Radboud Universiteit

DIGNITY FIRM

Policy Brief

Employer Sanctions in the Netherlands: How to Bridge Policy Silo's to Protect Migrant Workers

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Introduction

This policy brief builds on a workshop on employer sanctions in case of the "illegal employment of third country migrant workers", organised by DignityFIRM researchers at Radboud University on 22 May 2025 in Nijmegen, the Netherlands. It presents the discussion on the current state of Dutch employer sanctions policy and case law, drawing on expert contributions from practitioners: lawyers and judges, representatives of the Netherlands Labour Authority (NLA), ministries, private immigration and mobility consultancy firms, the International Organization for Migration (IOM), academics, and migrant NGOs.

In this policy brief, we draw attention to two central topics in the context of irregular employment:

1) the limited transparency of the NLA's enforcement of illegal employment and irregular working conditions;

2) the proportionality of administrative fines and other sanctions for employers;

3) the consideration of migrant workers' rights and interests in enforcement practice.

Before turning to these themes, we first outline the different forms of illegal employment that may arise.

Types of illegal employment

In the Dutch context, illegal employment of migrant workers concerns workers without legal residence (in accordance with the scope of the Employer Sanctions Directive 2009/52/EU) as well as legally residing migrant workers employed beyond what is permitted, e.g., international students working without the required work permit and/or with a work permit but more than the permitted 16 hours. The types of illegal employment cases investigated by the NLA and brought before administrative courts in the Netherlands vary greatly. Table 1 presents an overview of different categories of illegal employment that can lead to employer sanctions in the Netherlands.

In the Dutch context we use the term "illegal employment" in line with the legal terminology, yet we underline that this does not mean the workers are staying illegally. On the contrary, illegally employed workers may have legal residence. We reserve the term irregular employment for situations where it also concerns cases of informal employment, thus distinguishing between migration law (illegal employment) and labour law (irregular employment).

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Recent press reports from the NLA show that illegal employment and enforcement actions related to it occur in various sectors, including Farm-to-Fork sectors. Although little data about the total number of fines for all categories of illegal employment is available, a recent news article, stressing illegally employed migrant workers contribution to the country's economy, clarified that, over the past five years, the NLA has issued 3,137 fines to employers for hiring workers without residence permits.

Table 1: Sub-categories of illegal employment [illegale tewerkstelling] according to the Inspection-wide risk analysis of the Netherlands Labour Authority (2023)

Main category	Sub-categories/ Examples of main category
Violation of employment conditions for foreign nationals with a right of residence	- Abuse of the (highly skilled) knowledge migrant scheme - Abuse of Intra Corporate Transfer Directive - Abuse of cross-border services (intra-EU posting) - Abuse of Asian cook scheme (note: this scheme has been withdrawn) - Abuse of TWV (work permit) or GVVA (single permit)
Illegal employment of foreign nationals residing legally in the Netherlands	- Illegal employment of au pairs - Illegal employment of third-country nationals in the procedure - Illegal employment of foreign nationals with a 'short stay' permit
Violation of employment conditions of migrants with a right of residence (yet who are allowed to work on a limited basis)	- Illegal employment of international students - Illegal employment of asylum seekers (changed after court ruling in November 2023)
Employment of foreign nationals residing irregularly in the Netherlands	

During the policy workshop, the abuse of cross-border services (intra-EU posting constructions) was mentioned as a particularly complicated category of illegal and/or irregular employment to enforce. Where an EU-based company may provide a service in the Netherlands and engage its third-country national workers, the situation is often opaque: documentation is scarce, and it is unclear whether the work is indeed legal or not, in conformity with the rules and case law on intra-EU posting (on which Oosterom Staples published The Downside of intra-EU Labour Mobility (*De Keerzijde van intra-EU arbeidsmobiliteit*)). Inspections often reveal irregularities with a significant number of workers, but enforcement is difficult in the EU context. Where posted workers are illegally and/or irregularly employed, cooperation with other EU Member States is essential to

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establish whether genuine economic activity occurs abroad or whether companies exist solely to facilitate posting. According to our respondents, such cross-border investigations, are sometimes hampered by slow responses from foreign authorities, further complicating enforcement at a time when posting practices are steadily expanding. As a result, some respondents stressed that sanctions under the WAV risk becoming mostly symbolic, serving more to reassure politics than to have real impact while "constructions" are still applied in practice, often at the detriment of migrant workers. Nevertheless, since employer sanctions cover various forms of illegal/irregular employment, of which the abuse of cross-border services is only one, this conclusion may be premature.

Having clarified the main types of illegal and irregular employment, this policy brief now turns to the first central topic of this policy brief: the limited insights on the NLA's enforcement of illegal employment and unlawful working conditions.

1. Limited insights on the NLA's enforcement of illegal employment and unlawful working conditions

The policy workshop and DignityFIRM's stakeholder interviews highlighted three key gaps in understanding the NLA's enforcement of illegal employment. First, NLA annual reports, sectoral reports or media updates, lack detailed information on the actual enforcement actions. Second, several stakeholders pointed to uncertainty about the NLA's follow-up strategies when complaints are submitted. Third, there is unclarity about the data-sharing capacities of the NLA.

Limited data on the enforcement of illegal employment

Attendees of the policy workshop highlighted the lack of quantitative data on illegal employment and its enforcement. The NLA produces annual reports which provide limited insights into enforcement actions related to illegal employment. They do not specify how many official decisions have been issued for violations related to illegal employment under the Foreign Nationals Employment Act (Wet arbeid vreemdelingen) or the Minimum Wage and Minimum Holiday Allowance Act (Wet minimumloon en minimumvakantiebijslag). This lack of detailed information hinders the assessment of both the intensity and effectiveness of enforcement efforts targeting illegal employment. The NLA's program reports (such as the one on Migration schemes, international, sham arrangements and compliance with

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collective labour agreements, the one on the Agriculture and green sector and the one on the Retail and hospitality sectors) tend to be more detailed. However, as they cover only a single programme, it makes the information fragmented and difficult for outsiders to assess or compare. It must be noted that for transparency reasons, the NLA provides online information on where illegal employment was encountered (Inspectieresultaten).

Policy consideration

The NLA might consider including more specific data on enforcement actions related to illegal employment and the enforcement of employment rights in the NLA's reports, including on the consequences for the workers involved e.g., how many, what legal status, were unpaid waged recovered?

The data collection under the EU Employer Sanctions Directive should be made public more regularly and, if incomplete, the Member States should be pushed by the European Commission on sharing data to develop fact-based policies, not just on sanctioning employers, but also on protecting workers.

The high number of uninvestigated complaints

During the policy workshop, participants addressed the fact that, in 2023, only 55% (2,551) of complaints in the *Safe & Healthy Work* domain and 44% (2,043) in the *Fair Work* domain were investigated in 2023. This raised questions about why a significant portion of complaints are not followed up on and whether improvements are possible in this regard. NGO FairWork has raised a similar issue in the media. In the past three years, the NGO has reported 131 cases of labour abuse, involving withheld wages and unlawful deductions in sectors in the Farm to Fork supply chain, central to the DignityFIRM project. None of these reports led to compensation or recovery of wages through the NLA for migrant workers. By warning that this undermines trust and discourages workers from reporting abuses, FairWork calls on the NLA to ensure that reporting violations leads to concrete results. During the workshop NLA representatives present noted that some complaints may not be investigated due to their limited quality or because they fall under the remit of another authority. In 2023 the NLA report on numbers and facts showed they had not followed-up on 61% of the complaints (most on health and safety at work) because the complaints are – in their perception – incomplete (or outdated) (30%), fall outside the range of their authority (26%), it did not concern a

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severe enough case (19%) or other reasons (25%). When a complaint is incomplete, the question is why the NLA does not investigate the complaint further, to make the file complete.

Policy consideration

1. Commission a national study into the assessment of complaints and the policy assumptions for the reasons given by the NLA to disregard so many complaints related to safe, healthy, and fair work for migrant workers. If the issue lies not with the quality of complaints but with enforcement priorities (whether a case is severe or not), enforcement capacity (interpretation of the authority), or complaint procedures, or has another reason, this may indicate a need for adjusting priorities or improvement of procedures.

2. And at the EU level: Commission a study with the European Labour Authority and/or the EU Fundamental Rights Agency across EU Member States on access to complaint mechanisms, follow-up and reporting as should be available to migrant workers according to EU Labour Migration Directives and the Employer Sanctions Directive.

Pros and cons of bridging silo's in data sharing

There is an ongoing discussion on inter-agency data sharing. We signal a paradox in law and practice concerning data sharing. According to the national law (Article 16(2) of the Foreign Nationals Employment Act'(WAV)), the Netherlands Labour Authority can share information with other authorities on their own initiative, and must do so if requested to support enforcement of, amongst others illegal employment. Yet, considering ILO Convention 81 Article 3(1) on the functions of labour inspections, the NLA should not be driven by restrictive immigration policies, but rather by its mandate to protect the rights of workers. Here, policy goals clash.

Policy consideration

Ensure that any interagency data sharing regarding illegally employed migrant workers serves the worker protection and not immigration policy.

2. Proportionality of administrative fines and other sanctions for employers

Participants in the workshop and other interviewees reflected on the proportionality of sanctions such as administrative fines, and the advantages and disadvantages of different sanctions, namely warnings and preventive closures and criminal law instruments.

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Proportionality of administrative fines for employers

For years, administrative fines for illegal employment have involved a balancing act between strict enforcement and proportional fines (see Figure 1). The Ministry of Social Affairs and Employment has repeatedly been overruled by the Administrative Jurisdiction Division of the Council of State (ABRvS). The most notable ruling came in August 2022, when the Division found that the fines did not adequately differentiate between varying degrees of severity in the violations and degree of culpability. In that decision, the Division introduced a classification system based on culpability, ranging from reduced culpability, normal culpability, gross negligence, to intent. Since this court ruling, the vast majority of the administrative fines (89%) has been mitigated. As a result, fewer employers fined have started legal proceedings.

Th 2025 policy introduces a differentiated approach to setting fine amounts. Although it is a balancing act for the NLA, according to legal experts Krop & Meeuwsen (Wav-boete: Een evenwichtsbalk voor de Arbeidsinspectie, *Asiel & Migrantenrecht* 5/6, p. 287-291), praise the new policy for its incentives to nudge employers to abide by the law. It considers the type of offender, culpability of the offender, the seriousness of the violation, any repeat offences (which lead to increased fines), and possible mitigating factors (such as corrective measures taken). During the policy workshop, participants also responded positively to the new rule, noting that it aligns more closely with case law from the Council of State. However, its actual impact will depend on how it is implemented in practice. Multiple stakeholders noted that the impact of administrative fines currently depends on the company size, as the current height of fines is not related to company size, turnover, or a certain balance sheet above a certain amount, as is the case in the EU CSRDD Omnibus.

Policy considerations

1. To the Netherlands Labour Authority/Ministry of Social Affairs and Employment: When applying the 2025 policy on administrative sanctions for illegal employment, (continue to) mitigate fines to ensure they are proportionate and avoid lengthy legal proceedings –government resources can be used more effectively.
2. To the Ministry of Social Affairs and Employment: Similar to the recent recommendation of the Social and Economic Council (SER, 2025) (which brings together employers and employees), consider whether and how employer sanctions related to the Foreign Nationals Employment Act (Wav) can be linked to company size.

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Use and impact of preventive closure warnings

The use of business closures as an enforcement measure dates back to 2013 but has largely fallen into disuse. It is outlined in the Beleidsregel preventieve stillegging arbeidswetten [Policy rule preventative shutdown under labour laws] (2013) and Article 10.1 of the (Besluit uitvoering Wet arbeid vreemdelingen 2022 [Decision implementation Foreign nationals employment act 2022], 2025). Interviewees and attendants of the policy workshop have suggested the renewed enforcement of this instrument by the Netherlands Labour Authority (NLA). A preventive closure warning means that if an employer violates the Foreign Nationals Employment Act (Wet arbeid vreemdelingen) again within a specified period, their business may be temporarily closed, typically for one month. Repeated violations can lead to longer closures (e.g. two months for a second offence, and so forth).

Recent figures show a growing number of such warnings: 282 in 2023 and 231 in 2024. There was also an increase in related enforcement actions, including conditional penalties (*last onder dwangsom*: 32 in 2023 and 29 in 2024) and actual closure orders (*bevel tot stillegging*: 6 in 2023 and 17 in 2024). However, only two court rulings related to actual closures (interim injunctions) were found in recent jurisprudence. The question was raised whether the rise in warnings reflects increased enforcement attention or a rise in repeat offenders (a main ground for issuing warnings).

There was no consensus during the discussions on the actual impact of these warnings. Some participants suggested the instrument may have a largely symbolic effect, especially as long as temporary employment agencies can quickly set up new legal entities. Others argued the impact is more significant for labour hirers (*inleners*). It was also noted that many employers respond seriously to a preventive closure warning and are motivated to ensure compliance with the law. Employers have an added incentive to act, as taking prompt corrective measures after an offence can lead to a reduction in fines for illegal employment.

Policy consideration for the NLA

Increase preventive closure warnings when appropriate, especially to hiring companies. While the precise impact remains unclear, the measure appears to contribute to increased awareness of corporate responsibilities in the supply chain and the prevention of illegal employment.

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However, provide **information, legal aid and if needed shelter**, for the workers of companies that are forced to close.

Limited use of criminal law instruments on illegal employment

The administrative sanction for the illegal employment of third country nationals was first introduced into the WAV in 2005, replacing a system of only criminal sanctions. Criminal sanctions were found to be ineffective, and in practice often low, and there was a need for change (see Krop *De handhaving van het verbod op illegale tewerkstelling*, 2014). However, despite the introduction of administrative sanctions, criminal law sanctions that target the illegal employment of third country nationals remained in the criminal code. Participants in the workshop indicate that criminal law sanctions (197b and 197c of the criminal code) to target the illegal employment of third-country nationals are hardly used in practice. This implies that although the NLA advocates for higher administrative fines to better combat employers who break the law, they scarcely use the instruments they have to impose criminal law, higher and likely more deterring, sanctions.

Policy considerations

More balanced and proportionate use of different sanctions at disposal, especially in cases of employers who are repeat offenders and have turned the illegal employment of third country nationals into a business model.

Again, all authorities involved should consider migrant worker rights when implementing sanctions and these rights should ideally be equally protected whether engaging administrative or criminal law.

Focus on civil law: Underused wage claim for irregularly employed migrant workers

It is important that migrant workers receive their due pay. Employers who are sanctioned for the irregular employment of migrant workers can also be legally required to pay all outstanding wages. Article 6 of the Employers Sanctions Directive requires Member States to introduce a legal presumption that the worker was employed for at least three months, unless the employer or the worker can prove otherwise. This EU-level presumption of a minimum three-month employment period is shorter than the one provided under Dutch law. Article 23 of the Foreign Nationals Employment Act (WAV) establishes a legal presumption of

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six months' employment, entitling the worker to six months of back pay unless the employer can prove it was paid or a shorter period.

In practice, however, Article 23 WAV is rarely used. While flagged by De Lange in 2011 (*De verborgen schat in artikel 23 Wav)* as a potential hidden treasure, in case law there are nearly no examples of its use. A reason given is that before a *labour* court, the existence of an employment relationship must still be proven, which is often difficult in the case of illegal employment. Another reason is that migrant workers without a residence permit are frequently reluctant to come forward, as they risk detention and return. Additionally, legal practitioners tend to specialise in either public law (focusing on administrative fines for employers) or civil law (such as wage claims under labour law). As a result, many labour lawyers are unaware of Article 23 WAV, while immigration lawyers often do not pursue wage recovery claims. However, FairWork has kicked-off an by providing information on the (non) use of this legal presumption.

Legal practitioners have expressed their scepsis on the use of the legal presumption of an employment relationship in practice. Firstly, there is concern over the necessity to nevertheless prove the employment relationship before the national labour courts. To this end, the NLA is investigating if they can share their inspection reports with the workers and their representatives to support their civil lawsuits. This is, however, not yet common practice. Secondly, the question was raised whether the NLA themselves can use the legal presumption of 6 months of employment when deploying their authority to demand from employers that they pay at least minimum wage. It is however only the worker who can use the legal assumption. Article 6(2)(b) EU Employer Sanctions Directive potentially offers a wider application of the legal presumption, but only when provided for by national legislation can the competent authority start procedures to recover outstanding remunerations. This article was not transposed into national law (Parliamentary Documents 2010/11 32 843, nr. 3, p. 4).

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Policy considerations

The Dutch law (Wav) would need to be amended to grant the NLA the authority to act on behalf of the workers. Such an amendment could also see the labour inspectorate take ILO Convention 81 to heart as the focus can shift to protecting and enforcing workers' rights instead of (only) sanctioning employers.

To the European Commission, in the event of a recast of the Directive, expand the scope of the legal presumption and oblige Member State authorities to act on behalf of migrant workers and include the obligation to assist migrant workers in the burden of proof when they make a claim, e.g., by making available to them inspection reports on their working conditions and rights.

Finally, and to conclude, we recommend academic institutions and professional bodies to mitigate the effects of siloed legal practice. Criminal and administrative law, employer obligations and the rights of migrant workers, are seldomly taught in one course. To this end both initial legal education and continuing professional development should be restructured to foster interdisciplinary awareness, to bridge policy silo's. Curricula and training programmes should explicitly address the interconnections between different branches of law and highlight the implications of legal specialisation for the rights of vulnerable people, like migrants.

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About DignityFIRM

Towards becoming sustainable and resilient societies we must address the structural contradictions between our societies' exclusion of migrant workers and their substantive role in producing our food.

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