

Mode 4 and the Labor Rights of Migrant Workers

Migrant workers should be protected by labor laws of the host countries and must not be included in TISA or any free trade agreement. They are employees, not independent service-suppliers.

I. Introduction

Mode 4 provisions under the General Agreement on Trade in Services (GATS)¹, under the services chapters of free trade agreements², including the proposed Trade in Services Agreement (TISA)³, typically involve the movement of natural persons such as investors, intra-corporate transferees (managers, specialists, technical persons) and highly technical personnel such as those with expertise law, accounting, taxation, management consulting, engineering, computer, advertising, research and development services, translation services, higher education, architecture, and research and development, and the like.

One easily infers from the above enumeration that either these natural persons are trying to look for investment opportunities, or are providing highly-specialized, time-bound services. In neither case is any of them considered an employee. Hence, those deployed under Mode 4 who provide services by way of a contract for service do not expect any protection under the labor laws of the host country, and their contracts are instead governed by default contract laws.



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¹ Please see the European community and its Member States Schedule of Specific Commitments under the GATS, Supplement 2.

² Please see the Japan – Switzerland Free Trade Agreement, the ASEAN – Australia/New Zealand FTA, and the EUROPEAN FREE TRADE ASSOCIATION (EFTA) -Singapore FTA (ESFTA)

³ EU Initial Offer – Nov. 2013 - TRADE IN SERVICES AGREEMENT, EUROPEAN UNION SCHEDULE OF SPECIFIC COMMITMENTS & LIST OF MFN EXEMPTIONS.

http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152689.pdf

II. Mode 4 provisions do not apply to measures relating to employment.

Mode 4 provisions in FTA's and in GATS clearly state that these do not apply to measures affecting employment, nor to access to the employment market. The "Annex on Movement of Natural Persons Supplying Services Under the Agreement" to GATS provides that "[t]he Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis." Similar language is included in the ASEAN-Australia-New Zealand FTA, the Switzerland-Japan FTA, the Japan-Philippines Economic Partnership Agreement (JPEPA), and the EU-Colombia-Peru FTA.

Clearly then, such provisions do not, or should not apply to migrant workers. Typical Mode 4 persons, due to the nature of their sojourn in the foreign country, are not covered by labor laws of the host countries since they are not even considered as employees. On the other hand, migrants are, or should be, governed by labor laws of the host country since the nature and duration of their work would definitively show that their status is that of employees. There is clearly an employer-employee relationship since they are subject to supervision and control by the person for whom they render service. Attempts to include migrant workers, including unskilled workers, under Mode 4 would jeopardize their status as employees, thus running the risk of them losing the protection of labor laws in the host country.

From the vantage point of both labor law and international trade law, it is apparent that Mode 4 typically contemplates a valid contract for service⁴ between a person (natural or juridical) domiciled in one party to the trade agreement that provides service to an entity located within the other party to the agreement. There is no employer-employee relationship between the natural person (whether deployed by a juridical person or working for her/his own account) and the client, or the person who obtains the services, because the person providing the service has all but complete discretion on how to render the service or how the work is actually done - free from the control or supervision of the client.

Also, the services provided are typically of a short and/or pre-determined duration, or at least determinable at the time of the engagement. Moreover, the types of services are invariably highly technical and specialized, thus requiring from the natural person a highly specialized professional and educational background⁵.

⁴ Not to be confused with the "contract of service" which, under the labour law of New Zealand, is an employment contract.

⁵ However, there are also instances when highly-skilled professionals could also be treated as employees when they work for an indeterminate period of time and under the control and supervision of the person to services are rendered. An example would be doctors, nurses and other medical practitioners working permanently in hospitals and nursing homes.

Hence, Mode 4 does not apply to the situation of migrant workers, since they render service more or less of a permanent nature and under the framework of an employer-employee relationship. A clear indication of this relationship is the fact that the employer supervises the migrant and directs not only the nature, timeliness and quality of the final product, but also the way the work is actually done.

Thus, as mentioned earlier, Mode 4 provisions in FTAs and in GATS specifically provide that nothing in the said chapter on movement of natural persons shall apply to measures regarding employment or access to the employment market.

Just like those mentioned earlier, the Switzerland-Japan FTA thus provides on Art. 50 – Movement of Natural Persons (par. 2) that: “[t]his Chapter shall not apply to measures affecting natural persons seeking access to the employment market of a Party, nor shall it apply to measures regarding nationality or citizenship, residence or employment on a permanent basis.” A similar provision is included in Art. 108 – Movement of Natural Persons of the Japan-Philippines Economic Partnership Agreement (JPEPA): “2. This Chapter shall not apply to measures regarding nationality or citizenship, or residence or employment on a permanent basis.”

Also, apparently consistent with the same principle, the JPEPA starts off its list as follows:

“Article 110

Specific Commitments

1. Each Party shall set out in Annex 8 the specific commitments it undertakes for:

- (a) short-term business visitors of the other Party;
- (b) intra-corporate transferees of the other Party;
- (c) investors of the other Party;
- (d) natural persons of the other Party who engage in professional services;
- (e) natural persons of the other Party who engage in supplying services, which require technology or knowledge at an advanced level or which require specialized skills belonging to particular fields of industry, on the basis of a contract with public or private organizations in the former Party; and...”

Curiously, however, the above provision end up adding what seems an anomaly. Among the natural persons enumerated in JPEPA are those who, by the nature of their work, are invariably considered as employees of the hospitals, hospices and other health-care institutions where they work:

- “(f) natural persons of the other Party who engage in supplying services as nurses or certified careworkers or related activities, on the

basis of a contract with public or private organizations in the former Party or on the basis of admission to public or private training facilities in the former Party.”

Fortunately, the Philippines and Japan had since entered into a Memorandum of Understanding which explicitly states that nurses, certified careworkers and those engaged in related activities deployed under JPEPA shall be considered as employees. If the text of JPEPA were to be followed strictly, these nurses will not even be considered as employees, but will instead be relegated to “service suppliers” under Mode 4.

III. Mode 4 would remove labor law protection to migrants

TISA or other trade and investment agreements should not place migrant workers under Mode 4 because that would make them “independent service providers” or “independent contractors” supposedly working for their “own account”, and thus not considered as employees. Such erroneous characterization of the jobs that migrants typically render does not reflect the economic reality or the business reality of the relationship between the migrant and the employer.

It would also take them out of the coverage and protection of labor laws of the host country.

IV. Developing Countries and its Migrant Workforce

Developing countries inside and outside of TISA might think that they could send their migrant workers to jobs in developed countries by way of Mode 4. However, as mentioned earlier, Mode 4 does not apply to measures affecting persons seeking access to the employment market. Worse, the inclusion of migrants in Mode 4 takes them out of the protection of the labor laws in the host country.

Migrant workers, especially from developing countries, deserve protection under labor laws since they provide invaluable service to the countries where they work.

The same money they send back home to their families also becomes part of the badly-needed foreign currency earnings of their home countries, which are invariably developing countries facing many developmental challenges.

In some countries, migrants are in fact the top foreign currency earners, their remittances often exceeding even proceeds from exports of agriculture and that of manufactured products taken separately.

They are desperate for protection by the host countries since they are often victims of unscrupulous employers. They are scared of losing their jobs as what awaits back home could be as bleak as unemployment or severe under-employment, even as they are hesitant to assert their rights as individuals and as workers – for fear of reprisal.

Women workers, since they are vulnerable to physical and psychological harm through sexual harassment and/or outright sexual assault, and discrimination, are many times even more vulnerable.

The situation becomes even more problematic when they work in rich countries where the rule of law is not at par with the level of economic development or when they in fact work in yet another developing country. This is not to say that no problem occurs in developed countries.

V. Labor laws of host countries, and not the TISA of other trade agreements, should govern the status of migrant workers.

We believe that while each country has the right to pass and enforce its immigration laws in relation to its labor laws, it should always be the case that:

1. the existence of employer-employee, including with respect to migrants, should be determined under the labor laws of the host country where they work, and not by any trade or investment agreement; and
2. that should a migrant be considered an employee, all of the pertinent labor laws of that host country should apply to her/him.

There is a reason why the Mode 4 specific commitments in various agreements typically include only persons whose purpose of travel is not for employment and why the language in all Mode 4 sections in FTAs and in GATS specifically provide that the same does cover measures related to employment or access to the employment market: Mode 4 is meant solely for temporary movement of natural persons who will explore business opportunities or who will provide services to clients, which in turn will not supervise nor even have the power of control over the person who will provide services.

It is not a coincidence then that in many jurisdictions, such absence of control and supervision on the part of the person for whom services is rendered indicates clearly that there is no employer- employee relationship. Conversely, supervision and control indicate that an employer-employee relationship exists.

A quick look at norms to determine employer-employee relationships in a few jurisdictions - Thailand, New Zealand⁶, the U.S.⁷, the UK, and the Philippines⁸ – shows that one of the most important factors in determining the existence of employer-employee relationship is the existence of the right to employer to control not only the final outcome of the job, but also the means and manner of doing the job.

Simply put, there is employer-employee relationship if the employer has the right to control the manner and means by which the work is done. Also, provision of services, done on a full-time basis, over a long or indeterminable period of time would indicate the existence of an employer-employee relationship.

The services provided by migrant workers such as factory workers, domestic helpers, office clerks, store clerks, etc. all have these characteristics of an engagement where there is an employer-employee relationship.

Incidentally, the Labour Standards Law of Japan [Law No. 49 of 7 April 1947 as amended through Law No. 107 of 9 June 1995] is quite noteworthy as it provides for equal protection for all workers:

“Equal Treatment

Article 3. An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker.

Principle of Equal Wages for Men and Women

Article 4. An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman.”

However, these provisions will apply only if the migrant is considered an employee, and will not if the migrant is treated as a service provider under Mode 4.

⁶ JAMES BRYSON v. THREE FOOT SIX LIMITED (IN THE SUPREME COURT OF NEW ZEALAND - SC CIV 24/2004 [2005] NZSC 34).

⁷ U.S. Department of Labor - Wage and Hour Division - Fact Sheet #13: Am I an Employee? Employment Relationship Under the Fair Labor Standards Act (FLSA). (Revised May 2014) <http://www.dol.gov/whd/regs/compliance/whdfs13.pdf>

⁸ LEGEND HOTEL v. HERNANI S. REALUYO; G.R. No. 153511; July 18, 2012 (Supreme Court)

Not being considered employees, migrants deployed under Mode 4 would also not be able to join labor unions, thus depriving them of workers' rights under various ILO conventions.

Conclusion

Instead of trying to access the overseas labor market through Mode 4, sending countries should instead put in place the proper local legal framework to safeguard the deployment of migrants to host countries.

Moreover, without prejudice to the immigration laws of the host countries, the sending countries should strengthen the coordination with the host countries in order to ensure that the latter's labor laws apply to the migrants, recognize the existence of employer-employee relationship, and safeguard all of the core labor rights and labor standards.

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