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Informing the Care Services Workers on Posting Rules

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INFORMATION BROCHURES FOR THIRD-COUNTRY NATIONALS

1. **Legal aspects**
2. **Rights and violations of rights**
3. **Protection of the rights of workers from third countries**

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INFORMATION BROCHURE I: Legal aspects

In this *Information brochure I* we would like to highlight certain elements related to the legal aspects which pertain to the presence of *third-country nationals* in the Member States of the European Union.

It is very difficult to address the legal aspects pertaining to these citizens without mentioning the rights they enjoy when they reside or work in one of the Member States, which is why this first information brochure is closely linked to Information brochure II, which discusses the rights and violations of these rights of third-country nationals. Furthermore, when presenting proposals for the protection of the rights of these workers from third countries, which are contained in *Information brochure III*, the three brochures must be considered as an organic whole in order to maintain a coherent "thread of argument".

The system on which these *Information brochures* are based consists of raising questions related to the issues addressed below and providing answers to such questions. We believe that, by doing so, we will obtain an instrument that is easily understandable for every reader of these brochures.

What is the meaning of a *Third-country national* (TCN)?

Third-country nationals are citizens of countries other than the Member States of the European Union, the European Economic Area (EEA) or Switzerland.

Should we wish to provide a more precise definition, we may use the one established under *Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)*. Article 2. paragraph 6. of said Regulation prescribes the following:

"third-country national" means any person who is not a Union citizen within the meaning of Article 20(1) TFEU and who is not covered by point 5 of this Article.

Therefore, both the scope of the Regulation and the provisions of the TFEU must be taken into consideration.

Article 20. of the *Treaty on the Functioning of the European Union* (TFEU) establishes the citizenship of the Union, based on which every person holding the nationality of a Member State shall be a citizen of the Union, whereby the citizenship of the Union shall be additional to and not replace national citizenship.

In this way, citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia, the following rights which will be exercised under the conditions and within the limits provided for in the Treaties and the measures adopted for their implementation:

a) the right to move and reside freely within the territory of the Member States;

b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as

nationals of that State;

c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

On the other hand, Article 2. paragraph 5. of Regulation 2016/339 establishes the scope of the term third-country national as *persons enjoying the right of free movement under Union law* meaning:

(a) Union citizens within the meaning of Article 20(1) TFEU, and third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council[1] applies;

(b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens.

How is access to the labor market regulated for *Third-country nationals*?

The access of these persons to the national labor market is the autonomous responsibility of each Member State, although their rights of entry and residence have been harmonized [see the question: *How is the right of entry and residence of third-country nationals established and by whom* in *Information brochure II*].

The possibility of accessing the labor market of a Member State refers to the crossing of external borders defined in Article 2 of Regulation 2016/399 as *"land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders*".

Irrespective of this general definition, we should also refer to *Regulation 2018/1806/EC* of the European Parliament and of the Council of 14 November 2018, listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement.

Article 4) of this *Regulation* prescribes the following:

Nationals of third countries listed in Annex II shall be exempt from the requirement set out in Article 3(1) for stays of no more than 90 days in any 180-day period.

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[1] *Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.04.2004, p. 77).*

We cannot disregard the existence of *bilateral agreements* between countries (a Member State and a third country), which may eliminate the need to issue visas or allow the entry of nationals of certain countries regardless of the aforementioned general regulations.

The Summative report published in August 2022 as part of the European project financed by the European Union (*Postcare. Posting of third-country nationals in care services, the current state of play and scenarios for the future*) related to the third-country nationals who provide live-in care services for elderly specifies the following:

The legal uncertainty of the residence and employment status of a posted TCN is higher in the cross-border situations resulting from free movement of services than it is in the case of free movement of workers. Institutional and especially legal framework of a given Member State plays crucial role in choosing the employment and residency model for TCNs in the care sector. For instance, in Spain direct employment of TCNs from Columbia, Ecuador, and other South American countries in the care sector prevails over posting of workers. Ukrainian caregivers hired in Poland are usually posted to Germany and other Member States. [Marek Benio, European Labor Mobility Institute]

In short, what we are trying to emphasize is a different "use" of migrant workers and third-country nationals in the healthcare sector, depending on the Member States which receive the workers. Therefore, while countries like Spain employ third-country nationals directly (also included in Annex II of *Regulation 2018/1806/EC*), other countries like Poland employ workers from Ukraine and then post them to other countries, particularly to Germany, with the status of posted workers.

Who are *Third-country nationals* working as live-in caregivers?

The aim of the ***Postcare 2.0*** project is to inform caregivers about the posting standards. But what are live-in care services?

In order to precisely define what we are referring to, we may use some synonyms, such as *live-in care* (the caregiver lives in the same household as the person in need of care, most commonly elderly persons or persons with disabilities) or *in-house care* (the caregiver combines the care for a person with the care for his or her household). In both cases, the person providing these *home care* services encounters a number of difficulties regarding employment conditions, which are discussed in *Information brochure II*.

Perhaps an adjusted definition of what these live-in care services include, could be as follows: "*Live-in care is a service of taking care of dependent elderly or disabled people at their home, assisting them in their daily routine live activities, which they are not fully capable of doing on their own*." (*Postcare Summative report*, p. 12)

What legal forms of work of *Third-country nationals* can we use in "live-in care services"?

There are up to three legal models in the provision of these professional services: posting of workers, direct employment and self-employment (independent worker).

Direct employment is by far the most popular model of employing a live-in caregiver by the person using the services (who is in need of care) or by his or her family members. Therefore, this is the model with the highest number of cases of "shadow economy" (unregistered work) and, consequently, the highest number of abuses by the employer (this issue will be addressed when we discuss the violations of rights in *Information brochure II*).

A migrant worker can work in any country (irrespective of whether it is an EU Member State or not) in accordance with the free movement of goods, people and capital and the free movement of workers, as well as in accordance with the employment requirements applicable in the country in which he or she intends to work.

In many cases these workers do not have an employment contract (at best, they have a verbal agreement), which is why they are referred to as "unregistered workers". It is usually very difficult to monitor this situation since the right to household privacy and the protection of this right makes it impossible for labor and social security inspectors to monitor, control and prosecute this fraudulent contracting of work. [As mentioned in *Information brochure II*, the other reason is that workers are afraid of consequences because they do not dare or do not have the technical means to report these situations of abuse when they occur].

As for the **self-employment model**, it is perhaps the least common of the three models, although it does occur in some countries such as Italy or Germany. A negative connotation is attached to this model when it becomes what is known as "bogus self-employment" (more common in other types of activities, such as work via platforms). In these cases, they are usually "dependent" on intermediaries who act between the caregiver and the person in need of care, transforming what is theoretically self-employment into subordinate work with poor employment conditions and legal uncertainty.

What social security regulations can be applied to third-country nationals holding the "status" of posted workers?

Another model mentioned in the previous question refers to workers posted to provide live-in care services.

These posted workers, affected by cross-border mobility, are protected by the recently published ***Directive (EU) 2018/957*** of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC, and which entered into force on July 30, 2020, as well as by *Directive 2014/67/EU*, the objective of which was to "*ensure compliance with and practical effectiveness"* of Directive 96/71 in force at the time.

This regulation determines the situations in which a worker is considered to be posted, as opposed to the free movement of migrant workers. Article 2.1 of *Directive 96/71* defines the term *posted worker* as follows:

a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.

Certain requirements are established to define the ***posting of workers***:

- The posting must be temporary (maximum 12 months)

- It should not be carried out as a replacement for another worker who has already reached the maximum posting period.

- There must be a dependency (an organic link) with the posting company for the entire duration of the posting.

- The posting must take place between the Member States.

In order to dispel any doubts regarding workers who should be considered *posted*, Directive 2014/67 contains a number of *factual elements* which describe the figure of the posted worker and "*help determine whether a worker has been posted or not*". For example: the registered office of the company, the law applicable to contracts, the duration of work, functions and activities to be developed, etc.

Unlike directly employed workers, posted workers do not need a work permit (except in Croatia and Austria for certain professions). They also do not need recognition of their professional qualifications (although in some countries a written certificate of their professional qualifications may be required for certain professions) and they do not need to register for social security in the country to which they are being posted. They can also be posted only to another EU Member State.

Although we find this model of live-in care service provision to be the safest, we have identified several issues in the application of community regulations, particularly in relation to social security, which we will discuss briefly below.

As for social security, the company posting a worker to another Member State must contact the competent authority in the worker's country of origin, preferably before the posting. This body will issue the worker with an *A1 certificate* setting out the social security legislation applicable to the posted worker for the duration of the posting.

We should not forget that social security legislation (the criteria for which are set forth in *Regulation 883/2024/EU* on the coordination of social security systems and its *Implementation Regulation 987/2009/EU*) is not discretionary, unlike the application of labor law.

The coordination of social security systems establishes three rules for determining the applicable legislation:

- Article 11, for migrant workers to whom *local labor legislation applies*;

- Article 12, for posted workers, based on the legislation of the worker's Member State of origin.

- Article 13, for workers considered to be "highly mobile", cross-border workers who work in two or more Member States, to whom the legislation of the Member State of residence or the Member State in which the registered office of the employer is situated applies.

Although this is a complex issue and despite the fact that application criteria have been defined, we encounter difficulties in dealing with this issue, caused by the so-called "*letterbox companies*" (fictitious companies founded in a Member State due to tax issues and which recruit workers - in our case caregivers - to post them to other states with higher contributions or taxes). These companies are not considered illegal, but they constitute unfair competition as they were not founded to provide services in the country in which they were founded. They "export" (post) workers at lower costs and under worse working conditions than those they would have if they were employed in the country where they would actually provide their services.

The situation of these posted workers becomes even more complicated when the posted worker is a *third-country national* (we have already mentioned the case of Poland, which employs workers from Ukraine to be posted as Polish workers from one Member State - Poland - to other Member States, such as Germany). In this scenario, we are in the framework of the free movement of services, where we have "changed" the status of the migrant worker, who no longer needs a work permit to work in the new destination country. [There are several judgments of the Court of Justice of the European Union on this aspect: *Van der Elst* (ESP C-43/93), Rush (ESP C-113/89), Essent (ESP C-91/13), or the most recent one, Danielli (ESP C-18/17) from 2018]

Lastly, we refer to *Regulation 1231/2010/EU* of the Parliament and of the Council of 24 November, which extends the application of the principles of coordination of social security systems (Regulations 883/2004 and 987/2009) to third-country nationals who are not covered by them solely due to their nationality. This social security situation applies to third-country nationals who are temporarily residing in one Member State and working in another Member State or States (ESP Judgment C-477/17, Balandin).

What legal options are available to *Third-country nationals* to work in the European Union?

Europe is facing major demographic challenges, which are being exacerbated by the rapid aging of the population and low birth rates. According to forecasts, pensioners will make up around a third of the EU population by 2050. This will have major social and economic consequences, such as greater demand for healthcare and social services, lower productivity and higher public expenditure.

To counteract these changes, the European Union is promoting legal immigration to address shortages of workforce, close skills gaps and boost economic growth. To this end, it is reviewing the types of work permits that currently exist for non-EU third-country nationals, namely:

EU Blue Card:

The EU Blue Card is a work and residence permit that allows non-EU nationals to work and live in an EU country, provided that they have an equivalent degree or qualification and a job offer which meets a minimum salary threshold, and serves as a means of attracting highly-skilled workers.

New, revised rules will come into effect at the end of 2023, setting the validity of the job offer to at least six months and lowering the salary threshold to at least 100% of the average gross annual salary in the country of employment.

The Blue Card is valid for a maximum of four years and can be renewed. Cardholders are allowed to bring their family members to live with them in the EU. The card is recognized in all EU countries except Denmark and Ireland.

More information about the *EU Blue Card and its reform is available here.*

Single permit:

This is a temporary work permit specific for each country and made for those who do not meet the necessary requirements to obtain the EU Blue Card. It is a permit which encompasses both work and residence and is issued for a maximum of two years by the EU country in which the non-EU national will work and live.

The Single Permit Directive of 2011 is currently being revised. It has been proposed that the application process be shortened from four months to 90 days [a process which could be shortened to 45 days for applicants who already hold a permit or have been selected under the "EU Talent Partnerships" initiative].

In addition, the permit would no longer be tied to a specific employer, allowing workers to change jobs, making it easier to find employment and reducing the worker's vulnerability to exploitation. Workers would also be able to keep the Single Permit for a maximum of nine months during unemployment.

This permit does not apply to persons awaiting the processing of an asylum application or to self-employed persons.

EU long-term resident status:

The EU long-term resident status was introduced in 2003 to promote the legal immigration and integration of non-EU nationals. It allows non-EU nationals to reside and work in the EU for an indefinite period of time and gives them the right to move and work freely in the EU.

As part of the ongoing review, the Parliament and the Commission have proposed reducing the residence requirement from five to three years in order to obtain the status, as well as including refugees and other groups encountering greater obstacles to ensure equal treatment with EU citizens in areas such as employment, education and social benefits.

The long-term resident status will automatically be extended to include children whose parents hold this status, irrespective of their place of birth.

The possibility of obtaining this status is excluded for non-EU nationals who:

- are studying or undergoing vocational training
- have a pending application for temporary or international protection

- are only staying in the EU temporarily, whether as an au pair, as workers posted by a service provider for the purpose of providing cross-border services or as cross-border service providers.

Recognition of the qualifications of immigrants in the EU:

Taking into account the fact that in 2019 approximately 48% of highly skilled migrants worked in low or medium-skilled jobs, compared to only 20% of EU citizens, and that they are most commonly employed as cleaners or domestic workers, while 62% of computer programming companies and 43% of construction companies report a shortage in workforce, European standards aim to recognize the qualifications of migrant workers by proposing that the professional qualifications, skills and competences acquired by non-EU nationals in another EU country be recognized in the same way as those of EU nationals.

Each EU country would decide independently on the recognition of qualifications acquired outside EU territory, which may require a certain level of language proficiency before long-term residence is approved, but in such cases they must offer free courses.

INFORMATION BROCHURE II:

Rights and violations of rights

As already mentioned in *Information brochure I*, it is very difficult to separate it from the second one when it comes to the rights of third-country nationals residing or working in one of the Member States. In order to maintain a coherent thread of argument, we are "forced" to maintain a close relationship between the two brochures, with some of the topics covered in these brochures overlapping.

Which European regulations establish the rights of *Third-country nationals*?

The Charter of Fundamental Rights, adopted on December 7, 2000 in Nice, specifies the basic rights which the Union and the Member States must respect when applying the Law of the Union. It is a legally binding instrument[2] intended to formally recognize and make visible the role that fundamental rights play in the legal order of the Union.

The fundamental rights contained in the Charter are **dignity**, **freedoms** (which include the right to education and work), **equality** (and non-discrimination), **solidarity** (with the right to fair and just working conditions and the right to social security and healthcare), **citizens' rights** and **justice** (which affirms the right to an effective remedy and a fair trial).

These rights are not exclusive to the *Charter* as they are already included in the European Convention on Human Rights, the European Social Charter of the Council of Europe and the Community Charter of Fundamental Social Rights of Workers, as well as in the constitutions of the Member States and in the international conventions they have signed.

The Charter therefore makes the constituent part of the Primary law of the Union and, as such, serves as a reference parameter when assessing the validity of the Secondary law and national measures.

Who is responsible for establishing the rights of *Third-country nationals*?

In general, the rights of *third-country nationals* are subject to the policies established by each Member State and, in particular, to those pertaining to access to the labor markets of each country. However, with the intention of eliminating internal barriers between Member States, the employment and residence rights granted by one Member State to *third-country nationals* are recognized and this option is expanded to include the other Member States.

How is the right of entry and residence of *Third-country nationals* established and by whom?

Unlike the rights mentioned in the previous question, the entry and residence of these persons have been harmonized throughout the European Union in order to allow them to

[2] *The Charter has been legally binding since December 1, 2009. Article 6, paragraph 1 of the Treaty on European Union (TEU) prescribes that "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties*

freely cross the internal borders of the so-called *Schengen Area*.

We can distinguish *internal borders* defined in Article 2 of *Regulation (EU) 2016/399* as follows:

a) the common land borders, including river and lake borders, of the Member States,

b) the airports of the Member States for internal flights,

c) sea, river and lake ports of the Member States for regular internal ferry connections,

in contrast to external borders, which are defined as *the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders*.

How are the fundamental rights of *Third-country nationals* in an irregular situation implemented by a Member State?

International and European human rights law obliges the Member States of the Union to guarantee these rights to all persons under their jurisdiction. This includes immigrants in an irregular situation.

While Member States are not obliged to grant these immigrants the same benefits as their own nationals, they must adhere to essential human rights standards, which include access to:

- necessary healthcare for all, including emergency care and basic care, such as the opportunity to be examined by a physician or to receive the necessary medications;

- healthcare for pregnant women, as well as medical assistance and education for children of irregular migrants under the same conditions as for children who are EU nationals;

- justice, as a mechanism which enables people to submit claims and receive compensation in the event of damage suffered (e.g. an accident at work).

What are the situations in which the fundamental rights of *Third-country nationals* in an irregular situation can be violated in a Member State?

Due to their irregular status, these people can be the subject of exploitation and abuse in the workplace in any Member State. This is particularly true for people (mostly women) who are domestic workers or caregivers and who may be discriminated against on the basis of race or ethnicity and subjected to gender-based violence.

However, they also face legal and practical obstacles when it comes to receiving basic services such as healthcare, education or access to justice, which has particularly serious consequences for their health and the future development of their children.

In this sense, while Member States have the right to control who enters and who remains on their territory, they also have an obligation to ensure human rights standards in the application of immigration laws. In some Member States, such control measures include

detention of these irregular migrants or notifying the immigration authorities if these workers attempt to access services such as healthcare or education. This practice of detaining and notifying may prevent irregular migrants from exercising their fundamental rights for fear of deportation.

Hence, "*EU Member States should not use screening methods that effectively block access to healthcare, education or justice*" (FRA, *European Union Agency for Fundamental Rights*).

For this reason, the *European Union Agency for Fundamental Rights* establishes the following:

With regard to access to healthcare: Access to necessary healthcare should be granted to irregular migrants according to the same criteria as EU nationals, with the same rules for payment of fees and exemptions.

Pursuant to Article 24. of the United Nations Convention on the Rights of the Child (UNCRC) and Article 12. of the Convention on the Elimination of All Forms of Discrimination against Women, pregnant women must be entitled to free services in connection with pregnancy, confinement and post-natal period, while children must be entitled to healthcare provided according to the same principles as for EU nationals, including vaccinations.

With regard to access to education: Pursuant to Article 28. of the UNCRC, access to free basic education must be granted to all boys and girls.

When are the rights of *Third-country nationals* in an irregular situation violated when working in a Member State?

These workers, especially those working as domestic workers or live-in caregivers, are particularly exposed to abuse and exploitation (fraudulent contracting or a lack of contracting - shadow economy) as these employment sectors are usually less regulated by national laws than others.

Oftentimes employers do not offer rest and annual leave nor do they provide paid sick leave, even if these benefits are possible under national law.

When accessing justice to protect their labor rights, these workers who are victims of physical abuse, have sustained injuries at work, or have not received their wages, face various obstacles to exercising their rights in court: fear of being denounced by the court itself for their irregular situation and difficulties in defending their cases when they file a lawsuit, due to the language barrier, lack of witnesses or evidence of employment. Moreover, not all Member States recognize the right to claim payment or compensation for accidents in the workplace.

These situations reduce the deterrent effect of the law on employers and increase the exposure of irregular migrants to exploitation.

[In *Information brochure III*, which pertains to the protection of the rights of third-country nationals in these situations, we will try to offer some solutions from the activities of trade unions or NGOs that can support access to justice for irregular migrants and promote the

use of effective mechanisms which allow irregular migrants to file complaints against their employers, in accordance with the provisions of *Directive 2009/52 EC* on sanctions against employers].

What are the most commonly violated labor rights of *Third-country nationals*?

Irrespective of what we have said about the violation of the rights of third-country nationals in an irregular situation, when we analyze the work of caregivers, we identify a number of problems (some of which are mentioned in the Summative report of the Postcare project, August 2022), of which we can highlight the following:

Exploitation, abuse, shadow economy:

The research results of the ***Postcare*** project indicate a shortage of caregivers in the Member States, as well as a lack of skills and competences, which has led to caregivers coming from third countries to make up for this deficit. This influx of migrants under very different conditions led to the conclusion that approximately 80% of these caregivers are part of the "black market" (*Postcare Summative report, p. 9*). Even among the posted workers there is a large number of caregivers whose work is unregistered[3].

We should take into account the fact that the caregivers' employers are the same persons they have to care for, and that, as we have already mentioned, in many cases these are "unregistered jobs" (without an employment contract), which end up becoming informal or illegal jobs.

These cases of abuse by employers are an additional problem, as it is difficult for labor inspectors to visit a private household and check the working conditions.

Fraudulent contracting of work:

We have already mentioned that many of these workers combine their caregiving role with housework, resulting in more unpaid work, a lack of rest, a lack of free time and leisure, and a negative impact on their performance in care-related tasks when combined with housework (cleaning, cooking, shopping, etc.).

With regard to this violation of labor rights, we would like to highlight a "curiosity" taken from the *Postcare Summative report* (p. 22), which points out that in Germany TCNs hired as caregivers are gradually burdened with housekeeping work, whereas in Spain housekeepers' duties are gradually extended to include care for seniors.

Inadequate regulation of professional qualifications and skills:

The lack of specific regulations which govern the work of caregivers leads to a degradation of the work itself and affects the quality (low quality) of the service provided.

3 Marek Benio in ELMI Working Papers 2021 (Cross-border live-in senior care. Supply in Poland, demand in Germany) underlines that, based on cross-reference of the number of PDs-A1 attestations issued by social security competent institution in Poland for the care service, only 10% cover the in-house services in Germany, while 90% is informal care and undeclared work [quotation from the Postcare Summative report, p. 20]

The profession is highly unregulated, with the exception of tasks performed by nurses or medical treatments. In general, in most countries, no formal qualifications or skills are required to perform the tasks of a "live-in caregiver" and these skills are acquired through experience, in contrast to the work of a "caregiver in an institution", which is better regulated.

These situations lead to workers occasionally entering the profession, making them "intruders" in the profession and causing problems in the quality of the services they provide to those in need of care.

We should highlight that in Spain (as an exception to what has just been mentioned above) an official qualification that ascertains professional skills is required and can be any of the following two: a *certificate of the completed vocational training* or a *certificate of professionalism*, or through provable *work experience* or non-formal education. December 31, 2017 has been set as the deadline to acquire the necessary qualifications to work as a caregiver.

This entire situation regarding the professional qualifications of ‚live-in caregivers' and its implications for the people they care for at their homes means that we need to consider regulating the qualifications needed to provide this type of care in order to avoid intrusion into the profession and guarantee a high-quality service [we must always remember that these persons are particularly vulnerable: the elderly and persons with disabilities].

Low remuneration:

In places where many EU citizens are reluctant to work for a low salary, third-country nationals accept jobs with multiple roles for a lower or equal salary, often forced to do so by the circumstances of their stay in the host country.

As we have already mentioned, one of the problems is the existence of "fraudulent contracting of work", which means that certain tasks are undertaken in theory, while many others are performed in practice. For this reason, it is very difficult to set a *fair remuneration* for caregivers.

Moreover, this remuneration would depend not only on the tasks undertaken, but also on the specific needs of each person in need of care. This would mean that remuneration would correlate with these needs and an assessment of these needs would be required, with the salary parameters being set based on the care to be provided.

The working time spent caring for a person in need of care may also be a factor to consider when determining the caregiver's remuneration. Continuous care during the day (waking them up, assisting with personal hygiene, dressing, feeding, entertaining, taking them for a walk, etc.) is not the same as, for example, monitoring their sleep at night if the person requires special assistance.

In this regard and as a conclusion, I would like to mention the case of a judgment of the German Federal Labor Court (BAG) in which a higher remuneration was approved for a caregiver with 30 contractual hours per week, but who was ready to work on call (being available for the person in need of care). The court held that the worker was entitled to receive a higher remuneration for periods of readiness to work on call [cited by Marek Benio in the *Postcare Summative report*, p. 13].

Inadequate employment conditions:

This last aspect of the violation of rights that we are discussing is undoubtedly a product of the previous ones: the fact that caregivers work in the "shadow economy" (unregistered work), the existence of "fraudulent contracting of work" (undertaking tasks which are not within the job description of a caregiver), the lack of clear regulations on the qualifications required to provide live-in care services, and the fact that salaries are consequently low and do not correspond to the tasks performed, are in themselves inadequate employment conditions.

However, we should also add that some workers work in conditions bordering on "slavery", without days off, without rest periods, without annual leave, without what we refer to as "employment separation", without the possibility of separating their working day from their free time. In short, without a clear regulation of their tasks and the rights they enjoy in the provision of services.

In Spain, for instance, there are sectoral collective agreements for caregivers in which the aforementioned regulations are laid down and complied with in institutions, but not necessarily in the live-in care sector.

INFORMATION BROCHURE III:

Protection of the rights of workers from third-countries

The main issues related to the violation of rights of third-country nationals which we highlighted in *Information brochure II* are summarized below:

- Neither employers nor workers are familiar with the regulations applicable to their employment situation and the places where they could obtain such information and advice.

- Lack of skills of caregivers, no definition of standards for the provision of services by caregivers and consequently no guarantee of the quality of the services provided to customers.

- Lack of regulation of the specific tasks of caregivers, which are sometimes carried out together with household chores.

- Lack of information (both for workers and the employers who have to employ them) about the employment conditions, the applicable social security system and its contributions or the link to a specific collective agreement.

- Alleged non-compliance with the employment conditions of workers in the homes of the persons they care for (in particular excessive working hours and lack of rest periods), which could lead to situations of "exploitation" of workers.

There is no doubt that the role which social partners and trade unions can play in protecting third-country workers is fundamental. However, they may encounter difficulties in the process – a lack of affiliation of these workers.

A lack of affiliation is caused on the one hand by the disinterest of the worker, but also, and more frequently, by the "disconnection" of the worker, who does not perform his tasks in a workplace with other workers, but in a private household. As a result, the worker is isolated, which makes it almost impossible for the trade union to assist him.

In this final *Brochure* we will try to set out a series of recommendations that can help develop strategies for the protection of third-country nationals when their labor rights are violated.

Who should I contact in a situation of discrimination or abuse by my employer in the host country?

If a worker believes that his rights have been violated or that he is being discriminated

against or abused by his employer, he can contact the **Labor inspectorate** of the country to which he has been posted. The inspectorate will analyze the situation and apply the labor regulations relevant to the subject of the complaint.

If a worker was posted, the Labor inspectorate will inform the competent authorities of the administrative offenses committed by the companies in their country in connection with this posting.

They can also contact **trade unions**, which, depending on local legislation, are able to monitor working conditions and have the possibility of defending workers in administrative and judicial proceedings. [In case of posted workers, Directive 2014/67 explicitly grants them this possibility].

What solutions can be offered for breaches of employment conditions and fraudulent contracting of work?

Both situations, which we have already explained, can be resolved in the following manners:

- By extending guarantees for posted persons to migrant workers in view of the influx of this type of workers (which is already happening in Spain, where Law 45/1999, which transposes Directive 96/71, is extended to include third-country nationals).

- By creating specific regulations for migrant workers in the professional sectors of healthcare and caregiving, which are on the rise due to the aging of the population.

- Stricter control of fraud, which includes irregular employment in professional categories lower than those in which the worker actually works is the only way to detect and eradicate it.

- By enhancing inspection powers to enable inspectors to detect contractual irregularities; by regulating the possibility of accessing private households in which workers work and training to impose severe sanctions on those who do not comply with the terms of the contract.

How can the competences of persons providing live-in care services be guaranteed?

We have highlighted the consequences for the person who is being cared for by a "caregiver" without adequate training and the intrusion into the profession that it implies, and that in Spain, for example, there are two options for an official qualification of caregivers which ascertains their professional skills: obtaining a *certificate of the completed vocational training* or a *certificate of professionalism*, or through provable *work experience* or non-formal education. This issue can be solved in the following manners:

- By establishing a professional qualification for healthcare workers that is comparable between different countries and provides a reference framework for the

performance of these professional tasks.

- By ensuring that this service is provided with the required qualifications and establishing effective sanctions for practice of this profession without the appropriate qualification.

How can the employment conditions of live-in caregivers be improved in the EU?

We are referring to both posted workers and third-country nationals who are going to work in EU Member States.

- By creating a *reference European minimum wage* for healthcare workers, with parameters based on the workload involved (this option is proposed as a "reference framework", as the regulation of salaries falls within the competence of individual Member States and their autonomy must be respected).

- By establishing *transnational reference collective agreements* for the social services sector and, within this framework, for people working as caregivers.

- By strengthening cooperation between the different Member States in the control of this category of work by creating a transnational trade union structure that would allow an exchange of information on this group of workers (both posted and migrant workers).

What actions can be taken to guarantee access to adequate information?

Difficulties in accessing information, lack of knowledge of regulations and language barriers are common among third-country nationals and posted workers, although the latter can visit the unified official website at national level set up by the host Member State, as required by European directives.

However, neither migrant nor posted workers have access to complete information, even when it is accessible, mainly due to language barriers, as this information, if it exists, is usually only available in the national language and in English.

Therefore, the following is recommended:

- To guarantee the translation of documents, especially those related to labor rights that workers (posted or migrant) must be familiar with, into their "mother tongue".

- To standardize the computerization of contracting procedures both in the country of origin and in the country in which the service is provided if the person already resides there.

- To provide more clarity on the content of the Directives (especially for posted workers) to avoid confusion in their application.

- Trade unions can centralize basic information from various sources from governments, administrations and companies and make it available to workers on their own websites.

- To obtain information from the competent administrative units of each state about the contracts concluded in the caregiving sector, both for posted and migrant workers, in order to be familiar with the workers present in each country, their roles and the place where they provide services, and to facilitate the provision of direct assistance.

How can I access information about my labor rights?

Posted workers have access to *national liaison offices and institutions*, whose role is to monitor employment conditions, ensure that information on employment conditions and periods is available and up-to-date, respond to requests from government authorities on transnational employment of workers, including abuse or possible cases of illegal transnational activities, and assess difficulties encountered in the application of the provisions by State institutions.

Among the various ways to access these contact points, the ***Your Europe*** website offers a quick and convenient access by clicking on the following link: **National Liaison Offices and Institutions**.

https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm

By clicking on the link for each country, you will gain access to existing information, which is organized according to topics.

National contacts

Austria	Estonia	Italy	Portugal
Belgium	Finland	Latvia	Romania
Bulgaria	France	Lithuania	Slovakia
Croatia	Germany	Luxembourg	Slovenia
Cyprus	Greece	Malta	Spain
Czech Republic	Hungary	The Netherlands	Sweden
Denmark	Ireland	Poland	
Iceland	Liechtenstein	Norway	Switzerland

Final note on the protection of the rights of workers from third-countries

To conclude this *Information brochure*, we would like to mention other initiatives or institutions which could also help take actions aimed at protecting the rights of third-country nationals:

- ***ILO Compendium*** presents the situations that can lead migrant workers into irregularity, the rights of migrant workers in irregular situations, and the relevant international standards and good practice. It highlights laws, policies and practices that can help address irregular labor migration, and facilitate respect and promotion of the human rights of all migrant workers, regardless of status. The Compendium is not intended to be exhaustive but is instead a living document that will be regularly updated with new examples and experiences. It seeks to encourage the sharing of good practices by states, social partners, and other actors concerned and to contribute to the attainment of the objectives of the Global Compact for Safe, Orderly and Regular Migration. The original report was published on 23 December 2021 and updated in April 2022.

https://www.ilo.org/global/topics/labour-migration/publications/WCMS_864134/lang--es/index.htm

- The decision on the setting up of the **European Social Dialogue Committee for social services**, adopted on 10 July 2023 as part of the follow-up to the **2022 Care Strategy** and the **2023 Social Dialogue Initiative**

The committee will bring together European employers and trade union organizations of the sector: Social Employers and CEMR (the Council of European Regions and Municipalities), representing European employers in social services, and EPSU (the European Public Service Union) representing European workers of the sector. In addition, UNI-Europa and CESI (the European Confederation of Free Trade Unions) will also be part of the workers delegation to plenary meetings. The social services committee will cover approximately 9 million workers across the EU, and its objectives will include:

- delivering opinions and recommendations to the Commission on initiatives with regard to social and employment policy and the development of European policy which

have an impact in these areas on the social services sector,

- encouraging and developing the social dialogue at a European, national and local level in the social services sector,

- conducting exchanges on topics of mutual interest,

- developing joint actions,

- strengthening the capacity of national social partners,

- responding to consultations and other initiatives by the European Institutions in a proactive manner.

• **Joint labor mobility agenda**, the aim of which is to address migration from a regular, orderly, humanitarian and safe perspective.

On 18.11.2023, a new meeting of the *European Migration Network* (EMN) took place under the Spanish Presidency of the Council of the EU to reflect on the progress made so far and the need for measures to promote the skills and talents of third-country nationals who wish to start new life and work projects in Europe.

One of the planned measures is the establishment of a platform which would match job offers with job demands, as well as the strengthening of vocational training in order to achieve faster and easier recognition of the professional qualifications of third-country nationals.

As an example, we can mention the case of Spain, which (on 26.07.2022) approved the reform of the *Immigration regulation* to improve the migration model and promote the integration of migrants into the labor market. The aim of this new regulation is to open up complementary relocation paths based on labor and training routes, to open up the catalog of hard-to-fill jobs, to allow students from third countries to easily access the labor market, the flexibility of self-employment, to increase the stability of seasonal and circular jobs, and to ambitiously implement the EU Blue Card Directive.

In addition, this reform facilitates the permanent residence and work of foreign students and updates the concept of residence and work permits and family reunification, creates a new model of residence permit during studies based on the German model for foreigners who have resided irregularly in Spain for two years, promotes regular migration by facilitating the entry of entrepreneurs, promoting the employment of people of non-Spanish origin, and stabilizing circular migration processes, and introduces improvements in administrative management through the creation of the Immigration Files Processing Unit.

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Informing the Care Services Workers on Posting Rules

FEDERACJA PRZEDSIĘBIORCÓW POLSKICH

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