

EMPLOYERS' GUIDE

EMPLOYMENT
RELATIONSHIPS

INTERNATIONAL ORGANISATION OF EMPLOYERS

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This paper is designed as a general guide for employers in national debates on the changing and evolving nature of 'employment relationships'. The paper is based on the position the Employers' Group took at the 91st International Labour Conference General Discussion on the Employment Relationship in 2003.

1. BACKGROUND

- 1.1 The world of work and by consequence employment relationships are a moving and changing paradigm. The concept of the 'typical' contract of employment is now out of place in the modern business world. Attempts to define "typical" or "normal" employment relationships fail in all contexts, as technology and forms of work organization create almost unlimited variations and permutations; and not only in the developed, but also in the developing world. In the developing world what was considered 'atypical' in terms of the *fordist* model was the more 'typical' model outside the public sector.
- 1.2 Changes in lifestyles find workers looking for greater flexibility in balancing needs that are important to them, and looking for greater flexibility in finding means for earning income. Mothers are having children later in life and then returning to work, often on a part-time basis. The changing organization of work has meant greater operational independence of the labour force; individualization of working time arrangements; flexibility of work rules; personal and family leave. Self-employment too is growing rapidly in many developed countries and growth in this segment has been concentrated in the fastest growing economic sectors and in the higher skilled occupational groups.
- 1.3 Developments in the labour market, especially in developed economies, have strengthened the position of individuals in the labour market relative to employers, as they can choose to free themselves from the traditional type of work contract where the employer provided capital and organization and employees provided labour.
- 1.4 How 'employment relationships' are shaped has changed. Today, the characteristics of a good job go beyond pay and benefits to include a range of social, psychological and organizational features of work contexts and relations. Beyond the legal basis of employment relationships the core dimensions include trust, commitment, influence and communication. Intrinsic benefits or rewards are as important a component of work as monetary benefits. That is part of the reason why many are increasingly opting for forms of work other than traditional forms of employment.

- 1.5 For enterprises today increased flexibility is a vital component in remaining competitive (and viable in some cases) in an increasingly integrated global economy. For example, a key aspect in remaining competitive for many enterprises has been the development of a focus on core business activities and the outsourcing of the non-core aspects. Failure to do so could result in negative impacts on the enterprise, above all on its workforce. Such changes in the workplace reflect the needs and requirements of both employees and enterprises and importantly these developments can be mutually beneficial.

2. LACKING PROTECTION: EXPLAINING THE ISSUE

- 2.1 For employers the key question is how widespread is the problem of insufficient or deficient protection? There is not enough clarity and concrete data to give us an accurate picture and, without fully understanding the problem, we run the risk that any solution will cause new and potentially greater problems for workers, governments and businesses. For employers, the essential point is that we must first define the problem before finding a solution, and assess the impact of potential solutions before adoption.

- 2.2 Employment status is important because it determines such things as what statutory employment rights a working person is entitled to, how they are taxed, and their social security benefits. Key questions in this regard are:

- a. *Are there any categories of employed people unable to benefit from the protections flowing from their employment?*
- b. *If so, how widespread is the issue?*
- c. *What protections are we talking about?*
- d. *Do workers need or want these protections?*

A. Who is an employee?

- 2.3 An employment relationship exists as an universal concept, but one that is different in every country and region. Employment relationships are so complex that no definition could ever cover all possible constellations. For example, some countries have, by statute, extended the meaning of ‘employee’ and ‘employer’ for certain limited purposes. Practical variations exist in various jurisdictions to control and dependency tests (that include an examination of factors such as: hired for a specific project; level of integration; autonomy; freedom to delegate; freedom to work for others; freedom to refuse work; chance of profit/loss, amongst others), and many exemptions exist for certain occupations.

- 2.4 To be dependent on someone does not make that “someone” the employer by virtue of this fact. Dependency comes in many forms, and to varying degrees. Economic dependence, for example, may be more significant to a person earning subsistence income where such income is not easily replaceable, compared to a professional who can easily find new clients or customers. Similarly, dependence on the organizational infrastructure of a user enterprise may have different implications to an independent contractor with easy access to alternative support.
- 2.5 In short, perhaps the situation could best be summarized as follows: A person is either an employee or they are not. If they are not, then they are self-employed. If they appear to be self-employed, but are actually in a disguised employment relationship (and are therefore workers who should be afforded protection), they are employees. There is no in-between. The facts and an appropriate and reasonable application of the law should resolve any confusion.

B. Who needs protection?

- 2.6 If protection is lacking, is this because there are not enough laws, not enough enforcement, not enough benefits to compliance, or lack of specificity? It is important not to assume that those that do not have protection necessarily need it (or would be in a better position with it). Similarly, if there are certain workers who do need protections, it does not follow that all workers need these protections. Greater understanding of the magnitude of any need is required for a meaningful discussion to ensue.
- 2.7 Not all protections are tied to the employment relationship, as we often see in the context of health and safety. However, caution must be exercised in reference to such a model. In the case of health and safety, the historical basis for the model is occupiers’ liability law, and not employment law. Similarly, in the case of workers’ compensation, the historical premise for the model is civil liability law, and not the labour standards model. Even collective bargaining charts its origins outside the employment relationship, with the evolution of trade unionism since the 19th century. Only subsequently were the basic structures extended to workers outside the trades. Thus, to look to the employment relationship as the resolution for worker protections ignores a complex and rich history surrounding the regulation and evolution of work.

There are many obvious consequences to creating unwanted protections, among the more obvious include:

- it could create a separate category of worker. Such an intermediate category would have none of the flexibility of the self-employed worker, nor would it necessarily have the same legal protections as the employed;
- it will cause confusion beyond labour standards, as it could have consequences on tax and social benefits programmes and laws;
- it will inevitably encroach on commercial activities and commercial relations;
- it will restrict existing protections associated with commercial law;
- it would limit the freedom of choice among enterprises and workers, and promote attempts at disguising employment;
- it would encourage restrictive regulation, discourage job creation and economic growth, and limit flexibility in the efficient and competitive operation of enterprises;
- it would increase the cost of the public administration of labour and employment standards;
- it could create unnecessary constraints and obstacles on employment generation.

3. HOW PROBLEMS ARISE

A. The law is unclear

- 3.1 In many jurisdictions laws or other arrangements are in place, but are often not enforced. No international discussion, Convention, Recommendation or Resolution can influence protections when governments are unable or unwilling to apply the law. Assuming a willingness and capability to apply the law, the next question is whether the law is adequately clear.
- 3.2 Problems can arise when legislative frameworks are only partly applied because of the poor understanding of them by those responsible for their implementation. *This begs the question: how can an International Labour Standard rectify this situation?*
- 3.3 A lack of clarity is to no one's advantage. Employers, workers and unions all prefer clarity to litigation. Ultimately this is a local concern. We should not have to look to the ILO to suggest that clarity is needed in legislation, as it is not realistic or realisable to achieve such clarity at the international level. But while clarity is important so is flexibility and the ability to accommodate the huge range of needs of business and workers. Thus, any discussion of clarity should be tempered with respect for the need for flexibility.

B. The employment relationship is ambiguous

3.4 A lot of discussion has been provoked by the notion of ambiguous employment. A great deal of caution is recommended in using the notion of ambiguity as a concept. For example, is the ambiguity in relation to: the work; the relationship; the intent of the parties; or the law? Does it relate to factual ambiguity or legal ambiguity? Must the intent of the parties be ambiguous? Is a situation considered ambiguous because of lack of understanding, or because the situation is truly ambiguous? In this context a number of issues need to be taken into account.

- *An employee is an employee only when there is an employment relationship recognized by law. That is a legal test determined by national law and practice.*
- *Dependency is an inappropriate criterion to use (everybody is dependent on someone in some manner); the use of the notion of dependency will not lessen ambiguity, but will make the assessment of any situation more judgemental and therefore more susceptible to ambiguity.*
- *Employees who supply a service or product for a third party on agreement are the employees of the supplier, not of the person who is supplied.*
- *One must be sensitive to interference in commercial relationships. What one person considers ambiguous may be a valid attempt to appropriately structure a commercial relationship to the benefit of all parties.*

C. The employment relationship is disguised

3.5 The concept of disguised employment in essence is where a party or parties structure a relationship with the intent to disguise the relationship in order to evade legal obligations. Employers do not support deliberately disguised employment. It is a denial of entitled rights and protections and companies that operate in this way – evading laws – present unfair competition to companies that are fully compliant with and operate within the law.

3.6 It is important to underline that we are not talking about avoidance (structuring affairs within the law which can be instigated by either worker or employer or both) but evasion (clear issue of intent with criminal consequences). Conversely, such a type of avoidance works both ways. Workers often assume the status of an independent worker so as to avoid their own legal obligations.

3.7 The intention of the parties is paramount in assessing whether fraud is at question. The difficulty arises where two parties enter into bona fide and legitimate arrangements to structure their relations in a commercial context to maximize the benefits to both parties, and not to defraud one or the other of benefits, and not to evade social obligations. Is this disguised employment or valid structuring of commercial relations?

- 3.8 Some traditional relationships have changed and the direct link between employers and employees may appear disguised because individuals are becoming their own employers and therefore are able to forge relationships with companies and enterprises which are more akin to that of suppliers of services than that of the traditional employee. In this connection it consequently does not follow that there is a demand for ‘protection’ and the key danger here is falling into the trap of creating laws that cannot logically be applied. In many cases it is mostly rigid legislation or lack of application or enforcement in the first place that has created disguised employment.

D. It is unclear who the employer is

- 3.9 Employers believe that every worker has the right to know who his or her employer is (if he/she has an employer?) and should have access to a resolution process to establish this fact. In the event of a dispute on an employment relationship, the issue can really only be accurately answered by a duly constituted authority such as a court, by the application of clear tests to determine the case. Thus, it is for the national governments to ensure that the laws applicable to labour standards are clear, and that enforcement mechanisms are effective. In this way, there should be no confusion of who the parties to the employment relationship are.

4. APPROACHES TO AVOID

A. Creating new categories of workers

- 4.1 The creation of separate categories of workers needs to be avoided, principally for the reason that it could encroach on commercial activities, and also because it will cause confusion beyond labour standards (e.g. taxation issues) and limit freedom of choice in the relationship between enterprises and workers. It could also mean that such an intermediate category would have in reality none of the flexibility of the self-employed worker nor all of the legal protections of the employed.
- 4.2 An employee is an employee when there is a relationship with his or her employer which is in accordance or in compliance with the particular country’s legal requirements for an employment relationship.

B. Triangular employment relationships

- 4.3 A triangular employment relationship mostly assumes a civil, commercial or other contract between a user and a provider. The key issue centres on the question: who is the actual employer?

- 4.4 Where there is a civil or commercial contract between a user and a provider it is a misnomer to speak of a triangular employment relationship. Where there is an agreement whereby one person agrees to supply a service or product, the individuals who perform the service or make the product are the employees of the supplier, and not of the person who is supplied. There can be no *presumption* that in such arrangements the so-called 'principal' (user) is the employer. Even whilst at law some obligations to the employee may rest on the 'principal' (user), that assumption of obligation does not in the absence of a 'contract of employment' create an employment relationship.
- 4.5 The extension of blanket employment rights could fundamentally change the nature of the relationship between certain work providers and workers.
- 4.6 A common issue arising from such a discussion is whether there should be equality in wages, benefits and working conditions between workers employed by the user enterprise and workers employed by a third party doing work for the user enterprise. This is often referred to as equity, but the term is a misnomer. Equivalence does not mean equity. It does, however, mean a lack of competitive capacity, in that the provider is constrained in its capacity to offer cost effective services to the user.

C. Interfering in commercial activities

- 4.7 The concept of an independent worker can take many forms. Increasingly there are many emerging jobs in for example the ICT or consultancy sectors, which generally involve well-paid autonomous workers. But in this connection it should be noted that a commercial relationship with a company is no different than one with an individual, in that in neither case are they, by that relationship, an employee.
- 4.8 It is common for legal frameworks to focus on the facts of the relationship in determining employment. This is understandable from a historical perspective, but fails to respect the intent of the parties and the sanctity of contracts. As a result, workers (who are in reality independent workers and want to be treated that way) are often treated as employees at law. Maybe the bigger problem is finding ways to ensure that statutory labour standards are not imposed unfairly on workers seeking to be independent workers.
- 4.9 Within the context of globalization, businesses are restructuring their affairs with a much greater focus where their comparative advantage lies (for example, through the increased use of sub-contractors). Many companies have created hundreds of thousands of jobs by contracting out, and thousands of developing country enterprises have thus got access to global markets because of this arrangement. If that kind of business model were to be put in jeopardy by burdening them with responsibility for "dependent" workers, the logical thing for them would be to invest in fully automated plants in their home countries.

- 4.10 If there is a demand for protection then it needs to avoid interfering in genuine commercial activities. Independent workers are afforded protection under commercial law and do not seek other protections. Indeed such protections may impact negatively on their existing situation as they limit the means of providing services and limit their capacity to develop effectively and efficiently.
- 4.11 There are some specific commercial activities that have particular aspects that should not be confused in this debate, such as:
- *FRANCHISING: The central difference here is that the owner of the franchised brand can withdraw the brand but not directly interfere with local conditions. The usual stipulations are that the franchisee must deliver the product in a certain way and obey the laws of the particular country. This issue has no place in this debate.*
 - *EXPORT PROCESSING ZONES: EPZs are a different issue as the government alone has made a decision to provide exemptions to existing laws or tax requirements on the grounds of inducement to investment.*
 - *SUB-CONTRACT WORK: Sub-contract work is a vital component of the world of work today and indeed is indispensable to many industries where contracted specialists are essential (e.g. oil and gas, construction, mining industries).*

5. THE EMPLOYERS' APPROACH

- 5.1 Employers believe that there is a limited amount that can be achieved at the international level as the issue is a labour law issue relating to each national jurisdiction with actual solutions only realisable at this level. In this respect a key emphasis should be placed on the application and enforcement of existing laws. In many jurisdictions laws or other arrangements are in place (but often not enforced) or are being put in place (where this is appropriate).
- 5.2 The issue is extremely diverse - not just the national specificity, but also the sector specificity. Considering the national and often local specificities of this issue and the difficulties that some national administrations have in arriving at national solutions, employers do not see how an international instrument could possibly hope to address such a diverse issue (i.e. national laws state the principles of law, but their application still depends on the facts of each case).
- 5.3 Legal systems evolve over time and are embedded in culture and history and therefore it is up to each nation to review the extent to which, if any, changes are needed from time to time. This is precisely what legislatures do. Any attempt to try to arrive at universally applicable principles or categories of employees would result in rigidities being created at the international level.

- 5.4 Employers recognize that there is a problem of deliberately disguised employment relationships and are strongly opposed to it. Employers expressed a willingness to consider a Recommendation at the International Labour Conference in 2006 in this regard.¹
- 5.5 There is a need for more and better information as to what rights and entitlements apply to which category of person. Where there is a need for laws and regulations they must be good and relevant regulations, as opposed to unnecessary over-regulation. In that respect government responsibility should be discharged by closely involving the two social partners.
- 5.6 Employers see this principally as an issue of application and enforcement of existing legislation. Clearly when a person who is an employer evades his obligations towards his employees by fraudulently claiming that such persons are not his employees, provision for legal enforcement should be made if such does not already exist. In this respect the role of labour administration systems in achieving practical responses is essential. This is principally a national labour law issue. Some countries have developed mechanisms based on case law which provide for certain tests, on the basis of which courts determine the status, having regard to the facts. What is needed is effective implementation of existing laws, not new ones that could confuse the situation further.

1 Paragraph 25 of the conclusions of the General Discussion on Employment Relationships ILC 2003. “The ILO should envisage the adoption of an international response on this topic. A Recommendation is considered by the Committee as an appropriate response. This Recommendation should focus on disguised employment relationships and on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level. Such a Recommendation should provide guidance to member States without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take account of different economic, social, legal and industrial relations traditions and address the gender dimension. Such a Recommendation should not interfere with genuine commercial and independent contracting arrangements. It should promote collective bargaining and social dialogue as a means of finding solutions to the problem at national level and should take into account recent developments in employment relationships and these conclusions. The Governing Body of the ILO is therefore requested to place this item on the agenda of a future session of the International Labour Conference. The issue of triangular employment relationships was not resolved”

The following are suggested approaches to the resolution of disputed cases of employment relationships (The exact mechanisms to ascertain this needs to be determined by national - or regional - legislatures):

- Governments should try and ensure that national legislation is concise and clear. They need to devise methods for making existing legislation clear and understood.
- Labour administration systems need to provide more and better information as to what rights and entitlements apply to what categories of workers.
- Where laws and regulations are appropriate, they must be relevant to the modern world of work. In that respect government responsibility should be discharged by closely involving the two social partners.
- Consideration should be given to different solutions appropriate to a particular national situation, with due regard for differences among sectors, and differences in the intent behind various types of protections. This is often referred to as avoiding a one-size-fits-all approach to the application of standards;
- Mechanisms for resolution should be cost-effective and accessible, but also have sufficient controls to prevent abuse;
- Governments should be encouraged to examine existing national legislation to ensure clarity;
- Consideration should be given to providing more and better information as to what rights and entitlements apply to which category of person (e.g. national guidelines).
- With a view to respecting the intent of parties to commercial relationships, mechanisms should be established whereby the parties themselves can stipulate their relationship and then have that stipulation accepted by the courts;
- National administrations should conduct regular examination of enforcement problems.

6. ROLE OF GOVERNMENTS

The roles of governments on this matter is not complex, but is of considerable importance. Among the opportunities for governments are:

G O V E R N M E N T S

- Creating or strengthening institutions which are accessible to all.
- Reforming legal systems which provide relatively speedy access for the enforcement of contracts and which respects the rule of law.
- Formulating policies that facilitate employment generation.
- Examining taxation systems to ensure that they are clear and relevant.
- Promoting research on the economic consequences of undue regulation of the employment relationship, and on the value of alternative means of work organization.
- Increasing enforcement capacities and sharing information about practices with other States faced with similar problems.
- Consulting and involving the two social partners in policy development.

7. ROLE OF EMPLOYERS

E M P L O Y E R S

- If appropriate, helping to provide data that could clarify the situation at national level.
- Working with the other social partners in establishing or reforming resolution mechanisms.
- Assisting, where appropriate, in the process of reviewing national legislation so as to ensure clarity and fairness.
- Providing training and information to member enterprises, assisting them to apply statutes and relevant case law decisions.
- Finally, employers' organizations could participate with the other social partners in processes aimed at examining enforcement problems and at developing national strategies that could include guidelines or other means to provide guidance.

8. ROLE OF THE ILO



- Disseminating information on the new types of working relationships and methods of getting work done. This information should be value neutral.
- The ILO’s technical cooperation role should be one of providing the requisite information to the tripartite constituents, on the basis of which national policies could be adjusted where necessary. It should not take the form of legal advice on a matter, which is often within the judicial jurisdiction in each country.
- Some national governments may need assistance and technical cooperation in the area of enforcement and compliance. The ILO could provide governments with access to relevant information.
- Facilitating the collation and exchange of information concerning changes in employment relationships.
- Playing a role in assisting countries to develop appropriate policies.

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