



A Worker is a Worker:
How to Ensure that Undocumented
Migrant Workers Can Access Justice

Executive Summary

The vast majority of undocumented migrants work, across a range of different sectors. The workforce in some of these sectors is highly gendered. Migrant workers with precarious, dependent or irregular status frequently experience conditions below those required by minimum labour standards and collective bargaining agreements, in terms of pay, working time, rest periods, sick leave, holiday, and health and safety.

Many undocumented workers endure such conditions, as they see little alternative. If they try to negotiate due payment and respect of basic working conditions, their employers threaten to report them to immigration and wield over them their inability to access formal complaints mechanisms without risking deportation.

This report therefore explores judicial and state-based¹ non-judicial labour complaints and redress mechanisms that are in place in 15 EU member states, and what happens or would happen when undocumented workers try to use them. The report covers Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom (UK). It also draws on a few examples from non-EU countries and cities with

large migrant worker populations; Brazil, Geneva, Israel, New York City and South Korea.

It finds that:

- Undocumented migrants' rights at work are protected by the law,² although there remain problematic exclusions of domestic workers and sex workers, in particular, from labour law protections, and a lack of implementation.
- Civil courts and labour tribunals in 13 out of 15 EU member states in the study³ do or would consider undocumented workers' claims equally to other workers. They usually check identity, but do not check work permits, and in practice do not report undocumented workers for immigration enforcement purposes if the irregular status of the worker is known. There remain very significant barriers for undocumented workers to take complaints, participate in proceedings and receive due wages and compensation through the courts.
- There are significant barriers to undocumented workers gaining access to justice through the criminal justice system. Undocumented victims of crime, including violence and human trafficking,⁴ are often required to leave the country or are deported as a result of interaction with law enforcement.

1 Neither international and regional mechanisms nor non-state based non-judicial grievance mechanisms are addressed in this report, though they may be useful mechanisms for undocumented workers and those supporting them to explore. For example, mechanisms on international level that may be relevant include: the [UN Human Rights Council Complaint Procedure](#) to address consistent patterns of gross and reliably attested violations of human rights, the [OECD Guidelines for Multinational Enterprises Complaint Procedure](#), the [Ethical Trading Initiative Code Violation Procedure](#) and the [Fair Labor Association Complaint Procedure](#). At national level, there may be national ombudspersons who can take complaints, as well as corporate specific mechanisms (which may also have international reach for international companies).

2 This includes international, regional and national human rights laws, including ILO Conventions, the European Convention on Human Rights (ECHR) and related jurisprudence from the European Court of Human Rights ("EctHR"), and the EU Charter on Fundamental Rights, among others. They are also covered by a range of other EU law on migration, anti-trafficking, employment, health and safety and anti-discrimination and related jurisprudence from the Court of Justice of the European Union ("CJEU").

3 The 13 EU member states are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain. Ireland and the United Kingdom (UK) are the two countries in the study where there are some limitations in coverage and/or additional considerations when the civil courts and labour tribunals handle undocumented workers' cases, so the consideration is not equal to workers with authorisation to work.

4 As described in the relevant section, this relates to immigration enforcement before identification and if not found to be a victim of human trafficking, as well as the provision of only short-term permits for the duration of the reflection period or criminal proceedings, including for recognised victims. Only a few EU member states regularly provide long-term permits to recognised victims of human trafficking.

- In 13 out of the 15 EU member states,⁵ there is an inspection body with the competence to take individual complaints from workers regarding issues related to underpayment of wages and working conditions, although not all have the competence to investigate and take decisions on complaints of workers without an authorised employment relationship.
- Practices of labour inspections reporting personal information on undocumented workers to immigration authorities vary greatly, as does whether they are based on law, a formal cooperation agreement/ policy or common practice. There are a number of important examples, where labour inspectors maintain professional confidentiality and do not report undocumented workers with labour complaints for immigration enforcement.
- In all 15 of the EU member states⁶ examined in this report, there is an inspection authority whose remit relates to working conditions, salaries or financial matters, who is tasked with checking work permits of workers, in order to impose sanctions on employers in the case of irregular employment. Sometimes these authorities carry out inspections together with the police.
- Health and safety inspectorates are largely independent, when a separate authority, though there are some cases of reporting and/or joint inspections. Undocumented workers are normally able to claim for compensation for occupational illness and injury, but face barriers to doing so, and are usually excluded from incapacity allowance and essential health services, while being particularly at risk.
- Certain sectors where undocumented workers work face particular challenges in the monitoring and enforcement of employment standards include agriculture, domestic work and sex work, as well the gig economy.⁷
- Aside from the risk of immigration enforcement as a result of engaging in complaints mechanisms, key issues include lack of information, advice and legal assistance; the length of procedures and associated costs; additional sanctions related to irregular status or irregular work; challenges to prove the employment relationship and the extent of the rights violations; and difficulties to actually receive funds when employers evade payment.

The report also highlights several noteworthy practices to provide insights on how the different national systems work in practice, and inspiration on avenues for change. It concludes that it is essential to ensure undocumented migrant workers can effectively exercise their labour rights without risking immigration enforcement, to promote decent working conditions for all workers, prevent and provide remedy for exploitation, and reform sectors that rely on exploitation and undeclared work. Finally, it suggests recommendations to improve enforcement of labour standards and access to justice.

5 The 13 EU member states are: Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom (UK). Austria and Germany are the two countries in the study where there is no inspection body which handles workers' complaints regarding wage issues, though there are inspection bodies with competence to take complaints on other issues.

6 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom (UK).

7 The "gig economy" is a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer. It is increasingly common way of organising labour across several sectors, such as delivery.

Recommendations

To national authorities

Labour and justice authorities

- **Address gaps in labour law coverage and make explicit the inclusion of all workers.**
 - » Explicitly include all workers - in any employment relationship and regardless of their authorization to work - in relevant laws and collective agreements regulating wages, working time, rest and paid leave, conditions of work, parental rights, termination of employment, health and safety, insurance and state compensation funds or mechanisms (in case of employer insolvency and work-related illness or injury).

- **Re-establish the independence and primary role of labour authorities as the protection of workers and enforcement of laws related to conditions of work and ensure this role is not undermined by immigration enforcement responsibilities or cooperation.**
 - » Take measures to ensure there is no risk of immigration enforcement as a result of filing a complaint to labour inspection authorities, civil courts or labour tribunals, or engaging with labour authorities during inspections.
 - Establish clear policy and training around professional secrecy of labour inspection authorities and labour courts, to protect the confidentiality of workers submitting complaints or identified during inspections, as essential to enforce labour rights for all workers and to prevent employer retaliation, exploitation, and repeat victimization.
 - Overhaul practical cooperation agreements to ensure personal data gathered and actions carried out for enforcement of labour, social and financial laws are not used for immigration enforcement purposes, including by ending automatic transmission of data through access to or joint databases, as well as reporting obligations and joint inspections.
 - » Critically re-assess the role of labour inspectors in the enforcement of sanctions against employers of irregular migrants as well as the real impacts of such regimes overall. This review should be based on an independent and transparent evaluation, with consultation of all stakeholders including representatives of labour inspectors and migrant workers, and anonymized data on complaints lodged, inspections, labour violations registered, compensation, residence permits and sanctions.

- **Address practical aspects which make complaints mechanisms inaccessible and ineffective, in particular for migrant workers.**
 - » Provide labour inspection authorities with sufficient powers to investigate and award due wages and compensation, including enabling access to all places of employment as well as adequate resourcing to protect all workers.
 - » Provide legal aid to people with low income, including undocumented workers, as needed to file complaints and access compensation through civil and criminal courts and tribunals. Promote quality and independent legal advice and representation in the area of employment law through funding.
 - » Ensure that designated third parties can file complaints on behalf of undocumented workers. These third parties should include ombudspersons and relevant statutory agencies, trade unions and specialised NGOs.
 - » Share the burden of proof between the worker and employer in civil labour cases; the burden should not weigh only on the worker. Ensure multiple forms of evidence of the working relationship and labour

rights violations are accepted, including witness testimonies and declarations from trade unions or other designated third parties, implementing, at a minimum, the 3-month presumption of the employment relationship required by the Employers Sanctions' Directive.

- » Support training for different professionals (including in the health sector) on the rights of undocumented workers and undocumented victims of crime, to increase awareness, provision of information and referrals to local support organisations.
- » Establish mechanisms to ensure that when awarded, workers receive their due compensation in practice.
 - Make better use of powers to freeze the assets of exploitative employers early on in proceedings.
 - Establish pre-payment mechanisms to automatically provide financial support to people awarded compensation after a short period of time of nonpayment and pursue payment from the perpetrator.
 - Require banks to not discriminate in access to basic bank accounts on the basis of residence status and ensure administrative and documentary requirements do not block access in practice.
 - Cooperate with NGOs to support the transfer of funds, both when the worker is within the country and in another country.

Immigration and police authorities

- **Promote reporting, participation and remedy within the criminal and labour justice systems.**
 - » Establish safe reporting policies and practical protocols to ensure that undocumented victims and witnesses can safely report to, and engage with, law enforcement regarding incidents of labour exploitation, forced labour, human trafficking and violence and harassment in the workplace, without facing any risk of immigration enforcement as a result.
 - » Suspend enforcement of any existing return decision or removal order during ongoing procedures, and do not issue a return decision to any person who files a complaint, during the ongoing procedure, or on resolution of civil and criminal proceedings. This is essential to enable accountability and access to justice and to disempower employers who would threaten their workers with deportation.
 - » Grant residence and work permits to enable people to seek justice through civil or criminal procedures, as well as for the benefit of the prosecution and justice system by:
 - Facilitating access to special permits for all victims of criminal labour exploitation, human trafficking and other violent crimes who would like to remain in the country, independent of their cooperation with authorities and participation in legal proceedings.
 - Ensuring that, if issued on a temporary basis, special permits for victims of crime can be maintained at least until resolution of the case, provide access to services and the labour market, may be counted as regular residence towards statuses based on accrued residence and be convertible to a more stable status based on clear criteria, as a remedial measure and to prevent repeat victimisation, if a long-term status has not already been provided.
 - Developing clear criteria - in consultation with stakeholders - upon which equivalent permits to special permits for victims of crime would be accessible for claimants involved in civil labour proceedings.
 - Ensuring that undocumented workers involved in either criminal or civil labour proceedings, are supported to apply for residence and work permits provided for by national law that they may be eligible for (e.g. on grounds of work, family, study, protection or humanitarian reasons) and accepting applications from within the country.

- » Establish protocols that prohibit pursuing immigration enforcement as a result of someone having had a permit linked to legal proceedings, when it ends, regardless of the outcome, as this would in effect sanction the person for having sought protection and justice.
- **Facilitate labour rights through work permit schemes, and in the context of immigration enforcement.**
 - » Enable migrant workers to change their employer on the same residence and work permit, and change to a different type of permit, as well as apply for residence and work permits that are available from within the country.
 - » Ensure that all undocumented migrants who are in return or removal proceedings are provided with information about their rights to unpaid wages.
 - » Facilitate undocumented workers' access to complaints mechanisms, legal advice and assistance.
 - » Establish and utilize mechanisms to ensure undocumented workers in immigration proceedings actually receive their due wages and compensation.

To the EU institutions

- **Address the rights and situation of workers with precarious or irregular status facing labour rights violations, exploitation, violence or other crimes, in every relevant policy area and entity of the EU institutions.**
 - » Consider and address the political and institutional measures that need to be taken to enable access to justice for undocumented workers in every relevant area of work of the European Council, European Commission, European Parliament, including: migration, employment and social affairs, equality, justice, agriculture, regional development, trade, foreign affairs and health.
 - » Include a focus on the rights of workers with precarious or irregular status in the following EU entities and policies in the 2019-2024 legislature:
 - Strategy on victims' rights,
 - Gender equality strategy,
 - Farm to Fork strategy,
 - Minimum wage legislation,
 - Efforts to promote mandatory due diligence in supply chains,
 - EU Platform on Undeclared Work and
 - European Labour Authority.
 - » Develop meaningful engagement and consultation with NGOs, including direct service providers and migrant worker organisations.
 - » Within the European Labour Authority, include regular consultation of relevant NGOs.
 - » Extend the participation of NGOs in the European network on victims' rights.
- **Channel EU funds in the current and next multi-annual financial framework to support effective labour complaints mechanisms for all workers, regardless of status.**
 - » Channel resources from the structural funds (the AM(I)F and ESF(+)), operational grants to EU civil society networks, and action grants to support:
 - Civil society and trade union organisations to provide independent information and advice, legal assistance, and support services to workers with precarious or irregular status, to facilitate effective access to complaints mechanisms and cooperation with labour inspection, in line with Article 6.2

and 13.1 and 13.2 of the 'Employers' Sanctions Directive' (in particular in relation to complaints via third parties).

- Training for labour inspectors on the rights of undocumented workers under the Employers Sanctions Directive and the obligation to provide information.
 - Mechanisms with clear lines of responsibility within migration and labour authorities to ensure that persons who are in immigration enforcement proceedings receive back wages whether they are in the country, or elsewhere, including through cooperation with NGOs.
 - Establishment of special funds to pre-pay compensation to workers in cases where employers evade paying due financial settlements (similar to those in place in cases of employer insolvency or for victims of violent crime).
 - » Ensure that EU funds allocated for complaints mechanisms for undocumented workers do not establish separate complaints mechanisms or support any aspect of labour complaints mechanisms that may lead to immigration enforcement, but facilitate access of undocumented workers to existing complaints mechanisms for all workers.
 - » Promote quality jobs through the Common Agricultural Policy (CAP) by making receipt of payments conditional on respect for labour rights and standards.
 - » Support additional research on the situation of particularly vulnerable groups of workers and the functioning of complaints mechanisms in cases of undocumented workers.
- **Evaluate and improve the EU legal framework.**
 - » Employers Sanctions Directive:
 - The ongoing evaluation by the European Commission should assess the implementation of the provisions on rights for undocumented workers, and support member states to implement effective complaints mechanisms which do not lead to immigration enforcement, as part of a comprehensive and coherent migration policy.
 - The European Parliament should commission an independent evaluation of the impacts of employers' sanctions on irregular migration, undeclared work, employment standards and exploitation, and human rights.
 - » Ensure that the evaluations of the Anti-Trafficking Directive, Compensation Directive and Victims' Directive pay particular attention to undocumented victims.
 - » Encourage member states to use the various possibilities in EU law (e.g. from the Employers Sanctions Directive, the Directive on residence permits for victims of trafficking and smuggling, the Return Directive) to provide people in civil and criminal proceedings with residence permits both to participate in proceedings and access protection and justice in the longer term.
 - » Support ratification and implementation of relevant ILO instruments, in particular C189 on domestic workers and C190 on violence and harassment in the world of work.

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