless of the amount of time remaining on the migrant’s work visa. It becomes valid when the previous permit expires and remains valid until a year after the time the extension permit is issued (recognising delays that may occur in issuing the permit)¹² It is only available to exploited workers on certain valid work visas; undocumented workers and seasonal workers are excluded.

However, according to a 2023 report by the European organisation, Platform for International Cooperation on Undocumented Migrants (PICUM), there is limited evidence as to how this new permit is being implemented by the Finnish Immigration Service.¹³ PICUM also points to a number of limitations of the framework. First, the permit may not be practically accessible to migrant workers since the application costs €180 and must be submitted on paper. PICUM observes that it takes two to three months for the application to be processed, and sometimes there are delays of up to two months in informing a worker that their permit has been approved. Further, because the visa lasts for 365 days, cannot be renewed, and does not permit the visa-holder to transition onto a subsequent visa, the extension may not be an attractive option for workers with more than one year validity on their work visa as it would result in shortening their overall stay.

A variation of this extension permit is Finland's Certificate due to Exploitation by an Employer. This option is available for individuals who were exploited by their employer but have since found new employment (including for part-time jobs). A worker who gets a Certificate due to Exploitation remains on their original residence permit but has the right to change employer on their existing permit without any restrictions on the field or sector of employment.¹⁴ The certificate application costs €65 and involves the same process and requirements as the Residence Permit although the new employer will also have to submit documentation, in an appendix to the application, demonstrating that the individual has a new job.¹⁵

Although this is an expensive process for some migrant workers, and its accessibility and effectiveness need to be further assessed, the model in Finland offers some of the strongest protections for migrant workers to report exploitation and pursue a claim without sacrificing their work or residence opportunities in Finland.

C. Ireland

In Ireland, sponsored migrant workers who are exploited in the workplace can apply for a Reactivation Employment Permit to work for a new employer.¹⁶ This permit is available to migrant workers who encountered workplace exploitation, are still in Ireland, are now unemployed, and have a job offer in Ireland. Domestic workers (with some exceptions for carers) are not eligible for this Reactivation Employment Permit, nor is it available to migrants on student or tourist visas.¹⁷ The Reactivation Employment Permit is specific to a designated employer in a designated occupation and location. The new job must involve at least 20 hours of work per week and must pay the minimum wage in Ireland.¹⁸

To apply, a worker must first request temporary permission to remain in Ireland with a letter from the Department of Justice and Equality recognising their eligibility for a Reactivation Employment Permit. If granted, the individual will receive a four-month immigration stamp (in practice, a six-month permission) and can then apply for the Reactivation Employment Permit.¹⁹ As noted in a 2022 report by PICUM, although a job offer is not formally required for the first step (applying for the Stamp 1 Immigration pass), in reality, an undocumented migrant will need to have an offer because the application for the Reactivation Employment Permit needs to be submitted very soon after applying for the four-month stamp as there is generally a lengthy processing time for the Permit.²⁰

A worker can request a Reactivation Employment Permit for up to six months (€500) or two years (€1,000). A worker may apply for a Reactivation Employment Permit only once, although the permit can be renewed for up to a further three years after which it is envisaged that the migrant would apply for long-term residency.²¹ An employer may apply for the Reactivation Employment Permit for a worker, but may not make any salary deductions or charge any fee to the worker for doing so.²² While holding the Reactivation Employment Permit, the worker must generally stay with the designated employer for at least 12 months but may then apply for a new Employment Permit for a different employer.²³

Observers have noted that, in the past, long processing times for this visa have resulted in workers falling back into the irregular labour market.²⁴ Moreover, because it excludes individuals who came without a prior work permit, including many seasonal agricultural workers, it does not offer protection to workers who are vulnerable to the most severe exploitation.²⁵ However, this permit does offer a pathway to regularisation and eventual residency in Ireland and, as such, offers strong legal protections for migrant workers who raise labour violations in their worksite.

D. New Zealand

In 2021, New Zealand introduced a Migrant Exploitation Protection Work Visa, which gives migrant workers who have reported worksite exploitation permission to remain in New Zealand with work authorization for up to six months.²⁶ Migrant worker exploitation is defined as "behaviour that causes, or increases the risk of, material harm to the economic, social, physical or emotional well-being of a migrant worker. This includes breaches of minimum employment standards or breaches of health and safety and

immigration laws.”²⁷ Excluded from these claims are infractions that are “minor” or “easily-remedied”.

In order to be eligible for this six-month visa, a worker must report their exploitation to Employment New Zealand and obtain a Report of Exploitation Assessment letter, which the agency usually provides within a couple of weeks. The worker does not need to demonstrate further participation in an investigation. Some advocates have raised concerns that the visa is too short and, as most work visas in New Zealand are for up to three years, does not incentivise workers to bring claims early in the exploitation as doing so could reduce the amount of time they can stay and work in New Zealand to six months (if they do not find an alternative sponsor in the six month period they will need to depart New Zealand). Workers who experience abuse in the first few months, for example, might not report it until they are within six months of the end of their visa and work contract.

E. Belgium: Assistance to exploited migrant workers to find a new sponsor within the standard period of portability

In Belgium, all employer-sponsored migrant workers are given a 90-day period after leaving an employer in which to find an alternative sponsor in order to remain in Belgium. In the absence of a further extended period for exploited workers, the Belgian government has provided dedicated assistance to some migrant workers who have been victims of criminal exploitation to find an alternative job and sponsor within the 90 days. For example, in July 2022, the labour inspectorate and police in Belgium identified 174 victims of trafficking at a Borealis chemical factory in Antwerp. The government brought human trafficking charges against the company for several violations, including underpayment of the migrant workers, and immediately cancelled close to 500 work permits sponsored by the company.²⁸ This meant that those workers, including those identified as victims of trafficking, were required to leave the country in 90 days if they had not yet found a new sponsor. However, in this case, the government took steps to support these workers in finding new jobs, connecting them to the Flemish Service for Employment and Vocational Training, which resulted in most workers finding employment and transitioning to a new sponsor.²⁹

Advocates have requested that this government assistance be extended to non-trafficking cases to assist other victims of workplace exploitation to find new sponsors during the 90-day window, which would then enable them to pursue labour claims against exploitative employers rather than being required to depart without redress at the end of the 90-day period.³⁰



2. For undocumented workers, deferral of removal or extension of stay enables exploited workers to pursue labour remedies

Migrant workers who are undocumented or working outside of their work-related visa restrictions are often the most vulnerable to exploitation and the least likely to report it or try to recover the wages they are owed. This is because coming forward to address exploitation may expose them to arrest, detention, and deportation.

A. United States: deferral of removal, with work rights, to assist in a government labour investigation

In 2023, the United States government instituted new guidance to provide protection for noncitizen workers, including undocumented workers, who come forward to report abuse and want to remain temporarily in the country to pursue labour claims.

Immigration authorities in the US always have prosecutorial discretion to provide immigration relief to individuals they encounter. One form of immigration relief is “deferred action” where the agency agrees not to remove an individual who is otherwise deportable.³¹ This was used to enable undocumented migrant workers encountered during a worksite raid to remain in the country to assist a labour investigation.³²

The US Department of Homeland Security (DHS)’s 2023 guidance instituted a new, streamlined and centralised process for noncitizen workers to apply for deferred action to remain in the US to assist a labour investigation.³³ Under the new DHS guidance, deferred action:

- can be granted for up to two years;³⁴
- is available to individual victims of a labour violation, as well as witnesses, e.g. other employees at the same worksite whose participation in a labour investigation and case is necessary for the agency to document and pursue its case;
- does not confer any immigration status on an individual, but provides a migrant with protection from deportation and time to pursue labour remedies and other immigration options; and
- provides work authorisation that is not tied to a single employer, so workers can lawfully support themselves while pursuing labour remedies with reduced vulnerability to exploitation and bargaining power to avoid or leave an abusive work situation.³⁵

To obtain this protection, workers must submit a letter of support from a relevant government agency. This includes a broad range of government agencies and actors such as state attorneys general, local labour agencies, the National Labour Relations Board, and the federal Department of Labor (DOL).³⁶ Requests for a letter may be made on behalf of a group of workers, by an individual worker or by their representative.³⁷ Each labour agency has its own process and standards for deciding whether to provide a letter of support. The DHS officer processing the claim does not evaluate the merits of the labour claim or investigation, only whether the equities of an individual case support deferred action.

The participation of a wide range of labour agencies in this process means workers have broad opportunities to seek assistance — and incentivises different parts of government to intervene on behalf of immigrant workers. This is important given the limited resources of the DOL, and also because local and state labour enforcement agencies may be more accessible and active and have deeper connections with immigrant communities.

B. Europe: for undocumented workers subject to criminal-level exploitation, extension of stay to pursue a civil labour claim not conditional on participation in criminal proceedings

Numerous European countries have amended their laws to allow undocumented workers to apply for temporary residence to pursue a labour claim, in the course of implementing the 2009 EU Employer Sanctions Directive. This Directive was primarily enacted to prevent and sanction undocumented migrant labour, and obliges EU member states to criminalise the employment of undocumented workers and sanction employers who employ third-country nationals who lack legal authorisation.³⁸ However, recognising that undocumented workers are among the most vulnerable migrants and workers, it also requires member states to enforce the rights of undocumented migrant workers who have been subject to wage theft or other forms of exploitation.

The Directive requires Member States to introduce domestic legislation providing for temporary residence permits for undocumented workers who are victims of exploitative working conditions where there are criminal proceedings against the exploitative employer.³⁹ The Directive specifies that these criminal offences should include “particularly exploitative working conditions”, defined as “working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers’ health and safety, and which offends against human dignity”.⁴⁰ More than half of Member States have domestic legislation providing for temporary residence permits for victims of particularly exploitative working conditions short of human trafficking.⁴¹ In many EU countries, a grant of the permit is conditional on victims’ participation in criminal proceedings, although this is not required by the Directive.⁴² Permits granted to undocumented workers who participate in criminal proceedings are discussed in Section 5 below.

In several European countries, an undocumented worker who has endured “particularly exploitative working conditions” can be granted a residence permit without the need to participate in criminal proceedings.⁴³ For instance, in Latvia, an undocumented worker “employed in particularly exploitative working conditions” can request a one-year (renewable) temporary residence permit if the worker has approached a court “with an application regarding recovery of the unpaid work remuneration from the employer.”⁴⁴

In Portugal, a migrant worker may be given a residence permit if they are the victim of “a serious or very serious administrative offence related to the labour relationship” including “exploitation of salary or working hours, or in particularly abusive working conditions” provided that the claim is “substantiated by the inspection services of the ministry responsible for employment matters,” and the individual reports and agrees to collaborate with the relevant authorities.⁴⁵ An application for residency in these circumstances must be accompanied by a statement from the Authority for Working Conditions or a judicial authority, “confirming the collaboration of the applicant with the investigation and the existence of indicative evidence of the offences” and also a statement by the Authority for Working Conditions “attesting to the existence of a situation of social unprotection, wage and hour exploitation.”⁴⁶

Under Slovenian law, where an undocumented migrant worker can be detained and deported, they are permitted to apply for a residence permit if they pre-emptively come forward to bring an action against their employer “for the enforcement of employment rights”⁴⁷ and their continued presence in Slovenia for the proceeding is recognised to be necessary by a relevant court.⁴⁸ To receive a temporary residence permit, the individual pursuing a claim must submit an application for temporary residence and is issued a certificate “which is valid as a temporary residence permit pending a final decision on the application.”⁴⁹ The immigration office will determine the length of the permit, which can be extended while the proceeding continues, allows a migrant to work, and in some cases may give the migrant access to other social benefits.⁵⁰ An undocumented worker is eligible for this protection only if they pro-actively approach the authorities. Once they are detected by immigration authorities, they will face sanctions for working without authorisation and will be banned from applying for a work or

residence permit for two years. In practice, however, workers are rarely able to make use of this option because of the difficulty in proving to the State that the worker needs to remain in Slovenia during their legal proceedings. Moreover, workers need substantial assistance from service providers to prepare this application for a residence permit, which is not readily available.⁵¹

These protections set an important precedent for extension of stay for exploited undocumented workers to pursue civil labour claims. However, in their current form, they are limited in scope and accessibility. Most fundamentally, they are generally unavailable for a worker wishing to address wage theft in the absence of more serious criminal exploitation. Advocates also observe that, while a national law may permit a migrant worker to apply for short-term permission to remain in the country for a period to pursue a civil claim, this protection may not be available in practice and there is very limited data on how frequently workers access this protection or successfully pursue repayment of wages.⁵² According to the European Union Agency for Fundamental Rights (FRA), “[n]o Member State has centralised data on filed and successful complaints that migrant workers in an irregular situation made about back payment of due wages. This makes it difficult to assess the effectiveness of the complaint system.”⁵³ FRA further notes that, “even if data is available on successful claims, it is often unknown whether or not workers actually receive back pay in the end.”⁵⁴ Advocates report that victims also face barriers to accessing information and legal advice on the availability of permits, on how to apply or how to request consideration.⁵⁵

Additional research is required into the operation of these protections in practice, including the accessibility of the application process and the need for resourcing of government agencies and civil society to support workers to access visa protections. More broadly, for these provisions to have a systemic impact, the availability of stay extensions for criminally exploited undocumented workers should be extended to workers who have experienced substantial labour exploitation that does not rise to a level of criminality who need temporary residence in order to hold employers accountable through civil labour claims.

3. Proposal in Australia for a new short-term visa with work rights to enable an exploited migrant worker to remain in the country while pursuing a labour claim

In 2023 Migrant Justice Institute released a proposal for a new short-term Workplace Justice visa for migrant workers, including undocumented workers, who demonstrate they are taking action against an employer for a violation of labour law.⁵⁶ (In light of the very large population of international students undertaking low-wage work in Australia, and their special immigration-related concerns, the proposal also recommends the introduction of legislative protections against visa cancellation for international students pursuing a labour claim who have worked in breach of visa conditions which limit their working hours, with eligibility requirements that mirror those attached to the visa.)

As of March 2023, the proposal – endorsed by over 40 peak national organisations and unions – is under consideration by the Australian Government. If implemented, it would provide a new model and strong global precedent for protections for migrant workers who seek to bring labour claims without jeopardising their visa.

A migrant worker would be eligible for the visa if:

1. There are reasonable grounds to suspect that the worker’s employer has committed a non-trivial contravention of labour or immigration law in relation to that worker (including under employment law, workplace health and safety law and laws proscribing sexual harassment); and
2. The worker has taken steps to address the contravention. This includes assisting a relevant government agency’s investigation of the employer, engaging with a union in relation to the employer’s alleged contravention or having retained a private or community lawyer to pursue a legal claim.

Evidence of the merits of the worker's allegation, and evidence that the worker is taking steps to seek redress, could include:

1. Certification by a range of state and federal labour authorities, policing agencies and other enforcement agencies conducting investigations or enforcement actions;
2. A court, tribunal or commission certifying the worker's ongoing presence in Australia is required for the proceedings; or
3. Certification by an employment lawyer who holds specialist accreditation or is employed in a government-funded legal service, pro bono practice in a commercial firm, or a union. They must certify there are reasonable grounds to suspect that a worker's employer has contravened a relevant workplace law, and that the worker is pursuing a legal remedy through negotiation with the employer or a legal claim. The visa would be valid for 6-12 months, with work rights. The worker could apply for a further Workplace Justice visa if proceedings are still ongoing.

The visa would be available to undocumented workers regardless of whether they proactively come forward or bring a labour claim after detection by immigration enforcement officials. The full proposal contains an extended discussion of potential concerns and responses in relation to undocumented workers.⁵⁷

The proposal has the significant benefit of creating an enforcement community beyond government regulators and incentivising workers to bring claims through community lawyers and unions. The proposal also incentivises migrant workers to join a union and unions to recruit migrant workers. This ensures government agencies' resources are not depleted by a potentially large number of requests for assistance and certification, while substantially increasing the government's access to intelligence because the worker would also be required to report the noncompliance to a relevant government authority.

The proposal seeks to strike a balance between providing safeguards against fraudulent or unmeritorious claims to obtain the visa on the one hand, and, on the other hand, a simple process for adducing evidence and determining eligibility that does not create impediments to migrant workers genuinely applying for protection. It does this by restricting certification to lawyers who hold accredited specialisation (with increased professional reputational risk) or have no financial or other incentive to falsely certify a claim. Eligibility is also limited to migrant workers who can demonstrate a non-trivial alleged contravention by employers, e.g. a minimum underpayment of AUD 2,000 (USD 1,340) per worker.

4. Multipurpose short-term visas that can be used for exploited migrant workers to pursue a labour claim

In a handful of countries, migrant workers are allowed to extend their stay by a few weeks or months, at the discretion of immigration authorities, while they pursue a labour claim. For example, Israel permits, in some circumstances, a worker to stay beyond the 90 days to attend a court case and can issue a tourist visa for this limited stay, although a worker has no right to work on this visa.⁵⁸

Hong Kong and Malaysia each have the short-term visas that may be used for a broad range of purposes, including for migrant workers to pursue labour claims. However, because they are not designed specifically for this purpose, they are not well-suited to supporting a migrant worker through legal proceedings: they are costly to applicants, very short in duration and do not carry work rights. They are merely stop-gap measures used by workers and lawyers to give migrant workers a short period of time to collect evidence, file a claim, and possibly look for other employment once their prior position ends. They are discussed here, however, as they show how migrant workers and their advocates attempt to use these visas, and the deficiencies of these models demonstrate what additional features and protections short-term visas must have in order to enable migrant workers to address exploitation.

Hong Kong: Stay Extensions for Foreign Domestic Workers

Hong Kong employs around 380,000 migrant domestic workers annually. They are subject to several unique immigration restrictions, including that they must live in their employer's home and must leave Hong Kong within 14 days of the termination of their employment contract.⁵⁹ These rules make it extremely difficult for migrant domestic workers to pursue labour claims against their employers after their employment contract ends and prior to departure.⁶⁰

In the two weeks before their departure, migrant domestic workers can apply for a visa to extend their stay and find work and/or pursue a labour claim. This visa extension does not involve permission to work in Hong Kong (unless the Immigration Department exercises discretion to authorise work rights, which is very rare).⁶¹

In practice, to obtain the visa extension the migrant worker must provide evidence that they have filed a complaint with the Labour Department.⁶² This complaint can be filed only after the migrant worker has notified their employer of the claim (including calculation of wages owed) and seven days have elapsed during which the employer has refused to pay or settle the claim. The organisation HELP Domestic Workers can assist migrant domestic workers by calculating the wages that are owed for the worker to present to their employer.⁶³ Once the complaint is filed, the Labour Department schedules a conciliation meeting between the domestic worker and their employer, generally these meetings are scheduled within a two-week window, in light of the worker's limited visa. However, the Labour Department does not have authority to compel the employer to attend at this meeting.

If the employer does not attend, or if the parties refuse to settle the claim at this stage, the domestic worker can then file a case with the Labour Tribunal. If the matter is not settled, it may go to trial, but it may take several months before a trial can take place, and further time before the decision is handed down.

The visa extension may be granted for the purposes of filing and pursuing a labour claim, and is usually two weeks with further extensions while the case continues (immigration officers have discretion to grant longer visa extensions depending on the date of the worker's meeting with the Labour Department). Each two-week visa extension costs around HKD 230 (USD 29.32) and does not allow the individual to work while on the visa, so workers must pay for housing, food, and other expenses while pursuing a case. Given that the statutory minimum salary for a migrant domestic worker is HKD 4730 a month, this cost is prohibitive for many workers, particularly since multiple extensions will be required during lengthy judicial proceedings. For most, the cost of visa extension and lack of work rights present insurmountable barriers to using this visa to stay and seeing a case through.

Malaysia's Special Pass

In Malaysia, migrant workers can apply for a 'special pass' that allows them to stay beyond their visa, generally for up to 30 days.⁶⁴ The Immigration Department will provide a pass if a migrant worker demonstrates they are pursuing a labour claim.⁶⁵ However, the issuance, renewal and cancellation decisions are discretionary.⁶⁶ If a special pass is denied, the worker must leave the country the day their work pass expires.⁶⁷ The pass costs 100 Malaysian Ringgits (USD \$24) each time it is renewed and does not carry work authorisation.

Advocates note that this pass is not currently a meaningful safeguard for migrant workers to pursue a claim because it is discretionary and too short. According to research by the Malaysian Bar Council, even expeditious hearings into labour complaints handled by the Ministry of Human Resources take 84 days on average, and those that go to court can take significantly longer.⁶⁸ Some employers take advantage of the timing, delaying hearings so that the migrant worker has had to leave the country, often abandoning their case.⁶⁹

It is also expensive (100 Malaysian Ringgits (USD 24) per renewal),⁷⁰ and not accompanied by work rights, leaving a worker with no lawful ability to support themselves during the legal proceedings. One advocate, who has studied challenges to migrant workers' access to justice in Malaysia, observes that this pass is mainly used by well-resourced noncitizen workers.⁷¹ In helping an Indonesian worker in Malaysia pursue a labour claim, the union Building and Wood Worker's International (BWI) was able to cover the costs of this worker's pass but notes that other migrants are required to expend time and money to access the immigration office and pay for the pass without assurance that the pass will be granted or, if granted, that it will provide sufficient time to pursue their claims.⁷²

The Bar Council of Malaysia recommends reforms to ensure the special pass is an effective vehicle for migrant workers to pursue claims in Malaysia, including by:

- Making the pass automatic where a worker provides a letter from the labour department;
- Extending the pass to minimum six months with work authorisation, and making it renewable for three-month periods thereafter;
- Waiving the fee associated with the pass for individuals who have filed a complaint;
- Formalising the system and allowing migrant workers who cannot provide their passport to submit other identification documents.⁷³

5. Visa frameworks for migrant workers who pursue labour claims in criminal labour exploitation and trafficking cases

Numerous countries offer temporary permission for an exploited worker to remain in the country of employment where the worker participates in a criminal case against the employer, generally under the country's anti-trafficking laws.⁷⁴ This includes a range of countries in the European Union,⁷⁵ United States,⁷⁶ and Australia.⁷⁷ This temporary residence permit is frequently accompanied by additional resources and protections (including, in some jurisdictions, longer-term immigration status after the conclusion of the prosecution with the possibility of permanent residence).

In some countries, an identified victim of trafficking or criminal exploitation may use the extension of residence attached to the criminal investigation to pursue a civil claim against their former employer. However, this civil action may be deferred so as not to prejudice the criminal proceeding. Acknowledging this, some jurisdictions specifically provide for a further extension of stay to a victim of crime to recover unpaid wages. In Germany, for example, a victim of crime who has been issued a temporary residence permit may subsequently extend their stay beyond the criminal proceeding if they have not yet received the wages they are owed and if "it would represent particular hardship for the foreigner to pursue his or her claim from abroad".⁷⁸ In practice, however, this extension of stay to recover wages does not appear to be accessible to workers, who rarely have assistance in filing claims and are not permitted to be represented by a union. In the Netherlands, a victim of criminal exploitation is eligible for a short-term residence permit if, once "the criminal investigation or prosecution has been completed, ... there is a wage claim procedure before the subdistrict court".⁷⁹

In accordance with Article 13(4) of the 2009 EU Employer Sanctions Directive, more than half of Member States have domestic legislation providing for temporary residence permits for victims of "particularly exploitative working conditions" short of human trafficking.⁸⁰ In some Member States, the residence permit can be extended beyond the conclusion of the criminal proceedings, until the victim has been paid the outstanding wages. For example, in Slovenia, if the victim is claiming wages owed the temporary residence permit can be extended for up to one year.⁸¹ Hungary also allows a residence permit to be granted "by initiative of the court, to third-country nationals who have been subjected to particularly exploitative working conditions".⁸² This permit can be extended by up to six months each time and renewed "until the definitive conclusion of proceedings brought by the third-country national against his/her employer for the purpose of recovering outstanding remuneration".⁸³ (See Section 2 above for a discussion of several countries that allow a residence permit to be granted to victims of particularly exploitative working conditions without the need to participate in criminal proceedings.⁸⁴)

These frameworks provide important precedents of migration settings that ensure migrant workers who participate in criminal prosecutions can also stay to obtain civil remedies for the wages they are owed. However, in reality, they only provide civil labour remedies to a very small number of exploited migrant workers. These protections are generally not available for a worker wishing to address wage theft where the State declines to pursue a criminal case or the worker does not wish to participate.

Criminal investigations and prosecutions in relation to these offences are exceedingly rare. They require a substantial investment of resources in law enforcement because of the complexity of these criminal offences and the need for evidentiary standards to meet a criminal, rather than civil, burden of proof. Authorities are likely to prioritise cases impacting the largest number of people and with the most severe, documented abuse.

As discussed in Section 2 above, there is almost no data on migrant worker wage complaints in this context, and advocates report that victims face substantial barriers to accessing the application and as a result, these protections are often unavailable in practice⁸⁵ As noted above, for these provisions to have a meaningful impact, existing frameworks for visas and services for victims of trafficking and criminal exploitation should be extended to workers who have experienced substantial labour exploitation that does not rise to a level of criminality, and regardless of whether criminal offences are prosecuted. who need temporary residence in order to hold employers accountable through civil labour claims.



Conclusion

Governments must create migration frameworks that reduce the vulnerability of migrant workers who address exploitation, and genuinely enable large numbers to extend their stay for a short period in the country of employment to remedy wage theft and hold employers accountable for labour violations. A number of countries have introduced promising laws and policies to achieve these goals. Some, such as the new U.S. deferral of removal policy and various visa portability options, hold potential to enable a significant number of migrant workers to leave exploitative employers and recover the wages they are owed. Others, such as extensions of stay to pursue civil claims in the context of criminal exploitation, are promising on paper, but implementation must be overhauled to fulfil their potential beyond the small numbers of migrant workers that currently benefit. A small number of examples, such as short term visas without work rights, suffer from fundamental design flaws that limit their effectiveness.

Governments seeking to develop effective models must ensure short-term visas or extension of stay have:

- Application to a broad range of non-trivial labour violations, without onerous evidentiary requirements, to ensure that a sufficiently large number of migrant workers are eligible for visa protections to pursue labour claims;
- A swift and accessible application process, with very low or no application fees;
- Work rights for the duration of the visa/extension, not tied to a single employer;
- Duration sufficient to pursue a labour claim, with options for extension if proceedings continue;
- Adequate support for migrant workers to apply for visa protections and to pursue labour claims including resourcing civil society organisations and trade unions that assist migrant workers;
- Eligibility not contingent on government pursuing a criminal prosecution or workers acting as witnesses. Ideally, certification of a meritorious labour claim can be provided by a diverse range of government agencies, and by accountable private actors.

Given the striking commonality of migrant worker exploitation and barriers to justice in all regions of the world, we encourage governments, advocates, trade unions and international organisations to continue to share developments and lessons learned as they work towards developing global best practice models that overcome migration-law and policy obstacles to migrant workers' access justice for wage theft.

For a detailed case note on the U.S. protections from removal, and other reports, videos and more information on how governments and business can improve migrant workers access to justice for wage theft, visit www.migrantjustice.org/wagetheft2j



Endnotes

1 For example, Canada's Seasonal Agriculture Worker Program permits migrant workers to move between employers in the same sector. Advocates note that this mobility is still limited as workers in this program are subject to bilateral agreements between Canada and their country of origin and need to bring their concerns and request to change employer to their consulate or other liaison officers. According to Migrant Workers Centre in British Columbia, workers who bring these complaints might be seen as problematic and, as the country of origin handles recruitment, risk not being invited to return the following year. See Amanda Aziz, A Promise of Protection? An assessment of IRCC decision-making under the Vulnerable Worker Open Work Permit program (Migrant Rights Centre, 2022), 6 fn 6.

2 Migration Regulations 1994 (Cth), Sch 8, cl 8607.

3 Advocates note that this mobility is still limited as workers in this program are subject to bilateral agreements between Canada and their country of origin and need to bring their concerns and request to change employer to their consulate or other liaison officers. According to Migrant Workers Centre in British Columbia, workers who bring these complaints might be seen as problematic and, as the country of origin handles recruitment, risk not being invited to return the following year. See Amanda Aziz, A Promise of Protection? An assessment of IRCC decision-making under the Vulnerable Worker Open Work Permit program (Migrant Rights Centre, 2022), 6 fn 6.

4 Government of Canada, Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2019-148, Sections 299(2)(l) and 303.2(2)(a), available at: <<https://gazette.gc.ca/rp-pr/p2/2019/2019-05-29/html/sor-dors148-eng.html>>. See also Amanda Aziz, A Promise of Protection? An assessment of IRCC decision-making under the Vulnerable Worker Open Work Permit program (Migrant Rights Centre, 2022), 11.

5 Ibid.

6 Immigration, Refugees and Citizenship Canada, 'Open Work Permits for Vulnerable Workers [R207.1 – A72] – International Mobility Program', Government of Canada (guidance, 7 June 2021) <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/vulnerable-workers.html>>.

7 Ibid.

8 Ibid.

9 Amanda Aziz, A Promise of Protection? An assessment of IRCC decision-making under the Vulnerable Worker Open Work Permit program (Migrant Rights Centre, 2022), 16.

10 Finnish Immigration Services, 'Residence Permit or Certificate Due to Exploitation by Employer', Maahanmuuttovirasto Migrationsverket <<https://migri.fi/en/residence-permit-or-certificate-due-to-exploitation-by-employer>>.

11 Finnish Immigration Services, 'Significant Negligence or Exploitation by Employer', Maahanmuuttovirasto Migrationsverket <<https://migri.fi/en/significant-negligence-or-exploitation-by-employer>>.

12 See Platform for Undocumented Migrants (PICUM), Labour Migration Policies: Case Study Series - Finland (PICUM, 2023) <https://picum.org/wp-content/uploads/2023/02/Labour-migration-policies_Case-study-series_Finland_EN.pdf>, 12.

13 Ibid, 11-12. See generally, Finnish Immigration Services, 'Residence Permit or Certificate Due to Exploitation by Employer', Maahanmuuttovirasto Migrationsverket <<https://migri.fi/en/residence-permit-or-certificate-due-to-exploitation-by-employer>>.

14 Ibid, 13; Finnish Immigration Services, 'Certificate of Expanded Right to Work for Victim of Employer Negligence or Exploitation', Maahanmuuttovirasto Migrationsverket <<https://migri.fi/en/certificate-of-expanded-right-to-work-for-victim-of-employer-negligence-or-exploitation>>.

15 Ibid.

16 Government of Ireland, S.I. No. 95/2017 - Employment Permits Regulations 2017, Art 50-54, available at: <<https://www.irishstatutebook.ie/eli/2017/si/95/made/en/print>>; Department of Enterprise, Trade and Employment, 'Reactivation Employment Permit', Government of Ireland <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/permit-types/reactivation-employment-permit/reactivation-employment-permit.html>>. See also 'Employment Questions', Migrant Rights Centre Ireland <<https://www.mrci.ie/employment>>; PICUM, Labour Migration Policies: Case Study Series - Ireland (November 2022) <https://picum.org/wp-content/uploads/2023/02/Labour-migration-policies_Case-study-series_Ireland_EN.pdf>, 12.

17 Department of Enterprise, Trade and Employment, 'Reactivation Employment Permit', Government of Ireland <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/permit-types/reactivation-employment-permit/reactivation-employment-permit.html>>; see also European Platform tackling undeclared work, Subgroup on Tackling Undeclared Work Among Third Country Nationals: Regularisation Initiatives Output Paper (European Labour Authority, January 2022) <https://www.ela.europa.eu/sites/default/files/2022-04/SWG_regularisation_TCNs_output%20paper_EN%20%283%29_0.pdf>, 6.

18 Department of Enterprise, Trade and Employment, 'Reactivation Employment Permit', Government of Ireland <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/permit-types/reactivation-employment-permit/reactivation-employment-permit.html>>. The employer must also have at least 50% of its employees as EEA nationals.

19 PICUM, Labour Migration Policies: Case Study Series - Ireland (November 2022) <https://picum.org/wp-content/uploads/2023/02/Labour-migration-policies_Case-study-series_Ireland_EN.pdf>, 12.

20 Ibid, 12. Once the worker has submitted their application, the agency official will review the material and may request additional information, if required, which should be returned by the worker within 28 days. The official will then either grant an application or refuse it and provide specific reasons. If refused a permit, the applicant can request for the decision to be reviewed within 28 days, triggering review by a separate and more senior official. If the individual is again refused a Reactivation Permit, this does not preclude them from submitting a new application following all the relevant procedures for the specific employment permit type. For further procedural information, see generally, Department of Enterprise, Trade and Employment, 'Reactivation Employment Permit', Government of Ireland <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/permit-types/reactivation-employment-permit/reactivation-employment-permit.html>>.

21 Ibid.

22 Department of Enterprise, Trade and Employment, 'Reactivation Employment Permit', Government of Ireland <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/permit-types/reactivation-employment-permit/reactivation-employment-permit.html>>.

23 Ibid.

24 Petra van Nierop, Lisa Schönenberg and Petar Terziev, Counteracting Undeclared Work and Labour Exploitation of Third Country National Workers (European Platform tackling undeclared work, November 2020) <http://www.eurodetachement-travail.eu/datas/files/EUR/UDW_and_labour_exploitation_among_TC.N.PDF>, (citing European Migration Network, Illegal employment of third-country nationals in the European Union (2017)).

25 See 'Employment Permits Bill 2022: Second Stage (Resumed) – Dáil Éireann (33rd Dáil)', Houses of the Oireachtas (12 October 2022) <<https://www.oireachtas.ie/en/debates/debate/dail/2022-10-12/16>>, comments of Deputy Michael MacNamara.

26 Government of New Zealand, 'Migrant Exploitation Protection Work Visa: Visa Details', Immigration New Zealand <<https://www.immigration.govt.nz/new-zealand-visas/visas/visa/migrant-exploitation-protection-visa>>.

27 Government of New Zealand, 'Reporting migrant exploitation', Immigration New Zealand <<https://reportmigrantexploitation.employment.govt.nz/>>. Information in this section is drawn from email correspondence with Christina Stringer, University of Auckland, 21 March 2023.

28 'Flanders Cancels 500 Work Permits Following Antwerp Human Trafficking Case', The Brussels Times (online, 8 September 2022) <<https://www.brusselstimes.com/285898/flanders-removes-500-work-permits-following-antwerp-human-trafficking-case>>.

29 Ibid; interview with Jan Knockaert, Fairwork Belgium (1 February 2023).

30 interview with Jan Knockaert, Fairwork Belgium (1 February 2023).

31 *Reno v American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483–84 (1999) ("At each stage [of the removal process] the Executive has discretion to abandon the endeavor, and at the time [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] was enacted the INS had been engaging in a regular practice (which had come to be known as 'deferred action') of exercising that discretion for humanitarian reasons or simply for its own convenience.").

32 Department of Homeland Security & Department of Labor, Revised Memorandum of Understanding between the Departments of Homeland Security and Labour Concerning Enforcement Activities at Worksites (United States Government, 31 March 2011) <<https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/directives/files/DHSICE-DOLMOU-Final3-31-2011ESQA508c.pdf>>.

33 Department of Homeland Security, 'DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations', United States Government (13 January 2023) <<https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations>>. This process built off and complemented guidance from the DOL in 2022, providing a process for migrant workers and their advocates to request a letter of support from the DOL to accompany a request to DHS for prosecutorial discretion and deferred action. This guidance and the accompanying Frequently Asked Questions document explained that DOL would provide a letter of support to workers "on a case-by-case basis to strengthen DOL's enforcement and worker protection efforts." United States Department of Labor, Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes (United States Government, 6 July 2022) <<https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf>>.

34 Department of Homeland Security, 'DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations', United States Government (13 January 2023) <<https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations>>.

35 Interview with Nina DiSalvo, Towards Justice (2 February 2023); Interview with Benjamin Botts, Centro de los Derechos del Migrante, Inc. (9 February 2023).

36 Ibid. Applications for deferred action should include a letter of support (Statement of Interest) from a local, state, and federal labour agency, outlining (a) the "enforcement or jurisdictional interest of the labour agency and how it relates to the mission of the labour agency"; (b) the worker or workers covered by this Statement of Interest; and (c) why prosecutorial discretion for these workers would support the labour agency's interest.

37 United States Department of Labor, Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes (United States Department of Labour, 6 July 2022) <<https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf>>.

38 European Parliament, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0052&from=EN>>.

39 Ibid, Article 13(4).

40 Ibid, Articles 9(1)(c) and 2(i).

41 In accordance with Art 13(4) of the Directive, see FRA, Protecting Migrants in an Irregular Situation From Labour Exploitation: Role of Employers Sanction Directive (FRA, 2021) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf>, 50.

42 European Commission, Communication from the European Commission to the European Parliament et al., on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, COM(2021) 592, (European Commission, 29 September 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0592#footnote60>>.

43 FRA, Protecting Migrants in an Irregular Situation from Labour Exploitation: Role of Employers Sanction Directive (FRA, 2021) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf>, 44.

44 Government of Latvia, Immigration Law (Imigrācijas likums), Section 23(7) ("A foreigner, who, whilst staying illegally in the Republic of Latvia, has been illegally employed in particularly exploitative working conditions, as well as a minor foreigner, who, whilst staying illegally in the Republic of Latvia, has been illegally employed, has the right to request a temporary residence permit, if the foreigner has turned to the court with an application regarding recovery of the unpaid work remuneration from the employer. A temporary residence permit may be requested repeatedly, if the court proceeding for the collection of the unpaid work remuneration has not been completed or the unpaid

work remuneration has not been received from the employer. The first and repeat temporary residence permit shall be issued for one year. Particularly exploitative working conditions are such working conditions and employment requirements, which cause very incommensurate differences between the working conditions and employment requirements of legally employed workers and the working conditions and employment requirements of such foreigner who is staying illegally in the Republic of Latvia, as well as differences due to gender discrimination or another type of discrimination, or differences that affect the protection of health and safety of the foreigner at work, as well as violates his or her dignity.”).

45 Government of Portugal, Law 23/2007 (Lei n.º 102/2017), article 122(1)(m).

46 Government of Portugal, Regulatory Decree No. 84/2007 - Official Gazette No. 212/2007, Series I of 5 November 2007. Regulates Law no. 23/2007, of 4 July, which approves the legal regime for the entry, stay, exit and removal of foreign citizens from national territory, para. 15, available at: <https://files.dre.pt/StaticContent/DReg_84_2007_EN.pdf>.

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49 Ibid, Article 51 (2).

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63 Justice Without Borders and Herbert Smith Freehills, Just Compensation: A Toolkit for Cross-Border Access to Justice for Migrant Domestic Workers in Hong Kong (Justice Without Borders and Herbert Smith Freehills, 2022) <<https://forjusticewithoutborders.org/wp-content/uploads/2022/06/FINAL-PRINT-VERSION-Just-Compensation-Toolkit-2022.05.25.pdf>>, 20-37.

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67 Interview with Apolinar Tolentino (12 January 2023).

68 Renuka Balasubramaniam, Eleanor Taylor-Nicholson, and Natasha Mahendran, Migrant Workers’ Access to Justice: Malaysia (Bar Council Malaysia, November 2019) <[https://www.malaysianbar.org.my/cms/upload_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20\(28Nov2019\).pdf](https://www.malaysianbar.org.my/cms/upload_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20(28Nov2019).pdf)>, 127.

69 Ibid.

- 70 As of January 2023, the minimum wage in Malaysia has been raised to 1,500 ringgit (US\$341) per month. Ayman Falak Medina, 'Malaysia Increases Minimum Wage from May 1, 2022', ASEAN Business News (6 June 2022) <<https://www.aseanbriefing.com/news/malaysia-increases-minimum-wage-from-may-1-2022/>>.
- 71 Renuka Balasubramaniam notes that asylum seekers and others who fall out of immigration status by overstaying their permission to be in Malaysia may need to get this pass in order to regularize their status and depart the country. Without the pass, a migrant who has overstayed could be detained when they try to depart the country and then need to go to immigration court where they could potentially face imprisonment and fees for overstaying. Interview with Renuka Balasubramaniam (3 January 2023).
- 72 Interview with Renuka Balasubramaniam (3 January 2023).
- 73 Renuka Balasubramaniam, Eleanor Taylor-Nicholson, and Natasha Mahendran, Migrant Workers' Access to Justice: Malaysia (Bar Council Malaysia, November 2019) <[https://www.malaysianbar.org.my/cms/upload_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20\(28Nov2019\).pdf](https://www.malaysianbar.org.my/cms/upload_files/document/Migrant%20Workers%20Access%20to%20Justice%20Report%20(28Nov2019).pdf)>, 216.
- 74 See eg, in Europe: Alyna C Smith and Michele LeVoy, Insecure Justice? Residence Permits for Victims of Crime in Europe (PICUM, 2020) <<https://picum.org/wp-content/uploads/2020/06/Residence-permits-victims-of-Crime-FULL-REPORT.pdf>>. In certain jurisdictions, a successful prosecution can in principle deliver wage compensation to the migrant worker victim as a part of the criminal process. However, a 2021 report from the European Union Agency for Fundamental Rights (FRA), reviewing case law from EU Member States, found that this only had occurred in recent years in a handful of cases: in the Netherlands, Sweden and Portugal. European Union Agency for Fundamental Rights (FRA), Protecting Migrants in an Irregular Situation From Labour Exploitation: Role of Employers Sanction Directive (FRA, 2021) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf>, 19.
- 75 Eg, Estonia provides a temporary residence permit for participation in criminal proceedings for six to 12 months "on the application of the prosecutor's office." Government of Estonia, Aliens Act (Välismaalaste seadus), Section 208 (2010). In Poland, an undocumented worker might qualify for a temporary residence permit for the duration of criminal proceedings if they were the victim of a labour crime, including if they were working under conditions of "extreme abuse." Government of Poland, Act on Foreigners (USTAWA z dnia 12 grudnia 2013 r. o cudzoziemcach), Article 187(4), referencing Article 7(2).
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- 77 Migration Regulations 1994 (Cth), Sch 2, subclass 060 – Bridging visa F.
- 78 Government of Germany, Residence Act (Aufenthaltsgesetz, AufenthG), section 25 (4b), available at: <https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html>.
- 79 Government of the Netherlands, Aliens Decree 2000 (Vreemdelingenbesluit 2000), article 3.48(g).
- 80 European Parliament, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0052&from=EN>>; FRA, Protecting Migrants in an Irregular Situation From Labour Exploitation: Role of Employers Sanction Directive (FRA, 2021) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf>, 50.
- 81 Ibid, 45.
- 82 Government of Hungary, Act II of 2007 on the Entry and Residence of Third-Country Nationals (2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról), Section 29(1)(f).
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- 84 FRA, Protecting Migrants in an Irregular Situation from Labour Exploitation: Role of Employers Sanction Directive (FRA, 2021) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf>, 44.
- 85 European Commission, Communication from the European Commission to the European Parliament et al., on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, COM(2021) 592, (European Commission, 29 September 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0592#footnote60>>.