



Ad-Hoc Query on the payment of back wages to foreign illegal workers returned to their countries of origin

Requested by FR EMN NCP on 7th December 2009

Compilation produced on 3rd March 2010

Responses from Austria, Estonia, Finland, France, Germany, Latvia, Netherlands, Portugal, Slovak Republic, Spain, Sweden, United Kingdom (12 in Total)

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.

1. Background Information

As part of the transposition of Directive 2009/52/EC into the French law, the Ministry of Immigration would be very interested in your answers to the question you will find below.

1. Does your Member State already have a State device (or any another type of device) to ensure the payment of back wages to foreign illegal workers returned to their countries of origin?
2. If so, how is this device organized, from amounts owned by employers to the payment of back wages to foreigners returned in their countries of origin?

It would be very much appreciated if we could receive your answers by **11th December 2009**.

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2. Responses

		Wider Dissemination?	
	Austria	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Estonia	Yes	In Estonia we have no information available on that.
	Finland	Yes	Usually, if the employer does not pay wages in a due manner, the employee, as a member of a trade union, shall contact the union. A non-organised employee may sue for a wage claim in a general court by bringing action against the employer. The employee commences the action, for example by contacting a solicitor or a legal aid office. The OSH (Occupational Safety and Health Administration) Inspectorate does not bring the employee's matter to court. Legal aid may be granted to individuals whose case is being heard in a Finnish court or whose place of residence is in Finland. Legal aid may not be granted to companies or associations. A person pursuing a business may be given legal aid in court proceedings relating to the business, but in other matters relating to the business only if there is a special reason for it.
	France	Yes	France has no institutional device (or any another type of device) to ensure the payment of wage arrears to foreigners returned to their countries of origin. Only trade-unions can exercise legal actions arising in favour of foreign workers but have no other powers.
	Germany	Yes	No, the German legislation does not provide for a state "instrument" (i.e. a responsible authority pursuant to Art. 6 (2) b) of Directive 2009/52/EC) to ensure the recovery of outstanding remuneration of third country nationals who are returned to their country of origin. However, like all employees, third country nationals can introduce a claim against the employer also from abroad and have the judicial decision enforced. For this, they can mandate a third party, in particular a lawyer.
	Latvia	Yes	According to Latvian national legislation an employee who has not received a salary may submit an application in court. Submission of this application is not a subject of state duty. Employee can empower any person to represent him/her in the court thus his/her presence in the territory of Latvia is not mandatory to fulfil his/her rights. If the court has admitted that there has been a violation from the employer's side, the employer should transfer money to bank account of employee, indicated in the application.
	Netherlands	Yes	The Netherlands had no institutions to secure that foreign illegal employees will receive their income after returning to their country of origin. The employee, however, does have the possibility to appeal to the court. If the case involves an illegal labour situation, then one could presume a working period of at least six months. The usual payment mechanisms can be used (international money transfers). Also, the regulation concerning minimum wages has to be taken into account. If an employer disregards these regulations, he can be fined.

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			If he does not undo the underpayment within four weeks, the fine can reach a maximum of €25.000 per employee.
	Portugal	Yes	Portugal does not have any institutional device to ensure the payment of back wages to foreign illegal workers returned to their country of origin. If it happens, because until this moment never did, the procedure is through the permanent consular posts in way to give the back wages to the beneficiary.
	Slovak Republic	Yes	In the Slovak Republic there is so far no measure or system to ensure to pay back the salary of the illegal workers returned to their countries of origin. Currently it is possible to appeal to the court for the reasons of not paying the salary which is a procedure applicable also to foreigners. The appeal has to be however lodged by the foreigners him/herself, i.e. during his/her stay. The Slovak Republic will transpose the EC directive 2009/52 in the course of 2010. The part of the negotiations will be also the issue of who could undertake the legal acts on behalf of the foreigner when he/she returned to the country of origin.
	Spain	Yes	By means of the recently approved <i>Organic Law 2/2009 of 11 December which amended Organic Law 4/2000 of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (henceforth Organic Law 4/2000), still pending the development of the corresponding regulations</i> , Spain has incorporated to domestic legislation as regards alien affairs and immigration, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009, which sets forth minimum standards on sanctions and measures applicable to those who employ illegal third country nationals. The absence of a work and residence permit, without prejudice to the employer's responsibilities arisen there from, including those related with Social Security, neither invalidates the work contract as regards the rights to which the foreign worker is entitled nor impedes the obtention of allowances derived of circumstances outlined in international conventions on the protection of workers, or others which may apply, as long as they are compatible with the worker's situation. In any case, as is set forth in Article 36.5 of Organic Law 4/2000, a worker without a residence and work permit is not eligible for unemployment benefits. Spain already complied with this measure and has a mechanism in place, applicable nationwide, which guarantees back wage: the Guaranteed Salary Fund ("Fondo de Garantía Salarial" in Spanish, henceforth FOGASA), an autonomous entity ascribed to the Ministry of Labour and Immigration. The General Administration of the State, through the Ministry of Labour and Immigration, defines the purposes of this Body, specified in Article 33 of the Revised Text of the Workers Statute, approved by Royal Legislative Decree 1/1995 of 24 March, Royal Decree 505/1985 of 6 Mach, and the articulated text of the Law on Laboural Procedures. It was created by Article 31 of Law 16/1976 of 8 April, on Laboural Relations, for the basic purpose of instituting a guarantee for salaries claimed in the event of employer insolvency. Presently, it is attributed with the responsibility for paying salaries and indemnities which employers, due to being legally insolvent or declared bankrupt, fail to pay their workers. Once the allowances are paid, FOGASA obligatorily subrogates itself as to the rights and actions of the workers to proceed with the demand and action for recovery unto the indebted employers.

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			<p>This mechanism is not specifically for foreigners, but rather for all salaried employees regardless of their nationality or legal status in Spain and, therefore, a special procedure for illegal immigrants is not foreseen therein, though, in general terms, it is necessary for two circumstances to concur: a) that the existence of the laboural relation and amount of unpaid salaries or indemnities to which the worker is entitled to receive on behalf of the employer are certified, and b) that a declaration of the employer's insolvency has been issued.</p> <p>It must be pointed out that the following groups are excluded from the protective actions of FOGASA:</p> <ul style="list-style-type: none"> • Workers at the service of the family home. • Staff members of workers cooperatives and community labour-sharing agricultural cooperatives. <p>Likewise, directors or advisors to for-profit corporations assimilated as salaried employees in the terms set forth in Article 97.2.k of the Revised Text of Social Security, approved by Royal Legislative Decree 1/1994 of 20 June, when they carry out tasks related with company control and management in exchange for compensation, as well as those directors or advisors which control a company in the terms included in section 1 of additional provision 27 of the General Law on Social Security, are also excluded.</p> <p>Salaries pending payment, including back pay, along with corresponding bonus payments up to a maximum of three times the amount of the daily Minimum Inter-Professional Salary, with prorated bonus payments, for the number of days pending payment, with a limit of one hundred and fifty days, are guaranteed.</p> <p>This procedure may originate by law or by request of the party within one year, interrupted upon the exercise of enforcement procedures or the recognition of the bankruptcy proceeding claims, as well as other legally admissible forms. In the case of workers who file a claim from another country, they may do so at the Spanish diplomatic or consular representation.</p>
	<p>Sweden</p>	<p>Yes</p>	<p>Sweden has no special device or legislation for payment of back wages to foreign illegal workers returned to their country of origin.</p>
	<p>United Kingdom</p>	<p>Yes</p>	<p>1. The UK Government's position continues to be that the introduction of provisions for back pay of any outstanding remuneration to illegally employed foreign nationals to facilitate the recovery of outstanding remuneration of such a right could encourage some illegal workers to work in the knowledge that even if they are identified and removed from the UK they will still be paid in full. This risk undermining the clear message the Government is sending out to those would seek to work in the UK illegally.</p> <p>2. This matter was one scrutinised in 2007, when the European Council presented a proposal for a Directive on sanctions against employers of illegal workers. The Directive at that time contained a number of issues of concern for the Government and, therefore, the UK chose not to opt-in at that time but to seek to influence negotiations on the Directive with a view to opting-in at a later date if appropriate. In February 2008, following further negotiations, the EU Council agreed a text for adoption but the Government did not believe that the original issues of concern had changed sufficiently to enable the UK to opt-in. One of the issues the UK still had major concerns with was guaranteed protection under National Minimum Wage for illegal workers via Back Pay.</p>