

THE EMPLOYMENT RELATIONSHIP: An annotated guide to ILO Recommendation No. 198

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Background to the Guide

The subject of the employment relationship had been on the agenda of the International Labour Conference in 1997, 1998 and 2003 and had been analysed by a Meeting of Experts in 2000. The Employment Relationship Recommendation No. 198¹ adopted by the Conference in 2006 reflects the conclusions of the International Labour Conference standard-setting research that includes over 30 national monographs, the outcome of the general discussion on the scope of the employment relationship (2003) and the responses to a detailed questionnaire received by the International Labour Office from over 70 different countries and summarized in the Conference background papers.

A timeline description of ILO attention to these challenges reads as follows:

1997/8	2000	2003	2006
ILC discussion of 'contract labour'	Meeting of Experts on Workers in Situations Needing Protection	ILC General Discussion on the employment relationship	ILC adopts Recommendation No. 198 on the employment relationship; follow-up via a resolution
←-----Continuous Office research-----→			

The issue of who is or is not in an employment relationship – and what rights/protections flow from that status – has become problematic in recent decades as a result of major changes in work organization and the adequacy of legal regulation in adapting to those changes. Worldwide, there is increasing difficulty in establishing whether or not an employment relationship exists in situations where (1) the respective rights and obligations of the parties concerned are not clear, or where (2) there has been an attempt to disguise the employment relationship, or where (3) inadequacies or gaps exist in the legal framework, or in its interpretation or application. Contractual arrangements can have the effect of depriving workers of the protections they are due. Vulnerable workers appear to suffer particularly from such arrangements. In addition, Member States of the ILO and their social partners have emphasized that the globalized economy has increased the need of workers for protection, at least against circumvention of national laws by contractual and/or other legal arrangements. In the framework of the transnational provision of services, it is also important to establish who

¹ Full text appears in Annex I.

is considered a worker in an employment relationship, what rights the worker has, and who the employer is. The Conference in 2006 recognized that there is a role for international guidance to Members States regarding the means of achieving protection through national law and practice—protection that should be accessible to all women and men.

Summary

Recommendation No. 198 covers:

- the formulation and application of a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship;
- the determination – via a listing of pertinent criteria - of the existence of such a relationship, relying on the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement that may have been agreed between the parties; and
- the establishment of an appropriate mechanism - or the use of an existing one - for monitoring developments in the labour market and the organization of work so as to be able to formulate advice on the adoption and implementation of measures concerning the employment relationship.

Along with the adoption of Recommendation No. 198, in June 2006, the International Labour Conference adopted a resolution concerning the employment relationship to guide the Office's follow-up (see Annex II). The resolution states that the Conference invites the Governing Body of the International Labour Office to instruct the Director-General to assist constituents in developing national policies and setting up monitoring and implementing mechanisms as well as to promote good practices at the national and international levels concerning the determination and use of employment relationships. The Governing Body of the ILO, at its November 2006 Session, instructed the Director-General to implement the resolution.²

In this context, the Guide aims to be user-friendly and contains practical information about how countries are dealing with the issues of the employment relationship as set out in the Recommendation No. 198.

The Guide is the result of the technical work carried out by a group of eminent labour lawyers representing different realities and approaches in the world of work. The group was composed of: Prof. Shinishi Ago, Kyushu University Faculty of Law, Japan; Prof. Eduardo Ameglio, Professor of Labour Law, University of Uruguay, Uruguay; Dr. Catherine Barnard, Senior Lecturer, Jean Monnet Chair of EU Law, Trinity College, Cambridge, United Kingdom; Prof. Paul Benjamin, Faculty of Law, University of Cape

² GB document GB. 297/3, Nov. 2006.

Town, South Africa; Prof. Rachid Filali Meknassi, Faculty of Law, University of Rabat, Morocco; Prof. Adalberto Perulli, Professor of Labour Law, University of Venice, Italy and Mr. Jeffrey Sack, Q.C., of the law firm of Sack Goldblatt Mitchell, Toronto, Canada.

The Secretariat support was provided by the International Training Centre, Turin, and the DIALOGUE Branch, ILO Geneva.

Objectives

The objectives of the Guide are to disseminate practical information about countries dealing with issues concerning the employment relationship and to serve as a tool for promoting the application of Recommendation No. 198, as well as the Decent Work Agenda.

It addresses questions such as when does an employment relationship exist? How does one determine, as between different entities, which one is the employer? How can employees be assured of speedy, inexpensive, fair and efficient procedures for dispute settlement? A glossary of terms appears in Annex III.

Target Groups

The principal users of the Guide, among others, include:

- National policy makers (Governments, employers' and workers' organizations)
- Law enforcers (labour administrations, in particular labour inspectorates, conciliation and mediation institutions)
- Adjudicators (arbitration boards, labour courts and industrial relations tribunals, lower and appeal courts, human rights commissions, ombuds, etc.)
- Practitioners
- Individual employers and workers
- Academics.

- Protection of workers is at the heart of the ILO's mandate, the principles set out in the Declaration on Fundamental Principles and Rights at Work, 1998 and the Decent Work Agenda
- Laws and regulations, and their interpretation, should be compatible with the objectives of decent work because they seek, among other things, to address what can be an unequal bargaining position between parties to an employment relationship

I. National Policy of Protection of Workers in an Employment Relationship

R 198 Paragraph 1:

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

1. Applying a national policy

There is widespread agreement that increasing numbers of workers are not protected by labour law and there is therefore a real need for policy in this area. The following examples of national policies adopted by governments and social partners around the world provide information on policy rationale and the lessons learned from their implementation; they show how national policies are elaborated, for example by legislation, collective bargaining agreements (CBAs), judicial decisions, codes of practice, studies, etc. The examples also show how governments can react to changing circumstances by legislating a policy approach, and how labour law can be innovative in protecting workers.³

Legislative examples:

Belgium - Act on home work of 6 December 1996. Home work has long co-existed with enterprise-based employment. Until recently, it concerned mainly manual workers. With the development of new technologies, home work opened up to new activities such as text processing, translation, data encoding or invoicing and that form of employment regained drastically interest. Given the increasing number of home workers, it was felt urgent to adopt a new policy that would recognize them the same level of protection as the others workers since protection through case law was perceived to be losing ground, and subject to many variations. The Government therefore decided to legislate on this criterion for

³ Readers should refer to the Glossary (Annex III) to appreciate differences in use of the terms “workers” and “employees”.

determining the existence of an employment relationship. The Act extended the scope of application of the Act on Employment Contracts, 3 July 1978, to include home workers. Two criteria distinguish the employment contract of home workers from a standard employment contract: (i) work is being performed from home or any other places chosen by the worker and (ii) there is no direct control or supervision of the worker.

Italy - There are regional policies relating to the quality of occupation, protection and employment. These interventions, as shown by the experience of the Region of Friuli Venezia Giulia (Regional Law No. 18 of 9 August 2005), are directed at employment dynamics in order to increase the number of workplaces, their quality and stability, as well as to correct possible tendencies towards precarious employment. Another legislative approach is the use of instruments introduced for the promotion of equal treatment, and these have proven to be particularly significant in addressing the employment relationship dilemma. In particular, section 46 of Legislative Decree No. 198/2006, which states: "Private and public companies employing more than 100 employees have to prepare a report at least every 2 years on the situation of male and female personnel in every profession and report on the gender balance in the number of recruitments, training, professional promotions, levels, changes of categories or qualification requirements, and other phenomena such as mobility, interventions by the Wage Guarantee Fund, dismissals, pre-retirement and retirement and the effectively paid compensation. The report is prepared in conformity with indications from the Minister of Labour, and is transmitted to the company trade unions and to the Regional Counsellor for Equality".

Collective bargaining agreements:

Italy - Many collective agreements provide for permanent observatories, which are responsible for verifying the effectiveness and efficiency of the negotiated provisions.

Judicial decisions:

Canada - "...the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of

responsibility for investment and management held by the worker and the worker's opportunity for profit in the performance of his or her tasks." 671122 Ontario Ltd. v. Sagaz Industries Inc., [2001] 2 S.C.R. 983 at para. 47.

"...the 'legal subordination' and 'integration into the business' criteria should not be used as exclusive criteria for identifying the real employer. In a context of collective relations governed by the Labour Code, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work-and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, mention should be made of the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business." Pointe-Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015 at para. 48.

Codes of practice:

Ireland - An Employment Status Group was set up under the Programme for Prosperity and Fairness because of the growing concern that there may be increasing numbers of individuals categorized as "self employed" when the "indicators" may be that "employee" status would be more appropriate. The Group, which consisted of representatives of various ministries and of employers' and workers' organizations, decided to issue their report under the form of a Code of Practice that would be monitored by the Group itself. The Code spells out criteria that should help in reaching a conclusion as to the employment status – employee v. self employed - of a person. While the Code of Practice does not have any legislative effect, it is expected that its content would be taken into consideration by those involved in disputes on the employment status of individuals or groups of individuals. Its purpose is to eliminate misconceptions and provide clarity. With the listed 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.

Programme for Prosperity and Fairness “Code of practice for determining employment or self-employment status of individuals” (Dublin, July 2001):

Employees

Self-employed

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

An individual would be self-employed 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
- 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

- | | |
|--|---|
| <p>sound management in the scheduling of engagements or in the performance of tasks arising from the engagements;</p> <ul style="list-style-type: none"> - 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. | <ul style="list-style-type: none"> - 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. |
|--|---|

South Africa - Code of Good Practice: Who Is An Employee, 2006

This Code sets out guidelines for determining whether persons are employees. Its purpose is –

- (a) to promote clarity and certainty as to who is an employee for the purposes of the Labour Relations Act and other labour legislation;
- (b) to set out the interpretive principles contained in the Constitution, labour legislation and binding international standards that apply to the interpretation of labour legislation, including the determination of who is an employee;
- (c) to ensure that a proper distinction is maintained between employment relationships which are regulated by labour legislation and independent contracting

Studies, reviews and reports:

Canada - In October 2004, Commissioner Harry Arthurs was appointed by the Minister of Labour to review Part III of the Canada Labour Code, which establishes labour standards for workers employed in federally regulated enterprises and which regulates hours of work, minimum wages, statutory holidays and annual vacations, statutory leaves (maternity, parental, compassionate care, bereavement and sick leave) and the termination of contracts of employment. Part III also lays down procedures for workers to challenge their unjust dismissal and to recover unpaid wages, and also deals, to a limited extent, with human rights in the workplace (pay equity, sexual harassment). The Commission was assisted by two advisory panels, one of impartial experts, the other of labour and management representatives. It engaged leading Canadian

and foreign experts who undertook 23 research studies on labour standards and related subjects. Further studies were provided by Commission staff, including a rigorous analysis of actual experience under Part III, and comparisons between Part III and labour standards legislation in the provinces and territories, and in other countries. The Commissioner heard from 171 groups and individuals at public hearings across the country and received 154 formal briefs and numerous other informal submissions; it met both formally and informally during the course of its work with labour, management and community-based organizations, and labour standards administrators and practitioners. The final report was issued in October 2006. Among its findings figures the following:

“The fundamental principle of decency at work underlies all labour standards legislation and is the benchmark against which all proposals must be measured: Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as ‘decent.’ No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civil life.” (Harry Arthurs: *Fairness at Work, Federal Labour Standards for the 21st Century*, Quebec, 2006.)

Japan - Studies were conducted by a group, involving academics, established by the Minister of Labour, Japan, in 1985 and 1993, to examine the Criteria to Determine the Scope of a “Worker” in the Labour Standards Law and the Future of the Labour Contract Law System, including the question of the scope of the “worker”, respectively. Most recently, similar study groups have been set up by the Minister of Health, Labour, and Social Welfare. No significant “policy” has yet been established, but these studies have given significant impact on the court decisions.

A combined approach:

In the **United Kingdom**, a mixed approach through statute, regulations and case law is combined to meet the challenge of new types of work. In some cases judges have demonstrated a degree of judicial creativity to imply a contract of employment between, for example, a user undertaking and a temporary worker (e.g. *Dacas v. Brook St Bureau* [2004] ICR 1437). Studies have also been carried out on the question of employment status, in particular by

B. Burchell, S. Deakin, and S. Honey, "The Employment Status of Individuals in Non-standard Employment", Department of Trade and Industry Report, 1998, URN 98/943. In addition, statutory powers were introduced to enable Ministers to extend employment rights to 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 is to be regarded as their employer:

Employment Relations Act, 1999, amended 2004
Section 23

...

(2) The Secretary of State may by order make provision which has the effect of conferring any such right on individuals who are of a specified description.

...

(4) An order under this section may-

(a) provide that individuals are to be treated as parties to workers' contracts or contracts of employment;

(b) make provision as to who are to be regarded as the employers of individuals;

(c) make provision which has the effect of modifying the operation of any right as conferred on individuals by the order;

(d) include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit.

These powers have not yet been used. However, in certain contexts legislation has identified the employer and the status of the individual. For example, the Working Time (Amendment) Regulations, 1998, provide:

36 - Agency workers not otherwise "workers"

(1) This regulation applies in any case where an individual ("the agency worker") (a) is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but (b) is not, as respects that work, a worker, because of the absence of a worker's contract between the individual and the agent or the principal; and (c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

(2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and -

(a) whichever of the agent and the principal is responsible for

paying the agency worker in respect of the work; or
(b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work, and as if that person were the agency worker's employer.

R 198 Paragraph 2: *The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. (...)*

R198 Paragraph3: *National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.*

Other related Paragraphs of R198:
7(a), 11(c), 18, 20

2. Reference to other international labour standards

Some policies draw on already existing international labour standards. As Recommendation No. 198 itself notes “all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship”, should serve as inspiration for policy choices. The pertinent international labour standards appearing in Annex IV provide useful guidance for formulating a national policy to cover workers in situations requiring protection because their employment status is unclear or being deliberately disguised.

3. Social Dialogue (consultation & collective bargaining)

The Recommendation stresses social dialogue as the ideal means to achieve consensus on finding solutions to questions related to the scope of the employment relationship at the national level. This section illustrates with concrete examples the usefulness of tripartite social dialogue and collective bargaining in the design and implementation of national policies. It also aims at promoting best practices.

A reminder: the prerequisite for successful social dialogue is the existence of strong independent and autonomous workers' and employers' organizations. The Recommendation states that the most representative organizations of employers and workers should be represented, on an equal footing, in any national mechanism and consulted for monitoring developments in the labour market and the organization of work. This will involve the creation and strengthening of mechanism for dialogue and networks among constituents and the forging of alliances and partnerships for better addressing the complex phenomena around the employment relationship.

Canada - As mentioned above, has engaged in a broad, consultative process of review of federal labour standards through the Arthurs Commission, which released its report in October 2006. The process engaged in represents an optimal way of bringing together a variety of stakeholders, diffusing political tensions, and arriving at a comprehensive, rigorously thought-out set of recommendations. Such a process clearly depends on leadership

by a figure who is respected by parties representing all stakeholders including labour and management.

Italy - Consultation has become a consolidated practice between the government and the social partners. Many laws are indeed products of such dialogue and they explicitly refer certain questions to be regulated by the social partners through collective agreements. Examples include: (i) Legislative Decree No. 368/2001 implementing the EU Directive 1999/70/CE on fixed-term employment. It states: "Section 9(1) National collective agreements concluded by the comparatively most representative trade unions define the modalities for the information to be given to fixed-term workers about the vacancies in the company in order to guarantee these workers the possibility to obtain lasting jobs.

(2) The same collective agreements shall define the modalities and the contents of the information to be communicated to the workers' representatives. " and (ii) Legislative Decree No. 276/2003, section 2 (i) of which states:

"Citizen's Training Booklet: this personal booklet of the worker is defined by the agreement between the Ministry of Labour and Social Policy and the Ministry of Education with a prior agreement of the Joint Conference of the State and the Regions and with the opinion of the social partners ...".

In the **Japanese** labour legislation process, employers and workers are regularly consulted in the Labour Policy Councils established by the Minister of Labour, which are composed of the social partners and academics. Labour legislation and policies are usually reached through consensus in these Councils.

South Africa's National Economic and Development Advisory Council (NEDLAC) is a 'tripartite +' forum for national level consultations on a number of employment issues. It debated, over a 4 year period, the problems surrounding unclear employment relationships and finally adopted the above-mentioned 2006 Code of Good Practice.

United Kingdom - The Communications Workers Union (CWU) is the trade union which has been most prominent in the area of clarifying policy on rights for agency staff. In 2001, the CWU, negotiated an Agency Best Practice Code I with British Telecom (BT) covering equal opportunities and disciplinary and grievance procedures, aimed at creating consistency of approach in promoting best practice among agencies across the industries. The success of this measure was followed up by a second phase (Code II) covering best practice in the fields of health and safety, welfare,

parental, maternity, paternity and adoptive leave, working time regulations, recruitment, training and appraisals (but noticeably not dismissals).

Uruguay - The Wages Councils are a concrete manifestation of social dialogue and its importance in the debate on, among other issues, the employment relationship. They are composed of three representatives of the Ministry of Labour, and two each representing the workers' and employers' organizations. Established on a sectoral basis, (e.g. one for the finance sector, one for construction, one for metallurgy, etc.). Their mandate is to determine wage increases and categories. The parties can enter into genuine collective bargaining, with the Ministry representatives playing the role of mediation between the two parties. In this way, collective bargaining agreements (CBAs) have been negotiated on the employment relationship and subcontracting of services in two of Uruguay's principal economic sectors: fishing, meat packing and freezing. Other sectors that have managed to sign CBAs on multi-party relationships include the cleaning industry, food, drinks and tobacco, and sweets.

4. Specific policy measures

R 198 Paragraph 4:
National policy should at least include measures to:

*(a) provide **guidance** for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers; (...)*

R 198 Paragraph 2:
*(...) Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be **clear** and adequate to ensure effective*

The Office Report on the employment relationship published in 2005⁴ lists trends and justifications for paying particular attention to certain aspects of policy, such as: the world-wide acceptance of the primacy of fact over form, increasing reliance on determination through laws, easing of the burden of proof on workers, specific definition of the scope of the employment relationship, delineating the boundary between dependent and independent work, categorizing of certain types of work, and extending the scope of legislation to employee-like workers. The following section illustrates, with good national examples, what a national policy might include in this respect.

Clear guidance to the parties

As the following examples show, in some countries, the clarity is captured in case law, in others (Japan, Morocco, New Zealand, Slovenia), through definitions - broad or very specific - in laws and codes. Yet others (Italy) use an administrative approach or assistance to individuals through a handbook or guide (United Kingdom).

Italy - In addition to the definition provided in the Civil Code,

⁴ ILO, *The employment relationship*, Report V(1), 95th Session 206, (Geneva:2005)

protection for workers in an employment relationship.

section 75 of Legislative Decree No. 276 of 2003 introduces a measure called “certification” with the aim of reducing labour disputes. It consists of a voluntary procedure, activated on the basis of a common written request by the parties to the employment contract, presented before the competent organs in order to certify the contractual nature of their employment relationship. The “act of certification” must mention explicitly the civil, administrative, social security or fiscal effects of the certification. Section 81(1) on consultation and assistance to the parties ensures clarity of the employment relationship status: “The organs of certification provide consultation and assistance to the contracting parties both as regards the conclusion of the employment contract and its content and with its modifications, in particular regarding rights and the exact categorization of employment contracts. “

Japan - Regarding the definition of “worker” two legislative definitions exist, one being broader than the other, thus demonstrating the need for clarity in policy instructions. On the one hand, Article 9 of the Labour Standards Law states “In this Law, “worker” shall mean one who is employed at an enterprise or place of business and receives wages therefrom, without regard to the kind of occupation.” And this meaning applies in the Minimum Wage Law, Occupational Safety and Health Law, Workers’ Accident Compensation Insurance Law and other laws related to the Labour Standards Law. On the other hand, the Trade Union Law provides in Article 3: “Workers’ under this Law shall be those persons who live on their wages, salaries or other remuneration assailable thereto, regardless of the kind of occupation.” The principal difference in the definitions of the laws is that the Labour Standards Law does not cover unemployed persons, while the Trade Union Law does.

Morocco - The Labour Code, 2004, specifically includes groups of workers that are often unprotected, such as salespersons and home workers.

Section 2. The provisions of the Labour Code apply also

- i) to workers whose enterprise manager puts them at the disposal of his or her clients in order to deliver any services requested;
- ii) to persons engaged to carry out sales-related activities in premises provided by the enterprise in a different location and under conditions set by the enterprise;
- iii) to home workers.

Section 6. ‘Wage earners/salaried workers’ include every person who is engaged to carry out a professional activity under the

direction of one or more employers in return for remuneration, whatever the nature and method of payment.

'Employer' includes every physical and moral person whether private or public which hires the services of one or more physical persons.

New Zealand - The Employment Relations Act, No. 24 of 2000 specifically includes one group of workers that is often unprotected, namely "home workers".

Section 6 (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 home worker; 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.

Section 6 (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.

Slovenia's Employment Contracts Act, 1 January 2003, provides clear guidance by requiring the parties to define their mutual rights.

Article 61 (Agreement Between the User and the Employer, Referral of the Worker).

(1) Before the worker starts working, the user must inform the employer about all conditions which have to be fulfilled by the worker for the provision of work, and shall submit to the employer the assessment of risk of injuries and health damages.

(2) Before the worker starts working with the user, the employer and the user shall conclude an agreement in writing in which they shall in greater detail define mutual rights and obligations as well as the rights and obligations of the worker and of the user.

(3) In accordance with the agreement between the employer and the user, when referred to work with the user, the worker must be informed in writing about the conditions of work with the user, as well as about the rights and obligations which are directly related to the provision of work.

Article 62 (Rights, Obligations and Responsibilities of the User and of the Worker).

(1) The worker must carry out the work pursuant to the user's instructions.

(2) In the period of the worker's work with the user, the user and

the worker must take into account the provisions of this Act, of collective agreements obligating the user, and/or of the user's general acts, with regard to those rights and obligations which are directly related to the performance of work.

(3) If the user violates the obligations pursuant to the previous paragraph, the worker shall be entitled to refuse to carry out the work.

(4) If the worker violates the obligations pursuant to subsection 1 of this Article, these violations shall be a possible justification for disciplinary proceedings or for the termination of the employment contract with the employer.

(5) The worker shall take the annual leave in accordance with the agreement between the employer and the user.

Two provisions in **South Africa's** Basic Conditions of Employment Act, 1997 permit the extension of conditions of employment to workers who fall outside the statutory definition of an employee – section 55(4)(k) allows sectoral determinations that set minimum wages and other minimum conditions for specific economic sectors to specify minimum conditions for persons other than employees; section 83 allows the Minister of Labour to deem persons who are not employees as employees for the purposes of any labour statute.

United Kingdom Manpower, a large temporary work agency, has an "Employees Handbook". This is a voluntary measure ensuring clarity about the employment relationship it has with its employees. At various places, the Handbook clarifies that people working for Manpower are its employees, even when they are assigned to client enterprises.

R 198 Paragraph 4:
National policy should at least include measures to:

*(c) ensure standards applicable to all forms of contractual arrangements, including those involving **multiple parties**, so that employed workers have the protection they are due;*

Multiple parties

Noting that labour law has always been faced with situations where contractual arrangements can have the effect of depriving workers of the protection they are due and noting that Recommendation No.198 does not affect Convention No.181 on private employment agencies, this section gives examples of approaches to liability in contractual arrangements involving more than two parties. In many countries, there are legislative provisions that lay down the principles of (i) equal treatment between employees of the end user & of the principal, and (ii) joint and several liability of the multiple parties.

In **African countries** where the "tâcheron" system is practised, the principal entrepreneur is required to keep a list of all the "tâcherons" with whom it has signed a contract. The labour codes

further regulate the joint liability of the principal entrepreneur with regard to the “tâcheron’s” obligations vis-à-vis his/her workers.

Benin Labour Code, No. 98-004 of 1998

Section 75. The “tâcheron” is a secondary entrepreneur (sous-entrepreneur) who him/herself recruits the labour force required for a job, and who signs a written contract with an entrepreneur for the execution of a given job or for the provision of certain services in return for a negotiated price. The contract must be submitted, in duplicate, to the Labour Inspector within 48 hours of being counter-signed by the entrepreneur.

Section 76 provides that when the work is performed within the premises or building site of the principal entrepreneur, the latter is entirely liable for workers' claims arising out of their employment in the event of the “tâcheron’s” insolvency. However, when the work is performed within premises or building sites that do not belong to the main entrepreneur, then the latter is liable only of the payment of the workers' wages.

Section 78. The entrepreneur must maintain a list of the “tâcherons” with whom he/she has signed contracts.

Gabon Labour Code – Act N°3/94 of 21 November 1994

Section 113. The “tâcheron” is a certified and independent master worker (maître ouvrier) or secondary entrepreneur, who signs a contract with an entrepreneur or with the head of a work site/job manager for the execution of a given job or for the provision of certain services, in return for a fee negotiated between the parties. The “tâcheronnat” contract must be in writing.

Section 114. The “tâcheron” is forbidden to sub-contract, in whole or in part, the contracts that he/she has entered into.

Section 116. In case of insolvency of the “tâcheron”, and in accordance with the contract signed with the principal entrepreneur or head of a work site/job manager, the co-signatory is jointly (solidairement) responsible for the obligations of the “tâcheron” as regards the workers and this applies up to the level of the amount due from the principal entrepreneur to the “tâcheron”. The workers who have a claim are entitled to lodge such claims directly against the principal entrepreneur or head of a work site/job manager without prejudice to any restitution claim that the latter themselves may make against the “tâcheron”.

In **Canada**, the Ontario Employment Standards Act, 2000 covers “associated or related activities or businesses [which] are or were carried on by or through an employer and one or more other persons”, deeming them to be one employer for the purpose of protection under the Act. This “related employer” provision is

common in labour relations legislation across Canada.

Tunisia's Labour Code, in section 409, clarifies the nature of the relationship between one special group of multiple parties, namely travelling salespersons working for a number of different enterprises. It lays down basic rules (such as who arranges the clientele, makes the appointments, pays the travel expenses) for determining whether the relationship is one of employment (contrat de louage de services).

United Kingdom Court of Appeal *Hawley v. Luminar Leisure Ltd. & Others* [2006] IRLR 817

Mr. Hawley was seriously injured when punched in the face by a doorman working for one of Luminar's clubs, but employed by a security services firm. The Court of Appeal held that Luminar was vicariously liable for the conduct of the doorman at their club since they had become his "temporary deemed employer". The facts showed that the club exercised detailed control not only over what the doormen did, but also how they were to do it. The club could well have employed and trained its own door staff but had chosen not to do so, and to use a contract of service with the security intermediary, partly as a device to get round employment laws which Luminar believed might inhibit their ability properly to control their clubs.

In **Uruguay**, the law No.18.099 stipulates that end users and subcontractors/intermediaries are jointly liable for the workers' protection and the payment of their social security contribution.

R 198 Paragraph 4:
National policy should at least include measures to:

*(...) (g) provide for appropriate and **adequate training** in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.*

Provide for appropriate and adequate training

Training - both initial and continuous - is clearly a good vehicle for sharing information on evolving aspects of the employment relationship and clarifying the current national practice in this area. Various countries undertake education and capacity-building for labour inspectors, arbitrators, judges and other labour administration officers.

Training is particularly relevant for labour administrations given that in many countries a weak labour administration leads to considerable delays in adapting and applying labour laws for the protection of workers. To overcome this, the **Argentinean** Government has worked on revamping the Ministry of Labour so that the labour inspectorate will be really effective in enforcing labour legislation.

Likewise, in **Italy**, the Minister of Labour issued a circular (No.

17/2006 of 14 June 2006) addressed to labour inspectorates giving guidelines on the uniform interpretation of work carried out in call centres under a project-based employment contract. Despite legislative interventions on this type of contract, there were often interpretative problems and disguised situations, which deprived workers having this type of contract of their rights. The circular explicitly aims to create clarity and fight abuses.

In **Japan**, administrative instructions, which interpret relevant laws, are given to labour inspectors and other labour administrators.

Training for mediators and arbitrators is also a good way of ensuring that there is correct enforcement of national laws on this issue.

Canada, one of the recommendations in Arthurs' Report of 2006 concerns the establishment of a permanent roster of full and part-time Hearing Officers to hear appeals from the decisions of labour inspectors in certain cases and to perform adjudicative functions now undertaken by Referees and Adjudicators. These Hearing Officers should possess knowledge of and experience in labour standards issues, labour law, industrial relations or related disciplines and be trained.

South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) regularly trains its Commissioners who conduct mediation and arbitration. Commissioners are required to undergo training when they commence to serve as a Commissioner as well as annual Continuing Professional Development.

A number of national institutions offer regular courses and seminars on topical issues for judges: the **Canadian** Institute for the Administration of Justice and the National Judicial Institute; the **Italian** High Council for Judges; the **Moroccan** National Institute of Judicial Studies (under an agreement signed with the ILO, International Training Centre, Turin). In addition, in Morocco, special courses for judicial attachés have been introduced in the framework of their professional training to be admitted as magistrates and specific training for judges on equality and non-discrimination has been undertaken with ILO support and bilateral technical cooperation.

Other persons responsible for dealing with the settlement of disputes and enforcement of employment laws and standards, such as Ombuds and Human Rights Commissioners, often benefit from training courses on employment rights. Following the recommendation of the Vienna Declaration and Programme of

Action, adopted by the World Conference on Human Rights in 1993, many countries have created a national human rights mechanism which individuals may use to file complaints regarding violations of human rights, including labour rights. For example, in Nepal, the Human Rights Commission Act, 2053 (1997) Section 9 deals with functions and duties of the HRC. Section 9 states:

(1) It shall be the primary responsibility of the Commission to protect and promote the human rights,

(2) In order to perform the responsibility mentioned in sub-section (1), the Commission may carry out the following functions:

...(i) Publicize and propagate human rights education among the various sections of society through various seminars, symposia, conferences and also build consciousness and awareness about the guarantees bestowed by law for the protection of human rights.

5. Special categories of workers to protect

Vulnerable groups (women, young/old, persons with disabilities, informal economy & migrants)

R 198 Paragraph 5:
Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

See also paragraphs 6, 7, 11(c), 21, 22

In areas of work where women predominate, such as domestic work, the lack of legal protection increases the vulnerability of workers who are already, in many social and cultural contexts, not appreciated as “real workers”. As they work in private households, their work is invisible. While many new labour laws no longer exclude domestic work from the basic labour protections, the specificity of their employment relationship is simply not addressed in most legislation. Their working conditions remain, in essence, unregulated, and this problem is frequently compounded for foreign domestic workers who may not be covered by the current labour laws in the countries where they work, or are unable to claim those rights if they are working without proper documentation. The examples below show how some countries have tried to protect such vulnerable groups.⁵

In **Canada**, women, visible minorities and disabled workers also receive significant protection through human rights legislation and in particular from provisions prohibiting discrimination based on age, gender, ethnic origin, disability, etc. While employers may respond by asserting, for example, that a particular qualification is a bona fide occupational requirement, they cannot do so without establishing that they have attempted to accommodate the disadvantaged worker to the point of undue hardship. This obligation is spelled out in many Canadian statutes, and has been given teeth by the Supreme Court of Canada in British Columbia

⁵ Blackett, A.: *Making domestic work visible: the case for special regulation*, Geneva, ILO, 1998.

(Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (1999) 3 S.C.R. 3, known as the Meiorin Case. Commenting on the need to resort to actual occupational requirements of the job, it considered that a female firefighter who failed a physical endurance test tailored for men could not be refused employment. This obligation to accommodate is now enforced by human rights commissions and tribunals, and by arbitrators who have imported it into the administration of collective agreements, with the approval of the Supreme Court of Canada.

In the **Netherlands**, on call workers are mostly **women**, working in shops, hotels, restaurants, hospitals, food factories, etc. They do the same work as normal employees but are not be treated like them: either they get no employment contract at all because they are free to refuse the call or they get a so called "zero-hour" contract which has the effect of a labour contract void of any content. After uncertainties in the 1990's, a legislative solution was found. Since January 1999, if the employment is regular and continuous, the burden of proof is reversed and it is for the employer to prove that the person is not an employee. Also, the law introduced a second presumption concerning the volume of work agreed upon in order to avoid abuse of the "zero-hour" contract: when an employment contract lasts for at least three months, the work agreed upon is presumed, in a given month, to be of a volume equal to the average amount of work carried out in the three preceding months.

In **Uruguay**, the law No. 18.065 protects **domestic workers**, for example regarding hours of work, payment of wages, severance pay, medical insurance and minimum age.

Zimbabwe's Labour Relations (Domestic Workers) Employment Regulations, 1992 amended 1993 not only provide a more precise definition of the terms defining various kinds of domestic work, but also specifically address aspects of that work relationship that require particular attention, such as housing policy (room and board), hours of work, minimum wages, maternity leave, annual leave and termination of employment.

In some countries the law makers differentiate clearly between two

⁶ International Labour Conference, 92nd Session, 2004: Report VI "Towards a fair deal for migrant workers in the global economy" (ILO, Geneva, 2004), para 137.

⁷ Daza, J.-L.: *Informal Economy, Undeclared Work and Labour Administration*, DIALOGUE Working Paper No.9, ILO, Geneva, June 2005.

⁸ ILO, *Social Protection and inclusion: experiences and policy issues*, Geneva, ILO STEP Programme, 2006.

often amalgamated categories of home workers, namely “domestic workers” and workers who work “at home”.

In **South Africa**, the Basic Conditions of Employment Act, 1997, defines “domestic worker” as an employee who performs domestic work in the home of his or her employer and includes a gardener, a driver of a motor vehicle and a person who takes care of children the aged, the sick, the frail or the disabled but does not include a farm worker. The Sectoral Determination made in terms of the Basic Conditions of Employment that sets minimum wages and conditions of employment for domestic workers applies to all domestic workers irrespective of whether they are engaged in terms of a contract of employment.

As for as migrant workers are concerned, it should be noted that the ILO’s Migration report of 2004 states: “Subcontracting of temporary and seasonal workers through labour brokers in many sectors has been at the expense of worker benefits and entitlements such as holidays, bargaining rights and social protection. The manner of recruitment and placement thus has far-reaching consequences for the working conditions and general treatment of **migrant workers**. Some may be forced to endure situations of virtual debt-bondage or near-slavery to pay off debts owed to recruiters and traffickers.”⁶

Research into the reach of labour administration into the **informal economy** notes that sub-standard working conditions can be a problem: “Despite the lack of a common definition, laws referring to the informal sector are numerous, although they tend to be descriptive rather than prescriptive in content or laws creating administrative organs or public entities to deal with some aspect of informality. Taking into account that informal productive units can coincide with what are often termed micro-enterprises, the difference sometimes established is based on whether these are subsistence activities or profit-making ventures. As regards conditions of work, it is clear that there is no regulation applicable to self-employed workers in matters such as wages, and as for those employed by others, real earnings can be below the legal minimum. Neither are aspects such as the working hours and rest periods regulated for independent workers in labour legislation, although they may be subject to laws on opening and closing times for commercial or industrial establishments, which do not come under the labour authorities but stem from other ministries or local authorities. For employees, working time and rest are regulated, but it is likely that their duration is not respected, either through ignorance or lack of control.”⁷

India - An interesting initiative for extending protection to this vulnerable group was promoted by SE Women's Association (SEWA), a labour union comprised in 2005 of almost 800,000 women engaged in the **informal economy**. Its goals are to extend basic social protection, such as health insurance, to its members who have no fixed employee/employer relationship and are therefore not covered by the protections of labour legislation.⁸

Senegal - the workers of the road **transport industry**, since 2004, have included social protection as one of the principal objectives of their trade union's bargaining platform because of the particular vulnerability of that group of workers. As a result, and with ILO support, the National Committee of Social Dialogue (CNDS in French) has set up an ad hoc commission on the extension of social protection which has adopted a priority plan of action covering, in particular, social security coverage for transport workers. Such action was needed because of the increase, in a context of a rapidly expanding offer of transport services, in both precarious employment situations and impoverishment of drivers. For a full description, see this website <http://www.ilo.org/public/english/protection/secsoc/step/activities/senegal/routiers.htm>

Uruguay, collective bargaining agreements in the **construction industry** includes special social and employment protection for workers in this sector. These workers are considered highly vulnerable and hence in need of special protection.

R 198 Paragraph 4:
*National policy should at least include measures to: (a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the **distinction between employed and self-employed workers***

R 198 Paragraph 8:
*National policy for protection of workers in an employment relationship should not interfere with **true civil***

6. Employment relationships and true civil and commercial relationships

Where there has been an attempt to disguise the employment relationship, there is a particular danger that workers will be deprived of the protections due to them, and trust in the legal system suffers if national policy is unable to address the difference between fraudulent practices and true civil and commercial business relationships. Also, adjusting to recent changes in work organisation, some European systems developed new concepts such as 'para-subordinate' or 'quasi-salaried' (Italy, Germany) to describe persons who are working outside the traditional framework of an employment relationship but are still in need of protection.

Argentina Labour Code, amended up to 1995

Section 62. Contract of employment. An individual contract of employment shall mean, whatever name it is given, the written or

and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

verbal contract under which a person is obliged to render services or do work for another person, being subordinate to or dependent on that person. Employment relationship means, no matter what its origin is, a person doing work in conditions of legal subordination and economic dependence. This doing work, just mentioned, and the contract produce the same effects. The existence of an employment relationship is the determining factor on which is based the obligation to pay the wage.

Section 63. For determining the existence of an employment relationship, or the parties to it, no account shall be taken of any similar measures or contracts, nor of the participation of intermediary persons like supposed employers, nor the fabricated creation and operation of a legal person as a supposed employer.

Chile Labour Code, 2001

Section 8.

The standards contained in this Code apply to independent workers only in the cases where the Code makes express reference to them.

In **Germany**, in both legal theory and practice, quasi-salaried workers (arbeitnehmerähnliche Personen) are considered as belonging to the self-employed category, and more precisely as forming a sub-category in need of greater protection than that provided to most self-employed persons. Some of the legal protections afforded to employees are extended to quasi-workers (holidays, social security pension benefits). The characteristics of this category of workers are set out in many legislative provisions, but there is no general definition nor can the following individual indicators (specific to Germany) be applied across the board:

(i) absence of economic independence; (ii) economic dependence (different from the personal dependence of subordinate employees); (iii) need for social protection (an indicator of economic dependence); (iv) work performed personally without the aid of subordinate employees; (v) work done mainly for one person or the worker relies on one single entity for more than half of his/her total income.

Italy - The Civil Code (section 1362) states the general rule that it is the will of the parties to the contract that shall prevail over the literal meaning of the words used. According to long-standing jurisprudence of the Supreme Court, the legal term used by the parties to the contract, where the object is a specific activity of work, does not bind the judge who is called upon to qualify the relationship (Cassazione Decision No. 6168 of 27 November 1974). The courts will examine the essential modalities of the work

rather than the language used (Cassazione Decision No. 9900 of 20 June 2003). In Italy, this includes the 'para-subordination' relationship, a category which has received increasing attention due to pension reform of 1995. The latter extended pension rules usually provided to subordinate employees also to self-employed. These workers are covered by a variety of legal norms. For pension benefits, the Pension Reform Act (No. 335 of 1995) establishes a special public pension fund for para-subordinate workers; for occupational accidents and diseases, the laws were extended to cover their rights to this benefit; and for tax purposes, para-subordinate workers' incomes are treated in the same way as employees' incomes.

Slovenia Employment Relations Act, 1 January 2003

Article 11 (Application of the General Rules of Civil Law)...

(2) If the elements of employment relationship as laid down in Articles 4 and 20 exist, work may not be carried out on the basis of civil law contracts except in cases laid down by law.

South Africa - Recent case law has reinforced the approach that, despite representation of a relationship as being a commercial one for tax purposes, if the facts show that in truth and in reality the relationship is that of employer/employee, the Court will decide that there was an employment relationship and that certain protections, such as during dismissal, are due. *Denel (Pty) Ltd v. Gerber* (2005) 26 *Industrial Law Journal* (SA) 1256 (Labour Appeal Court).

II. Determining the existence of an Employment Relationship

The following examples are indicative of laws and practices relevant to the determination of an employment relationship, and are not intended to be exhaustive. The first group of examples (*Practical methods*) covers methods that are commonly used these days to establish an employment relationship. The second group of examples (*Criteria for identifying an employment relationship*) illustrates specific indicators used in different national contexts.

R 198 Paragraph 10:
*Members should promote clear **methods** for guiding workers and employers as to the determination of the existence of an employment relationship*

A. Practical methods

1. Legal presumption

In all modern legal systems that use this method, it can come into play in two different ways: on the one hand, there may be a broad presumption that all relationships are employment relationships and a worker making a claim is not required to adduce evidence

R 198 Paragraph 11:

For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following: (...)

*(b) providing for a **legal presumption** that an employment relationship exists where one or more relevant indicators is present;*

proving the employment relationship (Netherlands); on the other hand, the law may specify one or several indicators that a claimant must prove in order for the presumption to be activated in the worker's favour. In both cases, it is up to the other party to prove that the relationship is of a different nature and that therefore protections are not due (South Africa, United Republic of Tanzania).

In **Chile**, section 8 of the Labour Code automatically presumes a contract of employment when an employee works under the subordination and dependence of another person and enjoys a fixed remuneration.

France Labour Code Article L.751-1

Agreements covering representatives, travelling salespersons or insurance brokers on the one hand, and their employers on the other hand, shall be deemed - notwithstanding any express language in the contract or its silence on this issue - to be work contracts (contrats de louage de services) when the representatives, travelling salespersons or insurance brokers: (1) work for one or more employers, (2) work exclusively and continually in the area of representation, (3) do not carry out any commercial activity on their own account, (4) are bound to their employers by commitments concerning the nature of the services rendered or of the merchandise offered for sale or to be purchased, the region where they must exercise their professional activity, the categories of clients whom they must contact or the rate of remuneration.

In **the Netherlands**, two legal presumptions were included in the Flexibility and Security Act adopted on 14 May 1998 with a view to strengthening the legal status of flexi-workers. If an employee has worked on a regular basis for his or her employer for a period of three months (weekly, or at least 20 hours a month), then the law automatically presumes a contract of employment. If there is no specific agreement on the hours to be worked, the number of hours worked per month over the three previous months are taken to be the number of hours stipulated in the contract of employment. If the employer disagrees, it is at liberty to produce evidence to the contrary.

United Republic of Tanzania - Employment and Labour Relations Act, 2004

Section 15 (1)..., an employer shall supply an employee, when the employee commences employment, with the following particulars in writing, namely -

(a) name, age, permanent address and sex of the employee; (b) place of recruitment; (c) job description; (d) date of commencement ; (e) form and duration of the contract; (f) place of work; (g) hours of work; (h) remuneration, the method of its calculation, and details of any benefits or payments in kind, and (i) any other prescribed matter.

...

(5) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer.

(7) The provisions of this section shall not apply to an employee who works less than 6 days in a month for an employer.

R 198 Paragraph 11:

For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following: (...)

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

2. Deeming designated groups of workers (e.g. by sector) to be either employed or self-employed

This can be done in several ways: for example, (i) the law can give the Minister a general discretion, or (ii) the statute can specifically refer to a named group. The following examples apply to franchising etc.

France (Cour de Cassation Ruling No. 5371 of 19 December 2000)
The Supreme Court 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. In addition, in Rulings Nos. 5034, 35 and 36, of 4 December 2001, 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 according to which the provisions of the Labour Code were 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.

Malawi draft Employment (Amendment) Bill, 2006:

Section 78 (1) The Minister may, by notice in the deemed Gazette, deem any category of persons specified in the notice to be employees for purposes of the whole or any Part of this Act, or of any other Act or of any other written law regulating employment: Provided that the Minister shall consult the Tripartite Labour Advisory Council before he deems any category of persons to be employees.

(2) Before the Minister issues a notice under subsection (1), the Minister shall –

- (a) publish a draft of the proposed notice in the Gazette; and
- (b) invite interested persons to submit written representations on the proposed notice within a reasonable period.

In **Morocco**, section 8 of the Labour Code extends its scope of application to home workers and provides guidance as to what constitute essential elements of such employment.

Section 8. ‘Home workers’ under the present Code are considered to be wage earners/salaried workers, without there being a need to assess whether there is any legal subordination, any direct and habitual control by the employer, whether the place where they work and the tools they use belong to them or not, whether they supply with the work all or part of the basic materials used when these materials are sold to them by the person giving the work who subsequently purchases back the finished object, or are given to them by a supplier who is determined by the person giving the work and from whom the wage earners must get supplies, or whether they procure any additional materials themselves:

if they satisfy the following two conditions :

- i) they are responsible, either directly or through an intermediary, for accomplishing work for one or more enterprises in return for remuneration; and
- ii) they work alone or with an assistant or with their spouse and non-salaried children.

New Zealand Employment Relations Act, No. 24 of 2000

Section 5.

‘homeworker’(a) means a person who is engaged, employed, or contracted by any other person (in the course of that other person’s

trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it); and (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser.

Spain - Workers' Charter, 1995 recompilation

Section 2(1) (d) & (e) and Royal Decree 1435/1985 regulating the special employment relationship of professional sportswomen and men and performing artists.

1. The following are considered to be employment relationships of a special character: (...)

- d) professional sportswomen and men
- e) performing artists.

3. Employer's obligation to inform of employment conditions

Another practical method is to require employers to give information about the terms and conditions of employment.

Canada - The 2006 report on "Fairness at Work" emphasizes that one aspect of enforcing labour standards protections is to ensure that workers know what category of worker they fall into, and therefore what rights they have under the relevant legislation. It therefore calls for legislation requiring employers to notify workers of their status and stipulating that if no such notice is provided, the worker should be presumed to be an employee. The Report recommends that legislation also provide that it would be a violation of the Code for an employer to exercise coercion or use misrepresentation or undue influence in order to obtain a worker's consent to a particular status.

European Union Council Directive 91/533/EEC of 14 October 1991

Article 2(1) Obligation to provide information.

An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as "the employee", of the essential aspects of the contract or employment relationship.

Japan Labour Standards Law

Article 15: In concluding a labour contract, the employer shall clearly state the wages, working hours and other working conditions to the worker. In this case, matters concerning wages and working hours and other matters stipulated by Ordinance of the Ministry of Health, Labour & Welfare shall be clearly stated in

the manner prescribed by Ordinance of the Ministry of Health, Labour & Welfare.

In **Uruguay**, the benefit and Employment Act (2006) stipulates that the employer must inform the workers of their employment conditions.

4. Primacy of the facts

R 198 Paragraph 9: *For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.*

In the vast majority of legal systems, the primacy of facts - the substance of the relationship - trumps the form of a contract.

In **Canada**, the federal Court of Appeal, in *Wiebe Door Services Ltd. V. Canada (Minister of National Revenue)* (1986) 3 F.C. 553, looked to the factual situation of the various company workers (door installers and repairers) in deciding the company's liability for their axes, workers' compensation, unemployment insurance and Canada Pension Plan contributions. While noting that the company ran its business using the services of those persons on the specific understanding that the latter would be running their own businesses and be therefore responsible for their own taxes and other contributions, the Court stated "Such an agreement is not of itself determinative of the relationship between the parties, and a court must carefully examine the facts in order to come to its own conclusions."

The **Japanese** courts have judged that there exists an employment relationship 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 an effective control over the work and the payment of wages, the court determined an employment relationship. This interpretation principle applies also to the Work-for-Contract relations as well as to the worker dispatching-type relations (*SAGA TV Case: Fukuoka High Court Judgment 7 July 1983, Hanrei Jiho No.1084, p.126; SEN-EI Case: Saga District Court Takeo Branch Judgment 28 March 1997, Rodo Hanrei No.719, p.38*).

South Africa - The Labour Appeals Court in *Denel (Pty) Ltd v. Gerber* (2005) 9 BLLR 849 stated "... that the law is that whether or not a person is or was an employee of another is a question that must be decided on the basis of the realities – on the basis of substance and not form or labels – at least not form or labels alone."

United Kingdom Court of Appeal *Cable & Wireless PLC v. Muscat* [2006] IRLR 355

Confirming earlier case law in favour of implying a contract of employment as a matter of necessity (*Dacas v. Brook Street Bureau (UK) Ltd.* [2004] IRLR 359), the Court of Appeal enforced a mutuality test having two elements for deciding who is an employee in situations where there is a chain of relationships and triangular relationships. The two elements are, on the one hand, an obligation to provide work and, on the other hand, an obligation to perform it coupled with control; it does not matter whether the arrangements for paying are made directly or indirectly (as in the facts of this case, through an intermediary firm that paid invoices submitted to it). An implied contract did exist between the worker and the end-user, because the Cable & Wireless company was obliged to provide Mr. Muscat with work and Mr. Muscat was obliged attend the premises and do the work subject to the control of the company's management.

Uruguay - In TAT 2°, Sent. N°387, 31.10.2002, Tosi, López (r), Echeveste, the Court ruled that in labour disputes, the primacy of the facts trump the form of a contract.

B. Criteria for identifying an employment relationship

R 198 Paragraph 12:
*For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, **subordination or dependence.***

Criteria may vary and those listed below are not intended to be exhaustive. The weight given to criteria may also vary depending on their applicability or appropriateness to the particular type of employment. However, the most important criteria include: control, integration, dependence, and financial/risk.

1. Subordination or dependence

Situations vary across countries. In some countries, these two terms are co-extensive. In others, they may be differentiated, with control characterizing subordination, while dependence is characterized by *economic* dependence, whether or not control exists over the method of performance of the work. Today, the subordination criterion has proven to be insufficient as a principal benchmark to determine a genuine employment relationship as distinct from commercial relationships. Alain Supiot's Report cites two reasons for this: first, in a legal sense, it does not capture the situation of professional workers who enjoy an objective independence in the exercise of their work because of their high-level skills. For such workers the employer does not direct the core of the work but only the parameters of its execution. Secondly, from a social point of view, the criterion leads to excluding from the scope of labour law workers who are nonetheless objectively or

subjectively in need of protection.⁹

(a) Subordination

Argentina - Labour Code, amended up to 1995

Section 64. Legal subordination involves the employer, or its representative, exercising or being capable of exercising direction over the carrying out of the work.

Italy articles 2094 and 2222 of the Civil Code define the criteria of subordination and introduce the distinction between subordination and autonomous work.

Japan - In determining the existence of an employment relationship, the courts have placed stronger emphasis on the subordination element rather than the dependence element.

(b) Dependence

Argentina - Labour Code, amended up to 1995

Section 65. Economic dependence exists in any of the following cases:

- (1) when the amounts received by the natural person who provides the service or carries out the work are the only and main source of that person's income.
- (2) when the amounts referred to in the above subsection come directly or indirectly from a person or company, or as a result of the activity undertaken.
- (3) when the natural person who provides the service or carries out the work enjoys no economic autonomy, and is linked economically to the cycle of activity that is run by the person or company that could be considered to be the employer.

In case of doubt as to the existence of an employment relationship, the proof that there is an economic dependence will determine that the relationship shall be qualified/recognized as an employment relationship.

Canada - A category called "dependent worker" has been included in labour relations legislation to ensure protection for workers who do not exhibit the traditional indicia of employment status, but are nevertheless economically dependent on the employer, and are more like employees than independent contractors. Thus, the Ontario Labour Relations Act specifically deems "dependent contractors" to be "employees" and defines dependent contractors as: "A person, whether or not employed under a contract of

⁹ Supiot, A.: *Critique du droit du travail*, Presses Universitaires de France, 1994, page 165.

employment and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.”

In **British Columbia**, the Court of Appeal in *Old Dutch Foods Ltd. v. Teamsters Local Union No. 213* (2006) B.C.J. No. 3127, considered the statutory definition of “dependent contractor” (identical to Ontario’s, above) as establishing a two-part test for dependent contractor status. The first part is whether an Old Dutch snack food distributor “performs work or services for [Old Dutch] for compensation or reward...”. The second part is whether the distributors are economically dependent on Old Dutch. The Court agreed with the Labour Relations Board that Old Dutch’s control over the snack food product prices to both the distributors and the retailers in this complex inter-relationships between Old Dutch, the distributors and retailers was sufficient to support the conclusion that a relationship of work for compensation existed: compensation was paid by Old Dutch, albeit indirectly. The teamsters therefore had been rightly certified as the bargaining agent for the distributors

In **Italy**, an employment relationship is the one in which the obligation to work that is incumbent on one party, the worker/employee, has its counterpart in the obligation that is incumbent on the other party, the employer, to remunerate this work. In addition to these principal obligations there are ancillary duties with corresponding rights laid down by law, individual contract and collective agreement (for example, duty to obey, loyalty, annual holidays, rest periods, trade union rights, etc.).

R 198 paragraph 13:

Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

- (a) the fact that the

2. Control of the work and instructions

One of the principal indicators of subordination is control, since the primary “consideration” for which employers bargain is the right of command, the power to direct the worker to suit the changing needs of the labor process. Key considerations are: direction of the work, hiring, discipline, training, evaluation, etc. Control 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.

Burkina Faso - Section 1 of the 1992 Labour Code provides that work done under an employment contract is performed under 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;

employer's direction and/or authority.

Canada - perhaps the most frequently cited "test" of who is an "employee" in Canadian employment jurisprudence was first articulated by Lord Wright in a Privy Council decision in *Montreal v. Montreal Locomotive Works Ltd. et al.*, [1937] 1 D.L.R. 161 at p. 169 (P.C.), where he stated: "In earlier cases, a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.... In many cases, the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties."

Slovenia - Employment Relationship Act, 1 January 2003
Section 4 (Definition of Employment Relationship).

(1) An employment relationship is a relationship between the worker and the employer, whereby the worker is voluntarily included in the employer's organised working process, in which he in return for remuneration continuously carries out work in person according to the instructions and under the control of the employer.

South Africa - Code of Good Practice: Who is an Employee, 2006
39. An employee is subjected to the employer's right of control and supervision while an independent contractor is notionally on a footing of equality with the employer and is bound to produce in terms of the contract. The right of control by the employer includes the right to determine what work the employee will do and how the employee will perform that work. It can be seen in an employer's right to instruct or direct an employee to do certain things and then to supervise how those things are done.

40. The employer's right of control is likely to remain, in most cases, a very significant indicator of an employment relationship. The greater the degree of supervision and control to be exercised, the greater the responsibility that the relationship is one of employment. The right of control may be present even where it is not exercised. The fact that an employer does not exercise the right to control and allows an employee to work largely or entirely unsupervised, does not alter the nature of the relationship.

3. Integration of the worker in the enterprise

In new forms of work organisation, there is less and less control, but more and more integration. French case law demonstrates this when it brings out the importance of 'integration' in determining the existence of an employment relationship. In a number of countries (France, South Africa & the United Republic of Tanzania) the notion of integration is being used more and more as a determining indicator of the existence of an employment relationship.

Portugal - Labour Code, No. 99 of 2003

Section 12 Presumption. It is always presumed that the parties entered into an employment contract when all of the following indicators are present: (a) the worker is part of the organisational structure of the beneficiary's activity and performs a service under the latter's guidance...

South Africa - Code of Good Practice: Who is an Employee, 2006

18. The presumption comes into operation if the applicant establishes that one of the following seven factors is present –

(c) "in the case of a person who works for an organisation, the person forms part of that organisation". This factor may apply in respect of any employer that constitutes a corporate entity. It does not apply to individuals employing, for instance, domestic workers. The factor will be present if the applicant's services form an integrated part of the employer's organisation or operations. A person who works for or supplies services to an employer as part of conducting their own business does not form part of the employer's organisation. Factors indicating that a person operates their own business are that they bear risks such as bad workmanship, poor performance, price hikes and time over-runs. In the case of employment, an employer will typically bear these types of risks.

In the **United Kingdom**, the concept of "integration into the organizational structure" is vague. Although there were a few court decisions in the 1950s, like *Stevenson Jordon & Harrison Ltd v. MacDonald & Evans* [1952] 1 TLR 101(CA) 111 and *Bank voor Handel en Scheepvaart N.V. v. Slatford* [1953] 1 QB 248(CA) 295, which used this criterion, it was apparently not followed in the following decades. See, for instance, *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1967] 2 QB 497, 524.

However, due to the diversification of employment relations, lending itself to a difficulty in determining the existence of control by

an employer as to time, place and means, the concept of “integration into the organizational structure” is given more attention in many countries.

4. Work performed solely or mainly for another’s benefit

A key principle in determining the economic reality of a contractual relationship is whether or not the worker is limited exclusively to providing services to the principal.

Ireland - The Denny case sets an important legal precedent in this area. Denny, a food processing company, signed contracts of employment with a number of shop demonstrators who were entered on a panel of demonstrators, so that when a store requested a demonstrator, a member of the panel was contacted by the company to do the demonstration. The demonstrator submitted an invoice, which was signed by the store manager, was paid at a daily rate and received a mileage allowance, but was not eligible for the pension scheme or to join a trade union. One such worker’s annual contract was renewed several times (working an average of 28 hours a week for 48 to 50 weeks a year; giving some 50 demonstrations), until the contract for 1993 stated that she was an independent worker and as such was responsible for her own tax affairs. 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. (Supreme Court: *Henry Denny & Sons Ltd., trading as Kerry Foods v. The Minister for Social Welfare* [1998], 1 IR 34).

South Africa - Code of Good Practice: Who is an employee, 2006
15. Persons are considered to be employees, if they demonstrate that (a) they work for or render services to the person or entity cited in the proceedings as their employer; and (b) any one of the seven listed factors is present in their relationship with that person or entity. These factors are: i) control of the work; ii) control over the hours of work; iii) integration of the worker; iv) hours of work for the same person over the last three months; v) economic dependence; vi) provision of tools or work equipment and vii) **work performed**

solely for one person.

5. Carried out personally by the worker

In determining whether a worker is an “employee” or an “independent contractor”, it may weigh heavily in the balance if the worker does none or substantially little of the work him or herself. If the worker can offer a substitute to perform the work then the individual is usually not a worker. The subdelegation of some of the work in question should not be taken as conclusive of independent contractor status, however. In Canada, some store “owners” operating under franchise agreements have been held to be employees of the franchisor even though they are allowed to hire their own employees to help run the store.

Chile - Labour Code

Article 3 (b) A worker [is] a person under a contract of employment who provides personal intellectual or manual services under dependence and subordination.

Italy - Civil Code

As mentioned above, article 2094 states that a subordinate worker is someone who obliges him/herself in return for remuneration to collaborate with the enterprise, supplying his/her own intellectual or manual work.

Vietnam - Labour Code 1994 as amended to 2002

Article 30 Employment Contract

1. A labour contract shall be entered into directly between the employee and the employer (...)

4. The tasks stipulated in the labour contract must be carried out directly by the person who has entered into such contract, and the transfer of such tasks to another person without the approval of the employer is prohibited.

6. Carried out within specific hours or at an agreed place

A central aspect of the “control” bargained for in the employee-employer relationship is the employer’s right to determine when and where work is carried out, rather than simply the manner in which the job is done.

European Framework Agreement on Telework of 16 July 2002

This voluntary agreement aims at establishing a general framework at the European level to be implemented by the members of the signatory parties (European Trade Union Confederation, UNICE/UEAPNE and CEEP) in accordance with the national

procedures and practices specific to management and labour...

Clause 2. Telework is a form of organizing and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis. This agreement covers teleworkers. A teleworker is any person carrying out telework as defined above. Clause 3. 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. A worker refusal to opt for telework is not, as such, a reason for terminating the employment relationship or changing the terms and conditions of employment of that worker.

Slovakia - Labour Code, 2002

Section 43 Employment Contract.

(1) In an employment contract, the employer shall be obliged to stipulate with the employee the following substantial items:

- a) type of work for which the employee has been engaged (description of work activities),
- b) place of work performance (municipality and organisational unit, or place otherwise determined),
- c) day of work take-up,
- d) wage conditions, unless agreed in collective agreement...

South Africa - Labour Relations Act, 1995 as amended 2000

Section 200A.

(1) Unless the contrary is proved, a person who works for, or provides services to, any other person is presumed to be an employee, if any one or more of the following factors are present...
(b) the person's hours of work are subject to the control or direction of another person.

7. Having a particular duration and continuity

In the context of increasing casualisation, the Recommendation makes mention of continuity as an indicator of the existence of an employment relationship. However, it should be noted that the model of work in "atypical" relationships is "task" based, rather than "time" based.

Chile - Labour Code, 2001

Since the 2001 reform of section 8 of the Labour Code, home work which is "neither discontinuous nor sporadic" is presumed to be employment.

El Salvador - Labour Code, 1972 as amended up to 1995

Section 20. An employment relationship is presumed to exist if it is proven that the worker performed services for more than 2 consecutive days or if there is evidence of subordination.

South Africa - Under the Labour Relations Act, 1995, there is no minimum duration e.g. casual workers are employees.

8. Requires worker's availability

A requirement that a worker be available may evidence employment status as much as the actual performance of work itself.

Singapore - Employment Act, 1996

Section 2: "hours of work" means the time during which an employee is at the disposal of the employer and is not free to dispose of his/her own time and movements exclusive of any intervals allowed for rest and meals.

Slovakia - Labour Code, 2002 - Section 96 Work stand-by

(1) Work on stand-by concerns an employer who, in justified cases, in order to secure necessary tasks, charges an employee or agrees with him/her to keep for a determined time to a determined place and be ready for work performance outside the scope of the timetable of work shifts and beyond the determined weekly working time arising from the predetermined working time distribution.

(2) An employer may charge work stand-by up to the maximum scope of 8 hours per week or 36 hours per month, and 100 hours per calendar year. Work stand-by in excess of such scope shall only be admissible upon agreement with the employee.

(3) An employee shall be entitled to compensation for a period of work stand-by in the amount of...

Uruguay - Article 6 of Legislative Decree of 1957

Is computed as hours of work, the time during which an employee remains at the disposal of the employer

9. Provision of tools/materials by the person requesting the work

The ownership of tools and equipment must not be accorded decisive weight in and of itself since many employees own their own tools. However, usually it suggests independent contractor status if the worker personally makes a substantial capital investment, such as purchasing a vehicle of his or her own.

Finland - Employment Contracts Act, No. 55 of 2001

Section 1 - Scope of application.

This Act applies to contracts (employment contract) entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer's direction and supervision in return for pay or some other remuneration...Application of the Act is not prevented merely by the fact that the work is performed at the employee's home or in a place chosen by the employee, or by the fact that the work is performed using the employee's implements or machinery.

Japan - According to the 1985 report of the Government-instituted study group, an employment relationship is determined initially by two factors: existence of a 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 machineries, which are considerably expensive, such work weakens the worker's position as an employee and attributes a nature of self-employment, in which a work is performed by a person at his/her own calculation and risk.

South Africa - Code of Good Practice: Who is an Employee, 2006
18. Among other indicators, an employment relationship exists if the [employer" retains the right to choose which tools, staff, raw materials, routines, patents or technology are used.].

R 198 paragraph 13:

Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include: (...)

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source

10. Periodic payments to the worker

It will point towards "employee" status if the individual receives regular, periodic payment from the principal, rather than claiming payment through invoices or at the end of a contract for specified services.

Italy - Constitution

Article 36. Workers have the right to remuneration proportionate to the quantity and the quality of their work and, in any case, sufficient to guarantee them and their family a free and dignified life.

In addition, case law provides that if the employee is paid periodically, this constitutes an indication that an employment relationship exists.

United States - Inland Revenue Service 20 Rule Test for establishing an employment relationship

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.

Rule 12. [The person is an employee and not an independent contractor if she/he] is usually paid for work by the hour, week, or month. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earnings tends to indicate the existence of an employer-employee relationship.

<http://www.wm.edu/grants/HANDBOOK/irs20ruletest.htm>

11. This remuneration being sole or principal source of income

If a self-styled “independent contractor” is legally entitled to sell his or her services to the world at large, but in practice works entirely or substantially for one employer, this suggests that the individual is really an employee. Thus, the fact that a person works for more than one employer does not necessarily indicate that he or she is an independent contractor rather than an employee.

Please see examples furnished above, under “Economic dependence”.

Portugal - Labour Code

Sections 10 and 13 provide 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, the Code 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. 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.

Panama - Labour Code amended up to 1995

Section 65 – Employment relation - proof

There is deemed to be economic dependency where

- (1) the sums received by the worker constitute his or her only or main source of income,
- (2) where such sums are paid by a person or enterprise as a result of the worker’s activity, and
- (3) 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.

As the employment relationship is basically judged in **Japan** by the degree of control, economic dependence is not given a special status. This criterion is useful in ascertaining employment relationship for a self-employed worker working exclusively for a single undertaking, but it may entail a risk of depriving his/her rights working for multiple undertakings.

12. Payment in kind

Italy - Civil Code

Article 2099 –remuneration. The remuneration of workers can be established on the basis of time or performance and it shall be paid over according to the modalities and within the terms in use at the place where the work is carried out. In the absence of an agreement between the parties, the remuneration shall be determined by the judges taking into consideration, if applicable, the opinion of professional organizations. The worker may be remunerated in whole or in part with participation in the results or in kind.

In a large number of **Latin American** countries, Labour Ministers, when setting of wages in certain sectors, may at the same time allow a percentage to be paid in kind.

South Africa - Code of Practice - Who is an employee, 2006

46. Likewise, the fact that the person is a member of the same medical aid or pension scheme as other employees of the employer is an indication that they are an employee. Other factors which may be indicative of an employment relationship are - (a) the inclusion in a contract of payments in kind for items such as food, lodging.

In other southern African countries, too, remuneration may include payment in kind (e.g. farm workers may receive accommodation as part of the wage).

13. Recognition of entitlements (e.g. weekly rest & annual leave)

In general terms, where a contract provides for workers to enjoy weekly rest or leave, they would be considered to be employees.

South Africa - Code of Practice - Who is an employee, 2006

46. Likewise [...] other factors which may be indicative of an employment relationship are - (b) the inclusion in a contract of provision for weekly rest periods and annual leave will usually be

consistent with an employment relationship...

14. Travel payment by the person requesting the work

Equally, where the contract provides for workers to be reimbursed for travel expenses they are likely to be workers.

South Africa - Code of Practice - Who is an employee, 2006

46. Likewise [...] other factors which may be indicative of an employment relationship are - (a) the inclusion in a contract of payments in kind for items such ... transport...

15. Absence of financial risk for the worker

Another aspect of being integrated into the workforce is that the individual does not bear direct financial consequence if the employer's business becomes less profitable. Conversely, they will also not necessarily enjoy the benefits if the business is successful. A worker's exposure to chance of profit and risk of loss may be a strong indicator of his or her employee status. However, incentive structures such as commissions or bonus pay should not be viewed as indicative of financial risk. Rather, the question is whether the worker's gains or losses are dependent on something other than his or her own work effort.

Latin American jurisprudence refers to this as an indication of the existence of an employment relationship.

Canada - The Manitoba Court of Appeal, in *Imperial Taxi Brandon (1983) Ltd. v. Hutchison (1987) M.J. No. 551*, was faced with the issue of whether or not a cab-driver was entitled to the minimum wage, overtime, vacation and other protections under the Manitoba legislation. The driver did not receive wages directly from the company and remitted a portion of the fares periodically to the company by way of rental for the use of the car; the company shouldered the financial risk because it owned the vehicle and operated a calls system in which the drivers were expected to participate. The Court decided that there was an employment relationship.

Ireland - As mentioned above, the Code of practice for determining employment or self-employment status of individuals of 2001 states:

Employees

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

Self-employed

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

- ...
- 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;
- ...

- ...
- 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;
- provides his or her own insurance cover;
- ...

III. Adopting measures with a view to ensuring compliance

The Recommendation proposes that the competent authority adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship, for example, through dispute settlement machinery, labour inspection services and their collaboration with the social security administration and the tax authorities.

R 198 Paragraph 14:
The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

1. Appropriate dispute resolution mechanisms: inexpensive, speedy, fair and efficient procedures

The problem of non compliance requires the establishment of efficient labour dispute settlement machinery. ILO research shows that 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. The ILO DIALOGUE Branch has a full programme of services for establishing, training, up-grading and modernizing these mechanisms whether they be administrative or adjudicatory.

Cameroon - Labour Code, No. 92-007 of 1992 - Section 138 -

R 198 Paragraph 4:
National policy should at least include measures to: (e)
provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship

settlement of individual disputes.

(1) The proceedings for the settlement of individual disputes relating to employment, both in first instance and on appeal, shall be free of charge.

(2) Any decisions and documents produced shall be registered duty-free and all procedural costs shall be treated on the same footing as costs in criminal proceedings in respect of their payment, charging, settlement and collection.

Canada - Labour disputes arising out of collective agreements in unionized workplaces are settled through binding arbitration. Timelines for bringing about a grievance and its adjudication are governed by individual collective agreements and provincial labour relations codes. A number of codes, such as the Ontario Labour Relations Act, also provide for the option of expedited arbitration, with a hearing to be scheduled within 21 days. With regard to improving the efficient adjudication of employment standards complaints, the 2006 "Fairness at work" report recommends the appointment of a permanent panel of full and part-time Hearing Officers to deal with non-payment of wages and unjust dismissal cases. The Hearing Officers would be deployed on the 'cab-rank' principle: as soon as a case is ready for adjudication, it should be assigned to the first available Hearing Officer. Moreover, it should be possible to develop guidelines for processing cases through the successive stages of the system on a fixed and compressed schedule. This would help resolve another difficulty that afflicts the present system: the non-availability of counsel. Armed with guidelines and fixed schedules for the proceedings, Hearing Officers would be able to insist that lawyers make themselves available for proceedings. All of these innovations should ensure that cases are heard and decided much more expeditiously.

New Zealand - Employment Relations Act, No. 24 of 2000
Section 187(1)(f) gives the Employment Court exclusive jurisdiction to hear and determine any question about whether a person is an employee within the meaning of the Act or a worker/employee within the meaning of any of the other Acts under which labour inspectors have powers. Higher Courts are also directed to follow the overall message of the new law. Section 216 outlines the Court of Appeal's obligation to have regard to the special jurisdiction of the Employment Court when it determines an appeal under certain sections, and states that it "must have regard to...-(b) the object of this Act and the objects of the relevant Parts of this Act."
Section 189(1). In all matters before it, the Employment Court has, for the purpose of supporting successful employment relationships and promoting good faith behavior, jurisdiction to determine them

in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA) was established for a number of social dialogue aims: to conciliate and arbitrate disputes including disputes over who is an employee and therefore covered by the labour legislation, to facilitate the establishment of various workplace dialogue fora like bargaining councils, to compile & disseminate statistics on workplace relations, to supervise ballots for trade unions and employers' organizations and to provide training on collective bargaining and disputes prevention and resolution. Since its creation in 1996, the CCMA has seen its workload increase from 14,500 cases to over 125,000 cases in 2005-06. Over 75% of cases are settled by conciliation (latest data show that 52.6% of cases are successfully conciliated) or withdrawn – the rest being referred to the Labour Court. Conciliation and arbitration systems along these lines have also been established in Botswana, Lesotho, Swaziland and United Republic of Tanzania and are to be established in Namibia and Mozambique.

R 198 Paragraph 15:

*The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through **labour inspection services** and their collaboration with the social security administration and the tax authorities.*

2. Role of labour inspection

Currently in a number of IMEC countries, such as **Canada** and several **Latin American** countries, the powers and responsibilities of inspectors are not clearly defined, are insufficient for the tasks at hand and, in certain respects, are encumbered by inappropriate procedural arrangements. These problems lead to a dissipation of inspectors' time and energies, resulting in their inability to pursue questionable cases that might, in some circumstances, reveal larger problems that ought to be addressed by new regulations or statutory amendments. In Canada, recent data show that federal labour inspectors devote some 87% of their time to reactive functions such as responding to complaints, and as a result conduct few proactive inspections or workplace audits, other than those provoked by complaints. Very little of their time is devoted to educational and outreach activities. Instead of concentrating on processing workers' complaints, he observes, it would be more effective for inspectors to take the initiative by randomly auditing sectors or enterprises that exhibit a profile of non-compliance, or by making a concerted effort to enforce particular provisions of the Labour Code that seem to be violated with unusual frequency. If educational functions were primarily conducted by a specialized staff, inspectors would have more time to give to enforcement

activities. Conversely, inspectors might retain their present responsibilities but change the balance of their work in order to achieve better overall outcomes. The Arthurs Report therefore recommends that, instead of concentrating on processing workers' complaints it would be more effective for inspectors to take the initiative by randomly auditing sectors or enterprises that exhibit a profile of non-compliance, or by making a concerted effort to enforce particular provisions of the Labour Code that seem to be violated with unusual frequency. If educational functions were primarily conducted by a specialized staff, inspectors would have more time to give to enforcement activities. Conversely, inspectors might retain their present responsibilities but change the balance of their work in order to achieve better overall outcomes.

R. 198 Paragraph 16:
*national labour
administrations should
monitor enforcement
in sectors with a high
proportion of women*

3. Enforcement in sectors with a high proportion of women

In **Canada**, the mandate of the federal Pay Equity Commission is to discourage wage discrimination or any policy or practice that may lead to wage discrimination on the ground of sex by investigating pay equity complaints in a timely, thorough, professional, neutral, and unbiased manner. Pay equity is governed by the Canadian *Human Rights Act* and the Equal Wages Guidelines. Similarly, the purpose of the *Pay Equity Act* in Ontario is to "redress systemic gender discrimination in compensation for work performed by employees in female job classes."

R 198 Paragraph 17:
*Members should
develop, as part of the
national policy referred
to in this
Recommendation,
effective measures
aimed at removing
incentives to disguise
an employment
relationship.*

4. Disincentives to disguising an employment relationship

Slovenia - Employment Relations Act, 1 January 2003

Article 231 (1) A fine of SIT 300,000 may be imposed on the employer/legal person on the spot if:

1. he/she has not delivered a photocopy of the insurance registration to the worker within 15 days from the beginning of the employment (Paragraph 2 of Article 9);
2. the worker carries out the work on the basis of a civil law contract contrary to Paragraph 2 of Article 11 of this Act...

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. These powers have not, as yet, been used.

5. Burden of proof

Singapore - Employment Act, 1996 - Section 131. Onus of proof. In all proceedings under Part XV, the onus of proving that he is not the employer or the person whose duty it is under this Act or under any regulations made thereunder to do or abstain from doing anything shall be on the person who alleges that he is not the employer or other person, as the case may be.

In **South Africa**, the Labour Relations Act, the presumption in section 200A and section 83A of the Basic Conditions of Employment Act has the effect of shifting to the employer the burden of proving that there is not an employment relationship.

R. 198 Paragraph 18:
*As part of the national policy, Members should promote **the role of collective bargaining and social dialogue** as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.*

IV. Implementation and Monitoring

To better assess and address the various issues relating to the scope of the employment relationship, governments should collect statistical data and undertake research and periodic reviews of changes in the structure and patterns of work at national and sectoral levels. 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. Social dialogue is also referred to above under “National Policy, Point. 3”.

Belgium - The National Labour Council, created in 1952, is a permanent tripartite body set up to:
advise a Minister or the Houses of Parliament on its own initiative or at the request of these authorities, on general social issues concerning employers and workers;
issue opinions on jurisdictional disputes between joint committees;
conclude collective labour agreements, which are binding on various branches of activity or all sectors of the economy;
carry out more specialized advisory tasks under social laws. Such laws are e.g. those related to the following matters: work contracts, organization of the economy, collective industrial agreements and joint committees, protection of the remuneration, labour Act (working hours, Sunday rest, young people's work, women's work and protection of maternity), work rules, paid holidays, labour

R 198 Paragraph 19:
Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

R.198 Paragraph 20:
The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

R 198 Paragraph 21:
Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

courts or tribunals, wage earners' social security and pensions, etc. On 19 December 2006, the National Labour Council gave its "advice" on the Bill transposing EU Directive 96/71/EC on the posting of workers in the framework of the provision of services into Belgian legal system. (<http://www.cnt-nar.be/AVIS/avis-1589.pdf>)

Canada - The Arthurs report recommends, as part of national policy, the inclusion in a labour standards code of a provision for the establishment of a committee that would review labour standards and issues arising out of the administration of the code, either periodically or on a continuing basis, and would make public recommendations at regular intervals to the government for revision of the Code. If this is not institutionalized as a regular event, the likelihood is that labour standards may not be reviewed or revised for decades, except on an ad hoc basis where a stark need arises. The nature of work relationships is constantly, and rapidly, changing, and a process for continuous review will, to some extent, depoliticize the process of reform.

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". 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.

The Department of Labour in **South Africa** operates in terms of a Ministerial Programme of Action that is focused on the following –

- Contribute to employment creation
- Enhance skills development
- Protect vulnerable workers
- Promote equity in the labour market
- Strengthen multilateral and bilateral relations
- Strengthen social protection (unemployment insurance and compensation for injuries and diseases and occupational health and safety)
- Promote labour relations
- Monitor the impact of legislation on broad government policy

- Strengthen the Department of Labour's institutional capacity to improve services provided.

R 198 Paragraph 22:
*Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the **transnational provision of services**. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.*

EU Directive 96/71/EC on the posting of workers in the framework of the provision of services is intended to promote the transnational provision of services in a climate of fair competition while guaranteeing respect for workers' rights. EU Parliament considered that the posting of workers Directive has two key objectives, firstly, to guarantee the free movement of persons and services, and, secondly, to ensure that posted employees are subject to the terms and conditions of the host Member State. EU Parliament observed that, in general, the difficulties in applying this Directive are related to the fact that it has not been transposed by all Member States and it called on the Commission to keep it informed of the progress of infringement proceedings against defaulting Member States. It drew attention to the fact that these difficulties partly result from differences of interpretation of some key concepts, such as worker, minimum salary and subcontracting and also from the lack of access to information and from the difficulty of monitoring compliance. It also noted that the Commission, in its guidelines, recognised both the social objective of the posting of workers directive and the full responsibility of the host country to put that objective into practice, and therefore called on the Commission to submit a proposal for a directive on the conditions required for the crews of vessels providing regular passenger and freight ferry services between Member States and biennially concrete data on the transposition of the directive at national level, focusing particular on instances of infringements.

[<http://europa.eu/bulletin/en/200610/p108007.htm>]

R198 Employment Relationship Recommendation, 2006

The General Conference of the International Labour Organization,

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

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

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

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

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

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

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

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

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

Recognizing that national policy should be the result of consultation with the social

partners and should provide guidance to the parties concerned in the workplace, and

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

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

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

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

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

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

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

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

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

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

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

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate

to ensure effective protection for workers in an employment relationship.

3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

4. National policy should at least include measures to:

(a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

(b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

(c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due;

(d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

(a) take special account in national policy to address the gender dimension in that

women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and

(b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

7. In the context of the transnational movement of workers:

(a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;

(b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

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

II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;

(b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

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

21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

22. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

IV. FINAL PARAGRAPH

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

Resolution concerning the employment relationship

The General Conference of the International Labour Organization,

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

Having adopted the Recommendation concerning the employment relationship,

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

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

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

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

GLOSSARY OF TERMS

English	French	Spanish
Autonomous worker: a new Canadian term coined by the Arthurs Report on Fair Labour Standards (2006) to describe a status in between “employee” and “independent contractor”, applicable to workers who are more like the former than the latter.		
Case law, Jurisprudence	Jurisprudence	Jurisprudencia
Common law	Idem	Idem
Casualisation of employment	Précarisation de l’emploi	Precarización del empleo
Casual/occasional/contingent worker or employee	Travailleur occasionnel/temporaire	Trabajador ocasional/ trabajador precario
Contractor (also builder-contractor in construction), Sub-contractor,	Sous-traitant, preneur d’ordres	Contratista, subcontratista
Contract of employment (Employment contract) / Contract of service	Contrat de travail	Contrato de trabajo
Contract for service	Contrat d’entreprise	Contrato (de arrendamiento) de servicios o de obra
Contract labour / work provided by an enterprise / work by a self-employed person; depending on the context	Travail fourni par une entreprise / par un travailleur indépendant ; <u>selon le contexte</u>	Trabajo de empresa / de trabajador independiente, <u>según el contexto</u> Trabajo por contrata / Trabajo en régimen contractual
Contract worker / Worker of a contractor / self-employed; depending on the context	Travailleur d’une entreprise sous-traitante / travailleur indépendant qui fournit un service en vertu d’un contrat ; <u>selon le contexte</u>	Trabajador de un contratista / trabajador autónomo que presta un servicio en virtud de un contrato / trabajador contratado; <u>según el contexto</u>
Contracting out / outsourcing / Sub-contracting	Sous-traitance (d’activités) (contrat commercial), externalisation	Subcontratación de obras o servicios / externalización / tercerización

English	French	Spanish
<p>Dependent contractor: This term is used in Canadian labour legislation to denote workers who are not, strictly speaking, employees, but are not independent contractors because they are more like employees in what they do and the conditions in which they do it, with their primary characteristic being economic dependence upon the employer.</p>		
Dependent worker	Le travailleur dépendant	Trabajador dependiente
Disguised employment (different from undeclared work)	Travail déguisé (sous la forme d'un contrat civil ou commercial (à différencier de non déclaré))	Trabajo encubierto, disfrazado (distinto del trabajo no declarado)
Duress	Contrainte, rigueur	Coacción, apremio, rigor
Employee, as distinct from “worker” below, is an individual who has entered into a contract for employment	Salarié	Asalariado / trabajador por cuenta ajena / empleado
<p>Employer</p> <ul style="list-style-type: none"> - associated employer (in Latin America) - common employer/related employers: (in Canada) to refer to a finding that two or more related organizations which operate under common control or direction, for example, separate corporate subsidiaries within a conglomerate, are a single employer for the purposes of collective bargaining and labour standards protection. Typically this finding is made in order to counteract steps taken by employers to circumvent employment rights through manipulation of the corporate structure. 	Employeur, patron	Empleador, patrón, patrono - empleador complejo

English	French	Spanish
Private Employment Agency/ temporary work agency (see Convention No. 181) means any natural or legal person, independent of the public authorities, which provides labour market services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise	Agence d'emploi privée, y compris entreprise de travail temporaire/ intérimaire / Bureau de placement	Agencia de empleo incluye a las empresas de trabajo temporal o de "servicios eventuales" / agencia de colocación
Employment relationship	Relation de travail (ou d'emploi CDN)	Relación de trabajo
Fake contract	Simulation de contrat	Contrato simulado
Fixed-term contract	Contrat de durée déterminée CDD	Contrato de duración determinada / por tiempo determinado
Contract without limit of time / open- ended contract / indefinite contract	Contrat de durée indéterminée CDI	Contrato de duración indefinida / por tiempo indeterminado
Fixed-price contract	Contrat au forfait/ sur commande (opposé du contrat en régie)	Trabajo por obra, contrato por obra
In business on one's own account	Travail à compte propre	Trabajo autónomo, trabajo por cuenta propia, trabajo independiente
Intermediary	Intermédiaire	Intermedio
Involuntary part-time work	Temps partiel contraint (par opposition à choisi)	Tiempo parcial impuesto
Mutuality of obligation/mutual obligation (currently the predominant UK test): is there an obligation on the employer to provide work and is there a concomitant obligation on the individual to accept the work offered	Obligation réciproque	
Objectively ambiguous employment relationships.	Relation de travail objectivement ambiguë	Relación de trabajo objetivamente ambigua
On-call work means periods of time when a worker is required to be available at the workplace or elsewhere and can be called on to work as and when required, but is not performing the tasks required by the contract of employment		
Primacy of facts principle	Principe de réalité des faits, primauté des faits	Principio de la primacía de la realidad

English	French	Spanish
Salary/remuneration (see Convention No. 100)	Traitement, <i>parfois</i> salaire	Sueldo, salario
Scope of the employment relationship.	Champ de la relation de travail	Ámbito de la relación de trabajo
Self-employed / Independent Worker / Independent contractor / Freelance / own-account	Travailleur indépendant/ à son compte	Trabajador independiente, autónomo, por cuenta propia
Stakeholder	Partie prenante/intéressée, partenaire	Parte interesada, asociado, interlocutor
“Subordinate worker”		Trabajador para subordinado (Latin America)
Temporary employment agency/manpower company (see Convention No. 181) is		Empresa de trabajo temporal (ETT in Latin America)
Legal concept of subordination	Lien juridique de subordination	Vínculo jurídico de subordinación
In some French-speaking African countries, a system whereby an independent subcontractor contracts with an enterprise or a project manager to perform work or services for an agreed price	Tâcheron system ou Maître ouvrier	
Tax avoidance	Eluder la fiscalité	Eludir impuestos
Tax evasión	Evasion fiscale	Evasión fiscal
Temporary worker/employee, is used in 2 senses: (i) a non-permanent worker, being a person on a fixed term or task-related contract that both parties know will end (see Convention No. 158, Art.2(1)(a) “workers engaged under a contract of employment for a specified period of time or a specified task”; (ii) as distinct from a worker supplied by a temporary employment agency; in both cases they do not have the status of a permanent worker and typically do not enjoy similar benefits.		
Time sharing/job sharing	Travail à temps partagé	Tiempo compartido / subdividido
Transfer of an undertaking	Transfert d’une entreprise (ou d’une partie d’entreprise)	Transferencia de una empresa o parte de ella
Triangular employment relationship.	Relation de travail triangulaire	Relación de trabajo triangular

English	French	Spanish
User / client / the “principal”, the main company	Utilisateur / client / donneur d’ordres / maître d’ouvrage	El usuario / el utilizador / el dueño de la obra o faena
Wage (see Convention No. 100)	Salaire, gain (salarial)	Salario
Work for more than one employer	Multi-salariat	Multiempleo / Trabajo para varios empleadores
Worker, should not be confused with “employee” (above), being a generic term covering persons who work; the concept of worker includes employees but it also includes certain independent contractors who contract personally to supply their work to an employer	Travailleur	Trabajador
“worker dispatching” (as used in Japan & Korea)	Convention No.181/Art1(1)(b)	
Vulnerable worker: in the Canadian context, refers to workers who lack either collective or individual bargaining power. They are therefore less likely than most to secure or retain a decent job, and are more likely than most to work under inappropriate or exploitative conditions. Typically, they are paid low salaries and receive few fringe benefits, work unsociable hours or in difficult conditions, have limited or no access to training, enjoy poor prospects of career advancement, and relatively short job tenure. They often lack the knowledge, capacity or financial means to enforce whatever statutory or contractual rights they supposedly enjoy.		
Zero hours contract is understood like “on-call work” (above) to be a method of allowing flexible working time and for calculating payment related to time worked	Contrat sans heures ni horaires fixes	Contrato sin horas de trabajo prefijadas

**RELEVANT INTERNATIONAL LABOUR STANDARDS
FOR CONSIDERATION WHEN ELABORATING
NATIONAL POLICIES**

***Freedom of Association and Protection of the Right to Organise Convention, 1948
(No. 87)***

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Equal Remuneration Convention, 1951 (No. 100) & Discrimination (Employment and Occupation) Convention, 1958 (No. 111) clearly apply to all workers.

Minimum Age Convention, 1973(No. 138)

Article 1

Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.

Article 2

1. Each Member which ratifies this Convention shall specify, in a declaration appended to its ratification, a minimum age for admission to employment or work within its territory and on means of transport registered in its territory; subject to Articles 4 to 8 of this Convention, no one under that age shall be admitted to employment or work in any occupation.

Article 5

3. The provisions of the Convention shall be applicable as a minimum to the following: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and

other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.

Rural Workers' Organisations Convention, 1975 (No. 141)

Article 2

1. For the purposes of this Convention, the term rural workers means any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, subject to the provisions of paragraph 2 of this Article, as a self-employed person such as a tenant, sharecropper or small owner-occupier.

2. This Convention applies only to those tenants, sharecroppers or small owner-occupiers who derive their main income from agriculture, who work the land themselves, with the help only of their family or with the help of occasional outside labour and who do not (a) permanently employ workers; or (b) employ a substantial number of seasonal workers; or (c) have any land cultivated by sharecroppers or tenants.

Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

Article 2

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to operate procedures which ensure effective consultations, with respect to the matters concerning the activities of the International Labour Organisation set out in Article 5, paragraph 1, below, between representatives of the government, of employers and of workers.

Article 5

1. The purpose of the procedures provided for in this Convention shall be consultations on (a) 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; (b) the proposals to be made to the competent authority or authorities in connection with the submission of Conventions and Recommendations pursuant to article 19 of the Constitution of the International Labour Organisation; (c) the re-examination at appropriate intervals of unratified Conventions and of Recommendations to which effect has not yet been given, to consider what measures might be taken to promote their implementation and ratification as appropriate; (d) questions arising out of reports to be made to the International Labour Office under Article 22 of the Constitution of the International Labour Organisation; (e) proposals for the denunciation of ratified Conventions.

and accompanying ***Recommendation No. 152***

Para 6. The competent authority, after consultation with the representative organisations, should determine the extent to which these procedures should be used for the purpose of consultations on other matters of mutual concern, such as-...(b) the action to be taken in respect of resolutions and other conclusions adopted by the

International Labour Conference, regional conferences, industrial committees and other meetings convened by the International Labour Organisation...

Labour Administration Convention, 1978 (No. 150)

Article 6(2)

The competent bodies within the system of labour administration, taking into account international labour standards, shall...

(c) make their services available to employers and workers, and their respective organisations, as may be appropriate under national laws or regulations, or national practice, with a view to the promotion--at national, regional and local levels as well as at the level of the different sectors of economic activity --of effective consultation and co-operation between public authorities and bodies and employers' and workers' organisations, as well as between such organizations...

Article 7

When national conditions so require, with a view to meeting the needs of the largest possible number of workers, and in so far as such activities are not already covered, each Member which ratifies this Convention shall promote the extension, by gradual stages if necessary, of the functions of the system of labour administration to include activities, to be carried out in co-operation with other competent bodies, relating to the conditions of work and working life of appropriate categories of workers who are not, in law, employed persons, such as (a) tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers; (b) self-employed workers who do not engage outside help, occupied in the informal sector as understood in national practice; (c) members of co-operatives and worker-managed undertakings; (d) persons working under systems established by communal customs or traditions.

Labour Relations (Public Service) Convention, 1978 (No. 151)

Article 1

1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.

2. The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.

3. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

Collective Bargaining Convention, 1981 (No. 154)

Article 2

For the purpose of this Convention the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

Termination of Employment Convention, 1982 (No. 158)

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.
2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period.
3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

and accompanying ***Recommendation No. 166***

Paragraph 2

- (1) This Recommendation applies to all branches of economic activity and to all employed persons.
- (2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period...

Paragraph 3

- (1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.
- (2) To this end, for example, provision may be made for one or more of the following: (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration; (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration; (c) deeming contracts for a

specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

Private Employment Agencies Convention, 1997 (No. 181)

Article 1

1. For the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services: (a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom; (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks...

Article 11

A Member shall, in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by private employment agencies as described in Article 1, paragraph 1(b) above, in relation to: (a) freedom of association; (b) collective bargaining; (c) minimum wages; (d) working time and other working conditions; (e) statutory social security benefits; (f) access to training; (g) occupational safety and health; (h) compensation in case of occupational accidents or diseases; (i) compensation in case of insolvency and protection of workers claims; (j) maternity protection and benefits, and parental protection and benefits.

Article 12

A Member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to: (a) collective bargaining; (b) minimum wages; (c) working time and other working conditions; (d) statutory social security benefits; (e) access to training; (f) protection in the field of occupational safety and health; (g) compensation in case of occupational accidents or diseases; (h) compensation in case of insolvency and protection of workers claims; (i) maternity protection and benefits, and parental protection and benefits.

and accompanying ***Recommendation No. 188***

Paragraph 5

Workers employed by private employment agencies as defined in Article 1(1)(b) of the Convention should, where appropriate, have a written contract of employment specifying their terms and conditions of employment. As a minimum requirement, these workers should be informed of their conditions of employment before the effective beginning of their assignment.

Paragraph 6

Private employment agencies should not make workers available to a user enterprise to replace workers of that enterprise who are on strike.

Paragraph 8

Private employment agencies should:

(a) not knowingly recruit, place or employ workers for jobs involving unacceptable hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind;

(b) inform migrant workers, as far as possible in their own language or in a language with which they are familiar, of the nature of the position offered and the applicable terms and conditions of employment.

Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No.159)

Article 1

1. For the purposes of this Convention, the term disabled person means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment.

2. For the purposes of this Convention, each Member shall consider the purpose of vocational rehabilitation as being to enable a disabled person to secure, retain and advance in suitable employment and thereby to further such person's integration or reintegration into society.

Article 2

Each Member shall, in accordance with national conditions, practice and possibilities, formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons.

Article 3

The said policy shall aim at ensuring that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and at promoting employment opportunities for disabled persons in the open labour market. Indigenous and Tribal Peoples Convention, 1989 (No. 169)

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

(a) admission to employment, including skilled employment, as well as measures for promotion and advancement;

(b) equal remuneration for work of equal value;

(c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;

(d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3. The measures taken shall include measures to ensure:

(a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;...

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

Part-Time Work Convention, 1994 (No. 175)

Article 9

1. Measures shall be taken to facilitate access to productive and freely chosen part-time work which meets the needs of both employers and workers, provided that the protection referred to in Articles 4 to 7 is ensured.

2. These measures shall include: (a) the review of laws and regulations that may prevent or discourage recourse to or acceptance of part-time work; (b) the use of employment services, where they exist, to identify and publicize possibilities for part-time work in their information and placement activities; (c) special attention, in employment policies, to the needs and preferences of specific groups such as the unemployed, workers with family responsibilities, older workers, workers with disabilities and workers undergoing education or training.

3. These measures may also include research and dissemination of information on the degree to which part-time work responds to the economic and social aims of employers and workers.

Maternity Protection Convention, 2000 (No. 183)

Article 2

1. This Convention applies to all employed women, including those in atypical forms of dependent work.

Forced Labour Convention, 1930 (No. 29)

Article 1

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

Article 4

1. The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.

2. Where such forced or compulsory labour for the benefit of private individuals, companies or associations exists at the date on which a Member's ratification of this Convention is registered by the Director-General of the International Labour Office, the Member shall completely suppress such forced or compulsory labour from the date on which this Convention comes into force for that Member.

Migration for Employment Convention (Revised), 1949 (No. 97)

Article 2

Each Member for which this Convention is in force undertakes to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.

Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

Article 10

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Article 12

Each Member shall, by methods appropriate to national conditions and practice-

(g) guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

Labour Clauses (Public Contracts) Convention, 1949 (No. 94)

Article 3

This Convention applies to work carried out by subcontractors or assignees of contracts; appropriate measures shall be taken by the competent authority to ensure such application. This means that certain national laws provide for the inclusion of a declaratory clause in 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.

Safety and Health in Agriculture Recommendation, 2001 (No. 192)

Self-employed farmers

13. (1) In accordance with national law and practice, measures should be taken by the competent authority to ensure that self-employed farmers enjoy safety and health protection afforded by the Convention.

(2) These measures should include: (a) provisions for the progressive extension of appropriate occupational health services for self-employed farmers; (b) progressive development of procedures for including self-employed farmers in the recording and notification of occupational accidents and diseases; and (c) development of guidelines, educational programmes and materials and appropriate advice and training for self-employed farmers covering, inter alia: (i) their safety and health and the safety and health of those working with them concerning work-related hazards, including the risk of musculoskeletal disorders, the selection and use of chemicals and of biological agents, the design of safe work systems and the selection, use and maintenance of personal protective equipment, machinery, tools and appliances; and (ii) the prevention of children from engaging in hazardous activities.

14. Where economic, social and administrative conditions do not permit the inclusion of self-employed farmers and their families in a national or voluntary insurance scheme, measures should be taken by Members for their progressive coverage to the level provided for in Article 21 of the Convention. This could be achieved by means of: (a) developing special insurance schemes or funds; or (b) adapting existing social security schemes.

15. In giving effect to the above measures concerning self-employed farmers, account should be taken of the special situation of: (a) small tenants and sharecroppers; (b) small owner-operators; (c) persons participating in agricultural collective enterprises, such as members of farmers' cooperatives; (d) members of the family as defined in accordance with national law and practice; (e) subsistence farmers; and (f) other self-employed workers in agriculture, according to national law and practice.

Promotion of Cooperatives Recommendation, 2002 (No. 193)

Paragraph 8

National policies should notably: ... (b) ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationships, and combat pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises.

CHECK LIST OF CRITERIA WHEN ESTABLISHING A NATIONAL POLICY

- Have there been **consultations** with the social partners about labour market developments demonstrating issues (like lack of protection of certain workers) that involve the employment relationship?
- Have those consultations led to a **national policy**?
- Does the national policy contain **clear guidance** to workers and employers and their organisations about how to determine the existence - or not - of an employment relationship?
- Is the national policy **gender** sensitive?
- Does the policy refer to any **vulnerable groups** in the country, who may require special help in proving the existence of an employment relationship?
- Is the national policy **holistic**?
- Does the policy contain a **presumption** that such a relationship exists?
- Does the national policy allow the **burden of proving** that an employment relationship exists to shift, from the worker claiming such a relationship, to the other party?
- Does the national policy list **criteria** as references points for determining whether an employment relationship exists?
- What national institutions exist **to monitor labour market developments**, and are their reports and data being used to ascertain whether measures are needed in the field of the employment relationship?
- What international cooperation can be leveraged to track developments concerning the employment relationship in transnational movement of workers?