

SHORT-TERM LABOUR MIGRATION AND POSTING OF THIRD COUNTRY NATIONALS (TCNs) FOR A LIMITED WORKING PERIOD: THE SPANISH CASE

Óscar Contreras Hernández. PhD in Law. University of Castilla-La Mancha. 15-07-2021

Content

- Introduction and national context.
- Legal framework on short-term labour migration and posting of workers in Spain.
- Main legal regime for short-term labour migration of TCNs in Spain.
- Posting of TCNs in the framework of the provision of services.
- Temporary agency workers from third countries.
- Self-employed workers from non-EU/EEA countries.
- References.

Introduction and national context

This report provides an overview of the Spanish legal framework regulating the entry of third-country nationals (TCNs) from outside the European Union (EU) or the European Economic Area (EEA), who move to Spain to carry out a temporary professional activity or provide temporary services on behalf of their employer. It is the result of the author's participation in the European Trade Union Institute (ETUI) project number 2051-103-31 "*National law on short-term migration and posting of third country nationals*".

Although the determination of the conditions of admission and the rights of TCNs is an EU competence¹, Member States are responsible for establishing the national regulatory framework of TCNs entry conditions for employment purposes, in accordance with the common policy established mainly through Directives. In Spain, this framework is broad and can be complex due to a certain legal dispersion caused by the constant regulatory evolution at European level and also by the importance of this phenomenon in Spain.

Prior to the health and socio-economic crisis caused by COVID-19 (March 2020), the number of Spanish Social Security affiliates from non-EU/EEA countries was 1,293,771 people. By sector, most of these workers were employed in activities related to household services, hotels and tourism services, construction and agriculture-horticulture. In relation to the latter sector, Spain is a *receiving state* because it receives more TCN workers than it sends to other countries. Although there are no official statistics available that specifically record the number of seasonal workers entering and leaving Spain, figures and data on Social Security affiliations show that approximately 155,000 TCN workers were included in the special agricultural insurance system in March 2020, out of which 60% came from Morocco (Ministry of Inclusion, Social Security and Migration, 2020)². However, Spain is a *sending country* of posted workers in the framework of a transnational provision of services in the EU, i.e. more posted workers are sent than are received, having experienced an exponential growth during the period 2012-2018 of almost 22% (de Wispeleere *et al*, 2019: 21). This trend has been abruptly curtailed and conditioned by the international pandemic situation and the emergency regulations adopted at European and national level to contain the spread of the coronavirus.

¹ In accordance with Articles 77-80 of the Treaty on the Functioning of the European Union (TFEU).

² <https://revista.seg-social.es/wp-content/uploads/2020/04/Marzo2020-EXTRANJEROS.pdf>, pp. 7-18.

1. Legal framework on short-term labour migration and posting of workers in Spain

The international and European legal framework concerning the rights and obligations of TCNs moving for short-term work in Spain is implemented in various legal and regulatory norms, as well as in numerous orders and instructions³. This legal regime can be classified into two groups: the first group consists of immigration rules that impose obligations related to entry, residence and work permits. The second group is related to labour and social security laws that are applicable indistinctly, albeit with nuances, to Spanish workers, to workers resident in another EU Member State who move to Spanish territory and also to TCNs who move to Spain in order to carry out a work or professional activity on their own account or on behalf of their employer. The national legal framework affecting the rights and obligations of migrants is vast and certainly complex. It consists of a large group of regulations that include frequent references and linkages between the various situations and requirements foreseen in each case (Escudero, 2010). This legislation also interrelates with other legal norms concerning posting or migration and with EU labour and social security regulations. These are the main regulations that, from a national perspective, have the greatest impact on the subject of this report.

Table 1 - National law related to short-term labour migration and posting of TCNs in Spain

<i>CONSOLIDATED LAW</i>	<i>BRIEF DESCRIPTION OR MAIN CONNECTION WITH TCNs</i>
Spanish Constitution (1978)	Recognizes rights and public freedoms of foreigners in Spain
Law 14/1994	Law of temporary agency work
Law 45/1999	Law of posting of workers in a provision of services
Organic Law 4/2000	Law of migrant's rights and their social integration
Organic Law 5/2000	Law of labour and social sanctions
Organic Law 8/2000	Reform of Law 4/2000 to incorporate clarifications to Law 4/2000
Organic Law 2/2009	Reform of Law 4/2000 and incorporation of some EU Directives
Royal Decree. 557/2011	Regulation for the implementation of Law 4/2000
Law 14/2013	Law of internationalization of the Spanish economy and labour mobility
Royal Legislative Decree 2/2015	Workers Statute Law
Royal Legislative Decree 8/2015	Social Security Law

Source: own elaboration

There are two main groups of TCN workers who move to Spain in order to carry out a temporary work. The first group consists of those who are recruited by Spanish companies for a temporary work (migrant workers). The second one is made up of those who are posted upon the initiative of their employer within the framework of a transnational provision of services (posted workers) either by companies established in a Member State (to which the EU regime applies) or by companies from non-EU or non-EEA countries.

All the regulations listed in Table 1 establish rules applicable to migrant or posted workers arriving on national territory, however, Organic Law 4/2000 and Royal Decree (RD) 557/2011

³ All the information on the formalities and procedures for complying with the existing rules in Spain in cases of labour mobility of third-country nationals is available at: <https://extranjeros.inclusion.gob.es/en/redeuropeamigracion/index.html>

comprise the main regulatory framework for the conditions under which TNCs can entry to Spain for the purpose of carrying out short-term or limited duration work. This legal regime is completed by Law 45/1999, which regulates the posting of workers in the framework of a transnational provision of services and establishes rules and conditions applicable to companies that temporarily send posted workers from an EU country or from third countries non-EU/EEA to carry out a temporary activity in Spain.

2. Main legal regime for short-term labour migration of TCNs in Spain: seasonal and temporary workers

As a general rule and irrespective of the duration of the work, non-EU/EEA workers wishing to carry out an employment or professional activity in Spain need an administrative permit to reside and work in the country, the employer must indeed request this administrative permit beforehand and, in any case, it must be supported by an employment contract that guarantees continuous activity during the period of validity of the permit and stay in Spain. Article 36.2 of Law 4/2000 establishes that the effectiveness of the initial residence and work permit is subject to the worker's registration in the Social Security system.

Although there are several types of residence and work permits in Spain regarding employed activities, this report refers exclusively to the one that affects TCN workers who can work in Spanish territory for seasonal and fixed-term work. The special regime that affects these workers is regulated in Article 42 of Law 4/2000 and in Articles 97 to 107 of RD 557/2011. The main characteristic of fixed-term residence and work permits is that they are temporary, meaning they are valid for a limited period of time and are not subject to renewal. Likewise, a prerequisite to obtain the permit is the existence of a commitment to return to the country of origin once the work and the employment relationship has concluded. The regulation presents the following classification of permits that allow TCNs to carry out a short-term work in Spain [Article 98 of RD. 557/2011]:

- a) Seasonal work permits⁴.
- b) Fixed-term work permits:
 - For works and services for the assembly of industrial or electrical plants, construction of infrastructures, buildings or electricity, telephone, gas or railway supply networks and for the installation and maintenance of production equipment, as well as their set-up and repairs.
 - Of a temporary nature, it is carried out by senior management staff, sports professionals, artists, as well as other groups determined by the Ministry of Labour. All of them must hold the administrative licenses that are required, where applicable, for the development of the professional activity.

In the case of seasonal or campaign activities, the duration of the permit shall correspond to the duration of the employment contract, with a maximum limit of 9 months within a period of 12 consecutive months. In the remaining cases, that is, activities related to works and services or highly qualified personnel, the time limit shall, in principle, correspond to the duration of the employment contract or to the planned duration of the activity, duly accredited. However, the

⁴ Although they can apply to any nationality, these permits primarily target foreign workers belonging to States with which Spain has signed agreements regulating migratory flows. At present, Spain has agreements in force with Ukraine, Mauritania, Dominican Republic, Morocco, Ecuador and Colombia to regulate and organize migratory flows.

duration of the permit shall be limited to a maximum of 12 months, beyond which it may not be extended, notwithstanding the exceptional possibility when the employer provides evidence of unforeseen circumstances that determine the need to continue the labour relationship, for example, upon the completion of a work project that has been delayed due to severe weather conditions. In any case, if the initial permit is for a duration of less than 12 months, it may be extended under any circumstances up to that maximum, provided that it is requested by the employer in order to continue with the same work, service or activity specified in the initial contract [Article 102.2 of RD. 557/2011].

2.1. Main conditions to obtain and keep residence status, work permit and visa

The temporary residence permit and the seasonal or fixed-term work permit required to TCN workers requires compliance with the following conditions:

- a) They must not be citizens or residents of an EU or EEA State.
- b) They must not be in an irregular situation in Spanish territory.
- c) They must not have prior criminal records in Spain or in the countries of previous residence (during the last 5 years) for offences stipulated under Spanish law.
- d) They must not be listed as rejectable in the territory of countries with which Spain has signed an agreement to this effect.
- e) The non-return period agreed in the context of their voluntary return to their country of origin must have elapsed.
- f) The *national employment situation* must allow for recruitment.

For the initial authorization of the residence and work permit, the *national employment situation* shall be taken into account [Article 38.1 of Law 4/2000] so that, with respect to seasonal workers, recruitment of TCNs is allowed if the existing job offers have vacancies following their publication by the State Public Employment Service (SEPE) for 25 days so that resident workers in Spain can previously compete to fill them. With regard to fixed-term contracts for works and services of TCNs, contracting is allowed if:

- 1) The occupation to be performed by the worker is included in the catalogue of occupations that are difficult to be filled and are published quarterly by the Public Employment Service⁵.
- 2) The Aliens Office considers that the job could not be filled, as duly declared by the Public Employment Service.
- 3) The permit is issued for nationals of States with which Spain has signed international agreements (Chile and Peru).
- 4) They can prove the existence of a case listed in Article 40 of Law 4/2000, regulating specific cases of exemption from the national employment situation.

⁵ This catalogue contains a list of jobs that can be filled by hiring foreign workers. However, this requirement is not applicable in the following cases: necessary workers for the assembly or renovation of a production facility or equipment; highly qualified professionals, including technicians and scientists hired by public entities, universities or research, development and innovation centers dependent on a company; staff of a company or group of companies in another country who intend to work for the same company or group of companies; and foreigners who have held work permits for seasonal activities for two calendar years and have returned to their country (see Article 40 Law 4/2000 and Article 99.3 *in fine* RD. 557/2011).

Permits for temporary residence and fixed-term employment must be requested by companies and employers' organizations at least 3 months prior to the start of the activity. Once granted, the corresponding temporary residence visa and seasonal work permit will be obtained, stating the worker's situation and the duration of the permit [Article 42 of Law 4/2000 and Articles 70 and 101 of RD. 557/2011]. This visa authorizes temporary residence in Spain; however, within 3 months of entry into Spanish territory, the company must formalise the worker's affiliation and registration in the Spanish Social Security system and communicate the content of the employment contract to the Public Employment Services. In the case of seasonal workers, the worker must be registered in the Social Security system within 1 month of entry. Failure to do so will result in the termination of the permit due to non-compliance with the required conditions [Additional Provision 16^a of RD. 557/2011].

Registration in the Social Security system will make the initial temporary residence and work permit effective. However, it should be noted that, as established in Article 70.9 of RD. 557/2011, if at the end of the initial authorization period there is no proof that the worker has been registered, he/she will be obliged to leave the national territory, otherwise incurring in an infringement on the grounds that he/she is in Spain illegally.

Regarding the validity of the work permit, this will begin on the day on which the worker enters Spain. The duration of the seasonal residence and work visa will cover the entire period authorized to reside and work, the maximum duration of which, it should be reiterated, is limited by virtue of the case for which the worker is authorized (9 months for seasonal work and a maximum of 12 months for a planned temporary duration of an activity for work and service provision). It is important to note that TCNs who temporarily enter the Spanish labour market must commit to return to the country of origin once the employment relationship has been concluded. In order to comply with this requirement, he/she must provide a signed document in which he/she commits to comply with this legal obligation. In fact, failure to present such a document will be cause for refusal of the visa and, furthermore, if the worker subsequently fails to comply with the commitment to return, he/she may be refused further applications for work permits during the 3 years following the end of the granted permit⁶.

2.2. Other requirements for employers and rules related to application in Spain of collective agreements and working conditions to TCNs.

In Spain, the requirements to obtain a fixed-term residence and work permit coexist with another series of requirements in terms of working conditions, formalization of employment contracts and other requirements related to accommodation conditions and reimbursement of expenditures to cover board and lodging expenses. Firstly, Article 99 of RD. 557/2011 requires the employer to prior notify the employee of the essential elements of the employment relationship and the main working conditions in writing⁷, which must include a projection of the net salary to be received.

⁶ In order for the worker's return to be verified, he/she must present him/herself at the diplomatic mission or consular office that issued the visa within a period of one month from the end of his/her permit in Spain. The mission or office must provide the foreigner with a document accrediting their attendance and will transfer this information to the Ministry of Interior for the purposes of its entry in the Central Register of Foreigners. In these cases, the fulfilment by the worker of his/her obligations, as well as the accreditation of his/her return before the competent diplomatic or consular authority, will entitle him/her to fill other possible job vacancies that may arise within the same activity.

⁷ In accordance with Article 2.2 of RD. 1659/1998.

These conditions must be set out in the employment contract, which must be formalized in writing and contain at least the following information: identity of the parties to the employment contract; the date of commencement of the employment relationship and its expected duration; information about the registered office of the company or employer and the workplace where the worker will provide services; its professional category; amount of remuneration; duration and distribution of working hours and annual leave; and the collective agreement applicable to the employment relationship.

Secondly, but exclusively for TCNs working on a seasonal basis or carrying out work and service activities, employers must provide them with adequate accommodation, and must in any case ensure the dignity and proper hygiene of this accommodation. They must also arrange workers' trip to Spain and their return to their country of origin and cover at least the cost of the first such journey and the costs of the workers' transfer to and from the place of entry into Spain and the place of accommodation [Article 99.3 of RD. 577/2011].

In relation to the rules and working conditions applicable to these workers, it should be noted that Article 3 of Law 4/2000, in accordance with the Spanish Constitution, establishes equality between foreigners and Spaniards in the legal system in relation to the enjoyment of individual and collective labour rights provided that they are in a regular situation, have obtained authorization to work and the employment relationship has been initiated in Spain (Molina, 2017). In fact, Article 10 of Law 4/2000 expressly refers to this mandate, stating that those who meet the established requirements have the right to exercise a remunerated activity, as well as access to the Spanish Social Security system. Differential treatment with regard to working conditions would amount to discrimination on grounds of nationality, which is expressly prohibited by Article 17 of the Workers' Statute, which prevents the nationality of the worker from being used as a justification for generating inequality. Thus, TCNs authorized to work in the territory of some EU Member State are entitled to working conditions equivalent to those enjoyed by citizens of the Union [Article 15.3 of the EU Charter of Fundamental Rights]. Therefore, the working conditions laid down in the laws and regulations of the State, as well as in the collective agreements applicable in the place and sector of activity where they provide services, shall apply to TCN workers who have entered into an employment relationship in Spain, in accordance with the principle of equal treatment with national workers or workers from other EU Member States⁸.

2.3. Main Social Security rules applicable to TCNs in Spain

The effectiveness of the initial residence and work permit is conditional on the worker's registration in the Spanish Social Security system by the employer. When this is effective, TCNs are subject to the Spanish Social Security system, meaning that from then on their employer must pay contributions on their behalf and these workers will have the right to access the benefits and services offered by the system on equal terms with Spanish employees, as there is full equality between them and foreigners who provide services in Spain legally, including social services and benefits [Article 14 of Law 4/2000].

⁸ European Union citizens may carry out seasonal work in another Member State on the basis of freedom of movement for workers within the Union (Art. 45 TFEU). This fundamental right implies the abolition of any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment. Seasonal employment is governed by the laws of the host Member State on the basis of equal treatment. In this respect, EU citizens, as seasonal workers, enjoy the same rights and entitlements as nationals with regard to, inter alia, the provisions of collective agreements, working conditions and access to trade unions (as laid down in the Regulation 492/2011).

The main legal norm that regulates the rights and obligations in terms of Social Security in Spain is the Royal Decree Legislative 8/2015 (Social Security Law) which, in its Article 7, determines that foreigners who reside or are legally in Spain will be included in the Social Security system, provided that they carry out their activity in national territory. If TCN workers comply with the requirements set out in this legal framework, they will have access to all the social benefits offered by the system under equal conditions with Spanish workers, such as health care, illness, temporary disability as well as unemployment benefits, social assistance and family benefits.

Spain has signed bilateral international agreements with 23 countries, the aim of which is to ensure that workers who are nationals of signatory states and who move for professional reasons do not suffer any detriment to their social security rights, nor are they subject to unjustified double protection. To this end, rules are introduced to remove obstacles to the application of the different legislations, to connect them with each other and to harmonize inter-relations among the different social security administrations⁹.

2.4. The application of EU Directives (2009/52/EC; 2014/36/EU and 2014/66/EU)

The transposition of Directive 2009/52/EC into Spanish law took place under Organic Law 2/2009. Many of the aspects regulated by this Directive were already included in Spanish legislation prior to its approval, specifically in Law 4/2000 and in the regulatory provisions implementing this law; however, these were modified to adapt them to the provisions of the European legislation, especially with regard to the minimum standards on sanctions and measures applicable to non-EU/EEA employers who employ TCNs in an illegal situation. In this sense, Articles 53 and following of Law 4/2000 were amended to increase the effectiveness of the fight against irregular immigration, reinforcing the means and instruments of control and sanctions, especially with regard to those who facilitate the access or stay of illegal immigration in Spain.

With regard to Directive 2014/36/EU on seasonal workers and Directive 2014/66/EU on intra-corporate transfers, it should be noted that many of the rules they impose were already included in the Spanish legal framework, so they were already applicable on the date of approval of these European regulations. The adaptation of the national legislation did not entail any significant technical or legal difficulties, although some regulations were approved to implement the contents that were not included, for example, Order ESS/1571/2014, establishing the fees for processing administrative authorizations in relation to international mobility. In any case, all the provisions of these Directives are implemented by Law 4/2000, RD. 557/2011, Law 14/2013 and Law 45/1999 in Spain.

2.5. Third country national workers during the Covid-19 pandemic in Spain

Exceptionally, several orders were passed to temporarily restrict non-essential travel from third countries to Spain, in line with European guidelines¹⁰. The measures promoted by the Spanish government to contain the Covid-19 pandemic included the denial of entry of TCNs, except for holders of a long-stay visa issued by an EU Member State, cross-border workers, health

⁹ To access to bilateral agreements signed between Spain and other countries, please see: <http://www.seg-social.es/wps/portal/wss/internet/InformacionUtil/32078/32253?changeLanguage=en>

¹⁰ See: Communication from the Commission Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak C/2020/4813.

professionals or care workers on their way to or returning from work, and transport workers in transit [Article 1 of Order INT/356/2020 of 20 April].

Among other exceptional situations, the border closure situation led to a contingent of seasonal female workers from Morocco -who were in Spain to work in the red fruit harvest in the province of Huelva-, found themselves in a situation in which they could neither return to their country of origin nor continue working elsewhere in Spanish territory¹¹. In response to this situation, on 7 April 2020, the Spanish Government approved Royal Decree-Law 13/2020 to adopt urgent measures on agricultural employment and, among other measures, it authorized the extension of work permits for seasonal workers until 30 June 2020 to allow employment in the harvest of other fruit and vegetables in other Spanish regions.

3. Posting of TCNs in the framework of the provision of services. Main requirements, specific rules and aspects related to working conditions and social security.

In order to talk about posted workers to Spain is necessary to distinguish between two categories of posting. The first includes postings carried out by companies established in an EU/EEA Member State. These postings are covered by the freedom to provide services in the EU internal market [Article 56 TFEU], so that these companies have the right to move among EU/EEA countries and post their own workers previously employed in origin. This situation is also covered by Directive 96/71/EC, revised by Directive (EU) 2018/957, which was transposed into Spanish legal framework by Law 45/1999 (Carrascosa, 2020: 39).

TCNs posted by those companies, once they have been already authorized to reside and work in an EU or EEA country of origin, do not need a new authorization or work permit in Spain¹², although they must provide documentary proof of their legal situation: short-term visa for stays of less than three months (if required according to nationality) together with a passport or identity document that proves their residence in the first Member State. In case of longer stays, a visa and a temporary residence or stay permit must be obtained [Article 31 of Law 4/2000 and Article 45 of RD. 557/2011]. Law 45/1999 refers to the posting of workers to Spain (irrespective of their nationality) who provide services in companies established in an EU/EEA country, provided that the posting takes place to Spanish companies with which they have signed a contract for the provision of services in one of the following cases:

- Posting within the framework of a contract for the provision of services between companies.
- Intra-corporate postings or within companies of the same corporate group.
- Posting by a Temporary Employment Agency to a user undertaking in Spain.

During the time of providing services in Spain, the worker will maintain his employment relationship with the posting company. With regard to Social Security, the legislation of the State of origin will be applicable. The EU rules apply to TCNs with legal residence in an EU Member State, in accordance with the provisions of Regulations (EC) 883/2004 and 987/2009 on the coordination of Social Security systems in the EU. In this sense, together with the residence or stay permit, workers must have the Portable Document (PD) A1 form that certifies the continuity of application of the Social Security legislation of origin (Carrascosa, 2019).

¹¹ See: <https://english.elpais.com/society/2020-07-14/fruit-pickers-trapped-in-spain-we-have-run-out-of-money-and-need-to-return-to-morocco.html>

¹² See CJUE judgment of 09.8.1994 (*Vander Elst*, case C-43/93) paragraph 26.

The second category includes postings of workers by companies that are not established in an EU/EEA Member State. In this case, immigrations regulation [Law 4/2000 and RD. 557/2011] are applicable, but exclusively for TCNs (Casas, 2002: 24). This regulation establishes that the company must first obtain a temporary residence and work permit for their workers in order to allow these workers to perform their activities in Spain¹³. The provision of services must fall under one of the following cases:

- a) Execution of a contract concluded between a foreign company and the recipient of the provision of services which is established or carries out its activity in Spain.
- b) Temporary relocation to a work centre in Spain of the same company or of another company within the corporate group.
- c) Temporary posting of highly qualified workers for the purpose of supervising or advising on works or services to be carried out abroad by companies based in Spain.

The residence and work permit will be limited to a specific occupation and territorial scope, and its duration will be the same as the working period, with a time limit of 1 year [Article 110.3 of RD. 557/2011]. Main requirements to grant the residence and work permit for seasonal work are the following:

- Posted workers must not be irregularly present in Spanish territory and must not have any criminal record.
- The residence of the worker in the country where the company is established is stable and regular.
- The worker's activity in the country where the posting company is established must be of regular nature and the worker must have been engaged in that activity for at least one year and have been employed by that company for at least nine months. [Article 116 of RD. 557/2011].
- The national employment situation must allow posting¹⁴.
- The posting company must guarantee applicable requirements and working conditions, in accordance with the provisions of Law 45/1999.

Both for workers posted by companies established in the EU/EEA and for those posted from companies not established in an EU Member State, Law 45/1999 establishes in Articles 3.1, 3.4 and 3.5 that employers must guarantee the working conditions stipulated in the legal or regulatory provisions as well as in arbitration awards or universally applicable collective agreements in force in the place and sector or branch of activity in question. In particular, the following working conditions shall be applicable to posted workers in Spain: working time, remuneration, equal treatment and non-discrimination, prevention of occupational hazards, freedom of association, rights to strike and to assemble. In addition, according to Directive (EU) 2018/957, accommodation conditions and allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons must be guaranteed to the posted workers to Spain (Contreras, 2020).

¹³ This permit regulated in Articles 45, 114-116 of RD. 557/2011 authorizes the carrying out of a lucrative activity in cases of temporary posting of foreign workers to Spain by companies that are not established in any EU Member State. To apply for this permit, form EX-08 must be submitted: https://extranjeros.inclusion.gob.es/es/ModelosSolicitudes/Mod_solicitudes2/index.html

¹⁴ This requirement does not apply when workers are posted to work centres of the same company or corporate group of companies (Article 40.2 of Law 4/2000 and Article 65 of RD. 557/2011).

A further obligation that the company must fulfil is to notify of the posting to the competent labour authorities prior to the performance of the services. This notification must include information on the posting company and the company receiving the service, the activity sector, the number and identity of the workers posted, the starting date and the expected duration of the posting, among others (Art. 5 of Law 45/1999).

During the posting to Spain, the posted worker shall maintain his employment contract and social security status in force with the company that posted him/her. Exclusively to posting from non-EU/EEA countries, in the case of an applicable international instrument of social security, a posting certificate must be obtained from the competent authorities of the country of origin certifying that the worker remains subject to the Social Security legislation of that country¹⁵. In this case, the effectiveness of the temporary residence and work permit will take place at the time of the worker's legal entry into Spain. On the other hand, if there is no international Social Security instrument, the residence and work visa that is issued entitles the worker to enter and stay for a maximum period of 3 months, and to start a work activity and registration in the social security system during the 3 months following legal entry into Spain. In this case, the company must designate, by means of a public document, a representative in Spain for the purpose of complying with Social Security obligations.

4. Temporary agency workers from third countries

The law regulating temporary work agencies in Spain covers the transnational activity of temporary work agencies established in the territory of an EU/EEA Member State, but not of non-EU/EEA work agencies (Article 22 of Law 14/1994). In the absence of specific rules, all the standards analysed in the above points regarding temporary residence and work permits, visas, notification of posting and applicable working conditions apply to TCNs who are posted to Spain by these companies. It should be noted that workers can be posted to Spain by these companies in the following cases: highly qualified workers; assignment to supervise or advise the Spanish user company and when there is a prior employment relationship with the company to which the worker is posted. From the labour perspective, all the provisions of Law 45/1999 will be applicable -as stated in its 4th additional provision- so that employers who post workers from third countries must guarantee the working conditions provided for in the legal or regulatory provisions in Spain and in arbitration awards or collective agreements of general application, among other obligations. Likewise, workers will be subject to the same rules and conditions as those workers who are directly hired by the user company.

In cases of recruitment of TCNs by temporary employment agencies established in Spain, immigration regulations (Article 42 of Law 4/2000 and Articles 97-107 of RD. 557/2011) and Law 14/1994 will apply. Through this formula for hiring workers, TCNs are hired by temporary employment agencies that oversee the hiring procedures, formalization of registration in the Social Security system and payment of wages. This is possible by means of a service provision contract under which workers are temporarily assigned to the user company established in Spain. Article 11.1 of Law 14/1994 obliges temporary employment agencies to apply the essential working conditions -equal treatment- that would correspond to the temporary workers if they had been directly hired by the user company to fill the same position (Cabeza, 2011: 66). This formula, which is often used in Spain, has been the subject of some controversial cases; the main trade union in Spain (CC.OO.) has been systematically denouncing the labour

¹⁵ International social security conventions applicable in Spain (e.g., bilateral conventions, Multilateral Ibero-American Social Security Convention and other international standards) are available at: <http://www.seg-social.es/wps/portal/wss/internet/InformacionUtil/32078?changeLanguage=en>

situation experienced by temporary workers (especially seasonal workers in agricultural activities) who are hired through this formula, which sometimes involves the non-application of the working conditions established by the applicable collective agreements and, within the current pandemic situation, the non-application of health and safety measures in the workplace¹⁶.

5. Self-employed workers from non-EU/EEA countries: entry conditions and mandatory registration and social regime

In Spain, a self-employed worker is a natural person who carries out an economic or professional activity for profit regularly, personally, directly, on his/her own account and outside any other person's sphere of management and organization, whether or not he/she employs workers (Article 1 Law of 20/2007). TCNs wishing to carry out a self-employed activity on Spanish territory must first obtain a temporary residence and self-employed work permit (Article 36 of Law 4/2000). In addition to the general requirements to obtain a temporary residence permit already mentioned in Section 2.1 of this report (non-illegal presence in Spain, lack of criminal record, completion of the non-return period of commitment and having paid the corresponding fee), they must comply with the following conditions regarding work (Article 105 of RD. 557/2011):

- a) Comply with the requirements stipulated by the Spanish legislation on the opening and functioning of the planned activity.
- b) Possess the legally required professional qualification or accredited experience.
- c) Prove that the investment planned is sufficient and that it will have an impact, where applicable, on job creation.
- d) Have sufficient financial resources for maintenance and accommodation.
- e) Have paid the fee for the self-employment work permit.

The granting of a residence and self-employment permit will be followed by the procedure for the granting of a visa. This must be requested by the foreign worker within 1 month of the consular office notifying him/her of the granting of his/her temporary residence and work permit (Article 108 of RD. 557/2011). If he/she meets the requirements and the permit is granted, the self-employed worker must enter Spain for the duration of a 3-month stay visa, and he/she has 3 more months to register in the corresponding Social Security regime in order to give effect to the residence and self-employment work permit (Special Regime of Self-Employed Workers). If the registration does not take place, the residence permit will not be effective and the stay period will expire, and he/she will have to leave Spanish territory, otherwise incurring a serious infringement upon being in an irregular situation in Spain (Art. 53.1.a. of Law 4/2000).

¹⁶ See: [https://industria.ccoo.es/noticia:493798--CCOO denuncia la ETT Aldi en la Inspeccion de Trabajo por no garantizar la seguridad y la salud de los temporeros](https://industria.ccoo.es/noticia:493798--CCOO%20denuncia%20la%20ETT%20Aldi%20en%20la%20Inspeccion%20de%20Trabajo%20por%20no%20garantizar%20la%20seguridad%20y%20la%20salud%20de%20los%20temporeros)

References

Cabeza, J. (2011), *La reforma de las Empresas de Trabajo Temporal*, Bomarzo, Albacete.

Casas, M.E. (2002) “Libre prestación de servicios y desplazamientos temporales de trabajadores en Europa en la era global: objetivos y significación de la Ley”, in CASAS, M.E. and DEL REY, S. (dirs.), *Desplazamientos de trabajadores y prestaciones de servicios transnacionales*, CES, Madrid.

Carrascosa, D. (2019) "Desplazamiento en la UE y dumping social en el mercado único: estado de la cuestión y perspectivas", *Revista del Ministerio de Trabajo, Seguridad Social y Migraciones*, 142, Ministerio de Trabajo, Madrid.

Carrascosa, D. (2019) “Coordinación de los sistemas nacionales de Seguridad Social en la Unión Europea (Reglamentos CE/883/2004 y CE/987/2009)”. In: CASAS, M.E., et al, *Derecho Social de la UE. Aplicación por el Tribunal de Justicia*, Lefebvre, Madrid.

Contreras, O. (2020) *Desplazamiento de trabajadores en la Unión Europea: situación actual y nuevos horizontes*. Bomarzo. Albacete.

Escudero, R. (2010) "Claves legislativas en materia de inmigración y problemática de las vías de acceso al mercado de trabajo por cuenta ajena", in Escudero, R., (coord.), *Inmigración y movilidad de los trabajadores*, Madrid.

De Wispelaere F., et al. (2019) *Posting of workers - Report on AI Portable Documents issued in 2018*, Directorate-General for Employment, Social Affairs and Inclusion, European Commission, Brussels.

European Commission (2020) *Annual Report on Intra-EU Labour Mobility 2020*. Social Europe, Brussels.

Molina, M.A., (2019) "Derechos sociolaborales de los extranjeros". In: Imbronda, B.J., Ruíz, C. (coords.), *Extranjería*, Francis Lefebvre, Madrid.

Ministry of Inclusion, Social Security and Migration (2020), *Foreign Social Security Affiliates March 2020*, p. 7-18. <https://revista.seg-social.es/wp-content/uploads/2020/04/Marzo2020-EXTRANJEROS.pdf>