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**Report V(1)**

# **The employment relationship**

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# Contents

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	<i>Page</i>
Introduction .....	1
Chapter I. The employment relationship: Overview of challenges and opportunities.....	3
Evolution of the discussion at the ILO on the employment relationship .....	4
The employment relationship and the law .....	6
The employment relationship and workers' protection.....	8
Context of the lack of protection.....	8
Repercussions of the lack of protection.....	9
Uncertainty with regard to the law .....	11
Closing the gap .....	15
Clarifying the scope of the law .....	15
Adjusting the limits of the legislation .....	15
Balancing equity and adaptability.....	16
Ensuring compliance.....	16
Chapter II. Trends and problems in regulation: A comparative analysis.....	19
The law and the employment relationship .....	19
Substantive definitions .....	20
Descriptive definitions .....	21
Parties to the employment relationship .....	22
Determining the existence of an employment relationship.....	24
The principle of the <i>primacy of fact</i> .....	24
Determination by law .....	26
Easing the burden of proof.....	28
Clarifying the scope of the employment relationship .....	30
Defining the scope of the employment relationship .....	31
Delineating the boundary between dependent and independent work.....	33
The combined approach .....	35
Categorizing certain types of work .....	37
Extending the scope of legislation to equivalent workers .....	38
Developments in case law .....	38
Regulation of “triangular” employment relationships.....	42
Who is the employer (the provider)? .....	42
What is the position of the user? .....	45
What are the worker's rights? .....	47
Compliance and enforcement .....	50

	<i>Page</i>
Chapter III. A new instrument: The basis and possible content of a Recommendation ....	53
Structure of the questionnaire .....	54
Content of the questionnaire .....	54
Section I: Form of the international instrument .....	54
Section II: Preamble.....	54
Section III: Content of the instrument .....	55
Section IV: Other issues.....	58
Questionnaire.....	59
Annex 1. Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour .....	71
Annex 2. Resolution concerning the employment relationship .....	72
Annex 3. Employment by status in employment and sex, latest year .....	78
Annex 4. List of referenced legislation .....	85

## Introduction

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1. The question of the employment relationship will be examined according to the single-discussion procedure established in article 38 of the Standing Orders of the Conference. The Office has accordingly produced the present summary report on law and practice, which covers a broad spectrum of existing law and practice in more than 60 ILO member States across different regions and different legal systems and traditions. The report provides a comparative analysis of the main developments and emerging trends based on a review of the legal texts, case law and other forms of regulation. It is accompanied by a questionnaire drawn up with a view to the preparation of a Recommendation. Governments are invited to give detailed replies to the questionnaire, on the basis of which the Office will prepare a final report in accordance with article 38, paragraph 2, of the Standing Orders of the Conference. This final report will contain a draft Recommendation for consideration by the Conference.
2. In accordance with the provisions of article 38, paragraph 1, of the Standing Orders, the present report must reach governments not less than 18 months before the opening of the 95th Session of the Conference in 2006. In accordance with paragraph 2 of the same article, the final report must be communicated to governments not less than four months before the opening of the 95th Session of the Conference. So that the Office has time to examine the replies to the questionnaire and prepare the final report, governments are requested to ensure that their replies to the questionnaire reach the International Labour Office in Geneva by 1 July 2005, or by 1 August 2005 in the case of federal countries and countries where it is necessary to translate the questionnaire into the national language.
3. The Office wishes to draw the attention of governments to article 38, paragraph 1, of the Standing Orders, which calls on them to consult the most representative organizations of employers and workers before they finalize their replies. The governments' replies should reflect the results of these consultations and indicate the organizations consulted.
4. This report is divided into three chapters as follows. Chapter I traces the evolution over the last decade of the discussions at the ILO on the employment relationship, including the discussions on "contract labour" in 1997 and 1998, the 2000 Meeting of Experts on Workers in Situations Needing Protection and the 2003 general discussion. It also summarizes the most pertinent issues identified by the 39 national studies conducted in 1999-2001. Chapter II provides an overview of trends and problems in regard to the manner in which the general aspects of the employment relationship are regulated in different countries. This is based on a comparative analysis of the relevant laws of more

than 60 ILO member States; it elaborates on and supplements the information on law and practice provided in the report submitted for general discussion to the 91st Session of the International Labour Conference in 2003.<sup>1</sup> Chapter III briefly introduces the rationale behind the questionnaire and outlines its structure and content.

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<sup>1</sup> ILO: *The scope of the employment relationship*, Report V, International Labour Conference, 91st Session, Geneva, 2003.

# Chapter I

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## The employment relationship: Overview of challenges and opportunities

5. The employment relationship is a legal notion widely used in countries around the world to refer to the relationship between a person called an “employee” (frequently referred to as “a worker”) and an “employer” for whom the “employee” performs work under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. The employment relationship has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security. It is the key point of reference for determining the nature and extent of employers’ rights and obligations towards their workers.

6. The profound changes occurring in the world of work, and particularly in the labour market, have given rise to new forms of relationship which do not always fit within the parameters of the employment relationship. While this has increased flexibility in the labour market, it has also led to a growing number of workers whose employment status is unclear and who are consequently outside the scope of the protection normally associated with an employment relationship. In 2004, the Director-General of the International Labour Office described the challenge as follows:

The State has a key role to play in creating an enabling institutional framework to balance the need for flexibility for enterprises and security for workers in meeting the changing demands of a global economy ... At the heart of national policies to meet the social challenges of globalization is a dynamic strategy for managing labour market change.<sup>1</sup>

7. The legal framework governing the employment relationship is an important component of national policy for managing labour market change taking account of the need for flexibility and security.

8. The question of the employment relationship has, in one form or another, been on the agenda of the International Labour Conference for over a decade. The following is an overview of the evolution of these discussions culminating in the general discussion in 2003. This chapter also summarizes the most pertinent issues raised in the national studies conducted in 1999-2001, which formed the basis of the report prepared by the Office for the 2003 general discussion and which are comprehensively analysed and referenced in that report.<sup>2</sup>

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<sup>1</sup> ILO: *A fair globalization: The role of the ILO*, Report of the Director-General on the World Commission on the Social Dimension of Globalization, International Labour Conference, 92nd Session, Geneva, 2004, p. 17.

<sup>2</sup> ILO: *The scope of the employment relationship*, Report V, International Labour Conference, 91st Session, Geneva, 2003.

## Evolution of the discussion at the ILO on the employment relationship

9. The ILO has taken the employment relationship as the reference point for examining various types of work relationships. In recent years, the Conference has held discussions on self-employed workers, migrant workers, homeworkers, private employment agency workers, child workers, workers in cooperatives, and workers in the informal economy and in the fishing sector. It has also addressed work relationships in the course of discussions on social security and maternity protection.

10. In 1997 and 1998, the Conference examined an item on “contract labour”.<sup>3</sup> The original intention of the Conference discussion on “contract labour” was to protect certain categories of unprotected workers through the adoption of a Convention and a Recommendation, but the proposal to adopt a Convention and Recommendation failed. However, at the end of the second discussion in 1998, the Conference adopted a resolution in which it invited the Governing Body of the ILO to place these issues on the agenda of a future session of the Conference with a view to the possible adoption of a Convention supplemented by a Recommendation if such adoption was, according to the normal procedures, considered necessary by that Conference. The Governing Body was also invited to instruct the Director-General:

- (a) to hold meetings of experts to examine at least the following issues arising out of the deliberations of the Committee on Contract Labour:
  - (i) which workers, in the situations that have begun to be identified in the Committee, are in need of protection;
  - (ii) appropriate ways in which such workers can be protected, and the possibility of dealing separately with the various situations;
  - (iii) how such workers would be defined, bearing in mind the different legal systems that exist and language differences.<sup>4</sup>

11. It is noteworthy that in the various debates mentioned above, delegates from all regions repeatedly alluded to the employment relationship, in its various forms and with different meanings, as a concept familiar to all.

12. In accordance with the 1998 resolution, a tripartite Meeting of Experts on Workers in Situations Needing Protection was held in Geneva in May 2000.<sup>5</sup> The common

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<sup>3</sup> For the reports of the Conference Committee on Contract Labour and the discussion of the reports in plenary, see ILO: *Record of Proceedings*, International Labour Conference, 85th Session, Geneva, 1997, 20th Sitting, 18 June, and *Provisional Record* No. 18; and *Record of Proceedings*, International Labour Conference, 86th Session, Geneva, 1998, *Provisional Record* Nos. 16 and 21. The following documents were prepared by the Office to serve as a basis for these discussions: ILO: *Contract labour*, Reports VI(1) and (2), International Labour Conference, 85th Session, Geneva, 1997; and *Contract labour*, Reports V(1), (2A) and (2B), International Labour Conference, 86th Session, Geneva, 1998.

<sup>4</sup> *Record of Proceedings*, 86th Session, op. cit., *Provisional Record* No. 16, p. 16/73. The full text of the resolution is reproduced in Annex 1 to this report.

<sup>5</sup> The Office prepared the following document as the basis for discussions at the Meeting: ILO: *Meeting of Experts on Workers in Situations Needing Protection (The employment relationship: Scope)*, basic technical document (Geneva, 2000), doc. MEWNP/2000, at <http://www.ilo.org/public/english/dialogue/ifpdial/publ/mewnp/index.htm>. The report of the Meeting is contained in ILO: *Report of the Meeting of Experts on Workers in Situations Needing Protection*, doc. MEWNP/2000/4(Rev.), appended to doc. GB.279/2, 279th Session, Geneva, November 2000, at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-2.pdf>.



statement adopted by the Meeting<sup>6</sup> noted that the global phenomenon of transformation in the nature of work had resulted in situations in which the legal scope of the employment relationship (which determines whether or not workers are entitled to be protected by labour legislation) did not accord with the realities of working relationships. This had resulted in a tendency whereby workers who should be protected by labour and employment law were not receiving that protection in fact or in law.<sup>7</sup> The scope of regulation of the employment relationship did not accord with the reality, which varied from country to country and, within countries, from sector to sector. It was also evident that while some countries had responded by adjusting the scope of the legal regulation of the employment relationship, this had not occurred in all countries.

13. The common statement also noted that various country studies had greatly increased the pool of available information concerning the employment relationship and the extent to which dependent workers had ceased to be protected by labour and employment legislation. The Meeting agreed that countries should adopt or continue a national policy in terms of which they would, at appropriate intervals review and, if appropriate, clarify or adapt the scope of the regulation of the employment relationship in the country's legislation in line with current employment realities. The review should be conducted in a transparent manner with participation by the social partners. The experts further agreed that the ILO could play a major role in assisting countries to develop policies to ensure that laws regulating the employment relationship cover workers needing protection.

14. Further to the resolution adopted by the Conference in 1998, the Office undertook a series of national studies.<sup>8</sup> The objective of the national studies was to help identify and describe the principal situations in which workers lacked adequate protection, as well as the problems caused by the absence or inadequacy of protection, and to suggest measures to remedy such situations.

15. The research undertaken confirmed the universal importance of the idea of the employment relationship, on which labour protection systems are largely based, while highlighting the deficiencies affecting the scope, in terms of persons covered, of the

<sup>6</sup> *Report of the Meeting of Experts on Workers in Situations Needing Protection*, op. cit., para. 107.

<sup>7</sup> The Worker and Government experts believed that this was a growing tendency, but the Employers did not feel that the extent of this tendency had been proven.

<sup>8</sup> A first set of studies on worker protection was carried out in 1999 for the following 29 countries (with the name of the author or authors in brackets): *Argentina* (Adrián Goldín and Silvio Feldman); *Australia* (Alan Clayton and Richard Mitchel); *Brazil* (José Francisco Siqueira Neto); *Cameroon* (Paul Gérard Pougoué); *Chile* (María Ester Feres, Helia Henríquez, José Luis Ugarte); *Czech Republic* (Marcela Kubincová); *France* (Françoise Larré and Vincent Wauquier); *Germany* (Rolf Wank); *Hungary* (Lajos Héthy); *India* (Rajasi Clerck and B.B. Patel); *Islamic Republic of Iran* (Kgeshavad Monshizadeh); *Italy* (Stefano Liebman); *Japan* (Mutsuko Asakura); *Republic of Korea* (Park Jong-Hee); *Mexico* (Carlos Reynoso Castillo); *Morocco* (Mohamed Korri Youssoufi); *Nigeria* (Femi Falana); *Pakistan* (Iftikhar Ahmad and Nausheen Ahmad); *Peru* (Marta Vieira and Alfredo Villavicencio); *Philippines* (Bach Macaraya); *Poland* (Marek Pliszkiwicz); *Russian Federation* (Janna Gorbatcheva); *Slovenia* (Polonca Kontar); *South Africa* (Halton Cheadle and Marlea Clarke); *Trinidad and Tobago* (Roodal Moonilal); *United Kingdom* (Mark Freedland); *United States* (Alan Hyde); *Uruguay* (Antonio Grzetic and Hugo Fernández); and *Venezuela* (Oscar Hernández Alvarez and Jaqueline Richter Duprat). When the item was placed on the agenda for a general discussion, the following new studies were carried out in 2000-01: *Bulgaria* (Ivan Neykov); *Costa Rica* (Fernando Bolaños Céspedes); *El Salvador* (Carolina Quinteros and Dulceamor Navarrete); *Finland* (Mari Leisti, in collaboration with Heli Ahokas and Jorma Saloheimo); *Ireland* (Ivana Bacik); *Jamaica* (Orville W. Taylor); *Panama* (Rolando Murgas Torrazza and Vasco Torres de León); *South Africa* (Marlea Clarke, with Shane Godfrey and Jan Theron); *Sri Lanka* (R.K. Suresh Chandra); and *Thailand* (Charit Meesit). Most of the national studies may be consulted at [http://www.ilo.org/public/english/dialogue/ifpdial/II/er\\_back.htm](http://www.ilo.org/public/english/dialogue/ifpdial/II/er_back.htm). In this report, these studies will be referred to indicating the name of the country in italics. The second report on South Africa will be referred to as *South Africa 2002*.

regulations governing this relationship. It also confirmed the extent and repercussions of the problems of lack of workers' protection.

16. At the 91st Session of the Conference in June 2003, a general discussion was held on the scope of the employment relationship. During the discussion, many delegates emphasized that the concept of the employment relationship is common to all legal systems and traditions. There are rights and entitlements which exist under labour laws, regulations and collective agreements and which are specific to or linked to workers who work within the framework of an employment relationship. One of the consequences associated with changes in the structure of the labour market, the organization of work and the deficient application of the law is the growing phenomenon of workers who are in fact employees but find themselves without the protection of an employment relationship. There was a shared concern among governments, employers and workers to ensure that labour laws and regulations are applied to those who are in employment relationships and that the wide variety of arrangements under which work is performed by a worker can be put within an appropriate legal framework.<sup>9</sup>

17. The Conference also recognized that the protection of workers is at the heart of the ILO's mandate. Within the framework of the ILO's Decent Work Agenda, all workers, regardless of employment status, should work in conditions of decency and dignity.

18. The Conference noted that the ILO should envisage the adoption of an international response on this topic. A Recommendation was considered as an appropriate response. The 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.

## The employment relationship and the law

19. The *employment relationship* is a legal concept which underpins the operation of the labour market in many countries. This was confirmed particularly in the discussions on "contract labour" at the International Labour Conference in 1997 and 1998, the Conference discussion leading to the adoption of the Private Employment Agencies Convention, 1997 (No. 181), the national studies undertaken by the ILO, the Meeting of Experts on Workers in Situations Needing Protection, and the 2003 Conference general discussion on the scope of the employment relationship. It is also reflected in a significant number of international labour standards: some ILO Conventions and Recommendations cover all workers without distinction, while others refer specifically to independent workers or self-employed persons, and others apply only to persons in an employment relationship.

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<sup>9</sup> Conclusions concerning the employment relationship, in ILO: *Provisional Record* No. 21, International Labour Conference, 91st Session, Geneva, 2003, pp. 21/52-57.

20. The employment relationship continues to be the predominant framework for work in many countries.<sup>10</sup> Moreover, a study published in 2000 found that in the industrialized countries, in particular, the employment relationship is not just predominant but is proving durable, contrary to persistent reports that major changes in employment relationships have led to less stability and greater numerical flexibility.<sup>11</sup> Another study published in 2001 found similar results in six transition countries.<sup>12</sup>

21. Of course, the situation with regard to the employment relationship is not the same in every country. Where the formal economy absorbs only a very small part of the population and where high unemployment swells the ranks of the self-employed, the reality tends to be different. Even in these cases, however, wage earners may represent a significant proportion of the working population in quantitative terms.

22. The widespread emergence of new forms of employment is frequently referred to in the context of changes in the organization of work and flexible work arrangements. However, new forms of employment may be understood in different ways and mean different things, especially with respect to the legal implications, and for this reason an important distinction needs to be made at this point.

23. People may provide their labour either within the employment relationship under the authority of an employer and for remuneration or within a civil/commercial relationship independently and for a fee. Each of these relationships has certain characteristics which vary from one country to another and determine to what extent the performance of work falls within an employment relationship or a civil/commercial relationship.

24. In some countries and in some sectors more than others, employment relationships have become more diversified. They have become much more versatile and, alongside traditional full-time employees, employers are increasingly employing workers in other ways which allow them to use their labour as efficiently as possible. Many people accept short-term employment, or agree to work certain days of the week, for want of better opportunities. But in other cases, these options are an appropriate solution, both for the worker and for the enterprise. Recourse to various types of employment is in itself a legitimate response to the challenges faced by enterprises, as well as meeting the needs of some employees for more flexible work arrangements. These various types of work arrangements lie *within* the framework of the employment relationship.

25. At the same time, there are civil or commercial contractual relationships under which the services of self-employed workers may be procured, but on terms and conditions which differ from those within an employment relationship. Frequent recourse to such contractual arrangements has become increasingly widespread in recent years. From a legal standpoint, these arrangements lie *outside* the framework of the employment relationship.

26. The determination of the existence of an employment relationship should be guided by the *facts*, and not by the name or form given to it by the parties. That is why the existence of an employment relationship depends on certain objective conditions being

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<sup>10</sup> See Annex 3.

<sup>11</sup> P. Auer; S. Cazes: "The resilience of the long-term employment relationship: Evidence from the industrialized countries", in *International Labour Review* (Geneva), Vol. 139 (2000), No. 4, pp. 379-408.

<sup>12</sup> S. Cazes; A. Nesprova: "Labour market flexibility in the transition countries: How much is too much?" in *International Labour Review* (Geneva), Vol. 140 (2001), No. 3, p. 305 and table 4.

met and not on how either or both of the parties describe the relationship. This is known in law as the principle of the *primacy of fact*, which is explicitly enshrined in some national legal systems. This principle is also frequently applied by judges in the absence of an express rule.

27. Various *factors*<sup>13</sup> are used in many countries to determine the existence of an employment relationship. While these factors vary, some of the more common factors include the level of subordination to the employer, work for the benefit of another person, and work under instruction. In some cases, the law goes one step further, and classifies certain workers as employees whose situation could be ambiguous, or provides for a presumption in their case that there is an employment relationship. Conversely, legislation may specify that certain contractual arrangements are not employment relationships.

28. In some legal systems, certain *indicators* are relied on to identify whether or not the relevant *factors* are present to determine the existence of an employment relationship. These *indicators* include the extent of integration in an organization, who controls the conditions of work, the provision of tools, materials or machinery, the provision of training and whether the remuneration is paid periodically and constitutes a significant proportion of the income of the worker. In common law countries, judges base their rulings on certain *tests* developed by case law, for example the tests of control, integration in the enterprise, economic reality, who bears the financial risk, and mutuality of obligation. In all systems, the judge must normally decide on the basis of the facts, irrespective of how the parties construe or describe a given contractual relationship.

29. The existence of a legal framework regulating the provision of labour does not, of course, preclude disagreement when it comes to the examination of specific cases to determine whether an employment relationship exists. Indeed, this is a frequent occurrence, given the proliferation and great diversity of situations in which the worker's status is unclear.

## The employment relationship and workers' protection

### Context of the lack of protection

30. As mentioned above, the Meeting of Experts in May 2000 highlighted the lack of protection of workers in certain situations in which the legal scope of the employment relationship did not accord with the realities of working relationships. The context in which this lack of protection has arisen varies considerably from one region to another and from one country to another, but in all cases it is linked to significant changes in the structure of employment. Some of these changes are associated with globalization,<sup>14</sup>

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<sup>13</sup> Many jurisdictions use the words *factors*, *indicators* and *tests* interchangeably without making a clear distinction between them. For the purposes of this report, the word *factors* is used to refer to the qualitative elements which can prove the existence of an employment relationship. The word *indicators* refers to the actual circumstances that can assist in verifying whether or not in each specific case the above *factors* are present. This distinction has been made in the report for methodological purposes only and is reflected in the accompanying questionnaire.

<sup>14</sup> The key characteristics of globalization are defined by the World Commission on the Social Dimension of Globalization as "the liberalization of international trade, the expansion of [foreign direct investment], and the emergence of massive cross-border financial flows". ILO: *A fair globalization: Creating opportunities for all*, report of the World Commission on the Social Dimension of Globalization (Geneva, 2004), p. 24.

technological change and transformations in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment. In the words of the World Commission on the Social Dimension of Globalization, “globalization has set in motion a process of far-reaching change that is affecting everyone”.<sup>15</sup> The impact of these changes is very uneven in terms of the degree to which they benefit countries, industries and enterprises.<sup>16</sup>

31. Changes in workers’ status and mass redundancies, especially in developing countries or those in transition, are frequently related to major financial crises, external debt, structural adjustment programmes and privatization. These realities have been reflected in a drastic reduction in countries’ financial capacity and a deterioration in conditions of employment and work. In this context, the growth of the informal economy and undeclared employment has been especially significant.

32. Associated with these developments, changes in the structure of the workforce have been accentuated by migration from one country to another or from one sector of the economy to another.<sup>17</sup> Other factors include a strong shift to services, greater participation of women, higher skill levels of young people in certain countries and deskilling of workers in others. Changing lifestyles, education levels and expectations also lead to workers demanding more flexibility. These changes inevitably influence workers’ attitudes and the way in which they cope with finding and keeping a job.

33. Many enterprises, for their part, have organized their activities so as to utilize labour in increasingly diversified and selective ways, including various kinds of contracts, the decentralization of activities to subcontractors or self-employed workers, or the use of temporary employment agencies. These arrangements are encouraged by rapid developments in technology and new management systems in response to the growing demands of competition. This kind of flexibility has frequently been preceded or accompanied by legislative and institutional reforms to enhance the supply and demand for labour or to promote self-employment with the aim of stimulating job creation.

### Repercussions of the lack of protection

34. Above all, of course, the lack of labour protection has adverse consequences for workers and their families. At the same time, however, the absence of workers’ rights or guarantees can be counterproductive to the interests of the enterprise itself and have a negative impact on society generally. Moreover, there is some evidence indicating that these changes affect women more than men. Workers in these situations not only lose

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<sup>15</sup> *ibid.*, synopsis, p. x.

<sup>16</sup> On the different regional impact of these changes, see *A fair globalization: Creating opportunities for all*, op. cit., pp. 35-49; D. Dollar and A. Kraay: *Trade, growth, and poverty*, World Bank Policy Research Department Working Paper No. 2615 (Washington, DC, 2001); K. Watkins: “Making globalization work for the poor”, in *Finance and Development* (Washington, DC), Vol. 39, No. 1, Mar. 2002; P. Warr: *Poverty incidence and sectoral growth: Evidence from Southeast Asia*, WIDER Discussion Paper No. 2002/20 (Helsinki, United Nations University, World Institute for Development Economics Research, Feb. 2002); E. Lee: *The Asian financial crisis: The challenge for social policy* (Geneva, ILO, 1998); T. Ademola Oyejide: “Globalisation and its economic impact: An African perspective”, in J. Semboja; J. Mwapachu; E. Jansen (eds.): *Local perspectives on globalisation: The African case* (Dar es Salaam, Mkuki na Nyota Publishers, 2002); S. da Silva: *Is globalization the reason for national socioeconomic problems?* (Geneva, ILO, 2001).

<sup>17</sup> Migrant workers were the subject of a general discussion at the International Labour Conference in 2004. See ILO: *Towards a fair deal for migrant workers in the global economy*, Report VI, International Labour Conference, 92nd Session, Geneva, 2004.

their rights under labour law, but also have difficulty securing the protection of the competent inspection services or seeking redress through the labour courts. In many countries, they are completely excluded from or on the fringe of social security protection and receive less favourable benefits than those workers recognized as employees.

35. The lack of labour protection of workers can also affect employers, to the extent that it undermines productivity and distorts competition between enterprises, both at national and sectoral or international level, often to the detriment of those who comply with the law.<sup>18</sup> The lack of legal certainty can also result in judicial decisions reclassifying “self-employed” workers as employees, with considerable unforeseen economic consequences for enterprises. At the same time, the reality of work without any prospect of stability or promotion can ultimately make workers lose their commitment to the enterprise and contribute to an increasing and costly labour turnover.

36. Another dimension of the lack of labour protection is the neglect of training, including training for work in environments where there are inherent risks. Enterprises can be reluctant to invest in training workers who will probably not be with them for long. The user enterprise is unlikely to train the workers supplied by another firm, except for very specific purposes.<sup>19</sup> Untrained workers are more vulnerable to accidents in the workplace and can hamper the competitiveness of the enterprise. Furthermore, a lack of investment in training can undermine national competitiveness. In addition, in some sectors which have large numbers of unprotected workers, the negative image can create serious problems of recruitment and retention of workers. The construction industry is one example of such a sector.

37. The lack of labour protection can also impact on the health and safety of third parties and society in general. Some accidents, such as those caused by heavy vehicles<sup>20</sup> or major accidents in industrial plants, have caused damage to the environment, as well as injuries and fatalities to third parties. The link between accident risks and the lack of workers’ protection has also been observed in situations where there is extensive use of subcontracting.<sup>21</sup> The issue is not subcontracting itself but its improper use, which can create or aggravate risks.

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<sup>18</sup> The subject of competition is explicitly mentioned in the first national collective agreement signed in Italy covering non-dependent employment relationships in the market research sector in December 2000. The parties undertake to establish guarantees for workers and enterprises, with a view to protecting workers and discouraging the use of illegal labour, which distorts competition. See “Agreement signed for atypical workers in market research”, in *European Industrial Relations Observatory On-line (Eironline)*, at <http://www.eiro.eurofound.ie/2001/01/inbrief/IT0101171N.html>.

<sup>19</sup> The difficulties faced in access to training by workers in the construction industry were highlighted, and possible solutions proposed, in ILO: *The construction industry in the twenty-first century: Its image, employment prospects and skills requirements*, report for discussion at the Tripartite Meeting on the Construction Industry in the Twenty-first Century: Its Image, Employment Prospects and Skills Requirements, Geneva, 2001, TMCIT/2001, at <http://www.ilo.org/public/english/dialogue/sector/techmeet/tmcit01/tmcitr.pdf>.

<sup>20</sup> For example, one of the national studies mentions a collision in Australia between a semi-trailer and two cars, which resulted in six fatalities in 1999. The cause of the accident was the extreme fatigue of the truck driver, who was driving under the influence of stimulant drugs given to him by his employer and a co-worker. In addition, driving for long periods, in excess of those permitted under current regulations, was a regular practice of the transport company for which he worked. See *Australia* (pp. 51-52). Non-compliance with regulations was also cited in connection with a truck collision which led to 11 fatalities in the St. Gothard tunnel, Switzerland, on 24 October 2001; see International Road Transport Union (IRU): Press release No. 625, 30 Oct. 2001; see also “Gothard: les camionneurs européens dénoncent leurs moutons noirs”, in *Le Temps* (Geneva), 31 Oct. 2001.

<sup>21</sup> In the case of the explosion in the AZF chemical complex in Toulouse, France, on 21 September 2001, which killed 30 and injured hundreds, devastating thousands of homes, a commission of inquiry cited “cascade

38. Lack of protection can also have a considerable financial impact, in terms of unpaid social security contributions and taxes.<sup>22</sup> For example, in the United States, according to Treasury Department estimates, misclassification of dependent workers (employees) as independent workers results in a loss of some US\$2.6 billion each year in unpaid contributions to social security, the healthcare system (Medicare) and the federal unemployment insurance scheme, as well as US\$1.6 billion in income tax. In short, protection is necessary not just for the sake of workers and enterprises, but also because there are public goods at stake.

### Uncertainty with regard to the law

39. Disputes concerning the legal nature of a relationship for the provision of labour are increasingly frequent. The employment relationship may be *objectively ambiguous* or *disguised*. Both situations create uncertainty as to the scope of the law and can nullify its protection.

40. The problems faced by workers involved in “triangular” employment relationships pose different legal questions. These are workers employed by an enterprise (the “provider”) who perform work for a third party (the “user”) to whom their employer provides labour or services. For these employees, their employment status is not in doubt, but they frequently face difficulties in establishing who their employer is, what their rights are and who is responsible for them.

41. Changes in the legal status of workers, whether real or apparent, seem to be a sign of the times and are commonly observed not only in traditional sectors such as transport (truck drivers, taxi drivers), construction and clothing, but in new areas as well, such as sales staff in department stores, or certain jobs in wholesale distribution or in private security agencies, although there are considerable differences from one country to another and from region to region.

### *Objectively ambiguous employment relationships*

42. In a standard employment relationship, the worker’s status is not normally open to doubt. In some cases, however, a worker may have a wide margin of autonomy and this factor alone may give rise to doubt as to his or her employment status. There are situations where the main factors that characterize the employment relationship are not apparent. It is not a case of a deliberate attempt to disguise it, but rather one of genuine doubt as to the existence of an employment relationship. This may occur as a result of the specific, complex form of the relationship between workers and the persons to whom they provide their labour, or the evolution of that relationship over time. Such situations may occur with persons who are normally self-employed, such as electricians, plumbers

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subcontracting” (the use of subcontracting by an enterprise which is already itself subcontracting) as a factor aggravating the risk of a major industrial accident. The commission of inquiry proposed, inter alia, that the practice be prohibited in high-risk industrial complexes and that the working conditions and protection of external employees be improved. Assemblée Nationale: *Rapport fait au nom de la commission d’enquête sur la sûreté des installations industrielles et des centres de recherche et sur la protection des personnes et de l’environnement en cas d’accident industriel majeur* (Report prepared for the commission of inquiry into the safety of industrial plant and research centres and protection of persons and the environment in the event of a major industrial accident), No. 3559, 29 Jan. 2002, Vol. I, at <http://www.assemblee-nationale.fr/Rap-enq/r3559/r3559-01.asp>. In response to the accident, a law on the prevention of technological and natural risks and compensation was adopted in 2003 (Act No. 2003-699 of 30 July 2003), amending the Labour Code.

<sup>22</sup> See United States General Accounting Office: *Contingent workers: Incomes and benefits lag behind those of rest of workforce*, GAO/HEHS-00-76, June 2000, at <http://www.gao.gov/new.items/he00076.pdf>.

and computer programmers, and who gradually enter into a permanent arrangement with a single client.

43. In other cases, especially in work environments affected by major changes, it is possible and sometimes necessary to resort to a range of flexible and dynamic employment arrangements which can be difficult to fit into the traditional framework of the employment relationship. A person may be recruited and work at a distance without fixed hours or days of work, with special payment arrangements and full autonomy as to how to organize the work. Some workers may never even have set foot in the enterprise if, for example, they have been recruited and work via the Internet and are paid through a bank. However, perhaps because they use equipment supplied by the enterprise, follow its instructions and are subject to subtle but firm control, it may be that the enterprise quite naturally considers them as employees. The emergence of “e-lancers” (electronically connected freelancers) is another phenomenon which is challenging the traditional employment framework.<sup>23</sup>

44. Midway between the employment relationship and self-employment, there are “economically dependent workers” who are formally self-employed but depend on one or a few “clients” for their income. They are not easy to describe, let alone quantify, because of the heterogeneous nature of the situations involved and the lack of a definition or statistical tool.

45. In cases where the contract is clearly intended to procure the services of a self-employed worker, it is in employers’ interest to make sure that they have not misclassified the worker, as they can be held financially liable if the authorities find that the worker is in fact an employee.<sup>24</sup>

#### *Disguised employment relationships*

46. A disguised employment relationship is one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form. Disguised employment relationships may also involve masking the *identity of the employer*, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers.

47. The most radical way to disguise the employment relationship consists of giving it the appearance of a relationship of a different *legal nature*, whether civil, commercial, cooperative, family-related or other. Some of the contractual arrangements most frequently used to disguise the employment relationship include a wide variety of civil and commercial contracts which give it the semblance of self-employment.

48. The second way to disguise the employment relationship is through the *form* in which it is established. While the existence of an employment relationship is not in question, the nature of the employment relationship is intentionally misrepresented so as to deny certain workers’ rights and benefits. For the purposes of this report, such

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<sup>23</sup> See L. Karoly; C. Panis: *The 21st century at work: Forces shaping the future workforce and workplace in the United States* (Santa Monica, California, RAND, 2004).

<sup>24</sup> See, for example, S. Fishman: *Hiring independent contractors: The employer’s legal guide*, 4th edition (Berkeley, Nolo, 2003).



contract manipulation amounts to another type of disguised employment relationship, resulting in a lack of protection for the workers concerned. This is the case, for example, of contracts concluded for a fixed term, or for a specific task, but which are then repeatedly renewed, with or without a break. The most visible effect of this type of contract manipulation is that the worker does not acquire the rights and obtain the benefits provided to employees by labour legislation or collective bargaining.

49. The trend towards replacing the employment contract with other types of contract in order to evade the protection provided under the Termination of Employment Convention, 1982 (No. 158), was noted by the ILO Committee of Experts on the Application of Conventions and Recommendations in 1995.<sup>25</sup>

#### *“Triangular” employment relationships*

50. As already mentioned, “triangular” employment relationships occur when employees of a person (the “provider”) work for another person (the “user”). A wide variety of contracts can be used to formalize an agreement for the provision of work. Such contracts can have beneficial effects for the provider’s employees in terms of employment opportunities, experience and professional challenges. From a legal standpoint, however, such contracts may present a technical difficulty as the employees concerned may find themselves interacting with two (or more) interlocutors, each of whom assumes certain functions of a traditional employer.

51. There are also, of course, cases of *objectively ambiguous* or *disguised “triangular” employment relationships*. A “triangular” employment relationship normally presupposes a civil or commercial contract between a user and a provider. It is possible, however, that no such contract exists and that the provider is not a proper enterprise, but an *intermediary* of the supposed user, intended to conceal the user’s identity as the real employer.

52. “Triangular” employment relationships have always existed, but this phenomenon is now on the increase. The national studies identified a growing tendency among enterprises in many countries to operate through other enterprises or with their collaboration. In these situations, workers provided by different enterprises can be found working on the user’s own premises or outside, even in a different country.

53. “Triangular” employment relationships can take various forms. The best known is the use of contractors and private employment agencies. Another very common arrangement is franchising. In this case, an enterprise allows another enterprise or a person to use its trademark or product, in principle on an independent basis. However, the franchisee has financial obligations towards the franchiser, which normally exercises control over the franchised business, including its staff.

54. In an employment relationship, there is usually no doubt about the identity of the employer where workers deal with only one person. This person is the one who hires the worker or who performs the normal functions of an employer: assigning tasks, providing the means to perform them, giving instructions and supervising their performance, paying wages, assuming risks, making profits and terminating the employment relationship. The situation may be different, however, in a “triangular” employment relationship, when these roles are assumed separately or jointly by more than one person and any one or a number of them may be perceived as the employer, in which case the

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<sup>25</sup> ILO: *Protection against unjustified dismissal*, Report III(4B), International Labour Conference, 82nd Session, Geneva, 1995, para. 56.

employee may reasonably wonder: who is in fact my employer? In particular, workers may not know, for example, from whom exactly to claim payment of remuneration or compensation for an accident at work, and whether they can file a claim against the user when the direct employer disappears or becomes insolvent. Doubt as to the identity of the employer, or the involvement of the user in the employment relationship, leads to the following key questions in the case of “triangular” relationships: what are the worker’s rights – are they the rights agreed by the employee with his or her employer (the provider), or those of the employees employed by the user, or a combination of the two?

55. Workers may wonder who is responsible for their rights. The logical answer, which is normally consistent with the law, is that employers are primarily responsible for the rights of their employees, whether they are a contractor, an employment agency, a cooperative or any other employing enterprise or entity. However, the role of the user can be crucial with respect to ensuring respect of these rights (such as limits on working hours, rest breaks, paid leave, etc.). There are laws which in some circumstances also assign a measure of responsibility to the user, as the person who benefits directly from the labour of the worker and who often appears to be an employer or someone similar to an employer. Depending on the circumstances and national law, the employer (or provider) and the user may bear joint and several liability, so that the worker can claim against both or either of them without distinction. In other circumstances, the user bears subsidiary liability, in the sense that a claim may only be brought against the user in the event of non-compliance by the provider. A number of ILO instruments also address this subject.<sup>26</sup>

56. The determination of the identity of the employer and other possible parties to “triangular” employment relationships, of the workers’ rights and of the persons responsible for ensuring those rights raises legal issues which are not easy to resolve. However, the major challenge lies in ensuring that employees in such a relationship enjoy the same level of protection traditionally provided by the law for employees in a bilateral employment relationship, without impeding legitimate private and public business initiatives.

57. In summary, in cases of “triangular” employment relationships, employees are frequently faced with multiple interlocutors. In such circumstances, it is essential that such employees know who the employer is, what their rights are and who is responsible for them. It is equally important to determine the position of the user with respect to the employees of the provider enterprise. A balanced and constructive approach to the question should take into account the legal difficulties involved, and the legitimate interests concerned.

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<sup>26</sup> For example, the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), establishes a number of guarantees for workers employed by the contractors engaged by public authorities. The Asbestos Convention, 1986 (No. 162), provides that where there is more than one employer in the same workplace, they shall cooperate to implement protective measures, without prejudice to the responsibility of each employer for the safety and health of the workers employed by them. The Safety and Health in Construction Convention, 1988 (No. 167), establishes a similar obligation, assigns obligations and responsibilities among employers and defines the term “employer” (which includes the principal contractor, the contractor and the subcontractor). There are similar provisions in the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), the Occupational Safety and Health Convention, 1981 (No. 155), and the Safety and Health in Mines Convention, 1995 (No. 176). Moreover, the Home Work Convention, 1996 (No. 177), refers to the respective obligations of employers and intermediaries, while the Private Employment Agencies Convention, 1997 (No. 181), deals with the responsibilities of these agencies and user enterprises in relation to agency workers.

## Closing the gap

58. In response to the growing divergence between the law and the reality of the employment relationship, measures need to be taken to close this gap. The objective should be to update and clarify the law governing the employment relationship so as to facilitate recognition of the existence of an employment relationship, and deter attempts to disguise it. Given the proliferation of objectively ambiguous and disguised situations and the growth of “triangular” relationships, member States, with the involvement of the social partners, could examine their legislation so as to identify any deficits in the light of their own specific problems and comparative law. This would enable them to determine the nature and extent of the measures needed. The outcome of this exercise should be to enable the laws on the employment relationship to be regularly updated as part of an ongoing and dynamic process.

## Clarifying the scope of the law

59. The first part of the strategy would be aimed at clarifying, supplementing and stating as precisely as possible the scope of the law. At this stage, it could be useful to examine the most common forms of disguised employment relationships and cases in which it is most difficult to determine whether there is an employment relationship or a civil or commercial relationship. The task would consist of remedying the technical deficiencies in the legislation in order to address objectively ambiguous cases and to tackle the phenomenon of disguised employment relationships. In relation to “triangular” relationships, the objective would be to clarify the law so that the employees know who the employer is, what their rights are and who is responsible for them.

60. Comparative law contains a wealth of notions and legal constructs as to what is meant by an employment relationship and the factors and indicators used for recognizing it. In addition, there are mechanisms and institutions to enforce the law and guarantee workers’ rights. These generally enable the regulation of the employment relationship to operate smoothly so that the status of the worker can usually be determined. However, the law does not cover all of these aspects equally or with the same degree of precision and effectiveness in all countries (see Chapter II).

## Adjusting the limits of the legislation

61. Clarification alone, however, may not be enough to regulate cases which do not fall within the current scope of the legislation. These call for certain adjustments to the limits of the legislation. This can be done in a number of ways. First, in the case of objectively ambiguous relationships, where some or all of the features of the employment relationship are blurred or absent, the law needs to be adjusted so as to enable a clearer identification of the employment relationship, where it exists. Second, the legislation can be extended to include categories of employees or sectors that are explicitly or implicitly excluded from the scope of the law. These exclusions frequently apply to employees in small and micro-enterprises and in some export processing zones (EPZs). Furthermore, in some countries, labour laws do not have general coverage, but apply only to certain employees. In such circumstances, progressive steps could be taken towards a more general application of the legislation concerned. Third, the scope of the law may be adequate, but it may be narrowly interpreted by the courts. The development of factors and indicators for determining the existence of an employment relationship can promote consistency and predictability in court decisions.

## Balancing equity and adaptability

62. The lack of labour protection raises questions of equity, on the one hand, and flexibility or adaptability, on the other. A balance between the two must be sought through social dialogue aimed at building a broad consensus. Employers are constantly faced with the challenge of survival in a competitive global environment and legitimately seek viable solutions among the range of options offered by different forms of employment. However, it is difficult for enterprises to improve their productivity with a poorly trained, demotivated and rapidly changing workforce.

63. Balancing equity and adaptability is at the very heart of the ILO's Decent Work Agenda, which offers a framework for reconciling the different interests and reaching a consensus through social dialogue. Countries have found different institutional and policy responses to reconcile these diverging interests. For instance, a number of European countries have moved away from a situation where flexibility creates insecurity to one in which security promotes flexibility.<sup>27</sup>

## Ensuring compliance

64. The problem of objectively ambiguous, disguised or "triangular" employment relationships cannot, however, be entirely attributed to lack of clarity and the problems relating to the scope of the law. Another contributing factor, which is particularly serious in some countries, is failure to comply with the law, accompanied by poor enforcement.

65. The problem of non-compliance is particularly widespread in developing countries, although it also occurs in industrialized countries. The studies carried out confirm a commonly expressed view that traditional mechanisms to enforce labour laws are not used as they should be. In particular, mechanisms and procedures for determining the existence of an employment relationship and establishing the identity of the persons involved are generally insufficient to prevent infringements of labour law or to safeguard workers' rights. Problems of compliance and enforcement are particularly acute in the informal economy.

66. Enforcement of labour law by the administrative and judicial authorities is affected by financial constraints in most countries. Moreover, the limited powers of these authorities and their enforcement mechanisms, such as they are, often mean that they are unable to discharge their obligations.

67. Labour inspectorates frequently face considerable difficulties in carrying out their tasks. In some countries, the probability that an inspector will visit a particular enterprise, detect shortcomings, impose corrective measures and enforce them is very low or nonexistent. Particular difficulties arise where the premises are extensive or located in remote places and, for different reasons, in small and micro-enterprises. The situation is even more uncertain as regards the possibility of action by labour inspectors concerning workers in objectively ambiguous or disguised employment relationships, even in countries where inspectors are empowered to identify such cases and remedy them.

68. In principle, all workers have access to the courts. In practice, however, there are countries where restrictions on access to the courts are considerable and few workers can afford to enter into long, costly and inevitably uncertain judicial proceedings. Rarer still,

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<sup>27</sup> See P. Auer: *Employment revival in Europe: Labour market success in Austria, Denmark, Ireland and the Netherlands* (Geneva, ILO, 2000).

of course, are those workers who, while still working, resort to the courts for a ruling on their employment status.

69. Improving protection for workers within the employment relationship requires that the mechanisms and institutions established to enforce compliance with labour law function effectively. Each country, depending on the deficits in its legal system and in the organization and functioning of its labour institutions, should consider streamlining the task of labour inspection and making it more efficient, with advisory and enforcement powers appropriate to present-day circumstances.

## Chapter II

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### Trends and problems in regulation: A comparative analysis

70. This chapter gives an overview of the manner in which the general aspects of the employment relationship are regulated in different countries, and focuses in particular on its scope. It is based on a review of the relevant laws in more than 60 ILO member States.<sup>1</sup> This comparative analysis elaborates on and supplements the information on law and practice provided in the report submitted to the 91st Session of the International Labour Conference in 2003.<sup>2</sup> In addition to reviewing the relevant legislation and case law in different countries, this chapter provides other useful information on the kind of regulatory measures member States might consider adopting when designing and implementing a policy on the employment relationship.

### The law and the employment relationship

71. Many national labour laws contain provisions on the employment relationship, particularly with regard to scope. Despite certain similarities, however, not all national labour laws provide exhaustive or equal coverage of the subject. Some provisions deal with the regulation of the employment contract as a specific contract, its definition, the parties and their respective obligations. Other provisions are intended to facilitate recognition of the existence of an employment relationship and prescribe administrative and judicial mechanisms for monitoring compliance and enforcing these laws.

72. In general terms, the employment relationship creates a legal link between a person who performs work and the person for whose benefit the work is performed in return for remuneration, under certain conditions established by national law and practice.

73. Some laws define the employment contract as the framework for this relationship, and also provide a definition of an employee and an employer.<sup>3</sup> A contractor or an employment agency may be included within the definition of employer, and the law may impose certain obligations on the user of the contractor's or the agency's services.

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<sup>1</sup> A list of the legislation reviewed is given in Annex 4 to this report. The texts are referred to in the footnotes to this chapter by name of country only; in the case of countries for which more than one item is listed in the annex, the full or abbreviated title is indicated in the footnote.

<sup>2</sup> ILO: *The scope of the employment relationship*, op. cit.

<sup>3</sup> For example, see the following national studies, available at [http://www.ilo.org/public/english/dialogue/ifpdial/ll/er\\_back.htm](http://www.ilo.org/public/english/dialogue/ifpdial/ll/er_back.htm) : *Argentina* (p. 2), *Brazil* (pp. 16-17), *Cameroon* (p. 11), *Chile* (p. 9), *Costa Rica* (pp. 2, 7-9, 45), *Czech Republic* (p. 4), *El Salvador* (pp. 6-7), *India* (pp. 6-8, 10-14, 19), *Islamic Republic of Iran* (p. 7), *Italy* (p. 2), *Jamaica* (pp. 8-9), *Republic of Korea* (pp. 3-6), *Mexico* (p. 9), *Morocco* (pp. 2-5), *Nigeria* (p. 7), *Panama* (pp. 6-8, 17-19), *Peru* (pp. 6-12), *Poland* (pp. 2, 11), *Russian Federation* (pp. 2, 12), *South Africa* (pp. 10-13), *Trinidad and Tobago* (pp. 15-17, 27-30), *United Kingdom* (p. 9), *Venezuela* (pp. 6-12).

74. In many countries, the legislation contains a substantive definition of the employment contract, worded in such a way as to establish what *factors* constitute such a contract and hence what distinguishes it from other similar contracts. In other countries, however, the legislation is less detailed and the task of determining the existence of an employment contract is largely left to case law.

### Substantive definitions

75. Laws containing substantive definitions basically provide that the employment contract is an agreement under which a person undertakes to carry out work for another person in exchange for payment of remuneration, under specified conditions. Certain *factors* are used to determine whether or not a contract is an employment contract; the description of these *factors* varies in wording and level of detail from one country to another.

76. In Argentina and El Salvador, for example, the law stipulates that the work is performed in conditions of *dependency* on the employer; in Chile, the terms used are *dependency and subordination*; in Panama, *subordination or dependency*; in Colombia, *continuing dependency or subordination*; in Costa Rica, *permanent dependency and direct or delegated direction*; in Nicaragua, *subordination* to an employer; in Mexico and Peru, *subordinate work*; and in Venezuela, *work for another person in conditions of dependency on that person*.<sup>4</sup> In France, case law has found that there is an employment contract where the work is performed in *conditions of subordination* to an employer.<sup>5</sup> Other laws refer to work according to internal regulations or under the employer's guidance.<sup>6</sup>

77. The laws of Benin, Burkina Faso, Democratic Republic of the Congo, Gabon, Niger and Rwanda, among other countries, as well as the Labour Code of Portugal, provide that work done under an employment contract is performed under the employer's *direction* and/or *authority*. Further variations on these *factors* are found in Finland, where the law refers to work done under the employer's *direction and supervision*; in Bahrain and Qatar, under the employer's *direction or supervision*; in Tunisia, under the employer's *direction and control*; and in Morocco, under the employer's *direction*. In Angola and Botswana, there is deemed to be a contract of employment if the worker performs work under the employer's *orders*; in Slovenia the words *according to the instructions and under the control of the employer* are used.<sup>7</sup>

78. Thus, the most commonly used *factors* for determining whether work is being performed under an employment contract are *dependency* and *subordination*, or work done under the *direction, authority, supervision* or *control* of the employer, or on the latter's *orders* or *instructions* or for the *employer's account*. Some legal systems use the

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<sup>4</sup> See, respectively, Argentina, Employment Contracts Act, s. 21; El Salvador, s. 17; Chile, s. 7; Panama, s. 62; Colombia, ss. 22(1), 23(1); Costa Rica, s. 18; Nicaragua, s. 19; Mexico, s. 20; Peru, Productivity and Labour Competitiveness Act, s. 4; Venezuela, s. 67.

<sup>5</sup> *Code du Travail*, 65e édition (Paris, Dalloz, 2003), p. 23. See also Estonia, s. 1.

<sup>6</sup> Latvia, s. 28(2); Lithuania, s. 93; Russian Federation, s. 56.

<sup>7</sup> See Benin, s. 9; Burkina Faso, s. 10; Democratic Republic of the Congo, s. 7(c); Gabon, s. 18; Niger, s. 37; Rwanda, s. 5; Portugal, s. 10; Finland, Ch. 1, s. 1; Qatar, s. 1(9); Bahrain, s. 38; Tunisia, s. 6; Morocco, s. 6; Angola, s. 53(2)(f); Botswana, s. 2; Slovenia, s. 4. For definitions of dependent employment in European Union countries, see the comparative table in R. Pedersini: "'Economically dependent workers', employment law and industrial relations", in *European Industrial Relations Observatory On-line (Eironline)*, at <http://www.eiro.eurofound.ie/2002/05/study/TN0205101S.html>.

terms *dependency* and *subordination* as alternatives or together, either with different meanings or as synonyms.

79. In Panama, for instance, the law assigns a different meaning to each word, and each is accompanied by a different qualifier: *legal subordination* and *economic dependency*. *Legal subordination* is understood to mean that the employer or his or her representatives direct or are likely to direct the performance of the work. There is deemed to be *economic dependency* where the sums received by the worker constitute his or her only or main source of income, where such sums are paid by a person or enterprise as a result of the worker's activity, and where the worker does not enjoy economic autonomy and is economically linked to the sphere of activity in which the person or enterprise that may be considered as the employer operates. It is interesting to note that in case of doubt, *economic dependency* may be used as a *factor* for determining whether there is an employment relationship.<sup>8</sup>

80. In Costa Rica and Panama the law allows for degrees of subordination, since it recognizes that there can be an employment relationship even in cases of "minimal" or "attenuated" subordination.<sup>9</sup>

81. The labour codes in some countries define not only the employment contract but also the employment relationship, understood to mean the fact of performing a service, irrespective of the nature of the agreement under which it is performed.<sup>10</sup> In one country's legislation, the employment contract is placed in the broader context of the employment relationship.<sup>11</sup> The Labour Code of Panama stipulates that an employment relationship has the same effect as an employment contract.<sup>12</sup>

## Descriptive definitions

82. In other, mainly common-law countries, the employment contract is simply described, without referring to the *factors* characterizing it as an employment contract. In Kenya, it is defined as a contract under which a person agrees to serve as an employee; in Nigeria, as an agreement to serve an employer as a worker; in Lesotho and Indonesia, as a contract between an employer and an employee; in Ireland and New Zealand, as a contract of service; and in the Republic of Korea, as a contract under which a person undertakes to work for remuneration.<sup>13</sup> It has been defined in Cambodia and China as a contract between a worker and an employer through which an employment relationship is established.<sup>14</sup> In Malaysia a contract of service is defined as an agreement whereby one person agrees to employ another as an employee and that other agrees to serve his employer.<sup>15</sup>

<sup>8</sup> Panama, ss. 64, 65.

<sup>9</sup> With a view to extending the scope of labour law, the existence of an employment relationship has been recognized even in cases of "minimal subordination" in *Costa Rica* (pp. 3 and 62) and "attenuated or diluted subordination" in *Panama* (pp. 7 and 13).

<sup>10</sup> Argentina, Employment Contracts Act, s. 23; Mexico, s. 20; Panama, s. 62.

<sup>11</sup> Venezuela, Labour Act, Title II.

<sup>12</sup> Panama, s. 62.

<sup>13</sup> See Kenya, s. 2; Nigeria, s. 91(1); Lesotho, s. 3; Indonesia, s. 1(14); Ireland, s. 2(1); New Zealand, s. 5; Republic of Korea, s. 17.

<sup>14</sup> Cambodia, s. 65, China, s. 16.

<sup>15</sup> Malaysia, s. 2(1).



83. However, even countries whose legislation does not contain a substantive definition of the employment relationship or contract may have provisions giving a clear idea of the conditions in which a worker who is bound by such a relationship or contract works. For example, provisions governing a worker's duties often include the obligation to respect the employer's orders and instructions – which is characteristic of wage employment – and this provides an important indicator for determining the existence of an employment contract.<sup>16</sup>

## Parties to the employment relationship

84. The laws of many States also define the parties to the employment relationship or contract, and in some cases this definition serves to reiterate or specify the conditions under which the work is performed in the employment relationship.

### *The employee or worker*

85. The term “worker” is often used to refer to a person who performs services in an employment relationship, although strictly speaking this generic term can also cover self-employed workers. A “worker” is defined in Chile as a person who works in conditions of *dependency or subordination*; in Mexico, as someone performing *personal, subordinate work*; and in Nicaragua, as a person working under the employer's *direction and in direct or delegated subordination to the employer*.<sup>17</sup>

86. By contrast, in countries where descriptive definitions are the rule, the legislation merely states that an employee is a person working for an employer. For example, in Lesotho, employee means any person who works in any capacity under a contract with an employer; in Thailand, a person who agrees to do work for an employer in return for a wage, regardless of the name given to describe that person's status; in Australia, any person whose usual occupation is that of employee, but does not include a person who is undertaking a vocational placement; in Pakistan, any and all persons not falling within the definition of employer who is employed in an establishment or industry for remuneration or reward either directly or through a contractor, whether the terms of employment be express or implied; and in the United Kingdom, an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.<sup>18</sup> In this case one definition refers to another, and neither of them defines the term precisely. Hence, it is even more important in these countries for case law to establish the *factors* and *indicators* distinguishing an employment contract or relationship and identifying its parties. What is surprising is the amount of convergence between the legal systems of different countries in the way they deal with this and other aspects of the employment relationship, even between countries with different legal traditions or those in different parts of the world.

87. In any case, irrespective of the definition used, the concept of a worker in an employment relationship has to be seen in contrast to that of a self-employed or non-dependent worker; in Chile, for example, a self-employed worker is defined as a person

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<sup>16</sup> See, for example, Angola, s. 53(2)(f); Slovenia, s. 32.

<sup>17</sup> Chile, s. 3; Mexico, s. 8; Nicaragua, s. 6.

<sup>18</sup> See, respectively, Lesotho, s. 3; Thailand, s. 5; Australia, s. 4(1); Pakistan, s. 2; United Kingdom, Employment Rights Act 1996, s. 230(1). For other definitions of worker or employee, see Botswana, s. 2; Kenya, s. 2; Mauritius, s. 2; Nigeria, s. 91(1); Zambia, s. 3(1); Ireland, s. 2(1); Slovenia, s. 5(1); Bangladesh, s. 2; Netherlands, Civil Code, s. 7:659; New Zealand, s. 6; Philippines, art. 13; Sri Lanka, s. 2(1); Trinidad and Tobago, s. 2(1).

who, in the exercise of his or her activity, does not depend on an employer or have workers dependent on him or her.<sup>19</sup>

### *The employer*

88. Some laws merely define the employer as the person who employs the worker, or uses the latter's services, possibly under an employment contract.<sup>20</sup> In Venezuela, an employer is a person responsible for an enterprise or worksite where workers carry out their work. In Brazil, the employer is defined in more detail as the person who bears the business risk, hires and pays remuneration, and directs the performance of services.<sup>21</sup> In Viet Nam, the employer is defined in terms of three functions: recruiting, employing and paying wages to an employee.<sup>22</sup>

89. In Spain, the law also refers expressly to employers lawfully engaged in supplying labour. An employer or entrepreneur means any legal or natural person, or joint-ownership arrangement, receiving services performed by workers employed by another person and integrated in the organization and under their/its direction, as well as persons hired in order to be provided to user enterprises by legally established temporary work enterprises.<sup>23</sup>

90. The law in the United Kingdom contains the following definition: employer, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.<sup>24</sup>

91. The legislation of the Philippines defines an employer of homeworkers in terms of specific aspects pertaining to the situation of the employer, and in terms of the employer's relationship with the worker. Employer, in this context, means any natural or artificial person who, for his own account or benefit, or on behalf of any person residing outside the Philippines, directly or indirectly, or through any employee, agent, contractor, subcontractor, or any other person, delivers or causes to be delivered, or sells, any goods or articles to be processed in or about a home and thereafter to be returned or to be disposed of or distributed in accordance with his direction, and then rebuys them himself or through another after such processing.<sup>25</sup>

92. Some definitions of employer refer to the person signing the contract with the worker, and in this case may also include a person representing the employer. In Botswana, for instance, the employer is defined as any person who has entered into a contract of employment to hire the labour of any person, including the Government or a public authority, or the person who owns or is carrying on for the time being or is

<sup>19</sup> Chile, s. 3(c).

<sup>20</sup> Argentina, Employment Contracts Act, s. 26; Canada, Canada Labour Code, s. 3; Chile, s. 3; Colombia, s. 22(2); Costa Rica, s. 2; Mexico, s. 10; Nicaragua, s. 8; Panama, s. 87; Bahrain, s. 1; Democratic Republic of the Congo, s. 7(b); Ghana, s. 175; Islamic Republic of Iran, s. 3; Qatar, s. 1(4); Thailand, s. 5; Malaysia, s. 2(1); New Zealand, s. 5; Latvia, s. 4; Slovenia, s. 5(2).

<sup>21</sup> Brazil, s. 2; Venezuela, s. 49.

<sup>22</sup> Viet Nam, s. 6.

<sup>23</sup> Workers' Charter, s. 1(2).

<sup>24</sup> Employment Rights Act 1996, s. 230(4).

<sup>25</sup> Omnibus Rules Implementing the Labor Code, Rule XIV, s. 2(b).

responsible for the management of the undertaking, business or enterprise of whatever kind in which the employee is engaged.<sup>26</sup>

93. In other countries, the law refers specifically to representatives of the employer and draws a distinction between them and employers.<sup>27</sup>

## Determining the existence of an employment relationship

94. Even where the law contains clear provisions regulating the employment relationship, it may be difficult, or even impossible, to determine whether there is in fact an employment relationship in a given case. In many cases, a worker will not refer the matter to the courts as long as the employment contract is in force for fear of losing his or her job; and once the contract expires it may be even more difficult to collect and present evidence.

95. A comparison of the legislation reveals various alternative means of easing the burden of proof on the worker and facilitating the judge's task of determining the existence of an employment relationship. Perhaps the most important of these is the universal application of what is known as the principle of the *primacy of fact*.

### The principle of the *primacy of fact*

96. As already mentioned in Chapter I, the determination of the existence of an employment relationship should be guided by the *facts* of what was actually agreed and performed by the parties, and not on how either or both of the parties describe the relationship. This is known in law as the principle of the *primacy of fact*.<sup>28</sup>

97. In general, the judge must decide on the basis of the facts. For example, the law in many countries provides that the employment contract may be explicit or implicit.<sup>29</sup> Allowing for the possibility of an implicit contract means giving weight to the facts surrounding the agreement reached between employer and worker when such agreement is not in writing and probably also in cases where the facts reflect a different reality from that which might be in a written contract. The idea of an implied contract is growing in importance in case law.<sup>30</sup>

98. Other laws define the worker as a person who undertakes to place his or her professional activity, in exchange for remuneration, under the direction and authority of an employer, and go on to specify that neither the legal status of the employer nor that of the worker shall be taken into account in determining whether a person is a worker.<sup>31</sup> Similarly, another labour code provides that in cases when it has been judicially

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<sup>26</sup> Botswana, s. 2. For similar definitions, see Lesotho, s. 3; Nigeria, s. 91(1); Bangladesh, s. 2.

<sup>27</sup> Mexico, s. 11; Panama, s. 88; Venezuela, s. 50.

<sup>28</sup> See *Argentina* (p. 14), *Cameroon* (p. 15), *Chile* (p. 20), *Costa Rica* (p. 3), *France* (p. 33), *Germany* (pp. 4, 39), *Republic of Korea* (p. 4), *Mexico* (p. 10), *Pakistan* (p. 4), *Panama* (p. 9), *Peru* (p. 8), *Poland* (p. 2), *Russian Federation* (p. 35), *Slovenia* (p. 9), *Trinidad and Tobago* (pp. 18, 20, 30-32), *United Kingdom* (pp. 33-34), *United States* (p. 96), *Uruguay* (p. 6). In *Italy* (p. 10), judges seem to attach more weight to the real intentions of the parties.

<sup>29</sup> See, for example, *Ghana*, s. 175; *Ireland*, s. 2(1); *Kenya*, s. 2; *Lesotho*, s. 3; *Malaysia*, s. 2(1); *Malawi*, s. 3; *Mauritius*, s. 2; *Sri Lanka*, s. 2(1); *Thailand*, s. 5; *Zambia*, s. 3(1).

<sup>30</sup> For an example from the United Kingdom, see below under "Supply of labour under commercial contracts".

<sup>31</sup> See *Benin*, s. 2; *Burkina Faso*, s. 1; *Cameroon*, s. 1(2); *Gabon*, s. 1; *Niger*, s. 2.

determined that a civil contract actually regulates labour relations between an employee and an employer, the provisions of labour legislation shall be applied to such relations.<sup>32</sup>

99. As regards remuneration – one of the key elements of the employment contract – the law in Finland applies regardless of the absence of any agreement on remuneration, if the *facts* indicate that the work was not intended to be performed without remuneration.<sup>33</sup>

100. To establish the facts, some legal systems rely on certain *indicators* to determine whether or not there is an employment relationship. These include, among others, compliance with the employer's instructions, being at the employer's disposal, and socio-economic inequality between the parties.<sup>34</sup>

101. In common-law countries, judges base their rulings on certain tests developed by case law, for example the tests of control, integration in the enterprise, economic reality (who bears the financial risk?) and mutuality of obligation.<sup>35</sup>

102. Some legal systems even go so far as to lay down provisions to combat concealment or fraud in order to ensure that the principle of the *primacy of fact* prevails in the interests of the worker and/or the tax or social security institutions. In Panama, for example, the Labour Code provides that in determining whether there is an employment relationship, or identifying the subjects of such a relationship, account shall not be taken of fictitious contracts, the participation of intermediaries as alleged employers, or the establishment or fictitious operation of a legal entity as employer. It provides further that where a legal entity attempts to evade compliance with its obligations under labour law through fraudulent or false documents or through the establishment or operation of the legal entity, a worker employed by that entity may also assert his or her employment-related claims against its shareholders, partners or members. The law also stipulates that

<sup>32</sup> Russian Federation, s. 11.

<sup>33</sup> Finland, Ch. 1, s. 1.

<sup>34</sup> See *Italy* (pp. 5-12). In the *Republic of Korea* (p. 5), a decision of the Supreme Court in 1994 listed the following indicators: "... the employer decides the content of labour, the employee is subject to personnel regulations, the employer conducts or supervises concretely and individually the execution of labour, the employee may employ a third party to substitute the labour, the possession of fixtures, raw material or work tools, the nature of wage as a price for labour, existence of basic wage or fixed wage, collection of labour income tax through withholding income, the continuance of supply of labour and the exclusive control of the employer, the recognition of employee status by other laws such as the Social Welfare Act and the social economic situations of both parties". In *Panama* (pp. 14-17), the following are mentioned: (1) indicators of an employment relationship; (2) indicators that are not sufficient in themselves to prove an employment relationship; (3) indicators which, taken together, may exclude the employment relationship; and (4) apparent indicators for exclusion of an employment relationship which, however, are not sufficient to rule out completely the possibility that such a relationship exists. In the Netherlands, "when identifying the real nature of the employment relationship, the following indicators might be taken into consideration by the judge: the working hours and workplace are set by the employer; the employer gives binding instructions regarding the content, performance and practical organization of the work, or has the authority to do so; absences should be notified to the employer; the employer keeps a holiday and leave registration; the worker receives a fixed monthly or weekly salary; the worker is paid during sick leave; the worker is supposed to join meetings of the personnel/is part of the employers' organization; the worker receives clothing instructions; the worker does not own the materials and equipment used for the job; the work is performed under the guidance and supervision of the employer; the worker has to be available at the call of the employer; the worker is obliged to perform the work personally (...). Judges usually state a number of indicators to justify their decision ...". C. Bosse: "The scope of the employment relationship in the Netherlands" (Tilburg University, 2004), unpublished document, pp. 5-6. See also indicators of legal or economic dependency or subordination, and independence, in *Argentina* (pp. 15-17), *Islamic Republic of Iran* (pp. 8-11), *Japan* (p. 10), *Morocco* (pp. 5-8), *Peru* (pp. 6-8), *Russian Federation* (pp. 12, 35-37), *Uruguay* (pp. 2-4).

<sup>35</sup> *United Kingdom* (p. 6). See also *Australia* (pp. 29-30), *India* (pp. 19-20), *Jamaica* (p. 10), *Nigeria* (p. 15), *Pakistan* (p. 4), *Trinidad and Tobago* (pp. 18-19), *United States* (pp. 55-62).

the simulated participation of a legal entity in the performance of the service or the work shall not prevent the natural person concerned being considered as a worker.<sup>36</sup> In Argentina, a contract is void if it was concluded on the basis of fraud or fraudulent evasion of labour legislation, whether by simulating contractual terms that do not pertain to an employment contract, through the use of intermediaries or by any other means; in such cases the relationship is still governed by the Employment Contracts Act.<sup>37</sup> Also in Argentina, the law refers specifically to fraudulent use of the cooperative system to evade the application of labour legislation and encourages the regularization of the employment relationship while discouraging evasion through the imposition of fines and exemptions from contributions and fines in the event of voluntary compliance.<sup>38</sup> In Chile, in addition to joint liability, the law provides for the imposition of fines on an employer who simulates the recruitment of workers through third parties or anyone using any subterfuge, concealing, disguising or altering his or her description or assets with the effect of evading compliance with labour and social security obligations. In these cases, subterfuge means any alteration through establishing different company names or legal identities, dividing the enterprise, or any other act which results in the impairment or loss of the workers' individual or collective labour rights. Moreover, the time limit for bringing actions and claiming rights in this regard has been extended to five years.<sup>39</sup> Lastly, some laws protect homeworkers even where the relationship with the employer consists of the worker buying materials from the latter and selling him or her the products made from such materials as if it were a commercial sales-purchase operation.<sup>40</sup>

### Determination by law

103. Some legal systems go a step further and describe certain potentially ambiguous or controversial situations as employment relationships, either in general or under certain conditions, or at least presume they are employment relationships.

104. In Spain, for example, professional sportspersons are deemed by law to have a special employment relationship where they devote themselves voluntarily on a regular basis to practising a sport on behalf of and under the organization and direction of a sports body or club, in return for remuneration. Conversely, persons who devote themselves to practising a sport in a club and only receive compensation for the expenses incurred in their practice of the sport are not covered by the law.<sup>41</sup> The same applies to artists engaged in public performances who enter into a relationship with an organizer of public performances or a manager, on behalf of and under the organization and direction of the latter.<sup>42</sup>

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<sup>36</sup> Panama, ss. 63, 92, 93.

<sup>37</sup> Argentina, Employment Contracts Act, s. 14. Similarly, see also Brazil, s. 9; El Salvador, s. 17; Mexico, with regard to the road transport sector, s. 256.

<sup>38</sup> Argentina, National Employment Act, ss. 2(j), 7, 8, 12.

<sup>39</sup> Chile, s. 478.

<sup>40</sup> El Salvador, s. 71; Mexico, s. 312; Venezuela, s. 293.

<sup>41</sup> Spain, Workers' Charter, s. 2(1)(d), and Royal Decree 1006/1985 of 26 June, regulating the special employment relationship of professional sportspersons.

<sup>42</sup> Spain, Workers' Charter, s. 2(1)(e), and Royal Decree 1435/1985 of 2 August, regulating the special employment relationship of performing artists.

105. In France, the following categories are presumed to have an employment relationship under certain conditions: performing artists (as in Spain), models, professional journalists, sales representatives or travelling salespersons.<sup>43</sup> Mexican law contains similar provisions on sales representatives, insurance salespersons, travelling salespersons, sales promoters and similar categories.<sup>44</sup> In Mexico and Panama, the law refers to various public transport workers (drivers, operators, conductors, etc.).<sup>45</sup>

106. The French Labour Code goes even further by protecting certain workers irrespective of whether or not they have an employment contract, provided certain conditions are met with regard to their activity.<sup>46</sup>

107. In some cases, the legislation specifies whether a given type of work is excluded from its scope or whether or not it gives rise to a contract of employment, depending on the conditions under which it is performed. In Chile, for example, home work is deemed to be employment if it is neither discontinuous nor sporadic; on the other hand, work done by persons performing work or services directly for the public, or home work that is performed discontinuously or sporadically, is not deemed to give rise to an employment contract, and neither is work done by a student or graduate of higher education or secondary vocational and technical education for a specified period to fulfil a practical work requirement, even if the enterprise where this work is done provides food, transportation or an allowance in lieu of such benefits.<sup>47</sup> Mexican legislation contains similar provisions concerning homeworkers.<sup>48</sup> The Employment Contracts Act in Finland stipulates that the application of the Act is not prevented merely by the fact that the work is performed in the employee's home or a place chosen by the latter, or that it is performed using the employee's implements or machinery.<sup>49</sup>

108. In Colombia, vendors of insurance policies, savings bonds and betting slips may or may not be employees, depending on whether they have agreed to an employment contract or rely on their own means, are not dependent on a company and have a commercial contract.<sup>50</sup>

109. Conversely, legislation may specify that certain forms of employment are not employment relationships,<sup>51</sup> or exclude certain categories of workers from their scope, while other laws authorize the Government to make such exclusions. The most common

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<sup>43</sup> France, ss. L.761-2, L.762-1, L.763-1, L.751-1. The Labour Code extends employee status to certain workers, such as homeworkers, journalists and performers, who, because of the conditions in which they work, might otherwise be regarded as independent workers (L.721-1, L.721-6, L.761-1).

<sup>44</sup> Mexico, s. 285.

<sup>45</sup> Mexico, s. 256; Panama, s. 245. In *Panama* (pp. 9-14) the following are considered employees: economically dependent sharecroppers and tenant farmers; agents, commercial vendors and similar workers, except where they do not do the work in person or only occasionally; performers, musicians and lecturers; transport drivers; teachers; ice-cream and other vendors; cooperative workers; and apprentices. A similar extensive definition of employee can be found, for example, in Queensland, *Australia* (pp. 68-69), in the Industrial Relations Act 1999.

<sup>46</sup> France, ss. L.781-1, L.782-1.

<sup>47</sup> Chile, s. 8.

<sup>48</sup> Mexico, ss. 311-316.

<sup>49</sup> Finland, Ch. 1, s. 1.

<sup>50</sup> Colombia, ss. 94-97, 97B.

<sup>51</sup> In *Panama* (p. 30), for example, homeworkers are not considered as workers in an employment relationship and are therefore excluded from the scope of labour law (Act No. 1 of 17 March 1986, to enact labour provisions to promote employment and productivity, and adopt other regulations, s. 7).

is the total or partial exclusion of public servants and similar workers;<sup>52</sup> less frequently, that of public sector workers. Some laws also refer to compulsory labour or services, or work performed during imprisonment;<sup>53</sup> ordinary non-vocational activities;<sup>54</sup> domestic workers and persons regarded as such,<sup>55</sup> and members of cooperatives.<sup>56</sup> In Spain, the legislation also excludes business consultants, work done on an amicable, voluntary or goodwill basis, commercial activity and work done by family members, unless there is proof that they are employees.<sup>57</sup> Some countries have excluded enterprises with fewer than a certain number of workers from the scope of legislation on the employment relationship, or from certain of its provisions.<sup>58</sup> Other countries have adopted special regulations on the employment relationship of certain categories of workers; in the case of Morocco, for example, such regulations cannot provide inferior rights.<sup>59</sup>

110. In other countries, however, the legislation authorizes the Government to adapt the coverage of the legislation on the employment relationship; this may be done by including certain categories of workers, for example, in the United Kingdom, an order may provide that individuals are to be treated as parties to workers' contracts or contracts of employment.<sup>60</sup> In South Africa, "the Minister may, on the advice of the (Employment Conditions) Commission and by notice in the *Gazette*, deem any category of persons specified in the notice to be [...] employees for purposes of the whole or any part of this Act, any other employment law other than the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), or any sectoral determination".<sup>61</sup> In Botswana, the partial or total exclusion of a specific occupation by ministerial order is possible.<sup>62</sup>

### Easing the burden of proof

111. In order to ease the burden of proof on workers seeking to prove the existence of an employment contract, the law may provide that such contracts are consensual, i.e. formed merely by the consent of the parties without further formalities.<sup>63</sup> However,

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<sup>52</sup> For example, Benin, s. 2; Bahrain, s. 2; Cambodia, s. 1; Cameroon, s. 1(3); Chile, s. 1; El Salvador, s. 2; Gabon, s. 1; Ghana, s. 1; Kenya, s. 1; Lesotho, s. 2; Malawi, s. 2; Pakistan, s. 1; Panama, s. 2; Qatar, s. 3(1); Viet Nam, s. 4.

<sup>53</sup> Spain, Workers' Charter, s. 1(3)(b); Finland, Ch. 1, s. 2, Estonia, s. 7.

<sup>54</sup> Finland, Ch. 1, s. 2.

<sup>55</sup> Bahrain, s. 2, Qatar, s. 3(4).

<sup>56</sup> Angola, s. 1(5); Brazil, s. 442, which states that there is no employment relationship between a cooperative, irrespective of the branch of activity in which it operates, and its members, or between the latter and the cooperative's users; Colombia, Act to revise the legislation on cooperatives, s. 59; Viet Nam, s. 4.

<sup>57</sup> Spain, Workers' Charter, s. 1(3).

<sup>58</sup> In the Islamic Republic of Iran, enterprises with fewer than ten workers may be temporarily excluded from some of the provisions of the Labour Code if circumstances so warrant (s. 191). In the Republic of Korea, the Labour Standards Act applies only to businesses or workplaces in which more than five workers are ordinarily employed (s. 10). Peru has adopted special labour regulations, on a temporary basis (for up to five years) for small and micro-enterprises (1-50 workers) with a limited annual sales turnover (Act on the promotion and formalization of small and micro-enterprises, ss. 43 ff.).

<sup>59</sup> Morocco, s. 3.

<sup>60</sup> Employment Relations Act 1999, s. 23(4).

<sup>61</sup> s. 83 of the Basic Conditions of Employment Act, 1997 (BCEA), as amended by s. 20 of the Basic Conditions of Employment Amendment Act, 2002.

<sup>62</sup> Botswana, s. 106.

<sup>63</sup> In this respect, the legislation in some countries provides that the contract of employment may be oral or written, or explicit or implicit, or define it irrespective of its form or name. See, for example, Argentina,

the law may require that the contract be in writing for various reasons relating to compliance or to evidence; or it may proceed from the assumption that the employment relationship exists based on the fact that services are provided. In this respect, the Labour Code of the Russian Federation provides that a contract of employment that is not drawn up in due form is considered to have been concluded if the employee starts working with the knowledge or on the instructions of the employer or the employer's representative. Once the employee starts to work, the employer is obliged to draw up a written contract of employment with the employee no later than three days from the day on which the employee started to work.<sup>64</sup>

112. It is also common for legislation to provide expressly that the employment relationship may be proved by any of the usual means, or by any means permitted by law.<sup>65</sup>

113. An important element of certainty, which also makes it easier to prove the existence of an employment contract, is the obligation on the employer to inform employees of the conditions applicable to the contract by providing a written contract, a letter of engagement or other documents indicating the essential aspects of the employment contract or relationship. This obligation is explicitly laid down in the European Union<sup>66</sup> and further developed in national legislation.<sup>67</sup> Non-compliance with this obligation may cause the worker to question his or her employee status. Conversely, having the written information in question makes it easier for the worker to prove that status.

114. With the same aim of easing the burden of proof, some laws provide for a presumption of the existence of an employment relationship or contract.<sup>68</sup>

115. The law may provide, for example, with some variations, that an employment relationship or contract is presumed to exist between a person providing a personal service and the person who receives it;<sup>69</sup> or if it is proven that the worker performed services for more than two consecutive days or there is evidence of subordination.<sup>70</sup> In the Netherlands, the law provides that any person who for the benefit of another person performs work for remuneration for three consecutive months on a weekly basis, or for no fewer than 20 hours per month, is presumed to perform such work on the basis of a

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Employment Contracts Act, s. 21; Botswana, s. 106; Brazil, s. 422; Cambodia, s. 65; Colombia, s. 37; El Salvador, s. 17; Finland, Ch. 1, s. 3 (an employment contract may be oral, written or electronic); Ghana, s. 175; Indonesia, s. 51; Lesotho, s. 3; Mexico, s. 20; Nicaragua, s. 19; Panama, s. 62; Portugal, s. 102; Spain, Workers' Charter, s. 8; Trinidad and Tobago, s. 2.

<sup>64</sup> Russian Federation, s. 67.

<sup>65</sup> See, for example, Burkina Faso, s. 12; Latvia, s. 41(1); Morocco, s. 18; Mexico, s. 776; Niger, s. 39; Rwanda, s. 7; Argentina, Employment Contracts Act, s. 50; Brazil, s. 456; Colombia, s. 54; Qatar, s. 38; Tunisia, s. 6.

<sup>66</sup> Arts. 2 and 3 of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, *Official Journal of the European Communities*, No. L 288, 18 Oct. 1991, [http://europa.eu.int/comm/employment\\_social/labour\\_law/docs/directive91\\_533\\_en.pdf](http://europa.eu.int/comm/employment_social/labour_law/docs/directive91_533_en.pdf).

<sup>67</sup> See, for example, Finland, Ch. 2, s. 4; Netherlands, Civil Code, s. 7:655; Spain, Workers' Charter, s. 8(3); United Kingdom, Employment Rights Act 1996, ss. 1-7.

<sup>68</sup> The Labour Code of Panama lists eight presumptions relating to the existence of an employment relationship and other aspects thereof (s. 737).

<sup>69</sup> Argentina, Employment Contracts Act, s. 23; Chile, s. 8; Costa Rica, s. 18; Mexico, s. 21; Panama, s. 66; Spain, Workers' Charter, s. 8(1); Venezuela, s. 65.

<sup>70</sup> El Salvador, s. 20.



contract of employment.<sup>71</sup> In Portugal, an employment relationship is presumed to exist if all of the following indicators are present: (a) the worker is part of the organizational structure of the beneficiary of his or her activity and performs a service under the latter's guidance; (b) the work is performed in the beneficiary's enterprise or a place under its control, according to a previously defined timetable; (c) the worker is remunerated for the time spent on carrying out the activity or is economically dependent on the beneficiary of the activity; (d) the work tools are essentially supplied by the beneficiary; and (e) the services are performed for a continuous period of over 90 days.<sup>72</sup> In Slovenia, in the event of a dispute as to the existence of an employment relationship between the worker and the employer, it shall be presumed that an employment relationship exists if certain *indicators* are present; in Estonia, the parties are deemed to have entered into an employment contract unless the alleged employer proves otherwise or unless it is evident that the parties entered into a different kind of contract.<sup>73</sup> In Malaysia, the employment, engagement or contracting of any person or class of persons to carry out work other than under a contract of service may be prohibited; in that case, the person or class of persons employed, engaged or contracted shall be deemed to be an employee or employees and the person or institution employing, engaging or contracting him/them shall be deemed to be the employer. The contravention of these provisions is an offence.<sup>74</sup>

116. The law may also require that the contract be in writing and render the employer liable to court proceedings if the contract was purely verbal. The labour code of one country provides that, in the absence of a written contract, the facts or circumstances alleged by the worker which should have been in the contract are presumed true unless proved otherwise beyond reasonable doubt.<sup>75</sup>

117. In addition to presuming the existence of an employment contract, the law may also provide for a presumption as to its terms, for example by deeming in certain conditions that a contract is for an unspecified duration, even if a duration is stipulated, if the nature of the work assigned to the worker is permanent in the enterprise.<sup>76</sup>

## Clarifying the scope of the employment relationship

118. Legislation adopted in some countries since the end of the twentieth century contains provisions refocusing the employment relationship to extend the scope of the law and hence its protection to new categories of workers; to combat disguised or fraudulent employment relationships and improve compliance with the law; and to ease the burden of proof on the worker, in particular when seeking to prove the existence of an employment relationship in a given case. Parallel to this regulatory response to the growing concern at the lack of protection for workers who are in fact in an employment relationship which might be ambiguous or disguised, there has also been a continuing tendency in case law to apply the traditional approach on the employment relationship to new and complex situations.

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<sup>71</sup> Netherlands, Civil Code, s. 7:610a.

<sup>72</sup> Portugal, s. 12.

<sup>73</sup> Slovenia, s. 16; Estonia, s. 8.

<sup>74</sup> Malaysia, s. 2A.

<sup>75</sup> Panama, s. 69.

<sup>76</sup> El Salvador, s. 25.

119. The concern to clarify the scope of the employment relationship has been expressed in a variety of ways. One response has been to try to redefine more precisely the scope of the employment relationship, irrespective of the form of the contract, or to establish mechanisms to adjust the scope of the law in line with changing needs. Another approach to the problem has been to delineate more clearly the boundary between dependent and independent work. A third option combines both these elements. Provisions have also been introduced in legislation to deal with certain types of work which had hitherto been inadequately defined in some countries. Lastly, in one labour code the protection concerning the employment contract is extended to equivalent contracts. These five approaches are described in the following paragraphs, and illustrated by referring to relevant case law developments.

### Defining the scope of the employment relationship

120. New Zealand has addressed the issue of protection of workers in the Employment Relations Act, which gives a broad definition of which workers are covered by the new legislation and empowers independent bodies (the Employment Court or the Employment Relations Authority) to investigate the real nature of the link between the person doing the work and the entity commanding that work. Such powers play a key role in eliminating fraudulent or disguised employment relationships. Section 6 of the Act provides as follows:

- (1) In this Act, unless the context otherwise requires, employee:
  - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - (b) includes:
    - (i) a homemaker; or
    - (ii) a person intending to work; but
  - (c) excludes a volunteer who:
    - (i) does not expect to be rewarded for work to be performed as a volunteer; and
    - (ii) receives no reward for work performed as a volunteer.
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the authority (as the case may be) must determine the real nature of the relationship between them.

121. In Finland, the Employment Contracts Act applies to employment contracts entered into by an employee or employees, under which they agree to perform work personally for an employer under the latter's direction and supervision in return for payment or other remuneration.<sup>77</sup> It reaffirms the prohibition on discrimination, the requirement for equal treatment and the broad scope of the employment relationship and, as mentioned above, it stipulates that its provisions do not cease to apply because of the fact that employees use their own tools or equipment. Finnish law already provided that the employment contract could take any form.<sup>78</sup> The new Act specifies that the contract may

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<sup>77</sup> Finland, Ch. 1, s. 1.

<sup>78</sup> Employment Contracts Act (No. 320 of 1970), as amended, which was repealed by the new Act.

be in oral, written or electronic form;<sup>79</sup> the latter makes it easier to identify the employment relationship, even if it is between people located in different countries who do not know each other.

122. Like other older legislation, the new Act favours the open-ended contract over the fixed-term contract: it only allows the latter type of contract to be concluded for a justified reason. It also guarantees that workers retain their acquired rights in a continued relationship or even in the case of brief interruptions. In this way, the gap is narrowed between workers with fixed-term contracts and those with open-ended contracts. Fixed-term contracts that are concluded or consecutively renewed without a justified reason are considered open-ended. The provisions reaffirming the preference for the open-ended contract are particularly significant, since one of the main recent developments in the employment relationship in Finland has been the increase in fixed-term contracts. This trend has affected women and men differently: according to 1999 data, 21 per cent of women and 15 per cent of men worked under fixed-term contracts.<sup>80</sup>

123. In a similar vein, the law in New Zealand specifies that, in agreeing to a fixed-term employment contract that will end on a specified date, on the occurrence of a specified event or at the conclusion of a specified project, the employer must have “genuine reasons based on reasonable grounds” for specifying that the employment of the employee is to end in that way. The law states that the following are not “genuine reasons”: “(a) to exclude or limit the rights of the employee under this Act; (b) to establish the suitability of the employee for permanent employment.”<sup>81</sup>

124. In the United Kingdom, the law itself authorizes the Government to adjust its scope – a novel power in response to the growing problem of disguised and objectively ambiguous employment relationships. Under section 23 of the Employment Relations Act 1999, the Government may confer employment rights on certain individuals vis-à-vis an employer (however defined), and may provide that such individuals are to be treated as parties to employment contracts and make provision as to who are to be regarded as their employers.

125. In India, the National Commission on Labour was created in October 1999. Its terms of reference were to suggest rationalization of existing laws relating to labour in the “organized sectors”, and to suggest “umbrella legislation” for ensuring a minimum level of protection for workers in the “unorganized sector”.<sup>82</sup> With the aim of making the law universally applicable, the Commission suggested in its report that the definition of a worker should be the same in all laws. It recommended the enactment of a special consolidated law for small-scale enterprises (defined as those with fewer than 20 workers). This would not only protect the workers in these enterprises but would make it easier for small enterprises to comply with the law, as the Commission considered that the existing legislation, intended for large enterprises, was inadequate for this sector.<sup>83</sup>

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<sup>79</sup> Finland, Ch. 1, s. 3.

<sup>80</sup> *Finland* (pp. 3, 11-16).

<sup>81</sup> New Zealand, s. 66.

<sup>82</sup> According to the report of the Commission, the unorganized sector accounts for 92 per cent of the total workforce; 32 per cent of workers in the unorganized and self-employed sectors are women. Report of the Second National Commission on Labour, June 2002, paras. 1.15, 1.22, at [http://www.labour.nic.in/comm2/nlc\\_report.html](http://www.labour.nic.in/comm2/nlc_report.html).

<sup>83</sup> *ibid.*, paras. 1.17, 6.21, 6.28, 6.30.

## Delineating the boundary between dependent and independent work

126. In Ireland, the difficulty of distinguishing between dependent and independent workers has prompted an approach based on consensus between the Government and the employers' and workers' organizations. The Irish system of industrial relations is based on broad social partnership reflected in a national agreement which fixes wage increases and other aspects of policy.<sup>84</sup>

127. In the context of the negotiations on the agreement for 2000 to 2002, called the Programme for Prosperity and Fairness (PPF), it was agreed to establish an Employment Status Group with the task of devising a uniform definition of "employee". In the absence of a statutory definition of "employed" or "self-employed", there was growing concern that the number of people classified as "self-employed" was increasing, despite evidence that in their case the status of "employee" would be more appropriate.

128. The issue has far-reaching implications, since aspects such as the way in which taxes and social security contributions are payable, entitlement to unemployment, disability or sickness benefits, a number of rights under labour legislation and responsibility for the work performed all depend on whether or not the worker is classified as an employee. Incorrect classification of a worker can also entail serious consequences for the employer, including penalties. Finally, tax authorities have a special interest in the appropriate classification of workers and are very active in their efforts to identify who is an employee and who is self-employed, in order to prevent tax evasion. The Employment Status Group formulated a set of *indicators* for determining which workers were employees and which were self-employed (see box 1). With these *indicators* in mind (even though not all of them may apply in every case) and taking into consideration the person's work as a whole, including the conditions of work and the real nature of the relationship, it should be easier to determine the employment status of the individual.

129. In addition to establishing the *indicators* for distinguishing between employees and the self-employed, the Employment Status Group also considered how these *indicators* should be expressed. The Group rejected the idea of embodying them in a law and preferred to introduce them in a code of practice, the application of which would be purely voluntary. The code had the legitimacy of having been approved by consensus by the employers' and workers' representative bodies, as well as by the competent authorities.<sup>85</sup> Although it does not have binding effect, it was expected that it would be taken into account by the bodies responsible for handling disputes about employment status. The application of the code of practice would be monitored by the Employment Status Group itself to assess its effectiveness.

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<sup>84</sup> See *Ireland* (pp. 1-4) and Pedersini, *op. cit.*

<sup>85</sup> The idea of the code of practice also had precedents: the Revenue Commissioners and Department of Social, Community and Family Affairs' publication entitled *Employed or self-employed – A guide for tax and social insurance* (1998); the Revenue Commissioners' leaflet, *Employees and contractors in the construction industry* (1996); and a series of information leaflets by the Department of Enterprise, Trade and Employment which, although they do not refer to "employee" status, fully explain employees' rights at work.

**Box 1**  
**Ireland: Code of practice for determining employment or self-employment status of individuals**

**Employees**

An individual would normally be an employee if he or she:

- is under the control of another person who directs as to how, when and where the work is to be carried out;
- supplies labour only;
- receives a fixed hourly/weekly/monthly wage;
- cannot subcontract the work. If the work can be subcontracted and paid by the person subcontracting the work, the employer/employee relationship may simply be transferred on;
- does not supply materials for the job;
- does not provide equipment other than small tools of the trade. The provision of tools or equipment might not have a significant bearing on coming to a conclusion that employment status may be appropriate having regard to all the circumstances of the case;
- is not exposed to personal financial risk in carrying out the work;
- does not assume responsibility for investment and management in the business;
- does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements;
- works set hours or a given number of hours per week or month;
- works for one person or for one business;
- receives expenses payments to cover subsistence and/or travel;
- is entitled to extra pay or time off for overtime.

**Self-employed**

An individual would normally be self-employed if he or she:

- owns his or her own business;
- is exposed to financial risk, by having to bear the cost of making good faulty or substandard work carried out under the contract;
- assumes responsibility for investment and management in the enterprise;
- has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks;
- has control over what is done, when and where it is done and whether he or she does it personally;
- is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken;
- can provide the same services to more than one person or business at the same time;
- provides the materials for the job;
- provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account;
- has a fixed place of business where materials, equipment, etc. can be stored;
- costs and agrees a price for the job;
- provides his or her own insurance cover;
- controls the hours of work in fulfilling the job obligations.

Source: Programme for Prosperity and Fairness, Employment Status Group: *Code of practice for determining employment or self-employment status of individuals* (Dublin, July 2001).

130. In Germany, there has been a legal definition of employee for the purposes of social security since January, 1999, when the revised Social Security Code came into force. A presumption has been introduced whereby a person is deemed to be an employee if he or she meets at least two of the following *indicators*: the person does not

have employees subject to social security obligations; usually works for one contractor; performs the same work as regular employees; has performed the same work as an employee before; and does not show signs of engaging in entrepreneurial activities. The underlying idea was to achieve a sufficiently precise and practical definition to reduce the opportunity to disguise the employment relationship and to make it easier to deal with situations midway between a genuine and a disguised employment relationship.<sup>86</sup>

### The combined approach

131. The 2002 legislative reform adopted in South Africa<sup>87</sup> combines a number of the above elements. This reform, which amends labour legislation adopted in 1995 and 1997, is important not only for its content, but also for the process of intense, effective and constructive social dialogue leading up to it, in which all of the stakeholders participated.<sup>88</sup> Among other aspects, the reform addresses the scope of the employment relationship, a particularly difficult task in a country where ambiguous bilateral and “triangular” employment relationships have proliferated over the last decade and even more since the adoption of the 1995 legislation.<sup>89</sup>

132. Two elements were introduced to clarify and adjust the scope of the law. The first, which is reminiscent of the German approach and the Irish code of practice, is a broad presumption in favour of employee status, which appears both in the Basic Conditions of Employment Amendment Act, 2002, and the Labour Relations Amendment Act, 2002.<sup>90</sup> According to this presumption, a person is deemed to be an employee if one or more of seven *indicators* set out in the Act exist (see box 2).

133. The presumption in favour of employee status does not apply, however, in the case of workers with a certain level of income. When the Basic Conditions of Employment Act (BCEA) was enacted in 2002, the income threshold was set at 89,445 rand (US\$10,000) per year.<sup>91</sup>

<sup>86</sup> *Germany* (pp. 4-6). See also Pedersini, op. cit.

<sup>87</sup> Basic Conditions of Employment Amendment Act, No. 11 of 2002, and Labour Relations Amendment Act, No. 12 of 2002.

<sup>88</sup> The reform, announced in 1999, began with consultations with all the stakeholders, the Labour Court, the Commission for Conciliation, Mediation and Arbitration (CCMA) and bargaining councils. The resulting bills were published for public comment and discussion in the National Economic Development and Labour Council (NEDLAC) in July 2000. When negotiations in NEDLAC reached an impasse, they continued in a three-member tripartite committee and in parallel there were negotiations to find basic points of consensus in the Millennium Labour Council (MLC). An agreement in principle in the MLC opened the way for agreement in NEDLAC in July 2001, after which a legal drafting team prepared the bills, which were promulgated on 1 August 2002. *South Africa 2002* (pp. 44-50).

<sup>89</sup> *ibid.* (pp. 13, 22).

<sup>90</sup> *ibid.* (pp. 50-54).

<sup>91</sup> According to the 2001 Labour Force Survey, 600,000 out of 10 million employed earned more than 8,000 rand per month. Hence, about 5.5 per cent of the total employed earned above the threshold laid down in the BCEA (see *South Africa 2002*, p. 53). Under the BCEA, the Minister of Labour has the power to make a determination regarding the amount of the income threshold on the advice of the Employment Conditions Commission and following publication of a notice in the *Government Gazette*. Following this procedure, the income threshold was raised to 115,572 rand with effect from 24 March 2003 (Basic Conditions of Employment Act 75 of 1997: Determination: Earnings Threshold, Government Notice No. 356, in *Government Gazette*, No. 25012, 14 Mar. 2003).

**Box 2**  
**South Africa: Presumption of employee status**

A person is presumed to be an employee if one of the following indicators is present:

- the manner in which the person works is subject to the control or direction of another person;
- the person's hours of work are subject to the control or direction of another person;
- in the case of a person who works for an organization, the person is a part of that organization;
- the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- the person is economically dependent on the other person for whom that person works or renders services;
- the person is provided with tools of trade or work equipment by the other person; or
- the person only works for or renders services to one person.

Source: S. 83A introduced in the Basic Conditions of Employment Act 1997 (BCEA) by the Basic Conditions of Employment Amendment Act 2002, s. 21.

134. As a complementary measure, the Labour Relations Amendment Act required the National Economic Development and Labour Council (NEDLAC) to prepare and issue a code of good practice containing guidelines for determining whether persons, including those with incomes over the limit mentioned in the previous paragraph, are employees.<sup>92</sup> Another innovation, as mentioned above, is the very special power granted to the minister to deem any category of persons to be employees for the purposes of employment legislation.<sup>93</sup> It is not just a matter of clarifying the scope of the law but also of amending it by ministerial order.

135. In Peru, the General Labour Bill of July 2002 contains an explicit and broad definition of its scope. The Bill is intended to regulate the personal provision of services, on a subordinate and paid basis, based on an oral or written contract, irrespective of its name or form. A worker does not lose his or her status even if personal services are concealed in the guise of a legal entity. Thus, the provision of services is subordinate when a worker performs the service within the organization and under the direction of the employer or a third party when the law so permits. The Bill contains a presumption that any provision of personal services for remuneration is subordinate and that an employment relationship exists when there is a provision of services in a workplace. Furthermore, it indicates elements which are not essential to classifying a relationship as an employment relationship, but which can serve as indicators for that purpose or to determine entitlement to certain rights. Likewise, the Bill defines the parties to the employment contract (employer and worker) and presumes that such contracts are for an indefinite term.<sup>94</sup>

136. Another initiative to refocus the employment relationship was the appointment in 2002 of a committee of experts in Quebec, Canada, which produced a report on the

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<sup>92</sup> s. 51 of the Labour Relations Amendment Act, which amends s. 200 A of the Labour Relations Act, 1995.

<sup>93</sup> s. 83 of the BCEA, as amended by s. 20 of the Basic Conditions of Employment Amendment Act, 2002. See *South Africa 2002* (p. 54).

<sup>94</sup> See General Labour Bill, July 2002, ss. I-IX and 1, 4-7, 11, 14, 17.

social protection needs of people in non-traditional work situations.<sup>95</sup> This was in response to the changes in work relationships arising out of new operating methods of some enterprises and the provision of certain public services, as well as the emergence of new categories of self-employed persons – some of them only apparently independent and others who are genuinely independent.

### Categorizing certain types of work

137. Together with the general provisions on the scope of the employment relationship, there are also provisions specifically relating to certain workers or certain types of employment, intended to determine the existence of an employment relationship. This is the case of home work, telework, private employment agency workers and workers' cooperatives.

138. Since the 2001 reform of the Labour Code in Chile, home work which is neither discontinuous nor sporadic is presumed to be employment.<sup>96</sup> In Finland, the Employment Contracts Act states expressly that its application is not prevented by the fact that the work is performed at the employee's home.<sup>97</sup>

139. In New Zealand, in setting out the framework of the employment relationship, the Employment Relations Act lays particular emphasis on homeworkers. This Act deems as an employee anyone who is bound by a contract of service. However, it also expressly includes homeworkers in this category, even if they are engaged, employed or contracted under a form of contract whereby the parties are technically a vendor and a purchaser.<sup>98</sup> With respect to buying and selling in home work, the Labour Act of Venezuela, as amended in 1997, provides that when a person habitually or with a degree of regularity sells materials to another to be processed or made up by the latter at his or her home and then purchases the product for a determined price, the former is deemed to be an employer (*patrono*) and the latter a homeworker.<sup>99</sup>

140. The Peruvian General Labour Bill mentioned above provides that the service is regarded as personal in the case of home work, even when it is performed with the assistance of the worker's immediate family members who are economically dependent on him or her.<sup>100</sup>

141. As to teleworking, which is in some respects a modern kind of home work, a 2002 framework agreement at European Union level provided regulations emanating from the social partners themselves.<sup>101</sup> The framework agreement covers different forms of teleworking, but is confined to regular teleworking, i.e. that which takes place in the context of an employment contract or relationship, and is based on the recognition that

<sup>95</sup> J. Bernier; G. Vallée; C. Jobin: *Social protection needs of individuals in non-standard work situations*, Final report, Canada, Quebec, Ministry of Labour, 2003, at [http://www.travail.gouv.qc.ca/actualite/travail\\_non\\_traditionnel/Bernier2003/index.html](http://www.travail.gouv.qc.ca/actualite/travail_non_traditionnel/Bernier2003/index.html).

<sup>96</sup> Chile, s. 8, as amended by s. 5 of Act No. 19,759.

<sup>97</sup> Finland, Ch. 1, s. 1.

<sup>98</sup> New Zealand, s. 5.

<sup>99</sup> Venezuela, s. 293.

<sup>100</sup> s. II of the Preambular Title.

<sup>101</sup> The European social partners were invited "to negotiate agreements modernizing the organization of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the necessary balance between flexibility and security". Point 1, para. 1, of the Framework Agreement on telework, at [http://europa.eu.int/comm/employment\\_social/news/2002/jul/telework\\_en.pdf](http://europa.eu.int/comm/employment_social/news/2002/jul/telework_en.pdf).



teleworkers have the same rights as workers who render services in the employer's premises. The agreement contains the following provision to prevent ambiguities concerning the worker's status and possible "conversion" to self-employment: "the passage to telework as such, because it only modifies the way in which work is performed, does not affect the teleworker's employment status".<sup>102</sup>

142. The Peruvian General Labour Bill defines teleworking and suggests indicators which can help to identify subordination in this kind of work.<sup>103</sup> Under the Chilean Labour Code, teleworking (described as services rendered outside the premises of the enterprise, using computers or telecommunications) is exempted from the limits on working hours.<sup>104</sup>

143. With respect to cooperatives, the ILO Promotion of Cooperatives Recommendation, 2002 (No. 193), provides that national policies should notably promote the ILO fundamental labour standards and the ILO Declaration on Fundamental Principles and Rights at Work, for all workers in cooperatives without distinction whatsoever.

### Extending the scope of legislation to equivalent workers

144. The Labour Code of Portugal provides for partial extension of its scope beyond the limits of the employment contract, which, as pointed out above, concerns workers performing services under the authority and direction of another person or other persons. In this respect, it provides as follows: "Contracts for the performance of work without legal subordination shall be subject to the principles laid down in this Code, especially as regards the rights of the person, equality, non-discrimination, and safety and health at work, without prejudice to any provisions in special legislation, provided that the worker is considered to be in a situation of economic dependence on the beneficiary of his or her activity."<sup>105</sup> The Code refers to these as contracts "treated as" ("*contratos equiparados*") an employment contract and makes them subject to the principles laid down in the Code.

### Developments in case law

145. In considering developments on the employment relationship, it is always interesting and useful to keep an eye on case law. Courts and other judicial bodies play a crucial role in classifying the employment status of workers based on the facts. It is worth mentioning some decisions from different countries.

146. The Denny case in Ireland<sup>106</sup> sets an important legal precedent in this area, as pointed out in the report of the Employment Status Group.<sup>107</sup> A worker signed a contract of employment as a shop demonstrator with Denny, a food processing company, and was entered on a panel of demonstrators offering free samples of various products to customers. When a store requested a demonstrator, a member of the panel was contacted

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<sup>102</sup> *ibid.*, point 1, para. 3; point 2; and point 3, para. 4.

<sup>103</sup> "The distance work employment contract regulates the performance of work without the physical presence of the worker in the enterprise, with which he is connected by computer, telecommunications and similar media, by means of which control and supervision are exercised" (s. 39, see also s. 40).

<sup>104</sup> s. 22 of the Labour Code, as amended by s. 7 of Act No. 19,759.

<sup>105</sup> Portugal, ss. 10, 13.

<sup>106</sup> Supreme Court: *Henry Denny & Sons Ltd., trading as Kerry Foods v. The Minister for Social Welfare* [1998], 1 IR 34.

<sup>107</sup> *Ireland* (pp. 10-12).

by the company and asked to carry out the demonstration. The demonstrator then submitted an invoice, which was signed by the store manager. The demonstrator was paid at a daily rate and was given a mileage allowance, but was not eligible for the pension scheme or to join a trade union. The annual contract was renewed several times. However, the contract for 1993 stated that the worker was an independent worker and as such was responsible for her own tax affairs. At that time, she worked an average of 28 hours a week for 48 to 50 weeks a year, during which she gave some 50 demonstrations. She did so without supervision from the company, but she complied with any reasonable instructions of the owner of the store and written instructions from the company, which provided her with the materials for the demonstration and gave its consent to carry it out. The question in the case was whether she was actually self-employed or an employee who should be insured by the company. Based on the particular facts of the case and the general principles developed by the courts, the Supreme Court held that she was an employee, bound as such by a contract of service, because she had performed services for another person and not for herself.

147. In another case<sup>108</sup> in Ireland, the Labour Court considered the situation of a part-time temporary veterinary inspector who had worked for the Department of Agriculture since 1966, to determine whether or not he was an employee. As stated by the Court, the distinction between a contract *of* service and a contract *for* service is a fine one and surrounded by legal complexity, making it difficult to apply in borderline cases. The Court examined the provisions contained in the code of practice for determining employment or self-employment status of individuals, issued by the Employment Status Group. In the light of this code of practice and various other tests, the Court concluded that, given the right to refuse work and the degree of control exercised by the veterinary inspector over the performance of his duties, he was a free agent, economically independent from the person engaging his service. The Court found, therefore, that he was employed under a contract *for* service and was not an “employee”.

148. In South Africa, a contractor specializing in the manufacture and installation of built-in cupboards persuaded the vast majority of its workers to resign and to continue rendering their services as independent workers. The Labour Court considered whether the contracts with the workers were genuine and bona fide, based on the case of one of the workers. The Court found that the worker in question merely helped to load cupboards on to a vehicle and then clean and touch them up once they were installed, and this work was an integral part of the service performed by the contractor. The Court held that the contractor had perpetrated a “cruel hoax” on the worker by inducing him to believe that he was a self-employed entrepreneur, which left him without any of the protections accorded to an employee under the law. The Court held that the contract was a sham and remained a sham even though the worker had consented to it.<sup>109</sup>

149. In the Netherlands, in 2004 the District Court of Apeldoorn, in line with the case law of the Supreme Court, decided that “the existence of subordination does not require that the employer is actually giving instructions to the employee: it includes the *authority* to do so”.<sup>110</sup> Also in line with former case law, the Court of Appeal of Middelburg ruled that the content of a written agreement is not conclusive as to the

<sup>108</sup> Labour Court, Department of Agriculture, Food and Rural Development and Maurice O’Reilly, DWT0232, 18 June 2002.

<sup>109</sup> *Building Bargaining Council (Southern and Eastern Cape) v. Melmons Cabinets CC and Another* (2001), 22 ILJ 120 (LC), Labour Court (P478/00), 23 November 2000.

<sup>110</sup> District Court Apeldoorn, 10 March 2004, *JAR* 2004/75, cited in Bosse, *op. cit.*, p. 6.

existence of an employment contract; the purpose of the contract and the way it is carried out should also be taken into consideration. In the case of a medical advisor, the Court determined that there was an employment contract on the basis of the following facts: (a) the “employee” did not work for principals other than the “employer”; (b) he had to adjust to the working method and organization of the “employer”; (c) he received instructions with regard to the content of his work; (d) he worked at the office of the “employer” on fixed days and at fixed hours; (e) he could not take leave without the consent of the “employer”; (f) his salary was fixed on the basis of a directive of the Association of Doctors in Employment; (g) taxes and contributions were withheld by the “employer”; and (h) the “employee” had to perform the work personally.<sup>111</sup>

150. In France, the Supreme Court (*Cour de Cassation*) examined the case of a person who drove a taxi under a monthly contract which was automatically renewable, called a “contract for the lease of a vehicle equipped as a taxi”, and paid a sum described in the contract as “rent”. The Court held that this contract concealed a contract of employment, since the taxi driver was bound by numerous strict obligations concerning the use and maintenance of the vehicle and was in a situation of subordination.<sup>112</sup>

151. Also in France, the Supreme Court examined the case of workers engaged in the delivery and collection of parcels under a franchise agreement. The “franchisees” collected the parcels from premises rented by the “franchiser” and delivered them according to a schedule and route determined by the latter. In addition, the charges were set by the enterprise, which collected payment directly from the customers. The Supreme Court examined the situation of three “franchisees” in three separate cases and handed down three rulings on the same day.<sup>113</sup> The Court held that the provisions of the Labour Code were also applicable to persons whose occupation consisted essentially of collecting orders or receiving items for handling, storage or transport, on behalf of a single industrial or commercial enterprise, when those persons performed their work in premises supplied or approved by that enterprise, under conditions and at prices imposed by that enterprise, without the need to establish a subordinate relationship. This is understood to amount to an extension of the scope of the Labour Code to certain “franchised” workers.<sup>114</sup>

152. A case in Venezuela involved distributors of beer and other products who had each formed a limited company for the purpose of that activity. The distributors purchased products at a price fixed by the enterprise and sold them to retailers within a specified area covered by their trucks, painted with the logos of the brewery company, for another price, also set by the enterprise. Their income was the difference between the two prices. They could not sell the products outside the designated area, or sell products other than those of the enterprise in that area. In one case, the Supreme Court of Justice held that the distributors were in reality wage workers, since it had been shown that they provided personal services, despite being registered as businesses, and their work being structured around commercial contracts for sale and purchase. However, 80 other cases were

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<sup>111</sup> Court of Appeal Middelburg, 5 February 2003, *JAR* 2003/66, *ibid.*, p. 6.

<sup>112</sup> Ruling No. 5371 of 19 December 2000. See *Le Monde*, 22 Dec. 2000.

<sup>113</sup> Rulings Nos. 50105034, 35 and 36, of 4 December 2001. See *Libération*, 28 Jan. 2002, and *Droit social*, No. 2, Feb. 2002, pp. 162-163.

<sup>114</sup> A. Jeammaud: “L’assimilation de franchisés aux salariés”, in *Droit social*, *op. cit.*, pp. 158-161.

referred for mediation and conciliation by the same tribunal and the parties admitted that the relationships were of a commercial nature.<sup>115</sup>

153. Similarly, a cabin crew member with three years' service with a Venezuelan airline was withdrawn because of pregnancy from the flight programme and a training course with a view to promotion, without being assigned new functions. She was thus deprived of remuneration, since she only received a monthly commission based on flights and had not been declared for the purposes of social security. The company denied that it was bound by an employment relationship and claimed, on the contrary, that it had signed a commercial contract with her in her capacity as representative of a limited company. Nevertheless, since she had indeed provided her services to the airline, the Court of First Instance held that an employment relationship between the parties had been shown to exist and ruled in favour of the worker.<sup>116</sup>

154. Since 1987, a major United States electronics firm employed "temporary agency employees" and "freelancers". The "freelancers" had agreed in writing that they would not enjoy certain employee benefits, including access to the stock purchase plan. It was held by the Court, however, that both the "agency workers" and the "freelancers" were common-law employees of the enterprise.<sup>117</sup> After several years of negotiations, a settlement was reached whereby the company agreed to pay some US\$97 million to compensate the workers in question. Furthermore, the company changed its practices for hiring and classifying personnel, which meant that some 3,000 workers in the category concerned were converted to employee status and as such were eligible to participate in employee benefit plans and programmes.<sup>118</sup>

155. In the context of case law there is the problem of lengthy court proceedings, and even after such long delays often the outcome benefits only one or a few plaintiffs. In two of the three cases before the French courts mentioned above relating to franchises, the proceedings lasted approximately four years, while the relationships of each of the parties lasted for just over three years. The proceedings against the United States electronics company lasted more than eight years and only ended with an out-of-court settlement between the parties. Even so, the impact of that case affected an initially undefined category of persons, which proved to consist of several thousand,<sup>119</sup> while the French rulings only directly benefited the plaintiffs.

<sup>115</sup> Supreme Court, Social Chamber of Cassation, rulings of 15 March 2000 and 17 October 2002. In a case related to workers of this enterprise, the Committee on Freedom of Association, while pointing out that it does not have the competence to express an opinion concerning the legal relationship (labour or commercial) between the distributors and sales agents concerned and the enterprise, concluded that persons engaged in the distribution and sale of beer should be able to set up organizations of their choice (Convention No. 87, Article 2), 281st Report of the Committee on Freedom of Association, Case No. 1578, *Official Bulletin* (Geneva, ILO), 1992, Series B, No. 1, paras. 395-396.

<sup>116</sup> Labour Court of First Instance, Vargas State, 28 April 1999.

<sup>117</sup> *Vizcaino v. United States District Court*, 173 F 3d 713 (Ninth Circuit, 1999); see *United States* (pp. 114-119).

<sup>118</sup> United States District Court, Western District of Washington, Seattle, *Vizcaino et al. v. Microsoft Corporation et al.*, *Hughes et al. v. Microsoft Corporation et al.*, Class Action Settlement Agreement, 8 December 2000; and United States Court of Appeals for the Ninth Circuit, No. 01-35494, 15 May 2002.

<sup>119</sup> In dealing with a problem of fees in this case, the court "observed that the litigation also benefited employers and workers nationwide by clarifying the law of temporary worker classification. Moreover, it noted that as a result of this litigation, many workers who otherwise would have been classified as 'contingent' workers received the benefits associated with full-time employment", United States Court of Appeals for the Ninth Circuit, No. 01-35494, 15 May 2002, p. 7011.

## Regulation of “triangular” employment relationships

156. Legislative provisions to address “triangular” employment relationships are considerably less extensive and less common than those on the traditional bilateral relationship between an employer and a worker, especially in certain regions. There is a marked contrast between, on the one hand, legal systems which provide for cases of “triangular” employment relationships and, on the other hand, systems which do not refer to “triangular” employment relationships or only mention them briefly. In particular, laws which cover “triangular” employment relationships contain provisions on the identity of the employers and the possible respective liabilities of the employer and user, as well as the rights of the workers.

157. The following paragraphs give some examples of legal provisions which address certain key aspects of “triangular” employment relationships.

158. Laws tend to focus on the two main types of “triangular” relationship: the performance of work and services, on the one hand, and the supply of labour under commercial contracts, on the other. In both cases, national legislation contains provisions identifying the employer, referring to working conditions and workers’ rights and laying down the obligations and liability of the provider and the user.<sup>120</sup>

### Who is the employer (the provider)?

159. Both recent and less recent legislation identify the employer (the provider) as the person or enterprise employing the worker and the user as the person using the labour services provided – although there are variations on this in some countries.

### *Contracting for work or services*

160. Most of the provisions on “triangular” employment relationships refer to the performance of work or services under contract. A comparison of laws shows that this kind of “triangular” relationship is regulated from three different perspectives: that of the employer, the user and the worker.

161. Some laws classify as an employer a natural or legal person which, using its own equipment and personnel, undertakes to carry out work or perform a service for the benefit of a third party.<sup>121</sup> The traditional concept of the contractor (*contratista*) is defined in Chile in the context of commercial or agro-industrial enterprises engaged in agriculture, forestry and similar activities, as a natural or legal person who hires workers on his or her own account to provide services to third parties.<sup>122</sup> The Workers’ Charter in Spain also refers to the contractor, in a provision concerning user enterprises that contract with others for the performance of work or services relating to their own activity.<sup>123</sup>

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<sup>120</sup> For the purposes of this report and Report V prepared for the 2003 general discussion, the ILO uses the words “provider” and “user” to refer to the parties, other than the worker, to a “triangular” employment relationship. However, as this chapter is based on a review of law and practice, terms such as contractor, subcontractor, principal enterprise and indirect employer can be found when referring to the parties in so far as they reflect the terminology used in the relevant laws.

<sup>121</sup> See, for example, Cambodia, ss. 45, 47; Colombia, s. 34; Costa Rica, s. 3; Mexico, s. 13; Nicaragua, s. 9; Panama, s. 89.

<sup>122</sup> Circular No. 153 issued pursuant to s. 92bis of the Labour Code (introduced by s. 14 of Act No. 19,759).

<sup>123</sup> Spain, s. 42(1) of the Workers’ Charter, as amended by s. 2 of Royal Legislative Decree No. 5/2001.

162. In other legislation, the term “contractor” is also used to refer to those who supply labour to a principal;<sup>124</sup> in Mauritius, the term used is “job contractor”,<sup>125</sup> while still other laws refer to contractors without defining the term, but may specify their obligations or liabilities, or both.

163. Similarly, in some African countries, the law recognizes the “*tâcheron*” or “*maître ouvrier*”, an independent subcontractor who contracts with an enterprise or a project manager to perform work or services for an agreed price.<sup>126</sup>

164. In France, the Labour Code approaches this question from a different angle. It refers to an arrangement in which an industrial or commercial enterprise enters into a contract for the performance of certain work or the provision of certain services with a person who recruits the necessary workers but who does not own a business or is not an independent artisan. If the person who recruits the workers fails in his/her obligations to the workers, the liability transfers to the industrial or commercial enterprise in certain circumstances. The Tunisian Labour Code contains similar provisions.<sup>127</sup> Similarly, the Moroccan Labour Code defines subcontracting (“*contrat de sous-entreprise*”) as a written contract whereby an enterprise contracts with a subcontractor for the performance of a certain job or services.<sup>128</sup>

165. A provider bears the usual obligations incumbent on any employer, but may have others in addition. In Spain, for example, providers are bound to inform both their workers and the social security institution in writing of the identity of the user enterprise to which they are providing services.<sup>129</sup>

#### *Supply of labour under commercial contracts*

166. Unlike contracting for work or services, contracts dealing with the supply of labour are usually much more circumscribed in that they can only be carried out by certain enterprises in certain conditions.<sup>130</sup> The supply of labour in conditions other than those provided for under legislation may be expressly prohibited and even constitute an offence.

167. The supply of labour by private employment agencies is the subject of the ILO Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188). Convention No. 181 attributes to the agency the function of employing workers with a view to making them available to a third party, expressly referred to as the “user enterprise”. The workers have as interlocutors the agency that employs them and the clients of the agency to whom it provides services.<sup>131</sup>

168. Some national legal systems contain provisions regulating private employment agencies, often along the lines set forth in the above ILO instruments. Problems

<sup>124</sup> Botswana, s. 2(1).

<sup>125</sup> Mauritius, Labour Act, s. 2.

<sup>126</sup> Benin, ss. 75-78; Burkina Faso, ss. 54-58; Cameroon, ss. 48-51; Gabon, s. 113; Niger, ss. 20, 21.

<sup>127</sup> France, s. L. 125-2; Tunisia, ss. 28-30.

<sup>128</sup> Morocco, s. 86; see also Democratic Republic of the Congo, ss. 82-85.

<sup>129</sup> Spain, Workers’ Charter, s. 42(3).

<sup>130</sup> See, for example, Spain, Workers’ Charter, s. 43; Cameroon, s. 26; France, s. L.125-1; Morocco, ss. 477-483, 497, 498; Niger, ss. 18, 19; Slovenia, s. 57.

<sup>131</sup> Article 1(1)(b).

concerning the protection of workers in these agencies tend to arise mainly in countries where there is no appropriate legislation, or where the law is not effectively applied.<sup>132</sup>

169. While private employment agencies in many countries are normally the employer, this is not always the case. For example, a recent decision in the United Kingdom signals a shift in the legal relationship of temporary agency workers and those who use them.<sup>133</sup> A person was registered with an employment agency, under a “temporary worker agreement”, which made it clear that its provisions “shall not give rise to a contract of employment” between the agency and the worker, or the worker and the client. For a number of years, that person had been assigned by the agency to work as a cleaner exclusively at a council-run hostel for the long-term care of people with mental health problems. The council, through the hostel management, exercised day-to-day control over her and supplied her with cleaning materials, equipment and protective clothing. She worked prescribed hours five days a week. The agency paid her wages out of the price of its services to the council. In April 2001, following an incident at the hostel, the council asked that she be withdrawn from the agreement and the agency informed her that it would no longer be finding work for her. The worker lodged a complaint for unfair dismissal. A first-instance decision found that, in the absence of a contract of employment, she had not been employed by the agency or by the council. On appeal, the Employment Appeal Tribunal held that she had been employed by the agency, because of its considerable control over her and the mutuality of obligation between the agency and the worker. However, on hearing the further appeal of this case, the Court of Appeal decided that a contract of service could be implied between the council and the worker, as a necessary inference from the conduct of the parties and the work done, if the “irreducible minimum of mutual obligation necessary for a contract of service” existed. “This contractual relationship can be implied regardless of whether there is an express contract of employment and, indeed, regardless of whether the contract between the worker and the agency, as here, expressly stipulates that there is no contract of employment with the end-user (or with the agency).”<sup>134</sup> The Court of Appeal held that the Employment Tribunal had erred in holding that the applicant was not an employee of the council to which she had been assigned by the agency to work as cleaner for a number of years because there was no express contract between the applicant and the council. In reaching that decision, the tribunal had failed to address the possibility that there was an implied contract of service between the applicant and the council.

170. Several countries have seen the emergence of “workers’ cooperatives” as a system for supplying labour. In Colombia, for example, workers join workers’ cooperatives to produce goods or perform work or services. The work should preferably be carried out by the worker members, who are not subject to the labour legislation applicable to dependent workers, unlike the workers employed by the cooperative, and may even contribute their work out of solidarity when the cooperative is in the start-up phase or at times of crisis, either free of charge or for an agreed remuneration.<sup>135</sup>

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<sup>132</sup> In the Netherlands, for instance, the General League of Temporary Employment Enterprises (ABU) refers to the growing phenomenon of illegal placement. See Bosse, op. cit., p. 14, and <http://www.abu.nl/abu/pagina.asp?pagkey=37892>.

<sup>133</sup> *Dacas v. Brook Street Bureau (UK) Ltd.* [2004] EWCA Civ 217, in *Industrial Relations Law Reports*, Vol. 33, No. 5 (May 2004), pp. 358-360.

<sup>134</sup> M. Rubenstein: “Highlights”, in *Industrial Relations Law Reports*, op. cit., p. 345.

<sup>135</sup> Act to revise the legislation on cooperatives, ss. 70 and 57-60.

171. However, this system has given rise to disguised and fraudulent employment relationships which have attracted penalties. In Colombia, for example, news reports referred to an investigation involving 200 workers' cooperatives, which found that "some temporary work agencies were operating under the guise of cooperatives in order to evade tax and social security contributions".<sup>136</sup>

172. In Argentina, the law provides that workers' cooperatives cannot operate as casual or temporary work enterprises, or in any other way provide services that are normally provided by employment agencies.<sup>137</sup>

173. A private employment agency that has concluded a contract with a user enterprise bears the normal obligations of any employer, but may have other obligations in addition. For example, it may have to inform the workers and their representatives of the identity of the user enterprise and the terms of the contract concluded, its purpose, duration, place of execution, number of workers involved, and measures to coordinate occupational risk prevention activities.<sup>138</sup>

### What is the position of the user?

174. Providers are normally employers; they are linked in turn by a commercial contract with a user enterprise, to which they provide services. Some laws designate the user as the "principal entrepreneur".<sup>139</sup> In Finland, the Employment Contracts Act refers to the "user enterprise" in cases where an enterprise assigns an employee to another enterprise.<sup>140</sup>

175. The legislation in some countries lays down the obligations and responsibilities of the user with regard to the provider's workers. The user's obligations may cover aspects such as the selection and control of the provider, notification of its own employees of the terms of the agreement reached with the provider, compliance with labour and social security provisions and the payment of minimum wages and other remuneration by the provider, the inclusion of labour clauses in the contract concluded with the latter and keeping a copy of the agreements entered into with the provider.

176. The user's responsibility in the selection and control of the provider which it contracts is usually based on the obligation to ensure that the provider is appropriately registered, if applicable. In Spain, the user, designated by the law as the principal enterprise, is also required:

- (a) to satisfy itself that the contractor is up to date with its social security payments;
- (b) to inform the legal representatives of its own workers of the terms of each contract concluded with a contractor or subcontractor; and
- (c) to inform the works committee of the conditions in which the subcontracting is to take place.<sup>141</sup>

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<sup>136</sup> *El País* (Cali), 30 Apr. 2004.

<sup>137</sup> See Argentina, Labour Regulation Act, s. 40.

<sup>138</sup> For example, Spain, Workers' Charter, s. 42.

<sup>139</sup> Spain, s. 42(2) of the Workers' Charter, as amended by s. 2 of Royal Legislative Decree No. 5/2001 of 2 March; Brazil, s. 455; Morocco, ss. 87, 89.

<sup>140</sup> Finland, Ch. 1, s. 7, and Ch. 2, s. 9.

<sup>141</sup> Workers' Charter, ss. 42(1), 42(4), 64.



177. Where labour is supplied by an employment agency, the user enterprise is normally responsible for the statutory and agreed conditions of work as regards hours of work, night work, weekly rest and holidays, health and safety, and employment of women, children and young persons. The user also bears the obligations pertaining to occupational health and, in principle, has to provide personal protection equipment.<sup>142</sup>

178. Cost-cutting by the user enterprise was a factor in one case, in which the responsibility of the user enterprise was highlighted by a ruling handed down by a court in the United States. In a case taken by the Department of Labor under the Fair Labor Standards Act, the Court prohibited a clothing manufacturer from selling goods made by contractors in breach of regulations on minimum wages and overtime. Apart from the harm done to the workers, the judgement held that the low-cost production gave a competitive advantage to those who broke the law and a comparative disadvantage to law-abiding manufacturers and distributors.<sup>143</sup> The Court went further, however, and ordered the company, prior to entering into any agreement with a contractor, to examine whether the price that it proposed to pay to the contractor was sufficient to enable the contractor to comply with the regulations on minimum wages and overtime. In addition, the company was ordered to examine the contractor's willingness and ability to comply with such regulations and to require the contractor to inform it immediately if it were unable to do so. In addition, each contractor was required to allow the user enterprise to inspect its records and the enterprise was to review them when it suspected non-compliance by the contractor. Contractors also had to give a written assurance to the enterprise that they complied with the law. In turn, the enterprise in the case was obliged to maintain and keep full records of transactions with each contractor and to respond promptly to any request by the Department of Labor concerning such information. Finally, if any contractor violated the regulations on minimum wages and overtime, the enterprise had to notify the Department of Labor and refrain from marketing goods manufactured in breach of the law.

179. In Botswana, the Employment Act 1982, along the lines of the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), provides for the inclusion of a declaratory clause in certain public contracts in relation to contracts of employment, to the effect that every contract of employment entered into pursuant to the contract shall be subject to the Employment Act.<sup>144</sup>

180. There are also provisions of legislation making the user legally liable for the provider's non-compliance. While this principle has long-standing precedents in the legislation of many countries, it continues to be established or reiterated in new laws. The user may bear subsidiary liability for certain obligations in the event of non-compliance by the provider,<sup>145</sup> or joint liability concerning transfers and the contracting or subcontracting of work or services.<sup>146</sup> In Venezuela, the law provides for such liability if the provider's activity is inherent to or related to that of the user.<sup>147</sup> The

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<sup>142</sup> See, for example, France, s. L.124-4-6.

<sup>143</sup> United States District Court for the Southern District of New York, 992 F. Supp. 677, 5 February 1998. According to information provided in the case by the Department of Labor, in 1997 approximately 63 per cent of clothing contractors in the city of New York were in breach of the provisions of the Fair Labor Standards Act on minimum wages and overtime.

<sup>144</sup> Botswana, s. 134.

<sup>145</sup> Brazil, s. 455; Chile, s. 63.

<sup>146</sup> Colombia, s. 34; Mexico, ss. 13, 15; Panama, ss. 89, 90.

<sup>147</sup> Venezuela, ss. 55, 56.

Labour Code of Panama provides that the user will be considered as the employer of all the provider's workers when the latter is exclusively or chiefly working for the user, but that both shall be jointly liable for all the benefits and compensation due to the workers.<sup>148</sup>

181. In Mauritius, the law stipulates that, for purposes of securing payment of remuneration, workers employed by a job contractor shall have the same privileges in respect of the property of the user as they would have had if they had been directly employed by the user without the intervention of the provider.<sup>149</sup> In Chile, the user does not bear subsidiary liability in cases where construction work is undertaken at a pre-agreed price, when the person ordering the work is a natural person.<sup>150</sup>

182. On the issue of limits on the user's responsibility, the Supreme Court of Argentina has ruled that the user's joint responsibility does not extend to covering the payment of arrears in wages and dismissal compensation to the employees of enterprises which held a concession to run a bar and restaurant on the user's premises.<sup>151</sup> In India, the Supreme Court issued a judgement on the abolition of labour engaged by or through a labour contractor which ruled that the user enterprise is under no obligation to absorb as its own employees the workers employed by or through a provider.<sup>152</sup>

183. In Australia, the Federal Court has set limits on the transfer of activities and workers to another person or enterprise. The Court dealt with the dismissal of workers responsible for home and community care of elderly, disabled or disadvantaged persons by the Greater Dandenong City Council, in the State of Victoria.<sup>153</sup> The provision of these services had been opened up to competitive tendering, although it was known beforehand that the staff already employed by the council would not be able to compete unless they accepted a reduction in their entitlements acquired through collective bargaining and that most of them would have to be dismissed. They did in fact lose the bid to a company offering the services at a cheaper rate with lower conditions of employment, and most of them were dismissed, some of them subsequently being employed by the lower-bidding company but with lower terms and conditions. The Court held that the dismissal had taken place for a "prohibited reason" in breach of the Workplace Relations Act of 1996 – i.e. because of their entitlements under the collective agreement – and was thus in violation of freedom of association.

### What are the worker's rights?

184. The third key question for workers in a "triangular" employment relationship concerns their rights.

185. In principle, employees' rights are the minimum rights laid down by law and collective agreements, and those set out in the employment contract. However, when the work is performed on behalf of a provider for the benefit of a third party who also has

<sup>148</sup> Panama, s. 90. A similar provision is contained in Mexico, s. 15.

<sup>149</sup> Labour Act, s. 42.

<sup>150</sup> Chile, s. 63.

<sup>151</sup> CS, "Escudero, Segundo R. y otros c. Nueve A S.A. y otro" of 14/9/2000, E. 119.XXXIV-DT, 2001-A, 98, in *Derecho del trabajo*, No. 7, July 2001.

<sup>152</sup> Case of Steel Authority of India, judgement delivered on 30 August 2001.

<sup>153</sup> *Australian Municipal, Administrative, Clerical and Services Union (AMACSU) v. Greater Dandenong City Council* (2000), 48 Australian Industrial Law Reports 4-326.

employees, there is often a demand to equalize conditions of employment. This urge may be more pressing if work takes place in the user's premises or worksites, alongside the user's employees, and if both perform work of equal value. This is what often happens when an agency employee is assigned to a team of employees in the user enterprise to carry out the same activity. Furthermore, the issue of breach of the law may arise where a provider enterprise is used to evade legal or contractual obligations. This occurred as regards wages and conditions of employment in the abovementioned case before the United States District Court for the Southern District of New York, and as regards the exercise of collective rights in the case before the Federal Court of Australia, also mentioned above.

186. Some legal systems provide for rights with regard to collective bargaining, freedom of association and certain conditions of work vis-à-vis the user enterprise, or comparable rights to those recognized by the user for its own employees.

187. The Employment Contracts Act of Argentina stipulates that a worker hired through a temporary work agency shall be covered by the collective agreement, be represented by the trade union and benefit from the social institution for the activity or category in which the user enterprise actually operates.<sup>154</sup>

188. The Finnish Employment Contracts Act clearly promotes collective bargaining for workers assigned to an enterprise. The Act states that every employer must at least comply with a national collective agreement. If a provider enterprise is not bound by any collective agreement, then at least the terms of the collective agreement applicable to the user enterprise shall be applied to its employees.<sup>155</sup>

189. The right of agency employees to bargain collectively was the subject of a decision by the National Labor Relations Board (NLRB) in the United States, of great importance not only because of the legal issue involved and the fact that the NLRB overturned its previous position, but because it situated the issue in the broader perspective of the "contingent workforce" and the need to refocus the protection contained in the National Labor Relations Act.<sup>156</sup> In the specific case, the NLRB examined whether or not workers supplied by an employment agency were in the same bargaining unit as the employees of the manufacturer (the user enterprise). The manufacturing enterprise had given its consent, but there was no evidence that the agency had done so. For the Board, it was evident that the manufacturing enterprise and the employment agency were joint employers (or co-employers) of the agency workers in question, since both decided matters concerning the employment relationship, such as hiring, firing, discipline, supervision and direction, so that they co-determined essential aspects of those relationships. The agency workers worked side by side with the employees of the manufacturing enterprise, performed the same work and were subject to the same supervision. The Board came to the conclusion that the workers employed jointly by a "user employer" and a "supplier employer", in this case an employment agency, could be in the same collective bargaining unit without the need for the "supplier employer's" consent. On the issue of the consent of the employer, the Board overturned its previous position. Now, in this new approach, the principle of "community of interest" prevailed: in other words, it was shown that the temporary workers shared with the permanent

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<sup>154</sup> Argentina, s. 29bis.

<sup>155</sup> Finland, Ch. 2, ss. 7, 9.

<sup>156</sup> See [331 NLRB No. 173] M.B. Sturgis, Inc., 14-RC-11572, at [www.nlr.gov/nlr/shared\\_files/decisions/331/331-173.htm](http://www.nlr.gov/nlr/shared_files/decisions/331/331-173.htm).

employees common supervision, working conditions and interest in wages, hours and conditions of employment.

190. Under the Employment Act of Slovenia, the employment contract of a person assigned by the employer to provide services for a user shall stipulate that the level of the wage and of the compensation shall depend on the work actually performed with the user, taking into account the collective agreements and general acts binding on individual users. Moreover, during the period for which the worker works with the user, the user and the worker shall take into account the provisions of that Act, of collective agreements binding on the user, or of the user's general acts, with regard to those rights and obligations which are directly related to the performance of work.<sup>157</sup>

191. Referring both to service enterprises and workers' cooperatives, Peruvian legislation provides that their workers and members shall enjoy the rights and benefits applicable to the other workers in the private sector, and that during their assignment to a user enterprise they shall be entitled to the remuneration and working conditions afforded by the enterprise to its own employees.<sup>158</sup>

192. In the same vein, in Niger, the wages paid to temporary workers of an employment agency during each assignment cannot fall below what they would have received had they been employed by the user enterprise.<sup>159</sup>

193. In Mauritius, the law contains detailed provisions expressly prohibiting discrimination and sexual harassment against contract workers by contractors, employment agencies and principals.<sup>160</sup> In France, workers employed under a temporary employment contract have access, in the user enterprise, under the same conditions as the employees of that enterprise, to the collective transport and collective facilities (in particular catering facilities) available to such employees.<sup>161</sup>

194. In the Netherlands, a new collective agreement for temporary employment, 2004-09, provides for the progressive protection of workers depending on their length of service in three phases as follows: (i) phase A: up to 78 weeks working for the same temporary employment agency; (ii) phase B: up to two years or eight contracts with the agency; and (iii) phase C: after three-and-a-half years with the same agency the worker obtains an open-ended contract with the employment agency. After 26 weeks in the same user enterprise, the temporary employee will receive the same wages as comparable employees of the user enterprise. In phase B, if the temporary work finishes during one of the contracts, the employment agency is obliged to pay wages until the end of the foreseen period.<sup>162</sup>

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<sup>157</sup> Slovenia, ss. 60(2), 62(2).

<sup>158</sup> Act to regulate the activity of special service enterprises and workers' cooperatives, s. 7.

<sup>159</sup> Niger, s. 16.

<sup>160</sup> Mauritius, Sex Discrimination Act, ss. 10, 11, 21.

<sup>161</sup> France, s. L. 124-4-7.

<sup>162</sup> Bosse, *op. cit.*, pp. 8-9. A summary of the collective agreement is available at <http://www.abu.nl/assets/abu/overabu/cao/Samenvatting%20CAO%20Engels.pdf>.

## Compliance and enforcement

195. Provisions on enforcement and compliance are very important, especially in complex cases where the individual worker is not able to assert his or her rights effectively.

196. Certain recent initiatives have focused on problems of compliance with and enforcement of labour law, and seek to provide a suitable response. As regards voluntary compliance with the law, there is an emerging trend reflected in a number of declarations, codes of practice and framework agreements between international employers' and workers' organizations to promote compliance. These initiatives have proved to be crucial in a globalized economy, where corporate behaviour is closely watched by shareholders, consumers, the media and workers' organizations alike. Concerning the State's role in securing compliance, apart from the general refocusing of legislation already discussed, some provisions and mechanisms have been specifically designed to prevent situations of uncertainty or fraud as to a worker's status, or to provide an effective remedy, although limitations on access to the courts continue to be a major problem.

197. The Employment Contracts Act in Finland sets out in detail the employer's obligation to inform the employee about the terms of his or her contract.<sup>163</sup> While this provision in fact protects only the employee, at the same time it means that the employer has to decide at the outset whether he or she regards the worker as an employee or self-employed, since only in the former case will the employer have to provide the information required by law. Workers who do not receive such information but believe themselves to be employees may file a complaint with the competent authority.

198. The Labour Relations Amendment Act in South Africa is more explicit in this respect, since it creates an institutional advisory mechanism for workers who are uncertain of their status. Except in the case of persons earning in excess of the prescribed income limit,<sup>164</sup> any of the contracting parties may apply to the Commission for Conciliation, Mediation and Arbitration (CCMA) for an advisory award on whether the persons involved are employees.<sup>165</sup>

199. In Quebec, Canada, new legislation provides for a similar preventive mechanism, not just to determine whether or not a worker is an employee, but whether the employee will be converted into an independent worker without employee status as a result of changes that may be introduced in the enterprise by the employer. The employer must notify the relevant employees' association of the changes it proposes to introduce. If the association does not agree with the employer's view as to the consequences of the change on the employee's status, it may seek a determination by the *Commission des relations du travail*. If the association applies to the Commission, the employer may not implement the announced changes until the Commission has ruled or the two parties have reached an agreement.<sup>166</sup>

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<sup>163</sup> Finland, Ch. 2, s. 4.

<sup>164</sup> Under s. 6(3) of the Basic Conditions of Employment Act.

<sup>165</sup> s. 200A(3) of the Labour Relations Act 1995, as amended by s. 51 of the Labour Relations Amendment Act 2002. See *South Africa 2002* (p. 53).

<sup>166</sup> s. 20.0.1 of the Labour Code, introduced by s. 11 of Bill 31 (2001, Ch. 26), an Act to amend the Labour Code, to establish the *Commission des relations du travail* and to amend other legislative provisions, 21 June 2001.

200. The amendments introduced in the Labour Code in Chile contain important measures of a different kind, designed to prevent fraud in the employment relationship and improve enforcement of the law. The reform imposes a heavy fine on employers who simulate the recruitment of workers through third parties, or use any subterfuge to disguise or alter their identity or capital for the purpose of evading labour or social security obligations.<sup>167</sup> The amending Act also authorized the creation of 300 labour inspectors' posts and the adoption of provisions to improve enforcement of labour legislation.<sup>168</sup>

201. The General Labour Bill in Peru contains a number of important provisions in this regard: it reiterates the principle of the *primacy of fact*; it requires the employer to maintain a register of homeworkers and to provide a copy to the worker; it requires registration of service suppliers; and it expressly extends the application of the law to members of cooperatives.<sup>169</sup>

202. The legislation of some countries also contains specific provisions aimed at enforcement of the rights of workers involved in "triangular" employment relationships. Such provisions essentially cover the activity itself of the provider, the supervision to be carried out by the user, the employment contract, administrative supervision and access to the labour courts.

203. As regards the activity of the provider, there are provisions requiring licensing or registration, in order to operate as a provider, an employment agency or to establish a workers' cooperative. Guarantees may also be required in respect of solvency.

204. Under the legislation of Niger and Peru, labour supply must be the sole activity of an enterprise.<sup>170</sup> Under Peruvian law, provider enterprises and workers' cooperatives are required to post a bond guaranteeing the discharge of their labour and social security obligations with regard to the workers assigned to a user enterprise.<sup>171</sup>

205. In the African countries where the *tâcheron* system is practiced, the principal entrepreneur is required to keep a list of all the *tâcherons* with whom it has signed a contract.<sup>172</sup>

206. In the United States, the State of California requires certain contractors to obtain a licence to operate from the Labor Commissioner.<sup>173</sup>

207. In France, in order to operate as an employment agency the law requires that a declaration be made to the administrative authority, indicating the legal characteristics of the enterprise, the names of its directors and the geographical and occupational area in which it intends to operate; a sufficient financial guarantee must also be provided. A similar situation is found in Peru in the case of employment agencies and cooperatives. Once the agency or cooperative is in operation, it is required to sign contracts with its clients on the supply of the workers assigned to work for it, in which it shall state the

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<sup>167</sup> s. 478 of the Labour Code, as amended by s. 100 of Act No. 19,759.

<sup>168</sup> Transitional clauses 6 and 7 of Act No. 19,759.

<sup>169</sup> s. XI.6 of the Preambular Title, and ss. 35, 73, 60.

<sup>170</sup> Niger, s. 15; Peru, Act to regulate the activity of special service enterprises and workers' cooperatives, s. 2.

<sup>171</sup> Peru, *ibid.*, s. 24.

<sup>172</sup> Benin, s. 78; Burkina Faso, s. 57; Cameroon, s. 51.

<sup>173</sup> California Labor Code, ss. 1682-1689.

reasons and characteristics of the assignment. It is also required to inform the competent authority of the employment contracts signed.<sup>174</sup>

208. In conclusion, the review of law and practice undertaken for the purposes of this report has shown that, by and large, the general problems associated with compliance and enforcement of labour law also affect the employment relationship. While some specific measures have been introduced in some jurisdictions to address problems of disguised employment relationships and difficulties surrounding “triangular” employment relationships, there is little evidence of a consistent and determined effort to resolve the problems of lack of compliance and poor enforcement. In this context, it is worthwhile referring to the relevant conclusions of the 2003 general discussion on the scope of the employment relationship, which make specific recommendations on the problems of poor enforcement and lack of compliance.<sup>175</sup>

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<sup>174</sup> France, ss. L.124-8, L.124-10; Peru, Act to regulate the activity of special service enterprises and workers’ cooperatives, ss. 17-26.

<sup>175</sup> See Annex 2, in particular paras. 11, 12, 13.

## Chapter III

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### **A new instrument: The basis and possible content of a Recommendation**

209. The resolution and conclusions concerning the employment relationship adopted at the 91st Session (2003) of the International Labour Conference<sup>1</sup> envisage a significant role for the ILO in relation to the scope and application of the employment relationship, including further research and a programme of technical cooperation, assistance and guidance to member States. The conclusions also state that the ILO should envisage the adoption of an international response on this topic. The resolution adopted at the 86th Session (1998) of the International Labour Conference<sup>2</sup> also referred to the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour.

210. The 2003 general discussion provided an opportunity to the ILO's tripartite constituents to discuss and analyse in detail the nature and extent of the problem, based on their own knowledge and experience of these issues at national level as well as the research undertaken by the Office. A dynamic picture emerged, demonstrating that this important problem has many facets to it; it is a complex and growing phenomenon; the possible solutions are diverse and constantly evolving and, at the same time, many common elements and trends can be found in the responses across different countries and regions. The importance of action at the national level was emphasized throughout the discussion. The conclusions stated that action at national level should include the development of a national policy framework in consultation with the social partners, enhanced collection of statistical data, clear policies on gender equality, and better compliance and enforcement. This is similar to the approach adopted by the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000).

211. The parameters of a possible international standard on this topic were outlined in the 2003 resolution, and the Office has been guided by these in the preparation of the questionnaire. A Recommendation, as proposed by the Conference in 2003, is by definition a promotional instrument and would have the advantage of encouraging member States towards the formulation and progressive implementation of national policies that have a common objective but are designed to take account of national circumstances. By its very nature, it would refrain from imposing detailed and precise obligations on member States other than the standard reporting obligations that arise under the ILO Constitution.

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<sup>1</sup> Annex 2 to this report.

<sup>2</sup> Annex 1 to this report.



212. The following paragraphs provide a brief explanation of the structure and content of the questionnaire. This is designed to assist member States and workers' and employers' organizations in the preparation of their replies. The approach taken in the questionnaire is to identify the essential components of a possible Recommendation which will facilitate, provide guidance and a framework to member States on the development and clarification of their policies, legislation and approaches to dealing with problems relating to the determination of the existence of an employment relationship and the employment status of workers.

## Structure of the questionnaire

213. The body of the questionnaire is divided into four sections as follows: the form of the international instrument; the preamble; the content of the instrument; and other issues. It is preceded by some preliminary questions intended to expand on, and refine, the available information on legislation and case law.

## Content of the questionnaire

### Section I: Form of the international instrument

214. The questionnaire is drafted with a view to the adoption of a Recommendation in 2006, in line with the approach taken in the general discussion in 2003. The conclusions of that discussion clearly state that the ILO should envisage the adoption of an international response on this topic and that a Recommendation is considered as an appropriate response.<sup>3</sup> *Questions 1 and 2* address this issue.

215. Once an item has been included in the agenda of the Conference, the member States are called upon to express their views on the subject in their replies to a questionnaire. It will then be for the delegates to the 95th Session of the International Labour Conference (2006) to take a decision on the matter. Under article 19(1) of the Constitution of the International Labour Organization "when the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention."

### Section II: Preamble

216. ILO standards are normally preceded by a Preamble. *Question 3* of the questionnaire is intended to decide what elements should be included in the Preamble to the instrument and also to identify the relevant references to existing ILO instruments and policies.

217. The following basic considerations are raised in the different components of this question: (1) in the context of current changes in the labour market and in the organization of work, it is sometimes difficult to establish whether an employment relationship exists, for the various reasons indicated; (2) in some cases there is an employment relationship but it is sometimes difficult to determine who the employer is, what rights the worker has and who is responsible for them; (3) owing to these

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<sup>3</sup> Point 25 of the conclusions concerning the employment relationship (Annex 2 to this report).

difficulties, there are workers who are in practice excluded from the scope of labour legislation; (4) therefore States should develop and implement a policy aimed at ensuring that such workers enjoy protection, also taking into account the gender dimension; (5) the Preamble would reaffirm the importance and utility of social dialogue for this purpose; and (6) it would refer to the ILO Declaration on Fundamental Principles and Rights at Work and other relevant instruments.

### Section III: Content of the instrument

218. Given the problems created by the lack of protection for workers who are outside the scope of the employment relationship because of one, or a combination of the reasons listed in *question 3*, the aim of the new instrument would be to encourage States to develop and implement a policy to address the issue in a dynamic manner which is appropriate to national circumstances, and this aspect is dealt with in *question 4*. The approach would be to review at appropriate intervals and, if necessary, clarify and adapt the scope of legislation in order to guarantee adequate protection under the law to workers who are in fact in an employment relationship.

219. The new instrument would not be fully implemented by merely adopting a specific measure, such as a review or revision of the relevant legislation, however effective that might be. The value of the new instrument would also lie in drawing the attention of States to the need to develop the political will to protect the workers in question and to act on this political will through an ongoing process which would take into account the extent and characteristics of the problem of the employment relationship at the national level. This ongoing process could lead to proposals which could in turn be translated into appropriate short-, medium- and long-term measures which would be regularly evaluated and monitored.

220. It is quite possible, and indeed desirable, that a given State would already have a policy in place similar to that proposed in this section of the questionnaire or would design and implement such a policy. In this situation, the new instrument would suggest that States continue that policy and evaluate it at appropriate intervals.

221. The new instrument would not lay down specific instructions to member States concerning the form or content of a policy on the employment relationship. It would be for each State to choose appropriate means of monitoring the changing reality of the labour market, to identify areas in which workers are left unprotected, either because of inadequate legislation or as a result of the inadequate application of such legislation, and to devise the most appropriate means of overcoming such gaps.

222. However, the new instrument would suggest certain elements that could be part of a national policy on the employment relationship. In section III of the questionnaire, these elements are set down in *questions 5 to 16* under the following six subheadings: Content of national policy; Consultation and implementation; Determination of the existence of an employment relationship; Dispute settlement; Compliance and enforcement; and Civil or commercial contracts.

223. *Question 5* provides for the principle of the *primacy of fact*, recognized in many national legal systems. The principle of the *primacy of fact* could inform the appropriate examination of situations in which workers perform work where the employment relationship is ambiguous, or wrongly described by the parties as civil or commercial relationships or otherwise disguised.

224. The first paragraph of *question 6* refers to other fundamental aspects of the policy that could be dealt with in a new instrument: such a policy should be national,

transparent and formulated on a tripartite basis. This report has made it clear that the lack of protection for workers affects many sectors and is a matter of concern for the State and society in general, as well as the social partners. Therefore, effective, balanced and harmonious solutions are needed which take due account of these diverse interests. Hence the need for transparency in the design and implementation of a policy on the employment relationship. This can best be achieved with the participation of the competent authorities and the most representative organizations of employers and workers. The report illustrates the value of social dialogue on this question by mentioning some national experiences.

225. Although the problem of lack of protection of workers who are in fact in an employment relationship is basically similar everywhere, the nature and extent of protection of the workers concerned should be determined at the national level, i.e. in accordance with the law and practice in each country.

226. Although the new instrument would leave a substantial amount of leeway for national action, a set of measures could be listed to provide guidance on what could be included in a national policy on the employment relationship. These measures are suggested in the second paragraph of *question 6*.

227. As already stated, the participation of the social partners in the design of the policy is vital. Under *question 7*, in the section on consultation and implementation, the new instrument would provide for a mechanism for reviewing changes in the labour market and in the organization of work, as well as advising the government on the adoption and implementation of the measures referred to in *question 6*. This might be a new or an existing mechanism, either with exclusive competence in the subject area or with a broader remit. What is important is that the mechanism be appropriate and enable effective information-sharing and consultation.

228. *Questions 8 and 9* set forth the conditions that should be met by this consultation mechanism in order for it to carry out its task effectively. First, to be meaningful, the mechanism should include representatives of the competent authorities and the most representative organizations of employers and workers (*question 8*); second, consultations with these organizations should be held at frequent intervals, ensuring the representation of employers and workers on an equal footing, and be based on experts' reports or technical studies using methods agreed by the parties (*question 9*).

229. In order to ensure that the national policy on the employment relationship is transparent and the government is fully informed of the views of the competent authorities and the most representative organizations of employers and workers, the consultation mechanism for the design and implementation of the employment relationship policy should meet a number of conditions such as those set forth in *questions 7, 8 and 9*. However, such conditions should not have the effect of unnecessarily complicating the consultation mechanism and process. On the contrary, member States should devise solutions and modalities that are appropriate to their own experience and national conditions. The emphasis should rather be on strengthening and developing awareness of the need for such a policy and seeking consensus to establish simple but effective methods of putting it into practice.

230. The questions on the design and implementation of a policy on the employment relationship inevitably raise the issues of what is meant by an employment relationship and how its existence can be determined, especially in the case of objectively ambiguous or disguised relationships. These matters are raised in *questions 10 to 12* in the section on determination of the existence of an employment relationship.

231. In this respect, the questionnaire was designed taking account of the conclusions of the general discussion in 2003. The new instrument would not intend to provide a definition of the employment relationship, which is left to each member State. Rather, it lays down methodological guidelines that may be useful to member States in establishing a satisfactory national definition of the employment relationship which will help in determining its existence and resolving disputes about employment status. It is rather aimed at clarifying, in broad terms, what could constitute an employment relationship, and providing possible *factors* and *indicators* to be used in identifying it, based on the lessons learned from the legislation reviewed.

232. It is worth noting that some common trends are found in the legislation examined, even in laws which simply describe the employment relationship. What is more problematic and difficult to determine in an unequivocal and generally satisfactory manner are the *factors* which determine the existence of an employment relationship and distinguish an employee from a self-employed worker.

233. *Questions 11 and 12* are intended to promote the search for tools to help identify the employment relationship.

234. *Question 11* seeks to ascertain whether the new instrument should provide that the existence of an employment relationship should be determined on the basis of *factors* established by national law and practice, as is already the case in the legislation or case law of many member States; and whether it should mention a list of *indicators* to establish the presence of such *factors*.

235. *Question 12*, on the other hand, relates to *proving* the existence of an employment relationship. In view of the difficulties that workers usually face in this regard, some national legislation provides, in different ways and in different terms, for a presumption of the existence of an employment relationship, on the basis of certain *indicators*. In some countries, these *indicators* have been established through case law. The question seeks to ascertain whether the new instrument should also provide that once one or more of the *indicators* has been identified, the relationship between the worker who performs work and the person for whose benefit the work is performed should be deemed, *prima facie*, to be an employment relationship.

236. The next part of this section deals with the settlement of disputes concerning the employment relationship. It is not enough to design and implement a national policy on the employment relationship. It is also essential for workers and employers to have effective and speedy mechanisms to prevent and settle disputes relating to the employment status of workers. Access for workers to justice is essential to guaranteeing their rights and, for employers, effective dispute prevention and settlement procedures provide a guarantee of certainty and legal security.

237. In this regard, the questionnaire asks whether the new instrument should provide that effective and speedy administrative or other procedures should be established to allow the competent authority to deal with disputes concerning the employment status of workers (*question 13*); and whether the settlement of disputes in this area should be a matter for labour courts, other tribunals, arbitration or other bodies in accordance with national law and practice (*question 14*).

238. At the same time, it is essential to ensure effective compliance with the laws on the employment relationship by the parties concerned, but it is equally important for the authorities to be bound to, and able to, ensure compliance. The questionnaire therefore asks whether the new instrument should provide that effective and efficient enforcement

measures should be undertaken by the authorities in accordance with national law and practice (*question 15*).

239. Section III of the questionnaire concludes with a question on the right of employers to establish civil or commercial contractual relationships (*question 16*). Throughout the discussions on the employment relationship, the concern was expressed that regulation in this area could interfere with the right of a person to contract for services by another person on a civil or commercial basis. This issue has been duly clarified both in ILO reports and in the discussions. A person may be contracted to perform work on the basis of an employment relationship, or on a civil or commercial or indeed any other basis. The nature of such a contract will ultimately be determined not in the light of the label the parties have put on it, but in accordance with the principle of the *primacy of fact*. This question aims to establish whether a provision should be included in the new instrument to state expressly that none of the provisions of the new instrument may be interpreted as limiting in any way the right of employers to establish civil or commercial contractual relationships.

#### Section IV: Other issues

240. Lastly, the questionnaire includes two questions seeking the views of member States on any particularities of their national law and practice that might create difficulties in the application of the new instrument (*question 17*), and on any other pertinent issues not covered in the questionnaire (*question 18*). The replies to these two questions may be crucial in ensuring that the new instrument adequately reflects the concerns and suggestions of member States.

## Questionnaire

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The following questionnaire has been prepared in accordance with article 38<sup>1</sup> of the Standing Orders of the International Labour Conference with a view to ascertaining the views of member States on the possibility of adopting international labour standards in the area examined in this report and on the elements that might be included in such standards. In accordance with article 38 of the Standing Orders, governments are invited to give their views after consulting the most representative organizations of employers and workers. Such consultations are obligatory in the case of Members that have ratified the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).<sup>2</sup> In accordance with established practice, the most representative organizations of employers and workers may send their replies directly to the Office. In order for the Office to take account of the replies to the questionnaire, replies must reach the Office no later than 1 July 2005, or by 1 August 2005 in the case of federal countries and countries where it is necessary to translate the questionnaire into the national language. The questionnaire will be available on the ILO web site at the following address: [www.ilo.org/public/english/dialogue/ifpdial/ll/er.htm](http://www.ilo.org/public/english/dialogue/ifpdial/ll/er.htm) .

When preparing their replies, Members will wish to bear in mind that, in the light of the conclusions and resolution adopted by the 91st Session (2003) of the International Labour Conference arising from the general discussion held at that session of the Conference, standards-related activity in this area might be oriented towards the adoption of one instrument, namely a Recommendation. Such an instrument could embody the principle that States undertake to pursue a policy of clarification and adaptation of the scope of labour legislation, taking into account current labour market and employment realities and in consultation with employers' and workers' organizations, and to ensure that the legislation is applied in practice; and list a number of measures that might be adopted at the national level with a view to implementing this policy. The Office has therefore prepared the present questionnaire on this assumption. In the event that Members are of a different view, they are requested to indicate this in their replies.

### Preliminary questions\*

*If legislation and case law of your country are mentioned in this report, please indicate:*

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<sup>1</sup> The single-discussion procedure applies.

<sup>2</sup> Under the terms of Article 5, paragraph 1(a), of Convention No. 144, the purpose of the procedures provided for in that Convention shall be consultations on government replies to questionnaires concerning items on the agenda of the International Labour Conference and government comments on proposed texts to be discussed by the Conference.

\* If necessary, please attach additional comments on a separate sheet of A4 paper.

(a) *whether the references are correct:*

- Yes                       No

*If they are not correct, kindly make the necessary corrections:*

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(b) *other relevant legislation and case law (please send a copy, if possible):*

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*If legislation and case law of your country are not mentioned in this report, please indicate any legislation and case law relevant to all or some of the points developed in Chapter II of the report and, if possible, send a copy:*

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**I. Form of the international instrument**

1. *Should the International Labour Conference adopt an instrument concerning the employment relationship?*

- Yes                       No

*Comments:*

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2. *If so, should the instrument take the form of a Recommendation?*

- Yes                       No

*Comments:*

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## II. Preamble

### 3. *Should the Preamble of the instrument:*

(1) *consider that, in view of ongoing and extensive changes in the labour market and in the organization of work, it is sometimes difficult to establish whether or not an employment relationship exists because of one or a combination of the following reasons:*

(a) *the legal framework is unclear, the legislation is too narrow in scope or otherwise inadequate;*

Yes                       No

*Comments:*

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(b) *the employment relationship is ambiguous;*

Yes                       No

*Comments:*

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(c) *the employment relationship is disguised?*

Yes                       No

*Comments:*

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(2) *consider that it is possible that the employment relationship exists but it is sometimes difficult to determine who the employer is, what rights the worker has and who is responsible for them?*

Yes                       No

*Comments:*

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(3) *consider that, as a result of these difficulties, workers who should be protected within the framework of an employment relationship may in practice be excluded from the scope of labour legislation and consequently deprived of protection?*

Yes                       No

*Comments:*

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(4) *consider that Members should develop and implement a national policy of reviewing the application of labour legislation periodically, in order to ensure that the workers referred to above enjoy adequate protection, taking also into account the gender dimension?*

Yes                       No

*Comments:*

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(5) *reaffirm the importance and the utility of social dialogue as a means of developing and implementing a national policy to protect such workers?*

Yes                       No

*Comments:*

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(6) *refer to the ILO Declaration on Fundamental Principles and Rights at Work and other relevant ILO instruments (to be specified)?*

Yes                       No

*If yes, please specify:*

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### III. Content of the instrument

#### National policy of protection for workers in an employment relationship

4. *Should the instrument provide that Members should develop and implement, or continue, a national policy which would aim to review at appropriate intervals and, if necessary, clarify and adapt the scope of legislation in order to guarantee adequate protection to workers within the framework of an employment relationship?*

Yes                       No

*Comments:*

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#### Content of national policy

5. *Should the instrument provide that, for the purposes of the national policy referred to in question 4, the determination of the existence of an employment relationship should be guided by the facts, irrespective of the arrangement, contractual or otherwise, agreed between the parties?*

Yes                       No

*Comments:*

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6. *(1) Should the instrument provide that the nature and extent of the protection referred to in question 4 should be determined in accordance with national law and practice, but that in any event the relevant policy should be conducted in a transparent manner with the participation of the most representative organizations of employers and workers?*<sup>3</sup>

Yes                       No

<sup>3</sup> Paragraph 5 of the common statement adopted by the Meeting of Experts on Workers in Situations Needing Protection (Geneva, 15-19 May 2000), in ILO: *Report of the Meeting of Experts on Workers in Situations Needing Protection*, doc. MEWNP/2000/4(Rev.), appended to doc. GB.279/2, 279th Session, Geneva, November 2000, at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/gb-2.pdf>, para. 107.

*Comments:*

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(2) *Should such a national policy include at least the following measures to:*

(a) *provide for those concerned, in particular employers and workers, guidance on how to determine the existence of an employment relationship;*

Yes                       No

*Comments:*

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(b) *combat disguised employment relationships;*

Yes                       No

*Comments:*

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(c) *establish clear rules for situations where employees of a person (“the provider”) work for another person (“the user”)?*

Yes                       No

*Comments:*

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*If yes, should such rules address, inter alia, the following:*

(i) *who is the employer?*

Yes                       No

*Comments:*

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(ii) *what are the conditions of work, including remuneration, taking into account the principles of equal opportunity and treatment?*

Yes                       No

*Comments:*

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(iii) *the joint and several liability of the provider and the user in such a manner that the employees are effectively protected?*

Yes                       No

*Comments:*

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(d) *avoid interfering with civil or commercial contractual relationships;*

Yes                       No

*Comments:*

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(e) *ensure access to appropriate dispute resolution processes and mechanisms to determine the employment status of workers;*

Yes                       No

*Comments:*

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(f) *provide for effective and efficient enforcement?*

Yes                       No

*Comments:*

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*Other measures:*

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### Consultation and implementation

7. *Should the instrument provide for the establishment of a new mechanism, or the designation of an appropriate existing mechanism, for reviewing changes in the labour market and in the organization of work, as well as advising the government on the adoption and implementation of the measures referred to in question 6?*

Yes                       No

*Comments:*

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8. *Should such a mechanism provide for the participation of the competent authorities and the most representative organizations of employers and workers?*

Yes                       No

*Comments:*

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9. *Should the instrument provide that, within the framework of the mechanism referred to in question 8, consultations with the organizations of employers and workers concerned should:*

(a) *be held at frequent intervals;*

Yes                       No

*Comments:*

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(b) *ensure the representation of employers and workers on an equal footing;*

Yes                       No

*Comments:*

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(c) *be based on experts' reports or technical studies using methods agreed by the parties?*

Yes                       No

*Comments:*

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#### Determination of the existence of an employment relationship

10. *Should the instrument clarify that the employment relationship creates a legal link between a person who performs work and the person for whose benefit the work is performed in return for remuneration, under certain conditions established by national law and practice?*

Yes                       No

*Comments:*

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11. (1) *Should the instrument provide that the existence of an employment relationship should be determined on the basis of factors (such as subordination, work for the benefit of another person, work under instruction) established by national law and practice?*

Yes                       No

*Comments:*

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- (2) *Should the instrument provide a list of indicators that may assist in establishing the factors mentioned in question 11(1) (for example, the person who determines the conditions of work; whether remuneration is paid periodically and constitutes a significant proportion of the income of the worker; whether the tools, materials and machinery are provided; whether the work is performed solely or mainly for one person; the extent of integration of the worker into the business)?*

Yes                       No

*Comments:*

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- (3) *If yes, please specify the indicators that may be used:*

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12. *Should the instrument provide that when one or more of the indicators, as determined by national law and practice, are met the relationship between the worker who performs work and the person for whose benefit the work is performed should be deemed, prima facie, to be an employment relationship?*

Yes                       No

*Comments:*

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### Dispute settlement

13. *Should the instrument provide that effective and speedy administrative or other procedures should be established to allow the competent authority to deal with disputes concerning the employment status of workers?*

Yes                       No

*Comments:*

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14. *Should the instrument provide that the settlement of disputes with a view to determining the status of workers should be a matter for labour courts, other tribunals, arbitration or other bodies in accordance with national law and practice?*

Yes                       No

*Comments:*

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#### Compliance and enforcement

15. *Should the instrument provide that effective and efficient enforcement measures should be undertaken by the competent authorities in accordance with national law and practice?*

Yes                       No

*Comments:*

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#### Civil or commercial contracts

16. *Should the instrument provide that none of its provisions may be interpreted as limiting in any way the right of employers to establish civil or commercial contractual relationships?*

Yes                       No

*Comments:*

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#### IV. Other issues

17. *Are there any particularities of national law and practice that may create difficulties in the application of the instrument as proposed in this report?*



Yes                       No

*If yes, how should these difficulties be addressed?*

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18. *Are there any other pertinent issues not covered in this questionnaire?*

Yes                       No

*If yes, please specify:*

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## Annex 1

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### **Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour**

The General Conference of the International Labour Organization,

Having met in Geneva in its Eighty-sixth Session, from 2-18 June 1998,

Having adopted the report of the Committee appointed to consider the fifth item on the agenda,

Noting that the Committee on Contract Labour has begun to identify situations where workers require protection, and

Noting that the Committee has made progress on these issues;

Invites the Governing Body of the ILO to place these issues on the agenda of a future session of the International Labour Conference with a view to the possible adoption of a Convention supplemented by a Recommendation if such adoption is, according to the normal procedures, considered necessary by that Conference. The Governing Body is also invited to take this action so that this process is completed no later than four years from now,

Further invites the Governing Body of the ILO to instruct the Director-General:

- (a) to hold meetings of experts to examine at least the following issues arising out of the deliberations of this Committee:
  - (i) which workers, in the situations that have begun to be identified in the Committee, are in need of protection;
  - (ii) appropriate ways in which such workers can be protected, and the possibility of dealing separately with the various situations;
  - (iii) how such workers would be defined, bearing in mind the different legal systems that exist and language differences;
- (b) to take other measures with a view to completing the work commenced by the Committee on Contract Labour.

## Annex 2

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### Resolution concerning the employment relationship

The General Conference of the International Labour Organization, meeting in its 91st Session, 2003,

Having undertaken a general discussion on the basis of Report V, *The scope of the employment relationship*,

1. Adopts the following conclusions;
2. Invites the Governing Body to give due consideration to them in planning future action on the employment relationship and to request the Director-General to take them into account both when implementing the Programme and Budget for the 2004-05 biennium and allocating such other resources as may be available during the 2004-05 biennium.

### Conclusions concerning the employment relationship

1. The protection of workers is at the heart of the ILO's mandate. Within the framework of the Decent Work Agenda, all workers, regardless of employment status, should work in conditions of decency and dignity. There are rights and entitlements which exist under laws, regulations and collective agreements and which are specific to or linked to workers who work within the scope of an employment relationship. The term *employee* is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship. The term *worker* is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee. *Employer* is used to refer to the natural or legal person for whom an employee performs work or provides services within an employment relationship. The employment relationship is a notion which creates a legal link between a person, called the "employee", with another person, called the "employer", to whom she or he provides labour or services under certain conditions in return for remuneration. Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.

2. Among other things, employment or labour law seeks to address what can be an unequal bargaining position between parties to an employment relationship. The concept of the employment relationship is common to all legal systems and traditions, but the obligations, rights and entitlements associated with it vary from country to country. Similarly, the criteria for determining whether or not an employment relationship exists can vary even though in many countries common notions such as dependency or subordination are found. Regardless of the criteria used, there is a shared concern among governments, employers and workers to ensure that the criteria used are sufficiently clear so that the scope of application of various laws and regulations can be more easily determined, and that they cover those who are meant to be covered, i.e. those who are in employment relationships.

3. Changes in the structure of the labour market and in the organization of work are leading to changing patterns of work both within and outside the framework of the employment relationship. In some situations, it may be unclear whether the worker is an employee or genuinely self-employed.

4. One of the consequences associated with changes in the structure of the labour market, the organization of work and the deficient application of the law is the growing phenomenon of workers who are in fact employees but find themselves without the protection of an employment relationship.

This form of false self-employment is more common in less formalized economies. However, many countries with well-structured labour markets also experience an increase in this phenomenon. Some of these developments are new; some have existed for many decades.

5. It is in the interest of all the labour market actors to ensure that the wide variety of arrangements under which work is performed or services are provided by a worker can be put within an appropriate legal framework. Clear rules are indispensable for fair governance of the labour market. This task is difficult in many countries because of one or a combination of the following factors:

- the law is unclear, too narrow in scope or otherwise inadequate;
- the employment relationship is disguised under the form of a civil or a commercial arrangement;
- the employment relationship is ambiguous;
- the worker is in fact an employee, but it is not clear who the employer is, what rights the worker has, and against whom those rights can be enforced;
- lack of compliance and enforcement.

6. It is agreed that clarity and predictability in the law are in the interests of all concerned. Employers and workers should know their status and, consequently, their respective rights and obligations under the law. To this end, laws should be drafted in such a way that they are adapted to the national context and provide adequate security and flexibility to address the realities of the labour market and to provide benefits to the labour market. While laws can never fully anticipate every situation arising in the labour market, it is nonetheless important that legal loopholes are not created or allowed to persist. Laws and their interpretation should be compatible with the objectives of decent work, namely to improve the quantity and quality of employment, should be flexible enough not to impede innovative forms of decent employment, and promote such employment and growth. Social dialogue with tripartite participation is a key means to ensuring that legislative reform leads to clarity and predictability and is sufficiently flexible.

7. Disguised employment occurs when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status. This can occur through the inappropriate use of civil or commercial arrangements. It is detrimental to the interests of workers and employers and an abuse that is inimical to decent work and should not be tolerated. False self-employment, false subcontracting, the establishment of pseudo-cooperatives, false provision of services and false company restructuring are amongst the most frequent means that are used to disguise the employment relationship. The effect of such practices can be to deny labour protection to the worker and to avoid costs that may include taxes and social security contributions. There is evidence that it is more common in certain areas of economic activity but governments, employers and workers should take active steps to guard against such practices anywhere they occur.

8. An ambiguous employment relationship exists whenever work is performed or services are provided under conditions that give rise to an actual and genuine doubt about the existence of an employment relationship. In an increasing number of cases, it is very difficult to distinguish between dependent and independent work, even where there is no intent to disguise the employment relationship. In this respect, it is acknowledged that in many areas the distinction between employees and independent workers has become blurred. One of the characteristics of some new forms of work is the autonomy or greater independence of employees.

9. In the case of so-called *triangular* employment relationships where the work or services of the worker are provided to a third party (the user), these need to be examined in so far as they may result in a lack of protection to the detriment of the employee. In such cases, the major issues at stake consist of determining who the employer is, what rights the worker has and who is responsible for them. Therefore, mechanisms are needed to clarify the relationship between the various parties in order to allocate responsibilities between them. It should be noted in this respect that a particular form of triangular employment relationship relating to the provision of work or services through temporary work agencies has already been addressed by the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188).

10. Respect for the law is a fundamental principle and there should be a strong political commitment from the State to ensure compliance with the law, supporting all mechanisms that facilitate this, also involving the social partners where appropriate. Cooperation should be promoted between the different government enforcement agencies, particularly the labour inspectorate, the social security administration and the tax authorities, and there may also be a role for greater coordination with the police and the customs services. This would enable the pooling and more efficient use of resources and data to combat abuses arising out of disguised employment arrangements. Labour administrations and their services have a crucial role to play in monitoring the application of the law, collecting reliable data on labour market trends and changing work and employment patterns, and combating disguised employment relationships.

11. It should be acknowledged that many countries have reliable enforcement mechanisms and institutions while many others have not. Poor enforcement and lack of compliance with the law can be significant factors which explain why many workers lack protection. The effective implementation and enforcement of rights associated with employment in many countries is weak because of under-resourcing, lack of training and inadequate legal frameworks. The Labour Inspection Convention, 1947 (No. 81), provides that a system of labour inspection should secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work. It is also recalled that under this Convention, inspection staff are to be composed of public officials whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and of improper external influences.

12. The problem of enforcement is not limited to the question of resources; it is also essential that labour administration staff, and particularly the labour inspectorate, where applicable, receive appropriate training. Such training should include a good knowledge of the relevant laws and regulations, including court decisions, relating to how to determine the existence of an employment relationship. Training materials, which could include guidelines elaborated by the social partners, could greatly help to enhance the skills of the staff and their capacity to tackle effectively the problems associated with disguised and ambiguous relationships. In addition, exchange of experiences and working methods in different countries could be achieved through detachments of professional staff, particularly between the labour administrations and the labour inspectorates, where applicable, of developed and developing countries.

13. Labour administrations, in line with the role envisaged for them under the Labour Administration Convention, 1978 (No. 150), may also play an important role at the earlier stages of the formulation of laws and regulations aimed at addressing the problems relating to the scope of the employment relationship. It is highly desirable that both employers' and workers' organizations be closely associated with the rule-making process and machinery so that the elaboration of draft laws and regulations can benefit from the knowledge and experience of the key labour market actors. While laws and regulations should be sufficiently clear and precise leading to predictable outcomes, they should avoid creating rigidities and interfering with genuine commercial or genuine independent contracting arrangements.

14. Dispute resolution machinery and/or administrative procedures for determining the status of workers is an important service which should be provided by the appropriate agency. Depending upon the national industrial relations systems, such machinery may be tripartite or bipartite. It could have general competence or it may be limited to specified sectors of the economy. It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms and procedures to resolve disputes about employment status.

15. There is evidence that the lack of labour protection of dependent workers exacerbates gender inequalities in the labour market. Data worldwide confirm increased participation by women in the workforce, particularly in the informal economy where there is a high prevalence of ambiguous or disguised employment relationships. The gender dimension of the problem is reinforced because women workers predominate in certain occupations and sectors where the proportion of disguised and ambiguous employment relationships is relatively high such as domestic work, the textile and clothing industry, sales/supermarket jobs, nursing and care professions and home work. Exclusions or restrictions in relation to certain rights, for example in some export processing zones, clearly disproportionately impact on women.

16. There is a need to have clearer policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension of the problem can be

effectively addressed. At the international level, the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), clearly apply to all workers and the Maternity Protection Convention, 2000 (No. 183), specifies that it “applies to all employed women, including those in atypical forms of dependent work”.

17. To better assess and address the various issues relating to the scope of the employment relationship, governments should be encouraged to develop a national policy framework in consultation with their social partners. As stated in the common statement adopted by the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000), such a policy might include but not be limited to the following elements:

- providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
- providing effective appropriate protection for workers;
- combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
- not interfering with genuine commercial or genuine independent contracting;
- providing access to appropriate resolution mechanisms to determine the status of workers.

18. Collection of statistical data and undertaking research and periodic reviews of changes in the structure and patterns of work at national and sectoral levels should be part of this national policy framework. The methodology for the collection of data and for undertaking the research and reviews should be determined after a process of social dialogue. All data collected should be disaggregated according to sex, and the national and sectoral level research and reviews should explicitly incorporate the gender dimension of this question and should take into account other aspects of diversity.

19. National labour administrations and their associated services should regularly monitor their enforcement programmes and processes. This should include identifying those sectors and occupational groups with high levels of disguised employment and adopting a strategic approach to enforcement. Special attention should be paid to those occupations and sectors with a high proportion of women workers. Innovative programmes of information and education and outreach strategies and services should be developed. The social partners should be involved in developing and implementing these initiatives.

## Role of the ILO

20. The ILO has a significant role to play in this area, and the capacity of the Office to gather comparative data and to undertake comparative research is widely recognized. This work helps all ILO constituents better to understand and assess this phenomenon. The ILO should expand its knowledge base, and use such to promote good practice. This could include:

- commissioning regular country studies to capture ongoing labour law reforms in the area of the scope of the employment relationship;
- comparative analysis of the information and studies already completed, to identify trends, and new policy developments;
- producing publications on specific aspects of the subject, such as to include both the description of the phenomenon across national boundaries, as well as to examine the policy responses that have been developed;
- undertaking studies on regional, sectoral and gender dimensions on the subject;
- doing work on the development of usable, comparative data, and data categories;
- hosting meetings at regional and subregional levels to share experiences, disseminate the results of country studies, and build the capacity and knowledge of the ILO constituents;
- convening meetings of experts to consider specific aspects of the subject, as appropriate;
- place related topics as a subject matter for consideration by sectoral meetings.

The ILO should allocate resources for a programme of technical cooperation, assistance and guidance to member States on the scope and application of the employment relationship, to address:

- the scope of the law;
- general aspects of the employment relationship;
- access to courts;
- policy guidelines and capacity building to strengthen administrative and judicial action to promote compliance.

In addressing this subject, the ILO should recall the conclusions of the Committee on the Informal Economy, especially those concerning the importance of governance and the legal and institutional framework.

21. As compliance and enforcement are critical aspects of this question, the Office should strengthen its assistance to national labour administrations, and in particular to labour inspectorates. It should review its internal organizational arrangements in relation to labour administration and labour inspection, where applicable, in order to ensure that the Office provides a more coherent and efficient service to constituents in this area.

22. In most countries, courts and tribunals play a key role in the adjudication and resolution of disputes concerning the employment status of workers. It is highly desirable that judges, mediators and other designated officials dealing with these disputes receive adequate training on this issue, including on international labour standards, comparative law and case law. The Office should be encouraged to further strengthen its programme of collaboration and cooperation with the designated officials and judges of the relevant bodies and courts.

23. It is acknowledged that a substantial number of innovative measures have been introduced in many countries to address the problems relating to the determination of the employment status of workers. Member States, with the cooperation of the social partners, should engage in the search for appropriate and viable solutions to these problems. Each State should undertake an in-depth review to identify shortcomings in order to explore appropriate and balanced solutions that take different interests into account. Some measures have taken the form of new laws or the revision of existing laws, while others have emerged through case law. Measures that have been adopted by countries include:

- the law defines the employment relationship;
- the law establishes a legal presumption of employment if work is performed or services are provided in specified circumstances, unless it is shown that the parties had not intended to enter into an employment relationship;
- criteria for identifying the employment relationship are set out in law, case law or a code of practice developed by or with the social partners.

Other measures that have been used have provided for a competent authority to declare that an employment relationship exists. All such innovative measures warrant careful consideration. Bipartite and tripartite efforts, for example in the form of guidelines, voluntary codes and dispute resolution mechanisms and procedures, have also contributed at national level to addressing these problems. All measures should be pursued with technical advice from the ILO, as appropriate.

24. The ILO should step up its dialogue with other international institutions, including the international financial institutions, whose policies could impact on the employment relationship.

25. 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.



## Annex 3

### Employment by status in employment and sex, latest year

Country or territory	Source	Latest year available	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Anguilla	Labour force survey	2002	Total	5.5	0.0	0.0	0.0	0.0
			Men	3.0	0.0	0.0	0.0	0.0
			Women	2.5	0.0	0.0	0.0	0.0
Argentina	Labour force survey	2002	Total	8 570.8	71.8	27.1	1.1	0.0
			Men	4 887.7	66.5	32.8	0.8	0.0
			Women	3 683.1	79.0	19.5	1.6	0.0
Australia	Labour force survey	2002	Total	9 311.4	86.2	13.3	0.4	0.0
			Men	5 191.9	83.5	16.2	0.3	0.0
			Women	4 119.5	89.7	9.7	0.6	0.0
Austria	Labour force survey	2002	Total	3 798.4	87.4	10.7	2.3	0.0
			Men	2 101.8	86.3	12.6	1.3	0.0
			Women	1 696.7	88.7	8.3	3.4	0.0
Bangladesh	Labour force survey	2000	Total	51 764.0	12.6	35.3	33.8	18.3
			Men	32 369.0	15.2	49.8	10.1	24.9
			Women	19 395.0	8.3	11.0	73.2	7.4
Belgium	Official estimates	1999	Total	3 847.6	82.1	14.7	3.2	0.0
			Men	2 201.6	80.7	18.5	0.8	0.0
			Women	1 645.9	84.1	9.5	6.4	0.0
Belize	Labour force survey	1999	Total	84.7	0.0	31.5	3.4	0.1
			Men	58.6	0.0	34.5	3.3	0.1
			Women	26.1	0.0	24.9	3.5	0.1
Bolivia	Labour force survey	2000	Total	2 096.0	49.7	42.2	7.8	0.4
			Men	1 171.1	54.7	39.5	5.2	0.7
			Women	924.9	43.3	45.5	11.1	0.1
Botswana	Labour force survey	2000	Total	483.4	69.7	13.2	17.1	0.0
			Men	269.4	71.2	11.9	16.9	0.0
			Women	214.0	67.9	14.7	17.4	0.0
Bulgaria	Labour force survey	2003	Total	2 834.0	84.7	13.1	1.9	0.3
			Men	1 500.0	81.5	16.8	1.3	0.3
			Women	1 334.0	88.2	8.9	2.3	0.3
Cambodia	Labour force survey	2001	Total	6 243.3	16.2	40.9	42.8	0.1
			Men	3 017.1	19.1	49.3	31.6	0.1
			Women	3 226.2	13.6	33.0	53.3	0.1

Country or territory	Source	Latest year available	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Canada	Labour force survey	2002	Total	15 411.8	84.8	15.0	0.2	0.0
			Men	8 262.0	81.5	18.3	0.1	0.0
			Women	7 149.8	88.5	11.2	0.3	0.0
Chile	Labour force survey	2003	Total	5 675.1	68.2	29.7	2.0	0.0
			Men	3 749.7	65.7	32.9	1.4	0.0
			Women	1 925.4	73.2	23.5	3.3	0.0
Colombia	Labour force survey	2002	Total	16 619.9	49.6	44.2	6.0	0.3
			Men	9 935.0	47.8	47.6	4.2	0.3
			Women	6 685.0	52.1	39.0	8.6	0.2
Costa Rica	Labour force survey	2001	Total	1 640.4	69.5	27.9	2.6	0.0
			Men	1 069.0	68.6	29.3	2.1	0.0
			Women	571.4	71.1	25.3	3.6	0.0
Croatia	Labour force survey	2002	Total	1 536.4	75.8	20.4	3.8	0.0
			Men	850.5	74.8	23.4	1.8	0.0
			Women	685.9	77.0	16.6	6.3	0.0
Cyprus	Labour force survey	2003	Total	327.1	76.3	20.2	3.5	0.0
			Men	181.6	69.9	29.0	1.1	0.0
			Women	145.5	84.3	9.2	6.5	0.0
Czech Republic	Labour force survey	2002	Total	4 765.0	83.2	15.4	0.6	0.8
			Men	2 700.0	79.0	19.9	0.1	0.9
			Women	2 065.0	88.8	9.5	1.2	0.5
Denmark	Labour force survey	2002	Total	2 692.5	91.2	8.1	0.7	0.0
			Men	1 447.8	88.3	11.4	0.3	0.0
			Women	1 244.6	94.7	4.2	1.2	0.0
Dominican Republic	Official estimates	1997	Total	2 652.0	52.3	42.7	5.0	0.0
			Men	1 891.4	47.1	47.6	5.3	0.0
			Women	760.6	65.4	30.6	4.0	0.0
Ecuador	Labour force survey	2002	Total	3 459.4	58.4	36.5	5.2	0.0
			Men	2 131.7	60.4	36.5	3.0	0.0
			Women	1 327.7	55.0	36.3	8.6	0.0
Egypt	Labour force survey	2001	Total	17 556.7	61.5	29.2	9.3	0.0
			Men	14 361.1	60.8	31.6	7.6	0.0
			Women	3 195.6	64.8	18.2	17.0	0.0
El Salvador	Labour force survey	2002	Total	2 520.1	53.5	32.6	8.7	5.2
			Men	1 467.6	61.5	28.3	8.5	1.8
			Women	1 052.4	42.3	38.7	9.0	10.0
Estonia	Labour force survey	2002	Total	594.3	91.1	7.5	0.4	0.0
			Men	302.5	88.2	11.5	0.3	0.0
			Women	291.8	94.1	5.4	0.4	0.0
Ethiopia	Labour force survey	1999	Total	24 896.6	8.2	44.3	47.0	0.5
			Men	14 117.8	9.5	55.6	34.3	0.5
			Women	10 778.8	6.4	29.5	63.6	0.6
Finland	Labour force survey	2002	Total	2 385.0	86.4	12.3	0.4	0.9
			Men	1 247.0	82.1	16.0	0.4	1.6
			Women	1 138.0	91.2	8.3	0.4	0.0

The employment relationship

Country or territory	Source	Latest year available	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Georgia	Labour force survey	2002	Total	1 813.7	34.1	37.0	28.8	0.1
			Men	954.3	33.8	46.2	19.9	0.1
			Women	856.4	34.4	26.7	38.8	0.1
Germany	Labour force survey	2002	Total	36 172.0	88.6	10.4	1.1	0.0
			Men	19 996.0	86.1	13.4	0.5	0.0
			Women	16 176.0	91.7	6.6	1.8	0.0
Greece	Labour force survey	2002	Total	3 948.9	60.2	32.0	7.8	0.0
			Men	2 442.5	58.2	38.0	3.9	0.0
			Women	1 506.4	63.5	22.3	14.2	0.0
Grenada	Labour force survey	1991	Total	24.7	75.4	19.6	0.0	5.0
Honduras	Labour force survey	1999	Total	2 299.0	46.8	39.7	13.0	0.5
			Men	1 472.1	48.1	39.1	12.3	0.6
			Women	826.9	136.0	40.9	14.3	0.3
Hong Kong, China	Labour force survey	2002	Total	3 223.3	87.3	12.0	0.7	0.0
			Men	1 780.7	82.5	17.3	0.2	0.0
			Women	1 442.5	93.3	5.4	1.4	0.0
Hungary	Labour force survey	2002	Total	3 921.9	86.7	12.6	0.5	0.2
			Men	2 126.5	83.1	16.2	0.4	0.3
			Women	1 795.4	90.8	8.3	0.7	0.2
Iceland	Labour force survey	2002	Total	156.7	83.4	16.3	0.3	0.0
			Men	83.0	76.4	23.3	0.2	0.0
			Women	73.8	91.2	8.4	0.3	0.0
Iran, Islamic Rep. of	Population census	1996	Total	14 571.6	51.7	39.3	5.5	3.6
			Men	12 806.2	51.4	41.9	3.4	3.4
			Women	1 765.4	53.7	20.6	20.8	4.9
Ireland	Labour force survey	2002	Total	1 749.9	82.3	16.8	0.9	0.0
			Men	1 017.2	74.9	24.3	0.7	0.0
			Women	732.7	92.5	6.3	1.2	0.0
Isle of Man	Population census	2001	Total	39.1	85.4	14.6	0.0	0.0
			Men	21.3	79.7	20.3	0.0	0.0
			Women	17.8	92.3	7.7	0.0	0.0
Israel	Labour force survey	2002	Total	2 330.2	86.2	11.4	0.4	1.9
			Men	1 257.6	81.9	15.9	0.2	1.9
			Women	1 072.6	91.2	6.1	0.7	2.0
Italy	Labour force survey	2002	Total	22 133.0	72.9	22.2	4.1	0.9
			Men	13 769.0	69.2	26.9	3.0	0.9
			Women	8 365.0	78.9	14.4	5.8	0.9
Jamaica	Labour force survey	1998	Total	954.3	59.0	38.2	2.2	0.5
			Men	553.7	54.3	43.8	1.3	0.6
			Women	400.6	65.5	30.5	3.4	0.5
Japan	Labour force survey	2002	Total	63 160.0	84.5	10.4	4.7	0.4
			Men	37 190.0	84.9	13.1	1.6	0.4
			Women	25 970.0	83.8	6.6	9.2	0.4

Country or territory	Source	Latest year available	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Korea, Republic of	Labour force survey	2000	Total	21 061.0	62.4	28.5	9.1	0.0
			Men	12 353.0	63.5	34.7	1.8	0.0
			Women	8 707.0	60.8	19.7	19.5	0.0
Latvia	Labour force survey	2002	Total	1 006.9	87.0	9.3	3.7	0.0
			Men	516.6	85.1	11.4	3.5	0.0
			Women	490.2	89.0	7.1	3.9	0.0
Lithuania	Labour force survey	2002	Total	1 438.0	79.6	16.9	3.5	0.0
			Men	726.2	76.4	20.8	2.8	0.0
			Women	711.8	82.9	12.9	4.3	0.0
Macau, China	Labour force survey	2002	Total	202.6	89.0	9.4	1.6	0.0
			Men	1 047.0	85.6	13.9	0.5	0.0
			Women	95.6	92.9	4.3	2.8	0.0
Madagascar	Labour force survey	2002	Total	8 098.5	15.0	43.7	40.6	0.7
			Men	4 135.7	17.8	51.6	29.7	0.8
			Women	3 962.8	12.0	35.4	51.9	0.6
Malawi	Population census	1998	Total	4 458.9	12.9	84.6	2.5	0.0
			Men	2 208.9	21.2	76.0	2.8	0.0
			Women	2 250.0	4.8	93.1	2.1	0.0
Malaysia	Labour force survey	2003	Total	9 869.7	3.4	91.8	4.8	0.0
			Men	6 323.6	4.6	93.2	2.2	0.0
			Women	3 546.1	1.2	89.2	9.6	0.0
Maldives	Population census	2000	Total	86.2	23.8	51.6	2.0	22.6
			Men	57.4	21.3	59.4	1.3	18.1
			Women	28.9	28.8	36.2	3.4	31.6
Malta	Labour force survey	2002	Total	147.9	85.1	14.2	0.0	0.0
			Men	101.2	82.8	17.2	0.0	0.0
			Women	45.9	91.8	6.3	0.0	0.0
Mauritius	Labour force survey	1995	Total	436.3	80.9	16.7	2.4	0.0
			Men	299.3	78.8	19.6	1.6	0.0
			Women	137.0	85.5	10.4	4.1	0.0
Mexico	Labour force survey	2002	Total	40 302.0	62.3	28.6	9.1	0.0
			Men	26 383.2	62.1	30.8	7.0	0.0
			Women	13 918.8	62.7	24.4	12.9	0.0
Moldova, Republic of	Labour force survey	2002	Total	1 356.5	64.0	33.6	2.4	0.1
			Men	661.3	62.9	35.7	1.3	0.1
			Women	695.2	65.0	31.5	3.4	0.0
Mongolia	Population census	2000	Total	779.2	41.2	32.5	25.3	0.9
			Men	420.5	39.3	45.6	14.0	1.1
			Women	358.7	43.6	17.1	38.6	0.7
Morocco	Labour force survey	2002	Total	9 487.5	38.0	28.5	29.9	3.7
			Men	7 100.6	39.5	33.8	22.2	4.4
			Women	2 387.0	33.4	12.7	52.5	1.5
Netherlands	Labour force survey	2002	Total	7 952.0	88.9	10.5	0.6	0.0
			Men	4 484.0	87.2	12.7	0.2	0.0
			Women	3 468.0	91.2	7.7	1.1	0.0

The employment relationship

Country or territory	Source	Latest year available	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Netherlands Antilles	Labour force survey	2000	Total	52.2	87.8	9.0	0.5	2.7
			Men	27.3	84.0	13.2	0.1	2.7
			Women	24.9	92.0	4.3	1.0	2.7
New Caledonia	Population census	1996	Total	64.4	83.8	15.9	0.3	0.0
			Men	39.6	80.5	19.3	0.3	0.0
			Women	24.8	89.1	10.4	0.5	0.0
New Zealand	Labour force survey	2002	Total	1 921.0	80.7	18.6	0.7	0.0
			Men	1 045.1	75.5	24.0	0.5	0.0
			Women	875.9	86.8	12.3	0.9	0.0
Norway	Labour force survey	2002	Total	2 269.0	92.5	7.0	0.3	0.2
			Men	1 198.0	89.8	9.7	0.3	0.3
			Women	1 071.0	95.4	3.9	0.4	0.3
Oman	Labour force survey	2000	Total	281.6	87.8	11.4	0.0	0.8
			Men	243.1	87.8	11.6	0.0	0.5
			Women	38.6	87.8	9.9	0.0	2.3
Pakistan	Labour force survey	2000	Total	38 882.0	39.9	39.3	20.8	0.0
			Men	33 189.0	40.3	43.3	16.4	0.0
			Women	5 693.0	37.1	16.0	46.9	0.0
Panama	Labour force survey	2002	Total	1 080.5	64.9	31.7	3.4	0.0
			Men	703.3	59.5	37.4	3.1	0.0
			Women	377.2	74.9	21.1	4.0	0.0
Peru	Labour force survey	2001	Total	7 619.9	43.7	43.1	7.7	5.5
			Men	4 232.6	52.1	42.2	4.7	1.1
			Women	3 387.3	33.2	44.1	11.5	11.1
Poland	Labour force survey	2002	Total	13 617.0	72.7	21.8	5.5	0.0
			Men	7 432.0	70.2	25.7	4.0	0.0
			Women	6 185.0	75.7	17.1	7.2	0.0
Portugal	Labour force survey	2002	Total	5 127.7	73.1	24.9	1.6	0.5
			Men	2 796.8	71.8	26.9	1.0	0.5
			Women	2 330.9	74.8	22.6	2.3	0.4
Puerto Rico	Labour force survey	2002	Total	1 190.0	85.1	14.3	0.6	0.0
			Men	676.0	80.2	19.8	0.0	0.0
			Women	514.0	91.6	7.0	1.2	0.0
Qatar	Labour force survey	2001	Total	310.3	0.0	0.0	0.0	0.0
			Men	266.4	0.0	0.0	0.0	0.0
			Women	43.9	0.0	0.0	0.0	0.0
Romania	Labour force survey	2002	Total	9 234.2	61.7	23.0	15.1	0.3
			Men	5 031.5	63.0	28.6	8.1	0.3
			Women	4 202.6	60.1	16.2	23.4	0.3
Romania	Official estimates	1994	Total	10 011.6	61.9	25.2	12.8	0.0
			Men	5 342.1	66.4	27.9	5.7	0.0
			Women	4 669.5	56.9	22.2	21.0	0.0
Russian Federation	Labour force survey	1999	Total	60 408.0	92.6	5.3	0.2	1.9
			Men	31 524.0	91.6	6.0	0.2	2.2
			Women	28 884.0	93.8	4.5	0.2	1.5

Country or territory	Source	Latest year available	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
Russian Federation	Official estimates	2002	Total	65 650.0	0.0	0.0	0.0	0.0
San Marino	Official estimates	2002	Total	19.4	88.5	11.5	0.0	0.0
			Men	11.5	86.6	13.4	0.0	0.0
			Women	7.9	91.2	8.7	0.0	0.0
Singapore	Labour force survey	2002	Total	2 033.7	86.5	12.7	0.7	0.0
			Men	1 122.6	82.0	17.7	0.3	0.0
			Women	911.1	92.1	6.6	1.3	0.0
Slovakia	Labour force survey	2002	Total	2 164.6	90.0	9.6	0.1	0.3
			Men	1 177.1	86.9	12.9	0.1	0.1
			Women	987.5	93.6	5.7	0.2	0.5
Slovenia	Labour force survey	2002	Total	896.0	86.0	9.8	4.2	0.0
			Men	488.0	83.4	13.5	3.1	0.0
			Women	409.0	89.0	5.1	5.6	0.0
Spain	Labour force survey	2002	Total	16 694.6	81.5	16.3	1.6	0.7
			Men	10 284.3	79.1	19.2	0.9	0.7
			Women	6 410.2	85.2	11.5	2.7	0.6
Sri Lanka	Labour force survey	1998	Total	5 946.2	0.0	0.0	0.0	0.0
			Men	3 855.3	0.0	0.0	0.0	0.0
			Women	2 090.8	0.0	0.0	0.0	0.0
Sweden	Labour force survey	2002	Total	4 234.0	90.4	9.4	0.3	0.0
			Men	2 191.0	86.1	13.7	0.3	0.0
			Women	2 043.0	94.9	4.8	0.2	0.0
Switzerland	Labour force survey	2002	Total	3 951.0	82.6	15.1	2.4	0.0
			Men	2 169.0	80.3	18.0	1.8	0.0
			Women	1 782.0	85.3	11.6	3.1	0.0
Tanzania, United Rep. of	Labour force survey	2001	Total	16 914.8	6.9	8.4	3.8	81.0
Thailand	Labour force survey	2000	Total	34 676.3	40.5	34.8	24.6	0.1
			Men	19 081.2	40.9	43.1	16.0	0.1
			Women	15 595.1	40.2	24.5	35.2	0.1
The former Yugoslav Rep. of Macedonia	Labour force survey	2002	Total	545.1	72.7	15.8	11.4	0.0
			Men	327.3	71.8	21.2	7.0	0.0
			Women	217.8	74.2	7.8	18.1	0.0
Trinidad and Tobago	Labour force survey	2001	Total	525.1	77.3	20.8	1.0	0.9
			Men	329.0	74.2	24.3	0.5	1.0
			Women	196.1	82.4	14.9	1.9	0.8
Tunisia	Labour force survey	1989	Total	2 951.2	64.3	26.8	8.7	0.2
			Men	1 592.8	69.0	24.4	5.7	0.9
			Women	386.0	58.6	19.3	21.8	0.3
Turkey	Labour force survey	2002	Total	20 287.0	50.9	29.2	19.9	0.0
			Men	14 615.0	55.7	35.4	8.9	0.0
			Women	5 673.0	38.8	13.2	48.1	0.0
Ukraine	Labour force survey	2002	Total	20 554.7	87.6	10.9	1.5	0.0
			Men	10 470.5	87.8	11.2	1.1	0.0
			Women	10 084.2	87.4	10.6	2.0	0.0

The employment relationship

Country or territory	Source	Latest year available	Sex	Total employment (thousands)	Employees (%)	Employers and own-account workers (%)	Contributing family workers (%)	Others and not classifiable (%)
United Kingdom	Labour force survey	2002	Total	27 820.8	87.2	12.5	0.3	0.0
			Men	14 973.4	82.9	16.9	0.2	0.0
			Women	12 847.4	92.2	7.4	0.4	0.0
United States	Labour force survey	2002	Total	136 485.0	92.8	7.1	0.1	0.0
			Men	72 903.0	91.6	8.3	0.1	0.0
			Women	69 734.0	85.8	5.3	0.1	0.0
Uruguay	Labour force survey	2002	Total	1 032.0	70.2	28.5	1.4	0.0
			Men	589.7	65.5	33.6	0.9	0.0
			Women	442.3	76.4	21.6	2.0	0.0
West Bank and Gaza Strip	Labour force survey	2003	Total	591.1	57.2	31.4	11.4	0.0
			Men	489.6	57.7	35.3	7.0	0.0
			Women	101.5	55.0	12.5	32.5	0.0
Yemen, Rep. of	Labour force survey	1999	Total	3 621.7	41.6	33.2	0.3	24.9
			Men	2 731.6	50.7	36.2	0.3	12.8
			Women	890.1	13.8	24.0	0.3	39.4

Source: ILO: LABORSTA.

## Annex 4

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### List of referenced legislation <sup>1</sup>

<b>Arab States</b>	
Bahrain	Labour Law for the private sector, promulgated by Legislative Decree No. 23 of 1976.
Qatar	Labour Law, No. 14 of 2004.
<b>Africa</b>	
Angola	General Labour Act of 11 November 1981.
Benin	Act No. 98-004 of 27 January 1998 to promulgate the Labour Code.
Botswana	Employment Act, 1982 (No. 29).
Burkina Faso	Act No. 11-92/ADP of 22 December 1992 to promulgate the Labour Code.
Cameroon	Act No. 92/007 of 14 August 1992 to promulgate the Labour Code.
Democratic Republic of the Congo	Act No. 015/2002 of 16 October 2002 to promulgate the Labour Code.
Gabon	Act No. 3/94 of 21 November 1994 to promulgate the Labour Code. Act No. 12/2000 of 12 October 2000 to amend certain sections of the Labour Code.
Ghana	Labour Act, 2003 (No. 651).
Kenya	Employment Act (Chapter 226), No. 2 of 1976 (consolidated to 1984).
Lesotho	Labour Code Order, 1992 (Order No. 24 of 1992).
Malawi	Employment Act, 2000 (No. 6 of 2000).
Mauritius	Labour Act, 1975 (No. 50) (consolidation, as amended up to 2002). Sex Discrimination Act, 2002 (No. 43).
Morocco	Dahir No 1-03-194 of 11 September 2003 to promulgate Act No. 65-99 respecting the Labour Code.
Nigeria	Labour Act (Chapter 198), 1974, No 21.
Niger	Ordinance No. 96-039 of 29 June 1996 to promulgate the Labour Code.
Rwanda	Act No. 51/2001 of 30 December 2001 to promulgate the Labour Code.

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<sup>1</sup> Links to many of these texts, in the original language and/or in translation, can be found in NATLEX, the ILO's database of national labour and related legislation, at [http://www.ilo.org/dyn/natlex/natlex\\_browse.home](http://www.ilo.org/dyn/natlex/natlex_browse.home).



South Africa	Basic Conditions of Employment Act, 1997 (No. 75 of 1997) (BCEA). Basic Conditions of Employment Amendment Act, 2002 (No. 11 of 2002). Labour Relations Amendment Act, 2002 (No. 12 of 2002).
Tunisia	Act No 66-27 of 30 April 1966 to promulgate the Labour Code, as amended up to 15 July 1996.
Zambia	Industrial and Labour Relations Act, 1993 (No. 27 of 1993), as amended up to Act No. 13 of 1994.
<b>Americas</b>	
Argentina	Labour Regulation Act, No. 25,877, 2. March 2004. National Employment Act, No. 24013, 5 December 1991. Employment Contracts Act, No. 20,744, consolidated by Decree No. 390 of 13 May 1976.
Brazil	Consolidation of Labour Laws, adopted by Legislative Decree No. 5452 of 1 May 1943, as amended.
Canada	Canada Labour Code, as amended.
Canada, Quebec	Labour Code, as amended up to 1 August 2004.
Chile	Labour Code, Legislative Decree No. 1, 31 July 2002.
Colombia	Substantive Labour Code, promulgated by Decrees Nos. 2663 and 3743 of 1950. Act No. 50 of 29 December 1990, to amend the Substantive Labour Code and enact other provisions. Act No. 79 of 23 December 1988 to revise the legislation on cooperatives.
Costa Rica	Labour Code, as amended up to 1995.
El Salvador	Labour Code, promulgated by Decree No. 15 of 23 June 1972, as amended up to July 1995.
Mexico	Federal Labour Act, as amended up to 1 October 1995.
Nicaragua	Act No. 185 to promulgate the Labour Code, 30 October 1996.
Panama	Labour Code, promulgated by Cabinet Decree No. 252, as amended up to Act No. 44 of August 1995.
Peru	Act No. 28,015 on the promotion and formalization of small and micro-enterprises, 2 July 2003. Act No. 27,626 to regulate the activity of special service enterprises and workers' cooperatives, 9 January 2002. Presidential Decree No. 003-97-TR to approve the Productivity and Labour Competitiveness Act, 21 March 1997.
Trinidad and Tobago	Industrial Relations Act, 31 July 1972.
United States	California Labour Code.
Venezuela	Organic Labour Act, as amended up to 1997.
<b>Europe and Central Asia</b>	
Estonia	Employment Contracts Act (consolidation), 1992, as amended up to 2003.
Finland	Employment Contracts Act, No. 55 of 2001.
France	Labour Code, 1973, as amended.
Ireland	Employment Equality Act, 1998 (No. 21 of 1998).
Latvia	Labour Law, 20 June 2001.
Lithuania	Labour Code, approved by Law No. IX-926 of 4 June 2002.

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Netherlands	Civil Code. Cited in C. Bosse: "The scope of the employment relationship in the Netherlands" (Tilburg University, 2004). Unpublished document.
Portugal	Act No. 99/2003 to promulgate the Labour Code.
Russian Federation	Labour Code of the Russian Federation, 30 December 2001.
Slovenia	Employment Relationships Act of 24 April 2002 (Text No. 2006).
Spain	Workers' Charter, consolidated text promulgated by Royal Legislative Decree 1/1995, as amended up to 2003. Royal Decree No. 1006/1985 of 26 June regulating the special employment relationship of professional sportspersons. Royal Decree No. 1435/1985 of 2 August regulating the special employment relationship of performing artists.
United Kingdom	Employment Rights Act 1996. Employment Relations Act 1999.

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### Asia and the Pacific

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Australia	Workplace Relations Act 1996 (as amended up to 12 March 1997). Industrial Relations Act 1988, No. 86 of 1988.
Bangladesh	Employment of Labour (Standing Orders) Act, 1965 (Act VIII of 1965).
Cambodia	Labour Law of 10 January 1997.
China	Labour Law of the People's Republic of China, promulgated by Order No. 28 of the President of the People's Republic of China, 5 July 1994.
Indonesia	Act of the Republic of Indonesia, No. 13, 2003 concerning manpower.
Iran, Islamic Republic of	Labour Code, 20 November 1990.
Korea, Republic of	Labour Standards Act, No. 5309, 13 March 1997.
Malaysia	Employment Act, 1955 (No. 265) (revised up to 1981).
New Zealand	Employment Relations Act 2000 (No. 24 of 2000), 19 August 2000.
Pakistan	Industrial Relations Ordinance, 2002.
Philippines	Labor Code of the Philippines, Presidential Decree No. 442 of 1974, as amended.
Sri Lanka	Workmen's Compensation Ordinance, 1935.
Thailand	Labour Protection Act of 1998.
Viet Nam	Labour Code of the Socialist Republic of Viet Nam, 23 June 1994.