

International Journal of Social, Political and Economic Research

IJOSPER

ISSN: 2667-8810 (Online)

ijosper.uk



Original Article

Received Date: 10-06-2022

Accepted Date: 29-10-2022

doi.org/10.46291/IJOSPERvol9iss02pp1-15

The Legal (in)Security of Foreign Workers

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Abstract

Portugal recognizes several rights for foreign workers in order to protect them. These rights include fundamental rights as well as labor rights and worker guarantees given by the Portuguese labor code. The constant socio-economic developments and changings bring the necessity to harmonize the legislation to these changes, helping the foreign workers to ensure their rights, guaranteeing their legal and labor security, and good working conditions as well. Although the legislation establishes a set of rights and guarantees, studies have confirmed that foreign workers are in a position of vulnerability, so its relevant to focus on questions like: Which documents allow entry and to stay in the country, the importance of holding one of those documents and possible consequences of not having such documentation? What is meant by undeclared work? What is the legal and labor insecurity of the foreign worker? Therefore, this paper focuses on the most violated rights of foreign workers in Portugal, as well as the main difficulties and obstacles to which they are subject.

Keywords: Legal Security, Foreign workers, Labor Rights.

1. Introduction

In recent years, Portugal has seen a change in migratory patterns, now seeing itself as a receiving country and an attractive destination for immigrants. Currently, we live in a time marked by the increase in the migratory flow, cultural diversity, intercultural relations and the

evolution of the international labor market marked by social, economic and cultural changes, metamorphosing a homogeneous society into a socioculturally diverse society.

It so happens that this rapid increase brings with it some disadvantages at the preparatory level of society, thus verifying the existence of social stress marked by cultural conflicts, the social exclusion of immigrant communities, discrimination, racism and xenophobia. The increase in the number of immigrants created a need to generate a legal framework for foreign workers in order to preserve their rights, both fundamental and labor.

The essential importance of this paper is to understanding all the difficulties encountered by foreign citizens when they leave their country and start to live and work in an unknown country, it is included here, among many aspects, being confronted with prejudices and stereotypes (ex: that are seen as a threat to the Portuguese labor market and/ or a burden to the local economy, or as an invading individual), language barriers (which make communication and integration difficult), cultural clashes, discrimination and failure to enforce labor rights. The foreign citizen is in a vulnerable position, a vulnerability that emerges from these same difficulties.

This paper goes through a conceptual approach, more precisely, through the concept of illegal work, undeclared work, human trafficking, and labor exploitation. It is intended here to understand the reality to which foreign workers are subjected, trying to understand the consequences that these irregularities bring to their lives both economically and socially.

2. Illegal Work

According to the International Labour Organization (ILO), illegal work is the one who that does not comply with national legal requirements and practices. In accordance with the Organisation for Economic Co-operation and Development (OECD) point of view, it is that which is provided by persons (natural or legal) who are not legally authorized to work. The definition of illegal work should focus on the employer's capacity and legitimacy to perform the work. The European Union (EU) considers illegal work to be when we encounter the following situations:

a) The recurrence of workers not legally authorized to work (such as, for example, foreign workers not regularized, professionals not holding a qualification to exercise such functions or activity, incompatibility between public and private functions, minors without age and mandatory minimum schooling, unemployed people receiving unemployment benefits, among others);

- b) Self-employed workers, with conditions characteristic of an employment contract, are often false self-employed workers or false service providers.
- c) Work in an internship or training regime under conditions that are characteristic of an employment contract.
- d) Illegal Posting of Workers.
- e) Illicit precarious work, such as, for example, when abusive use is made of fixed-term employment contracts and temporary employment contracts.
- f) Economic activities developed by an entity not authorized or licensed.

Illegal labor solicitation is characterized by being "the enticement or solicitation, with lucrative intent for oneself or for others, in a repeated manner or not, with the aim of introducing into the labor market foreign citizens who are not qualified with a residence permit or visa that entitles them to exercise a professional activity." (Santos, 2013, p. 366).

3. Undeclared Work

Undeclared work is understood to be any type of work, paid for and of a lawful nature, but which has not been declared to the appropriate public authorities. Often undeclared work is associated with housework, gardening, tutoring, and construction work.

This definition includes clandestine work provided by irregular immigrants (this situation occurs in most economic activities and mainly in agriculture, forestry, the extractive industry and the primary sector). Therefore, in comparison with the concept above referred, there is neither the lack of remuneration nor the illicit nature of the work activity.

Thus, there is a lack of communication to public entities, more precisely, to the Tax Authority (AT) and Social Security (SS) for the purpose of assessment of income tax and social security contributions. There is also a lack of communication to the working conditions authority when this is necessary (e.g. admission of workers from countries outside the European Union (EU) and to the Immigration and Borders Service (IBS) in the case of foreign workers).

In short, undeclared work consists of the exercise of paid work (in cash or in kind), of a lawful nature, but which has not been fully or partially declared to the public authorities (AT, SS, SEF, ACT, etc.).

The concept under analysis can be further typologically divided between wholly or partially undeclared work and intranational and international undeclared work. The first typology is related to the type of public authority to which the exercise of the activity or the remuneration was not declared. The second typology, in turn, already depends on the regularity of the situation of the intervening economic agents in terms of nationality and immigration legislation.

Concerning to the totally undeclared work, there is neither the declaration of the remuneration received through the development of the work activity nor the declaration of the exercise of such activity.

This irregularity is highly detrimental to the worker, since there is no employment relationship between the worker and the employer, which causes the worker to bring about numerous consequences regarding the exercise of their rights. The worker who is subject to undeclared or partially undeclared work is in a vulnerable position facing a set of barriers that compromise good working conditions and consequently their psychological, physical and psychosocial well-being. These barriers created by not creating a labour relation and not reporting the hiring of a worker to the above-mentioned entities foster the non-existence of labour and social protection and end up allowing some rights violations to be verified, the most observed being the following:

- a) Not having an insurance policy, which makes it impossible for the worker to benefit from insurance in the event of an accident at work and ensure the repair of the damage resulting from it. "The most vulnerable human and social dimension that is damaged by the accident at work claims that it should be prioritized before the interests of the company, hence its progressive framing in the theories of civil liability in the face of the most elementary finding of justice that those who create or maintain a risk for their own benefit, should bear the harmful consequences that result from it" (Varela, 1994, p. 646). Responsibilities for work accidents are imposed on the insurer, but it is the employers who have the obligation to respond for damages arising from work accidents when the insurer does not cover them. However, if there is no employment relationship, the employee is not fully protected with regard to certification that all data arising from such an accident are repaired;
- b) Social security contributions are not made correctly or not at all, and thus they have no social protection in terms of social benefits, e.g. maternity allowances, child care allowances, old age pensions, sick leave, unemployment benefits;

- c) They have no employment relationship, which allows them to be subjected to undignified and unsafe working conditions.
- d) No equality in career advancement opportunities, on-the-job continuing education.
- e) Discrimination and harassment at work which is a psychosocial risk;
- f) There is no place for the protection that is recognized by the legal regime of parenthood, which will adulterate the right to leave, the possibility of justified absence, there is no reduction in working time;
- g) There is no protection of the safety and health of pregnant workers, i.e. pregnant workers are often subjected to tasks and activities that are prohibited by law, such as exposure to chemical agents, vectors of toxoplasma transmission or ionizing radiation, physical agents that may cause fetal injury or placental abruption (vibrations, manual handling of loads, extreme heat or cold temperatures);
- h) Insertion of workers in work sectors below their qualifications;
- i) Unfavorable working conditions and high levels of insecurity;
- j) The retribution is not paid as stipulated by law, i.e., many times we are faced with situations in which the retribution is lower than the minimum monthly guaranteed remuneration or that which is foreseen by the applicable Collective Labor Regulation, it may also happen that it is not paid on time, or the vacation and food subsidies are not paid;
- k) The maximum limits of normal working hours are not respected, i.e., the worker ends up working more hours than those allowed by law, which can put at risk the worker's well-being, increasing the probability of occurrence of work accidents or foster psychosocial risks derived from excessive workload and little rest, such as stress and burnout. This lack of rest can compromise the work activity, we speak here not only in low productivity or the incorrect development of work tasks, but also ends up interfering directly in the mental and physical health of workers, enhancing the occurrence of wear and tear and reduction of self-esteem, quality of life and well-being.;
- l) Existence of contractual vicissitudes;
- m) Insecurity regarding unfair dismissal, that is, if the "employment relationship" is not communicated to the competent authorities, it will be easier for the employer to dismiss the employee without just cause. The worker here does not enjoy the protection that is given by legislation, namely by articles 351 and following of the Labor Code (Portuguese Law 07/2009),

nor the compensation that would be due in the case of termination of the employment contract or compensation in the case of unfair dismissal;

n) Non-compliance with the rules of health and safety at work and measures to promote the improvement of workers' health and safety, there being no correct "development and implementation of an effective and coherent policy of management and health and safety at work (OSH) which, in strict compliance with the general principles of prevention, presupposes, inter alia: the organization of the company's OSH services; the assessment and control of occupational risks; the implementation of prevention measures appropriate to the risks in question; the training of workers in STT; the monitoring of workers' health; ensuring that workers exercise their rights to consultation, information and participation; the use of appropriate work equipment; and the implementation of collective and individual protection measures that prove necessary" (Santos, 2013, p. 114);

o) Degradation of the working and living conditions of worker's, "translated, as a rule, into the exercise of professional activity in undignified, unhealthy and unsafe conditions, in clear violation of the most basic workers' rights, especially in matters such as equality and non-discrimination" (...)” (Santos, 2013, p. 183). The working conditions degradation fosters an increase in work-related accidents (accidents at work and occupational diseases), with a mutual degradation of moral and ethical values.

p) Impediment to the acquisition of a residence permit to exercise a subordinate activity. This is an impediment because the acquisition of the permit is only possible if the individual applicant already holds an employment contract in accordance with the law (as seen in the previous chapter) and is registered with social security and has his tax situation in order, for example.

The fact that they usually do not benefit from adequate social protection, have difficulty understanding and expressing themselves in the language of the host country, do not have access to relevant information, are unaware of the legislation applicable in the host country (and, in particular, of their rights and obligations), are unable to have their qualifications, skills and professional experience recognised, validated and certified, in addition to the fact that they live in constant fear of being deported to their country of origin or citizenship, tend to aggravate their particular vulnerability, reducing their level of demand and their capacity to claim and exercise rights, which is often translated into accepting undeclared work, very often in socially unacceptable conditions (because undignified, unsafe and unhealthy), as the only way to ensure their own subsistence and that of their families, thus contributing to the generalized reduction

of working conditions through social dumping. (Santos, 2013, p. 358). Foreign workers fall into one of the groups that the literature typifies as one of the most vulnerable groups to involuntary undeclared work.

In the context of undeclared workers, irregular immigrants end up being among the most exposed to intolerable levels of occupational risks, often being forced to work for long periods, without breaks and without rest days, usually in tasks of low productivity and not very demanding in terms of qualifications, earning low wages (often below the minimum monthly salary guaranteed by law), irregular and without guarantees of receipt and, usually, without any access to training and information. (Santos, 2013, p. 359).

Controlling the phenomenon of undeclared work is a complex task that is highly dependent on the act of denunciation (by the worker or third party) and inspections by the competent authorities.

Although there has been a progressive increase in the investigation of this fact, it is necessary to create methodologies and techniques for prevention and to increase the efficiency of inspection.

4. Human Trafficking and Labor Exploitation

Trafficking in Human Beings (THB) is characterized as a very complex crime against personal freedom because it uses various forms of violence and exploitation. As stated in Article 160 of the Penal Code, anyone who "offers, delivers, recruits, entices, accepts, transports, harbors, or receives a person for the purpose of exploitation, including sexual exploitation, labor exploitation, begging, slavery, the removal of organs, or the exploitation of other criminal activities a) By means of violence, abduction or serious threat; b) By means of a ruse or fraudulent maneuver; c) With abuse of authority resulting from a relationship of hierarchical, economic, work or family dependence; d) By taking advantage of the psychic incapacity or situation of special vulnerability of the victim; e) By obtaining the consent of the person who has control over the victim; shall be punished with imprisonment (...)", that is, it is verified here the identification of the forms that this crime is practicable while prohibiting the practice of these acts. It is important to emphasize that these acts are punishable and prohibited even if the victim agrees to perform them, as provided in paragraph 8 of the article under analysis.

As far as exploitation is concerned, we must take into consideration that "besides the exploitation that usually occurs before departure, associated with the charging of high fees for the "service" of placing irregular migrants in the host country, or during the journey, related to the deplorable, unsafe and dangerous conditions of the trip itself, exploitation usually arises after arrival in the country of destination and is usually of a sexual or labour nature (Santos, 2013, p. 379). As far as labor exploitation is concerned, it refers to the submission of the worker to precarious working conditions and insecurity in the work context. We can verify a higher occurrence of exploitation in sectors such as agriculture and construction.

This crime is associated with a pattern consisting essentially of three major phases: recruitment, transportation and exploitation. These phases can be developed by only one agent, but in most cases, we find 3 entities, namely, the recruiter, the transporter and the employer. The recruiter selects, contacts, and recruits the potential victims by deceiving them and abusing their vulnerability. The transporter takes the foreign workers (victims) to the place where they are to be exploited, where the employer enters and assigns them the tasks, they must fulfill through mechanisms of direct or indirect coercion.

It is generally in the last phase of the process that people realize the web of dependence in which they have been entangled, but the hypothesis, also real, of abusive conditions being noticed as soon as they are recruited, or during transport (...) we can see that they are mostly made through the publication of telephone contacts in newspapers with a wide circulation, posters posted in local cafés, via the Internet, or through informal acquaintances where a "friend of a friend" makes an offer that cannot be refused. In the specific case of Trafficking for Labor Exploitation, the bait usually consists of a strangely generous job offer. (OIKOS, 2018, p. 38).

The elements of labour exploitation include excessive working hours and non-compliance with rest periods and days, non-compliance with safety and hygiene rules and measures at work, non-compliance with the duty to pay the worker's wages or payment of wages below the minimum wage, unlawful dismissal, non-compliance with the duty to notify the ACT and SS, followed by non-compliance about the payment of social security contributions, among others. It is important to stress that many times exploitation is not the only thing that happens, i.e. it can be intertwined with the use of coercion - this is carried out in many different ways, such as violence, withholding of documents or means of subsistence, threat of deportation and threat to the person and their family members.

It was verified, and still is, that exorbitant amounts are demanded from them regarding accommodation, food, transportation, gas, electricity and water, and the deductions of these

expenses are made directly from their salaries, never reaching the total salary "in the hands" of these workers. The fact that this discount is direct and that there is even a situation where documents or salaries are withheld, makes it impossible or extremely difficult for foreign workers to find protection mechanisms, making it essential to increase inspections by the competent authorities in order to dismantle these crimes.

In view of the above, to verify and prove a situation of THB ends up being a little difficult, since they are well organized and hidden networks and there is an enormous fear or even ignorance on the part of the victim, not reporting this occurrence.

According to the the Immigration, Borders and Asylum Report 2020 (RIFA 2020), 59 victims of THB were reported, of which 48 correspond to labor exploitation, 6 to sexual exploitation, 1 to begging and 2 to illegal adoption. Labor exploitation is the type of exploitation that has the highest incidence in Portugal.

According to the Observatory of Trafficking in Human Beings, there are more cases of THB in the agricultural sector, followed by catering and domestic servitude.

The defendants recruited foreign citizens who they knew were illegally residing in Portugal to work in the commercial establishments they operated, imposing on them excessive working hours, without time off and without adequate remuneration, putting them to sleep in lodgings without minimum conditions, thus taking advantage of the situation of special vulnerability and total economic dependence in which, they found themselves (OTSH, 2021, p. 40).

5. Other Illegalities (Conected or Isolated)

Analyzing the main illegalities verified by professional experience and knowledge, it is pertinent to address some of the most common ones in order to better understand the reality of foreign workers.

5.1. SWINDLING

Swindling in relation to work or employment consists of "causing financial loss to another person, with the intention of obtaining for oneself or a third-party illegitimate enrichment, by enticing or promising work or employment abroad, or by enticing or promising work or employment in Portugal to a foreigner (Santos, 2013, p. 368). In addition to fraud related to work or employment, in the strict sense, it is common to see a dynamic of collaboration between the employer and intermediary companies that recruit foreign workers by promising them a certain job, under certain conditions. However, what was promised and agreed upon

does not correspond to reality, i.e., the job may not exist, or it may exist under precarious conditions. Usually, these intermediary companies not only provide the contact between the employer and the worker, but also "help" in obtaining the documentation for the entry of foreigners into the country (for example, tourist or short-term visas) and in obtaining accommodation.

In the most drastic situations, such companies manage the financial and social situation of foreign workers, receiving their remuneration, and in some cases directly discounting the value of their mediation (in addition to values already paid before entering the country) and accommodation (accommodation that often presents inhuman conditions and has superb values). Companies may also retain workers' identification documents to guarantee the continuation of this situation, thus playing on their fear, ignorance and vulnerability.

There is a juggling act between deception, coercion, isolation, and exploitation. Deception, as an inseparable aspect of trafficking in human beings, primarily involves the provision of false information about the nature of the work to be performed, the conditions of the work, the harshness, conditions and dangers of the journey to be undertaken, the country of destination, and the immigration laws applicable in the transit and host countries (Santos, 2013, p. 378).

5.2. Coercion

For its part, coercion mainly involves threats, extortion, abuse of power, and often the use of force and violence itself. Although coercion usually only takes place in the country of destination (since it is easier to get people across the border voluntarily), it is not uncommon for trafficked people to be kidnapped or even auctioned in "modern" slave markets (Santos, 2013, p. 378). Coercion includes forcing workers to perform tasks against their will, withholding pay or paying it late, confiscating identification papers, or intimidating workers and their families through physical or psychological violence.

5.3. Isolation

Isolation is also a common feature of the treatment of trafficked migrants, the aim of which seems to be to prevent them from establishing bonds of trust with people who might be able to help them outside the circle in which they are allowed to circulate. (Santos, 2013, p. 379). This isolation is sometimes achieved by placing the worker in lodgings that are inhabited only and exclusively by people in the same situation, who are not aware of their rights. This "network"

sometimes resorts to even more drastic actions, such as transporting these workers so that they have a work-home, home-work life, eliminating the possibility of contact with the "outside world..

5.4. False Legal Representation

One of the ways to get around the law that is widely used in the labor world is the false provision of services, that is, the worker is hired as a service provider, but is under legal subordination, i.e., usually has a work schedule, works in the employer's facilities and / or uses the materials of the employer, among others.

The employer, by using the provision of services, is avoiding the creation of an employment bond between it and the employee, thus facilitating the employee's "dismissal", that is, the employer will be able to release the employee from its services more easily.

The legislator, in order to combat this fraud, established in article 12 of the Labor Code the presumption of employment. This presumption improves the protection of foreign workers, however, they must know their rights in order to report this situation if they are victims of such irregularity. For foreign workers to know their rights, we suggest the development of awareness and information actions that should be carried out in companies.

5.5. General Irregularities

Besides the irregularities mentioned, there are countless illegal situations that foreign citizens are disposed to. Based on professional knowledge it is possible to ascertain the following situations, in addition to those already mentioned:

- a) The worker does not receive the remuneration due for his work - income is not paid or is paid but below the minimum monthly wage (e.g. 1 or 2 euros per hour), the salary is lower compared to a Portuguese worker;
- b) The worker receives remuneration irregularly;
- c) The work and consequently the worker's remuneration is subject to the days that he works, i.e., in agriculture, if it rains he does not work and does not receive a salary - it often happens that in months that rain for several days the worker only works 10 days and only receives the income corresponding to those days;

- d) Workers are denied the right to rest days - there are several situations in which workers work for 3 or 4 months (or even longer) without being entitled to a single day of rest and when they request a rest day they are faced with threats of dismissal, eviction from their accommodation, retention of documents or deportation, they are subjected to coercion;
- e) Workers are not entitled to rest periods;
- f) The employee is not entitled to the right to vacation, vacation and Christmas bonus;
- g) The employee does not receive the food allowance;
- h) No employment contract is drafted, or it is drafted with several errors and gaps, or it may even be drafted correctly but the admission of the employee is not reported to ACT and SS;
- i) The admission of a worker is not communicated at all to ACT (when required) and SS;
- j) SS contributions are not paid correctly or not at all - sometimes the employer informs the employee that his situation is in order, but this information does not correspond to the truth;
- k) The employer charges a fee for requesting the foreign worker's SS Number;
- l) The entity deducts directly from the worker's salary exorbitant amounts corresponding to accommodation provided by the entity;
- m) The worker is a victim of coercion;
- n) The worker is a victim of discrimination;
- o) The worker is subjected to poor working conditions;
- p) Individual safety equipment is not provided to the worker and is not covered by the occupational health and safety policies;
- q) The worker is not covered by occupational medicine;
- r) The worker does not have work accident insurance;
- s) The worker is not compensated for damages caused by the work accident;
- t) The worker is dismissed without just cause and without receiving due compensation;
- u) Withholding identification documents;
- v) The worker is recruited to do a certain job under certain conditions and is forced to do another job, often under worse conditions;

- w) The worker is forbidden the right to training and career advancement;
- x) The employer performs employment contracts for a fixed or uncertain term - many times the employer has several companies and will draw up several employment contracts for a fixed or uncertain term with the worker, i.e., whenever the employment contract terminates, the company hiring the worker is changed so as not to perform an open-ended contract and the worker does not become effective in the company's staff;
- y) When the worker asks for his rights to be enforced, he is threatened in many ways - physical and psychological threats, such as being deported, his family is threatened, etc..
- z) Among others.

The foreign worker subjected to these illicit actions suffers countless consequences, being filled with fear, feelings of insecurity, shame or guilt, functional, cognitive and affective disorders, and may also suffer psychiatric and social alterations.

Analyzing the collection of norms referring to Labor Law, Safety, Health and Hygiene in the Workplace and Foreign Law, it can be seen that there is a relevant number of norms that legislate on this matter.

Even so, it is also verified that the Portuguese legal system still has many gaps to fill and that the legislation should be more severe in what concerns the punishment of the mentioned illegalities and crimes.

However, the realities experienced by foreign citizens do not correspond one hundred percent to the provisions of the law, since there is a difficulty in enforcing the law. Thus, mechanisms must be created to protect foreigners as citizens and as workers, and the mechanisms for monitoring, awareness and information must be improved in order to reduce the incidence of these situations. It is important to be able to comply with what is laid down in the legal system and to enforce its legal provisions.

It is essential that policies are developed that assess this risk by performing a good management of the risk indicators. To do so, one must identify and understand the risk indicators, monitor and plan appropriate responses to the protection of the foreign worker, and reassess these risk indicators.

Legal support should be provided to foreign workers in order to inform them of their rights and how and to whom they should report such illegal practices; and social support, in order to speed up the resolution of social problems.

6. CONCLUSIONS

The foreign worker is in a constant situation of vulnerability, due to many factors, such as cultural and linguistic differences, prejudices and stereotypes, discrimination, undeclared work, THB, among many others.

The irregularity arising from undeclared work has numerous consequences for the worker, namely the loss of certain rights and guarantees, such as, for example, the special protection conferred by the legal regime of parenthood (leave, sick leave, dispensations, health protection and safety at work), social protection regime of parenthood, equal opportunities and equal treatment in access to employment, training, non-discrimination, legal protection, functional and geographical mobility regime, regime of duration and organization of working time (violation of maximum limits of working time, daily and weekly rest period, vacations, fairs, etc.), occurrence of unfair dismissal, provision of work without just cause, hygiene and safety conditions, health and safety, etc.), occurrence of unfair dismissal, provision of work without health and safety conditions.

Legal insecurity also entails countless consequences that negatively impact on the life of the foreign worker because he or she finds themselves in a situation of risk at various levels, psychosocial risks being one of those that are present in this reality. It is said that psychosocial risks are related to the legal insecurity of the worker, since they are based on situations such as poor pay, not respecting rest periods and vacation rights, not declaring work and not paying social security contributions. These situations can cause the worker high levels of stress, emotional stress, burnout, poor working conditions, among many other problems, making them conducive to the likelihood of accidents at work.

Although there has been an increase in the number of studies on this subject, there is a need for further research on the subject. Given the clear need to develop studies and research on the subject, we propose an investment in awareness and information actions on the part of entities and workers, as well as the creation of new techniques of inspection and attention with a view to legal security at the labor level, pointing out new practices for the employer and their articulations with the field of safety at work.

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