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# UNDOCUMENTED MIGRANT WORKERS:

## Guidelines for developing an effective complaints mechanism in cases of labour exploitation or abuse

### What is an effective complaints mechanism for labour rights violations?

A complaints mechanism is an essential safeguard that exists to prevent labour exploitation and protect the labour rights of all workers, regardless of nationality, migration or residence status.



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## What barriers do undocumented workers face?

If an undocumented worker files a complaint to the labour authorities, neither the police nor the immigration authorities need to be involved. In a number of EU member states, however, undocumented workers are prevented from filing a complaint due to a lack of clear separation between labour inspection and immigration control.<sup>1</sup> The police frequently accompany labour inspectors during inspections. The police are usually required to check the residence permits of workers and labour inspectors are often

required to report all persons found without residence status to the immigration authorities. These practices undermine the objectives of a complaints mechanism and enable exploitation by preventing undocumented workers from reporting violations and claiming their rights.

Contrary to the provisions of the Employers' Sanctions Directive, in some member states there are also no specific provisions in national law on how to make a complaint.<sup>2</sup>

In most member states there is no possibility for undocumented migrant workers to complain through third parties, such as NGOs, trade unions, or migrant workers' organizations.

## COMPLAINTS MECHANISMS IN EU LAW

Legal provisions requiring or indicating need for effective complaints mechanisms for labour rights violations can be found in several international and regional instruments. In many cases labour rights violations are civil labour law matters, while in others criminal law and justice provisions apply. At EU level, these include:

The **Employers' Sanctions Directive** (2009/52/EC) establishes sanctions for employers who hire undocumented workers. The directive also includes specific provisions aimed at protecting undocumented workers' rights, including the availability and accessibility of complaint mechanisms (Article 13.1); the recuperation of outstanding wages (Articles 6.1, 6.2 and 6.3); and access to residence permits (Article 13.4). It requires member states to implement procedures to facilitate and process complaints from undocumented workers.

The **Anti-Trafficking Directive** (2011/36/EU) sets out EU member states' responsibility to identify, protect, and support victims of human trafficking. It requires governments to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations (Article 11). An effective complaints mechanism for labour exploitation would be one such mechanism.

The **Victims of Crime Directive** (2012/29/EU) establishes minimum standards for the rights, support and protection of victims of crime. The directive applies to all victims regardless of residence status (Article 1). Although not explicitly required by the Directive, a complaints mechanism effective for undocumented migrants would be a critical implementing measure for undocumented victims of labour exploitation that is a crime, and violence in the workplace, to access their rights under the directive.

1 A PICUM position paper *Employer Sanctions: Impacts on undocumented migrant workers' rights in four EU countries* (2015) found this to be the case in Belgium, Italy, the Czech Republic, and the Netherlands.

2 See Association for Legal Intervention *Unprotected. Migrant workers in an irregular situation in Central Europe* (2014)

# What makes a complaint mechanism effective?

Complaints mechanisms should be transparent, fair, independent, accessible, responsive, speedy, and socially inclusive. The main principles of effective complaints mechanisms include:

## The Firewall

- › The firewall<sup>3</sup> is a **clear separation in law and practice** between putting forward a complaint to the relevant national body and any proceedings related to immigration. Coming forward with a complaint should not lead to any reprisals for the undocumented worker in relation to their immigration status. This includes protection from fines and other administrative sanctions, prosecution for immigration-related criminal offences, arrest, detention and deportation.
- › The firewall principle should also **apply in routine labour inspections** that are not initiated by the worker themselves but through inspections of relevant bodies.

## The Complaints Body

- › Sufficient **investigative powers should be granted** to the body that is responsible for properly assessing the complaint.
- › The complaints body should be granted access **to all places of employment**, including private residences.
- › The body responsible for complaints mechanisms should be **adequately resourced**.
- › Complaints mechanisms should be geared towards the **protection of workers**.

## Legal Proceedings

- › The undocumented worker should have the **right to be involved** and supported by a third party in any proceedings.
- › The undocumented worker should have the **right to appeal** the decision in a court or other relevant independent body.
- › There should be guaranteed **access to legal aid** for undocumented workers who wish to file a complaint and access to other means of legal representation in countries where legal aid is not available.

## Residence Status

- › The complaints body should **request a temporary residence permit** for the undocumented worker and their family for the duration of the procedure, with the possibility of extension.

## Unpaid Wages and Compensation

- › The complaints body should have the right as appointed by the government to **award unpaid wages and compensation** to the undocumented worker even if the worker is no longer residing in the country.
- › A precise mechanism should be put in place to ensure that unpaid wages and compensation awarded **are actually received by the undocumented worker**.

<sup>3</sup> See the European Commission Against Racism and Intolerance (ECRI) [General Policy Recommendation No.16: on Safeguarding Irregularly Present Migrants from Discrimination](#) (2016)



## Data collection and monitoring

Data should be collected regularly by state authorities at the national level, and made public, on:

- the number of complaints lodged
- the number of labour inspections
- the number of violations registered by labour inspectors
- the number of persons that received compensation and the amount received in each case
- the number and types of residence permits issued
- the number and types of sanctions imposed on employers
- the number of undocumented workers who were given an order to leave the country following an inspection
- the number of undocumented workers who were deported following an inspection

PICUM  
Platform for International Cooperation on Undocumented Migrants  
Rue du Congres / Congresstraat 37-41, post box 5  
1000 Brussels  
Belgium  
Tel: +32/2/210 17 80  
Fax: +32/2/210 17 89  
info@picum.org  
www.picum.org

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