

THE EMPLOYMENT
RELATIONSHIP
RECOMMENDATION,
2006 (No.196)

EMPLOYERS' GUIDE

INTERNATIONAL ORGANISATION OF EMPLOYERS

July 2006

PURPOSE OF THIS GUIDE

This guide has been prepared to assist employer organizations at the national level in dealing with ILO Recommendation No.196 concerning the Employment Relationship. Such a guide was deemed advisable due to a number of elements of the Recommendation that are particularly problematic, and due to the technical nature of other elements of the Recommendation. In addition, it was considered advisable to ensure that concerns expressed during the development of Recommendation No.196 were not lost with the passage of time.

BACKGROUND

The 95th International Labour Conference (2006) (hereafter “ILC”) adopted Recommendation No.196 on the Employment Relationship. The Recommendation concludes debates around an issue that has continued acrimoniously in the ILO since the early 1990s, and has produced instruments on Home-Work, Part-Time Work and Private Employment Agencies. It is the culmination of an attempt to regulate the various forms of flexibility that have emerged in today’s labour market.

Employers have consistently taken the view that, as the issue of employment relationships is so grounded in unique national realities and practices, it would not be a suitable subject for standard setting. That view has been borne out by successive Conference failures. The debate on Recommendation No.196 exemplifies this, as it failed to secure the support of the Employers’ Group and over one- sixth of governments.¹ *It is a bipartite agreement reached between workers and governments.*

¹ Submitted to the plenary sitting for record vote, the Recommendation was adopted by 329 votes in favour, 94 against and 40 abstentions. The following Governments abstained: Australia; Bahrain; Colombia; Costa Rica; Czech Republic; El Salvador; Guatemala; Korea; Iran; Kuwait; Nicaragua; Malaysia; Saint Kitts and Nevis; Qatar; Seychelles; Switzerland; Timor Leste; United Arab Emirates; United Kingdom; United States; Yemen.

The basis for the failure to reach consensus can be attributed to a move away from the mandate for the discussion on the Recommendation. That mandate should have been derived from paragraph 25 of the conclusions of the General Discussion on the Employment Relationship at the 91st International Labour Conference (2003), which sought to focus on a Recommendation on Disguised Employment.²

In 2005, the Office prepared a questionnaire in preparation for the 2006 ILC discussion. This questionnaire was to serve as the basis for the draft instrument that would be put before the Committee at the 95th ILC. The questionnaire, unfortunately, included the very problematic issues that had dogged previous ILC debates – triangular relationships, interference in commercial relations, universal criteria and indicators, and presumption of employment – issues employers expressly sought to avoid in the 2003 consensus.

Despite such a history, and despite the obstacles placed before the Committee in June 2006, employer representatives worked with the other parties to try and reach a consensus. However, this proved to be extremely difficult considering the inappropriate draft placed before the Committee. Sadly, the final text was agreed without the support of the employers and a sizeable number of governments.

WHAT THE RECOMMENDATION ACHIEVES

While the Recommendation is not a consensus instrument it does, however, contain a number of useful elements for employers in the national public policy context. Some of the more problematic elements around triangular relationships have been removed; there is clear language demonstrating respect for true commercial relationships, along with recognition of Convention No.181 on Private Employment Agencies. These elements were the result of employer involvement in the process.

² Paragraph 25 of the Conclusions of the General Discussion on the Employment Relationship, ILC 2003, stated “*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 tradition 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 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*”.

IT RESPECTS COMMERCIAL CONTRACTS

Paragraph 8 strikes the right balance between the rights of employees and the rights of independent workers.

“National policy for the protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due” (Paragraph 8)

This language creates a correct balance between the necessary protection of all workers with the need to ensure that commercial relationships flourish. This is the balance that employers have been seeking on the issue for a decade.

Paragraph 8 is probably the first and only time that commercial contracts are explicitly recognized in an international labour standard. This paragraph should be promoted as the centrepiece of the Recommendation. Not only does it recognize the legitimacy of alternate forms of work and business – e.g. independent contractors, outsourcing, subcontracting - it also promotes a balance between labour and commercial standards. Employers’ organizations should strongly advocate that all other provisions of the Recommendation should be read in the context of this paragraph, particularly paragraph 11 which is sadly in clear contradiction with this paragraph 8. Additionally, in preambular paragraph 12 the importance of economic growth and job creation is noted, in terms of developing national policy. As with paragraph 8, other provisions of the recommendation should be seen in the context of this statement.

IT CAUTIOUSLY ADDRESSES TRIANGULAR RELATIONSHIPS

Perhaps the most difficult issue that has dogged this debate has been the threat that the obligations of an employer under an employment relationship could be extended to that employer’s clients (the so-called “triangular relationship”).

This is a dangerous concept on a number of fronts. First, it could create uncertainty by extending potential liability in commercial contracts to the workers of service providers. This would, in turn, make it unpredictable and extremely difficult to manage the cost of an operation, and to manage the work being performed with even the most remote connection to an operation. This would discourage investment and job creation by suggesting that, if the employee of one employer does work that benefits another – which is, by definition, the nature of practically any useful work, - the one who benefits from the work must assume liabilities arising from the employment relationship.

Second, it could lead to significantly increased burdens for national labour administrations, because of the potential opportunities it would provide for claims and conflict. For example, if a business fails, its workers could be able to seek redress from its customers, or from the end-purchasers of products and services produced by those workers, under employment legislation. This would undermine well-functioning and responsible systems of sub-contracting, micro-

enterprise development, temporary work agencies and outsourcing, all of which have legal frameworks that function effectively and are critical components of the modern labour market.

These difficulties were, in part, avoided in the Recommendation by focusing on ‘disguised’ multiparty relations. In the operative part, Paragraph 4 (c) states: “*National policy should at least include measures toensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protections they are due.*”

The objective of the Employers’ Group in this respect was to shift the focus to clarity in the law, and to acknowledge rights where they are due. This was intended to provide flexibility in the Recommendation to allow the unique nature of existing national law to govern. While the overall Recommendation may be described as disjointed, employer organizations should similarly focus any discussion of the Recommendation’s application on clarity of law, efficiency in dispute resolution and, as mentioned above, respect for commercial agreements.

TEMPORARY WORK AGENCIES

The final paragraph of the Recommendation explicitly states that the instrument will not interfere with the existing Convention dealing with Private Employment Agencies (C.181).³ There was much scope to confuse the private employment agencies in this Recommendation, particularly under the rubric of triangular relationships. Employers’ organizations at the national level should be vigilant to ensure that Recommendation No.196 is not used to encroach on the Temporary Work Agency Industry.

Paragraph 23 provides clarity on this: “*This Recommendation does not revise the private Employment Agencies Recommendation, 1997 (No.188) nor can it revise the Private Agencies Convention, 1997 (No. 181).*”

³ Convention No.181 was supported by employers, as it appeared to be a flexible instrument. Importantly it specifically allowed for implementation to take into account national contexts. Employers were much less happy with the Recommendation which accompanied the Convention, as it appeared to suggest a stricter regulatory route. Convention No.181 has secured , as of June 2006, 19 Ratifications.

AMBIGUOUS RELATIONSHIPS

A consistent concept presented by the Office was that of “Ambiguous Relationships.” The fundamental approach of employers in these debates has been to underline the importance of clarity. Employers have consistently said that they believe everybody has the right to know who their employer is. They have also said somebody is either an employee or is not – i.e. 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. However, the notion of ‘ambiguity’ has clouded recent debates and a desire was shared by all parties to avoid creating a third category of worker.

Employers argued that ambiguity is merely indicative of a problem – it is not in itself a category. Somebody is either in an employment relationship or they are not. An employment relationship may be disguised, but it remains an employment relationship. Employers’ organizations should resist any attempt at the national level to introduce a concept of “ambiguous employment” into national law. In doing so, they should point to the Recommendation and the debate on this issue to demonstrate that the notion of “ambiguity”, in itself, is better addressed by dealing with the underlying issues giving rise to the concern.

The concerns giving rise to the idea of “ambiguity” are addressed in the operative paragraph 4 (a) *“National policy should at least include measures to provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self employed workers”*.

DISGUISED EMPLOYMENT AND GUIDANCE TO GOVERNMENTS

Disguised employment occurs when a party or parties structure a relationship with the intent to disguise the relationship in order to evade legal obligations. This is fraud, and should be unacceptable in all jurisdictions. This needs to be differentiated from bona fide structuring of relationships and affairs in order to meet legitimate needs. There is a clear distinction between avoidance (structuring affairs within the law which can be instigated by either worker or employer or both) and evasion (clear issue of intent to mislead and/or violate national laws). Mature parties will structure their affairs in a manner that suits their needs, with due consideration and respect for the law.

The Recommendation deals specifically with disguised employment. Paragraph 4 (b) outlines that:

“National policy should at least include measures to:....combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations

can arise where contractual arrangements have the effect of depriving workers of the protection they are due”.

The Recommendation also contains various provisions promoting effective dispute resolution, which address many of the concerns regarding disguised employment. The employer view was that, if the law was clear and adequate (paragraph 2) and there are good mechanisms for resolving disputes, administration and enforcement will be effective. To this end, paragraph 4(a) recommends guidance on establishing the existence of an employment relationship, and paragraph 4(e) recommends speedy, inexpensive, fair and efficient dispute resolution mechanisms. However, the Employers’ Group did not support some of the specific elements of processes set out in the Recommendation, such as a presumptive approach (discussed below). It was on this point, and the inclusion of specific criteria and indicators, that led to the disengagement of employers from the process.

In addressing these issues at the national level, employer organizations should refer to, and promote, the elements of the Recommendation on which there was agreement – in particular paragraph 8, which recognizes commercial contracts - and draw a line between those elements and others on which there was no agreement.

APPLICATION OF EXISTING LAW

The Recommendation notes the importance of application and implementation of effective laws (Paragraph 4.f) as what is often needed in many jurisdictions is effective implementation of existing laws, not new ones that could confuse the situation further. Paragraph 1 additionally notes that circumstances change and laws should be reviewed in line with such changes.

“Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.”

In this connection, the role of labour administration systems in achieving practical responses is essential. A strong labour administration, which guarantees compliance with national law by national and international companies, can be an attractive feature for national and international businesses.

The Recommendation notes the importance of labour administration systems but, importantly, is not prescriptive. Due to the broad diversity of national conditions, there is no “one-size-fits-all” system of labour administration. The development of an effective labour administration should respond to national conditions, such as economic development and financial resources.

In short, employers' organizations should take a position that governments should :

- (a) *promote effective labour administration systems;*
- (b) *promote the development of relevant and useful national law;*
- (c) *be guided by the need for balance between commercial and employment regulation, and the need to promote economic growth and entrepreneurship.*

Assuming success in these objectives, the application of national law then becomes a priority.

WHERE THE RECOMMENDATION IS UNHELPFUL

The Recommendation reflects some fundamental misunderstandings about the way economic life in general, and commercial arrangements in particular, take place. It reveals a failure to understand how the labour market has evolved with growing specialization and diversity in business models, based on technological change and increasing levels of education. Such an evolution is one of several elements that have contributed to economic growth, which has, in turn, generated unprecedented levels of employment and better standards of living for more people than ever before.

The first reason that governments should oppose this instrument is that it is bad for business and employment. When courts and tribunals look to the ILO for guidance on this matter, they will find this Recommendation. They will find overly simplistic criteria and indicators and, worse, a suggestion that there should be a presumption of employment on the basis of inappropriate criteria. It suggests that there is logic in treating independent workers as employees. Such notions fly in the face of reality and logic, and could impose an economic relationship on parties contrary to their intention and interests.

Enterprises will have to be extremely cautious in using independent entrepreneur, because, in doing so, the user enterprises will risk being treated as the employer, bringing on associated costs and administrative burdens on them. This limits the capacity of business to structure its work, and limits the opportunities available to budding entrepreneurs and self-employed workers. It works to deny workers the right to be their own boss. This Recommendation discourages investment because it creates uncertainty as to the legal obligations that are attached to work. This is not good for employment, economic development or social improvement.

CRITERIA AND INDICATORS

The instrument includes a list of indicators and criteria which are not helpful, and which could be misused to characterize many independent contractor relationships as employment relationships. This is counter to entrepreneurship promotion and the development of enterprise. It threatens many businesses in the service industry. It creates new uncertainty as to relationships, which is destabilizing to the investment climate. It interferes with the delicate economic and legal balance that has been achieved in most jurisdictions between commercial and employment relationships.

The enumeration of criteria is not suitable for an international instrument because every national jurisdiction has over the years developed its own criteria, which are rooted in its own economic realities, history, culture and traditions. The introduction of a specific list of criteria in the instrument therefore, even while not binding, may well interfere in national processes as the Recommendation will be looked to for guidance as established policy or customary international law. Many jurisdictions now take into account a lot of facts related to the case brought before them. Listed criteria could lead to a narrowing of possibilities in making the right judgement. Employers have argued that International Labour Standards should be instruments of principle that can last the test of time. Indeed, this notion is captured in the preamble of Recommendation No.196.

A set list of criteria will inevitably become outdated. In an evolving labour market, technology and new forms of work organization constantly create new variations. What is relevant today may not be relevant or appropriate tomorrow. Employers had favoured an approach whereby the 'importance' of criteria was underlined without specifying what they should be (noting that they would differ from jurisdiction to jurisdiction, sector to sector, and even job to job). A specific "one-size-fits-all" list does not take account of sector specificities and specificities linked to certain professions. Many of the indicators fit some situations, but could lead to wrong conclusions in other cases.

A specific list could also be used unscrupulously. For instance, those who want to disguise an employment relationship will soon find ways to do so by fulfilling the listed criteria in one way or another. Such individuals could use the 'listed criteria' in the Recommendation to 'prove' that an employment relationship does or does not exist - in reality, using the Recommendation to do the exact opposite of what was intended.

Set criteria additionally risk overruling the will of the parties even when there is no intention to disguise the relationship. Such uncertainty about the legal status could interfere with genuine independent contract relationships.

It was this element and the "presumption" issue (discussed below) that led to a breakdown in the Conference process of developing the regulation, and led to the Employers' Group disengaging from the process in protest. Employer concerns on this issue have been repeated from 1997, when the topic under consideration was a Convention on Contract Labour. Even in the 'compromise' paragraph 25 of the Conclusions of the General Discussion on the Employment Relationship (91st ILC), employers insisted that a universal approach to criteria was not important. During

discussions leading up to the 2006 Conference, employers were clear that they would not support an instrument that contained criteria. During the 2006 Conference, it was made clear that, if criteria and indicators remained in the Recommendation, the Employers' Group would no longer participate and would consider the Recommendation to be a bipartite instrument.

Where a government is considering enumerating criteria that are not part of the existing national law, employer organizations should stress that the balance referred to in paragraph 8 of the Recommendation be reflected in the legislation. The employers' organization should reiterate that standard criteria do not necessarily reflect the sectoral or industry specific circumstances, and could lead to bona fide commercial agreements being undermined.

PRESUMPTION AND DEEMING OF EMPLOYMENT RELATIONS

Paragraph 11 allows for a legal presumption of employment to be created and for deeming. Deeming means that an individual who is not an employee can be declared to be an employee. It also means that an individual who is self-employed can be declared to be an employee. This means turning people into something they are not. Such a paragraph has the effect of taking away rights and disregarding bona fide commercial agreements. It has the effect of disregarding the intention of the parties to the agreement.

Rights and obligations of the parties concerned are determined either by an employment relationship, involving contractual and legal aspects, or by commercial contract. Both areas of law have legal protections applicable to their circumstances.

The provisions in the Recommendation suggest that, on account of the legal framework not being adequate, there should be a presumption of employment. It creates a status that is not based on reality. It creates costs for the user enterprise, which is forced to rebut, or accept, the presumption.

The key concern regarding presumption is that when courts investigate if a contract is an employment one or a commercial one, they approach the process of investigation without any presumptions or prejudices - i.e. they have an open mind and make a decision based on facts. This ensures the fairness and impartiality of the courts. When a presumption of employment is created *at law*, this destroys the impartiality of the courts. It destroys community confidence in the processes of the law and undermines the law - i.e. the law becomes a product of the political machinery of legislatures, which can change over time. 'Presumption', be it of an employment relationship or, indeed of an independent contracting arrangement, is contrary to the principle of impartiality before the law.

Employers' organizations should promote efficient and effective dispute resolution processes. They should stress that the Employers' Group at the ILO continuously objected to and opposed such concepts (deeming and presumption). Finally, they should point to paragraph 8, which expresses respect for true commercial relationships and that the presumption and deeming provisions are inconsistent with paragraph 8.

THE INFORMAL ECONOMY

Amongst the employers' key concerns is the negative impact the Recommendation can have on the informal economy, particularly in developing countries. The small businesses in the informal economy are currently unable to meet most of the requirements of existing legislation. They will be further alienated by the requirements in this Recommendation. Our fear as employers is that the provisions in the Recommendation will hamper enterprise growth and employment creation. Governments have a responsibility to ensure that employers – and, for that matter, workers – operate within the national laws. In this case, the onus is on the government to ensure that employment relationships are governed by the laws of the country. In many developing countries, enforcement machinery is weak. However, while governments are grappling with this problem, that in itself should not allow such governments to off-load their responsibilities onto the international community.

New rules do not solve issues of the informal economy if they do nothing more than make compliance complicated and expensive.

ROLE OF THE SOCIAL PARTNERS AND COLLECTIVE BARGAINING

The role of the social partners is noted in numerous parts of the instrument, particularly in relation to the discharge of national policy. In this respect, Paragraph 20 states:

“The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.”

Caution should be exercised in this regard, as workers' organizations have no direct role in the organization of work, and often have conflicting objectives with many of the parties to the work. For example, workers' organizations do not represent small businesses and independent contractors, and are likely to have conflicting interests with such parties.

Paragraph 18 raises the role of collective bargaining (and social dialogue) as a means (amongst others importantly) to finding solutions to questions related to the scope of the employment relationship. However, while social dialogue may be a useful mechanism for developing national policy on labour standards generally, collective bargaining is a *non sequitur* in the Recommendation as the Recommendation concerns employment relationships per se, not the conditions of employment pertaining to a given relationship. Having this paragraph in the Recommendation implies that collective bargaining can be about the relationship rather than the conditions within it. This, if logically followed through, would imply an erosion of the use of the law in defining employment relationships.

The employment relationship is a legal one depending on the facts of the case and applicable law. It should therefore be for judicial or quasi-judicial bodies to resolve the issue when disputes arise. It should not be subject to negotiation with parties with vested interests.

HOW THE RECOMMENDATION CAN BE USED

A Recommendation is an international labour standard. However, unlike Conventions, Recommendations do not need to be ratified in order to be given effect. Under Article 19.6 (d) of the ILO Constitution, governments can be asked by the ILO Governing Body to report periodically on the extent to which effect has been given to Recommendations. They often influence public policy in member States, shape ILO policy and programmes, and influence study and research around the world. In some countries, judges refer to ILO Recommendations for guidance, and trade unions make claims based on them.

Courts in dualist and monist systems may consider that norms contained in formally non-binding instruments or unratified Conventions are reflective of customary rules, which are accepted as being part of national law in many legal systems. Judicial practice in the establishment of the exact content of a rule of international customary law may be difficult, and courts and tribunals often go beyond the reliance on ILO Conventions and also take into account ILO Recommendations.⁴

Additionally, cases before the ILO Committee of Experts increasingly take into consideration Recommendations. Generally, the Committee of Experts reminds the member State of the existence of a particular provision in a Recommendation and asks that Member to take guidance from it. In some cases, the experts merely remind Members of its existence much in the same way that they would in the context of provisions of Conventions. However, in several recent cases touching on different topics, Recommendations have been cited more or less authoritatively. Recommendations are also raised in the Applications Committee (generally these are referred to in plenary interventions).

It is important that employers understand the context of Recommendations that may be used in this way. In particular, it is important to recall that this Recommendation was not supported by employers and a sizeable number of governments, that employers disengaged from the process and that the resulting Recommendation is essentially a bi-partite instrument. Although the Recommendation on the Employment Relationship exists as a newly-adopted ILO instrument, its failure to achieve a tripartite consensus in a tripartite body is likely to weaken its persuasive authority both within the ILO and amongst member States.

⁴ *“The use of international labour law in domestic courts: Theory recent jurisprudence and practical implications”* (Constance Thomas, Martin Oelz and Xavier Beaudonnet)

This Recommendation will be used by workers' organizations as leverage for change in public policy and regulation, and in litigation with employers on the matters at issue. It is important that any consideration of the Recommendation include the views expressed by employers throughout the debate, including the employer disengagement and opposition to the instrument.

A Resolution (see Annex II), outlining future work for the ILO to undertake, was attached to the Report of the Employment Relationships Committee. While this Resolution did not have the support of the Employers' Group, due to concerns with the outcome of the Recommendation, the essence of the Resolution was supported.

CONCLUDING REMARKS

A number of elements of this Recommendation hold value and will be of use to constituents in different ways. But, in many respects, the instrument is a missed opportunity. By failing to take on board genuine and principled concerns, namely, in paragraphs 11 and 13, a consensus was not reached and this is highly regrettable.

There may be attempts to portray this instrument as one that was arrived at 'largely by consensus', but this would be completely inaccurate and override large and fundamental concerns of employers and many governments. Employers should view the entire Report of the meeting to get a clear and accurate view of the position adopted by employers.⁵

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⁵<http://www.ilo.org/public/english/standards/reln/ilc/ilc95/pdf/pr-21.pdf>;
<http://www.ilo.org/public/french/standards/reln/ilc/ilc95/pdf/pr-21.pdf>;
<http://www.ilo.org/public/spanish/standards/reln/ilc/ilc95/pdf/pr-21.pdf>.

THE EMPLOYMENT RELATIONSHIP RECOMMENDATION, 2006 (No.196)

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Ninety-fifth Session on 31 May 2006, and

Considering that there is protection offered by national laws and regulations and collective agreements which are linked to the existence of an employment relationship between an employer and an employee, and

Considering that laws and regulations, and their interpretation, should be compatible with the objectives of decent work, and

Considering that employment or labour law seeks, among other things, to address what can be an unequal bargaining position between parties to an employment relationship, and

Considering that the protection of workers is at the heart of the mandate of the International Labour Organization, and in accordance with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and the Decent Work Agenda, and

Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and

Recognizing that there is a role for international guidance to Members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and

Further recognizing that such protection should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes, and that encourages voluntary compliance, and

Recognizing that national policy should be the result of consultation with the social partners and should provide guidance to the parties concerned in the workplace, and

Recognizing that national policy should promote economic growth, job creation and decent work, and

Considering that the globalized economy has increased the mobility of workers who are in need of protection, at least against circumvention of national protection by choice of law, and

Noting that, in the framework of transnational provision of services, it is important to establish who is considered a worker in an employment relationship, what rights the worker has, and who the employer is, and

Considering that the difficulties in establishing the existence of an employment relationship may create serious problems for those workers concerned, their communities, and society at large, and

Considering that the uncertainty as to the existence of an employment relationship needs to be addressed to guarantee fair competition and effective protection of workers in an employment relationship in a manner appropriate to national law or practice, and

Noting all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship, and

Having decided upon the adoption of certain proposals with regard to the employment relationship, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation;

adopts this sixteenth day of June of the year two thousand and six the following Recommendation, which may be cited as the Employment Relationship Recommendation, 2006.

I. NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

1. Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.
3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.
4. National policy should at least include measures to:
 - (a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;
 - (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;
 - (c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due;
 - (d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;
 - (e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;
 - (f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and
 - (g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.
6. Members should:
 - (a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and
 - (b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.
7. In the context of the transnational movement of workers:
 - (a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;
 - (b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.
8. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.
10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.
11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:
 - (a) allowing a broad range of means for determining the existence of an employment relationship;
 - (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
 - (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.
12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.
13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:
 - (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

- (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.
14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.
 15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.
 16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.
 17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.
 18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and in the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.
20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.
21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.
22. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

IV. FINAL PARAGRAPH

23. This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

RESOLUTION CONCERNING THE EMPLOYMENT RELATIONSHIP

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 95th Session, and

Having adopted the Recommendation concerning the employment relationship,

Noting that Paragraphs 19, 20, 21 and 22 recommend that Members should establish and maintain monitoring and implementing mechanisms, and

Noting that the work of the International Labour Office helps all ILO constituents better to understand and address difficulties encountered by workers in certain employment relationships,

Invites the Governing Body of the International Labour Office to instruct the Director-General to:

1. Assist constituents in monitoring and implementing mechanisms for the national policy as set out in the Recommendation concerning the employment relationship;
2. Maintain up-to-date information and undertake comparative studies on changes in the patterns and structure of work in the world in order to:
 - (a) improve the quality of information on and understanding of employment relationships and related issues;
 - (b) help its constituents better to understand and assess these phenomena and adopt appropriate measures for the protection of workers; and
 - (c) promote good practices at the national and international levels concerning the determination and use of employment relationships;
3. Undertake surveys of legal systems of Members to ascertain what criteria are used nationally to determine the existence of an employment relationship and make the results available to Members to guide them, where this need exists, in developing their own national approach to the issue.

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