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Social insurance for mobile construction workers

The effects of posting and other forms of mobility on worker precarity

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Policy recommendations

- The regulatory regime pertaining to posted workers resolves the problem of continuity of coverage and contributions for migrant construction workers by situating social insurance in the sending country. This results, de facto, in a system that is complex, multi-jurisdictional and idiosyncratic, incentivising employers to avoid contributions. The regime should be restructured via EU legislation to be more self-enforcing, so that workers are no longer de facto obliged to understand and enforce the rules themselves.
- There should be simple, uniform and anonymous procedures to enable mobile construction workers to check required and realised social insurance contributions, and to report possible employer violations throughout the EU.
- Unions should have access to information on the status of mobile construction workers' social insurance conditions to improve their ability to represent this group. This could help to address the enforcement gap.
- Unions should explicitly advocate for ensuring that mobile workers have practical access to social insurance, both because this positions them as mobile worker advocates in areas that overlap with labour rights, but also because a lack of social insurance protection can drive down mobile workers' wages and conditions.

Introduction

One goal of European integration has been to realise free mobility of labour and services across the EU. But this entails that mobile workers should have continuity of social insurance coverage and contributions wherever they are working in the EU. Because replacing national welfare states with a pan-European system is too ambitious for the foreseeable future, efforts have instead focused on ensuring continuity of coverage. For posted workers, this is resolved by maintaining home country coverage, albeit for a limited period of up to 24 months. Workers who move independently of an existing employment relationship (for example, those who move to take up a host country job contract) instead enter into the host country's social insurance system upon arriving.

Current social security coordination arrangements in the EU do not address the needs of mobile construction workers adequately because: (i) they depend on employers' capacity and willingness to comply actively with regulations; and (ii) EU social welfare systems are designed with national labour markets in mind and take transnational work into account only as an afterthought. The existing coordination arrangements, as we found from our interviews with mobile construction workers and industry stakeholders, do not function well (or at all) when employers do not take an active role in ensuring that their mobile employees are covered. This is unfortunate because many employers do not bother and some even actively and fraudulently avoid making social insurance contributions on behalf of their employees as a way of reducing labour costs. As a result, the migrant workers most vulnerable to labour exploitation, and hence those most likely to need social insurance, are also the ones least able to ensure that they are covered.

Posted workers are part of a large and growing pan-European labour market for mobile workers. Approximately 5 million PD A1 forms were issued in 2019 (De Wispelaere et al. 2021: 7), estimated to represent around 2 million individuals (many being posted more than once). Postings represent one form of mobility used by mobile construction workers, which include self-initiated formal and 'informal' migration for work. Posting as a form of work mobility was conceived as part of an ongoing dependent employment relationship, and specifically designed to prevent discontinuity of social security contributions and benefits because posted workers remain attached to their home countries' social security systems while working abroad temporarily. In our interviews with posted workers and focus groups with sectoral experts in six European countries, however, it became clear that the notion of 'posted workers' as a separate worker category or labour market segment with a special regulatory system is a legal fiction. Workers shift between categories regularly and therefore, posting cannot be relied upon as a method for ensuring continuity of coverage.

Transnationally mobile construction workers often work under contracts and organisational forms that fall under one of the various categories of posting (see De Wispelaere and Pacolet 2019 for a description), but also under various

other formal or informal arrangements. An individual worker will probably work on many different job sites over the course of a construction industry career usually in various EU and non-EU countries, and for various employers, or as self-employed. The worker might also sometimes be posted from a country other than their country of origin, or even their country of residence (especially in the case of non-EU citizens).

The many variations possible in the form that posting or worker mobility can take enhances the need for clear and comprehensive communication about it to ensure mobile workers' security through transparency and accountability. We found, however, that workers are often poorly informed about their social insurance rights and status. They often do not trust their employers or host country authorities to handle these matters on their behalf, but at the same time are reluctant to contact anyone to clarify their status.

We base our conclusions and policy recommendations on research conducted under the auspices of the SMUG¹ project – *Uncovering Gaps in the Social Protection of Posted Workers* (2021–2022). This project involved (i) biographical interviews with construction workers who had at least one 'posting' experience, conducted in six EU countries (Austria, Denmark, Finland, Italy, Poland, and Slovenia); (ii) focus groups for identifying actionable policy solutions collaboratively with social partners, relevant stakeholders, and experts, including trade union representatives; conducted in the same six EU countries; and (iii) discussing key findings and policy recommendations with established international experts in the area of posted work. The interviewed workers were (a) posted to the six consortium countries among others from many different EU member and non-member states, or (b) posted from the six consortium countries outward to EU and EEA member countries. These include workers from wealthier EU countries, as well as from those typically thought of as posting countries (such as Lithuania and Poland), and so-called third-country nationals (TCNs) (such as Ukrainians). They represented both low and high skilled workers, including some with supervisory experience, and university education. All were male, as is typical in construction.

The policy brief does not aim to compare social security systems across member states, but rather to analyse the effects of this variegated pan-EU system of interlinked social insurance regimes from the perspective of mobile workers navigating the single EU internal labour market. We discuss these effects under two topics: (i) employment 'constructions' that facilitate regulatory avoidance by firms and result in fragmented career paths and social insurance outcomes for internationally mobile construction workers, and (ii) mobile worker attitudes and relations to employers. In each case, we show how these themes reflect trends leading to discontinuity in social contributions, and interfere with access to social benefits. Overall, the lower the workers' skill level, the more likely they were to encounter benefits-related problems, while those from wealthier countries had fewer difficulties. Those from poorer EU countries recounted that they had encountered difficulties often, and most from outside the EU (the TCNs) had a very difficult time.

1. <https://www.jyu.fi/hytk/fi/laitokset/yfi/en/research/projects/research-groups/smug>

These findings also reflect the poor enforcement of labour rights for mobile construction workers. The same activities employers undertook to avoid collective agreements and labour laws – such as informal work arrangements – also resulted in unpaid and/or inaccessible social contributions.

Employment ‘constructions’ for regulatory avoidance and the fragmented careers of mobile construction workers

The construction industry has always been characterised by geographic mobility, as well as inter-employer mobility because of its project-based nature and the high degree of subcontracting. Many workers are recruited through temporary employment agencies, or are self-employed. Much labour mobility occurs because subcontracting chains have become transnational – as firms win (sub) contracts in other countries, they send their own workers and often recruit new ones specifically to perform these jobs. They sometimes use temporary work agencies to recruit and employ some of these newly recruited workers on their behalf. There are also ‘labour-only’ subcontractors that exclusively supply staff to be supervised by managers from other firms.

Many of the workers we interviewed had what we call ‘posting careers’. While some worked mainly in their home country, with occasional posting gigs, more had careers made up entirely or primarily of a series of gigs across the EU. Overall, frequent mobility and residence in multiple member states was a common feature of our research participants’ work experience. This is consistent with evidence from statistical research on PD A1 form records, which show that many workers have repeat postings (see De Wispelaere et al. 2021). Some work mobility experiences involved moving transnationally while in a continuous employment relationship with a sending country employer, but more often workers were hired specifically for a particular posting.

A typical duration of a posting gig was three months, the longest two years, and the shortest one and a half weeks. Multiple gigs in sequence could add up to several years, sometimes decades. This could translate into dozens of contracts, multiple employers based in multiple sending countries, multiple receiving countries, and unemployment periods between postings. For example, one Italian worker told us he had been working around Europe for ‘25 out of 35 years in the trade’, as well as two years in Iraq.

A number of posted workers were posted by construction companies, which managed successive projects, or had multiple projects running simultaneously in different locations. These firms might hire a particular worker on a long-term work contract but then move them from one project to another, usually in different member states. Cases like this fit well into the design of the posting regime under EU legislation, with workers’ social insurance always referring back to the home country. If the employer is honest and pays the necessary contributions, the system should work. However, our interviews suggest that this occurs only in a minority of postings, typically those from wealthier member

states such as Finland to other wealthier member states such as Germany or Austria.

In other cases, workers were posted in a contractual sense from countries other than their country of residence. This was typical for third-country nationals, but some EU citizens also experienced this. 'Re'-posting via intermediate sending countries could result in multiple social insurance bases, requiring coordination when a worker tries to access benefits.

Often, intermediary companies are situated in a country other than the worker's host or origin country. This enables the employer to manipulate the rules related to social contribution payments. This can result in social contributions being paid in a third jurisdiction, to which neither the worker, the host country, nor the sending country authorities have easy access. At best, accessing benefit rights from this third country will be complicated and difficult and more likely, no practically accessible benefit rights will be accrued or recognised. This problem occurred for at least two re-posted third-country national informants, who had difficulty establishing benefit eligibility and contribution history. Many of the workers who had been reposted, however, were so alienated from host and intermediate posting societies that even checking eligibility seemed an unrealistic prospect.

Career paths are particularly complicated and precarious for third-country national workers. Third-country national posting is accomplished through 're-posting', involving an intermediary or 'transit' EU country, which is a nominal country of employment for the TCN posted worker. The employer recruits third-country nationals in an EU member state where they can gain entry, but sends them to another EU member state to work. This means that third-country national workers will often be employed by intermediary firms, and therefore have their work contracts and residence permits located in intermediary countries. We found cases in which workers never actually worked in the jurisdiction of their work contract. Third-country national posting careers involve multiple mobilities and switching between types of postings, legal statuses and social security systems even more than intra EU posted workers. Most of their employment also seemed to be informal, and they usually did not know whether social contributions were being paid properly. These workers were often highly exploited, but lacked the trust to ask for help from host country authorities. The use of third-country national workers adds legal uncertainty, both about the competency of host and transit country regulators, and applicable working conditions.

The third-country nationals we interviewed generally spoke neither the transit- nor the host-country language, and were unfamiliar with their rights in either country. They were also uncertain of their right to remain. The issue of work permits does not arise for intra-EU postings, but third-country national workers are dependent on the transit country for legal permission to work and the right to remain in the receiving country. While in principle established case law allows re-posting of third-country nationals, the kinds of employers operating in this space tend not to have their papers in order and their workers' right to remain in their re-posting job depends on this.

Both third-country-national and EU workers must trust that employers really are making social insurance contributions, and sometimes they do not. Typically, the worker does not find out about this in a timely way. Often, they find out at the point when the employer falls behind on wages, as one Slovenian interviewee related. In his case, he investigated and found that the social insurance contributions had not been paid. As is typical in such cases, he moved on to another job and did not pursue the matter.

When reflecting on their career paths, the workers also expressed their confusion about medical coverage while abroad, and about pensions. Sometimes the confusion was created by the existence of an employment intermediary, such as a work agency or labour-only subcontractor as it was unclear who was the legal employer or what the division of responsibilities was between different parties. This confusion often seems deliberate, designed to complicate and confound public authorities seeking to collect social contributions or enforce labour laws.

'Bogus self-employment' is a common alternative to posting in many EU countries. It can also be organised as a form of posting, when done in the sending country. It allows employers to avoid many of the social payment obligations inherent in a regular employment relationship. Our Finnish focus group members noted that the practice had recently become more common in Finland, in the form of so-called 'light entrepreneurship', which in their view was not a legitimate practice, but rather a way to shift social security payments onto employees. Such arrangements seem financially attractive to workers who are unaware of the social security cost, and are persuaded by promises of higher gross wages.

Focus group experts pointed out that these arrangements can lead to debts for the workers when authorities force the 'self-employed' to cover the missing social contributions.

Worker and employer attitudes to risk and social insurance

The variegated and poorly regulated nature of the pan-EU labour market subjects mobile construction workers to increased risk, related to limited knowledge of foreign social insurance systems, and to the possibility of being cheated by employers. Our interviewees were relatively accepting of these risks. However, their narratives revealed a tendency to manoeuvre through problematic situations rather than tackle them head on (cf. Berntsen 2016).

This sometimes meant taking on unsafe tasks rather than refusing them on safety grounds, as the following reflection of a Slovenian worker posted in Austria illustrates: '[there was this boy] who was like little Tarzan, he did [dangerous] things. He was playing Tarzan and lost his balance and fell almost 12 m down to the concrete.' Such stories were common, of workers acquiescing to pressure from employers to work without proper safety provisions.

Cavalier attitudes toward occupational health and safety are related to problems with access to social insurance because accidents were sometimes

concealed to prevent revealing safety violations. Some of our worker interviewees told of employers pressuring workers to conceal accidents, resulting in denying or delaying medical care. One Polish worker posted to Denmark explained: 'I fell from a truck [...] I slipped and hit my head on some stones and lost consciousness [...] we all made it look like it did not happen [...] They hid me in a store house and didn't let me go until I had regained consciousness.'

The attitude also finds expression in not worrying too much about future security, such as pensions. Especially younger posted workers treat posting as an adventure and a way of life, and pensions are something to worry about later. The Slovenian focus group noted that posted workers tend to check net earnings but take no notice of social security issues, making it unlikely that they will become aware of insurance and social security gaps. Older workers behave differently in this respect. Some older interviewees had looked into pension entitlements. No doubt, this is also common among non-migrant young people, but national social insurance institutions tend to ensure these contributions happen automatically for their nationals.

In our focus groups, some sectoral experts faulted the posted workers who are able to access such information but rarely do, but they also recognise that workers might not want to find out as they could be held responsible by host country authorities for missing payments. Furthermore, their employer could punish them for contacting the authorities. These interactions are further complicated by the lack of local language skills.

Conclusion

Atypical employment constructions, complicated and fragmented career paths accompanied by careless and hesitant attitudes among workers, and an imbalance of power between workers and employers complicate and undermine migrant construction workers' access to social insurance and benefits. This is not a problem of 'worker posting' per se, but rather of the fact that mobile workers' employment moves between various forms of contracts and social insurance jurisdictions over the course of a working career, ensuring that contributions will often remain unpaid or inaccessible. Currently, at the EU level, it is de facto primarily the responsibility of the individual worker to figure this out and ensure employer compliance.

Some of our focus groups discussed various initiatives aimed at informing mobile workers about social insurance rights and obligations, but found they had limited impact, probably because the workers have at least partly legitimate reasons to distrust the authorities, and to fear their employers' reactions. Instead of asking the authorities, migrant construction workers tend to trust their own personal networks or ask on social media, which allows them to retain anonymity. Officials in the Finnish and Slovenian focus groups mentioned that they had reviewed such discussions and found that the information given was sometimes incorrect.

The crux of the problem is the fact that the responsibility to resolve these issues falls de facto on the mobile worker, because each will have an

individualised work history, often spanning different forms of contracts, with various employers based in a variety of EU and non-EU countries. For this system to function each individual employee would need to investigate and force every employer they work for to comply. Employers cannot be trusted to attend to these issues, unless they are forced by the authorities. For this reason, the existing system, if it can be called that, guarantees that those with the least labour market power also receive, de facto, the least social protection. Fixing this can occur only through systematic and uniform action by the authorities, as the workers in question are not in a position to resolve their cases successfully. Trade unions and government enforcement institutions have a role to play in raising awareness of these issues, and accounting for and representing the interests of mobile workers in accessing social insurance benefits.

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