Technical advice on the definition of the employment relationship

INTRODUCTORY REMARKS

Background

1. The Ministry of Labour – Invalids and Social Affairs of the Socialist Republic of Viet Nam (hereinafter referred to as "the Government") is leading work within Viet Nam on the reform of the Labour Code 2012. The ILO is supporting this process, including providing technical advice from the International Labour Office (hereinafter referred to as "the Office") on the amendments to the Labour Code through the ILO Country Office in Hanoi and the New Industrial Relations Framework (USDOL) project.

2. In this context, the Government and social partners need to be provided with technical information and guidance on a number of issues being examined during the reform process. In particular, they wish to benefit from existing guidance on how to ensure alignment with ILO Conventions as well as understand the way comparative countries have ensured this alignment.

3. This note covers one of the issues being considered as part of this reforms: the definition of the employment relationship.

Preparation of ILO's technical advice

4. The Office in Geneva has examined the issues raised and answered the questions in light of both international labour standards and comparative labour law and practice.

5. The Office wishes to clarify that these comments are provided without prejudice to any comments that may be made by the ILO bodies responsible for supervising compliance with international labour standards.

SPECIFIC QUESTIONS

Guidance on how to define an employment relationship in labour law

6. International labour standards on the definition of the employment relationship are laid down in the ILO Employment Relationship Recommendation, 2006 (No. 198).

7. Paragraph 4 (a) of Recommendation No. 198 calls on governments to, together with social partners, develop a national policy to provide guidance on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers. Many labour law systems address the issue by differentiating treatment of workers that can be categorised as *dependent* employees and those categorised as autonomous self-employed. Others adopt more complex and multi-layered notions of the employment relationship, where categories of workers in an intermediate status enjoy some of the rights prescribed for dependent employees.[1]

8. Recommendation No. 198, Paragraph 9, states that the determination of the existence of an employment relationship should be guided *primarily by the facts* relating to the performance of work and the remuneration of the worker, regardless of how the relationship is characterized in any arrangement, contractual or otherwise, that may have been agreed between the parties (emphasis added).

9. Reflecting Recommendation No. 198, in the clear majority of legal systems, the principle known as "the primacy of facts" overrides the form of a contract.[2] For example in Brazil, Japan and Korea.

10. In **Brazil**, where courts generally apply this principle, it does not matter what the parties call their relationship, e.g., 'self-employment', 'internship', 'voluntary work', 'help', 'eventual work'. What matters is how the work actually occurs and is managed.[3]

11. In **Japan**, courts have judged that an employment relationship exists when the actual work circumstance lends itself to an employment relationship, regardless of the provisions of the contract. That is to say, when there is effective control over the work and the payment of wages, the court has determined the existence of an employment relationship.[4]

---

[1] Countouris. N. 2011. "The Employment Relationship: A Comparative Analysis of National Judicial Approaches" in Casale, G. (ed.) *The Employment Relationship: A Comparative Overview* (Geneva, International Labour Office), pp. 36-37. Countouris notes that "the *nomen iuris* of each type of labour relationship is of little or no value if seen outside the context of jurisprudential reasoning and of its practical application".

[2] ILO: *The Employment Relationship: An annotated guide to ILO Recommendation No. 198*, (Geneva, 2007), p. 32. Available at: *http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_172417/lang--en/index.htm* [22 March 2007].

[3] Judgment of the Regional Court of the 4th Region (Tribunal Regional do Trabalho da 4ª Regiao, 9ª Vara do Trabalho de Porto Alegre), RTOrd 0021587-30.2014.5.04.0009, 2017. Available at: http://s.conjur.com.br/dl/sentenca-9a-vara-trabalho-porto-alegre.pdf [22 March 2007].

[4] SAGA TV Case: Judgement of the Fukuoka High Court, 7 July 1983, Hanrei Jiho No. 1084, p. 126; SEN-EI Case: Judgement of the Saga District Court Takeo Branch, 28 March 1997, Rodo Hanrei No. 719, p. 38.

12. In **Korea**, an "employment contract" is understood as a contract that has been entered into by a worker and an employer. The former has to provide labour, whereas the latter pays wages for it.[5] However, in determining the existence of an employment relationship, the courts have consistently required the existence of a "user-subordinate relation". Such relation is determined by looking at the nature and content of the relationship between the employer and the provider of labour, regardless of the form of the contract.[6]

13. Other examples can be found in *The Employment Relationship: An annotated guide to ILO Recommendation No. 198*[7] and in *Regulating the Employment Relationship in Europe: A guide to Recommendation No. 198*[8]

14. Additionally, Recommendation No. 198 provides guidance to member States on how to develop law and policy to ensure that appropriate workers benefit in practice from the protection of an employment relationship. It provides, in particular, that member States should consider the possibility of defining , in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

> (a) the fact that the work is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work; and
>
> (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.[9]

15. Countries differ on the criteria they apply to recognise the existence of an employment relationship. Looking at national practice, it could be said that some of the most common terms to define the employment relationship are: "control", "dependency", "direction",

[5] The Labour Standards Act No. 5309, 13 March 1997, Article 2, paragraph 1, section 4,
[6] Judgment of the Supreme Court, 9 December 1994, 94-da-22859.
[7] ILO: *The Employment Relationship: An annotated guide to ILO Recommendation No. 198*. (Geneva, 2007). Available at: *http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_172417/lang--en/index.htm* [22 March 2007].
[8] ILO: *Regulating the Employment Relationship in Europe: A guide to Recommendation No. 198*. (Geneva, 2013). Available at: http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@dialogue/documents/publication/wcms_209280.pdf [22 March 2007].
[9] Employment Relationship Recommendation, 2006 (No. 198), Paragraph 13.

"subordination" or "supervision".[10] In the following paragraphs, national examples of the definition of these terms will be provided.

16. Traditionally, control (in civil law systems usually called "subordination") has been used as the main indicator of the existence of an employment relationship.[11] Control is understood as the power to direct the worker to suit the changing needs of the labour process, and may cover either the process of performing the work, and/or the result of the work, as well as when, where and how a product is sold.[12]

17. Three examples from Asia are given below: Japan, Korea and Malaysia.

    a. In **Japan**, an employment relationship is determined initially by two factors: existence of control over the person concerned, and the remuneration paid in return to the work performed. In case control is difficult to determine, a comprehensive approach is adopted in the court of law by considering other criteria, such as the degree of the self-employment or degree of exclusiveness. For instance, when a worker uses his/her own tools and equipment such work weakens the worker's position as an employee. It attributes a nature of self-employment, in which work is performed by a person at his/her own calculation and risk.[13]

    b. In **Korea**, where the criterion of "user-subordination" prevails, in determining the existence of an employment relationship, courts look at the following indicators:

        a) The employer decides what work will be performed.
        b) The employee is subject to the company's work rules.
        c) The employer exercises considerable supervision over the performance of work.
        d) The employer specifies time and place in which work is done.
        e) The possession of fixtures, raw material or work tools.
        f) The worker may employ a third party to substitute their services.
        g) The worker itself assumes risks of making a profit and causing loss.
        h) The nature of wages as the price for labour, the existence of a basic wage or fixed wage, or the collection of labour income tax through withholding income.
        i) The worker provides labour continuously and works exclusively for the employer.
        j) The recognition of employee status under other laws including social security laws.

[10] Casale, G. 2011."The Employment Relationship: A General Introduction" in Casale, G. (ed.) *The Employment Relationship: A Comparative Overview*. (Geneva, International Labour Office), p. 26.
[11] Davidov, G. 2002. "The three axes of the employment relationship: A Characterization of Workers in Need of Protection", in *The University of Toronto Law Journal*, Vol. 52, No. 4 (Autumn, 2002), pp. 366-368.
[12] ILO: *The Employment Relationship: An annotated guide to ILO Recommendation No. 198*, (Geneva, 2007), p. 35. Available at: http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_172417/lang--en/index.htm [22 March 2007].
[13] ILO: *The Employment Relationship: An annotated guide to ILO Recommendation No. 198*. (Geneva, 2007), p. 42. Available at: http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_172417/lang--en/index.htm [22 March 2007].

Indicators a) – d) have been traditionally used by courts in order to determine the existence of "personal dependence."[14] Indicators e) and f) are used by the courts to determine whether the worker runs its own business independently.[15] Regarding indicator h), the court has held that the employee does not lose his or her status simply because they did not have a basic wage or they were regarded as self-employed under tax laws or social security laws.[16]

c. Following a tendency towards a more broad understanding of control/subordination,[17] in **Malaysia**, courts apply a multi-factor test that focuses more on the extent to which the worker is integrated into the business and economic reality. This multi-factor test has been applied in cases where the application of the traditional control test would have resulted in a contrary finding.[18]

18. In the same line, taking into account that in new forms of work organisation there is less and less direct control over the work to be performed, other countries are also regarding the integration of the worker in the enterprise as a valuable indicator of the employment relationship. In **Portugal**, section 12 of the Labour Code establishes a presumption of an employment relationship when various indicators are present, including when "(a) the worker is part of the organisational structure of the beneficiary's activity and performs a service under the latter's guidance".[19]

19. More indicators and country examples can be found in, *The Employment Relationship: An annotated guide to ILO Recommendation No. 198.*[20]

Guidance on using written employment contracts as a determinant of the existence of an employment relationship

20. The question "whether a person is an employee" is different from the question "whether all employees should have a written contract".

21. As explained in the previous section, Recommendation No. 198 provides guidance to member States on how to develop law and policy to ensure that workers who perform work in the context of an employment relationship benefit in practice from the protection of an employment relationship. It also enshrines the principle of primacy of facts. This principle means that if certain indicators of an employment relationship are satisfied, an employment relationship exists and must be recognised. Whether or not there is a written contract is only one factor to be considered, unless the law expressly provides otherwise, as for example in

[14] Judgment of the Supreme Court, 9 December 1994, 94-da-22859.
[15] Judgment of the Supreme Court, 7 December 2006, 2004-da-29736.
[16] Judgment of the Supreme Court, 7 December 2006, 2004-da-29736.
[17] Davidov, G. 2002. "The three axes of the employment relationship: A Characterization of Workers in Need of Protection", in *The University of Toronto Law Journal*, Vol. 52, No. 4 (Autumn, 2002), pp. 366-367.
[18] *Ekajaya (M) Sdn Bhd v Ahmad Mahad & Ors* High Court judgment of Lee Swee Seng JC, 3 ILR 457, (2014).
[19] ILO: *The Employment Relationship: An annotated guide to ILO Recommendation No. 198* (Geneva, 2007), p. 37 Available at: http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_17241 7/lang--en/index.htm [22 March 2007].
[20] ILO: *The Employment Relationship: An annotated guide to ILO Recommendation No. 198* (Geneva, 2007). Available at: http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_172417/lang--en/index.htm [22 March 2007].

China. Therefore, a law that makes the existence of a written contract the determinant of an employment relationship would not be in line with Recommendation 198: contracts should not, by themselves, determine whether a worker is an employee. Employees must benefit from protection even when they do not have a written contract, if circumstances show that an employment relationship exists.

22. For the protection of the employee to be effective, both employees and employers need to know and be able to enforce their rights and obligations. In that sense, written contracts can be an important and common means of providing legal certainty. A comprehensive contract of employment allows an employer to specify an employee's duties and responsibilities, and allows the employee to know exactly what is expected of them. Written contracts are one means through which terms and conditions of employment are clearly expressed, for the assistance of both parties.

23. Accordingly, including an obligation in the law for an employer to provide a contract to a worker is recommended. The contract should outline the terms and conditions of employment. In particular, the contract should give clear indications on the duration of the contract, remuneration, working hours, rest breaks, weekly rest periods and possible types of personal leaves, as well as grievance and disciplinary procedures.

24. In case key terms of the contract are the same for other employees, this obligation can be fulfilled by posting a notice in the workplace with such information.

25. In any case, it is also important to ensure that the employment contract, or a written notice published at a workplace, is drafted in a language that can be understood by the workers. From a comparative perspective, the ILO Good Labour Practices Guidelines adopted for certain specific sectors in Thailand[21] provide that employment contracts should be written in workers' native language; that workers should be informed about their wages in a language they can understand and in a way that explains how their wages are calculated; and that in the case of workers with limited literacy, contracts are explained verbally in the workers' native language.

26. Regarding national practice, in **Malaysia**, it is not mandatory for employers to issue written contracts to workers. Section 10 of the Employment Act 1955 only requires terms to be in writing for fixed term contracts. Moreover, not having a written contract is not an obstacle for the employment relationship to be recognised by courts.[22] This is also the case in Australia and New Zealand.

27. In **China**, a labour relationship (other than a casual labour relationship) requires a written labour contract. There cannot lawfully be an oral contract for an ongoing or fixed term labour relationship. The Chinese legal approach to sham arrangements consists of

[21] ILO: *Good Labour Practices (GLP) Guidelines for Primary Processing Workplaces in the Shrimp and Seafood Industry of Thailand,* Good Labour Practices (GLP) programme, ILO, IPEC, (Thailand, 2013). Available at: http://www.ilo.org/asia/whatwedo/publications/WCMS_221481/lang--en/index.htm [22 March 2007].
[22] *Ekajaya (M) Sdn Bhd v Ahmad Mahad & Ors* High Court judgment of Lee Swee Seng JC, 3 ILR 457 [2014].

penalising entities (employers) that engage workers without a written labour contract in circumstances where the Labour Contract Law is applicable. Article 82 of the Labour Contract Law provides that, where a work unit fails to conclude a written labour contract within one month of the worker's engagement, the work unit must pay up to 12 months' double wages.[23]

Guidance on ensuring that Labour Laws cover informal workers and those in SMEs

28. Under the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), member States are recommended to "prevent and sanction deliberate avoidance of, or exit from, the formal economy for the purpose of evading taxation and the application of social and labour laws and regulations".[24] ILO Recommendation No. 204 also emphasises the importance that States "adopt, review and enforce national laws and regulations or other measures to ensure appropriate coverage and protection of all categories of workers and economic units".[25] For the purposes of Recommendation No. 204, the term "informal economy" refers to "all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements".[26] The ILO Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189) also echoes Recommendation No. 204 by inviting member States to include measures and incentives aimed at assisting and upgrading the informal sector to become a part of the organized sector.[27]

29. It is a common practice to make different provisions in labour laws for smaller enterprises. However, conscious exceptions and accidental exclusions can leave large numbers of employees unprotected. The 2016 ILO Office Report on Non-Standard Employment around the World observed that, "some non-standard workers are not covered by existing labour regulations or collective bargaining arrangements *because they work either in enterprises that are excluded from certain provisions, such as small enterprises in some countries*, or in sectors with non-existent or limited labour regulations or collective bargaining arrangements, such as domestic work or agriculture. The erosion of the direct employment relationship also means that some workers are not covered by existing labour regulations or collective bargaining arrangements because they are not considered employees, or because their status is beyond the scope of application of labour laws" (emphasis added).[28]

[23] See also Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases (II), 1st October, 2006 article 1.
[24] Paragraph 7 (l) of Recommendation No. 204.
[25] Paragraph 9 of Recommendation No. 204.
[26] Paragraph 2 (a) of Recommendation No. 204.
[27] Paragraph 6 (3) of Recommendation No. 189.
[28] ILO: *Non-Standard Employment around the World – Understanding challenges, shaping prospects* (Geneva, 2016), p. 210. Available online: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf [22 March 2007].

30. Recommendation No. 189 recommends policies to remove constraints to the growth of SMEs, including those that are a disincentive to the hiring of personnel. It also specifies that these policies *must not prejudice the levels of conditions of employment*, effectiveness of labour inspection or the system of supervision of working conditions (emphasis added).[29] Such prejudice may arise where workers are not recognised as employees under the labour law.

31. Paragraph 3 of Recommendation No. 189, also states that "member States should adopt appropriate measures and enforcement mechanisms to safeguard the interest of workers in SMEs by providing them with the basic protection available under other relevant instruments".[30]

32. In this line, in **Nepal** the new Labour Act[31] covers all workers (meaning workers involved in an employment relationship) regardless of the size of the enterprise. This brings a fundamental change in terms of provision of rights to the working population, as the former Labour Act only covered workers in firms of 10 or more employees.[32]

33. The Office emphasises the importance of endeavouring to ensure that labour regulation leads neither to an exit of SMEs – or of their workers and or of some of their economic activities – from the formal economy, nor to a lowering of the working conditions of workers hired by SMEs.[33]

***

Geneva, April 2018

This product is supported by ILO's New Industrial Relations Framework (NIRF) project which is funded by the United States Department of Labor. Any statements made do not necessarily reflect the views or policies of the United States Department of Labor, nor does the mention of trade names, commercial products or organizations imply endorsement by the United States Department of Labor.

[29] Paragraph 6 (2)(h) of Recommendation No. 189.
[30] Other relevant instruments contributing to defining the basic protection of workers in SMEs include the Employment Policy Convention and Recommendation, 1964, and the Employment Policy (Supplementary Provisions) Recommendation, 1984; the Co-operatives (Developing Countries) Recommendation, 1966; the Human Resources Development Convention and Recommendation, 1975; and the Occupational Safety and Health Convention and Recommendation, 1981.
[31] Labour Act, No. 14 of the year 2074 (2017).
[32] Before the enactment of the new Labour Act, workers in small firms had only right to receive minimum wage and working hours.
[33] On this issue, see also: ILO: *Extending the scope of application of labour laws to the informal economy. Digest of comments of the ILO's supervisory bodies related to the informal economy* (Geneva, 2010). Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_125855.pdf [22 March 2007].