

Briefing Note on Human Trafficking
Implications of Draft Agreement on
the Establishment and
Management of the Employment
Service Enterprise of the Lao
People's Democratic Republic
(Agreement 43)

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Table of Contents

Establishment, renewal and annulment of an Employment Service Enterprises 3

Duties of an Employment Service Enterprise..... 5

Service charges of the Employment Service Enterprise..... 5

Complaints against Employment Service Enterprises 5

Prohibitions for Employment Service Enterprises 6

Rights and responsibilities of the Labour Management Organization 7

Monitoring and inspections 7

Awards and penalties..... 8

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Lao PDR has made significant gains in its efforts to confront trafficking in persons, including with the enactment of *Law on Anti-Trafficking in Persons* (2015). Lao PDR understands exploitation broadly in the context of trafficking in persons to include 'labour exploitation' defined in Article 4(2) of the *Law on Anti-Trafficking Persons* (2015) as "forced labour, excessive workload or overtime working without remuneration or with inadequate remuneration as agreed." The *Agreement on the Establishment and Management of the Employment Service Enterprise of the Lao People's Democratic Republic* (Agreement 43) presents a significant opportunity to prevent labour exploitation and advance Lao PDR's counter-trafficking efforts.¹ Notably, by prohibiting Employment Service Enterprises from charging fees to migrant workers in article 35(7), the vulnerability of migrant workers to falling victim to human trafficking is significantly reduced.

ASEAN-ACT commends the efforts of the Ministry of Labour and Social Welfare for this comprehensive legislation, and appreciates the opportunity to offer the following recommendations for consideration in support of its efforts to strengthen Lao PDR's legislative framework against human trafficking.

1. Establishment, renewal and annulment of an Employment Service Enterprises

Lao PDR is encouraged to strengthen Agreement 43 to establish Employment Service Enterprises (ESEs) to mitigate against risks of worker exploitation and victimization. Article 9 of Agreement 43 sets out that ESEs are created as limited or sole companies. Important to note in this respect, is that both legal entities and natural persons can be liable for trafficking in persons and related offences.² Agreement 43 should set out clear criteria for the Ministry of Labour and Social Welfare (MLSW) determinations on establishing, renewing or annulling ESEs in fulfillment of its responsibilities set out in Article 37 of the Agreement. Notably, failure of ESEs to fulfil duties set out in article 21 and violation of prohibitions set out in article 35 should be included as grounds for non-renewal and annulment. Renewal decisions should therefore be made on the basis of performance reviews and monitoring processes outlined in Article 40 to 42 (see section 7 below).

Requirements for establishment (article 10 to 12)

Effective monitoring and enforcement of the requirements for establishing an ESE can mitigate risks of the ESE mechanism being misused to traffic workers abroad. MLSW should be equipped with clear criteria for making determinations on establishment of ESE. Currently, it is not clear what criteria MLSW will consider in making a determination, and the extent to which human trafficking risks will be taken into account. Although criminal records are required to be submitted (article 12), it is not clearly stated that evidence of conviction for serious offences would bar or jeopardize an applicant from establishing an ESE.

- **Recommendation 1:** Clarify that the reference to a 'clear biography' in article 10(5) refers to a clean criminal record, to ensure that evidence of conviction for serious offence would prevent or jeopardize an application to establish an ESE.

Requirements for renewal (article 18 - 19)

The requirements for renewing an approval for establishing an ESE do not guard against the renewal of ESEs who have trafficked workers, facilitated their placement into exploitative employment situations, or otherwise exposed them to risks of trafficking or forced labour. As currently drafted, it is not clear

¹ Article 5 of Agreement 43 affirms that the Agreement is to be implemented in line with international instruments to which Lao PDR is a party, which includes *Trafficking in Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (2000).¹

² *United Nations Convention against Transnational Organized Crime* (2000), Article 10.

whether the failure to fulfil the duties set out in article 21 and/or non-compliance with the prohibitions for ESEs set out in article 35, would disqualify an ESE from renewal of its approval to establish an ESE.

- **Recommendation 2:** Clarify that failure to fulfill specified duties set out in article 21 is grounds for non-renewal. From a counter-trafficking perspective, this should include failure to protect the rights and interests of workers and ensure their safety (article 21(5)).
- **Recommendation 3:** Clarify that contravention of specific prohibitions set out in article 35, is grounds for non-renewal. From a counter-trafficking perspective, this would include: violation of the prohibition on charging workers employment services fees (article 35(7)), violation of the prohibition on charging deposit fees (article 35(9)), as well as coercing or pressuring workers (article 35(2) and (10)).

Article 18(3) includes as a requirement for renewal that the ESE does “not cause any socio-economic damage”. However, the provision does not specify whether the damage guarded against is that caused to Lao PDR, to countries where Lao citizens work, or to individual workers who have potentially been victimized by the ESE through receipt of its services.

- **Recommendation 4:** Clarify what is meant by socio-economic damage in article 18(3), and whether the damage referred to is to Lao PDR, destination countries where Lao citizens are dispatched, or individual workers.

The documents required for renewal (Article 19) do not include updated criminal record checks, nor any documentation relating to any complaints brought against the ESE under article 38 or 39 of Agreement 43. Such information is vital for MSLW determinations as to whether there are risks that an ESE has engaged in trafficking or has otherwise neglected to protect workers from trafficking and other risks.

- **Recommendation 5:** Specify in Article 19 that updated criminal records are to be submitted in applications for renewal, and clarify that clean criminal records are a requirement for renewal.
- **Recommendation 6:** Require ESEs to disclose complaints brought against them by workers and others, and require MSLW to verify information received by ESEs against open-source information and in consultation with migrant worker support organisations, so that trafficking and other risks can be considered in renewal decisions.

Requirements for Annulment (articles 28 – 31)

The provisions relating to annulment of an ESE (articles 28-31) could more proactively respond to situations in which ESEs are engaged directly or indirectly in trafficking in persons.

- **Recommendation 7:** In the conditions for annulment set out in article 29, explicitly make conviction for a serious criminal offence, including trafficking in persons, a grounds for annulment.
- **Recommendation 8:** Clarify whether failure to fulfill duties specified in article 21 is grounds for annulment
- **Recommendation 9:** Clarify whether failure to comply with the prohibitions set out in article 35 is grounds for annulment.
- **Recommendation 10:** Clarify whether repeated complaints by workers (under article 38 and 39) is a consideration in annulment decisions
- **Recommendation 11:** Explicitly refer in article to the *Law on Anti-Trafficking in Persons* (2015) as a ‘relevant law’ in Article 29.

2. Duties of an Employment Service Enterprise

Some of the duties of ESEs set out in article 21 are relevant for reducing trafficking risks. Notably, these include the duty to: monitor, manage and protect the rights and interests of workers who have been employed through their services and to address problems and report situations (article 21(5)); look for employment for returning workers (article 21(6)); raise awareness about employment systems, conditions, working in a safe condition, salary and poverty reduction (article 21(8)). These duties could be strengthened to better protect workers recruited by ESEs from falling victim to trafficking and other harm.

- **Recommendation 12:** Clarify which entity of the Labour Management Organization ESEs are to report situations of conflict or incident to, in fulfilling their duty under article 21(5), whether MLSW, Provincial and Vientiane Capital Department of Labour and Social Welfare and Labour and Social Welfare District Office and Municipality.
- **Recommendation 13:** Consider including among the duties set out in article 21(5), the duty of ESEs to monitor the conditions of workers and verify that employers have not passed any fees and service charges on to workers, including those fees and services charges set out in article 20(5).
- **Recommendation 14:** Include in article 21(8) the duty of ESEs to raise awareness of human trafficking risks, and provide information about human trafficking in pre-departure training, including information on how workers are to report abuse and exploitation, and to who.³

In addition to the duties of ESEs set out in article 21 of Agreement 43, are duties that appear in other Lao legislation. One such duty is included in article 32 of the *Law on Anti-Trafficking in Persons (2015)*, under which ESEs as legal entities and the persons employed by them are obliged to report orally or in writing when they “know, see or receive information or source of information on trafficking in persons” so that police can initiate criminal proceedings against any offenders in accordance with the law, under article 33.

- **Recommendation 15:** Refer explicitly in article 21 to the obligation of ESEs to report trafficking in persons to appropriate authorities in accordance with article 33 of the *Law on Anti-Trafficking in Persons (2015)*.

3. Service charges of the Employment Service Enterprise

Vitality from a counter-trafficking perspective, article 35(7) explicitly prohibits the charging of any service fees to workers. The following recommendations are offered to reinforce this commendable achievement in Lao PDR’s labour migration legislation, and its contribution to Lao’s counter-trafficking efforts, to ensure that employers do not pass fees onto workers.

- **Recommendation 16:** Specify the fees and service charges referred to in Article 25(5).
- **Recommendation 17:** Make explicit in Article 33 that that the service charges of ESEs are to be paid by employers, not workers, in accordance with Article 35(7).

4. Complaints against Employment Service Enterprises

Article 38 and 39 of Agreement 43 give the Departments of the Labour and Social Welfare of the Province and Vientiane Capital and the District Offices of Labour and Social Welfare, the responsibility

³ Ensuring that people are provided with accurate information about the risks of trafficking also serves the principle set out in Article 5(3) regarding transparency of ESEs.

to “Receive and consider the complaints of individuals, legal entities or organizations related to the activities of the employment services.” However, no detail is offered to explain what if any mechanism is in place to effectively receive and consider these complaints. It is therefore not clear how these provisions support the right of Lao workers abroad to “submit complaints to the authorities and related organizations” as specified in Article 10(9) of the *Decree on Placement of Lao Workers to Work Abroad* (2020).

- **Recommendation 18:** Amend provisions concerning complaints against ESEs to clarify the procedure for submitting, receiving, considering and responding to complaints, including those that reveal potential abuse, exploitation, trafficking in persons or other criminal activities by ESEs.

5. Prohibitions for Employment Service Enterprises

Article 35 of Agreement 43 prohibits certain conduct and activities of ESEs. Some of the prohibitions set out in this section are critical to prevent the misuse of ESE structures by traffickers posing as ESEs to traffic workers, and to otherwise reduce risks of workers being trafficked by employers who take advantage of deficiencies in ESE operations. Some amendments can be made to further strengthen these provisions.

Article 35(2) prohibits ESE’s from “Creating conditions to prevent the application to work abroad, especially sex discrimination, direct or indirect coercion.”

- **Recommendation 19:** Amend article 35(2) to prohibit creation of conditions to prevent application to work not only through direct or indirect coercion, but also through deception, inducements, threats or other ‘means’ specified in article 11 of the *Law on Anti-Trafficking in Persons* (2015). Additionally, prohibit the use of these illicit means by ESEs not only to *prevent* application to work abroad, but also to *promote* applications to work abroad. This amendment would be in line with the prohibition set out in article 35(10) against “creating contracts that are binding or otherwise puts pressure on workers.”
- **Recommendation 20:** Broaden the article 35(2) prohibition on sex discrimination to prohibit discrimination on any ground, including but not limited to grounds of gender, sexual orientation, sexual identity, race, ethnicity, religion or belief, political or other opinion.

Article 35(5) prohibits ESEs from “creating risk factors in dispatching Lao workers to work abroad”. It is not clear what is meant by risk factors, nor what the risk is, or who is at risk. If ‘risk factors’ refer to those that put migrant workers at risk of being trafficked or otherwise exploited abroad (such as debt and other vulnerability factors), risks could relate to dispatching people considered to be members of ‘at-risk groups’ or otherwise vulnerable to trafficking according to the *Law on Anti-Trafficking in Persons* (2015), without taking steps to mitigate this risk. It is important to emphasise here that when persons from ‘at risk groups’ are dispatched for work abroad in a way that accords with their human and labour rights, the result can and should be to reduce their vulnerability to trafficking. Indeed, risks factors could also refer to dispatching Lao workers abroad without equipping them with sufficient pre-departure training on trafficking and risks, so that people who were not previously vulnerable become members of ‘at-risk groups’. Whether the provision relates to these other risks should be clarified.

- **Recommendation 21:** Clarify what risks factors are referred to in article 35(5), what the risk is, and who is at risk, so ESEs understand how to avoid creating risk factors.

Article 35(4) prohibits “hiding information in the process of dispatching Lao workers to work abroad”.

- **Recommendation 22:** Specify in article 35(4) that information should not be hidden from workers and prospective workers, and clarify the type of information that must be shared with them, and how

it should be shared, being in a language and manner that they can understand, in accordance with the duties set out in article 21(8) of Agreement 43.

Article 35(7) explicitly prohibits the charging of any service fees to workers.

- **Recommendation 23:** Clarify that article 35(7) prohibits passing costs of operating ESEs to migrant workers, including fees for establishing an ESE (article 23), payments into the investment fund (article 13) and warranties (article 14).

6. Rights and responsibilities of the Labour Management Organization

Article 37, 38 and 39 of Agreement 43 set out the rights and responsibilities of the Labour Management Organization, being comprised of the Ministry of Labour and Social Welfare, Provincial and Vientiane Capital Department of Labour and Social Welfare and Labour and Social Welfare District Office and Municipality (as defined by article 3). The following recommendations are offered to advance the wellbeing, rights and interests of workers, being a key purpose of *Decree on the Dispatch of Lao Workers to Work Abroad* (2020), including to protect them from trafficking.

- **Recommendation 24:** Explicitly refer to the *Law on Anti-Human Trafficking* (2015) in Article 37 (concerning the MLSW) and Article 38 (concerning DLSW), to ensure that the prescribed rights and responsibilities set out in Agreement 43 are fulfilled in accordance with counter-trafficking obligations set out therein, including the specific obligations of the labour and social welfare sector in Article 63 of the *Law on Anti-Human Trafficking*.
- **Recommendation 25:** Consider adding practical measures in fulfillment of counter-trafficking obligations, including to ensure that anti-trafficking information is included in any pre-departure training given to workers.

7. Monitoring and inspections

Articles 40 to 42 of Agreement 42 set out the responsibility of the Labour Management Organization to monitor and inspect ESEs. Furthermore, the principles outlined in Article 5 promote the role of individuals, entities and local and international organizations to “contribute to and facilitate, monitor and manage the activities of employment service enterprises in accordance with laws and regulations.”

- **Recommendation 26:** Explicitly state in Article 40 who is responsible for monitoring and inspecting ESEs, whether MLSW, Provincial and Vientiane Capital Department of Labour and Social Welfare and Labour and Social Welfare District Office and Municipality.
- **Recommendation 27:** Explicitly state in Article 41 *what* the responsible authority is monitoring ESE activities for, as well as the actions to be taken if evidence is found that ESEs are engaged in activities contrary to Agreement 43 or other laws, including the *Law on Anti-Human Trafficking* (2015).
- **Recommendation 28:** Clarify the role of individuals, entities, local and international organizations set out in article 4, notably to include their role in monitoring ESEs for activities contrary to Lao PDR’s commitments to combat trafficking in persons, and to protect human and labour rights.

Consideration also could be given to specifying that a monitoring mechanism and tools for monitoring and evaluation be put in place to support the Labour Management Organization, to monitor ESEs in accordance with the standards set out in the Agreement and the *Decree on the Dispatch of Lao Workers to Work Abroad* (2020).

8. Awards and penalties

Article 43 of Agreement 43 sets out awards in the form of recognition for ESEs who achieve ‘remarkable accomplishments’ as certified by ‘the Board’ and the Labour Management Organization. Consideration could be given to the extent ESEs could be awarded for their role in supporting victims of trafficking, reducing vulnerability to trafficking and protecting workers from trafficking risks. This approach is in line with the role of the labour and social welfare sector described in the *Law on Anti-Trafficking in Persons* (2015) to develop skills and provide employment opportunities for victims of trafficking, and MSLW’s role as a member of the National Committee on Anti-Trafficking in Persons. Such criteria would also support the advancement of the wellbeing, rights and interests of workers, being a key purpose of *Decree on the Dispatch of Lao Workers to Work Abroad* (2020) that Agreement 43 is pursuant to.

- **Recommendation 29:** Amend Article 43 to emphasize wellbeing of workers and protection of their rights and interests, as key criteria for measuring the ESE’s accomplishments.

Article 44 of Agreement 43 prescribes penalties for individuals or entities that operate an employment business without approval as specified in the law, and refers to the immediate cessation of activities and prosecution. As it is currently phrased, the section could be misinterpreted to suggest that these penalties (including minor penalties of warnings and fines) relate to violation of *any* law, including the *Penal Code* and the *Law on Anti-Trafficking in Persons* (2015).

- **Recommendation 30:** Amend Article 44 to clarify that the violations referred to in this provision refer to violations of *this* law, being Agreement 43, and relate specifically to the operation of an ESE without establishing it in accordance with Section II of the Agreement.

From the perspective of human trafficking prevention, it is important to ensure that the application of penalties on ESEs prescribed by Article 44 of Agreement 43 does not have harmful consequences for workers who have been recruited by penalized ESEs. Unless guarded against, such consequences could increase the vulnerability of workers to human trafficking and other exploitation and abuse.

- **Recommendation 31:** Clarify the extent to which the ‘losses’ referred to in Article 44 relate to those incurred by workers, how workers are to be compensated for those losses, as well as the protections in place to support them to continue their work, to find alternative employment and / or to be safely repatriated home.
- **Recommendation 32:** Specify the penalty amount in Kip, as opposed to United States dollars, in accordance with other monetary amounts specified throughout the Agreement 43.