

The Fundamental Rights of Irregular Migrant Workers in the EU¹

ABSTRACT

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, aims to inform policy debates about how to protect more effectively the fundamental rights of irregular migrant workers in the EU. It analyses the nature and causes of the gaps between the fundamental rights protections enshrined in EU legal standards and the rights realised by irregular migrants working in EU Member States in practice, and it discusses strategies for how these 'protection gaps' can be reduced.

Scope and Aims of Study

There are large gaps between the rights of all individuals and workers as articulated in the Charter of Fundamental Rights of the European Union and the experiences of irregular migrants working across Member States. This Study analyses the **nature** and **causes** of these **protection gaps**, and it discusses strategies for how they can be **reduced**.

Efforts to reduce the protection gaps for irregular migrant workers face **two fundamental challenges**. First, how and to what extent can "the law" be used to protect people who live and work "outside the law"? Second, how can irregular migrants access and realise their fundamental rights in a meaningful way when their irregular residence status makes them liable to deportation? These two questions, which relate to the limits of legal protection and the tension between the promotion of rights and immigration control policies, are at the heart of policy debates about the rights of irregular migrant workers.

Key Findings

Shortcomings of EU Laws on the Rights of Irregular Migrant Workers

As a benchmark for fundamental rights protection in the EU, the Charter of Fundamental Rights is not sufficiently clear about its scope vis-à-vis the labour rights of irregular migrant workers. EU Directives on labour standards similarly offer ambiguous protection for irregular migrant workers owing to the extent to which they are circumscribed by the parameters of national labour laws. The Employer Sanctions Directive, whilst marking an important development in the explicit protection of irregular migrants' rights, has nonetheless had the effect of tightening the relationship between fundamental rights protections and immigration controls, thereby undermining the protective value, in rights terms, of this recent EU initiative.

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621934/IPOL_STU\(2020\)621934_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621934/IPOL_STU(2020)621934_EN.pdf)



Rights Protection Gaps in the Laws of EU Member States

Despite the development of revised and new national laws to transpose the Employer Sanctions Directive and otherwise improve fundamental rights standards for irregular migrant workers, significant rights protection gaps remain in all EU Member States. The formulation of national labour laws, the interaction of labour laws with immigration laws, and legal doctrines of “illegality” and “immoral contracts”, all limit the scope of national fundamental rights protections and, in particular, labour justice guarantees, for irregular migrant workers. The tensions that arise in national policy-making in terms of balancing fundamental rights duties and implementing national labour and immigration laws contribute to reluctance among irregular migrants to assert their rights because of fear of deportation.

Labour migration can generate a range of multi-faceted costs and vulnerabilities for migrants, especially – although not only – for irregular migrant workers. To understand the conditions of irregular labour migrants, however, we need to go beyond costs and ‘adverse effects’ to consider the range of benefits irregular migrant labour markets can create for different groups including employers, labour market intermediaries, host country consumers, and for migrants themselves. The employment of irregular migrants can also serve particular economic and political functions for host states.

Reducing the Gaps 1: welfare rights and services

Sub-national actors at municipal and regional government levels in a limited number of EU Member States have filled some of the gaps in fundamental rights protections for irregular migrant workers. Initiatives have been most successful in the areas of social welfare such as health, social assistance and housing and, typically require effective partnerships with NGOs. Sub-national actors cannot, however, be expected to play an effective role with regard to strengthening the labour rights protections for irregular migrant workers. Given the centralised nature of labour laws, sub-national actors lack devolved powers to take independent steps to promote labour justice for migrants working illegally. At best, EU cities have financially supported NGOs to assist migrants with crucial labour, immigration and human rights law advice.

“Firewalls” which prevent service providers from reporting the irregular migration status of service-users to the relevant authorities, can increase irregular migrants’ access to basic social rights. Firewalls are, however, a less effective tool for protecting irregular migrants’ labour rights. Labour justice procedures require interaction with law enforcement agencies (such as the courts, police and labour inspectorates) whose mandates, developed at national level, typically impose duties to report irregular migration. In many cases, labour exploitation is directly related to the irregular migration status of the worker. A firewall designed to prevent law enforcement authorities from reporting irregular migration to immigration enforcement authorities could be viewed as contrary to the public interest by potentially undermining efforts to target the causes of labour exploitation and by restricting the ability of the state to pursue employer sanctions.

Reducing the Gaps 2: labour rights and justice

To encourage irregular migrant workers in exploitative employment situations to assert their labour rights in legal proceedings, they must be assured that, should they be successful in their claims against their employers, they will have the opportunity to reside and work legally in the host country, at least for a limited duration. It is essential to provide a meaningful incentive for irregular and exploited migrants to come forward without undermining the host country’s immigration controls. These twin goals could be achieved by creating a special temporary **‘redress work permit’** specifically for irregular migrant workers who have come forward to claim their labour rights and whose employment conditions were found, by the relevant judicial authority, to constitute a significant breach of their fundamental rights.

For labour justice measures to be effective and trusted by irregular migrant workers, it is critical to support **NGOs, trade unions and/or National Human Rights Institutions to act as intermediaries** between irregular migrants and law enforcement authorities in complaints processes. There are already encouraging practices in this regard in certain Member States and these could be developed further through increased financial support.

In order to clarify the scope of EU laws in protecting the labour rights of irregular migrant workers in the EU, consideration should be given to the development of a **new EU Directive specifically on labour protections for irregular migrant workers** in the EU. Based on the Charter and existing labour rights Directives, such a new Directive should make clear the full range of labour rights standards that apply in equal measure to irregular migrants as to those residing and working legally in the EU.

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